

SUPREME COURT OF THE UNITED STATES

No. 91-1729

UNITED STATES, ET AL., PETITIONERS v.
TEXAS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT
[April 5, 1993]

JUSTICE STEVENS, dissenting.

As the Court correctly notes, the requirement that private parties must pay prejudgment interest on contractual debts owed to the United States is a common-law rule of long standing. *Ante*, at 4. Over a century ago we recognized an equally well-established exception to that rule: the United States is not entitled to recover interest from a State unless the State's consent to pay such interest has been expressed in a statute or binding contract. *United States v. North Carolina*, 136 U. S. 211 (1890).¹ The reason for this exception is not any sovereign immunity attributable to a State,² but the venerable presumption that a sovereign State is always ready,

¹"Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers. *United States v. Sherman*, 98 U. S. 565; *Angarica v. Bayard*, 127 U. S. 251, 260, and authorities there collected; *In re Gosman*, 17 Ch. D. 771." *United States v. North Carolina*, 136 U. S., at 216.

²The individual States retain no sovereign immunity against the Federal Government. *United States v. Texas*, 143 U. S. 621 (1892).

willing and able to discharge its obligations promptly.³

³“Judgments, it is true, are by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is no part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. *But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes.*” *United States v. Sherman*, 98 U. S. 565, 567-568 (1879) (emphasis added). See also *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 336 (1920).

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The presumption that a sovereign State is “always ready to pay what it owes”⁴ may well have been just as fictional as the presumption that the King could do no wrong, but it nevertheless was firmly embedded in the common law.⁵ Moreover, even today the tradition of according special respect to a sovereign State whenever it is subjected to the coercive powers of judicial tribunals is very much alive. See *e.g.*, *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U. S. ___, ___ (1993) (slip op., at 7). The ancient common law presumption and a continuing recognition of “the importance of ensuring that the State's dignitary interests can be fully vindicated,” *ibid.*, best explain why Congress deliberately omitted any provision for the collection of interest from a sovereign State when it enacted the Debt Collection Act in 1982.⁶

The Court is also correct in noting that we are reluctant to infer a legislative abrogation of the common law. *Ante*, at 4. We presume that Congress understands the legal terrain in which it operates, see *Cannon v. University of Chicago*, 441 U. S. 677, 698–699 (1979), and we therefore expect Congress to state clearly any intent to reshape that terrain.

⁴See n. 3, *supra*.

⁵See, *e.g.*, *Attorney General v. Cape Fear Navigation Co.*, 37 N. C. 444, 454 (1843) (“[T]he general rule is, that the State never pays interest, unless she expressly engages to do so”); *State v. Thompson*, 10 Ark. 61 (1849).

⁶Title 31 U. S. C. §3717(a) requires the appropriate government official to charge interest “on an outstanding debt on a United States Government claim owed by a person,” but 31 U. S. C. §3701(c) provides that for purposes of this section the term “‘person’ does not include an agency of the United States Government, of a State government, or of a unit of general local government.”

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Before we can apply this reluctance to infer legislative abrogations of the common law, however, we must determine what that terrain was—or at least how it might have been perceived—when Congress acted; Congress cannot think it necessary, and we should not expect it, to state clearly an intent to abrogate a common-law rule that does not exist.

When Congress enacted the Debt Collection Act of 1982, the question whether interest might ever be collected from a sovereign State unless explicitly authorized was undecided by this Court. We had never held that the United States could demand prejudgment interest on a debt owed to it by a State. Not until five years later, in *West Virginia v. United States*, 479 U. S. 305 (1987), did we hold for the first time that in some circumstances the United States may demand prejudgment interest from the States themselves. The Court therefore rewrites the history of our common law when it predicates its entire analysis of this case on what it creatively describes as “the United States’ federal common-law right to collect prejudgment interest on debts owed to it by the States.” *Ante*, at 1. Only through hindsight—or by crediting Congress with a prescience as to what the common law *would become*—can the Court find that the 97th Congress did not intend to abrogate a rule that did not then exist.⁷ Congress had every

⁷So long as we are going to credit the Congress with a *post hoc* understanding of the common law, we might as well refer to the *post hoc* comments of the author of the amendment, Senator Percy:

“Prior to September 27, 1982, neither Senate bill 1249 nor House bill 4613 contained a provision exempting any entity from the Act. Several interest groups, however, presented the view that sections 10 and 11 of the Act, except in cases where fraud was evident, should not be applied to states or local governments because they constituted a different

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reason to think it was writing on a “clean slate,” *ante*, at 4-5, when it decided to exclude the State from its definition of the class of persons who must pay interest on debts to the United States. There was no occasion for Congress to specifically abrogate a principle that it had no reason to think stood in its way.

In *Board of Comm'rs of Jackson County v. United*

class of debtor than did private individuals and would suffer great harm if the federal government attempted to assess interest or apply administrative offsets against them. These same concerns had been presented in hearings before the House Committee on the Judiciary during the House's consideration of the Debt Collection Act of 1981, H.R. 4614.

“In response to these concerns, on September 27, 1982, I proposed an amendment to S. 1249. This amendment, UP amendment 1299, amended provisions in Sections 10 and 11 of the Act, stating that ‘the term “person” does not include any agency of the United States, or any state or local government.’ This provision effectively took federal agencies, states and local governments out of the Act, but retained sufficient flexibility to permit Congress to legislatively pick and choose according to circumstances, those situations in which the government might assess interest against those entities exempted by the Act. As enacted, the Debt Collection Act of 1982 appears clear on this point. It was not anticipated that federal agencies would attempt to invoke common law authority, which, *if it exists with respect to interest assessment and administrative offset against states and local governments*, was abrogated by sections 10(e)(2) and 11(e)(8) of the Act.” Letter of November 21, 1983 from Senator Charles H. Percy to the Comptroller General (emphasis added). See *Texas v. United States*, 951 F. 2d 645, 649-650 (CA5 1992);

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States, 308 U. S. 343 (1939), the Court held that the United States, suing on behalf of a Native American, could *not* recover prejudgment interest from a county even though the county had improperly collected those taxes. While noting that “interest in intergovernmental litigation has no . . . roots in history,” *id.*, at 351, the Court did not rule out the possibility that in an unusual case, considerations of fairness might make it appropriate to collect such interest from a state agency. See *id.*, at 352. Only to that small extent, therefore, was any aspect of our decision in *Board of Comm'rs* “reaffirmed,” *ante*, at 4, in *West Virginia*, *supra*.

In fact, in *West Virginia*, we rejected the balancing of equities that *Board of Comm'rs* had suggested might be the only basis for charging a State with prejudgment interest.⁸ There, the State of West

Pennsylvania Dept. of Public Welfare v. United States, 781 F. 2d 334, 341, n. 10 (CA3 1986). Of course, the significance of a comment by an individual legislator is discounted when made “`after passage of the Act,” see *Bread Political Action Committee v. FEC*, 455 U. S. 577, 582, n. 3 (1982). This Court's use of the 1987 opinion in the *West Virginia* case to describe the state of the common law in 1982 should be similarly discounted.

⁸“The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. *United States v. Sanborn*, 135 U. S. 271, 281; *Billings v. United States*, 232 U. S. 261.” *Board of Comm'r's of Jackson County v. United Sates*, 308 U. S. 343, 352 (1939). In 1987 the Court rejected the argument that “whether interest had to be paid depended on a balancing of equities between the parties.” *West Virginia v. United States*, 479 U. S. 305, 311, n. 3.

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Virginia had refused to reimburse the Federal Government for costs advanced to it under the Disaster Relief Act of 1970. The Court held that “any rule exempting a sovereign from the payment of prejudgment interest not only does not apply of its own force to the State's obligations to the Federal Government, cf. *Library of Congress v. Shaw*, 478 U. S. 310 (1986), but also does not represent a policy the federal courts are obliged to further.” 479 U. S., at 311-312 (footnotes omitted). This was the first statement by this Court suggesting that the States might be generally liable for prejudgment interest on the contractual claims brought by the Federal Government. And, even though we came close to saying in *West Virginia* that such interest is generally available, we did not go that far. Even in 1987—five years after the Debt Collection Act was passed—it was not clear to us, to Congress, or to the States, that the obligation of a State to pay prejudgment interest to the Government would extend to a typical contract claim.

Thus, even though the Court today suggests that its decision is merely an application of *Board of Comm'rs* and *West Virginia*, it actually takes a significant and independent step toward equating the Government's right to collect prejudgment interest from the States with the Government's right to demand prejudgment interest from *all* private parties in *every* case.⁹ Even if such an equation were well advised, which it may well be, it would say nothing about whether Congress had any reason to know in 1982 that the common law

⁹Whatever it says about reserving discretion about when interest should be imposed, and at what rate, *ante*, at 7, the Court has tacitly authorized an extension of the rule on which we relied in *West Virginia* by affirming its application to a claim for prejudgment interest on a strict liability, loss-spreading provision of the Food Stamp Program.

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was moving in that direction, much less that it had already arrived there. Yet the Court supports today's decision because the 97th Congress did not clearly state its intention to abrogate a rule that we now make clear for the first time.

My point, in sum, is not that the States had an absolute common law immunity from a claim for prejudgment interest in 1982; it is only that the State's *obligation* to pay such interest was so much *less than* a confirmed rule that we cannot say that the 1982 enactment "left [it] in place," *ante*, at 9. "[F]avoring the retention of long-established and familiar principles," *Isbrandtsen Co. v. Johnson*, 343 U. S. 779, 783 (1952), does not mean favoring the retention of rules that have not yet fallen into place.

I respectfully dissent.