Sovereign Immunity and the West Virginia Constitution

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The doctrine of sovereign immunity has long been a target for scorn.¹ It has prominent critics and seemingly few defenders.² Much of the disapproval

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¹ See The Pesaro, 277 F. 473, 474–75 (S.D.N.Y. 1921) (citing authorities).
² Nearly 80 years ago, the Supreme Court of Appeals of West Virginia acknowledged the debate in a case in which it extended sovereign immunity to municipalities (precedent later overturned). See Hayes v. Town of Cedar Grove, 30 S.E.2d 726, 734 (W. Va. 1944) (observing “the certain disposition of many law writers, law teachers and students of the law in general advocating more liberality” on the suability of government officials), overruled by Long v. City of Weirton, 214 S.E.2d 832 (W. Va. 1975).
centers on U.S. Supreme Court cases that, in general, shield states from liability for damages suits in federal court. Less discussed is the sovereign immunity provided to states in their own courts, which varies from state to state. This article does not enter the larger debate but proceeds in the shadow of it.

State law varies in the entitlement of states to sovereign immunity in their own courts. But West Virginia’s couldn’t be clearer—or could it? Ratified as part of the state constitution drafted by the Second Constitutional Convention, Article VI, Section 35 states, “The State of West Virginia shall never be made defendant in any court of law or equity[.]” Although this provision is “facially absolute,” the State, and its agencies and officials, are regularly named as defendants in West Virginia courts—including for suits seeking damages. How could that possibly be?

The answer, unsurprisingly, is found in judicial precedent. Starting around a century after ratification of the current state constitution, West Virginia’s highest court began to chip away at the core textual command of Section 35 until, at last, it simply rewrote it altogether. In *Pittsburgh Elevator Company v. West Virginia Board of Regents*, the Supreme Court of Appeals found that Section 35 did not bar claims for damages against the State (and its agencies) up to the limit of the applicable liability insurance policy. The impact of that decision still reverberates today. Despite its age and the undeniable reliance interests that have developed in its wake, we should be clear. As a matter of legal interpretation, the holding of *Pittsburgh Elevator* is pure invention. It is not the result of the traditional process of reading law, and it barely even purports to be so. Ultimately, the decision is rooted in an expansive view of the judicial power to craft extra- (or, worse still, contra-) textual remedies, in addition to its brazen hostility to the common law—and here, the constitutional doctrine of sovereign immunity.

*Pittsburgh Elevator* should not have come at a complete surprise. For one thing, the judicial application of sovereign immunity is no stranger to so-called legal “fiction.” And, to extent it matters, the legislative and executive

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3 See, e.g., Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001) (“Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law.”).

4 There is a textual exception—a limited waiver—for garnishment or attachment proceedings. See W. VA. CONST. art. VI, § 35.


7 310 S.E.2d 675 (W. Va. 1983).

8 Id.

9 Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984). See also Clackamas Cnty., Or. v. McKay, 219 F.2d 479, 488 (D.C. Cir. 1954) (“[T]he amiable recitation that when an officer does right he acts officially but when he does wrong he acts individually is a bit of fiction designed to reconcile the maxim that the King can do no wrong with the plain fact that the King,
branches played a role in its inception and, afterwards, have long been complicit in what the decision wrought by attempting to bypass the sovereign immunity bar using insurance policies.\textsuperscript{10} No doubt, however, the interests that reasonably rely on the structure built and legitimized by the decision are surely not fiction and remain significant indeed. Regardless of the collusion of the other branches in the judiciary’s creation, \textit{Pittsburgh Elevator} stands alone as a singular, breathtaking episode of the aggrandizement of judicial will over constitutional text—that is to say, the law. \textit{Pittsburgh Elevator} deserves criticism, yet it has received precious little.

The purpose of this article is to tell the story of how we got here. It also aims to show how a judiciary that prizes textualism and the separation of powers should confront \textit{Pittsburgh Elevator} in the legal world that has, for better or worse, been erected around it. It argues that \textit{Pittsburgh Elevator} is egregiously wrong and should be repudiated in the appropriate case. Even so, the decision provides a useful guide for the swift proposal and ratification of a state constitutional amendment that ensures those relying on the regime it sanctioned are not left in a lurch. That is, after all, the only way the West Virginia Constitution is \textit{supposed} to change.

This article proceeds in several parts. The first part examines the origins of sovereign immunity in state courts and West Virginia in particular, including the application of Article VI, Section 35 of the state constitution since ratification. The second part addresses \textit{Pittsburgh Elevator}, the aftermath, and the path to its reexamination. Finally, the third part explains how constitutional history and even the pragmatism of \textit{Pittsburgh Elevator} can shed light on shaping a constitutional amendment.

\textbf{I. BACKGROUND}

Sovereign immunity refers to the “established principle of jurisprudence”\textsuperscript{11} that “a State cannot be sued in its own courts without its consent.”\textsuperscript{12} Although frequently referred to as a doctrine familiar “at common

\textsuperscript{11} Beers v. Arkansas, 61 U.S. 527, 529 (1858).
\textsuperscript{12} R.R. v. Tennessee, 101 U.S. 337, 339 (1879); see Coolbaugh v. Commonwealth, 4 Yeates 493 (Pa. 1808) (finding it “a settled principle, that no sovereign power [is] amenable to suits either in its own courts, or those of a foreign country, unless by its own consent”). See also Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist., 62 F.4th 174, 188 (5th Cir. 2023) (Oldham, J., vacated as moot sub nom. McKay v. Clackamas Cnty., 349 U.S. 909 (1955); but see John Harrison, \textit{Ex Parte Young}, 60 STAN. L. REV. 989, 989 (2008) (“\textit{Ex parte Young} does not represent an exception to ordinary principles of sovereign immunity, it does not employ a legal fiction, it does not imply a novel cause of action under the Constitution or other federal law, and it does not create a paradox by treating officers as state actors for one purpose and private persons for another.”).
served a multitude of purposes,” including among other things, “protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.”

Numerous justifications for the doctrine of sovereign immunity can be seen from the historical record. The Supreme Court of Virginia, for example, has explained that the doctrine of sovereign immunity “serves a multitude of purposes,” including among other things, “protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.”

Long part of English jurisprudence, the doctrine was recognized by the Commonwealth of Virginia upon independence in 1776. Indeed, “at the time of the founding, it was well settled that states were immune under both the common law and the law of nations,” which the states “retained” as “aspects of sovereignty, ‘except as altered by the plan of the [U.S. Constitutional] Convention or certain constitutional Amendments.’” Indeed, Virginia courts

concurring) (“The doctrine of sovereign immunity was firmly established in the English common law by the thirteenth century.”).

See Hayes v. Town of Cedar Grove, 30 S.E.2d at 728, 728 (W. Va. 1944), overruled on other grounds by 214 S.E.2d 832; see also Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69 (1996); Springboards to Educ., 62 F.4th at 188 (Oldham, J., concurring) (“At the Founding, sovereign immunity became part of the American common law.”).

“‘It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.’” Alden v. Maine, 527 U.S. 706, 716–17 (1999) (quoting ALEXANDER HAMILTON, THE FEDERALIST NO. 41, 487 (C. Rossiter ed., 1961)); see also id. at 715 (“The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.”).

Afzall ex rel. Afzall v. Commonwealth, 639 S.E.2d 279, 282 (Va. 2007) (quoting Messina v. Burden, 321 S.E.2d 657, 660 (Va. 1984)). As Fifth Circuit Judge Andrew Oldham has noted, the “historical record contains competing justifications” for the doctrine. See Springboards to Educ., 62 F.4th at 188 (Oldham, J., concurring) (surveying justifications). Notably, Judge Oldham observed that “‘early American courts expressly disavowed any connection between an entity’s entitlement to sovereign immunity and its connection to the state treasury.’” Id. at 198 (Oldham, J., concurring). Discussion of the merits of the historical, competing justifications for sovereign immunity is beyond the scope of this article.

Cunningham v. Dorsey, 3 W. Va. 293, 298 (1869).

recognized the existence of sovereign immunity, such that as early as 1778 it had made limited waivers of its immunity by act of the legislature.

A. Sovereign Immunity in West Virginia and the Ratification of the 1872 State Constitution

Although West Virginia’s first constitution did not contain any expression of the State’s entitlement to sovereign immunity in its own courts, it did formally adopt English common law as it existed in Virginia as of the time of ratification in 1863. Therefore, when West Virginia ratified its 1863 constitution, it arguably brought along with it the doctrine of sovereign immunity. Regardless of the express reception of English or Virginia law—common or otherwise—when West Virginia became a state in 1863, the State would have possessed sovereign immunity in its own courts simply as a recognized attribute to its inherent dignity as a sovereign state, waivable only by the consent of the sovereign—here, the people through their elected representatives. And as the Virginia experience shows, that consent (limited or otherwise) could be provided by act of the legislature.

That understanding changed in 1872. After the Radical Republicans lost control of the levers of state power, a coalition of liberal Republicans and the ascendent Democrats successfully convened a constitutional convention to replace the 1863 Constitution. And replace it they did. Subject to only periodic amendment, the constitution ratified in 1872 is largely the one still in use today. Embedded within the legislative article, the sovereign immunity bar as we know it today first appeared in the 1872 constitution. The language added to Article VI, Section 35 not only constitutionalized sovereign immunity but also made it absolutely non-waivable. Although the provision was later amended in the 1936 to permit the State, including its subdivisions, to be made a defendant in

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19 See Higginbotham’s Ex’x v. Commonwealth, 66 Va. 627, 637 (1874) (observing that “it has ever been the cherished policy of Virginia to allow to her citizens and others the largest liberty of suit against herself; and there never has been a moment since October 1778 . . . , that all persons have not enjoyed this right by express statute.”).
20 Id. (quoting W. VA. CONST. art. II, § 8 (abrogated)).
21 Under our constitutional system, sovereignty rests with the people and the legislature exists to express their will. See Harbert v. Harrison Cnty. Ct., 39 S.E.2d 177, 187 (W. Va. 1946) (“The Legislature of this State possesses the sole power to make laws and it is necessarily invested with all the sovereign power of the people within its sphere.”); accord Syl. Pt. 1, State ex rel. Skinner v. Dostert, 278 S.E.2d 624 (W. Va. 1981).
22 See Higginbotham’s Ex’x, 66 Va. at 627, 637.
garnishment and attachment proceedings—effectively a limited waiver by constitutional amendment—the core prohibition has remained the same since 1872: “The State of West Virginia shall never be made defendant in any court of law or equity.”

B. The Meaning of Article VI, Section 35

1. The Textualist or Original Understanding Method

It may seem peculiar to ask in view of the apparent textual clarity of Section 35, but given Pittsburgh Elevator, what does the provision actually mean?

We must begin with the proper interpretative method. The Supreme Court of Appeals has instructed the courts in this state to interpret the state constitution based on the original understanding of its text. Most recently, the court reemphasized that the judiciary must apply the provisions of the state constitution “in a way that is consistent with the original purpose and understanding of the citizens at the time of the Constitution’s ratification.”

Original public meaning, or original intent originalism, has long been the way the Supreme Court of Appeals has interpreted the state constitution. As it explained over 100 years ago:

The plain terms of this constitutional provision should prevail. A Constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it; ‘for as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or obstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense

25 W. VA. CONST. art. VI, § 35 (emphasis added).
26 That is not to say that the Court has never suggested other approaches, see Randolph Cnty. Bd. of Educ. v. Adams, 467 S.E.2d 150, 163 (W. Va. 1995) (“Reasonable construction of our Constitution does not require static doctrines but instead permits evolution and adjustment to changing conditions as well as to a varied set of facts.”), or applied them, see e.g., Pittsburgh Elevator Co. v. W. Va. Bd. of Regents, 310 S.E.2d 675 (W. Va. 1983).
28 See Syl. Pt. 3, Diamond v. Parkersburg-Aetna Corp., 122 S.E.2d 436, 437 (W. Va. 1961) (“The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it.”).
designed to be conveyed.’ The great Chief Justice Marshall in the interpretation of a provision of the national Constitution said: ‘As men whose intentions require no concealment generally employ the words which most distinctly and aptly express the ideas they intend to convey, the enlightened patriots who adopted it must be understood to have employed words in their natural sense, and to have intended what they said.’

As early as 1882, the court—in a sovereign immunity case, no less—reiterated the “well settled rule” that “the meaning of the Constitution is fixed, when it is adopted; and it is not different at any subsequent time, when a court has occasion to pass upon it.”

Therefore, the goal of courts when applying the provisions of the state constitution “is to give effect to the intent of the people in adopting it.” Because the meaning of the constitution is “fixed,” the court observed that “[n]o change of public sentiment after the adoption of the Constitution should have the slightest weight with the court to influence them to give a construction to the instrument not warranted by the intention of its framers.” Yet where there is “doubtful meaning in the words used,” the court “look[s] to contemporaneous and practical construction.”

The textualist-based, original understanding method of interpreting the state constitution is appropriate for applying a written text; the constitution is, after all, “the very genesis of government.” “Unlike ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law. This basic organic law can be altered or rewritten only in the manner provided for therein.” Many other state judiciaries also interpret their constitutions based on original public meaning or a similar originalist method. Failure to adhere to this longstanding interpretive method

29 May v. Topping, 64 S.E. 848, 850 (W. Va. 1909) (quoting Gibbons v. Ogden, 22 U.S. 1, 188 (1824)) (citation omitted).
31 Id. at 418.
32 Id. at 419.
33 Id. at 420.
35 Id.
36 See, e.g., Elliott v. State, 824 S.E.2d 265, 268 (Ga. 2019) (“We have often explained that we interpret the Georgia Constitution according to its original public meaning.”); State v. Antonio Lujan, 459 P.3d 992, 999 (Utah 2020) (“We have repeatedly reinforced the notion that the Utah Constitution is to be interpreted in accordance with the original public meaning of its terms at the time of its ratification.”); Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 450–51 (Mich. 2020) (“Our ‘primary objective’ in interpreting a [state] constitutional provision . . . is to determine the text’s original meaning to the ratifiers, the people, at the time of ratification.”) (citation omitted).
for reading the state constitution, including Section 35, “would inappropriately expand the judicial power” by infringing upon the people’s prerogative to change the constitution via the amendment process.

2. The Original Meaning of Article VI, Section 35

The plain text of Section 35 does not contain the words “sovereign immunity,” but there is no doubt that the provision refers to that venerable doctrine. To be sure, courts did not regularly begin to use that label for the principle that a state cannot be sued in its own courts without its consent until the 20th century. Section 35 is thus textually consistent with how the doctrine had been expressed for many years before. The provision is also consistent with how identical provisions from other state constitutions were understood to refer to the longstanding doctrine of sovereign immunity.

No available historical evidence points toward a different meaning. Specific, contemporaneous evidence of the understanding or intent of the drafters or the ratifiers of the 1872 constitution is minimal. There is no indication from the official proceedings of the 1872 constitutional convention that the issue of sovereign immunity was subject to any discussion at all. Nor does it appear that the legislature ran wild with waivers of sovereign immunity between the years 1863 and 1872. This strongly suggests that what the founders proposed and the people ratified in 1872 was little more than a decision to constitutionalize the

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38 W. VA. CONST. art. XIV §§ 1–2.
39 In fact, the phrase does not appear to have been used by the Supreme Court of Appeals until 1945. See Stanton v. Ruthbell Coal Co., 34 S.E.2d 257, 263 (W. Va. 1945).
40 Compare Beers v. State, 61 U.S. 527, 529 (1857) (restating the principle, including that a state may waive sovereign immunity and “be made a defendant”) with W. VA. CONST. art. VI, § 35 (the State shall never “be made a defendant”).
41 See, e.g., Miller-Davis Co. v. Ill. State Toll Highway Auth., 567 F.2d 323, 328 (7th Cir. 1977) (quoting identical language from a provision of the 1870 constitution of Illinois); Gaines v. Smith, No. 1210304, 2022 WL 17073033, at *3 (Ala. Nov. 18, 2022) (same, quoting 1901 constitution of Alabama). Notably, the identical provision is still in force in Alabama. See id. (quoting ALA. CONST. art. 1, § 14). This provision, in turn, is a “literal reproduction of section 15, art. 1, of the [Alabama] Constitution of 1875.” Ala. Girls’ Indus. Sch. v. Adler, 42 So. 116, 117 (1905). Given that the Alabama provision is identical to the original version of Section 35 and was ratified less than three years later, it would not be unreasonable to surmise that Alabama copied it from West Virginia.
42 HENRY S. WALKER, JOURNAL OF CONSTITUTIONAL CONVENTION, ASSEMBLED AT CHARLESTON, WEST VIRGINIA (Convention Printer 1872). See also Pittsburgh Elevator Co. v. W. Va. Bd. of Regents, 310 S.E.2d 675, 680 n.6 (W. Va. 1983) (“The recorded debates and proceedings of the 1872 West Virginia Constitutional Convention are barren of any reference to the precise meaning of this provision.”). Despite this initial nod toward uncovering the original meaning (relegated to a footnote), see id., Pittsburgh Elevator quickly abandoned the effort not agreeing with what it found.
status quo—the enshrining of the long-understood principle of sovereign immunity into the constitution but with added teeth: it can “never” be waived. No available contemporary evidence sheds light on why the “never” condition was included. One can speculate that the drafters were concerned about the potential for future legislatures to liberally waive the defense to the detriment of the State’s treasury.

What the drafters proposed, and the people ratified, therefore, was a clear alteration of the received, or common law, understanding of sovereign immunity. That is because the plain text of Section 35 absolutely prohibits anyone—even the legislature—from waiving the defense or otherwise consenting to suit. In short, “never means never.” This should be seen as a partial derogation of the common law of sovereign immunity, which, as we have seen, was historically subject to waiver by legislative act. As it was later described by the Supreme Court of Appeals, as a textual matter, the original version of Section 35 contains “no specific exception” to its core prohibition and is, therefore, “ordinarily construed” to be “absolute and unqualified.”

After 1872, therefore, West Virginia’s sovereign immunity in its own courts could only be waived by constitutional amendment—a far more daunting prospect than the requirement of legislation. Thus, to the extent the West Virginia legislature had enacted any statutory waivers of sovereign immunity (including by retaining any such provisions received from Virginia Code in 1863), the ratification of the 1872 constitution rendered such provisions null.

As a result of ratification of the 1872 constitution, which included the non-waivable sovereign immunity bar, no longer could the Supreme Court abolish or modify the doctrine as other state judiciaries have done through their common law powers. In short—for West Virginia, at least—“never” includes even the judicial branch.

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44 See Beers, 61 U.S. at 529–30.
46 “It should go without saying that the Legislature is without capacity to pass a law affecting the constitutional immunity from suit of the state or one of its governmental agencies.” Id. at 568.
47 See, e.g., Bd. of Trs. v. Andrews, 535 S.W.3d 616, 622 (Ark. 2018) (explaining that the “drafters of our current constitution removed language from the [prior] constitution that provided the General Assembly with statutory authority to waive sovereign immunity and instead used the word ‘never’”).
48 See Evans v. Bd. of Cnty. Comm’rs, 482 P.2d 968, 969 (Colo. 1971) (observing that sovereign immunity resulted in “the injustice and inequity—even absurdity—of having recovery for negligence against individuals and against firms for negligence of their employees, but no recovery against governmental units for the negligence of their employees.”).
C. Application of Article VI, Section 35 before Pittsburgh Elevator

In the decades following ratification, Section 35 was applied as its plain text suggests it should. It was frequently raised in a variety of cases in which the focus was on whether a particular defendant should be considered the “State” or whether the form of the action (damages, mandamus, injunction, etc.) mattered for purposes of implicating the sovereign immunity bar. What follows are a few rules extrapolated from the cases leading to Pittsburgh Elevator.

1. Suits for Damages Against Corporations Created by the State

Less than ten years after ratification, the Supreme Court of Appeals in Tomkins v. Kanawha Board held (in a new syllabus point) that a suit for damages against a corporation created by the State is not barred by sovereign immunity. The court held that because the corporation was granted the right to sue and to be sued, and because it did not exercise any of the State’s sovereign powers, it was not the “State” within the meaning of Section 35. For its reasoning, the court relied on a 1856 decision of the Supreme Court of Virginia, which similarly held that the Commonwealth had not “clothed” a corporation it created (and that had been sued) with the “sovereign authority of the State.” In short, “[t]he exemption from liability to be sued is a privilege peculiar and personal (so to speak) to the [State] and does not extend to her assignee, any more than would her privilege not to be sued for land claimed by her extend to her grantee of land.” The court also appears to have focused on the distinction between proprietary and governmental functions, which is a principle reflected in later cases. For example, the court would later hold that the board of control, although a corporation, was held to be a “direct governmental agency” entitled to the protection of Section 35 because it exercised sovereign power. Where that line can be drawn and principally applied in different cases is less than clear.

Part of the reasoning from Tomkins (the authority to sue-and-be-sued) has been recently echoed by Fifth Circuit Judge Andrew Oldham when

49 19 W. Va. 257 (1881).
50 See id. at Syl. Pt. 1.
51 Id. at 263–64.
52 Id. at 262–63 (quoting James River & Kanawha Co. v. Early, 54 Va. 541, 555 (1856)).
53 Id. at 262 (quoting James River & Kanawha Co. v. Early, 54 Va. 541, 555 (1856)).
54 Id.
55 See Hope Nat. Gas Co. v. W. Va. Tpk. Comm’n, 105 S.E.2d 630, 636–37 (W. Va. 1958) (“The state has created many agents for public purposes, which agents exercise either proprietary or governmental functions, or both of such functions. In most instances, wherever the function from which the claim arises is purely governmental there is immunity from suit, but wherever the function is purely proprietary, there is no immunity.”).
questioning the functional, multi-factor balancing test used to determine whether an entity is an “arm of the State” and thus entitled to common law sovereign immunity.\(^{57}\) Instead of weighing factors such as the source of funding, nature of autonomy, among other things, Judge Oldham would simply ask whether the entity seeking common law sovereign immunity would be considered “the State” as a matter of original public meaning.\(^{58}\) Following a historical analysis, Judge Oldham concluded that an entity should not be considered “the State,” and therefore not entitled to sovereign immunity, if (1) the entity has a “separate legal status from the State (e.g., as a corporation, LLC, or 501(c)(3) nonprofit organization),” or (2) the “state statute designating the entity including a ‘sue-and-be-sued’ clause.”\(^{59}\) Otherwise, Judge Oldham would presume that “[a]ll other State-created entities are . . . arms of the State and entitled to sovereign immunity.”\(^{60}\) Judge Oldham’s originalist analysis of common law sovereign immunity has much to recommend it for making such determinations under West Virginia law.

2. Suits for Prospective Relief Against State Officials

The year after the decision in *Tomkins* was rendered, in 1882, the Supreme Court of Appeals held in *Chesapeake & Ohio R. Co. v. Miller* that a state officer can be sued for injunctive relief to “restrain him from the performance of a mere ministerial duty.”\(^{61}\) The court explained right off-the-bat that the “right to sue a State-officer, when the State cannot be sued, either to require or inhibit the performance of a mere ministerial duty has been repeatedly recognized.”\(^{62}\) However, such an official cannot be sued “where the duty to be performed is purely executive and political,”\(^{63}\) which today we label “discretionary.”

As some scholars have explained, “common law courts granted specific relief against Crown officials from the early seventeenth century onward, both to prevent and compel official action, without worrying about the English tradition of sovereign immunity.”\(^{64}\) The justification for this has been explained:

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\(^{58}\) *Id.* (Oldham, J., concurring).

\(^{59}\) *Id.* at 198 (Oldham, J., concurring).

\(^{60}\) *Id.* (Oldham, J., concurring).


\(^{62}\) *Id.* at 416–17 (citing cases).

\(^{63}\) *Id.* at 417.

The absence of sovereign immunity in officer suits in England reflects the imperatives of the rule of law, as embodied in the unique procedural posture of the writs. In a public action, the plaintiff named an officer of the Crown who had “committed an act not justified by the law” in the course of discharging his “public functions.” Such an officer was regarded as having acted “coram non judice,” or “without jurisdiction,” and thus was, like any other private person, subject to legal consequences for his misconduct “before the ordinary courts.” The plaintiff proceeded in name of the Crown itself, calling upon a malfeasant official “to account for [his] conduct.” Because the proceeding was the means by which the Crown commanded rogue officers to do “right and justice,” it made sense that defendant officers could not plead the Crown’s own immunity to evade its superintendency.65

This justification corresponds with how such writ proceedings were brought once the tradition crossed the Atlantic. “Understood in England as proceedings brought in the name of the Crown,” petitions for common law writs, such as mandamus, prohibition, and certiorari “evolved in the American Republic into suits brought (much like criminal proceedings) in the name of the people.”66 This explains why state court writ proceedings are captioned “as if prosecuted by the public as a whole.”67 Specifically, in West Virginia—as with many other state and federal jurisdictions—writ petitions are brought “naming the plaintiff”68 as the “State of West Virginia ex rel. [relator].”69 This “convention coheres with the principle that, even when the writs were sought by individual citizens, they were viewed as brought on behalf of the public as a whole.”70 Early American courts “explicitly recognized that these principles defeated the argument for sovereign immunity.”71

The Supreme Court of Appeals’ decision in Miller, which appears to have “transferred over” the “same concept” from the common law writs to the injunction,72 came a few decades before the U.S. Supreme Court did the same in

65 Id. at 1335–36 (footnotes omitted).
66 Id. at 1336.
67 Id.
68 Id.
70 Pfänder & Wentzel, supra note 64, at 1336.
71 Id.
72 Id. A competing view sees this exception to state sovereign immunity, famously recognized in Ex Parte Young, as a “negative injunction” that was “nothing more than the preemptive assertion in equity of a defense that would otherwise have been available in the State’s enforcement proceedings at law.” Virginia Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 262 (2011)
the well-known case of *Ex parte Young.* The key passage from the latter case succinctly explains the often-repeated reason for why actions seeking prospective relief against government officials falls outside of the traditional doctrine of sovereign immunity:

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official . . . . [T]he officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

However, the exclusion for prospective relief is more limited than it may seem. Sovereign immunity was held to apply in such actions where granting such relief “directly involved” a “contract or property right of the state.” As the West Virginia Supreme Court of Appeals explained, courts should look behind the labels to determine the nature and extent of the interest on the part of the State that is at issue. The key inquiry, therefore, is “whether the suit, irrespective of its form or the forum in which it is prosecuted, is against the state.” And “if a decision of the question involved would be, in substance and effect, one for or against the state,” Section 35 would prohibit the suit.

As recent as 1979, the Supreme Court of Appeals continued to apply these limitations to the prospective relief exception, explaining that “where the relief sought involves an attempt to obtain a retroactive monetary recovery against the official based on his prior acts and which recovery is payable from State funds, the constitutional immunity provision bars such relief.” However, the court has recognized that sovereign immunity did not apply in many prior

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73 209 U.S. 123 (1908).

74 *Id.* at 159–60.


76 *Id.* at 617.

77 *Id.*

cases against the state auditor “for failing to pay requisitions submitted by State agencies or officials” because the payments are based on warrants submitted by a state agency or official pursuant to a budget appropriation where the “law surrounding the appropriation” was in dispute.\footnote{79} Therefore, as to sovereign immunity, “where the Auditor rejects payment of a lawful warrant or requisition, he is acting outside his official function and is therefore not cloaked with constitutional immunity.”\footnote{80}

The court has otherwise applied sovereign immunity to bar a claim against a state agency where the plaintiff sought an order requiring the agency (its officials) to comply with a contract it had entered.\footnote{81} The court reasoned that the act of “making . . . the contract” with the plaintiff was not a ministerial act, but rather was discretionary, because the legislature had given the agency “the power to carry out the contract or to refuse to do so.”\footnote{82} That power required discretionary judgment, which the court could not compel in mandamus or restrain by injunction. Therefore, the court held that the case “being once against the state’s contracting agency . . . for the purpose of enforcing a contract made by it on behalf of the state, is therefore virtually a suit against the state itself[.]”\footnote{83} In later decisions, the court further limited the scope of prospective relief against state officials by forbidding suits that “directly involve[] a contract right or liability or [sic] the part of the State government or property belonging to it or in its custody.”\footnote{84} But where no contract or public funds are at issue, and only a purely ministerial act without the prospect of “interference with the rights or administrative duties and obligations” of any state agency, sovereign immunity is no bar.\footnote{85}

3. Legislative Claims Commission or Court of Claims

Because Article VI, Section 35 provides sovereign immunity to the State “in any court of law or equity,” the Legislature created its own internal adjudicative process by which it could determine—and, potentially, pay to remedy—”moral obligations” on the State by legislative enactment. Although referred to as the “state court of claims”\footnote{86} for many years and has a quasi-judicial flavor, the forum is an arm of the legislative branch alone. It is,

\footnote{79}{Id. at n.6 (citing cases).}
\footnote{80}{Id.}
\footnote{81}{State ex rel. Gordon v. State Bd. of Control, 102 S.E. 688, 689 (W. Va. 1920).}
\footnote{82}{Id. (emphasis added).}
\footnote{83}{Id.}
\footnote{84}{See Hamill v. Koontz, 59 S.E.2d 879, 882 (W. Va. 1950); see also Miller Supply Co. v. State Bd. of Control, 78 S.E. 672, 673 (W. Va. 1913).}
\footnote{85}{State ex rel. W.H. Wheeler & Co. v. Shawkey, 93 S.E. 759, 760 (W. Va. 1917).}
\footnote{86}{State ex rel. Catron v. Sims 57 S.E.2d 465, 466 (W. Va. 1950).}
essentially, a legislative committee dedicated to determining whether, under the Legislature’s exclusive judgment, the State owes a moral obligation to remedy a citizen’s injury. Because “a court of law or equity” (now merged) is alone the forum of the judiciary, the legislative branch’s internal forum for ascertaining the moral obligations of the State falls outside the textual prohibition of Section 35.

4. Suits for Damages Against State Agencies

Leading up to Pittsburgh Elevator, there was a largely unbroken line of cases applying Section 35 to bar damages suits against state agencies. For instance, in City of Morgantown v. Ducker, the Supreme Court of Appeals held that the West Virginia University Board of Governors constituted a state agency that was entitled to sovereign immunity. As a result, the court granted a writ of mandamus to the court of claims, ordering that the non-judicial body “take jurisdiction” over the damages claims made against the Board because the courts of law could not. Notably, the court did not direct how the court of claims should undertake its adjudication.

5. Suits for Damages Against Political Subdivisions

Additionally, there is the question of whether political subdivisions—such as municipalities—are entitled to sovereign immunity under Section 35. In Higginbotham v. City of Charleston, the Supreme Court of Appeals held that the answer was not, based on the “clear and unambiguous language” of Section 35, which “precludes on the State . . . from being made a defendant.” It specifically rejected Charleston’s argument that it should be considered a “branch” of the State. This “terse[] and unequivocal[] reject[ion]” of the argument that municipalities were entitled to sovereign immunity had the effect of overruling prior cases that stood for the proposition that a municipality had such immunity “while it was engaged in the performance of a governmental activity.” This was based on the theory “the state delegates a portion of its

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88 Id. at 302–04.
89 Id.; see also Parkulo v. W. Va. Bd. of Prob. & Parole, 483 S.E.2d 507, 514 (W. Va. 1996) (“[U]nder the traditional view, the claims giving rise to this appeal [against a state agency] may not be prosecuted in the courts by reason of the sovereign immunity of the State. Under that view, the remedy available to appellant, if any, would be to seek a recognition by the Legislature of her claim as a moral obligation of the State.”).
sovereignty, to be exercised within particular portions of territory for certain well-defined public purposes."  

There are arguably other common law immunities to which political subdivisions may have been entitled before being judicially abolished, but examination of those, being distinct from sovereign immunity and Section 35, are beyond the scope of this article.  


A few decades before Pittsburgh Elevator, the legislature creatively attempted to circumvent the sovereign immunity bar by establishing the state board of insurance, which purchased liability insurance for the purpose of providing “a fund or source from which members of the public having claims against the State for damage resulting from acts of negligence on part of the State . . . may recover.” As part of the deal, the State was not allowed to raise the doctrine of sovereign immunity as a defense. This, in short, was a policy of waiver expressly forbidden by constitutional text.  

The point, of course, was that such insurance policies would “protect the assets and treasury of the State from claims or judgments that may be made . . . .” The State would effectuate this policy by stipulating that it would not raise the defense of sovereign immunity while the plaintiffs agreed they would not attempt to “enforce [any] verdict” against the individual defendants or the State, “but rather that the plaintiffs’ recovery . . ., if any, will be limited to” the money “available from the policy or policies of insurance applicable[.]”  

Significantly, the State acknowledged that the insurance policies purchased by the state board of insurance for these purposes were paid for “with public monies.”  

The court blessed this arrangement in 1968 only by refusing to analyze whether the State could even refuse to assert the sovereign immunity bar voluntarily. It was wrong for the court not to have done so, because the State’s voluntary action constituted a deliberate waiver, which Section 35 clearly  

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92 Id. (quoting Brown’s Adm’r v. Guyandotte, 12 S.E. 707 (W. Va. 1890)).  
93 See Parkulo, 483 S.E.2d at 518 (discussing cases).  
94 Id. at 514. (“[I]n addition to providing a method of redressing claims against the State as moral obligations of the State, the Legislature has also authorized the purchase of liability insurance providing coverage of State ‘property, activities and responsibilities’, in spite of the fact that the State was and is immune from suit in the law courts of the State.”) (quoting Ch. 96, Acts of the Legislature, 1957, and W. Va. Code § 29–12–5).  
95 State ex rel. Scott v. Taylor, 160 S.E.2d 146, 148 (W. Va. 1968) (quoting stipulation entered into on behalf of the State by its attorney general).  
96 Id.  
97 Id.  
98 Id.
forbids. Indeed, it appears that the court was aware that raising the issue would have “rais[ed] grave doubts as to the validity” of the statutory provisions that established the state board of insurance and forbade reliance upon sovereign immunity in suits covered by the policies.\(^\text{99}\) The court expressly stated that it would not raise the issue sua sponte, even though no party would have had any interest in raising it given the stipulation and legislative framework providing for it.\(^\text{100}\)

As a matter of first principles, the State’s decision to decline to assert sovereign immunity—intentionally or otherwise—cannot control whether a court should apply Section 35. Otherwise, the State’s decision amounts to waiver, which clearly contravenes the plain text of Section 35. Never means never.

II. **Pittsburgh Elevator and the Triumph of Judicial Will**

*Pittsburgh Elevator* is a peculiar case for a few reasons. First, the point of law for which it is most well-known—\(^\text{101}\) Syllabus Point 2, the critical focus of this article—was almost certainly dicta. Second, the true holding of the case,\(^\text{102}\) which involved the application of a special venue statute (and was itself obviously wrong), was quietly overruled without dissent twenty years later.\(^\text{103}\) Nonetheless, the Supreme Court of Appeals has long characterized Syllabus Point 2 as the “central holding” of *Pittsburgh Elevator*.\(^\text{104}\)

A. **The Decision**

The case began after a four-year-old child fell off the main stage at the WVU Creative Arts Center in Morgantown. The child’s parents sued the WVU Board of Governors\(^\text{105}\) and others involved in the design and manufacture of the stage—including the Pittsburgh Elevator Company—which later asserted an indemnity claim against the Board. The lower court ultimately dismissed

\(^{99}\) *Id.* at 149.

\(^{100}\) *Id.*


\(^{102}\) *Id.* at Syll. Pt. 3.

\(^{103}\) Syll. Pt. 3, *King v. Heffeman*, 591 S.E.2d 761 (W. Va. 2003). Coincidentally, *Pittsburgh Elevator* was authored by Darrell McGraw (later Attorney General) while *King* was authored by his younger brother, Warren McGraw, who joined the court in 1999. Traveling down the rabbit hole a bit farther, the only modern justice to question *Pittsburgh Elevator*, Brent Benjamin, was only able to do so after defeating the younger McGraw in an election campaign that attracted attention nationwide—including from the U.S. Supreme Court. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009).


\(^{105}\) It was then referred to as the Board of “Regents.”
Pittsburgh Elevator’s indemnity claim for lack of venue based on a statute that made Kanawha County, the location of the state capital, the exclusive venue for claims against the State. (No one disputed that the Board was an arm of the State). As was apparently the custom for some time, and particularly since the legislature enacted the liability insurance regime discussed previously, the Board did not assert sovereign immunity as a defense. Instead, it relied upon the State’s purchase of insurance to cover the potential damages liability.

The question on appeal should have been a straightforward one of statutory interpretation. Was the Board, as an agency of the State, entitled to invoke the exclusive venue provisions contained in state code that required the claim against it to be brought in Kanawha County (the state capital) instead of Monongalia County (the location of WVU)? At that time, the relevant statute read, “[a]ny suit in which . . . a state agency is made a party defendant” “shall be brought and prosecuted only in the circuit court of Kanawha County.”106 Let’s be clear: This should have been a very easy case. But on this score the court was unanimous in holding that the exclusive venue provision did not apply because the cause of action actually sought “recovery . . . against the liability insurance coverage of a state agency.”107 This was despite the fact that the Pittsburgh Elevator Company had brought no claim against the State’s insurance company, and that the insurer was not a party to the case.108 In short, it had “brought” no “suit” against the insurer—only the Board.

The tortured reasoning suggests something was afoot. To arrive at its holding, the majority began by simply asserting that the “crucial issues raised in this case involve[d] the effect of” the statute authorizing the state board of insurance to procure liability insurance for the State “upon” the exclusive venue statute, “and the specious tenet of law that state agencies are immune from suit under W. Va. Const., art. VI, § 35.”109 This assertion is never explained; the case “involved” no such thing. Rather, the case “involved” merely a straightforward application of plain statutory language to an uncontested issue of fact (the Board is a “state agency”). As noted, the Board had not raised the defense of sovereign immunity—it had, in accordance with statutory insurance provisions, effectively “waived” it. It appears that the court felt that it needed to “constitutionalize,” or judicially amend Section 35 to conform it with the insurance coverage regime established by the legislature—reasoning which rested on the fiction that “the

107 Id. at Syl. Pt. 3.
108 Id. at 690 (Neely, J., concurring in part and dissenting in part) (“The suit under consideration here, however, is not against the State or its officers but rather against an insurance carrier. Protection of the carrier from jury prejudice determines that the carrier not be named as a party; nonetheless, the fiction of the caption does not change the underlying nature of the suit.”).
109 Id. at 680.
real party in interest is the insurance carrier.”

Therefore, because (according to the court) Pittsburgh Elevator’s lawsuit was, “in essence, a suit against a state agency’s insurance carrier,” the court concluded that “the justification for applying the exclusive venue provisions . . . evaporate[d].”

Undaunted by the prospect of simply applying the plain text of the exclusive venue statute, the court embarked on an extensive discourse against the doctrine of sovereign immunity as embodied by Article VI, Section 35 in order to legitimize its new fiction. The majority of three purported to find extensive “exceptions” in precedent, highlighted the legislature’s creation of the liability insurance regime that required state agencies to effectively waive sovereign immunity, and conducted a dubious “analysis” of Section 35 in light of statutory and other state constitutional provisions, even suggesting that Section 35 was itself inconsistent with other provisions of the state constitution. Ultimately, the court’s new “holding”—that damages suits against the State are permissible under Article VI, Section 35 so long as the plaintiff seeks no more than the limit of the State’s liability insurance coverage—is best read as the court engrafting a new exception (waiver) to the absolute text of the state constitution.

Justices Neely and Miller, though concurring in the judgment of reversal on the issue of venue, dissented from the majority’s extrajudicial commentary on sovereign immunity. It is clear they believed the court was, in fact, purporting to judicially modify the constitutional text. Justice Neeley wrote:

Apparently, the author of the majority opinion did not agree with the drafters of our State Constitution who believed sovereign immunity was necessary to protect the state coffers. Some reasonable men might even agree. Neither the existence of his opinion nor even its correctness, however, can erase the words from the page. That is the essence of constitutional government, government by law and not men. If judges are not mindful of that restraint, who will be?

I vigorously dissent, however, to any implication in the majority opinion that art. VI, § 35 does not protect the State from suit, and dissent even more vigorously to the further implication that this Court, sworn as we are to uphold the Constitution of the State of West Virginia, and bounded as we are by the limits of human rationality, would hold a State constitutional provision unconstitutional under the State Constitution.

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110 Id. at 689.
111 Id. (emphasis added).
112 See id. at 690–91 (Neely, J., concurring in part & dissenting in part); id. at 691–93 (Miller, J., concurring).
113 Id. at 691 (Neely, J., concurring in part & dissenting in part).
And Justice Miller—not known for the sharp tongue of his concurring colleague—also (accurately) noted that the court could not “nullify a constitutional command,” and that “no court” of which he was aware had “judicially abolished sovereign immunity set by its constitution.”

It was a stunning decision. The “notable takeaway” of Pittsburgh Elevator reflects a “purposivist” interpretation of the state constitution. Under that view, so long as the intent or purpose of sovereign immunity is served—as viewed by the court, the protection of the public fisc—its application of Section 35 is legitimate, notwithstanding the original meaning of the provision. Yet this mode of interpretation is contrary to that long prescribed by the Supreme Court of Appeals—original meaning interpretation—which best reflects the limited role of the judiciary in a constitutional structure that separates the lawmaking (and constitution-making) power from the judicial power. In short, the judicial power involves the power to say “what the law is” in a particular case—not what it should be—and the law is the original meaning of the state constitution, which is irrevocably fixed at the time of ratification. Instead of purporting to undertake that judicial task, Pittsburgh Elevator effectively engaged in a form of “updating” that purported to alter or even abolish the fixed meaning of Article VI, Section 35. This was a grave and flagrant violation of the separation of powers because it arrogated for itself the people’s right to amend the constitution.

B. The Aftermath.

Dicta or not, Syllabus Point 2 from Pittsburgh Elevator was soon reaffirmed and expanded upon by the Supreme Court of Appeals.

In the three decades that have followed Pittsburgh Elevator, pushback has been limited. Former Justice Benjamin, in two cases, filed concurring opinions in which he raised the issue of whether Syllabus Point 2 from Pittsburgh Elevator was correct in light of the plain text of Article VI, Section 35. In Blessing v. National Engineering & Contracting Co., a 2008 decision, the court unanimously reversed a trial court’s grant of summary judgment to the state department of transportation based on the lack of insurance coverage for the plaintiff’s alleged liability. The court instead found the existence of coverage to

114 Id. at 691 (Miller, J., concurring).
117 See supra Part I.A.
be a disputed question of fact. Although he joined the majority opinion, Justice Benjamin expressed his “serious reservations regarding the constitutionality of this Court’s prior decision in Pittsburgh Elevator . . . , with respect to the issue of sovereign immunity.”\footnote{Blessing v. Nat’l Eng’g & Contracting Co., 664 S.E.2d 152, 160 (W. Va. 2008) (Benjamin, J., concurring) (citation omitted).} He continued: “Although that issue was not presented by the parties to this action, if the appropriate case presents itself in the future, I believe this Court should revisit this issue to determine whether it is appropriate to judicially create an exception to sovereign immunity which the West Virginia Constitution explicitly prohibits.”\footnote{Id.} Then-Justice Starcher responded in a concurrence of his own, echoing much of the extrajudicial commentary from Pittsburgh Elevator and more,\footnote{Id.} yet not once citing to (much less quoting) the actual constitutional text found in Article IV, Section 35.\footnote{Id.}


> Judicially-created exceptions to clear and unambiguous mandates in the Constitution of West Virginia are neither appropriate nor legitimate. Although it may be tempting, perhaps even expedient, for this Court to nullify or amend constitutional provisions for reasons we deem important or necessary, we must resist this urge lest this Court exceed both its legitimate power and our role in constitutional governance. In this manner, we serve the greater good when we adhere to our constitutional mandate, not when we except ourselves from our constitutional obligations in order to serve partisan agendas or to satisfy some vague personal notion of cosmic justice. Such is a disrespect to the document from which we derive our power.\footnote{Id.}

Justice Benjamin was correct then and remains so now. However, in no subsequent case has the Supreme Court of Appeals (or any Justice) called for the reexamination of Pittsburgh Elevator’s central “holding,” which even Justice Benjamin acknowledged had not been “properly raised” in the cases that had
been before him. He thus did not “fault [his] colleagues for not addressing the issue.”  

Local federal courts have also tangled with *Pittsburgh Elevator* and its potential applicability to state sovereign immunity in federal court. A few rules bear mention. First, the special pleading rule required by the Supreme Court of Appeals whenever a plaintiff is suing a state agency or official for damages at or under the applicable insurance policy does not apply in federal court. Second, *Pittsburgh Elevator* and Chapter 29 of the State Code (which implements the insurance regime for state agencies and officials while precluding reliance on sovereign immunity) does not amount to a waiver of the State’s sovereign immunity in federal court. The “test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.” Waiver must be “stated by the most express language or by such overwhelming implications from the text” as to leave no doubt. Constructive consent will not overcome the presumption of sovereign immunity. In a recent decision, Chief Judge Thomas Johnston engaged in a lengthy analysis of these and ultimately (and correctly) concluded that the necessary showing of waiver was not found in State Code or caselaw.

To be clear, Article VI, Section 35—by its plain language and operation of the federal Supremacy Clause—can have no effect on a State’s ability to raise the defense of sovereign immunity in federal court or to restrict a judgment for damages to the limit provided by an insurance policy. Indeed, neither that provision nor *Pittsburgh Elevator* can provide any limitation, in federal court, on the extent of liability on a state agency or officer, at least for federal claims. Rather, they concern only claims against the State in state court.

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126 *Id.*
128 There are decisions going both ways. *See* Rex v. West Virginia Sch. of Osteopathic Med., 119 F. Supp. 3d 542, 554–55 (S.D.W. Va. 2015) (surveying cases; concluding that it does not apply in federal court). The cases holding in the negative have the better view.
131 *Id.* at 673–74.
132 *See* Wriston v. West Virginia Dep’t of Health & Hum. Res., No. 2:20-CV-00614, 2021 WL 4150709, at *311 (S.D.W. Va. Sept. 13, 2021). It is doubtful that a state high court could, by judicial decree, independently “waive” the State’s Eleventh Amendment immunity unless it was the result of the ordinary judicial process of construing “the relevant state statute.” *Lee-Thomas v. Prince George’s Cnty. Pub. Sch.*, 666 F.3d 244, 251 (4th Cir. 2012). Only then might the state judicial precedent control a federal court’s assessment of waiver. *See id.*
C. Reexamination, Stare Decisis, and Prospective Overruling.

This leads to the question of how such a reexamination could or should be undertaken. For example, because sovereign immunity in federal court may be waived, the defense is arguably considered a quasi-jurisdictional bar and treated “akin to an affirmative defense” on which the defendant bears the burden.

Unlike the sovereign immunity granted to states in federal court, however, Article VI, Section 35 is clear that the State’s sovereign immunity in state court may “never” be waived. In light of that, the mandate of the provision goes to the jurisdiction or power of the court in a particular case, much like the existence of a political question. And because courts are “duty-bound to examine the basis of subject matter jurisdiction sua sponte, even on appeal,” courts should similarly raise the sovereign immunity bar under Section 35 sua sponte whenever it is apparent from the record if a party has not done so.

If the continued viability of Pittsburgh Elevator (and its progeny) is raised and fully aired, considerations of stare decisis will be a critical part of the analysis. The basic principle, which the Supreme Court of Appeals has described as “judicial policy” rather than an inflexible rule of law, is that an appellate court “should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare

133 See, e.g., Pistor v. Garcia, 791 F.3d 1104, 1111 (9th Cir. 2015).
135 See E. Associated Coal Corp. v. Doe, 220 S.E.2d 672, 678 (W. Va. 1975) (observing that political question goes to the “determination of subject matter jurisdiction”). As the U.S. Supreme Court has explained, “the terms of [the sovereign’s] consent to be sued in any court define that court’s jurisdiction to entertain the suit.” United States v. Sherwood, 312 U.S. 584, 586 (1941). Consequently, there can be little question that “[s]overeign immunity is by nature jurisdictional.” Henderson v. United States, 517 U.S. 654, 675 (1996) (Thomas, J., dissenting); see also FDIC v. Meyer, 510 U.S. 471, 475 (1994); J.C. Driskill, Inc. v. Abdnor, 901 F.2d 383, 385 n.4 (4th Cir. 1990) (“Waiver of sovereign immunity is a jurisdictional prerequisite in the nature of, but not the same as, subject matter jurisdiction, in that unless sovereign immunity be waived, there may be no consideration of the subject matter.”).
136 Lane v. Halliburton, 529 F.3d 548, 565 (5th Cir. 2008) (quotation marks omitted) (holding that courts are required to examine the applicability of the political question doctrine sua sponte, even on appeal); accord In re Z.H., 859 S.E.2d 399, 407 (W. Va. 2021) (“Even if not raised by a party, if there is any question regarding a lack of subject matter jurisdiction . . . then the court should sua sponte address the issue as early in the proceeding as possible”).
137 If the issue is identified in a given case, the court should order additional briefing, including by seeking the views of the solicitor general, the State’s chief appellate advocate.
decisis, which is to promote certainty, stability, and uniformity in the law.” At the same time, a “principle of law should not be adhered to if the only reason therefor is that it has been sanctified by age,” because “it is better to be right than to be consistent with the errors of a hundred years.” An early, learned mind on the Supreme Court of Appeals, Justice Henry Brannon, described the doctrine similarly: “No legal principle is ever settled until it is settled right.” Moreover, stare decisis is at its weakest when applied to a constitutional decision, because the legislature lacks the power to change it if it disagrees with the court’s resolution.

Here, a court reexamining the viability of *Pittsburgh Elevator* is faced with both (1) a serious judicial error and (2) significant reliance interests.

In a new work, Professors John O. McGinnis and Michael Rappaport suggest one way that an originalist appellate court may confront such a situation. They argue that, when an originalist court is faced with entrenched non-originalist precedents, it should engage in “prospective overruling.” They define it as “the practice by which the court declines to invalidate an unconstitutional statute or action retrospectively, but announces it will do so when confronted with similar statutes and actions in the future.” Such an approach “has the advantage of making it easier to return to the correct interpretation of the law by reducing reliance of both individuals and governments.” Relevant here, the prospective overruling of Syllabus Point 2 of *Pittsburgh Elevator* (and its progeny) will provide notice to individuals and governments that the law will be changing (a restoration) in the future. With prospective overruling, individuals and governments “are more likely to be able to adapt to the new regime” and establish new law “that avoid the constitutional infirmities noted by the Court’s new analysis.”

This method addresses the reliance on longstanding precedent while placing the constitutional “on a glide path toward the recovery of original meaning.” Here, prospective overruling would theoretically communicate to the state agencies and officials that make up the executive branch and the

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141 Town of Weston v. Ralston, 36 S.E. 446, 450 (W. Va. 1900).
142 Jenkins v. City of Elkins, 738 S.E.2d 1, 7 (W. Va. 2012) (“Considerations of stare decisis have special force in the area of statutory interpretation, . . . unlike in the context of constitutional interpretation, the legislative power is implicated[.]”) (quotations omitted).
144 Id. at 3.
145 Id.
146 Id.
representatives in the legislative branch (as well as the bar and public) that Pittsburgh Elevator is soon to be departing, and that a constitutional amendment is necessary to preserve the purpose that animated the decision in the first place.

Alternatively, a simpler and, perhaps, preferable approach would be for the court to “freely overturn non-originalist precedents,” such as Pittsburgh Elevator, but to stay the effect of its ruling for a certain period (a year or more) to permit the amendment process to “run its course.”

III. CONSTITUTIONAL AMENDMENT PROPOSAL

The solution to the asserted injustices caused by Article VI, Section 35 has always been available. Article XIV of the state constitution specifically provides for an amendment process—one that has been regularly (and often successfully) invoked over many decades, including during the time of Pittsburgh Elevator and to the present day.

To be sure, amending the constitution is not easy; that is, of course, intentional. But any such objections on the subject of sovereign immunity ring hollow, because the process was successfully employed to amend the very provision just a few decades before Pittsburgh Elevator saw fit to judicially rewrite it. As noted, between 1872 and 1936, the sovereign immunity bar simply read that the State “shall never be made defendant in any court of law of equity.” However, in accordance with Article XIV, the legislature successfully proposed a constitutional amendment, which was placed on the ballot in the 1936 general election and approved by voters. The provision thereafter included a limited waiver of sovereign immunity, permitting the State and any “subdivision . . ., or municipality” to be “made a defendant in any garnishment or attachment proceeding.”

Other than lack of political will or interest in maintaining the rule of law, there is no reason why Section 35 could not again be amended to remedy the

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150 W.VA. CONST. art. VI, § 35.
151 Bouchelle, 192 S.E. at 170.
injustices perceived by *Pittsburgh Elevator* and others. But if there is a lack of political will, then perhaps the objections to the doctrine of sovereign immunity are not as widely shared as the doctrine’s detractors so loudly suggest.

Perhaps the best way to amend the provision is to restore its language to convey the meaning of the originally received, or common law, doctrine of sovereign immunity by permitting waiver by clear expression of the legislature, which is what the law provided in West Virginia prior to 1872 (and in Virginia before).\footnote{As previously explained, this was then the rule in Virginia, see *supra* Part I, and it has remained so. See *Eriksen v. Anderson*, 79 S.E.2d 597, 598–99 (Va. 1954); see also *Murphy v. Charlotte Cnty. Dep’t of Soc. Servs.*, 706 S.E.2d 546, 549 (Va. 2011).} The new provision could read, simply, “The state of West Virginia shall never be made a defendant in any court of law or equity absent the unambiguous consent of the legislature.”

Alternatively, drafters could construct a more detailed provision that imposes specific limits on the legislature’s ability to waive sovereign immunity, as Georgia did in 1990.\footnote{See *Ga. Const.* art. I, § 2, ¶ IX.} Another option, of course, is to repeal it altogether with straightforward language: “The doctrine of sovereign immunity is abolished.” Illinois has done similarly, except that it allows the legislature to reimpose sovereign immunity by affirmative act.\footnote{See *Ill. Const.* art. XIII, § 4 (“Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.”).}

The first option mentioned has several benefits and should be considered for proposal and ratification. For starters, it is faithful to the long-developed common law tradition of sovereign immunity as it existed prior to 1872 under both West Virginia and Virginia law. Other than by allowing the legislature to waive (and thus allowing the easy importing of the principles of waiver developed under similar law, such as Virginia’s), the provision is the same as what our courts have been interpreting since 1872. Thus, the case law that developed largely until the time of *Pittsburgh Elevator* would remain useful precedent for future application.

Second, the proposal has practical benefits. It gives the legislature maximum flexibility in determining whether and how the background rule of sovereign immunity can or should be imposed—indeed, if at all. Rather than enshrine some specific code of detailed rules in constitutional text, the simpler, more traditional formulation allows the legislature to change how it handles sovereign immunity as the needs of society change. The regular elections to which the legislature is subject will also ensure a high level of public accountability on the issue of waiver.

Third, it promises the least amount of disruption to the status quo. To the extent it is not already clear from the State Code, the legislature could simply declare its intent to waive sovereign immunity in its own courts for all damages claims against the State up to the coverage limit of the liability insurance policy
or policies applicable to the claims asserted.\textsuperscript{155} In some ways, with its focus on insurance coverage, \textit{Pittsburgh Elevator} paved the way for how the legislature may wish to consider waiving sovereign immunity under the constitutional amendment proposed here.

\textbf{IV. CONCLUSION}

Written constitutions were designed to be difficult to change, though not impossible.\textsuperscript{156} It is no answer, however, for judges to essentially rewrite a constitutional provision under the guise of interpretation because the text—in the view of the judge—is “archaic,”\textsuperscript{157} “specious,”\textsuperscript{158} or even “stupid.”\textsuperscript{159} Yet \textit{Pittsburgh Elevator} did precisely that. Though the court was largely candid about what it was doing, the decision earns no praise for honesty where it was in service of a fundamental violation of the separation of powers. Therefore, in a future case in which \textit{Pittsburgh Elevator}’s Syllabus Point 2 is squarely presented, the Supreme Court of Appeals should apply the text of Article VI, Section 35 as originally understood, repudiate \textit{Pittsburgh Elevator}, and delay the effect of its decision for a sufficient period to allow the amendment process to run its course.

\textsuperscript{155} There may be many provisions of the State Code that will no longer be necessary or require modification if such an amendment is ratified, but categorizing those is beyond the scope of this article.

\textsuperscript{156} See Debra Cassens Weiss, \textit{How Scalia and Ginsberg Would Amend the Constitution}, ABA J. (Apr. 21, 2014), https://www.abajournal.com/news/article/how_scalia_and_ginsburg_would_amend_the_constitution (“[J]ustice Scalia said fewer than 2 percent of the population could prevent enactment of a constitutional amendment. ‘It ought to be hard, but not that hard,’ he said.”).

\textsuperscript{157} Univ. of W. Va. Bd. of Trs. \textit{ex rel.} W. Va. Univ. v. Graf, 516 S.E.2d 741, 748 (W. Va. 1998) (Starcher, J., dissenting) (“[W]e have no right to use archaic constitutional language to undermine statutes[,]”).


\textsuperscript{159} \textit{Cf.} Brown v. Chicago Bd. of Educ., 824 F.3d 713, 714 (7th Cir. 2016) (“Justice Scalia once said that he wished all federal judges were given a stamp that read “stupid but constitutional.”) (citing Jennifer Senior, \textit{In Conversation: Antonin Scalia}, N.Y. MAG., Oct. 6, 2013).