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Sovereign Impunity: The Supreme Court of Georgia's False Textualism Expands the Doctrine of Sovereign Immunity in the State

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SOVEREIGN IMPUNITY: THE SUPREME COURT OF GEORGIA'S FALSE TEXTUALISM EXPANDS THE DOCTRINE OF SOVEREIGN IMMUNITY IN THE STATE

Laura R. Dove*

ABSTRACT

Until recently, sovereign immunity—the doctrine that protects state entities from suit without the State’s consent—had been held by the Supreme Court of Georgia not to apply to suits seeking solely injunctive relief to prevent the State, its departments, or agencies from acting illegally or outside the scope of their authority. This rule stemmed partly from the fact that a significant policy basis for sovereign immunity is the protection of taxpayer funds, but also was grounded on the principle that the State may not “cloak itself in the mantle of sovereign immunity” to prevent its citizens from holding the State accountable to its own laws. In a recent case, however, the Supreme Court of Georgia nullified this longstanding principle by overruling a previous decision recognizing and affirming it. The court’s decision to overrule the earlier case was based on a purportedly textualist analysis of a 1991 amendment to Georgia’s constitution reserving sovereign immunity to the State, its departments, and agencies, and granting the exclusive power to waive sovereign immunity to Georgia’s General Assembly. Textualism, an approach to statutory and constitutional interpretation, requires that courts interpret texts based on the ordinary meaning of the terms employed within their context. Georgia courts’ interpretation jurisprudence typically reflects textualist principles. Although the court examined the language in several portions of the constitution’s sovereign immunity provision, it neglected the meaning of the provision’s most significant phrase: “sovereign immunity” itself. The court failed to consider the constitutional language within its appropriate historical context, namely by refusing to examine the historical meaning of sovereign immunity as developed through decisions of the Georgia courts. This Article concludes that the court’s decision is unsupported by the textualist principles of constitutional interpretation that it espouses and by the Court’s own precedent on the interpretation of constitutional text.

* Assistant Professor of Law, Department of Human Resource Management and Business Law; Troy University. I first began to study the issues discussed in this Article as a clerk in Bibb County Superior Court in Macon, Georgia. I am grateful to the superior court judges of the Macon Judicial Circuit for the opportunity to serve as a clerk and for their advice and guidance. I would also like to thank the editors of the *William & Mary Bill of Rights Journal* for their feedback and assistance throughout the editing process.

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INTRODUCTION

“[T]he executive branch of government cannot cloak itself in the mantle of sovereign immunity when an injured party seeks to enjoin an illegal action. . . . [S]overeign immunity has *never* applied to bar this type of action seeking injunctive relief.”¹ Never, that is, until the Supreme Court of Georgia’s holding in *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.*² (*Sustainable Coast*), in which the court eviscerated the longstanding right of citizens to hold the State accountable to the very same laws it is entrusted to enact and enforce. In so holding, the court explicitly overruled its prior decision in *International Business Machines Corp. v. Evans*³ (*IBM*) and several cases following that decision, which recognized and confirmed that right.

This Article contends the court erred in ruling that sovereign immunity bars suits seeking injunctive relief against the State where it is alleged that the State is engaging in illegal or ultra vires acts. Although the court’s decision ostensibly relied on a textualist approach to interpreting the 1991 constitutional amendment, the court misapplied one of the fundamental principles of textualist interpretation. As an approach to constitutional and statutory interpretation, textualism seeks to determine the ordinary meaning of statutory or constitutional text at the time it was enacted. The court’s analysis of the 1991 amendment was flawed because it failed to consider the language of the amendment within its proper historical context, as required by established principles of interpretation in Georgia and by modern textualism generally. Specifically, the court improperly disregarded a long line of precedent that provided important evidence of the historical usage of the term “sovereign immunity” in Georgia law. As this Article demonstrates, such historical considerations are highly relevant under the Georgia courts’ textualist approach to constitutional interpretation.

Part I of this Article provides an overview of the doctrine of sovereign immunity under Georgia law before the Supreme Court’s decision in *Sustainable Coast*. First, Part I.A briefly explores the history of the doctrine’s treatment in Georgia’s current and previous constitutions. Parts I.B and I.C examine the *IBM* case and subsequent decisions relying on *IBM*. Part II begins with a summary of the background of *Sustainable Coast*, including the holding of the court of appeals in the case. Later, Part II discusses the decision of the Supreme Court of Georgia to review the case and explores the court’s analysis in its opinion. Part III begins with an overview of modern textualism

¹ *Int’l Bus. Machs. Corp. v. Evans*, 453 S.E.2d 706, 708–09 (Ga. 1995), *overruled by* Ga. Dep’t of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 755 S.E.2d 184 (Ga. 2014).

² 755 S.E.2d 184 (Ga. 2014).

³ 453 S.E.2d 706, 708–09 (Ga. 1995).

generally and then describes the emphasis on textualist interpretation in *Sustainable Coast* and other jurisprudence of the Supreme Court of Georgia. The remainder of Part III argues that the court's holding in *Sustainable Coast* is unsupported by textualist principles of interpretation. Specifically, the court improperly disregarded judicial and constitutional history, both of which provide necessary context with respect to the meaning of sovereign immunity in Georgia.

I. BACKGROUND

A. Sovereign Immunity in Georgia: Common Law Origins and Constitutional History

In a 1784 act, Georgia's General Assembly adopted the common law of England in force at the time of the American Revolution, except as modified by statute.⁴ The Supreme Court of Georgia has held that “[t]he doctrine of sovereign immunity was imbedded in the common law of England at the time of the American Revolution.”⁵ The court construed the doctrine to bar suits against “governments at all levels” without its consent.⁶

The common law status of the doctrine continued until 1974, when altered by amendment to the 1945 constitution (1974 amendment).⁷ This provision was subsequently incorporated into the 1976 State Constitution, preserving the doctrine's new constitutional status.⁸ It authorized the General Assembly to create a State Court of

⁴ *Crowder v. Dep't of State Parks*, 185 S.E.2d 908, 911 (Ga. 1971).

⁵ *Id.*; see also *Gilbert v. Richardson*, 452 S.E.2d 476, 478 (Ga. 1994) (noting that Georgia adopted “the common law doctrine of sovereign immunity” in 1784). In *Gilbert*, the court referenced Blackstone's famous refrain on the origins of sovereign immunity in the maxim that “the king can do no wrong.” *Id.* at 480–81; see also Brian A. Snow & William E. Thro, *The Significance of Blackstone's Understanding of Sovereign Immunity for America's Public Institutions of Higher Education*, 28 J.C. & U.L. 97, 104–07 (2001). Snow and Thro note that although Blackstone's influence on the understanding of sovereign immunity in the United States has been highly influential, many scholars have questioned whether his understanding comported with actual English practice at the common law. *Id.* at 98 n.4, 104–07.

⁶ *Gilbert*, 452 S.E.2d at 478; see also *Crowder*, 185 S.E.2d 908, 910 (citing cases). In *Gilbert*, the court cited, inter alia, Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924), “[f]or an in-depth analysis of the origins of the doctrine of governmental (sovereign) immunity . . .” 452 S.E.2d at 478 n.1. For further background on the history of the doctrine of sovereign immunity, see generally Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

⁷ GA. CONST. art. VI, § 5, para. 1 (1976); 1973 Ga. Laws 1489; see also *Gilbert*, 452 S.E.2d at 478 n.2.

⁸ GA. CONST. art. VI, § 5, para. 1 (1976); see also *Sheley v. Bd. of Pub. Educ. for Savannah*, 212 S.E.2d 627, 628 (Ga. 1975) (holding that the 1974 amendment granted sovereign immunity “constitutional status”). This notion of the doctrine's gaining “constitutional status” significantly impacted the court's analysis in *Sustainable Coast*, as discussed in further detail below.

Claims and to establish its jurisdiction over certain types of claims against the State.⁹ Otherwise, the provision concluded:

Nothing contained herein shall constitute a waiver of the immunity of the State from suit, but such sovereign immunity is expressly reserved except to the extent of any waiver of immunity provided in this Constitution and such waiver or qualification of immunity as is now or may hereafter be provided by act of the General Assembly.¹⁰

Although the 1974 amendment authorized the General Assembly to waive the State's sovereign immunity, the General Assembly did not exercise this power until the 1983 revisions to the State's Constitution.¹¹ At that time, voters approved an "insurance waiver," whereby the State and its departments and agencies were found to waive their sovereign immunity if they had purchased and were covered by liability insurance.¹²

Then, in 1990, voters approved an "extremely significant constitutional amendment" proposed by the General Assembly, which "effected no less than a complete repeal of, and replacement for, the 1983 constitution's [sovereign immunity provision]."¹³ This amendment (1991 amendment), found in article I, section 2, paragraph IX of the 1983 Constitution (Paragraph IX), has remained unmodified and is the present constitutional treatment of sovereign immunity in the State.¹⁴ Paragraph IX(a) authorizes the General Assembly to enact a State Tort Claims Act in order to "waive the state's sovereign immunity from suit . . ."¹⁵ Paragraph IX(d) details when "officers and employees of the state or its departments and agencies may be subject to suit . . ."¹⁶ Most significantly for the purposes of this Article, Paragraph IX(e) provides:

Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly

⁹ GA. CONST. art. VI, § 5, para. 1 (1976).

¹⁰ *Id.*

¹¹ *Gilbert*, 452 S.E.2d at 478 n.2.

¹² *Id.*; S. Res. 340, 1982 Gen. Assemb. (Ga. 1982).

¹³ R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405, 411 (1993).

¹⁴ *See* GA. CONST. art. 1, § 2, para. IX.

¹⁵ *Id.* para. IX(a).

¹⁶ *Id.* para. IX(d). The Supreme Court of Georgia has concluded that this section provides qualified immunity (or "official immunity") and applies to suits against such officials in their personal or individual capacity. *See infra* note 44 and accompanying text.

which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.¹⁷

Shortly after the 1991 amendment took effect, the Supreme Court of Georgia was asked in *Donaldson v. Department of Transportation*¹⁸ to consider the validity of the voter approval of the Amendment, and to determine whether or not the amendment applied retroactively.¹⁹ In the course of analyzing those issues, the Court readily concluded that the 1991 amendment “extend[ed] sovereign immunity to all state departments and agencies, regardless of any insurance.”²⁰

B. International Business Machines Corp. v. Evans Recognizes a Long Line of Precedent in Georgia Holding that Sovereign Immunity Does Not Apply to Suits Seeking to Enjoin Illegal or Ultra Vires Acts

Throughout the changes to the doctrine of sovereign immunity described above, Georgia courts consistently held that sovereign immunity was no bar to suits in which plaintiffs sought injunctive relief to curtail the alleged illegal or ultra vires acts of government entities.²¹ To be sure, the *rationales* for such holdings have not necessarily been so consistent, although given the significant changes described above, perhaps that is to be expected. Nevertheless, the fundamental principle—that sovereign immunity may not be used as a shield to enable government’s illegal or ultra vires acts—prevailed through all of the doctrinal changes. In sum, citizens’ right to hold the government accountable for violating the law and to ensure that government power is confined to its proper scope has been a firm and longstanding element of Georgia jurisprudence.

In *IBM*, the Supreme Court of Georgia recognized and clarified this established precept in Georgia law. The case involved a suit filed by IBM against the Georgia Department of Administrative Services (DOAS) and its commissioner, David Evans,

¹⁷ GA. CONST. art. 1, § 2, para. IX(e).

¹⁸ 414 S.E.2d 638 (Ga. 1992).

¹⁹ *Id.* at 639, 641. In *Donaldson*, the plaintiff filed suit against the Department of Transportation before the 1991 amendment took effect. *Id.* at 642. The DOT argued that waiver is a matter of legislative grace and could be revoked by the General Assembly at any time. *Id.* at 641. Thus, the plaintiff could not rely on the previously authorized waiver by means of insurance coverage, as that method of waiver was no longer authorized under the 1991 amendment. *See id.* The court rejected the argument that a waiver of sovereign immunity may be withdrawn with respect to plaintiffs who have relied on the waiver and whose cases are pending. *Id.* Thus, the 1991 amendment applied only prospectively. *Id.* at 641–42.

²⁰ *Id.* at 639.

²¹ *See, e.g.*, *Int’l Bus. Machs. Corp. v. Evans*, 453 S.E.2d 706 (Ga. 1995); *Chilivis v. Nat’l Distrib. Co.*, 238 S.E.2d 431 (Ga. 1977); *Irwin v. Crawford*, 78 S.E.2d 609 (Ga. 1953).

in his official capacity.²² The case arose out of a Request for Proposal that DOAS issued soliciting bids for the installation of a mainframe computer.²³ IBM and other companies submitted proposals seeking the award of the contract.²⁴ IBM alleged DOAS had wrongfully awarded the bid to another company, Hitachi, arguing that based on DOAS' own rules for awarding bids, the bid should have been given to IBM.²⁵ IBM sought to enjoin DOAS from awarding the bid to Hitachi.²⁶ DOAS and the commissioner argued that IBM's suit was barred by the doctrine of sovereign immunity.²⁷

1. The Majority Holds That the Sovereign Immunity Provision of Georgia's Constitution Does Not Apply to Certain Suits Seeking Solely Injunctive Relief, Recognizing a Longstanding "Exception" to the Doctrine of Sovereign Immunity

After a brief summary of the facts of the case, Justice Fletcher, writing for the majority of the court, proclaimed, "DOAS and the commissioner both contend that sovereign immunity protects them from injunctive relief. We disagree. This court has long recognized an exception to sovereign immunity where a party seeks injunctive relief against the state or a public official acting outside the scope of lawful authority."²⁸

The court went on to explain that earlier cases employed two different mechanisms "[t]o avoid the harsh results sovereign immunity would impose"²⁹ In some cases, the court employed "the legal fiction" that the suits were being brought against state *officials* acting wrongfully, and not against the state itself "even though the purpose of the suit[s] was] to control state action through state employees."³⁰ The other method entailed examining the allegedly wrongful act and finding that sovereign

²² *IBM*, 453 S.E.2d at 707, *overruled by* Ga. Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 755 S.E.2d 184 (Ga. 2014).

²³ *Id.*

²⁴ *Id.* at 708.

²⁵ *Id.* The Request for Proposal specified that a points system would be used to evaluate each proposal. *Id.* Although Hitachi's proposal earned higher points than IBM's, IBM claimed that the officer who issued the Request told IBM that it would be awarded a certain number of points for its proposal. *Id.* IBM contended that had it been awarded the number of points promised, its bid would have had the highest score. *Id.*

²⁶ *Id.* at 707. Alternatively, IBM sought to require DOAS to re-bid the contract. *Id.*

²⁷ *Id.* at 708.

²⁸ *Id.* (citing *Chilivis v. Nat'l Distrib. Co.*, 654, 238 S.E.2d 431 (Ga. 1977); *Irwin v. Crawford*, 78 S.E.2d 609 (Ga. 1953)).

²⁹ *Id.*

³⁰ *Id.* (citing *Undercofler v. Seaboard Air Line R.R. Co.*, 152 S.E.2d 878 (Ga. 1966)). The court explained that *Undercofler* held that a "suit seeking to enjoin assessment of property taxes was not [a] suit against the state because [the] complaint alleged [the] tax commissioner was acting contrary to state and federal constitutions." *Id.*

immunity barred the suit if the act was legal, but was no bar if the act was illegal.³¹ With regard to these mechanisms, however, the court concluded:

The underlying, though often unstated, premise in these cases is that the executive branch of government cannot cloak itself in the mantle of sovereign immunity when an injured party seeks to enjoin an illegal action. However, the use of such legal fictions and circular reasoning has contributed greatly to the confusion that exists regarding the proper application of sovereign immunity. Recognizing a suit for injunctive relief to restrain an illegal act as an exception to sovereign immunity will permit a more logical analysis.³²

Next, the court turned to an analysis of the changes to the sovereign immunity provision of the State's Constitution effected by the 1991 amendment.³³ The court concluded that the amendment did not "negate this long-standing principle of law," but merely altered the manner in which the state waived its sovereign immunity by no longer permitting waiver through the purchase of liability insurance.³⁴ "The 1991 Amendment [was] not implicated in this case because sovereign immunity has *never* applied to bar this type of action seeking injunctive relief."³⁵ The court noted that *Curtis v. Board of Regents*,³⁶ decided in 1992, held that the "intent of [the] 1991 amendment [was] to 'redraw and redefine the terms of the state's waiver of sovereign immunity.'"³⁷ Based on the foregoing analysis, the court ruled that sovereign immunity did not bar IBM's complaint.³⁸

2. Concurrence: The Purpose of Sovereign Immunity Is to Protect the Public Purse

Justice Hunt concurred in the judgment and wrote "to say that simple common sense tells us that the doctrine of sovereign immunity should not be applied in this case."³⁹ Justice Hunt argued "[t]he primary purpose of the doctrine of sovereign immunity is the protection of the public purse," as is the requirement that DOAS use

³¹ *Id.* (citing *Evans v. Just Open Gov't*, 251 S.E.2d 546 (Ga. 1979); *Cannon v. Montgomery*, 192 S.E. 206 (Ga. 1937)).

³² *Id.* (footnote omitted).

³³ *Id.*

³⁴ *Id.* at 708–09.

³⁵ *Id.* at 709.

³⁶ 416 S.E.2d 510 (Ga. 1992).

³⁷ *IBM*, 453 S.E.2d at 709 (quoting *Curtis v. Bd. of Regents*, 416 S.E.2d 510, 512 (Ga. 1992)).

³⁸ *Id.*

³⁹ *Id.* (Hunt, J., concurring).

a competitive bidding process to award its contracts.⁴⁰ Therefore, the fundamental purpose of sovereign immunity would be thwarted if the doctrine applied to a suit seeking injunctive relief in an instance such as *IBM*.⁴¹

3. Dissenting Justices Reject the Majority's Conclusion That the Constitutional Amendment Does Not Apply

Justice Benham, joined by Justice Hunstein, concurred in part of the judgment and dissented in part. He argued that the majority erred by applying the same analysis of the applicability of sovereign immunity to DOAS and its commissioner.⁴² Additionally, he disputed the majority's conclusion that the 1991 amendment did not apply to the case at bar.⁴³ Further, although he believed that DOAS was protected by sovereign immunity under Paragraph IX(e), he argued that the suit against the commissioner should be analyzed under Paragraph IX(d) of the State Constitution.⁴⁴

The dissenting justices would have held that the 1991 Amendment did more than merely change the means by which sovereign immunity could be waived; rather, Paragraph IX(e)'s "sweeping" language would give the state, its departments, and agencies immunity "unless it has been waived by the other subparagraphs of the constitutional provision or by an act of the General Assembly."⁴⁵ Therefore, under this "clear language . . . DOAS is entitled to dismissal of the action against it on the grounds that sovereign immunity bars such a claim against a department of the state."⁴⁶

As for the commissioner, the dissenting justices argued that case law did support the proposition that sovereign immunity did not apply to certain suits for injunctive

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 710 (Benham, J., dissenting in part).

⁴³ *Id.*

⁴⁴ *Id.* The majority addressed this contention in a footnote and argued that Paragraph IX(d) was not at issue in this case because it dealt only with official immunity, not sovereign immunity. *Id.* at 708 n.2 (majority opinion). Official immunity applies when a litigant seeks to hold a state official *personally* liable, rather than seeking to control the performance of an official's official duties. *Id.*; see also *Cameron v. Lang*, 549 S.E.2d 341, 344 (Ga. 2001) ("The doctrine of official immunity, also known as qualified immunity, offers public officers and employees limited protection from suit in their personal capacity."). The plaintiff in *IBM* filed suit against the Commissioner in his *official* capacity. *IBM*, 453 S.E.2d at 707. A recent decision of the Supreme Court of Georgia has confirmed that official immunity protects government officials from personal liability: "While sovereign immunity protects from tort liability the State itself, including its agencies and instrumentalities, official immunity protects state employees from being sued in their *personal* capacities." *Shekhawat v. Jones*, 746 S.E.2d 89, 91 (Ga. 2013). The decision cited Paragraph IX(d) (along with the Georgia Tort Claims Act) in support of the proposition that where official immunity applies, any liability based on the official's conduct must rest with the state government. *Id.*

⁴⁵ *IBM*, 453 S.E.2d at 710 (Benham, J., dissenting in part).

⁴⁶ *Id.*

relief, but that those suits included only those against *officers* of the state acting outside their lawful authority.⁴⁷ Justice Benham argued that these suits are “not against the state, but against an official stripped of his official character,”⁴⁸ evidently embracing the “legal fiction” rejected by the majority. Thus, he concluded:

I would maintain the separation between department and personnel that our case law has developed and hold that *the commissioner* does not enjoy sovereign immunity from a suit seeking injunctive relief *if* it is established that the commissioner acted without lawful authority and beyond the scope of his official power.⁴⁹

C. Subsequent Cases Rely on IBM to Permit Suits Seeking Injunctive Relief Against State Entities

In overruling *IBM* in *Sustainable Coast*, the Supreme Court of Georgia indicated that it had uncovered four published opinions (in addition to the court of appeals’ opinion under review) relying on *IBM* to permit suits seeking injunctive relief against the state to proceed.⁵⁰ One, *In re A.V.B.*,⁵¹ considered an action filed by the Georgia Advocacy Office seeking to have a minor child removed from the custody of the Dougherty County Department of Family and Children Services on the grounds that the Department had acted illegally in its care of the child.⁵² The court followed its earlier ruling in *IBM* and held that “[s]overeign immunity does not protect the state when it acts illegally and a party seeks only injunctive relief.”⁵³ Citing Justice Hunt’s concurring opinion in *IBM*, the court emphasized that the doctrine of sovereign immunity is meant to protect the public purse by shielding the state from suits seeking damages.⁵⁴ That same year, in *Glynn County v. Waters*,⁵⁵ the Supreme Court of Georgia cited *IBM* in its perfunctory conclusion that the county could not rely on sovereign immunity as a defense to Waters’ claim for equitable relief.⁵⁶

⁴⁷ *Id.* at 711.

⁴⁸ *Id.*

⁴⁹ *Id.* Justice Benham would have remanded the suit to the trial court for further finding of fact on whether the commissioner acted outside his lawful authority. *Id.* If so, the trial court would then be required to turn to Paragraph IX(d) of the Georgia Constitution to determine whether that provision would permit the suit to proceed. *Id.*

⁵⁰ *Sustainable Coast*, 755 S.E.2d 184, 191 (Ga. 2014).

⁵¹ 482 S.E.2d 275 (Ga. 1997).

⁵² *Id.* at 276.

⁵³ *Id.* (footnote omitted).

⁵⁴ *Id.*

⁵⁵ 491 S.E.2d 370 (Ga. 1997).

⁵⁶ *Id.* at 373 (providing no further analysis).

The other published opinions relying on *IBM* include a ruling of the court of appeals in *Premo v. Georgia Ports Authority*⁵⁷ and a federal district court's ruling in *BFI Waste Systems of North America v. DeKalb County*.⁵⁸ Additionally, a federal district court relied on *IBM* in an unpublished order in *Douglas v. DeKalb County*.⁵⁹ Finally, in *Southern LNG, Inc. v. MacGinnitie*,⁶⁰ the Court cited *IBM*, although in dicta.⁶¹ In that case, Southern LNG filed an action for declaratory judgment recognizing it as a "public utility" under Georgia statute.⁶² Additionally, it sought a writ of mandamus ordering the Georgia Revenue Commissioner to assess its taxes as a public utility.⁶³ The trial court dismissed the action on the ground of sovereign immunity.⁶⁴ On appeal, the Supreme Court of Georgia determined that it need not consider the issue of whether sovereign immunity barred the claim for declaratory relief, but noted that "[t]his is not to say that declaratory actions against the State are necessarily barred by sovereign immunity."⁶⁵

The following section discusses the issues involved in *Sustainable Coast* and presents the court of appeals' holding in the case: perhaps the most recent—and at this point final—decision of a Georgia court relying on *IBM*. The remainder of Part II details the somewhat unusual circumstances underlying the Supreme Court's decision to review the case and the ultimate holding of the court.

II. *CENTER FOR A SUSTAINABLE COAST, INC. V. GEORGIA DEPARTMENT OF NATURAL RESOURCES* PRESENTS AN OPPORTUNITY FOR *IBM*'S DISSENTING JUSTICES TO REVISIT THE DOCTRINE OF SOVEREIGN IMMUNITY

A. Background: The Superior Court Dismisses the Center's Claim for Injunctive Relief on Sovereign Immunity Grounds

In *Sustainable Coast*, the Center for a Sustainable Coast, Inc. and David and Melinda Egan (collectively the Center) sought a declaratory judgment and injunctive relief against the Georgia Department of Natural Resources and other defendants (collectively DNR) in the Superior Court of Glynn County on the ground that DNR was

⁵⁷ 488 S.E.2d 106 (Ga. Ct. App. 1997) (permitting a former employee of the Georgia Ports Authority (GPA) to proceed with his suit for injunctive relief against the GPA after he was fired and then banned from premises managed by the GPA).

⁵⁸ 303 F. Supp. 2d 1335 (N.D. Ga. 2004).

⁵⁹ No. 1:06-CV-0584-TWT, 2007 WL 647291 (N.D. Ga. Feb. 26, 2007).

⁶⁰ 719 S.E.2d 473 (Ga. 2011).

⁶¹ *Id.* at 473 n.1.

⁶² *Id.* at 473.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (citing *IBM v. Ga. Dep't of Admin. Servs.*, 453 S.E.2d 706 (Ga. 1995)). Interestingly, Justice Benham—a dissenting justice in *IBM*—filed a dissenting opinion in *Southern LNG* arguing that the trial court was correct in determining that the declaratory action was barred by sovereign immunity. *Id.* at 474 (Benham, J., dissenting).

issuing letters of permission (LOPs) for activities that require formal permits pursuant to Georgia's Shore Protection Act (SPA).⁶⁶ The SPA regulates the use of Georgia's beaches, dunes, and other coastal features, recognizing the importance of these natural resources to the State's economy.⁶⁷ Under the SPA, anyone wishing to engage in construction activities or other alterations of areas within the scope of the SPA is required to obtain a permit from the Shore Protection Committee.⁶⁸ The Center argued that the Coastal Resources Division of the DNR was issuing LOPs without the involvement of the Shore Protection Committee.⁶⁹ Essentially, the LOPs were granted to advise people or organizations whether a set of proposed activities would fall within the parameters of the SPA and thus require a permit.⁷⁰ The Center argued that DNR was without authority to issue the LOPs, and thus was acting illegally and *ultra vires*.⁷¹

DNR moved to dismiss the Center's petition on the grounds that: (1) there was no justiciable controversy, precluding the claim for declaratory judgment; and, (2) because all of the Center's additional claims were based on the declaratory judgment claim, they must be dismissed, as well.⁷² Additionally, because the Center filed its claim for injunctive relief based on a provision of the SPA, and that provision did not contain a waiver of the State's sovereign immunity, the action was also barred on that ground.⁷³ The superior court agreed and dismissed the action, and the Center appealed.⁷⁴

B. The Court of Appeals Reverses, Relying on IBM to Permit the Center's Claim to Proceed

On appeal, the court of appeals disagreed with the trial court's conclusion that the Center's claim for injunctive relief must be dismissed on the basis of sovereign immunity: "Pretermitted whether [the SPA] permits a claim for injunctive relief, the Center is able to bring such a claim without running afoul of sovereign immunity."⁷⁵ Even if the Center's claim could not be brought under statutory authority, it could still pursue a common law claim for injunctive relief. Because the Center clearly alleged that DNR was engaging in *ultra vires* conduct, its suit was entitled to proceed per the holding in *IBM*.⁷⁶ The court cited *IBM* for the proposition that Georgia courts "have 'long

⁶⁶ *Sustainable Coast*, 755 S.E.2d 184, 186 (Ga. 2014).

⁶⁷ See GA. CODE ANN. §§ 12-5-230 to 12-5-248 (2014).

⁶⁸ *Id.* at § 12-5-235.

⁶⁹ Appellees' Brief at 4, Ga. Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 755 S.E.2d 184 (Ga. 2014) (No. S13G0602).

⁷⁰ See *Sustainable Coast*, 755 S.E.2d. at 187.

⁷¹ *Id.* at 186–87.

⁷² *Id.* at 186.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Ctr. for a Sustainable Coast, Inc. v. Ga. Dep't of Natural Res., 734 S.E.2d 206, 209 (Ga. Ct. App. 2012), *rev'd*, 755 S.E.2d 184 (Ga. 2014).

⁷⁶ *Id.*

recognized an exception to sovereign immunity where a party seeks injunctive relief against the state or a public official acting outside the scope of lawful authority.”⁷⁷

C. The Supreme Court of Georgia Grants Certiorari to Address a Question Not Raised by Either Party: Whether IBM Should Be Overruled

DNR appealed the court of appeals’ ruling. Interestingly, the crux of DNR’s Petition for Certiorari centered on the argument that the court of appeals erred in holding that the Center had stated a common law claim for injunctive relief, whereas the Center’s petition allegedly sought injunctive relief solely under the SPA.⁷⁸ DNR did not contest the court of appeals’ reliance on *IBM* and its progeny, acknowledging that those cases reflected a “well-established exception that claims for common law injunctive relief against the State are not barred by sovereign immunity where the state acts outside the scope of its authority (i.e., ultra vires)”⁷⁹ Nevertheless, when the Supreme Court granted certiorari, it instructed the parties to address the following issue:

1. Did the Court of Appeals err in Division 2 of its opinion when it held that the doctrine of sovereign immunity is no bar to injunctive relief at common law against the Petitioners, notwithstanding that the Petitioners are a department of this State, a division of that department, and an officer of that department sued only in his official capacity? *Compare IBM v. Evans*, 265 Ga. 215, 216 (1)(453 S.E.2d 706)(1995), *with id.* at 218 (Benham, P.J., concurring in part and dissenting in part).⁸⁰

D. The Supreme Court Overrules IBM Based on the “Plain Language” of the Georgia Constitution

In the introductory paragraph of its opinion, the Court succinctly answered the first question it posed in its writ of certiorari: “[W]e find that sovereign immunity bars injunctive relief against the State at common law, and therefore, we overrule *Intl. Bus. Machines Corp. v. Evans*”⁸¹

⁷⁷ *Id.* (quoting *Int’l Bus. Machs. Corp. v. Evans*, 453 S.E.2d 706 (Ga. 1995)).

⁷⁸ Petition for Writ of Certiorari at 3, *Ga. Dep’t of Natural Res. v. Ctr. for a Sustainable Coast, Inc.*, 755 S.E.2d 184 (Ga. 2014).

⁷⁹ *Id.* at 5.

⁸⁰ Order Granting Writ of Certiorari at 1, *Sustainable Coast*, 755 S.E.2d 184 (Ga. 2014). Notably, Justice Benham and Justice Huntstein, the dissenting judges in *IBM*, continue to serve on the Supreme Court of Georgia, while Justices Fletcher and Hunt, who authored the majority and concurring opinions in *IBM*, were no longer on the bench at the time cert was granted. See *Supreme Court Brochure, Appendix*, SUPREME COURT OF GEORGIA, <http://www.gasupreme.us/history/> (last visited May 1, 2015).

⁸¹ *Sustainable Coast*, 755 S.E.2d 184, 185–86 (Ga. 2014).

The court listed four grounds for its decision to overrule *IBM*.⁸² The first and second are related and address the impact of the 1991 amendment to Georgia's constitution.⁸³ The court argued that the 1991 amendment granted the General Assembly the exclusive authority to waive sovereign immunity.⁸⁴ Further, the constitution does not provide an exception to this exclusive authority.⁸⁵ The court's third rationale criticized the *IBM* court's characterization of the case *City of Thomasville v. Shank*⁸⁶ as recognizing an exception to the doctrine of sovereign immunity.⁸⁷ The nature of the holding in *Shank* is not essential to the thesis of this Article, so it will not be examined further. The court's fourth rationale, however, is central to this Article's contention that the court's analysis ran afoul of its purportedly textualist grounds. The final basis for overruling *IBM* was the court's argument that *IBM* wrongly relied on cases predating the 1974 amendment.⁸⁸ This contention represents the crux of *Sustainable Coast*'s error: its failure to consider this critical evidence of the historical meaning of sovereign immunity in Georgia.

The court's opinion began by tracing the history of sovereign immunity in the State, noting that once the common law doctrine obtained constitutional status in 1974, the court had held that courts could no longer abrogate or modify the doctrine.⁸⁹ The 1974 amendment constitutionalizing sovereign immunity provided that sovereign immunity was "expressly reserved" and pronounced that only the Constitution or the General Assembly could waive it.⁹⁰ The Constitution of 1983 altered the status of sovereign immunity in Georgia by permitting the State to waive sovereign immunity

⁸² *Id.* at 188.

⁸³ *Id.* at 188–90.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 437 S.E.2d 306 (Ga. 1993).

⁸⁷ *Sustainable Coast*, 755 S.E.2d at 185–86 (citing *Shank*, 437 S.E.2d 306 (Ga. 1993)). *Shank* explained that a "nuisance exception" to the doctrine of sovereign immunity allowed citizens to hold municipalities liable for creating or maintaining dangerous nuisances or those that amount to a taking of property. *Id.* at 190 (quoting *Shank*, 437 S.E.2d at 306–07). *IBM* argued that *Shank*'s application of this longstanding exception *after* the passage of the 1991 Amendment demonstrated that the Amendment did not abrogate previously recognized exceptions to the doctrine of sovereign immunity. *Int'l Bus. Machs. Corp. v. Evans*, 453 S.E.2d 706, 709 (1995) (citing *Shank*, 437 S.E.2d 306). In *Sustainable Coast*, the court held that *Shank*'s reference to a nuisance "exception" was essentially a misnomer; thus, the *IBM* court "misconstrued" *Shank*'s holding. *Sustainable Coast*, 755 S.E.2d at 188–90. In actuality, the court contended, *Shank* dealt with a proper *waiver* of sovereign immunity as provided by the eminent domain provision of the Georgia Constitution requiring the government to compensate property owners for takings. *Id.* The court cited several cases holding that the constitution waives sovereign immunity in inverse condemnation actions in support of its contention that the holding in *Shank* truly rested on a legitimate waiver. *Id.* (citing *Columbia Cnty. v. Doolittle*, 512 S.E.2d 236 (Ga. 1999); *Rutherford v. Dekalb Cnty.*, 631 S.E.2d 771 (Ga. 2007)).

⁸⁸ *Sustainable Coast*, 755 S.E.2d at 190–91.

⁸⁹ *Id.* at 188–89 (citing *Sheley v. Bd. of Pub. Educ. for Savannah*, 212 S.E.2d 627 (1975)).

⁹⁰ *Id.* (citing *Sentell*, *supra* note 13, at 407).

through the purchase of liability insurance coverage for damages claims.⁹¹ Thus, certain acts of State departments and agencies *themselves* could constitute waivers of sovereign immunity; exclusive waiver authority no longer rested with the General Assembly.⁹²

In examining the 1991 amendment, the court repeatedly emphasized the “plain and unambiguous text” of the amendment,⁹³ noting the rule of constitutional interpretation requiring that “the ordinary signification shall be applied to words”⁹⁴:

[T]his Court must honor the plain and unambiguous meaning of a constitutional provision. Our duty is to construe and apply the Constitution as it is now written. Where the natural and reasonable meaning of a constitutional provision is clear and capable of a natural and reasonable construction, courts are not authorized either to read into or read out that which would add to or change its meaning.⁹⁵

The court concluded that these textualist rules of interpretation⁹⁶ revealed that the 1991 Amendment was designed to return exclusive waiver power to the General Assembly.⁹⁷ Thus, the court rejected its holding in *IBM* that the 1991 amendment merely changed the permissible means by which the State could waive its sovereign immunity by eliminating the insurance waiver under the 1983 amendment.⁹⁸ Rather—again emphasizing the “plain language” of paragraph IX—the 1991 amendment “explicitly bars suits against the State or its officers and employees sued in their official capacities, until and unless sovereign immunity has been waived by the General Assembly.”⁹⁹ Moreover—this time referencing the “straightforward text”—the court found that the 1991 amendment does not permit judicially created exceptions such as that of *IBM*.¹⁰⁰ “[B]ecause the amendment is ‘clear and capable of a natural and reasonable construction,’ we may not read an exception into the text or interpret the text to provide for an exception where none is present.”¹⁰¹ Thus, the court essentially rejected *IBM*’s characterization of its own holding as “recognizing” an *existing* exception to the

⁹¹ *Id.* at 189. The Supreme Court of Georgia later interpreted the 1983 constitution to permit waiver via this method by counties, school districts, and municipalities. *Id.* (citing Sentell, *supra* note 13, at 407–08).

⁹² *Id.* (citing Sentell, *supra* note 13, at 408–10).

⁹³ *Sustainable Coast*, 755 S.E.2d at 189.

⁹⁴ *Id.* (quoting Blum v. Schrader, 637 S.E.2d 396 (Ga. 2006)).

⁹⁵ *Id.* (alteration in original) (quoting Blum, 637 S.E.2d at 397–98).

⁹⁶ The contention that the Court’s analysis rested on textualist grounds is addressed in further detail in Part III.A, *infra*.

⁹⁷ *Sustainable Coast*, 755 S.E.2d at 188–89.

⁹⁸ *See id.* at 190.

⁹⁹ *Id.* (footnote omitted).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (quoting Blum v. Schrader, 637 S.E.2d 396, 398 (Ga. 2006)).

doctrine of sovereign immunity. Rather, the *Sustainable Coast* court argued that *IBM* wrongly *created* an exception where none are constitutionally permitted.

The court's final ground for overruling *IBM* was that *IBM* wrongly relied on precedent predating the 1974 constitution.¹⁰² The court cited Justice Benham's dissenting opinion in *Southern LNG, Inc. v. MacGinnitie*¹⁰³ in which he argued that the 1974 Amendment created "an entirely new ball game" regarding sovereign immunity;¹⁰⁴ thus, prior cases "are not applicable to claims against the State arising after the 1974 amendment . . ."¹⁰⁵ Though *IBM* relied on two cases decided *after* the 1974 amendment, the court dismissed those cases on the ground that they did not analyze the 1974 amendment's text and effect.¹⁰⁶ This line of reasoning further bolstered the court's finding that *IBM* could not have properly "recognized" an exception to sovereign immunity; even if an exception existed at one point, it did not survive the passage of the 1974 amendment. As discussed in Part III, however, that contention is erroneous.

After dispensing with *stare decisis*, the court proceeded to its conclusion overruling *IBM* and reversing the decision of the Georgia Court of Appeals.¹⁰⁷

III. THE SUPREME COURT'S HOLDING IN *SUSTAINABLE COAST* IS UNSUPPORTED BY ITS PURPORTEDLY TEXTUALIST GROUNDS

As outlined above in Part II.D, the holding in *Sustainable Coast* relied heavily on the finding of the Supreme Court of Georgia that the text of paragraph IX is plain and unambiguous. The court's analysis repeatedly invoked textualist principles of constitutional interpretation. Below, Part III.A.1 presents an overview of textualism as an approach to constitutional and statutory construction. Part III.A.2 describes how the Supreme Court of Georgia has embraced many of the tenets of textualism in *Sustainable Coast* and in other cases. Part III.B, however, argues that the court in *Sustainable Coast* failed to properly consider the historical context of sovereign immunity in Georgia as required by a true textualist analysis. The court correctly concluded that the 1991 amendment restored the sovereign immunity of the State to its status under the 1974 amendment. However, the court assumed, with little analysis, that the 1974 amendment barred suits seeking to enjoin the State from acting illegally.¹⁰⁸ This false premise resulted in the court's erroneous conclusion that the 1991 amendment does not permit such suits.

¹⁰² *Id.* at 190–91. The cases cited include *Undercofler v. Seaboard Air Line R.R. Co.*, 152 S.E.2d 878 (Ga. 1966), *Irwin v. Crawford*, 78 S.E.2d 609 (Ga. 1953), and *Cannon v. Montgomery*, 192 S.E. 206 (Ga. 1937). *Id.*

¹⁰³ 719 S.E.2d 473 (Ga. 2011).

¹⁰⁴ *Sustainable Coast*, 755 S.E. 2d at 191 (quoting *S. LNG*, 719 S.E.2d 475 (Benham, J., dissenting)).

¹⁰⁵ *Id.* at 190–91.

¹⁰⁶ *Id.* at 191. The post-1974 amendment cases cited were *Chilivis v. Nat'l Distrib. Co.*, 238 S.E.2d 431 (Ga. 1977), and *Evans v. Just Open Gov't*, 251 S.E.2d 546 (Ga. 1979). *Id.*

¹⁰⁷ *Id.* at 191–92.

¹⁰⁸ *Id.* at 190.

A. Both Modern Textualism Generally and Georgia Courts' Typical Textualist Approach Require that Legal Texts Be Interpreted in Their Proper Historical Contexts

1. Textualism Generally

As an approach to interpreting statutes and constitutions, textualism emphasizes the language of the text itself and seeks to determine the ordinary meaning of the words employed at the time the law was enacted.¹⁰⁹ Textualists embrace Justice Oliver Wendell Holmes' famous directive that "[w]e do not require what the legislature meant; we ask only what the statute means."¹¹⁰ In their recent treatise on textualism, *Reading Law*, U.S. Supreme Court Justice Antonin Scalia and Bryan Garner describe their interpretive approach as a "'fair reading': determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."¹¹¹ Inquiries into matters extrinsic to the text itself, such as legislative history, are considered inappropriate sources of meaning.¹¹² This reflects textualists' belief that the use of sources beyond the text itself improperly expands judicial discretion and infringes on the province of the legislature.¹¹³ Additionally, proponents of textualism argue

¹⁰⁹ Linda D. Jellum, *But That Is Absurd!: Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917, 919 (2011); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006). Some scholars would contend that this definition reflects both originalist and textualist principles because the goal is to determine the textual meaning when it was enacted, rather than when it is being applied. See Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 COLO. L. REV. 1, 9–10 (2004) (classifying Justice Scalia's approach to constitutional and statutory interpretation as "textualist originalism").

¹¹⁰ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 29 (2012) (quoting and endorsing Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) for this proposition).

¹¹¹ *Id.* at 33.

¹¹² Jellum, *supra* note 109, at 919 & n.10. Intentionalism and purposivism are two alternative approaches to statutory interpretation that advocate the consideration of legislative intent or purpose, respectively, as a part of the initial analysis of statutory text. *Id.* at 917 n.1, 919 n.10. Many textualist judges decline to undertake such inquiries even in the face of ambiguous text. *Id.*; see also SCALIA & GARNER, *supra* note 110, at xxvii ("Both of your authors are textualists: We look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences."). These textualists advocate the use of other tools, such as linguistic canons, to resolve ambiguities in text. See *id.* at 51. Some scholars have contended that purposivism and modern versions of textualism are becoming less differentiated, although this is certainly debated. Compare Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006), with Manning, *supra* note 109.

¹¹³ Frank H. Easterbrook, *Foreword to SCALIA & GARNER, supra note 110, at xxii.*

that interpretation methods that employ extratextual sources such as legislative history undermine democracy and the separation of powers¹¹⁴ and politicize judges,¹¹⁵ among other undesirable consequences.¹¹⁶

Despite textualists' devotion to semantics and syntax, even the strongest versions of modern textualism are not the equivalent of literalism (or, at least, not extreme literalism).¹¹⁷ In *Reading Law*, Scalia and Garner expressly reject what they term "strict constructionism," "a hyperliteral brand of textualism . . ."¹¹⁸ Scalia and Garner emphasize that determining the meaning of even clear text is not mechanical or automatic; every application of text to a particular fact situation involves interpretation.¹¹⁹ Modern textualists accept that language is a social construct and depends for its meaning on community usage, practices, and understanding.¹²⁰ Thus, they recognize the need to interpret text within its appropriate context rather than in a vacuum: "The words of a governing text are of paramount concern, and what they convey, *in their context*, is what the text means."¹²¹ Scalia and Garner contend that appropriate contextual considerations include the "a word's historical associations acquired from recurrent patterns of past usage . . ."¹²²

¹¹⁴ *Id.*; see also SCALIA & GARNER, *supra* note 110, at xxvii–xxx ("Our basic presumption: legislators enact; judges interpret." (footnotes omitted)).

¹¹⁵ SCALIA & GARNER, *supra* note 110, at xxvii.

¹¹⁶ *E.g.*, *id.* at 16 (noting that textualists also contend that their approach is more objective than others in that it provides less opportunity for judges' policy preferences to inappropriately color their decisionmaking). Many textualists doubt whether "legislative intent" could be effectively ascertained even if legislative history were to be consulted. This skepticism is frequently derived from public choice, social choice, and interest group theories. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408–19 (2003). Intent skepticism also has roots in legal realism. See Manning, *supra* note 109, at 73–74.

¹¹⁷ SCALIA & GARNER, *supra* note 110, at 39–40. Scalia and Garner advocate against either a nonliteral or "hyperliteral" approach to interpretation: Rather, "[t]he soundest legal view seeks to discern literal meaning in context." *Id.* at 40. Here, literal "bears a clinical sense, not a pejorative one . . ." *Id.* While nonliteral interpretation appears to mean, for example, twisting the fair meaning of text to conform to legislative intent or general purpose, the authors appear to equate hyperliteralism with the disregard of proper contextual factors, such as textually apparent purpose. See *id.* at 39–40.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 53 & n.1. Thus, modern textualists reject the tendency of early textualist judges to describe the application of unambiguous text as taking place without any need for interpretation. See Manning, *supra* note 116, at 2396 n.28 (citing cases).

¹²⁰ Manning, *supra* note 116, at 2396–98 & n.29 (arguing that "contemporary theories of textual interpretation . . . build on Wittgenstein's premise that language is intelligible by virtue of a community's shared conventions for understanding words in context" and that "[e]ven the strictest modern textualists accept Wittgenstein's premise that, because words lack intrinsic meaning, communication depends on a community's shared linguistic practices and understandings").

¹²¹ SCALIA & GARNER, *supra* note 110, at 56 (emphasis added); see also *id.* at 39.

¹²² *Id.* at 33.

With respect to constitutional and statutory language, the inquiry into the linguistic community's ordinary understanding of the terms employed includes consideration of the circumstances existing at the time of enactment.¹²³ Noted textualist scholar John F. Manning has argued that modern textualists “must always ascertain the unstated ‘assumptions shared by the speakers and the intended audience.’”¹²⁴ Thus, common law understandings—including “exceptions or qualifications” that go unstated in statutory or constitutional text—must be taken into account in the textualist's contextual inquiry.¹²⁵ This “historical context” shapes the meaning of constitutional terms and, therefore, must be examined in any textualist interpretation of such terms. Clearly, then, despite the Supreme Court of Georgia's repeated invocations of “plain meaning,” a true textualist inquiry is never automatic—there is more to the determination of even “plain meaning” than initially meets the eye.¹²⁶

2. The Textualism of the Supreme Court of Georgia

Georgia's statutory and constitutional interpretation jurisprudence typically reflects a decidedly textualist bent. Principles governing the interpretation of constitutional text frequently parallel those relating to statutory interpretation, and the interpretation of both types of text clearly entails similar methods.¹²⁷ It is, then, reasonable to imagine that two statutory provisions in Georgia guiding the courts in the construction

¹²³ See Manning, *supra* note 116, at 2397–98 (“Even without knowing the speaker's actual intent or purpose in making a statement, one can charge the speaker with the minimum intention ‘to say what one would ordinarily be understood as saying, given the circumstances in which one said it.’” (quoting Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 268 (Robert George ed., 1996))); Manning, *supra* note 109, at 76 (“Textualists give precedence to *semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances.”).

¹²⁴ Manning, *supra* note 109, at 81 (quoting Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 *CHI.-KENT L. REV.* 441, 445 (1990)).

¹²⁵ Manning, *supra* note 109, at 81–82 (emphasis added).

¹²⁶ “Plain meaning” and “ordinary meaning” are generally used interchangeably by courts and legal scholars. Jellum, *supra* note 109, at 921 n.23.

¹²⁷ See, e.g., Stack, *supra* note 109 (noting that typically statutory and constitutional interpretation principles tend to converge, although arguing that one's approach to statutory and constitutional construction need not be the same given the differing structural issues involved). *But see* Ga. Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 755 S.E.2d 184, 191 (Ga. 2014) (applying a differing level of deference to the principle of stare decisis when interpreting the meaning of a constitutional provision than when interpreting a statute because it is more difficult to alter a court's interpretation of constitutional text than that of statutory text). The latter principle should be distinguished from the use of case law as evidence of a term's historical meaning as advocated in this Article. The use of case law as historical context contemplates an analysis of constitutional terms *in the first instance* and is a part of the determination of ordinary meaning. Courts' usage of terms is *evidence* of the terms' ordinary meaning at the time the text was enacted. In contrast, stare decisis would urge courts to apply precedent solely on the basis of its status as precedent rather than as any evidence of the term's actual meaning.

of statutes have influenced the courts' constitutional interpretation, as well. First, courts are directed to "look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy."¹²⁸ However, "the ordinary signification shall be applied to all words . . ."¹²⁹ Thus, the Supreme Court of Georgia has held that so long as statutory text "is clear and does not lead to an unreasonable or absurd result, 'it is the sole evidence of the ultimate legislative intent.'"¹³⁰

On its face, the Supreme Court of Georgia's analysis in *Sustainable Coast* appears to employ many of the foregoing interpretive principles. The court's repeated reliance on paragraph IX's "plain and unambiguous text," "plain language," and "straightforward text,"¹³¹ along with the following passage quoted in the opinion, all comport with a textualist approach:

[T]his Court must honor the plain and unambiguous meaning of a constitutional provision. Our duty is to construe and apply the Constitution as it is now written. Where the natural and reasonable meaning of a constitutional provision is clear and capable of a natural and reasonable construction, courts are not authorized either to read into or read out that which would add to or change its meaning.¹³²

This passage, from the 2006 case *Blum v. Schrader*, echoes Scalia and Garner's "fair reading" method with its references to the "plain and unambiguous" and "natural and reasonable" meaning. The passage's referral to the court's "duty" and the contention that courts "are not authorized" to alter a provision's meaning through interpretation

¹²⁸ GA. CODE ANN. § 1-3-1(a) (2014).

¹²⁹ *Id.* § 1-3-1(b). The provision goes on to provide that technical terms and terms of art should be treated differently. *Id.*

¹³⁰ *Shorter Coll. v. Baptist Convention of Ga.*, 614 S.E.2d 37, 40 (Ga. 2005) (quoting *Ray v. Barber*, 548 S.E.2d 283, 284 (Ga. 2001)). The plain language of text "as evidence of" legislative intent is a position taken by many, but not all, textualists. Scalia and Garner, for instance, note:

Traditional authorities on interpretation, while repeating the mantra that the objective of interpretation is to discern the lawgiver's . . . intent, would add that this intent is to be derived solely from the words of the text. We would have no substantive quarrel with the search for "intent" if that were all that was meant. But describing the interpretive exercise as a search for "intent" inevitably causes readers to think of *subjective* intent, as opposed to the objective words that the drafters agreed to in their expression of rights and duties. Subjective intent is beside the point. . . . Objective *meaning* is what we are after, and it enhances clarity to speak that way.

SCALIA & GARNER, *supra* note 110, at 30 (footnote omitted).

¹³¹ See *supra* notes 93–101 and accompanying text.

¹³² *Sustainable Coast*, 755 S.E.2d 184, 189 (Ga. 2014) (alteration in original) (quoting *Blum v. Schrader*, 637 S.E.2d 396, 397–98 (Ga. 2006)); see also *supra* note 95 and accompanying text.

suggest a concern with preserving separation of powers and the democratic nature of constitutional enactments, both of which are significant concerns for textualists generally and for Georgia courts specifically.¹³³ Moreover, further evoking textualist theory, the *Blum* court cited the rule that in constitutional interpretation, “the ordinary signification shall be applied to words.”¹³⁴

The Georgia courts’ jurisprudence does not typically fall victim to what Scalia and Garner described as “hyperliteralism.” Rather, Georgia’s highest court has endorsed Scalia and Garner’s admonition that the meaning of text must be determined not in isolation, but in context. Indeed, the court explicitly cited Scalia and Garner’s *Reading Law* in *Smith v. Ellis*,¹³⁵ a case analyzing the exclusive remedy provision of Georgia’s Workers’ Compensation Act, noting that in construing statutes, “we do not read words in isolation, but rather in context.”¹³⁶ And, as part of that necessary

¹³³ For a succinct statement on the general concern of textualists for maintaining separation of powers, see SCALIA & GARNER, *supra* note 110, at xxvii–xxx (“Our basic presumption: legislators enact; judges interpret.” (footnotes omitted)) and Jellum, *supra* note 109, at 920. Georgia courts endorse this principle. *E.g.*, *Cavalier Convenience, Inc. v. Sarvis*, 699 S.E.2d 104, 108 (Ga. Ct. App. 2010) (“The doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced. Under that doctrine, statutory construction belongs to the courts, legislation to the legislature.” (quoting *Mason v. Home Depot U.S.A., Inc.*, 658 S.E.2d 603, 608 (Ga. 2008))). This is not to suggest that individuals espousing other interpretation methods are unconcerned with the separation of powers and democracy. Rather, the point is simply that the frequency with which textualists defend their theory based on these issues, in conjunction with the emphasis on plain language, lends credence to the argument that the Supreme Court of Georgia employs textualist principles, given the court’s heavy emphasis on the plain text. For a critique of textualists’ claim that their approach is superior in terms of preserving the separation of powers, see William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1529–32 (1998).

¹³⁴ 637 S.E.2d at 397 (quoting *Thomas v. MacNeill*, 37 S.E.2d 705, 708 (Ga. 1946)).

¹³⁵ 731 S.E.2d 731 (Ga. 2012); *see also id.* at 736.

¹³⁶ *Smith v. Ellis*, 731 S.E.2d 731, 736 (Ga. 2012). The court utilized the purpose of the statute—given the context of workers’ compensation—to interpret the meaning of the phrase “employee of the same employer” in the Act. *Id.* at 736–37. The plaintiff, Smith, was injured when Ellis accidentally shot him while firing a new rifle. *Id.* at 733. Both men were employees of a company that built and sold new houses. *Id.* at 732. At the time of the accident, Smith was at work on a subdivision to which he was assigned; Ellis, though off work that day, had stopped by the site to borrow a tool from Smith. *Id.* Smith later settled a workers’ compensation claim with the employer, but filed a negligence suit against Ellis. *Id.* at 733. Ellis argued that the exclusive remedy provision of the Worker’s Compensation Act barred Smith’s suit because Ellis was “an employee of the same employer” at the time of the injury, while Smith argued that the suit was permissible because Ellis acted as a “third-party tort-feasor.” *Id.* On appeal, the Supreme Court of Georgia held that “[i]f the phrase were read in isolation, we could say that Ellis was an ‘employee of the same employer’ as Smith.” *Id.* at 736. The court examined the purpose of workers’ compensation and found the purpose is to require employers to compensate employees for injuries related to the employment. *Id.* Thus, given the context—workers’ compensation—the court held that the defendant must have been *acting* as an employee at the time of the accident to be considered an “employee of the same employer.” *Id.* at 736–37.

context, the Supreme Court of Georgia routinely takes contextual clues in constitutional and statutory interpretation from historical considerations, examining the development of legal doctrine through legislative changes to relevant texts and through the evolution of the common law. Again, this is consistent with textualism's attention to the historical usage of terms when interpreting texts.

A recent decision by the Supreme Court of Georgia considering a constitutional challenge to the 2008 Georgia Charter Schools Commission Act highlights the significance of historical context in interpreting constitutional phrases. The plaintiffs in the case argued that the Act was unconstitutional because charter schools do not fall under the definition of "special schools" in a constitutional provision authorizing the General Assembly to provide for the creation of special schools.¹³⁷ Aside from special schools, Georgia's constitution grants authority to county and local boards of education to oversee public schools.¹³⁸ In reaching its conclusion that charter schools do not fall within the definition of special schools, the majority noted that "[c]onstitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption."¹³⁹ Importantly, the majority's analysis of the historical use of the term "special schools" in Georgia's previous constitutions *preceded* any mention of the rule that words should be interpreted in light of their ordinary meaning.¹⁴⁰ Ultimately, the court explicitly based its conclusion that charter schools are not special schools on "the natural meaning of the 'special schools' phrase and the constitutional history . . ."¹⁴¹

Otherwise, regardless of how divorced the conduct was from the workplace, suits brought against coworkers would effectively always be barred. *Id.*

One might wonder, given textualist criticisms of purposivism, how this case could be used to exemplify textualism. It is thus worth noting that the court's determination of statutory purpose in *Smith v. Ellis* was consistent with the scope of inquiry advocated by Scalia and Garner—the inquiry did not veer beyond the text of the Act itself, and its statement of the Act's purpose was concrete and precise. *See* SCALIA & GARNER, *supra* note 110, at 56–58 (listing four limitations that distinguish the textualist's purpose inquiry from a purposivist's). Scalia and Garner argue throughout *Reading Law* that a key drawback of purposivism is that a statute's "purpose" can become easily malleable by addressing purpose at varying levels of generality. *Id.* at 16–21, 33–39, 56–58. For instance, nearly any statute could be described as having been passed "for the greater good," but this extremely general purpose, Scalia and Garner argue, leaves judges with unduly broad discretion to determine what the statute does and does not cover. *Id.* Hence arises the authors' prescription that purpose must be divined solely from the text and should be stated in the most concrete and precise possible terms. *Id.* at 56–58. Finally, purpose—even textually derived purpose—may not be used to override the meaning of plain statutory text. *Id.* The Supreme Court of Georgia's description of purpose in *Smith* adhered to these requirements.

¹³⁷ Gwinnett Cnty. Sch. Dist. v. Cox, 710 S.E.2d 773, 775 (Ga. 2011).

¹³⁸ *Id.*

¹³⁹ *Id.* at 777 (quoting Clarke v. Johnson, 33 S.E.2d 425, 428 (Ga. 1945)).

¹⁴⁰ *See id.* at 777–78.

¹⁴¹ *Id.* at 779. Interestingly enough, Justice Huntstein, the author of the majority opinion in *Sustainable Coast*, authored the majority opinion in this case.

Further demonstrating that the use of historical context is an uncontroversial element of constitutional interpretation in Georgia is Justice Nahmias's dissent in the case. He strenuously criticized the majority's use of the historical treatment of special schools in Georgia—not because he felt the line of inquiry was improper, but because he disagreed with the majority's historical analysis.¹⁴² In fact, Justice Nahmias conducted his own lengthy¹⁴³ historical review of public education in Georgia¹⁴⁴ and of the constitution's treatment of the issue.¹⁴⁵ Overall, however, he agreed that “[a] provision of the constitution is to be construed in the sense in which it was understood by the framers and the people at the time of its adoption.”¹⁴⁶ Remarkably, then, *both* the majority and the dissenting justice engaged in historical analysis as a part of their inquiry into the meaning of the constitutional text. These justices agreed that the historical usage of constitutional terms shapes their “plain” or “ordinary” meaning.

Even in *Blum v. Schrader*, with its insistence on attention to plain meaning, the court strongly emphasized the context and history of the statutory text. In *Blum*, the court reviewed several voters' constitutional challenge to a 2006 act of the General Assembly redrawing three state senate districts.¹⁴⁷ The trial court below dismissed the action, and the voters appealed.¹⁴⁸ The appellants argued that when the Georgia Constitution of 1983 (the present Constitution) was adopted, a change in the language of article III, section II, paragraph II from the previous provision removed the discretion of the General Assembly to redraw districts at any time, rather than only if necessary in response to U.S. census data.¹⁴⁹ The earlier provision, of the constitution of 1976, read: “The General Assembly may create, rearrange and change Senatorial Districts as it deems proper. . . . The apportionment of the Senate shall be changed by the General Assembly, if necessary, after each United States decennial census becomes official.”¹⁵⁰ With the adoption of the Constitution of 1983, the provision was altered: “The General Assembly shall apportion the Senate and House districts. Such districts shall be apportioned of contiguous territory. The apportionment of the

¹⁴² *Id.* at 784–85, 799–800 (Nahmias, J., dissenting) (arguing that “[t]o understand why that holding is wrong, it is important to understand the historical context of these issues and of the ‘special schools’ provision in particular—a history that is truncated and twisted by the majority opinion” and that “[g]iven the majority’s dependence on constitutional history, it is remarkable how little support the majority identifies for its claims. In truth, the majority’s claims are at odds with the actual constitutional history of this State” (footnotes omitted)).

¹⁴³ *Id.* at 785 (noting that “[l]aying out this background takes many pages, but it will illuminate the analysis that follows”).

¹⁴⁴ *Id.* at 783–91.

¹⁴⁵ *Id.* at 799–801 (reviewing the constitutional history and criticizing the majority’s rendition of it).

¹⁴⁶ *Id.* at 797 (quoting *Collins v. Mills*, 30 S.E.2d 866, 869 (Ga. 1944)).

¹⁴⁷ *Blum v. Schrader*, 637 S.E.2d 396, 397 (Ga. 2006).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See id.* (alteration in original) (quoting GA. CONST. of 1976, art. III, § II, para. II).

Senate and of the House of Representatives shall be changed by the General Assembly as necessary after each United States decennial census.”¹⁵¹

The appellants first argued that the 1983 constitution limits the General Assembly to reapportioning districts every ten years because of the removal of the provision that the General Assembly “may” reapportion “as it deems proper[,]” indicating that this discretion was to be eliminated.¹⁵² The court disagreed with this contention, essentially finding that the “as it deems proper” language related to the manner and means of reapportionment, not the timing.¹⁵³

Alternatively, the appellants contended that even without regard to the earlier provision, the 1983 constitution’s provision did not empower the General Assembly with the necessary discretion to redraw districts except with respect to a decennial census.¹⁵⁴ Here, the court invoked the plain meaning rule using the language ultimately cited in *Sustainable Coast*.¹⁵⁵ Notably, despite the fact that appellants’ second argument was limited to the language of the 1983 provision *alone*, rather than the historical change, the court nevertheless continued to refer to the earlier provision in its analysis of the current one.¹⁵⁶ In fact, the Court noted,

Had the intent been to depart from the 1976 Constitution and limit the General Assembly to only one redistricting after each census, the framers of the 1983 Constitution could have made an express provision to that effect, and they would not have included the first sentence in Art. III, § II, Par. II.¹⁵⁷

Near the conclusion of *Blum*, the court quoted the 1947 case *Thompson v. Talmadge*:

“The contentions urged by [Appellants], if sustained would have the effect of isolating a few words from the entire paragraph and giving to them a refined definition without due consideration of the context in which they are used. This, under all the recognized rules of construction, cannot be done. The true meaning of such words can be ascertained in no other way except by a consideration,

¹⁵¹ See *id.* (quoting GA. CONST. art. III, § II, para. II).

¹⁵² *Id.*

¹⁵³ *Id.* The court found the General Assembly’s discretion was curtailed by the requirement of the 1983 constitution that apportioned districts must be of contiguous territory. *Id.* However, this issue did not impact the question of timing. See *id.* The General Assembly’s discretion relating to the timing of reapportionment came from the “create, rearrange and change” language in the provision; none of those verbs contemplates a temporal limitation. *Id.*

¹⁵⁴ *Id.* at 397–98.

¹⁵⁵ See *id.*; *supra* notes 95, 132 and accompanying text.

¹⁵⁶ See *Blum*, 637 S.E.2d at 397–99.

¹⁵⁷ *Id.* at 398.

inter alia, of the subject-matter to which they relate as disclosed by the entire paragraph.”¹⁵⁸

The court embraced a variety of contextual indicators—including the provision’s history—in reaching its conclusion. Overall, the court’s analysis demonstrates a willingness to consider historical indicators of meaning consistent with the textualist approach to interpretation. Earlier interpretations of the prior constitutional provision *impact* the court’s interpretation today, not merely the reverse.

Perhaps most notably, the court has considered previous constitutional language as part of the relevant interpretive context when addressing questions related to the 1991 amendment to Georgia’s constitution relating to sovereign immunity. In *Gilbert v. Richardson*,¹⁵⁹ the Supreme Court of Georgia reviewed a case brought against two county officials and dismissed by the trial court on the grounds of sovereign immunity.¹⁶⁰ Emma and Tommy Gilbert, the appellants and plaintiffs below, argued that the 1991 amendment, which provided for the sovereign immunity of “the state and all of its departments and agencies,” did not apply to counties.¹⁶¹

The court noted that the 1983 constitution prior to the 1991 amendment also extended immunity to the “state or any of its departments or agencies”¹⁶² In a 1985 case, the court had held that the “virtually identical” language of the 1983 constitution included counties within the ambit of sovereign immunity.¹⁶³ Further, the court had held in 1982 that similar language in the 1976 constitution extended sovereign immunity to the counties.¹⁶⁴ The court explained the import of its prior holdings:

¹⁵⁸ *Id.* at 398–99 (alteration in original) (quoting *Thompson v. Talmadge*, 41 S.E.2d 883, 895 (Ga. 1947)). Aside from its discussion of the historical change to the constitutional provision, the court addressed the possible applicability of two canons of construction in reaching its conclusion that the Constitution of 1983 did not preclude the General Assembly from redistricting at its discretion. *Id.* The appellants essentially argued that the canon that Scalia and Garner have termed the “Negative-Implication Canon” (commonly known as *expressio unius est exclusio alterius*, the expression of one thing implies the exclusion of others) supported their interpretation. *See id.*; *see also* SCALIA & GARNER, *supra* note 110, at 107. The appellants argued that because the Constitution of 1983 specifically provided that apportionment “shall be changed by the General Assembly as necessary” after each census, this was meant to be the exclusive time for apportionment. *Blum*, 637 S.E.2d at 397. The court, however, rejected that argument because of the application of another canon of construction, the rule against surplusage. *Id.* at 398; *see also* SCALIA & GARNER, *supra* note 110, at 174. The court found that the appellants’ suggested interpretation would render the first sentence of the provision (“The General Assembly shall apportion the Senate and House districts.”) superfluous. *Blum*, 637 S.E.2d at 398.

¹⁵⁹ 452 S.E.2d 476 (Ga. 1994).

¹⁶⁰ *Id.* at 478–79.

¹⁶¹ *Id.* (quoting GA. CONST., art. I, § II, para. IX(c)).

¹⁶² *Id.* at 479.

¹⁶³ *Id.* (citing *Toombs Cnty. v. O’Neal*, 330 S.E.2d 95, 97 (Ga. 1985)).

¹⁶⁴ *Id.* (citing *Nelson v. Spalding Cnty.*, 290 S.E.2d 915 (1982)).

With full knowledge of the construction placed upon the similar language of the 1983 amendment, the legislature proposed and the voters of this state ratified the 1991 amendment. Absent any evidence that the legislature intended a different interpretation or to indicate that the electorate did not intend to extend sovereign immunity to counties, we hold the 1991 amendment's extension of sovereign immunity to "the state and its departments and agencies" must also apply to counties.¹⁶⁵

Arguably, the phrase "state or any of its departments or agencies," read in isolation, by no means clearly entails the inclusion of counties.¹⁶⁶ Even reading the phrase in the context of the entire constitutional provision would not necessarily alter that conclusion because nothing in article I, section II, paragraph IX suggests a reading beyond the most obvious one, i.e. that "state or any of its departments or agencies" would include simply that.¹⁶⁷ Moreover, article I, section III, paragraph 1 of the constitution, which addresses eminent domain and immediately follows paragraph IX, provides compensation requirements for takings by "the state or the counties or municipalities of the state" for public purposes.¹⁶⁸ Although the phrase appears in a different section of the same article, at a minimum it demonstrates that paragraph IX could easily have been drafted to refer explicitly to counties.¹⁶⁹

¹⁶⁵ *Id.* (citation omitted).

¹⁶⁶ Professor R. Perry Sentell, Jr., who has written extensively on sovereign immunity in Georgia, called the court's initial decision to construe the 1983 Constitution's reference to "departments and agencies" to include counties "strategic magic via one deft maneuver," Sentell, *supra* note 13, at 409, and later described the inclusion of counties and municipalities as a dramatic move, see *id.* at 415. When the court was faced with the need to interpret the 1991 amendment using the same language, Professor Sentell noted that "in earlier times a restrictive reading might well have appeared in order, [but] that can no longer be the logical view." *Id.* A narrow reading after its previous interpretations "would require the analytical dexterity of a judicial contortionist—equal to that which the court originally employed in extending the coverage." *Id.*

¹⁶⁷ See GA. CONST. art. I, § II, para. IX.

¹⁶⁸ GA. CONST. art. I, § III, para. I.

¹⁶⁹ The Supreme Court of Georgia has held that where "the legislature uses certain language in one part of [a] statute and different language in another, the court assumes different meanings were intended." *Berryhill v. Ga. Cmty. Support & Solutions, Inc.*, 638 S.E.2d 278, 281 (Ga. 2006) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 194 (6th ed. 2000)). Of course, as noted, the language referenced above appears in two separate sections of the Constitution, albeit within the same article. Nevertheless, the sections' location within the same article and their close proximity to one another lend weight to the application of the rule cited in *Berryhill*. Another analogous interpretive principle applied by the court is the presumption "that the same meaning attaches to a given word or phrase wherever it occurs in a constitution . . ." *Clarke v. Johnson*, 33 S.E.2d 425, 427 (Ga. 1945). Finally, the court has applied the maxims "expressio unius est exclusio alterius (the expression of one thing implies the exclusion of another) and *expressum facit cessare tacitum* (if

Gilbert's interpretation of paragraph IX appears counterintuitive in relation to the constitutional text alone. This case and the others discussed in this Part underscore the significance of historical context in the Supreme Court of Georgia's interpretation of constitutional provisions.¹⁷⁰ Finally, case law is a recognized and significant indicator of historical context: The constitution is "to be construed in the light of the common law existing at the time of [its] adoption and the definition or meaning of its terms is to be ascertained by reference to the common-law meaning unless a contrary or different intention appears."¹⁷¹ Overall, the court's interpretation jurisprudence reflects a textualist, yet holistic, approach, in stark contrast to what Scalia and Garner disparage as "hyperliteralism." This typical attentiveness to context makes it all the more astonishing that the court so thoroughly disregarded historical context in *Sustainable Coast*.

B. Interpreted in Its Proper Historical Context, Georgia's Constitution Does Not Bar Suits Seeking to Enjoin the State's Illegal or Ultra Vires Conduct

The court's error in *Sustainable Coast* lies in its failure to recognize that the historical definition of sovereign immunity was not only *affected by* the text of the 1991 amendment; it also *affects* the meaning of the text. Under a true textualist analysis (as consistently espoused by the Supreme Court of Georgia), the historical context of constitutional text—including previous judicial and legislative understandings of language used—should be used to interpret even unambiguous text. A given text's "plain" or "ordinary" meaning inherently encompasses an analysis of historical usage of the text's terms.

Under this analysis, the court's finding that the plain language of the 1991 amendment grants the General Assembly exclusive authority to waive sovereign immunity is beside the point. The court's decision failed to inquire into the definition of most significant term in the 1991 amendment: "sovereign immunity." The court quickly dismissed pre- and post-1974 case law that shaped the doctrine of sovereign immunity on the basis that the 1974 amendment fundamentally altered the existing meaning

some things are expressly mentioned, the inference is stronger that those not mentioned were intended to be excluded)" in interpreting constitutional provisions. *See* *Gwinnett Cnty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 798 (Ga. 2011) (quoting *Goddard v. City of Albany*, 684 S.E.2d 635, 639 (Ga. 2009)). These canons also suggest that the phrase would be interpreted to exclude counties but for the historical understanding of the phrase.

¹⁷⁰ Similar principles are applied in statutory interpretation: "The General Assembly is presumed to enact all statutes with full knowledge of the existing condition of the law and with reference to it. The meaning and effect of a statute '[are] to be determined in connection, not only with the common law and the Constitution, but also with reference to other statutes and decisions of the courts.'" *Summerlin v. Ga. Pines Cmty. Serv. Bd.*, 690 S.E.2d 401, 402 (Ga. 2010) (alteration in original) (citation omitted) (quoting *Plantation Pipe Line Co. v. City of Bremen*, 178 S.E.2d 868, 875 (Ga. 1970)).

¹⁷¹ *Holman v. Holman*, 35 S.E.2d 923, 923 (Ga. Ct. App. 1945) (citing 16 C.J.S. *Constitutional Law* § 36, at 77; 11 AM. JUR. § 63, at 676–78).

of sovereign immunity in Georgia.¹⁷² This Part argues that this conclusion was incorrect; the 1974 amendment prohibited courts from altering the doctrine of sovereign immunity *in the future*, but did not alter the doctrine *currently in existence* at the time of the amendment's ratification. Pre-1974 case law was not abrogated by the 1974 amendment. Rather, the cases provide strong evidence of the historical usage of the term "sovereign immunity" in Georgia as used in the constitution. Thus, because the 1991 amendment restored sovereign immunity to its status under the 1974 amendment, case law that explicates the meaning of sovereign immunity under the 1974 amendment is relevant in determining the doctrine's scope. Part III.B.1 outlines some of the relevant case law and explores the scope of the doctrine with respect to suits seeking injunctive relief. Part III.B.2 demonstrates that the 1974 amendment incorporated the existing understanding of the meaning of sovereign immunity.

1. When Sovereign Immunity Gained Constitutional Status in 1974, the Doctrine Did Not Apply to Suits Seeking Injunctive Relief for Illegal and Ultra Vires Acts

Courts in Georgia consistently have held that suits which are designed to control the acts or property of the State are to be construed as suits against the State, thereby implicating sovereign immunity.¹⁷³ The rule clearly applies to suits brought against public officials in their official capacities: "Suits against 'public employees in their official capacities are in reality suits against the state and, therefore, involve sovereign immunity.'"¹⁷⁴ However, application of the rule is not dependent on the nominal defendant.¹⁷⁵ Even suits purporting to be brought against government officials

¹⁷² Ga. Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 755 S.E.2d 184, 190–91 (Ga. 2014).

¹⁷³ See, e.g., *Hennessy v. Webb*, 264 S.E.2d 878, 879 (Ga. 1980) ("Any suit against an officer or agent of the State, in his official capacity, in which a judgment can be rendered controlling the action or property of the State in a manner not prescribed by statute, is a suit against the State' . . . and cannot be maintained without its consent." (alteration in original) (quoting *Roberts v. Barwick*, 1 S.E.2d 713 (Ga. 1939))); *Ramsey v. Hamilton*, 182 S.E. 392, 396 (Ga. 1935) (citing federal courts' Eleventh Amendment case law as persuasive authority to hold that the question of whether a suit is in reality brought against the state is to be determined by inquiring whether relief from the state is sought and whether a judgment would apply to the state).

¹⁷⁴ *Cameron v. Lang*, 549 S.E.2d 341, 346 (Ga. 2001) (quoting *Gilbert v. Richardson*, 452 S.E.2d 476, 481 (Ga. 1994)); see also *Hennessy*, 264 S.E.2d at 879.

¹⁷⁵ See *Cannon v. Montgomery*, 192 S.E. 206, 208 (Ga. 1937) ("A suit cannot be maintained against the state without its statutory consent. This general rule cannot be evaded by making an action nominally one against the servants or agents of a state, when the real claim is against the state itself and it is the party vitally interested. Therefore, generally, where a suit is brought against an officer or agent of the state with relation to some matter in which defendant represents the state in action and liability, and the state, while not a party to the record, is the real party against which relief is sought, so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the state, will operate to control the action of the state or subject it to liability, the suit is in effect one against the state."); *Ramsey*, 182 S.E. at 396 ("Whether a State is the actual party defendant in a suit . . . is to

in their individual capacities will be treated as suits against the State if a plaintiff is actually seeking to control state action.¹⁷⁶ This sensible rule, grounded in reality and emphasizing substance over form, has long been a tenet of Georgia jurisprudence.

Nevertheless, one oddity developed in contravention of the otherwise straightforward rule: the “legal fiction” referred to by the court in *IBM*. Under it, courts held that suits brought to challenge a government entity or official’s ultra vires or illegal conduct were *not* suits against the State, but rather suits against errant officials.¹⁷⁷ The rationale for these holdings was essentially that illegal or ultra vires acts are not acts of the State.¹⁷⁸ Under the rule described above, therefore, suits seeking to enjoin such actions do not seek to control *the State’s* acts and thus are not barred by sovereign immunity. Essentially, as the court noted in *IBM*, courts had “scrutinized the challenged act and if the act is legal, found sovereign immunity applies; on the other hand, if the act is illegal, then [courts have] held that sovereign immunity is no bar.”¹⁷⁹ This analysis is apparent in a concurring opinion in *Evans v. Just Open Government*: “So long as the state and its officials obey the constitution and law they are immune from liability but neither the state nor its officials can violate the constitution or law and successfully claim immunity.”¹⁸⁰

be determined by a consideration of the nature of the case as presented by the whole record, and not, in every case, by a reference to the nominal parties of the record.” (quoting *In re Ayers*, 123 U.S. 443, 492 (1887)).

¹⁷⁶ *Cannon*, 192 S.E. at 208; *Ramsey*, 182 S.E. at 396.

¹⁷⁷ See, e.g., *Chilivis v. Nat’l Distrib. Co.*, 238 S.E.2d 431, 433 (Ga. 1977) (“The rule that the State may not be sued without its consent is not applicable to an action where injunction is sought to prevent the commission of an alleged wrongful act by an officer of the State acting under color of office but without lawful authority and beyond the scope of official power.”); *Undercofler v. Seaboard Air Line R.R. Co.*, 152 S.E.2d 878, 882 (Ga. 1966) (“It is urged that this is a suit against the state for which no consent has been granted, and is therefore subject to general demurrer. This assertion is not meritorious. The railroad’s claim is that the commissioner is acting beyond his authority and contrary to certain provisions of the State and Federal Constitutions. Hence, this is not a suit against the state.”); *Irwin v. Crawford*, 78 S.E.2d 609, 611 (Ga. 1953); *Cannon*, 192 S.E. at 208 (holding that a suit against a state employee based on unauthorized or illegal acts “would not be an action against the state”); *Ramsey*, 182 S.E. at 396; *Dennison Mfg. Co. v. Wright*, 120 S.E. 120, 122 (Ga. 1923).

¹⁷⁸ See *Duffee v. Jones*, 68 S.E.2d 699, 704 (Ga. 1952) (holding that where a county “through its members, acts beyond the scope of its lawful jurisdiction and commits an actionable wrong, the act so committed is not ‘county action,’ and in such a case a suit may be maintained in the courts of this State against the wrongdoers”).

¹⁷⁹ *Int’l Bus. Machs. Corp. v. Evans*, 453 S.E.2d 706, 708 (Ga. 1995). In *IBM*, the court presented this premise as an *alternative* to the legal fiction that suits seeking injunctive relief based on alleged illegal acts are not suits against the state. *Id.* (noting, after discussing the legal fiction, that “[i]n other instances” courts had focused on the legal versus illegal determination). However, this Part argues that the consideration of the legality of an act was wrapped up with the legal fiction because whether or not the act was legal determined whether the act was an act of the State.

¹⁸⁰ 251 S.E.2d 546, 552 (Ga. 1979) (Hill, J., concurring).

Suits seeking injunctive relief were permitted to proceed under this reasoning despite the fact that they clearly *were* brought with the purpose of controlling State decisions and acts. *Cannon v. Montgomery*,¹⁸¹ a 1937 case, provides a stark illustration. There, the plaintiff filed a suit seeking injunctive relief to eject the defendant, an employee of the State's Game and Fish Department, from the plaintiff's property.¹⁸² The plaintiff had obtained the property subject to a lease held by the State.¹⁸³ However, the plaintiff contended that the Game and Fish Department breached a condition of the lease requiring it to use the land as a fish hatchery, which terminated the lease.¹⁸⁴ The Department argued that it was propagating some fish on the property and that it had employed the defendant as its agent to act as a caretaker of the leased land.¹⁸⁵ Thus, it was clear from the Department's own argument that the defendant in the case was acting as an employee and representative of the State.

After outlining these facts, the Supreme Court of Georgia began by stating the general rule that the State cannot be sued "without its statutory consent."¹⁸⁶ Moreover:

This general rule cannot be evaded by making an action nominally one against the servants or agents of a state, when the real claim is against the state itself and it is the party vitally interested. Therefore, generally, where a suit is brought against an officer or agency of the state with relation to some matter in which defendant represents the state in action and liability, and the state, while not a party to the record, is the real party against which relief is sought, so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the state, will operate to control the action of the state or to subject it to liability, the suit is in effect one against the state.¹⁸⁷

The court's analysis in the quoted passage appears consistent with the basic line of reasoning described above wherein the substance of the suit, rather than the named defendant, governs how the suit is construed. One would imagine under this reasoning that the court would be compelled to determine that the suit was, in reality, against the State, given that *the State* held the lease at issue, and that the defendant justified his presence on the plaintiff's land on the ground that he was directed to be there *by the State Game and Fish Department*. In order for the court to grant the

¹⁸¹ 192 S.E.2d 206 (Ga. 1937).

¹⁸² *Id.* at 206.

¹⁸³ *Id.* at 207.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 207–08.

¹⁸⁶ *Id.* at 208.

¹⁸⁷ *Id.*

relief sought by the plaintiff, it would have to determine that the *State's* lease was invalid.¹⁸⁸ Nevertheless, the court continued its opinion as follows:

“If, however, the sole relief sought is relief against the state officers, it is maintainable. Such it is if it seeks compensation for a past wrong, recovery of possession of property wrongfully withheld, constituting a present wrong, or an injunction against a threatened wrong such as equity will enjoin.” A suit may be maintained against officers or agents personally, because, while claiming to act officially, they have committed or they threaten to commit, wrong or injury to the person or property of plaintiff, either without right and authority or contrary to the statute under which they purport to act. Although a defendant may assert that he acted officially and on behalf of the state, a suit of this class is not a suit against the state, whether it be brought to recover property wrongfully taken or held by defendant on behalf of the state. A suit against a state officer because of his unauthorized and illegal acts, for instance, where he is acting in derogation of the express purpose and intent of the state for which he is purporting to act, as where an officer of the state is authorized and directed by law to acquire and hold lands under a lease for the purposes of maintaining a fish hatchery, his actions in so doing would be the acts of the state; but, where such officer acts contrary to and derogatory thereof, his acts are illegal and unauthorized, and a suit against him to recover damages, for an injunction, or to compel him to obviate the effect of his actions in the premises, would not be an action against the state.¹⁸⁹

Although the court argued that suits such as that in *Cannon* are actually brought against state officials because the officials merely “claim” to act officially, “purportedly” on behalf of the State, the fiction inherent in that argument is obvious. In *Cannon*, the State itself plainly acknowledged that the defendant was acting as a caretaker on the State's behalf. This case did not involve an “errant” or rogue state official. From this passage, then, the source of the “legal fiction” identified in *IBM* is clear. Courts reasoned that the legality or illegality of an act determines whether or not an act is the State's because the use of the basic rule alone—which considers whether the relief sought will operate to control State acts—would not permit suits such as *Cannon* to proceed. In other words, if the only applicable rule considers the effect on the State of a judgment against a state officer, suits like *Cannon* would be barred by sovereign immunity, and the State could commit illegal acts through its agents with

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (citation omitted).

impunity. If, however, illegal acts are held to be outside the definition of “State action,” suits seeking to curtail them would not be barred by sovereign immunity, and the State may be held accountable to its own laws. This analysis illuminates the fact that while the courts justified holdings like *Cannon* on the ground that those suits were “actually” brought against individual state officials, the true basis for such holdings was that the State cannot use the doctrine of sovereign immunity to shield its illegal acts.

Remarkably, the court in *Cannon* continued its opinion after the passage quoted above by finding that if the State’s lease had been breached, the plaintiff could:

maintain proper proceedings to recover possession of the *property against the State Department or the official thereof holding the same*, without the statutory consent of the State. In such a case the plaintiff has the right to treat the contract forfeited and sue for possession, *and such action could not be defeated on the ground that it is a suit to enforce a contract against the state . . .* [T]his doctrine applie[s] not only to actions for recovery of possession of property wrongfully held *by the state or one of its departments*, but to any action to enforce real rights, such as suits to enjoin *a state department* from interfering with the plaintiff’s right of possession.¹⁹⁰

This only further evidences the true basis for the court’s holding: the legality or illegality of the act in question, rather than the impact of the suit on the State.

Compounding the illogic inherent in the “legal fiction” rule that insisted that state officials be sued individually is its confused and inconsistent application. In some cases, courts followed the rule in *Cannon* and insisted that suits against state officers could not be brought against them in their official capacities.¹⁹¹ In *Ramsey v. Hamilton*,¹⁹² a 1935 case, the plaintiff sought to enjoin Georgia’s comptroller general and other defendants from enforcing an allegedly unconstitutional act.¹⁹³ The

¹⁹⁰ *Id.* at 208–09 (emphasis added) (citations omitted). The court appeared to attempt to limit its holding by ruling that the rule quoted could be applied only to the particular subject matter “and affecting the plaintiff and defendant and the property, and not affecting the state or rendering it liable outside of the return of the property involved.” *Id.* at 209. This seems consistent with the decisions of later courts such as *IBM* holding that the State cannot be held liable for damages under any circumstances absent consent. Otherwise, though, the court’s “limitation” here does not seem especially significant given the qualification “outside of the property involved.” Interestingly, after all the sovereign immunity analysis, the court ultimately concluded that the trial court erred in granting the injunction sought by the plaintiff in *Cannon* because injunctive relief is unavailable to eject a defendant from real property. *Id.*

¹⁹¹ *See, e.g., id.* at 208 (“A suit may be maintained against officers or agents *personally . . .*” (emphasis added)); *Ramsey v. Hamilton*, 182 S.E. 392, 396 (Ga. 1935).

¹⁹² 182 S.E. at 392.

¹⁹³ *Id.* at 393.

court held that the case was *not* one involving a defendant “pretending to act within the scope of his employment and authority as a state official,” but was “plainly and avowedly against the officers *in their official capacity*.”¹⁹⁴ This was evident, according to the court, because the plaintiffs indicated that the defendant comptroller general was being sued “as comptroller-general of the state of Georgia.”¹⁹⁵ Moreover, the suit related to “a matter in which the officers have no personal interest as individuals, but are acting for and on behalf of the state of Georgia.”¹⁹⁶ On that ground, the court held that the suit was barred because it was a suit against the State.¹⁹⁷ Nevertheless, the court noted that its holding was not intended to bar suits against state officials as individuals “who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs”¹⁹⁸

The *Ramsey* court distinguished the case from a prior holding in *Dennison Manufacturing Co. v. Wright*,¹⁹⁹ in which a plaintiff sued Georgia’s comptroller general for allegedly collecting an unconstitutional tax.²⁰⁰ In *Dennison*, the plaintiff named the defendant William A. Wright, “who was and is comptroller general of Georgia.”²⁰¹ The court found that the reference to the defendant’s position was merely a descriptive phrase and did not indicate he was being sued in his official capacity rather than as an individual.²⁰² Further, the court’s syllabus indicated that the case is “not one against the defendant in his official capacity and to enforce a liability against the state, but is one against him individually for an act, which, *while done in his official capacity*, was wholly without lawful authority and beyond the scope of his official power.”²⁰³ Ultimately, the court held that the defendant could be held personally liable for the amount of the tax collected if the authorizing statute were found unconstitutional.²⁰⁴

¹⁹⁴ *Id.* at 396.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* It is difficult to distinguish this point from the situation described in *Cannon*, which the court decided only two years after *Ramsey*. Not only is it unclear that the defendant in *Cannon* had any “personal interest” in remaining on the plaintiff’s land, the State itself contended that the defendant was acting “for and on behalf of” the Department as a caretaker of the leased land. One possibility is that this case demonstrates the substantial and consistent difference in Georgia courts’ treatment of suits seeking damages versus those seeking solely equitable relief. Had the suit for damages been permitted to proceed in *Ramsey* against the official in his official capacity, the State may have been obligated to pay damages under respondeat superior.

¹⁹⁷ *Id.* at 397.

¹⁹⁸ *Id.* at 398.

¹⁹⁹ 120 S.E. 120 (Ga. 1923).

²⁰⁰ *Id.* at 123.

²⁰¹ *Id.* at 122.

²⁰² *Id.*

²⁰³ *Id.* at 120 (emphasis added).

²⁰⁴ *Id.* The court noted that this result, though harsh, was mitigated by the fact that in many instances such as in the case at bar, taxpayers will pay the illegal tax under protest, which should put the comptroller general on notice that the tax may be contested and that if turned over to the state, the comptroller may be personally liable for returning the amount paid. *Id.* at 124.

This case involves differing considerations than are relevant in most of the cases discussed throughout this Article because the remedy sought was damages. On that basis, it is perhaps more logical—although arguably unfair—to inquire whether a state official is sued “individually” because liability for *damages* can be imposed on an individual defendant without impacting the liability of the State. With respect to suits seeking injunctive relief, however, the same clear differentiation does not apply. The reference in the *Dennison* syllabus to the fact that the defendant therein, though sued individually, was nevertheless *acting in his official capacity* glaringly reveals the nonsensical nature of the legal fiction involved with respect to suits seeking injunctive relief. Liability for damages can be logically separated between State and state actor in the sense that liability can be imposed on one or the other or both. But to speak of enjoining the acts of a state official *only* as an individual and not in his official capacity is utter nonsense when, as in *Cannon*, a state official is clearly acting on behalf of the State and presumably in accordance with the wishes of his superiors. In *Sustainable Coast*, for instance, the plaintiffs noted that the challenged LOPs were not being granted by rogue DNR employees.²⁰⁵ Rather, the use of LOPs was an accepted and continuous agency practice.²⁰⁶ Moreover, LOPs were granted by no fewer than seven different officials at the DNR.²⁰⁷ By holding that suits against state officials acting in their official capacities are, in reality, suits against the state, courts have recognized that the entity of “the State” can *only* act through state officials.²⁰⁸ “The State” is necessarily made up of human actors. It defies common sense to recognize this prosaic point when the human actors act legally, but deny it when they act illegally.

Decisions subsequent to *Ramsey*, perhaps discerning this problem, departed from the earlier courts’ insistence that suits seeking relief against state officials clearly denominate the defendants in their individual, rather than official, capacities. Implicit in these decisions is a rejection of the legal fiction’s illogical justification for finding that suits seeking injunctive relief fell outside the doctrine of sovereign immunity. In significant contrast to cases like *Cannon* and *Ramsey*, several of these cases entirely failed to discuss the issue of how the defendants were named. Instead, the courts’ inquiry increasingly focused on the legality of the acts that plaintiffs sought to enjoin and the scope of the State defendants’ authority. For instance, in the 1952 case

²⁰⁵ Appellees’ Brief at 18–19, *Ga. Dep’t of Natural Res. v. Ctr. for a Sustainable Coast, Inc.*, 755 S.E.2d 184 (Ga. 2014) (No. S13G0602).

²⁰⁶ *Id.* at 18. Aside from the logical problem here, there is also a logistical issue. An order enjoining one individual is binding on that individual only. Thus, where illegal or ultra vires activities are being undertaken systematically by a State department or agency, plaintiffs would be forced to ascertain the identity of each individual who has committed or may commit the unauthorized acts in question in order to prevent the activity from occurring. This undermines the important policy that equitable remedies promote of avoiding unnecessary multiplicity of suits. *Id.* at 18–19.

²⁰⁷ *Id.* at 18.

²⁰⁸ *See Sustainable Coast*, 755 S.E.2d at 188.

Duffee v. Jones,²⁰⁹ residents and taxpayers of the Vinings School District of Cobb County filed suit against the Cobb County Board of Education, its president, and several named members.²¹⁰ The plaintiffs sought, in part, the cancellation of a quit-claim deed granted by the Board to a local church on the ground that the sale did not comply with procedures mandated by Georgia law.²¹¹ The court agreed with the plaintiffs that the action of the Board of Education was “wholly unauthorized” and did not pass title to the church.²¹² The court, however, found that it needed to address the objection raised by the Board and its individual members that the plaintiffs had no right to bring their action against the Board defendants.²¹³ The Court noted that, although the Board of Education was not a corporate body, the County was a public corporation which acted through the Board in matters related to education.²¹⁴ The court held:

When the board of education acts upon matters lawfully within its jurisdiction, it is the county acting through its corporate authority, and a county is not liable to suit for any cause of action unless made so by statute. But when the board of education, through its members, acts beyond the scope of its lawful jurisdiction and commits an actionable wrong, the act so committed is not “county action,” and in such a case a suit may be maintained in the courts against the wrongdoers.²¹⁵

Notably, it is by no means clear from the court’s opinion that the plaintiffs intended to sue the Board of Education defendants as individuals rather than in their official capacities acting on behalf of Cobb County. The language the court used to describe how the plaintiffs listed the defendants is distinguishable from that used by the plaintiffs in *Dennison*, which the court in that case held indicated a personal suit, and in *Ramsey*, which the court held clearly identified the defendant in his official capacity.²¹⁶ Nevertheless, the case signifies a departure from the earlier case law regardless of how the court was interpreting the suit²¹⁷ simply because of the court’s total lack of

²⁰⁹ 68 S.E.2d 699 (Ga. 1952).

²¹⁰ *Id.* at 701.

²¹¹ *Id.* at 702–03. In addition, the plaintiffs sought injunctive and other equitable relief against several other defendants, including the church. *Id.*

²¹² *Id.* at 704.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* (citation omitted).

²¹⁶ See *supra* notes 176–86 and accompanying text.

²¹⁷ In 1977, the Georgia Court of Appeals construed *Duffee* as a suit against the individual defendants. See *Dep’t of Human Res. v. Briarcliff Haven, Inc.*, 233 S.E.2d 844, 846–47 (Ga. Ct. App. 1977). The question of the nature of the suits against the Board of Education defendants in *Duffee* is but one example of a case where this problem arose. Professor R. Perry Sentell, Jr., a leading scholar on the issue, noted that the court’s decision in *Hennessey v. Webb*, a watershed

attention to the issue of the language identifying the defendants. Again, this suggests that the court was growing less preoccupied with the individual/official fiction and more concerned with the nature of the acts themselves.

Duffee is just one example of a case illustrating this point. In *Undercofler v. Seaboard Air Line Railroad Co.*,²¹⁸ the court explained that a petition for injunction was filed “against Hiram K. Undercofler, State Revenue Commissioner” after he allegedly collected an illegal assessment.²¹⁹ With regard to the contention that the suit was subject to demurrer because it was a suit against the State, the court ruled, “The railroad’s claim is that the commissioner is acting beyond his authority and contrary to certain provisions of the State and Federal Constitutions. Hence, this is not a suit against the state.”²²⁰ Again, the court engaged in no analysis of the nature of the claim in terms of whether it was being brought against the Commissioner individually or in his official capacity.

In *Chilivis v. National Distributing Co.*,²²¹ the plaintiff filed his action against “Nick P. Chilivis, State Revenue Commissioner,” alleging that the Commissioner issued several orders and held a hearing without the authority to do so.²²² The court held:

There is no merit in the contention of the Commissioner that National’s action for declaratory judgment and injunction is barred by the doctrine of sovereign immunity. The rule that the State may not be sued without its consent *is not applicable* to an action where injunction is sought to prevent the commission of an alleged wrongful act by an officer *of the State* acting under color of office but without lawful authority and beyond the scope of official power.²²³

case on the nature of the liability of state officials, was “taut with analytical tension” Sentell, *supra* note 13, at 424. There,

the court initially approached the action as one for “personal liability.” The case was not governed by the “different rule” prevailing when an officer is sued in his “official capacity.” Even so, however, the court denied that the officer was being sued as an individual. Rather, he had been sued solely because of the position he held,” and “the act complained of could only have been done in the official capacity of defendant.”

Id. (footnotes omitted).

²¹⁸ 152 S.E.2d 878 (Ga. 1966).

²¹⁹ *Id.* at 880.

²²⁰ *Id.* at 882.

²²¹ 238 S.E.2d 431 (Ga. 1977).

²²² *Id.* at 431. Though this case was decided after the 1974 amendment, its reasoning is consistent with the prior cases and thus demonstrates courts’ understandings of the pre-1974 case law. In fact, it is because of this similarity that the court in *Sustainable Coast* disregarded this case in its analysis.

²²³ *Id.* at 433 (emphasis added).

Hence, in addition to declining to inquire whether the suit was being brought against the defendant in his individual or official capacity, the court seems to have blatantly acknowledged that the acts that the plaintiff sought to enjoin were wrongful acts *of the State*. By this time, then, the courts appear to have tacitly acknowledged the futility of separating State versus individual acts in these types of cases.

Interestingly, both *Undercofler* and *Chilivis* cited *Dennison Manufacturing* as authority for their holdings, even though that case undertook extensive analysis of the nature of the claim as against the defendant individually or in his official capacity.²²⁴ Even if *Undercofler* and *Chilivis* can be interpreted as assuming without deciding that the cases were brought against the defendants solely as individuals,²²⁵ they demonstrate that the key rationale for these holdings was no longer the “individual” character of the acts. Instead, it is the *legality* of the acts that controls. By simply paying “lip service” to the old legal fiction, and instead focusing on the alleged illegality of the actions at issue, courts signaled an understanding that enjoining “the State” versus enjoining an “errant official” is a distinction without a difference.

Even more significantly, some cases were manifestly brought against government officials *in their official capacities*, yet were not found to implicate sovereign immunity. This provides perhaps the strongest evidence that the courts had effectively abandoned the legal fiction of individual versus official capacity suits in the context of suits seeking to enjoin the illegal or ultra vires acts of the State and its agents. In a 1953 case, *Irwin v. Crawford*,²²⁶ a group of taxpayers sought to enjoin “certain named persons *as members of the Wheeler County Board of Education* and the County School Superintendent” from consolidating two schools on the ground that the Board lacked authority to do so.²²⁷ The language “as members of” clearly establishes that the plaintiffs filed suit against the members in their official capacities.²²⁸ Yet despite this, the court did not refuse to consider the case on the grounds of sovereign immunity. Rather, the court noted that it had “consistently said that the county boards of education have jurisdiction of these local controversies and that

²²⁴ *Chilivis*, 238 S.E.2d at 433; *Undercofler*, 152 S.E.2d at 882.

²²⁵ See, e.g., *Int'l Bus. Machs. Corp. v. Evans*, 453 S.E.2d 706, 711 (Ga. 1995) (Benham, J., dissenting) (citing these cases along with *Cannon* and others to show that only suits against officers as individuals “stripped of his official character” have been held outside the scope of sovereign immunity). Again, however, the language in *Chilivis* referring to enjoining *State acts* suggests that while *Dennison*'s result influenced the case, the fiction it employed had been discarded, at least with respect to suits seeking injunctive relief.

²²⁶ 78 S.E.2d 609 (Ga. 1953).

²²⁷ *Id.* at 609 (emphasis added).

²²⁸ See *Ramsey v. Hamilton*, 182 S.E. 392, 396 (Ga. 1935) (holding that a suit brought against defendant “*as comptroller-general of the State of Georgia*” was “manifestly” an official capacity suit because the description was “the antithesis[i]s of descriptio personae”). *Contra* *Dennison Mfg. Co. v. Wright*, 120 S.E. 120, 122 (Ga. 1923) (holding that a suit brought against defendant, “who is comptroller general of the state of Georgia,” was solely *descriptio personae*).

courts will not interfere provided the proposed action is not illegal or contrary to law.”²²⁹ Therefore:

This language means that, if the actions of the county boards are illegal or contrary to law, the courts will intervene in order to prevent the board from doing something illegal or contrary to law. “There is no doubt but that equity will exercise jurisdiction to restrain acts or threatened acts of public corporations or of public officers, boards, or commissions which are ultra vires and beyond the scope of their authority, outside their jurisdiction, unlawful or without authority”

This court has many times recognized the right of a taxpayer to apply to a court of equity to prevent public officers from taking action or performing acts which they have no authority to do.²³⁰

In another case, *Georgia Power Co. v. Georgia Public Service Commission*,²³¹ the court relied, in part, on *Irwin v. Crawford* to hold that Georgia Power was entitled to seek injunctive relief against the Georgia Public Service Commission where the Commission sought to exercise regulatory power absent statutory authority to do so.²³² Remarkably, this was despite the fact that the Commission itself was named as a defendant and not merely its individual members.²³³ And, in *Head v. Browning*,²³⁴ a group of citizens, residents, and taxpayers sought injunctive relief against “Dixon Oxford, as Revenue Commissioner of the State of Georgia . . . to restrain and enjoin the defendant State Revenue Commissioner from issuing . . . a state liquor license” on the ground that he lacked the authority to do so.²³⁵ The court cited its holdings in *Irwin*, *Georgia Power Co.*, and several other cases to affirm the right of the plaintiffs to seek

²²⁹ *Irwin*, 78 S.E.2d at 611 (citing *Colston v. Hutchinson*, 67 S.E.2d 763 (Ga. 1951)).

²³⁰ *Id.* (citations omitted). Despite Justice Benham’s statement in *Sustainable Coast* that *Irwin* may no longer be cited authoritatively in light of the 1991 amendment, see Ga. Dep’t of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 755 S.E.2d 184, 190–91 (Ga. 2014), Justice Benham did cite the case as authority in a 1994 case, *Powell v. Studstill*. There, writing for the majority, Justice Benham ruled that a trial court erred in issuing an injunction against a school board, but would have been justified in doing so had the board’s action been contrary to law or outside its authority. *Powell v. Studstill*, 441 S.E.2d 52, 54 (Ga. 1994) (citing *Irwin*, 78 S.E.2d at 611). This point of law from *Powell* was affirmed in 1995 in another opinion authored by Justice Benham. See *Wilcox Cnty. Sch. Dist. v. Sutton*, 461 S.E.2d 868, 870 (Ga. 1995).

²³¹ 85 S.E.2d 14 (Ga. 1954).

²³² *Id.* at 19.

²³³ See *id.* *Georgia Power Co.* was cited by *Chilivis* in support of its holding, described *supra* notes 221–24 and accompanying text.

²³⁴ 109 S.E.2d 798 (Ga. 1959).

²³⁵ *Id.* at 799.

injunctive relief against the Commissioner to prevent him from acting without lawful authority.²³⁶

In essence, by the time the 1974 amendment was ratified, Georgia courts routinely permitted suits seeking injunctive relief to proceed where the suits alleged that the State and its agents were engaged in illegal or ultra vires conduct. Furthermore, even though early case law emphasized the distinction in this context between suits brought against state officials as individuals and suits brought against them in their official capacities, later case law had all but abandoned that legal fiction. Rather, the rule that evolved centered on an analysis of whether the acts in question were allegedly²³⁷ illegal or ultra vires. Even where personal liability in these cases was arguably assumed or implied, it was clear that courts grew to recognize that unlike in suits seeking money damages, suits seeking injunctive relief must, as a matter of pure logic, bind the State.²³⁸ Thus, the recurring theme that illegal or ultra vires acts do not constitute “state acts” should be understood to mean that such acts are

²³⁶ *Id.* at 801.

²³⁷ One interesting issue, beyond the scope of this Article but worthy of further research, would be consideration of the nature of proof required in order to maintain a case seeking injunctive relief where illegal or ultra vires acts are alleged. Many of the cases, including *IBM* and the court of appeals opinion in *Sustainable Coast*, would appear to require only that a plaintiff *allege* that the State is acting illegally or ultra vires in order to survive the State’s motion to dismiss on sovereign immunity grounds. *Int’l Bus. Machs. Corp. v. Evans*, 453 S.E.2d 706, 709 (Ga. 1995), *overruled by* *Ga. Dep’t of Natural Res. v. Ctr. for a Sustainable Coast, Inc.*, 755 S.E.2d 184 (Ga. 2014); *Ctr. for a Sustainable Coast, Inc. v. Ga. Dep’t of Natural Res.*, 734 S.E.2d 206, 209 (Ga. Ct. App. 2012), *rev’d*, 755 S.E.2d 184 (Ga. 2014). This suggests that plaintiffs need only properly state a claim and that courts should analyze claims under the fairly lenient 12(b)(6) standard. *See* GA. CODE ANN. § 9-11-12(b)(1) (2014); *Scouten v. Amerisave Mortg. Co.*, 656 S.E.2d 820, 821 (Ga. 2008) (explaining when a motion to dismiss under 12(b)(6) may be granted). On the other hand, the Georgia Court of Appeals has held that sovereign immunity is an issue of subject matter jurisdiction. *See, e.g., Dep’t of Transp. v. Dupree*, 570 S.E.2d 1, 5 (Ga. Ct. App. 2002) (“Sovereign immunity . . . raises the issue of the trial court’s subject matter jurisdiction to try the case . . .”). Moreover, where a plaintiff seeks to benefit from a *waiver* of sovereign immunity, the plaintiff has the burden of establishing that sovereign immunity has been waived. *Coosa Valley Technical Coll. v. West*, 682 S.E.2d 187, 190 (Ga. Ct. App. 2009). In the case of waiver, though, sovereign immunity will apply *unless* it has been waived. With suits alleging illegal or ultra vires acts and seeking only injunctive relief, sovereign immunity *is not applicable*.

²³⁸ It could be contended that cases truly involving errant officials could arise where a rogue government employee acts entirely on his or her own and without the direction or approval of anyone else within the relevant state department or agency. These cases arguably could, and should, be brought against such defendants in their individual capacities. However, one would imagine that the State itself—acting, of course, through the individual’s supervisors or superiors—learning that its agent was taking such actions, would terminate or otherwise discipline the employee. Where, however, illegal or ultra vires acts are authorized by the highest authorities within a State department or agency and become agency or department-wide practice and procedure, it is, as argued above, illogical to contend that those actions are not really the State’s.

stripped of the protection of sovereign immunity entirely. It does not mean that, rather than being “state acts,” they are acts of errant officials acting individually, merely purporting to act on behalf of the State. The case law analyzed in this Article, including the Supreme Court of Georgia’s opinion in *Sustainable Coast*, reveals the inherent absurdity of that claim. In the majority of the cases examined herein, the acting state officials had no apparent personal purpose or ulterior motive behind their acts. Furthermore, in many of the cases, particularly those involving school boards, the acts cannot even be fairly characterized as “individual.” Rather, these were decisions and actions undertaken systemically by government departments and agencies as a whole. The illegality of a policy or act means that sovereign immunity does not protect it from citizens’ suits. It does *not* mean that the act is, as an empirical or practical matter, not one undertaken by “the State.”

2. The 1974 Amendment Incorporated, Rather than Altered, the Existing Meaning of Sovereign Immunity in Georgia

The court in *Sustainable Coast* disregarded pre-1974 cases, finding that “[t]he 1974 amendment provided that sovereign immunity was expressly reserved and could only be waived by our Constitution or legislature.”²³⁹ The court did acknowledge that two cases decided *after* the adoption of the 1974 amendment held that sovereign immunity did not apply to suits alleging illegal action.²⁴⁰ However, it disregarded those cases on the basis that they did not explicitly address the effect of the 1974 amendment on the doctrine of sovereign immunity in Georgia.²⁴¹

The court wrongly refused to consider these cases. As discussed above in Part III.A.2, the Georgia General Assembly is presumed to have been aware of the existing law at the time it proposed, and the voters ratified, the amendment. “‘Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption.’”²⁴² Proper interpretation of the 1974 amendment’s reference to “sovereign immunity” requires more than simply locating “sovereign immunity” in a dictionary and consulting the definition. At the time the amendment was adopted, the doctrine of sovereign immunity *did not bar suits seeking to enjoin the illegal or unauthorized acts of public boards or officials*.²⁴³

It is true, as the *Sustainable Coast* court noted, that the post-1974 cases holding that sovereign immunity did not bar suits for injunctive relief did not explicitly

²³⁹ *Sustainable Coast*, 755 S.E.2d at 188.

²⁴⁰ *See id.* at 190–91.

²⁴¹ *See id.*

²⁴² *Gwinnett Cnty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 777 (Ga. 2011) (quoting *Clarke v. Johnson*, 33 S.E.2d 425, 428 (Ga. 1945)).

²⁴³ *See, e.g., Dep’t of Human Res. v. Briarcliff Haven, Inc.*, 233 S.E.2d 844 (Ga. Ct. App. 1977).

undertake a historical analysis of sovereign immunity or even mention the recent constitutional change.²⁴⁴ However, it is certainly plausible that those courts simply tacitly assumed that the 1974 amendment had no impact on the *existing* definition of sovereign immunity in Georgia.²⁴⁵ As noted in *Sheley v. Board of Public Education for Savannah*,²⁴⁶ the seminal case holding that the doctrine of sovereign immunity was enshrined in the Constitution after 1974, “Because of the adoption of [the 1974] constitutional amendment, and it is now effective as a part of our Constitution, we hold that the immunity rule *as it has heretofore existed* in this state cannot be abrogated or modified by this court.”²⁴⁷

The court in *Sheley* concluded that after the 1974 amendment, “changes in the immunity rule, and the extent of such changes and in what circumstances, are *now* solely within the domain of the General Assembly of Georgia.”²⁴⁸ This altered the prior rule, discussed in *Crowder v. Department of State Parks*,²⁴⁹ that sovereign immunity “was judicially created and . . . could be judicially abrogated.”²⁵⁰ And it does provide support for the *Sustainable Coast* court’s ruling that the 1991 amendment—which restored sovereign immunity to its constitutional status under the 1974 amendment—reinstated the General Assembly’s exclusive power to *waive* sovereign immunity by eliminating the insurance waiver. Nothing in *Sheley*, however, suggests that its holding interpreted the 1974 amendment as altering the then-“*heretofore existing*” doctrine of sovereign immunity in Georgia.²⁵¹ This is consistent with the textualist under

²⁴⁴ Even if sovereign immunity was not raised by the government defendants in those cases, this is not a particularly persuasive explanation for the courts’ failure to consider the issue: sovereign immunity is a question of subject matter jurisdiction, which courts are entitled to—and arguably have a duty to—raise *sua sponte*. See, e.g., *Dep’t of Transp. v. Dupree*, 570 S.E.2d 1, 5 (Ga. Ct. App. 2002) (“Sovereign immunity . . . raises the issue of the trial court’s subject matter jurisdiction to try the case . . .”).

²⁴⁵ This conclusion is, of course, speculative. Nevertheless, it seems at least as plausible as the opposing assumption: that several courts considering sovereign immunity in the post-1974 constitutional landscape either failed to realize that a major change to the State’s constitution had occurred, or that the courts realized that an important change had occurred and neglected to analyze the issue in their opinions. More likely is the conclusion that the courts understood the amendment to incorporate the *existing* doctrine of sovereign immunity into the constitution.

²⁴⁶ 212 S.E.2d 627 (Ga. 1975).

²⁴⁷ *Id.* at 628 (emphasis added).

²⁴⁸ *Id.* at 627–28 (emphasis added).

²⁴⁹ 185 S.E.2d 908 (1971).

²⁵⁰ *Shelley*, 212 S.E.2d at 627 (noting the treatment of sovereign immunity in *Crowder*).

²⁵¹ Some opinions analyzing the 1974 amendment have emphasized its reference to the sovereign immunity of the State *from suit*, for example, finding that there was no basis to distinguish between cases sounding in tort versus those in contract because the broad term “suit” would include both types of action. *Dep’t of Human Res. v. Briarcliff Haven, Inc.*, 233 S.E.2d 844, 846 (Ga. Ct. App. 1977). On this basis, the Georgia Court of Appeals held that “opinions of the courts of this state dealing with the judicial application of the rule prior to the 1974 amendment are not applicable to claims against the state arising since the 1974

standing that meaning should not be determined merely within the vacuum of the page; rather, context, including historical understandings of constitutional terms, must be taken into account in the interpretive inquiry.

The text of the 1974 amendment itself provides ample support for this reading of *Sheley*. The relevant text of the 1974 amendment provides that “[n]othing contained herein shall constitute a waiver of *the immunity* of the State from suit, but *such sovereign immunity* is expressly reserved”²⁵² First, the use of the definite article “the” in the phrase “the immunity of the State” denotes that an existing phenomenon is being referenced,²⁵³ which makes sense given the extensive common law history of sovereign immunity in the State. The following clause referring to “such” sovereign immunity again denotes in this context that the term at issue—sovereign immunity—is one that carries an existing meaning.²⁵⁴ Finally, the provision’s description of sovereign immunity being “reserved” strongly conveys the idea that the 1974 amendment was designed to incorporate the *existing* doctrine of sovereign immunity. Typical definitions of the term “reserved” (or its verb equivalent, “reserve”) include terms like kept, retained, and held on to.²⁵⁵ One cannot, as a matter of linguistics or logic, keep or retain that which one does not have in the first place. The foregoing analysis demonstrates that the most natural reading of the constitutional text is that it incorporated *the* sovereign immunity of the State *such as it already had*. Overall, the language of the text *itself* plainly incorporates the 1974 amendment’s historical

amendment.” *Id.* That opinion’s language has been endorsed repeatedly by Justice Benham. *See, e.g., S. LNG, Inc. v. MacGinnitie*, 719 S.E.2d 473, 475 (Ga. 2011) (Benham, J., dissenting). Within the context of examining the 1974 amendment’s effect on suits seeking injunctive relief, the problem again is that while these opinions analyze the meaning of the term “suit,” they fail to inquire into the meaning of the phrase “sovereign immunity.” The 1974 amendment notes that its authorization to create a Court of Claims does not “constitute a waiver of *the immunity* of the State from suit, but *such* sovereign immunity is expressly reserved” GA. CONST. of 1977, art. VI, § 5, para. 1 (emphasis added). Thus, the suits encompassed by this provision must be read in light of what *the sovereign immunity* of the state prohibits. As explained, the doctrine of sovereign immunity at the time it was embedded in Georgia’s constitution did not encompass suits seeking injunctive relief for illegal and ultra vires acts.

²⁵² GA. CONST. of 1977 art. VI, § 5, para. 1 (emphasis added).

²⁵³ A typical definition for the word “the” is “used to indicate a person or thing that has already been mentioned or seen or is clearly understood from the situation” *The Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/the> (last visited May 1, 2015).

²⁵⁴ Although “such” can be used in a variety of ways, because it follows the previous reference to “the immunity of the State,” the most plausible definition of “such” in this context is “of the character, quality, or extent previously indicated or implied” *Such Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/such> (last visited May 1, 2015).

²⁵⁵ *See Reserve Definition*, CAMBRIDGE DICTIONARIES ONLINE, <http://dictionary.cambridge.org/us/dictionary/american-english/reserve> (last visited May 1, 2015); *Reserve Definition*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/reserve (last visited May 1, 2015); *Reserved Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/reserved?show=0&t=1411656974> (last visited May 1, 2015).

context, even if one discards textualism's directive that context must be employed to divine the meaning of text in any case.

In *IBM*, the court recognized an "exception" to sovereign immunity, holding that the doctrine has *never* prohibited citizens from bringing suits for injunctive relief based on government officials' ultra vires or illegal acts.²⁵⁶ The *Sustainable Coast* court did not overrule *IBM* on the ground that this historical proposition was wrong.²⁵⁷ Rather, the foundation of the court's holding was that the 1991 amendment restored the doctrine of sovereign immunity to the status it held under the 1974 amendment.²⁵⁸ The court determined that this meant that suits such as those in *IBM* and *Sustainable Coast* were barred by sovereign immunity. Essentially, then, the court assumed without deciding that the 1974 amendment entirely abrogated prior case law.

As explained above, this conclusion is flawed. The inapplicability of sovereign immunity to suits seeking injunctive relief to prevent illegal or ultra vires acts became constitutional law with the passage of the 1974 amendment. When the General Assembly proposed and voters ratified the 1974 amendment, they did so using the term "sovereign immunity" within its historical context as shaped and refined through precedent of the Georgia courts. The 1974 amendment did not alter the right of citizens to prevent the State from acting illegally or beyond the scope of its authority. When the State engaged in such acts, sovereign immunity was simply never implicated:

²⁵⁶ The *IBM* court's use of the term "exception" seems to have unintentionally contributed to the *Sustainable Coast* court's ammunition for overruling the older case. In *Sustainable Coast*, much was made of whether or not courts had the power to "create" judicial exceptions to the doctrine *after* the 1974 amendment. Although the *IBM* court described its holding as merely "recognizing" an exception, it did appear to reject early courts' rationales for permitting suits like *IBM* to proceed despite sovereign immunity. As this Article demonstrates, however, even before the 1974 amendment, Georgia courts had de-emphasized the legal fiction rationale and focused more heavily on whether the suit sought to enjoin allegedly illegal or ultra vires State action. And, rather than reasoning that illegal acts are not "State acts," the courts at least tacitly acknowledged that illegal acts may constitute State acts, but that such acts are not protected by the doctrine of sovereign immunity. This progression could be described as the creation of an "exception" to sovereign immunity. Crucially, however, even if so described, this exception was created by courts *before the adoption of the 1974 amendment*. Once created, exceptions become part of the rules to which they apply. See FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 45 & n.7 (1991).

²⁵⁷ Justice Benham and Justice Huntstein's dissent in *IBM* suggests that they would perhaps disagree with the substantive historical conclusions reached by the majority in *IBM*. Nevertheless, this issue was entirely discarded in *Sustainable Coast*, as evidenced by the court's refusal to consider any cases predating the 1974 amendment.

²⁵⁸ See Ga. Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 755 S.E.2d 184, 189 (Ga. 2014) (citing Sentell, *supra* note 13 as "recognizing that the 1991 amendment 'effects a major constitutional retreat from 1983, and reclaims an earlier approach' returning the 'power of immunity waiver exclusively to the General Assembly'" (quoting Sentell, *supra* note 13)). Given the similarities between the language of the 1974 and 1991 amendments, this conclusion is certainly warranted.

The rule did not apply in the first instance. The *Sustainable Coast* court's preoccupation with whether or not the 1991 amendment permitted *IBM* to "create an exception" to the doctrine is entirely inapposite. Suits seeking to enjoin illegal or ultra vires acts are already excluded from the doctrine's operation.

CONCLUSION

Sustainable Coast correctly held that the 1991 amendment to Georgia's constitution restored sovereign immunity to its status under the 1974 amendment. The problem with the ruling lies in the court's failure to consider the historical context of both amendments. Case law developing the doctrine prior to 1974 was a relevant and significant part of that context and should have been considered by the court in a proper textualist approach to constitutional interpretation under Georgia jurisprudence. And, under that law, Georgia courts had correctly recognized that at times, the State, through its agents, *does in fact* act illegally or outside the scope of its authority. It defies common sense and justice to attribute State policies originating from the highest levels of authority to individual, rogue or errant state officials. Thus, courts held such actions outside the cloak of sovereign immunity, permitting citizens to insist that their government act within the confines of the laws it creates and enforces.

In *Sustainable Coast*, the Supreme Court of Georgia minimized the implications of its holding, noting that the solution for plaintiffs seeking to challenge allegedly illegal acts by government officials is to sue the officials in their individual capacities.²⁵⁹ The court acknowledged, however, that such suits may be barred by qualified, or official, immunity.²⁶⁰ Regardless, the court's recent attempts to clarify the doctrine of sovereign immunity have come at the price of oversimplification and inaccuracy—ironically, the same criticisms the Court raised with respect to its prior opinion in *IBM*. By falling victim to a "hyperliteral" analysis of the text of the 1991 amendment, the Supreme Court of Georgia has reshaped Georgia law to reflect principles considered insensible and outdated over half a century ago.

²⁵⁹ *Id.* at 192.

²⁶⁰ *Id.*