Hurry Up and Wait: Negative Statutes of Limitation in the Government Tort Liability Setting

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HURRY UP AND WAIT: NEGATIVE STATUTES OF LIMITATION IN THE GOVERNMENT TORT LIABILITY SETTING

JOHN MARTINEZ*

Elizabeth Swann (captive heroine):

“But you have to take me to shore! According to the [pirate] code . . .”

Captain Barbossa (pirate captor):

“First, your return to shore was never part of our negotiations nor our agreement, so I must do nothin’. Secondly, you must be a pirate for the Pirate’s Code to apply, and you’re not. And thirdly, the code is more what you’d call ‘guidelines’ than actual rules. Welcome aboard the Black Pearl, Miss Turner!”

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INTRODUCTION

Negative statutes of limitation force those who want to bring tort suits against the government to hurry up and wait. First, the claimant must hurry to file a “notice of claim” informing the government that the claimant has a tort claim. Then, the claimant must wait until the expiration of a waiting period during which he or she will be prevented from filing suit. This article suggests that, like the Pirate’s Code, negative statutes of limitation should be viewed more as “guidelines” than actual rules.

The article critically examines the nature and effect of the waiting period imposed by negative statutes of limitation and suggests that such statutes should not be construed as jurisdictional. Instead, they should be viewed as procedural provisions which do not deprive courts of subject matter jurisdiction, but merely allow governmental defendants to seek extensions of the time to respond to tort complaints or to seek temporary stays of such judicial proceedings. Treating negative statutes of limitation as procedural would more properly balance the interests of the government and the claimants involved.

The context of the problem requires understanding how tort suits against the government proceed. Claimants seeking to sue the government in tort first must file a notice of claim that sets out the surrounding events and the relief sought. For example, a claimant rear-ended by a city fire truck would set out in the notice of claim the date and location of the accident, identify the truck and driver, and state the amount of damages demanded. A notice of claim may be as informal as a letter, and usually is filed with a designated government official, such as a city recorder or clerk.

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2 This article is concerned with suits for tort liability, since notice of claim requirements and their concomitant negative statutes of limitation typically do not apply outside the tort claim setting. See, e.g., N.Y. GEN. MUN. LAW § 50-e(1)(a) (McKinney 2004) (notice of claim requirement is not applicable to “any case founded upon tort. . . .”); UTAH CODE ANN. § 6-30-5(1) (1953) (repealed 2004) (reenacted in UTAH CODE ANN. § 60-30d-301 (2004)) (“Actions arising out of contractual rights or obligations shall not be subject to [notice of claim or negative statute of limitations requirements].”).

3 This article discusses suits against federal, state and local governments. For purposes of this preliminary description of the problem, the generic term “government” is used in order to convey the basic idea of negative statutes of limitation.
The "hurry up" part of suing the government is a relatively short (conventional) statute of limitations which applies to the filing of a notice of claim. These statutes of limitation range from ninety days to one year after the claim arises.\(^4\) Claims are usually deemed to arise when the last event giving rise to the claim occurs.\(^5\) Thus, a claim based on a rear-ending accident would arise at the time the accident occurred.

This article focuses on the series of events after the claimant files the notice of claim and demonstrates how the imposed


\(^5\) The limitations period begins to run when the cause of action accrues, which in turn occurs upon the happening of the last event necessary to complete the cause of action. Bank One Utah, N.A. v. W. Jordan City, 54 P.3d 135, 136 (Utah Ct. App. 2002).

In Bank One Utah v. West Jordan City, the court explored the situation when a claimant was not aware that it was the government, and not a private party that caused the harm, until the one-year time limit for filing a Notice of Claim had expired. \(\text{Id.}\) at 136. Upper Valley Utilities (UVU), a private company, had conducted excavation in front of the Bank One building in early March 1999 to install a fiber optic conduit. \(\text{Id.}\) By March 15, however, Bank One's toilets starting backing up. \(\text{Id.}\) On that day, the Bank had both a UVU and a City inspector come out to look at the problem. \(\text{Id.}\) Not surprisingly, perhaps, each inspector blamed the other's company for the problem. \(\text{Id.}\) Bank One therefore hired its own contractor, who determined on March 22, 1999, that the City had been responsible for marking all utilities prior to UVU's excavation, that the City had not properly marked the sewer line, and that as a result, UVU had drilled through the sewer line. \(\text{Id.}\) Bank One's contractor finished repairs on April 1, 1999, at a cost of $29,586.49. \(\text{Id.}\)

On September 27, 1999, Bank One commenced suit against UVU and West Jordan. \(\text{Id.}\) The trial court granted West Jordan's motion to dismiss Bank One's complaint, since the bank had not previously filed a Notice of Claim. \(\text{Id.}\) On March 22, 2000, the bank filed its Notice of Claim. \(\text{Id.}\) Two months later, the trial court granted UVU's motion for summary judgment on the ground that it had not caused the problem. \(\text{Id.}\) The trial court concluded that the problem had instead been caused by West Jordan City's failure to mark the proper location for drilling in the street. \(\text{Id.}\) However, the trial court nevertheless granted West Jordan's motion for summary judgment, on the ground that the claim "arose" on March 15, 1999, and that therefore Bank One's Notice of Claim filed on March 22, 2000 was 7 days beyond the one-year statute of limitations for filing such Notice. \(\text{Id.}\)

The Utah Court of Appeals reversed. \(\text{Id.}\) at 139. The court concluded:

Obviously, a party cannot have a legitimate 'claim' against a governmental entity until it is aware that the governmental entity's action or inaction has resulted in some kind of harm to its interests. Only then does it have not just a gripe against parties unknown, but a "claim" against a particular governmental entity. \(\text{Id.}\) at 137. The claim here thus did not arise when the sewer was punctured, when Bank One's toilets backed up, or even on March 15, 1999, when the City's inspector denied that the City was responsible. \(\text{Id.}\) at 138. And, contrary to Bank One's assertion, it did not arise on April 1, 2000, when the Bank paid for the repairs. \(\text{Id.}\) Instead, the court held, the claim arose on March 22, 1999, when Bank One's contractor informed the Bank that the problem was caused by the City's failure to properly mark the location of the sewer line. \(\text{Id.}\) Thus, the March 22, 2000 Notice of Claim was timely. \(\text{Id.}\) at 139.
waiting period needlessly harms claimants. The typical scenario illustrates the problem. Suppose the relief a claimant seeks in the notice of claim is substantial, for example, in excess of $25,000, which would not be uncommon when medical expenses are involved. The claimant can reasonably expect that the claim will be denied by the government almost as a matter of course. This is particularly likely if the accident is not covered by the city’s liability insurance, or if the claim exceeds the city’s policy limits. No real incentive exists for the government to do anything but deny the claim—or indeed nothing at all—since any liability established through a subsequent judgment adverse to the government ordinarily will not include the attorneys fees and costs incurred by a successful plaintiff.

Tort claimants are deeply concerned about obtaining recovery for their injuries as quickly as possible. And in cases where enough money is involved, the government ultimately will refuse to pay, after a notice of claim, forcing claimants to eventually file a lawsuit to obtain recovery. Negative statutes of limitation, however, prevent the filing of a suit against the government until the waiting period expires, which begins with the filing of a notice of claim and ends some time thereafter, typically 60 to 90 later.

The purpose of the waiting period is to allow time for governmental officials to consider the claimant’s notice of claim and to determine whether to pay it or to deny it. The problem is that such administrative procedures delay the claimant relief until the end of the often inevitable lawsuit.

Moreover, the waiting period imposed by negative statutes of limitation is particularly burdensome—and perhaps utterly unworkable—when a claimant seeks injunctive relief, such as a temporary restraining order. In that provisional equitable remedy context, a waiting period defeats the very purpose of the relief sought because the need for the provisional relief is typically immediate.

Most courts have held that a negative statute of limitation deprives a trial court of subject matter jurisdiction.\(^6\) Therefore, if

\(^6\) See generally Cruse v. Bd. of County Comm’rs of Atoka County, 1995 OK 143, ¶ 5, 910 P.2d 998, 1000 (demonstrating that trial court may lack subject matter jurisdiction if action is not initially filed within prescribed statute of limitations).
a suit is filed prior to the expiration of the disability period imposed by the negative statute of limitation, the government may immediately move to dismiss the case. More insidiously, however, since the defect of filing a suit before the negative statute of limitations period has expired is generally held to be jurisdictional, the government may simply choose to do nothing about the jurisdictional defect for some time. Indeed, the government is free to litigate the case throughout trial and subsequent appeals, and later move at the last appellate level to dismiss the case for “lack of subject matter jurisdiction.” In fact, even without a motion by the government, the court at the last appellate level may dismiss the action *sua sponte*.

The effect of a dismissal at the appellate stage may prove disastrous for the claimant. Since by supposition the claimant filed the lawsuit before the expiration of the waiting period, the case typically will be dismissed for lack of subject matter jurisdiction. After such a dismissal, another “conventional” statute of limitations comes into play: a lawsuit must be filed within a certain period after the denial of the claim or the expiration of the waiting period of the negative statute of limitations. These conventional statutes of limitation typically range from 90 days to one year. If this last statute of limitations period has expired before the suit was dismissed for lack of subject matter jurisdiction, the claimant can no longer file a suit at all!

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7 See, e.g., Jakoby v. Goddard, 90 P.3d 1209, 1213 (Cal. 2004) (noting that failure of the information to state facts sufficient to negate statute of limitations is a jurisdictional defect).

8 See sources cited supra note 4.

9 It is arguable that a state savings statute, which allows filing of suits dismissed for lack of subject matter jurisdiction would extend the time for re-filing a suit even if it had first been filed prematurely. For example, the Utah savings statute provides:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

*UTAH CODE ANN. § 78-12-40 (2004).*

In *Madsen v. Borthick*, 769 P.2d 245, 246 (Utah 1988), plaintiffs first brought a suit against a state governmental entity, but that suit was subsequently dismissed for lack of jurisdiction because plaintiffs had failed to file a notice of claim altogether. The court held, however, that a second suit, this time against the governmental officials in their *personal* capacities, was timely because it had been filed within one year of dismissal of the first suit, as allowed by the state savings statute. Id. at 254. The case does not
This article argues that the idea that negative statutes of limitation are jurisdictional is suspect at best. Part I describes the sovereign immunity context in which negative statutes of limitations arose. Pragmatism is used as a descriptive methodology to examine the nature and impact of negative statutes of limitation in the government tort liability setting. Part II sets out a normative theory for prescribing ways in which the doctrine of negative statutes of limitation in the government tort liability setting should evolve. The theory distinguishes between process rules and power rules and sets out the considerations that weigh in favor of categorizing certain rules as process rules and others as power rules.

In Part III, the article suggests that when analyzed in terms of the normative theory of process and power rules, negative statutes of limitation should be viewed as process rules. Finally, Part IV considers possible criticisms of the suggested process approach to negative statutes of limitation.

I. THE SOVEREIGN IMMUNITY CONTEXT OF NEGATIVE STATUTES OF LIMITATION IN THE GOVERNMENT LIABILITY SETTING

The concept of sovereign immunity is the starting point for evaluating negative statutes of limitation in the government liability setting. Since the sovereign held all power, no one

address the problem directly, however, because the second suit did not require the filing of a notice of claim at all because it had been brought against the governmental officials in their personal capacities. Id. at 252. The case focused on the application of the savings statute, not upon the effect of that statute on the negative statute of limitations.

A case in the medical malpractice area is also instructive, although it does not address the issue squarely either. In McBride-Williams v. Huard, 2004 UT 21, ¶ 1, 94 P.3d 175, 175–76, the plaintiff filed a first suit for medical malpractice without exhausting prelitigation procedures as defined in the state Medical Malpractice Act. After the first suit was dismissed for lack of subject matter jurisdiction for failure to exhaust prelitigation procedures under the state Medical Malpractice Act, the plaintiff filed a second suit. Id. at ¶ 3, 94 P.3d at 176. The defendants moved to dismiss the second suit on the ground that it had been filed after the applicable statute of limitations. Id. The plaintiff contended the first suit should “count” for purposes of that statute, and the Utah Supreme Court agreed. Id. at ¶ 9-10, 94 P.3d at 177. It held that the state savings statute, construed with the policy underlying Rule 3 of the Rules of Civil Procedure to provide plaintiffs at least one day in court, warranted extending the statute of limitations for one year after the first suit had been dismissed. Id. at ¶ 16, 94 P.3d at 179.

See, e.g., Hall v. Utah State Dept. of Corr., 2001 UT 34, ¶ 23, 24 P.3d 958, 956 (“The rationale . . . derives naturally from basic principles of sovereign immunity.”).
could hold the sovereign responsible for his actions.\textsuperscript{11} The concept of sovereign immunity, in its pure form, provided that no one could sue the sovereign without the sovereign's consent.

\textsuperscript{11} There were ways in which one could seek relief from the King, but these were merely at the King's dispensation, not as a matter of right. Justice Traynor explained the nuances in \textit{Muskopf v. Corning Hospital Dist.}:

Sovereign immunity began with the personal prerogatives of the King of England. In the feudal structure the lord of the manor was not subject to suit in his own courts. (1 Pollock and Maitland, The History of English Law [1909 ed.] 518.) The king, the highest feudal lord, enjoyed the same protection: no court was above him. (1 Pollock and Maitland, The History of English Law, \textit{supra}, at pp. 512-517; 3 Holdsworth, History of English Law [1922 ed.] 462.) Before the sixteenth century, this right of the king was purely personal. (Watkins, The State as a Party Litigant 12 [Johns Hopkins University Studies in History and Political Science, Series XLV, No. 1 (1927)].) Only out of sixteenth century metaphysical concepts of the nature of the state did the king's personal prerogative become the sovereign immunity of the state. (Watkins, The State as a Party Litigant, \textit{supra}, at p. 11; see 4 Holdsworth, The History of English Law, \textit{supra}, at pp. 190-197.) There is some evidence that the original meaning of the pre-sixteenth century maxim—that the king can do no wrong—was merely that the king was not privileged to do wrong. (Borchard, \textit{Governmental Responsibility [sic: Liability] in Tort}, 34 Yale L.J. 1, 2 [1924]; Ehrlich, \textit{Proceedings Against the Crown} (1216-1377) at pp. 42, 127 [Oxford Studies in Social and Legal History, vol. VI (1921)].)

The immunity operated more as a lack of jurisdiction in the king's courts than as a denial of relief. There was jurisdiction, however, in the Court of Exchequer for equitable relief against the crown. "... [T]he party ought in this case to be relieved against the King, because the King is the fountain and head of justice and equity; and it shall not be presumed, that he will be defective in either. And it would derogate from the King's honour to imagine, that what is equity against a common person should not be equity against him." (Per Atkyns, B., \textit{Pawlett v. Attorney General} (1668), Hadres 465, 468, 145 Eng.Rep. 550, 552; \textit{Dyson v. Attorney- General} (1912), 1 K. B. 410, 415.)

The method for obtaining legal relief against the crown was the petition of right. The action could not be brought in the king's courts because of their lack of jurisdiction to hear claims against him. The petition of right stated a claim against the king, which was barred only by his prerogative. To the petition "there must always be a reply: 'Let right be done,'" (Holdsworth, \textit{The History of Remedies Against The Crown}, 38 L.Quar.Rev. 141, 149) and "... it is clear that the petition has assumed the character of a definite legal remedy against the Crown." (\textit{Id.} at p. 150.) There were procedural difficulties with the petition, but alternate remedies existed in large part. (\textit{Id.} at pp. 156-161.)

The main use of the petition of right in the early common law was in real actions, which then covered a wide field. (Holdsworth, \textit{Remedies Against The Crown, supra}, at p. 152.) The basic principle was that the petition was proper "whenever the subject could show a legal right to redress." (\textit{Id.} at p. 156.)

The early precedents may even be read as allowing a petition of right against the king for the torts of his servants. (See the cases of Robert (1325) and Gervais (1349) de Clifton, discussed in Ehrlich, \textit{Proceedings Against The Crown, supra}, at pp. 123-126; Watkins, The State as a Party Litigant, \textit{supra}, at pp. 20 n. 36.) In \textit{Tobin v. The Queen} (1864), 16 C.B.N.S. 309, 111 Eng. Com. Law Rep. 309, however, the court refused to so read the precedents, and held that the crown was not liable for the torts of its servants. This decision arose because of the formalistic and mistaken idea that concepts of vicarious liability did not apply to the crown. (See Holdsworth, \textit{Remedies Against The Crown, supra}, at pp. 294-296; Watkins, The State as a Party Litigant, \textit{supra}, at p. 25.) Under the Crown Proceedings Act, 1947, however, the crown is today liable for the torts of its servants to the same extent as private persons. (Hals. Laws of England, vol. XXXII, " 253 A, B [Cum. Sup. 1953].")
When governments replaced sovereigns, the concept of absolute governmental immunity took the place of absolute sovereign immunity and shielded governments from suit without their consent. It then followed naturally that if a government had given its consent to be sued, usually through a statute defining the circumstances in which the government waived sovereign immunity, the government could set any conditions it pleased on suits against it, and those conditions had to be strictly obeyed.

The pure form of sovereign immunity exists nowhere in the United States, however, and probably never did. The foundation for the power of a government to set conditions on suits against it is therefore flawed. After peeling back the sovereign immunity overlay, we can examine the fundamental interests and policies that underlie modern government tort liability and, in particular, how negative statutes of limitation should be evaluated in light of those concerns.

A. Sovereign Immunity and Negative Statutes of Limitation

Sovereign immunity preserves the right of government to determine the circumstances in which it will be held liable. In its pure form, sovereign immunity bars recovery against the government even though there is no question that governmental conduct has caused private harm. The principle of sovereign

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One other protection was afforded the subject injured by the king's servants. Many of the king's officers were liable for the wrongs committed, and from the earliest times those officers had to have a sufficient financial standing to make those remedies against them meaningful. (See Ehrlich, Proceedings Against The Crown, supra, at pp. 200, 214.)


"Open-ended" statutes provide that governments are liable unless exempted by common law, statute, or constitutional provision. States with open-ended statutes include: ALA. CODE § 11-93-3 (2004); ARIZ. REV. STAT. § 11-981(A)(2) (2004); NEB. REV. STAT. § 13-902 (2003); N.M. STAT. ANN. § 41-4-2(B) (2004); R.I. GEN. LAWS § 9-31-1 (2004).

Regardless of which model is adopted, the law of each state is unique. See generally 4 C. DALLAS SANDS, M. LIBONATI & J. MARTINEZ, LOCAL GOVERNMENT LAW § 27.08 (discussing operation of closed-ended and open-ended statutes).
immunity was originally a sovereign prerogative, often expressed as “the King can do no wrong,” since the King was immune from jurisdiction in any court, and all courts were subservient to this royal power.13

This pure form of sovereign immunity was a potent shield against the imposition of liability on the Crown. The principle not only held the King immune from liability, it also prohibited suit against the King altogether.14 That sovereign-imposed prohibition against courts' entertaining of suits against the King evolved into the modern notion that sovereign immunity deprives a court of subject matter jurisdiction.15

Sovereign immunity as royal prerogative was never accepted in this country.16 Nevertheless, sovereign immunity in the form of a legal principle which allows governments to declare themselves immune from liability for admittedly-caused harm has become orthodoxy, and has long baffled courts and scholars alike.17 The concept has evolved in dramatically different ways as applied to federal, state and local governments.

14 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 234–35 (1765).
16 See Langford v. United States, 101 U.S. 341, 343 (1879) (“We do not understand that either in reference to the government of the United States, or of the several States, or of any of their officers, the English maxim [the King can do no wrong] has an existence in this country.”).
17 However, courts and commentators have remained mystified why the doctrine was ever accepted in this country. For example, in Butler v. Jordan, 750 N.E.2d 554, 559 (Ohio 2001), the court explains that “[a]lthough the notion of sovereign immunity is best suited to a government of royal power, American courts nonetheless accepted the doctrine in the early days of the republic.” See also W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 1033 (5th ed. 1984).
1. Federal Sovereign Immunity Doctrine

Federal sovereign immunity is based on the rather opaque concept of universal consent and recognition. Before 1855, the only recourse for a claimant seeking damages against the United States was to petition Congress directly. Then, in 1855, as a result of the delay, inequities, and time involved in the private bill procedure, Congress created the Court of Claims. Under the 1855 Act, however, the Court of Claims could only hear claims, report to Congress, and submit draft private bills on those claims the court deemed should be paid.

In 1887, Congress improved on the Court of Claims procedure by enacting the Tucker Act, which waived federal sovereign immunity and allowed suits to be filed against the United States. The Tucker Act merely eliminated the sovereign immunity "shield;" it did not provide a substantive claim "sword." Thus, a claimant still was required to have an independent source for a claim, such as a statute or constitutional provision, in order to sue the federal government in tort.

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18 See U.S. v. Thompson, 98 U.S. 486, 489 (1878) (stating "[t]he United States possess other attributes of sovereignty resting also upon the basis of universal consent and recognition. They cannot be sued without their consent."); see also U.S. v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."); U.S. v. Clarke, 33 U.S. 436, 444 (1834) ("As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it"). See generally Alfred Hill, In Defense of Our Law of Sovereign Immunity, 42 B.C.L. REV. 485, 489 (May 2001) ("[I]mmunity is an inherent attribute of sovereignty, without regard to the form of government prevailing within the borders of the particular sovereign.").


20 See Act of February 24, 1855, c. 122, 10 Stat. 612 (creating the Court of Claims).

21 Act of February 24, 1855, c. 122, 10 Stat. 613.

22 The Tucker Act provides in pertinent part:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Further elaborating on federal waiver of sovereign immunity, the Federal Tort Claims Act, enacted in 1946, provides that claimants seeking to sue the federal government in tort must file a notice of claim, sometimes referred to as a "presentment requirement," within two years after a claim accrues. This presentment requirement is deemed jurisdictional and cannot be waived.

A conventional statute of limitations provides that tort suits against the federal government must be filed within six years after the claim accrues. In addition, 28 U.S.C. Section 2675 provides a 6-month negative statute of limitations for such actions. Under this negative statute of limitations, claimants seeking to file tort suits against the federal government must wait until their presentment of claim is denied, or six months after their presentment of claim was filed, whichever is earlier.

2. State Sovereign Immunity Doctrine

The notions that states are "sovereign" in our system of governance, and that immunity is inherent in the nature of sovereignty, were dramatically confirmed by the United States Supreme Court in Alden v. Maine. The Court held that states cannot be sued in state courts by state employees seeking damages for a state's violation of the overtime provisions of the

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27 Attallah v. U.S., 955 F.2d 776, 779 (1st Cir. 1992) (filing of timely administrative claim is a non-waivable jurisdictional requirement).
29 Specifically, it provides:
   An action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing . . . The failure of an agency to make final disposition of a claim within six months after it is filed shall . . . be deemed a final denial of the claim for purposes of this section.
federal Fair Labor Standards Act of 1938. It further held that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject non-consenting states to private suits for damages in state courts because States are “sovereign,” and a component of sovereignty is immunity.

The Court, basing its decision on a review of “history, practice, precedent and the structure of the Constitution,” explained that state sovereignty is not derived from the 11th Amendment, but from “sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today... except as altered by the plan of the Convention or certain constitutional Amendments.” Three years earlier, in Seminole Tribe of Florida v. Florida, the Court similarly had held that states could not be subjected by Congress to suit in federal courts for violation of the federal Indian Gaming Regulatory Act.

The Supreme Court's pronouncements regarding the special sovereign character of states confirm that states are largely free to define the parameters of public responsibility for private harm within state borders. Following these decisions, sovereign immunity doctrine in state courts and legislatures has evolved through four distinct phases: “received common law sovereign immunity,” “judicial abrogation of common law sovereign immunity,” “legislative revival of sovereign immunity,” and “judicial limitation of legislative revival of sovereign immunity.”

a. Received common law sovereign immunity doctrine

Traditionally, state courts enforced a relatively strict governmental immunity doctrine developed at common law, a model that most closely resembled the pure form of sovereign

32 Id. at 712 (Maine did not consent to suits for overtime pay and liquidated damages under FLSA and therefore cannot be subject to private suits in state courts); Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (2004).

33 See Alden, 527 U.S. at 715 (states cannot be subject to private suits absent consent).

34 Id. at 754 Congressional abrogation of States' immunity from private suit in their own courts exceeds Article I power).

35 See id. at 713 (State sovereignty precludes private suits against States in their courts).


immunity. For example, in *Kennedy v. City of Daytona Beach*, the Florida Supreme Court held that no claim for assault and false imprisonment was available against a city police chief because:

Under the common law, law enforcement officers were considered arms of the King and while an officer might be held liable for his wrongful acts the Government or that branch of the Government for which he acted, could not be held liable on the theory that "The King can do no Wrong," or the theory of Governmental or sovereign immunity.

In a society based on the rejection of sovereign prerogative, the acceptance of absolute governmental immunity based on royal power begs for an explanation. And nothing explains human behavior quite as powerfully as "tradition." State courts adopted a comparatively strict sovereign immunity regime because they viewed state common law to include the traditional common law sovereign immunity principles borne of English common law. The later adoption of the rule was found by modern courts and scholars to be perplexing, devoid of a rationale: "From the beginning there has been misstatement, confusion, and retraction... How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.'"

That justification by reference to tradition has been most recently echoed in 1999 by the United States Supreme Court in *Alden v. Maine*, in which the court held that states have inherent sovereignty, accompanied by inherent sovereign immunity. Yet, the incantation of tradition lacks explanatory power in that context as well.

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38 182 So. 228 (Fla. 1938).
39 *Id.* at 229.
42 *Id.* at 713. The court stated that "the founding document 'specifically recognizes the States as sovereign entities.'" *Id.* (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.15 (1996)). The court continued: "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. *Id.* at 715."
b. Judicial abrogation of common law sovereign immunity doctrine

The common law sovereign immunity tradition gave way in the 1950's to judicial abrogation of the pure form of sovereign immunity. The Florida Supreme Court was at the forefront of the movement to remove the shield of sovereign immunity from both state and local governments. In *Hargrove v. Town of Cocoa Beach*, decided in 1957, the court held that a claim could be stated against a municipality for the tortious conduct of its police officers acting within the scope of their duties, explaining:

> [T]he time has arrived to face this matter squarely in the interest of justice and place the responsibility for wrongs where it should be. In doing this we are thoroughly cognizant that some may contend that we are failing to remain blindly loyal to the doctrine of stare decisis. However, we must recognize that the law is not static. The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times. The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice.

The change begun by the Florida Supreme Court was followed in quick succession and eagerly embraced by other state courts.

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43 96 So. 2d 130 (Fla. 1957).
44 Id. at 133.

Twenty years after *Hargrove*, the Massachusetts Supreme Court bemoaned the fact that Massachusetts was one of only five remaining States to retain the common law immunity at both the State and local levels. As the court noted, forty-five States had modified or partly eliminated the defense of sovereign immunity in tort actions against municipal corporations, and all except thirteen States had abolished or limited the defense in suits against the State. Finally, after having waited four years for the legislature to act, the court announced its surprising "intention to abrogate the doctrine of municipal immunity in the first appropriate case decided by this court after the conclusion of the next (1978) session of the Legislature, provided that the Legislature at that time has not itself acted definitively as to the doctrine," therefore joining the majority of states in the abrogation of the common law immunity doctrine.

c. Legislative revival of sovereign immunity doctrine - substantive and procedural dimensions

State courts' abrogation of the common law doctrine of state sovereign immunity was short-lived; state legislatures quickly revived sovereign immunity. For example, in a state which was originally one of the first to initiate a change with regard to the sovereign immunity doctrine, in 1973, the Florida legislature

45 Molitor v. Kaneland, 163 N.E.2d 89, 96 (Ill. 1959) (abolishing immunity from tort liability enjoyed by school districts).
46 Muskopf v. Corning Hospital Dist., 359 P.2d 457, 458 (discarding as "mistaken and unjust" the doctrine of governmental immunity).
48 Spanel v. Mounds View School District, 118 N.W.2d 795, 803 (Minn. 1962) (finding doctrine of municipal immunity from tort liability to be archaic).
49 Holytz v. City of Milwaukee, 115 N.W.2d 618, 620 (Wis. 1962) (extirpating doctrine of municipal immunity).
50 Whitney v. City of Worcester, 366 N.E.2d 1210, 1213 (Mass. 1977) ("[W]e have no doubt as to our power to abrogate the doctrine of governmental immunity. We also have no doubt that the time for change is long overdue.").
52 Whitney, 366 N.E.2d at 1212.
53 See id. (stating intention to abrogate sovereign immunity).
enacted a limited waiver of sovereign immunity, cutting back on the wholesale judicial abrogation. A similar pattern developed in other states, including Arkansas, California, Colorado, Illinois, Kansas, Maine, Michigan, Minnesota, New Jersey, and Wisconsin.

54. See FLA. STAT. § 768.28 (2003) (waiving sovereign immunity for governmental tort liability subject only to limited liability enumerated). See generally Cauley v. City of Jacksonville, 403 So.2d 379, 381-82 (Fla. 1981) (stating "common law sovereign immunity for the state, its agencies, and counties remained in full force until section 768.28's enactment").

55. See Parish v. Pitts, 429 S.W.2d 45, 53 (Ark. 1968) (limiting sovereign immunity to "imperfect, negligent or unskilled execution of a thing ordained to be done") , superseded by ARK. CODE ANN. tit. 21, ch. 9, § 301 (1969) (stating list of government entities immune from liability except to extent they are covered by liability insurance).


57. See Evans v. County Comm'r's of El Paso, 482 P.2d 968, 971-72 (Colo. 1971) (abolishing sovereign immunity and notifying the legislature that it is free to say otherwise), superseded by COLO. REV. STAT. tit. 24, art. 10, § 101 (1972).


60. See Davies v. Bath, 364 A.2d 1269, 1273 (Me. 1976) (eliminating government immunity as a tool for dismissal of tort actions), superseded by ME. REV. STAT. ANN. tit. 14, § 8103 (West 1977) (repealed 1987) (stating all governmental agencies are immune from all tort claims seeking damages).

61. See Williams v. Detroit, 111 N.W.2d 1, 11-12 (Mich. 1961) (explaining the judicial decision to eliminate governmental immunity from tort liability), superseded by statute stated in Weaver v. City of Detroit, 651 N.W.2d 482, 484-85 (Mich. 2002) (noting enactment of a statute creating governmental immunity from tort liability involving governmental functions).

62. See Spanel v. Mounds View Sch. Dist., 118 N.W.2d 795, 803 (Minn. 1962) (expressing the court's intention to overrule the doctrine of sovereign immunity), superseded by statute as stated in Imlay v. City of Lake Crystal, 453 N.W.2d 326, 330 (Minn. 1990) (noting the Minnesota statute that abolished the court's prior decision to overrule sovereign immunity).


This subsequent legislative revival of sovereign immunity erected both substantive and procedural obstacles for claimants against recovery for harm caused by governmental conduct. Substantively, categories of conduct (or harm caused by such conduct) for which states are immune has increased dramatically. Closed-ended statutes, such as that in Pennsylvania, immunize state and local governments from tort liability, subject to legislatively defined exceptions.⁶⁵ An example of a legislatively defined exception in Pennsylvania provides that local governments are liable for a dangerous condition of traffic signs, lights, and other traffic controls, but only if (1) an action could have been brought at common law against a private person; (2) the injury was caused by negligent acts within the scope of traffic control duties (not criminal, fraudulent, malicious, or willful conduct, for which only an action against the government employee personally might be available); (3) the harm occurred as a result of a dangerous condition of the traffic controls; (4) the dangerous condition created a reasonably foreseeable risk of the kind of injury incurred; (5) the local government had actual notice or could reasonably be charged with notice under the circumstances; and (6) such notice was acquired at a sufficient time prior to the event for the government to have taken measures to protect against the dangerous condition.⁶⁶ The substantive exceptions to liability, as illustrated by this example, can rival the tax code in their intricacy, presenting claimants with formidable obstacles to recovery.

Procedural requirements are equally troublesome for unwary claimants. It is helpful to understand these procedures in terms of a time line consisting of four major points and three intervening periods of time. "Point 1" is the date of injury.⁶⁷ It is followed by "Period A," a conventional statute of limitations

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⁶⁵ See, e.g., 42 PA. CONS. STAT. ANN. § 8541 (West 2004) ("Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person").

⁶⁶ See 42 PA. CONS. STAT. ANN. §§ 8542(a), 8542(b)(4) (West 2004) (outlining the requirements to, and condition upon which, local governments may be held liable for a dangerous condition of traffic signs, lights, and other traffic controls).

⁶⁷ See Bank One Utah, N.A. v. West Jordan City, 2002 UT App 271, ¶ 8, 54 P.3d 135, 136 ("Limitation periods begin to run when a cause of action has accrued, which occurs upon the happening of the last event necessary to complete the cause of action." (quoting Aragon v. Clover Club Foods Co., 857 P.2d 250, 252 (Utah Ct. App. 1993))).
defining the period within which a notice of claim must be filed with the governmental agency. That period ends with “Point 2,” the last date when the notice of claim can be filed.

“Point 2” marks the start of “Period B,” the negative statute of limitations, defining the period during which the claimant must wait for the governmental agency to consider the claim. That period ends with “Point 3,” the last day of the waiting period. If the government takes no action, the claim is deemed denied as of that date.68 “Point 3” marks the start of “Period C,” a second conventional statute of limitations, defining the period within which a suit must be filed in court. That period ends with “Point 4,” the last date when such suit can be filed. The various points and periods can be depicted as follows:

Point 1 Injury giving rise to the claim.

Period A First conventional statute of limitations to file notice of claim.

Point 2 Last day when notice of claim can be filed with governmental agency.

Period B Negative statute of limitations waiting period.

Point 3 Last day of negative statute of limitations waiting period.

Period C Second conventional statute of limitations to file suit in court.

Point 4 Last day when suit can be filed in court.

The pure sovereign immunity theory continues to influence interpretation of such procedural requirements. Thus, courts consistently hold that since the government may choose not to allow suits at all, the requirements the government imposes on the circumstances in which it can be sued must be strictly obeyed.69 Such an interpretive approach makes severe demands for compliance on claimants.

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68 Of course, if the government denies the claim at any time during “Period B,” that denial date becomes “Point 3.”

69 See Hamilton v. Salt Lake City, 106 P.2d 1028, 1030 (Utah 1940) (noting that where the government grants statutory rights of action against itself, any conditions placed on those rights must be followed precisely).
The interpretation of such requirements by the Utah courts is illustrative. In *Thomas E. Jeremy Estate v. Salt Lake City*,\(^ {70} \) the court held that a cause of action against the government was barred where a notice of claim was not filed with the appropriate official prior to the filing of the suit in court. Similarly, in *Hamilton v. Salt Lake City*,\(^ {71} \) the court held that the plaintiff's suit was precluded even though she had provided the city notice of her claim, since she had not verified her letter of notice with an oath as was then required by the statute. And in *Yearsley v. Jensen*,\(^ {72} \) the court upheld a trial court's decision dismissing the plaintiff's suit as time-barred because she had filed her notice of claim one day late. In *Scarborough v. Granite School District*,\(^ {73} \) the court held that the plaintiff's claims against a school district were defective for failure to provide notice as required by the statute, despite the fact that the plaintiff had spoken with the principal at the school in question, and the principal had then reported that conversation to district officials. Similarly, in *Varoz v. Sevey*,\(^ {74} \) the court found the plaintiff's claims against a county were barred even though the county had conducted a "comprehensive investigation" into the matter and thus had "actual knowledge of the circumstances" giving rise to the claim.\(^ {75} \)

d. Judicial limitation of legislative revival of sovereign immunity

The enthusiastic revival of sovereign immunity by state legislatures has given rise to the fourth, still nascent, phase of state sovereign immunity doctrine under state law. State courts have tentatively reentered the field by interpreting state constitutions as restrictions on legislative power to re-introduce sovereign immunity legislatively.

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\(^ {70} \) 49 P.2d 405 (Utah 1935).
\(^ {71} \) 106 P.2d 1028 (Utah 1940).
\(^ {72} \) 798 P.2d 1127 (Utah 1990).
\(^ {73} \) 531 P.2d 480 (Utah 1975).
\(^ {74} \) See 506 P.2d 435 (Utah 1973), modified by Lee v. Gaufin, 867 P.2d 572, 578–79 (Utah 1993) (recognizing a tolling exception to the Governmental Immunity Act for claims brought by minors); *see also* Sears v. Southworth, 563 P.2d 192, 194 (Utah 1977) (applying the notice of claim provision despite the fact "law enforcement officers investigated the accident [at issue] and filed a report").
\(^ {75} \) 506 P.2d at 436. *See generally* 4 SANDS ET AL., supra note 12, at § 27.27 (1995) (discussing strict compliance requirement with respect to notice of claim).
State Just Compensation clauses have served as the doctrinal basis for state courts to curtail legislative revival of sovereign immunity. The federal Just Compensation Clause, the state clauses provide that state and local governments shall not take private property for public use without paying the owner just compensation. Forty-eight states and the District of Columbia have Just Compensation clauses in their state constitutions. Of these forty-eight, sixteen states and the District of Columbia prohibit “taking” of private property. Twenty-four states prohibit takings and also prohibit “damaging” of private property. Eight states prohibit takings and also prohibit private property from being “applied to public use.” Kansas has


77 U.S. CONST. amend. V. The federal Just Compensation Clause provides, “[n]or shall private property be taken for public use without just compensation.” Id. The federal Just Compensation Clause applies to state and local governments through the Due Process Clause of the Fourteenth Amendment which states “[n]or shall any State deprive any person of . . . property, without due process of law . . . .” U.S. CONST. amend. XIV, § 1. The Court has asserted that private property taken by a State for public use without compensation to the owner, even if pursuant to a state statute, is in violation of the Due Process Clause of the Fourteenth Amendment. See Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

78 See, e.g., CAL. CONST. art. I, § 19 (“Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner.”); UTAH CONST. art. I, § 22 (“Private property shall not be taken or damaged for public use without just compensation.”).

79 See U.S. CONST. amend. V (District of Columbia); CONN. CONST. art. I, § 11 (Connecticut); FLA. CONST. art. X, § 6 (Florida); IDAHO CONST. art. I, § 14, ¶ 2 (Idaho); IND. CONST. art. I, § 21 (Indiana); IOWA CONST. art. I, § 18 (Iowa); ME. CONST. art. I, § 21 (Maine); MD. CONST. art. III, § 40 (Maryland); Mich. CONST. art. X, § 2 (Michigan); NEV. CONST. art. I, § 8, cl. 6 (Nevada); N.J. CONST. art. I, ¶ 20 (New Jersey); N.Y. CONST. art. I, § 7(a) (New York); OHIO CONST. art. I, § 19 (Ohio); OR. CONST. art. I, § 18 (Oregon); R.I. CONST. art. I, § 16 (Rhode Island); S.C. CONST. art. I, § 17, ¶ 2 (South Carolina); VT. CONST. ch. 1, art. II (Vermont); WIS. CONST. art. 1, § 13 (Wisconsin).

80 See ALA. CONST. art. I, § 18 (Alabama); ARIZ. CONST. art. II, § 17 (Arizona); ARK. CONST. art. II, § 22 (Arkansas); CAL. CONST. art. I, § 19 (California); COLO. CONST. art. II, § 15 (Colorado); GA. CONST. art. I, § 3, ¶ 1(a) (Georgia); HAW. CONST. art. I, § 20 (Hawaii); ILL. CONST. art. I, § 15 (Illinois); LA. CONST. art. I, § 4(b) (Louisiana); MINS. CONST. art. I, § 13 (Minnesota); MISS. CONST. art. III, § 17 (Mississippi); MO. CONST. art. I, § 26 (Missouri); MONT. CONST. art. II, § 29 (Montana); NEB. CONST. art. I, § 21 (Nebraska); N.M. CONST. art. II, § 20 (New Mexico); N.D. CONST. art. I, § 16 (North Dakota); OKLA. CONST. art. II, § 24 (Oklahoma); S.D. CONST. art. VI, § 13 (South Dakota); TEX. CONST. art. I, § 17 (Texas) (both “damaged” and “applied to public use” clauses); UTAH CONST. art. I, § 22 (Utah); VA. CONST. art. I, § 11, ¶ 1 (Virginia); WASH. CONST. art. I, § 16 (Washington); W. VA. CONST. art. III, § 9 (West Virginia); WYO. CONST. art. I, § 33 (Wyoming).

81 See ALA. CONST. art. 1, § 23 (Alabama); DEL. CONST. art. 1, § 8 (Delaware); KY. CONST. § 13 (Kentucky); MASS. CONST. pt. 1, art. X, ¶ 1 (Massachusetts); N.H. CONST. pt. I, art. XII (New Hampshire); PA. CONST. art. I, § 10 (Pennsylvania); TENN. CONST. art I, §
adopted the just compensation principle by statute and North Carolina’s Supreme Court has interpreted a related property-protection provision in its state constitution to embody the just compensation principle.

One such application of a state Just Compensation provision occurred in Colman v. Utah State Land Board, in which the state planned to breach a causeway in response to the rapid rise of the water level in the Great Salt Lake. Anticipating problems with property owners that might be affected by such action, the Utah legislature amended the Utah Governmental Immunity Act to limit the liability of governmental entities for management of flood waters. Colman operated and maintained a five-mile-long underwater brine canal running parallel to and approximately 1,300 feet north of the causeway, which he used in his business of extracting minerals from deep lake brines. Colman alleged that the breach of the causeway would cause water from the south arm of the lake to flow through the breach under great pressure and cut through the canal banks, creating turbidity and sedimentation, rendering the use of the canal as a brine conduit impossible. The State argued that the amendment to the Utah Governmental Immunity Act shielded the State from liability. Emphasizing that “[t]he framers certainly did not intend to allow state government to override the constitutional guarantee with a legislative enactment,” the court held that Colman had properly stated a cause of action under the state constitution’s Just Compensation Clause.
Similarly, in Buckeye Union Fire Insurance Company v. Employers Mutual Fire Insurance Company, the state had acquired a factory in a tax foreclosure, and then let it deteriorate and become a nuisance. A fire started in the factory and spread to plaintiff's properties. When the plaintiff sued for the damage, the state raised the state legislatively-established sovereign immunity as a bar. The Michigan Supreme Court pointed out that the legislature's power to "shape the pattern of the State's immunity from liability" was restricted by the state Just Compensation Clause and held that the constitutional provision covered the nuisance-type of "taking" involved, superseding the state statute.

Furthermore, in Burns v. Board of Supervisors of Fairfax County, water allegedly had been discharged from a county storm sewer, causing $50,000 in damage to the plaintiffs' home. The county moved to dismiss on the ground of statutory governmental immunity, but the Virginia Supreme Court held that the complaint stated a claim for "damage" under the state constitutional provision, which prohibited taking or damaging of private property for public use without payment of just compensation. The court held that the state Just Compensation Clause provided an implied contract right, not a tort claim, when the government engaged in conduct amounting to a damaging of private property for a public use. Significantly, the constitutional provision prohibited the state legislature from passing any law to achieve that result. Accordingly, although it is not clear from the opinion, even if the county's objection had

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89 178 N.W.2d 476 (1970).
90 Id. at 482 (citing MICH. CONST. art. 13, § 1 (1908) (current version at MICH. CONST. art. 10, § 2) ("Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.").
91 238 S.E.2d 823 (Va. 1977).
92 Id. at 825–26 (holding that allegations of the motion were not demurrable); VA. CONST. art. I, § XI ("That... the General Assembly shall not pass any law... whereby private property shall be taken or damaged for public uses, without just compensation... ").
93 238 S.E.2d at 825 (stating "this section prohibits the General Assembly from passing any law whereby private property shall be taken or damaged for public uses without just compensation. It is well settled that this constitutional provision is self-executing, and the landowner may enforce his constitutional right to compensation in a common law action.").
been statutorily based, it would have been subordinate to the constitutional prohibition.

Fundamentally, these cases entail protection of individual rights under state constitutional provisions by restricting legislative power. The logical extension of the idea that state constitutions limit state legislative power to enact government immunity statutes places state courts in what Alexander Bickel identified as the "counter-majoritarian difficulty," describing the tension between judicial review of legislation and the democratic process, particularly when courts use open-ended constitutional provisions to do so.94 The premise of the counter-majoritarian difficulty argument is that legislatures are popularly elected and reflect majority will.95 Therefore, judicial restriction or invalidation of state legislature's revival of governmental sovereign immunity intrudes on the democratic process.96 Judicial intrusion in this field is particularly troublesome, because the courts' invalidation of legislatively-created immunity for state and local governments imposes costs distributed over the tax base as a whole.

It is therefore not surprising that courts in this fourth phase of the evolution of state sovereign immunity have made only tentative progress toward limiting legislatively-revived sovereign immunity. Consequently, it is equally unsurprising that all state courts that have confronted the issue have held that negative statutes of limitation are jurisdictional barriers to suit against states under state law.

3. Local Government Sovereign Immunity Doctrine

The principle of local government sovereign immunity originated from the uncritical acceptance in this country of


95 See Erwin Chemerinsky, Forward to the Vanishing Constitution, 103 HARV. L. REV. 43, 75 (1989) (discussing criticisms of this underlying assumption of the counter-majoritarian difficulty argument); see also MICHAEL J. PERRY, MORALITY, POLITICS AND LAW: A BICENTENNIAL ESSAY 149 (1988).

Russell v. Men of Devon,\(^{97}\) decided by the Kings Bench in 1788, and which stood for an altogether different proposition. In Russell, the plaintiff's wagon was damaged as a result of a bridge that was out of repair. The plaintiff's problem was the absence of a jural collective defendant. Although the inhabitants of the area apparently had a duty to maintain the bridge, no particular individual was responsible for doing so, and thus there was no available corporate defendant. As a result, the plaintiffs attempted to sue "The Men Dwelling in the County of Devon." The court sustained the general demurrer by two inhabitants, appearing for themselves and the rest of the men dwelling in the county, and dismissed the action.\(^{98}\) Because there was no jural collective defendant, Chief Judge Lord Kenyon reasoned, there was no corporate fund from which compensation could be paid.\(^{99}\) Consequently, Judge Ashhurst added, the only possible judgment would have to issue against the two individual inhabitants who had appeared in the action, and in turn, they had no means of reimbursing themselves except by generating a multiplicity of suits against the other inhabitants.\(^{100}\) Accordingly, Judge Ashhurst concluded, "it is better that an individual should sustain an injury than that the public should suffer an inconvenience."\(^{101}\) Both judges agreed that any relief should be provided by the legislature.\(^{102}\)

The absence of a jural collective, causing the prospect of a multiplicity of lawsuits, was notably absent in the case which introduced the concept of local government sovereign immunity to the United States. In Mower v. Inhabitants of Leicester,\(^{103}\) a stagecoach belonging to the plaintiff was traveling through the

\(^{97}\) 100 Eng. Rep. 359 (K.B. 1788).
\(^{98}\) Id. at 360 (stating that the lack of previous attempts to support such an action demonstrated that such an action cannot lie).
\(^{99}\) Id. at 362 (noting that where an action is brought against a corporation for damages, the damages are to be recovered out of the corporate estate).
\(^{100}\) Id. The judge here was proposing that if it were necessary to bring separate actions against each individual of the county, it would be better to leave the plaintiff without remedy. Lord Kenyon had expressed the same concern at the outset of his opinion: "If this experiment had succeeded, it would have been productive of an infinity of actions." Id.
\(^{101}\) Id.
\(^{102}\) Id. While Lord Kenyon was positing that the Legislature should manage any liability at law, Judge Ashhurst was indicating that the Legislature would have given a remedy had it been intended.
town of Leicester when one of the horses was killed while crossing a bridge, which the town statutorily required to maintain. Unlike the county in *Russell v. Men of Devon*, the Town of Leicester was incorporated and possessed a public treasury out for which a judgment could have been paid. The Massachusetts Supreme Judicial Court nevertheless denied relief, reasoning that recovery against the townspeople was improper because no statute had so authorized.

The court in *Mower*, therefore, misinterpreted *Russell*, holding that local governments are immune unless state legislatures provide otherwise. Nevertheless, this misinterpretation became the general American rule. As a consequence, notice of claim provisions and their accompanying negative statutes of limitation apply with equal force both in suits against states and against local governments under state law.

**B. Impact of Negative Statutes of Limitation—A Pragmatic Approach**

Removing the overlay of sovereign immunity exposes the underlying rationales of negative statutes of limitation to critical scrutiny. Since sovereign prerogative does not justify them, negative statutes of limitation must stand or fall on their own merits. The costs imposed by their strict interpretation as subject matter jurisdiction concepts must also be considered.

1. Pragmatism in Legal Analysis: Theory is Fine, Reality is Better

Pragmatism's overriding concern is with what "works" in human experience. Oliver Wendell Holmes is perhaps the most famous advocate of a pragmatic approach to law. His dictum that "the life of the law has not been logic: it has been

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104 See Borchard, *supra* note 13, at 41-42 (noting that the general rule of sovereign immunity in the United States was based on a "poorly reasoned decision, based upon a case which contradicts rather than sustains it"). See generally CAL. LAW REVISION COMM'N, RECOMMENDATIONS RELATING TO SOVEREIGN IMMUNITY—CLAIMS, ACTIONS AND JUDGMENTS AGAINST PUBLIC EMPLOYEES AND PUBLIC ENTITIES (1963); Louis Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 209-13 (summarizing history of sovereign immunity).

experience” captures the idea concisely. In *Miller v. Horton*, the town of Rehoboth ordered plaintiff’s horse to be killed, mistakenly believing that the horse had “the glanders.” As a shield against the horse owner’s suit for recovery for the animal’s value, the town raised a state statute allowing the town to kill horses suspected of having the disease. The statute did not provide for compensation to be paid to owners whose horses were mistakenly killed, as was the case in *Miller*. Justice Holmes pragmatically held that it was necessary to examine the actual impact of the statute on the owner of the horse. The fact that the town acted reasonably—even if with the utmost care to protect the community from serious public harm—did not change the fact that the owner had been deprived of a perfectly healthy horse.

It is helpful to examine the consequences of negative statutes of limitation through this lens of pragmatism. Such examination will provide a solid foundation from which to consider real world alternatives.

2. A Pragmatic Critique of Negative Statutes of Limitation

One rationale for negative statutes of limitation is to prevent payment of spurious claims. That rationale, however, contains the seeds of its own refutation. If the purpose is to avoid payment of unfounded or unmeritorious claims, then the government can best accomplish that objective by forcing the claimant to press his/her claim through the judicial system. The established procedures of court litigation would seem to be the best safeguard against ill-advised payment of claims, the heat of

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107 26 N.E. 100, 100-03 (Mass. 1891) (discussing the policy implications and constitutionality of construing a statute in various ways).
108 See id. at 105 (Devens, J., dissenting) (noting that the glanders is a contagious disease, which is dangerous to both man and domestic animals).
109 Id. at 102. Holmes considered who should fairly bear the monetary loss as between a man and his neighbors when the individual has done nothing but an innocent act.
110 See Sweet v. Salt Lake City, 134 P. 1167, 1171 (Utah 1913) (noting that “[o]ne of the principal objects of the statute is to prevent spurious claims from being paid”); Olson v. King County, 428 P.2d 562, 571-72 (Wash. 1967) (discussing one of the purposes of notice of claim requirements in statutes is to allow the government to investigate the merits of the claim).
litigation assuring that claimants would be put to their proofs in the most rigorous fashion.

The "spurious claims" rationale also imposes unnecessary costs upon claimant and government alike. It provides an incentive for the rational government decision-maker to do nothing. Why investigate a claim and mobilize administrative machinery to evaluate it if the claimant who is unsatisfied with the administrative outcome nevertheless can thereafter drag the government into court? The claimant intent on obtaining a judicial determination of the claim is needlessly forced to wait, cooling his/her heels while the government does nothing. Evidence grows stale; witness memories fade; the time value of money the claimant will ultimately recover is lost or at least delayed; and the opportunity cost of not having access to that money is surely lost forever.

A second rationale underlying negative statutes of limitation is to allow government officials a sufficient opportunity to investigate the demands in a notice of claim.\textsuperscript{111} If harm imposed on private parties is significant, the governmental entity will have sufficient notice to mobilize their investigative machinery even before the claimant files a notice of claim. A serious accident, for example, is hardly a secret in any organization. Moreover, insurance policies typically carried by governmental entities impose comparatively short time limits during which the entity must notify its insurer that a claim might be forthcoming.\textsuperscript{112} In light of these considerations, a governmental entity already has sufficient time and opportunity to investigate demands from private tort claimants even before a notice of claim is filed.

Moreover, if no negative statute of limitations applied and a claimant filed a suit simultaneously with the filing of a notice of

\textsuperscript{111} See, e.g., Hall v. Utah State Dept. of Corr., 24 P.3d 966 (Utah 2001) (noting that concurrent filing of a claim and notice of such claim deprives the state of the opportunity to assess the merits of the allegations and to decide whether to approve or deny the claim); Sweet, 134 P. at 1171 (noting that in the statute at issue, notice of claim was a condition precedent to the filing of a claim, and the purpose of this requirement was to allow the government to fully investigate the claim to prevent the payment of spurious claims); Johnston v. City of Seattle, 976 P.2d 1269, 1271-72 (Wash. Ct. App. 1999) (concluding that the "purposes of the 60-day waiting period are to enable the City to investigate claims without incurring litigation expenses and to foster inexpensive settlements").

\textsuperscript{112} See 4 SANDS ET AL., supra note 12, § 27.28 (explaining the policy considerations and practicalities of local government risk management and listing relevant case law).
claim, there is no reason why the governmental entity could not immediately commence investigation of the claim. The 20-day period for responding to a complaint is almost universal, and extensions on that time period could be obtained by the government to complete its investigation.\footnote{See e.g., FED. R. CIV. P. 12(a)(1)(A) (ordering that an answer is due, generally, within twenty days after service of summons and complaint); UTAH R. CIV. P. 12(a) (directing, generally, that answers are due within twenty days after service of summons and complaint).}

A third rationale for negative statutes of limitation is the desire to test the good faith of the claimant.\footnote{Sweet, 134 P. at 1171 (noting that notice of claim requirements allow the city to test the good faith of the claimants in filing a claim).} This rationale is probably a subset of the interest of the governmental entity to investigate the claim. Since good faith is largely a subjective criterion, it is most likely inextricably tied to the factual basis for the claimant’s demands.

A fourth rationale is to encourage inexpensive settlement of claims against the government.\footnote{Johnston, 976 P.2d at 1271-72 (noting that the dual purposes of the “waiting period are to enable the City to investigate claims without incurring litigation expenses and to foster inexpensive settlements”).} This rationale is usually described as an interest to avoid litigation through settlement of claims. Such expenses could be avoided even after a suit is filed, however, through settlement of the claim soon after a case is filed. Under those circumstances, the governmental entity will not incur significant litigation costs. Moreover, since settlements usually provide that each party will bear their own litigation expenses, the government will not have to pay the claimant’s litigation costs. If the claimant insists on filing suit as soon as possible, it would not seem unfair to have the claimant shoulder the additional litigation costs of such a strategy.

This review of the rationales underlying negative statutes of limitation in the government tort liability setting reveals that there is no pragmatic basis for such waiting periods. The question then becomes one of formulating a normative justification for treating such statutes as procedural rules rather than as jurisdictional barriers.
II. PROCESS RULES AND POWER RULES

Negative statutes of limitation can be evaluated using a normative theory that distinguishes between process rules and power rules. First, it is necessary to describe normative rules generally, and then to examine the normative structure of process and power rules.

A. Normative Rules Generally

The relation between normative rules and the legal doctrine of negative statutes of limitation can be understood in the context of an analytical framework which incorporates the various dimensions of legal analysis.\(^{116}\) At its most specific, legal analysis considers the facts giving rise to legal issues; at its most general, it considers philosophical conceptions of value. The entire organizational framework asks the following questions:

1. **Facts**: What facts give rise to the specific problems involved?
2. **Doctrine(s)**: What established legal doctrine(s) would ordinarily be expected to resolve the questions thereby posed?
3. **Standards of Judicial Review**: What standards of judicial review would a court be expected to apply?
4. **Normative Model(s)**: What normative models underlie the standards of judicial review in the context of the relevant legal doctrines?
5. **Philosophical Conceptions of Value**: What philosophical conceptions of value underlie the normative models?\(^{117}\)

The "facts" in the negative statute of limitations setting are straightforward: a person is injured through governmental conduct and seeks recovery for the harm. The "doctrine" of government tort liability and the particular role that negative statutes of limitation play have been explored earlier in this


\(^{117}\) Id. at 147-48 (noting that when deciding one of these cases, judges must have "in mind a normative model of government" based on ideal conceptions).
"Standards of judicial review" used by courts to consider whether to intervene have passed through several phases and are also discussed above. At this point, we must formulate a “normative model” that will best implement the “philosophical conceptions of value” that we seek to apply.

Normative models in American law reflect two distinct philosophical traditions. The Public Choice model is linked to a Hobbesian or Lockean notion of freedom:

The general idea is that values, so-called, are taken to be nothing but individually held, arbitrary and inexplicable preferences (the subjectivist element) having no objective significance apart from what individuals are actually found to be choosing to do under the conditions that confront them (the behaviorist element); from which it seems to follow that there can be no objective good apart from allowing for the maximum feasible satisfaction of private preference as revealed through actual choice—or, in other words, through ‘willingness to pay.’ The resulting allocation of resources to their highest-paying employments is the state known to economics as efficiency.

The Public Choice model, emphasizing individual satisfaction, has been revived by neoclassical economists. Their arguments rest “on the intuitive propositions that human beings act to further their own material well-being, that it is fruitless to attempt to suppress this characteristic entirely, and that the ability of individuals to act in their own best interest may have substantial social benefits.” This proacquisitive position suggests that property is a prepolitical right, that people should

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118 See generally supra Part I.A. (discussing federal, state and local sovereign immunities and their relationship to negative statutes of limitation).

119 See generally supra Part I.B. (discussing pragmatism in regards to negative statutes of limitation).

120 Michelman, supra note 116, at 152-53 (discussing “subjectivist conception of human experience” relevant to economists).


be able to act on their economic expectations, and that any unconsented or uncompensated governmental interference is wrong.

The Public Interest model, in contrast, traces its roots to a tradition in Western thought associated with Kant, Rousseau and Aristotle, and "conceives individual freedom in such a way that its attainment depends on the possibility of values that are communal and objective—jointly recognized by members of a group and determinable through reasoned interchange among them[:]. . . freedom is the state of giving the law to oneself."123 The Public Interest model posits that property is socially defined, with individual preference satisfaction as merely one—albeit important—objective.124 Public Interest advocates argue that the allocation of resources is best determined by society collectively for social objectives that are also collectively defined.

The Public Choice and Public Interest normative models are useful tools for analyzing the legal doctrine of negative statutes of limitation in the government tort liability setting. Achieving a proper balance between the individual and the community is what government tort liability law is concerned with. The overriding goal is to assure that government does not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."125 It is in this way we should consider negative statutes of limitation.

B. Process Rules and Power Rules as Norms

Existing standards of judicial review of negative statutes of limitation are premised on blind adherence to the principle of sovereign immunity.126 The only normative principle applied is the Public Interest normative model. Courts simply ask whether the sovereign has consented to suit, and proceed to strictly enforce the preconditions that the sovereign has imposed on the

123 Michelman, supra note 116, at 150 (illuminating connection between public choice and public interest models).
124 See generally id. at 153-54 (noting the differences between what Michelman calls "night-watchman" states and "welfare" states); Charles Reich, The New Property, 73 YALE L.J. 733, 771-774 (1964) (commenting on relationship between property and liberty).
125 See Armstrong v. United States, 364 U.S. 40, 49 (1960); see also U.S. CONST. amend. V (stating property cannot be taken for public use without "just compensation").
126 See generally supra Parts I.A, I.B (explaining different forms of sovereign immunity and negative statutes of limitation).
NEGATIVE STATUTES OF LIMITATION

availability of such suits. If those preconditions are not strictly followed, there is no claim. Applying the Public Interest normative model alone, courts conceive of negative statutes of limitation as “power” rules which divest courts of power to adjudicate a case. This view is the prevalent judicial “jurisdictional” approach to negative statute of limitation doctrine.

Exclusively adopting a “power” rule approach, however, fails to account for the private interests involved. Courts should apply both Public Choice and Public Interest normative models in order to take both individual and community interests into account. Only in that manner can legal doctrine avoid forcing “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” The distinction therefore turns on whether any particular doctrinal rule adequately provides for the private interests affected in light of the public interests involved.

Some doctrinal rules are properly characterized as “power” rules because they adequately provide for the private interests affected in light of the public interests involved. The requirement of exhaustion of administrative remedies is an example. That principle provides that a court action cannot be commenced until the claimant has utilized available administrative procedures for resolution of the claim involved. Several public interests animate the requirement of exhaustion of administrative remedies, including judicial deference to the expertise of administrative agencies and the desire to conserve judicial resources by keeping cases out of the court system that can be resolved short of judicial intervention. On the private interest side of the equation, the doctrine of exhaustion of administrative remedies has two singular characteristics: (1) the procedure is established precisely because the result may be that the claimant obtains a remedy, thereby relieving the private interests affected and (2) the claimant is an active participant in the process of investigation and determination, and has an

127 See supra note 125 and accompanying text (noting the scope of the Fifth Amendment).
129 See id. (noting matter is “one of policy, convenience and discretion”).
opportunity to actively engage in the process of healing the harm. The exhaustion of administrative remedies requirement addresses the claimant’s substantive remedial concerns as well as the claimant’s interest in participating in the resolution of the problem.

In order to be properly characterized as a “power” rule, it is not necessary that the private costs imposed by the rule should be the equivalent of private benefits received from the operation of the rule. There need only be a “reciprocity of advantage,” a rough correlation between the burdens imposed and the benefits obtained from governmental conduct. Situations of reciprocity of advantage render moot the logically subsequent question of whether such costs should be distributed over the population as a whole.

III. PROCESS RULES, POWER RULES, AND NEGATIVE STATUTES OF LIMITATION

Application of the Public Choice and Public Interest models demonstrates that negative statutes of limitation should be treated as process rules. Under the Public Choice model, we must consider the manner in which negative statutes of limitation affect the interests of government tort liability claimants. The decision to proceed directly to court as quickly as possible reflects the claimant’s preference for expediently proceeding to formal judicial resolution of the claim.

The preference for judicial resolution of disputes is highly valued and universally recognized in our system of justice. Our rules of civil procedure provide litigants with the steps for obtaining judicial determinations. Similarly, “open courts” provisions in state constitutions embody the right of litigants to have courts decide their cases.

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130 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding no compensation is required when there is a “reciprocity of advantage”).
131 See, e.g., McBride-Williams v. Huard, 2004 UT 21, ¶ 10, 94 P.3d 175, 177 (noting the policy underlying Rule 3 of the Utah Rules of Civil Procedure is to provide plaintiffs a day in court).
132 See, e.g., Laney v. Fairview City, 2002 UT 79, ¶ 28, 57 P.3d 1007, 1016, stating the open courts provision prohibited the legislature’s elimination of the city’s pre-existing government tort liability. The court was construing the following constitutional provision: All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be
More than a naked preference, the choice to seek judicial resolution as quickly as possible has substantial consequences for the claimant who seeks recovery for torts committed by the government. Evidence may grow stale with the passage of time. The claimant may be unable to pay substantial medical expenses that often result from serious personal injury. Witnesses may move away, die, or lose their memories. The claimant will be deprived of the time value of a money recovery, which may not be adequately remedied by payment of interest when payment is delayed. Finally, the opportunity cost of not having access to a monetary recovery for an extended period of time may be exacerbated by the additional waiting period delay in obtaining judicial resolution.

Applying the public interest normative model, the public interests involved in negative statutes of limitation would be adequately protected through treating such statutes as process rules. Preventing payment of spurious claims will be adequately protected through judicial resolution of tort claims against the government. The rigorous process of judicial resolution assures that the claimants will be put to their proofs.

Treating negative statutes of limitation as process rules does not preclude the government from conducting an investigation into the merits of any particular claim. In fact, the judicial machinery makes available to the government defendant the powerful tool of discovery mechanisms to ferret out the basis for the claim involved.

administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself, or counsel, any civil cause to which he is a party.

UT. CONST. art I, § 11. See generally Texas Ass'n of Business v. Texas Air Control Bd., 852 S.W.2d 440, 448 (Tex. 1993) (deciding that the Open Courts provision of the Texas Constitution guarantees (1) courts must actually be open and operating, (2) citizens must have access to those courts unimpeded by unreasonable financial barriers, and (3) meaningful legal remedies must be afforded. Open Courts provisions are present in the majority of state constitutions); David Schuman, The Right to a Remedy, 65 TEMP. L. REV. 1197, 1201-02 (1992), (reporting that 39 states have such clauses in their constitutions); Jonathan M. Hoffman, By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions, 74 OR. L. REV. 1279, 1281 (1994) (discussing the origins of state open courts provisions).

133 See Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1689 (1984) (demonstrating the term “naked preferences” as distribution of resources by legislatures to a group solely on the basis that those favored have the political power to get what they want).
In judicial proceedings, the claimant’s good faith is assured through the mechanism of verified complaints and the provision for testimony under oath. The interest of the government in assuring only good faith claims are paid is thereby protected.

Finally, the government’s interest in avoiding unnecessary expenses is adequately provided by rules of civil procedure. The government may request a stay of the proceedings or an extension of time to file a response while it conducts an investigation. The need to appear and request such a stay or extension may itself be an incentive for quick governmental investigation of claims.

IV. POSSIBLE CRITICISMS OF PROCESS APPROACH TO NEGATIVE STATUTES OF LIMITATION

A possible criticism of viewing negative statutes of limitation as process rules is that such an interpretation may do violence to mandatory language in state legislation containing such statutes of limitation. Such statutes, however, must be construed in light of the policies underlying state constitutional open courts provisions and state codes of civil procedure. Both of these sources of policy dictate that negative statutes of limitation should not be interpreted as jurisdictional requirements.

Another potential criticism is that such an approach may endanger all waiting period requirements. Examples might include medical malpractice prelitigation conditions, requirements that landlords serve a notice to quit, and ripeness requirements in federal Just Compensation litigation. First, these waiting periods do not share the suspect foundation of sovereign immunity of negative statutes of

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134 See Hathaway v. State, 2002 OK 53, ¶ 4, 49 P.3d 740, 746 (Kauger, J., concurring in part and dissenting in part) ("[T]he only consequence of the plaintiff’s premature filing is that the state may invoke an ex lege stay and stop all proceedings during the unexpired term of the time bar.");

135 See, e.g., McBride-Williams, 2004 UT at ¶ 7, 94 P.3d at 177 (finding medical malpractice pre-litigation procedures defined by statute deemed not to be jurisdictional);

136 See, e.g., Parkside Salt Lake Corp. v. Insure-Rite, Inc., 2001 UT App. 347, ¶ 20 n.5, 37 P.3d 1202, 1206 n.5, cert. granted, 42 P.3d 951 (Utah 2002) (defective notice to quit is not jurisdictional, but merely fails to state a claim, so the defect is waivable);

limitation in the government tort liability setting. Second, such waiting periods may be examined critically using the analytical approach described here. Like exhaustion of administrative remedies provisions, it may be that such waiting periods are perfectly appropriate given public choice and public interest concerns.

CONCLUSION

The feudal notion of sovereign immunity is the foundation for the idea that a waiting period imposed by a negative statute of limitation in the government tort liability setting is jurisdictional. We have progressed beyond the feudal, however, and should now view such waiting periods like the Pirate's Code—more as guidelines than jurisdictional rules.