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## The Collision of the Takings and State Sovereign Immunity Doctrines

Eric Berger

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# The Collision of the Takings and State Sovereign Immunity Doctrines

Eric Berger\*

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### I. Introduction

Among the Rehnquist Court's more striking accomplishments are the invigorated takings and state sovereign immunity doctrines. At first glance, these developments might be characterized as conservative jurisprudence in line with other recent decisions. Expanded takings doctrine, after all, champions property rights and restrains government from burdening landowners with the cost of regulation. Eleventh Amendment sovereign immunity,<sup>1</sup> like the Court's other federalism decisions, protects the states' dignity and curtails the federal government's power. From a broad level of generality, these doctrines seem part of a common judicial project.

And yet, though they are products of the same Court, there is reason to think that takings and state sovereign immunity cases are fundamentally incompatible with each other. On the one hand, the Court's recent takings cases often expand the instances in which a property owner can sue the government to recover just compensation for a taking of property. On the other hand, the state sovereign immunity cases make it easier for state governments to rely on sovereign immunity to shield them from suit. Of course, this rough characterization misses terrific doctrinal complexities but, at their core, these two doctrines do not mesh easily.

Curiously, despite the Court's recent attention to these areas, little has been made of the seeming incompatibility of such robust takings and sovereign immunity precedents. In recent memory, the Supreme Court has acknowledged the paradox rarely, most famously in 1987, in a footnote in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,<sup>2</sup> in which the Court offhandedly asserted that the Just Compensation Clause trumps

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1. My references to "Eleventh Amendment sovereign immunity" refer generally to state sovereign immunity. However, as discussed in Parts III, V, and VI, the Court's recent decisions in *Seminole Tribe* and *Alden* seem to root state sovereign immunity in pre-constitutional common law grounded in the structure of the Constitution, thus expanding the doctrine far beyond the Eleventh Amendment's textual confines.

2. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

sovereign immunity.<sup>3</sup> This *First English* footnote might, in fact, have it right, but the issue requires greater exploration. First, the footnote is dictum, because the plaintiffs in *First English* sued the county, not the state. Second, state and lower federal courts are split on the question, and many decisions have neglected to cite, let alone follow, the footnote.<sup>4</sup> Third, both areas of law have

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3. Footnote nine reads:

The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.

*Id.* at 316 n.9 (internal citations omitted).

4. The most thorough state judicial treatment of this problem is the Oregon Court of Appeals's decision in *Boise Cascade Corp. v. Oregon*, 991 P.2d 563 (Or. Ct. App. 1999). The court there concluded that "*Alden* should not be read so broadly as to dictate that states may not be sued in state courts on federal takings claims unless they have specifically waived their sovereign immunity." *Id.* at 569; *see also* Manning v. Mining & Minerals Div., 90 P.3d 506, 509 (N.M. Ct. App. 2004) (declining to follow *Boise Cascade* and finding sovereign immunity to bar takings claim), *cert. granted*, Manning v. N.M. Energy & Minerals, 92 P.3d 11 (N.M. 2004); SDDS, Inc. v. South Dakota, 650 N.W.2d 1, 9 (S.D. 2002) (following *Boise Cascade*).

Federal appellate courts have generally ruled that the Eleventh Amendment does bar takings suits, but they have not engaged with the issue carefully. Indeed, most fail to even cite *First English*. *See, e.g.*, Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1277-79 (11th Cir. 2000) (holding that the Eleventh Amendment bars takings claims in federal court, in part because state courts provide means for redress, but failing to cite *First English*); John G. & Marie Stella Kenedy Mem'l Found. v. Mauro, 21 F.3d 667, 674 (5th Cir. 1994) (finding that the Eleventh Amendment bars Fifth Amendment inverse condemnation suits brought in federal district court, but failing to cite *First English*); Robinson v. Ga. Dep't of Transp., 966 F.2d 637, 640 (11th Cir. 1992) (same); Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616, 618-20 (9th Cir. 1992) (deciding that inverse condemnation suits are barred in federal district court, without citing *First English*); Citadel Corp. v. P.R. Highway Auth., 695 F.2d 31, 33-34 n.4 (1st Cir. 1982) (finding the same before the Supreme Court had decided *First English*); Garrett v. Illinois, 612 F.2d 1038, 1040-41 (7th Cir. 1980) (finding a takings claim against the state barred by the Eleventh Amendment); *see also* Esposito v. S.C. Coastal Comm'n, 939 F.2d 165, 173 n.3 (4th Cir. 1991) (Hall, J., dissenting) (arguing that Eleventh Amendment must yield to takings claim, even though majority notes that plaintiffs did not challenge on appeal district court's ruling that Eleventh Amendment barred damages). The only federal appellate case to deal with these issues in any depth is the Sixth Circuit's recent decision, *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 1733 (2005), which rules that the Eleventh Amendment bars takings suits against the state in federal court, but would not do so in state court. *Id.* at 526-28. Unlike most other federal appellate decisions in this area, *DLX* does cite *First English*, *id.* at 527, but nevertheless finds that state sovereign immunity bars takings actions for damages against the state in federal court. *Id.* at 528. It is noteworthy that state and federal courts have tended to go in opposite directions on this issue, especially in light of *Alden v. Maine*, which arguably might require symmetrical immunity rules between the state and

changed significantly since 1987. Fourth, even if correct, the footnote is terse and does not wrestle with the issue's real complexities. Indeed, the conflict exposes deep tensions in our constitutional framework worthy of sustained analysis. Fifth, the doctrinal collision raises important, if more abstract, methodological questions about how to arbitrate between competing constitutional provisions.

It is interesting that the problem has received so little attention. The Court itself might have addressed it as recently as 2001 in *Palazzolo v. Rhode Island*,<sup>5</sup> but it declined to answer an amicus brief's argument that Rhode Island was a sovereign state immune from suit even in takings cases.<sup>6</sup> Admittedly, the Court is understandably reluctant to address newly presented arguments appearing only in amicus briefs. But quite possibly, the Court also recognized that squaring the two doctrines would be no small task, so it chose not to expose a snag in its case law. After all, addressing the doctrinal train wreck might have encouraged the Court to scale back one area to make room for the other, an outcome that, though perhaps logically more sound, was not required, given that both doctrinal lines had consistently commanded five votes.<sup>7</sup> Whatever the reason, the current Court has avoided the issue to date.<sup>8</sup>

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federal judicial systems. See *infra* Part V.B.2 (discussing *Alden* and the implication that state sovereign immunity applies equally in state and federal courts).

5. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

6. Brief for the Board of County Commissioners of the County of La Plata, Colorado et al. as Amicus Curiae Supporting the Respondents State of Rhode Island, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047), 2001 WL 15620, at 20–21. The Court opted not to address the collision, proceeding as though it accepted *First English's* assumption that the Takings Clause does trump sovereign immunity. See *Palazzolo*, 533 U.S. at 617–18 (addressing petitioner's takings claim against the state and stating that "the two threshold considerations" were ripeness and that the deprivation preceded petitioner's ownership).

7. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas quite consistently supported the expansion of both takings and state sovereign immunity law. These five again comprised the majority in *Palazzolo*. *Palazzolo*, 533 U.S. at 610.

8. Scholars have given slightly more attention to the problem, noting the paradox on occasion, though usually just in a short paragraph or in a footnote. See, e.g., RICHARD H. FALLON ET AL., *HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM* 379, 1002–03 (4th ed. 1996) [hereinafter *HART & WECHSLER*] (discussing the role of sovereign immunity with respect to the Takings Clause); RICHARD H. FALLON ET AL., *HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM: 2002 SUPPLEMENT* 181–82 (2002) [hereinafter *HART & WECHSLER, 2002 SUPPLEMENT*] (discussing cases that preceded *Alden v. Maine* and their implications for state sovereign immunity in cases involving constitutional rights); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1273 n.18 (3d ed. 2000) (noting the Court's stance in regards to the Takings Clause); Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 328 (1988) (discussing federalization of state tort law in context of Takings Clause prior to recent Eleventh Amendment decisions); Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 138

This Article explores the paradoxes arising from the collision of the Court's recent takings and state sovereign immunity doctrines. More

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n.344 (1999) (referencing *First English* footnote nine); Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment?: The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 243–44 (2006) (noting the collision and arguing that Congress could override sovereign immunity when a state takes property); Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 485 (2002) (noting the apparent *First English* exception to state sovereign immunity and suggesting that it is not coincidental that it protects "old property rights generally looked on with more solicitude by conservatives than by liberals"); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 115 nn.453–54 (1988) (noting the *First English* footnote and discussing "self-executing nature" of Takings Clause); Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1564 (1986) (reviewing RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)); Robert V. Percival, "Greening" the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809, 861–64 (2002) (noting the collision course between takings and state sovereign immunity); Thomas E. Roberts, *Facial Takings Claims Under Agins-Nectow: A Procedural Loose End*, 24 U. HAW. L. REV. 623, 623 n.2 (2002) (remarking on the disparity between takings clause doctrine and state sovereign immunity); Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 NEW ENG. L. REV. 571, 574 (2003) (citing *First English* and noting that Just Compensation Clause appears to be an exception to state sovereign immunity bar on damages claims against states); Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 145–46 (2004) (noting the collision in context of compensating the wrongfully convicted). However, though these critics' recognition of the issue has been thoughtful, it has not been thorough, for those articles do not focus on the tension I identify. Moreover, the recent expansion of both doctrines have highlighted the tension and presented yet more doctrinal knots.

The one article that has focused on these two issues together is Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067 (2001). Professor Seamon argues that although states are immune from just compensation suits brought in federal court, due process concerns can subject nonconsenting states to just-compensation suits in state court (hence, the asymmetry). *Id.* at 1068–70. Thus, if a state fails to create an adequate remedy, the Due Process Clause of the Fourteenth Amendment requires state courts to hear just compensation suits notwithstanding state sovereign immunity. *Id.* at 1069.

Seamon's discussion is very intelligent, but ultimately I disagree both with his conclusion and his methodology, particularly his reliance on century-old cases to support his argument that states are immune from just compensation suits in federal court. Because those cases mostly assert a vigorous state sovereign immunity (some before the Takings Clause even applied to the states), their holdings add less to the analysis of this constitutional conflict than one might initially think. Indeed, his decision to make one doctrine "fit" with the other one obstructs a more thorough analysis weighing the relative merits of the competing doctrines. Moreover, in light of *Alden*, it seems strange to assume, as he does, that the rules between federal and state court would be so different. See *infra* Part V.B.2 (discussing *Alden* and the symmetry of state sovereign immunity in state and federal courts). This Article not only arrives at a different conclusion, but seeks to wrestle more with the Court's recent case law, to consider more carefully the structural relationship between the two provisions, and, more abstractly, to explore methodological approaches for arbitrating between conflicting constitutional doctrines. This Article also relies more on the nature of constitutional remedies and the force of the Takings Clause, whereas Professor Seamon roots his argument in due process requirements.

specifically, it examines whether the Takings Clause is self-executing<sup>9</sup> and therefore can, by its own force, abrogate—or strip—the state of the sovereign immunity it would otherwise enjoy in actions for damages. If not, states would retain their sovereign immunity in takings cases unless Congress abrogated that immunity pursuant to its Fourteenth Amendment Section 5 power.<sup>10</sup> Either outcome jars current case law. If the Takings Clause only applies to the states when Congress abrogates the states' sovereign immunity (or, alternatively, if a state itself waives its sovereign immunity), then takings cases applied against the states rest on an illegitimate assumption.<sup>11</sup> To be sure, as sovereign immunity does not extend to state subdivisions or officers, the takings suits brought against counties, municipalities, or officers are not implicated, but there remain takings cases, like *Palazzolo* and *Lucas v. South Carolina Coastal Council*,<sup>12</sup> in which the defendants were the state or a state agency. Similarly, concluding that the Takings Clause, through the Fourteenth Amendment, abrogates state sovereign immunity by its own force, effectively ignores the Court's recent vigorous defense of state sovereign immunity principles.

Ultimately, this Article argues that the Takings Clause does trump state sovereign immunity by automatically abrogating—or stripping—the immunity that states usually enjoy in actions at law. An action to recover damages for a temporary taking therefore arises directly out of the Constitution and requires no statutory authorization, either to provide a cause of action or to abrogate state sovereign immunity.<sup>13</sup> The arguments on both

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9. This Article uses the term "self-executing" to mean that the Takings Clause abrogates state sovereign immunity by its own force and thereby provides a cause of action for damages against the state without further legislation. It is worth noting that the concept of a "self-executing" provision is somewhat woolly. In some contexts, for instance, it might mean merely that the provision has force without statutory authorization (so that, for instance, a plaintiff could sue a state official for an injunction to force him to return his taken property). Unless indicated otherwise, this Article uses it to refer more broadly to a provision that automatically abrogates Eleventh Amendment immunity.

10. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress can abrogate state sovereign immunity when enforcing Section 5 of the Fourteenth Amendment); see also *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 645–46 (1999) (indicating that Congress can abrogate state sovereign immunity for deprivations of property without due process provided that constitutional violation is manifest).

11. Because the Tucker Act waived the federal government's sovereign immunity for, *inter alia*, takings claims, such suits are permitted against the federal government. See *infra* notes 409–20 and accompanying text (discussing the Tucker Act and waiver of federal sovereign immunity).

12. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

13. A direct constitutional action against the state is not only theoretically sound but also practically necessary, as no such statutory action exists. The statute that most frequently is the

sides of this debate, however, are complex and, in places, persuasive.<sup>14</sup> The competing goals of individual rights and a workable structure of government reflect a constitutional system that, quite appropriately, seeks multiple objectives. Accordingly, the tension between the notion that rights deserve adequate protections and remedies, on the one hand, and the competing idea that the judiciary should be reluctant to control the legislature's budget, on the other, runs throughout this Article.

The judiciary plays but one part in the grand constitutional enterprise, and one danger with this Article's thesis is that it grants too much power to courts. This Article's theory of automatic abrogation must therefore be justified not merely with narrow legal arguments, but with broader arguments regarding judges' roles in our government structure. In particular, this Article focuses on the issue of constitutional remedies because, though money damages are seemingly the most appropriate remedy for a temporary taking, clearly our system does not provide the full ambit of remedies for every cognizable injury. The curious and fascinating interplay between remedy and injury—combined with the unique text of the Takings Clause—weaves through all the different arguments presented here.

In addition to the doctrinal details, a study like this must also consider the appropriate methodology for resolving incompatible lines of constitutional case law. How should the constitutional jurist address a

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basis for suits in federal court against local governments and state officials who have allegedly violated a party's federal rights, 42 U.S.C. § 1983, does not override state sovereign immunity. See *Quern v. Jordan*, 440 U.S. 332, 342 (1979) (finding no basis to conclude that Congress intended to abrogate the states' sovereign immunity). Section 1983's use of the word "person" has been found to apply to state officers sued in an individual capacity, *Hafer v. Melo*, 502 U.S. 21, 31 (1991), and state subdivisions, see *Monell v. Dep't of Soc. Servs.*, 436 U.S. 628, 688–89 (1978) (finding that "person" includes "local government bodies"), but not states themselves. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (finding that "a State is not a 'person' within the meaning of § 1983"). Accordingly, § 1983 creates no remedy against the state itself. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997) (finding that "§ 1983 actions do not lie against a State"); see also *infra* note 111 (discussing further this line of cases).

14. Upon first glance, some might view this collision as easily resolved. One school of thought might argue that the Takings Clause promises a damages remedy and that as incorporated against the states via the Fourteenth Amendment, it necessarily trumps any immunity emanating from the Eleventh Amendment. An opposing school would view state sovereign immunity as a bedrock principle that nothing in the Fifth or Fourteenth Amendments would purport to override. As the Court stated in *Edelman v. Jordan*, 415 U.S. 651 (1974), "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* at 663. Indeed, in the nineteenth century, just compensation clauses did not give rise to a damages remedy but instead invalidated legislation effecting takings without just compensation. This spectrum of reactions makes clear that this is not only an unanswered question but also a difficult one.



conflict between doctrines that rest on large bodies of precedent? It has been common in recent decades for American courts to make one doctrine fit with the other, to find exceptions within a body of law, and to claim that the apparent collision does not exist. Sometimes this approach is not only acceptable but correct; it nicely averts a messy collision and recognizes that only one doctrine is at the heart of the matter. But this approach has also gone too far, for real doctrinal conflicts sometimes do exist and in such cases the judge should address those conflicts directly. This is such a case. Though there may be ways of reconciling state sovereign immunity and temporary takings, it is healthier and more honest to acknowledge the paradox. Indeed, many other judicial systems around the world—for instance, in Europe, in Canada, and in South Africa—are far more comfortable recognizing conflicts within their own bodies of law, and have far less difficulty balancing the relative interests of both in determining which body should prevail in a given context.<sup>15</sup> Such weighing is not without its problems, but it does provide the opportunity for rigorous and honest assessment of a doctrine's place in a particular situation.

Part II of this Article frames the problem, providing a hypothetical suit in which this question would be central to the outcome. Given the doctrinal complexities of these areas, only a suit with certain characteristics would actually pose the collision this Article addresses. However, this collision is by no means hypothetical; suits like this do arise and, in fact, have been made more likely by recent decisions. Part III surveys the doctrinal train wreck and summarizes the Court's takings and tax refund due process cases, on the one hand, and state sovereign immunity cases, on the other. It also reviews quickly the Court's brief—and vague—statements about the instant conflict.

Parts IV, V, and VI argue that the Takings Clause automatically abrogates state sovereign immunity, focusing respectively on textual, structural, and historical arguments.<sup>16</sup> Though no single argument is necessarily dispositive, collectively these factors point strongly towards automatic abrogation. The Article concludes by considering what implications these findings might have for the courts' role in our democracy, for the judicial vindication of other constitutional rights, and for methodological approaches to the collision of constitutional doctrines.

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15. See *infra* note 532 and accompanying text (discussing the doctrinal balancing that sometimes occurs in foreign courts).

16. Because these categories are not rigid, each section borrows from others' reasoning, though this Article cabins some arguments in given sections for ease of presentation.

## II. Framing the Problem

Given the variety of ways in which takings claims arise, it is easy to imagine a takings case in which it would be impossible to raise an Eleventh Amendment defense. Only particular circumstances invite the potential "train wreck" between takings and sovereign immunity doctrines. Similarly, many scenarios pose procedural complications that, while significant to many takings litigants, are complicated enough to merit entire articles themselves. This Article briefly introduces the procedural complexities facing takings litigants; it focuses, however, on the potential conflict between immunity and just compensation issues.

Assume that a state government or agency enacts a regulation that deprives a landowner of the use of her land and that the owner sues the state government in state court to recover just compensation for this regulatory taking.<sup>17</sup> After appealing to the state or filing a lawsuit, the plaintiff successfully forces the state to stop the regulation, thus eliminating the condition that deprived her of the use of her property. Although her land has been effectively "returned," the landowner lost the use of her land for the duration of the regulatory taking. The state has ended the regulatory scheme that took her land in the first place but has refused to compensate her for the period she was deprived of her land. She sues the state to recover for the temporary taking, and the state raises an Eleventh Amendment sovereign immunity defense.

The details of this hypothetical are important to set up the collision because slight variations would avoid it. For instance, it must be the state's regulation that effects the temporary taking; municipalities and counties are never entitled to raise a sovereign immunity defense.<sup>18</sup> The suit must also be one to collect damages, such as for an interim taking, for which injunctive relief

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17. A variety of regulations might deprive a landowner use of her land. Many environmental regulations, for instance, might accomplish such deprivation, especially under the Court's current robust takings doctrine. In *Palazzolo*, for instance, the Rhode Island Coastal Commission denied plaintiff's application to construct a beach club on eighteen acres of coastal wetlands. *Palazzolo v. Rhode Island*, 533 U.S. 606, 611–16 (2001).

18. *See, e.g., Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (holding that the Eleventh Amendment does not bar an individual's suit in federal court against a county for nonpayment of debt). One wonders, though, given the current Supreme Court's willingness to extend state sovereign immunity far beyond the text of the Eleventh Amendment, whether the Court might also choose to extend that immunity to state subdivisions as well. *But see generally* Melvyn R. Durchslag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577 (1994) (arguing that *Lincoln County* distinction between states and counties for immunities purposes is not anomalous on either historical or functional grounds).

is effectively unavailable.<sup>19</sup> If the contested state behavior were, by contrast, a physical taking that had not yet ceased, then the plaintiff might sue a state officer for injunctive relief to force the state to return the property. Because *Ex parte Young*<sup>20</sup> permits suits against state officers for injunctive relief,<sup>21</sup> a state sovereign immunity defense could not arise. However, in the above hypothetical, a *Young* injunction does the plaintiff no good; the state has already returned her property, and so the only relief she seeks is money to compensate her for the loss of use of her land.<sup>22</sup> Given that the damages sought could be large, this hypothetical illustrates well why the officer suit alternative is not always adequate.<sup>23</sup>

The forum is also important. Though it is not clear that state and federal court lawsuits would necessarily require different results, a plaintiff can sue in state court to try to avoid substantial procedural obstacles. Most notably, takings plaintiffs in federal court must avoid the notorious "*Williamson* trap."<sup>24</sup> Under *Williamson County v. Hamilton Bank*,<sup>25</sup> a plaintiff may need to seek compensation on federal takings claims in state court to meet Supreme Court ripeness requirements.<sup>26</sup> The combination of these fairly rigorous ripeness requirements often forces litigants to bring state inverse condemnation

19. Temporary takings are not necessarily the only scenario in which this can arise, but they pose the collision most succinctly.

20. *Ex parte Young*, 209 U.S. 123 (1908).

21. *See id.* at 159 (reasoning that a state official who attempts to enforce an unconstitutional law may be subjected to a suit for injunctive relief because the official is "stripped of his official or representative character").

22. Under the Court's decision in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), a § 1983 suit to recover for a taking constitutes a suit for damages. *Id.* at 710. Whether one characterizes this relief as damages, restitution, just compensation, or something else, however, is not significant for sovereign immunity purposes, given *Edelman*'s rule that *Ex parte Young* relief applies only to prospective, not retrospective, remedies. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). Because money compensating a plaintiff for an already terminated regulatory taking is certainly retrospective, even if it is characterized as equitable restitution, *Edelman* applies and an *Ex parte Young* remedy is unavailable. *See id.* at 666–67 (finding that *Ex parte Young* may be unavailable even though plaintiff characterized the relief sought as equitable restitution). *But see infra* Part III.A.2 (noting that due process tax cases might avoid sovereign immunity in part because the remedy resembles restitution).

23. *But see* Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919, 920 (2000) (placing herself "squarely among the no-big-deal camp").

24. *See* DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 264 (2002) (discussing the "*Williamson* trap").

25. *Williamson County Reg'l Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

26. *See id.* at 186 (finding the respondent's taking claim to be "premature, whether it is analyzed as deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment").

proceedings before they can even get into federal court. The "trap," though, is that once they get into federal court, those same plaintiffs might be unable to raise the same claim they did in state court due to preclusion rules.<sup>27</sup>

Interestingly, these ripeness requirements sometimes make interim takings more likely to happen, thus, in the long run, increasing the number of possible takings claims. Because ripeness requirements tend to be strict, plaintiffs are likely to spend significant time seeking remedies outside the federal court system. If the plaintiff is complaining about an interim taking, the duration of that taking will increase as she works her way through the state agency's dispute procedures. Petitioning a state agency takes time, and, even if she ultimately succeeds in forcing the agency to return the property, either by physically returning it or halting the regulation diminishing its value, she has lost use of the land for the added time it took her to exhaust the state's administrative remedies. Even if the state ultimately returns her property, either as a result of the administrative procedures or because the state loses takings litigation in court, the landowner will have lost the use of her land for a longer period of time. Under *First English*, the property owner can recover for this interim violation whether it arises out of a physical or regulatory taking.<sup>28</sup> Ripeness requirements, therefore, make it more likely that the interim taking will have been for long enough to merit litigation.<sup>29</sup> The great irony, then, is

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27. See *DANA & MERRILL*, *supra* note 24, at 264 (discussing the "*Williamson* trap"). The unfathomable brilliance of this trap calls to mind Yossarian's respectful whistle upon first hearing about "catch-22." JOSEPH HELLER, *CATCH-22*, at 52 (1961).

In a case ostensibly challenging the procedural pitfalls resulting from *Williamson*, the Supreme Court recently held that even though federal claims are not ripe until after state court proceedings, the full faith and credit statute, 28 U.S.C. § 1738, precludes plaintiffs from relitigating in federal court § 1983 claims that state courts adjudicated. See *San Remo Hotel, L.P. v. City of San Francisco*, 125 S. Ct. 2491, 2507 (2005) (affirming the Court of Appeals' decision that found no exception to the requirements of 28 U.S.C. § 1738). In a short concurrence, however, Chief Justice Rehnquist, joined by three other justices, expressed skepticism about the *Williamson* doctrine. See *id.* at 2507 (Rehnquist, C.J., concurring) (writing that *Williamson* "may have been mistaken" in part). Specifically, Chief Justice Rehnquist wrote that he was not sure "why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive." *Id.* at 2509 (Rehnquist, C.J., concurring). It is unclear, of course, whether the remaining justices opted not to join the Chief's concurrence because they disagreed with him or because the wisdom of *Williamson* was not squarely presented in *San Remo*. Either way, for the time being *Williamson* remains good law and might have been further entrenched by the Court's suggestion that "it is entirely unclear why . . . [a] preference for a federal forum should matter for constitutional or statutory purposes." *Id.* at 2505.

28. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 319 (1987) (noting that converting a taking "into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause").

29. Of course, in many takings suits, a key issue is what constitutes "just compensation."

that just as ripeness requirements make it harder for property owners to litigate takings claims, they also make the damages component of such claims more significant. And, given the Supreme Court's increasingly robust sovereign immunity doctrine, they also increase the instances in which a state might raise an Eleventh Amendment defense to protect itself from a suit seeking to recover damages for a protracted interim taking.

### *III. The Doctrinal Collision Course*

To understand how and why takings and sovereign immunity doctrines collide, it is important first to understand the two areas independently. They are both complex bodies of jurisprudence, and the paradoxes this Article seeks to explore arise out of those complexities. Because others have explored each doctrine at length elsewhere, this Part will summarize each area very briefly, focusing on the Court's recent cases that most directly affect the "collision." The last section of this Part addresses the Court's brief attention to the collision.

#### *A. Takings Doctrine and Tax Refund Cases*

##### *1. Takings Cases*

The Takings Clause of the Fifth Amendment reads, "[N]or shall private property be taken for public use, without just compensation."<sup>30</sup> Initially, the clause applied only to the federal government, although the Court later incorporated it through the Fourteenth Amendment's Due Process Clause to apply to the states as well.<sup>31</sup> Much of the case law has focused on exactly what constitutes a taking: Precisely how must government regulation interfere with the private property owner's rights for that regulation to constitute a taking, thereby requiring the state to offer the property owner just compensation?

In the case of physical takings, the Court has articulated a bright line rule.<sup>32</sup> The problem of defining a taking, however, becomes more complicated

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Though obviously significant, this issue is beyond the focus of this Article.

30. U.S. CONST. amend. V.

31. See *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (finding that a taking by a state violates Fourteenth Amendment due process rights).

32. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (requiring compensation for a physical occupation). When the "'character of the governmental action' . . . [is] permanent physical occupation of property, our cases uniformly have found a taking to the

in the area of regulatory takings, when the regulation does not cause private property to be physically occupied, but rather deprives the owner of the full value of her property in some other way. When these restrictions deprive the owner of all "economically beneficial use of land,"<sup>33</sup> the Court will find a taking.<sup>34</sup> But when the restriction merely deprives a landowner of *some* economic value, the Court engages in an ad hoc, fact-specific inquiry to determine whether it constitutes a taking.<sup>35</sup> In recent years, the Court has tended to favor property owners in ad hoc inquiries, as in the exaction cases.<sup>36</sup> This trend in favor of property rights is perhaps most apparent in *Palazzolo v. Rhode Island*, itself a regulatory takings case, in which the Court held that a landowner can assert that a particular exercise of the State's regulatory power is onerous enough to compel compensation, even if that regulation went into effect prior to the owner's purchase of the land.<sup>37</sup> The Court found that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."<sup>38</sup>

Collectively, these cases from the past fifteen years have expanded the range of regulatory activity and conditions that constitute a taking. Though this phenomenon is certainly important by itself, *First English* renders them

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extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434–35 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

33. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992).

34. See, e.g., *id.* at 1030 (finding that a taking occurs when a property owner is deprived of all economically viable use). *Lucas's* rule might be complicated somewhat by *Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which suggested that *Lucas* might apply only to regulations effecting complete deprivations of all market value, as opposed to regulation that prohibits all building. See *id.* at 343 (Rehnquist, C.J., dissenting) (dissenting because in *Lucas* the Court found that under circumstances such as those presented in *Tahoe-Sierra Preservation Council*, the government must pay just compensation).

35. See, e.g., *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (stating that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking"); see also *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (describing the factors the Court considers when engaging in "essentially ad hoc factual inquiries").

36. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring "rough proportionality" between the exaction imposed and the harm created by the requested construction); *Nollan v. Cal. Coastal Comm.*, 483 U.S. 825, 837 (1987) (requiring an "essential nexus" between the condition imposed and the government interest furthered by the condition).

37. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001) (rejecting the Rhode Island Supreme Court's finding that the petitioner could not seek compensation based on a regulation enacted before he came into possession of the disputed property).

38. *Id.* at 629–30.

particularly significant for our purposes. *First English* establishes that the government must provide compensation for the period during which the government deprived the property owner of the use of his land for not only physical but also regulatory takings.<sup>39</sup> In this way, *First English* extended the line of precedent that already held that property owners suffering temporary physical takings were entitled to just compensation.<sup>40</sup> Stopping the regulation and returning the property to the owner is not enough; the government must also pay money damages to compensate for the owner's "lost time."<sup>41</sup> A property owner then may have already resumed complete use of his land but can still sue for "just compensation."<sup>42</sup>

The doctrinal collision occurs when the State raises a sovereign immunity defense to the plaintiff's takings claim for damages. It is important to note that doctrinal developments since *First English* do not themselves create this "collision"; the apparent incompatibility of takings and state sovereign immunity doctrine already existed, notwithstanding *First English's* attempt to brush aside those complexities in a footnote.<sup>43</sup> However, while *First English* did not create the tension, it did heighten the paradox by holding that property owners subjected to a temporary taking are entitled to compensation beyond the invalidation of the ordinance effecting the taking.<sup>44</sup> Because injunctive relief—invalidating the law and forcing the government to return the taken property—is therefore inadequate to make such a property owner whole, the owner can sue under *First English* to recover damages for the period during which she was denied use of the land. However, when the defendant is a state, it theoretically can raise sovereign immunity as a defense against suits for money damages.

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39. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 319 (1987).

40. *See id.* at 318 (describing prior cases in which the Court had required just compensation for temporary physical occupations); *see also* *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14 (1949) (requiring just compensation for a temporary physical occupation); *United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946) (same); *United States v. General Motors Corp.*, 323 U.S. 373, 384 (1945) (same).

41. *First English*, 482 U.S. at 319.

42. *Id.*

43. *See id.* at 316 n.9 (discussing briefly the "prohibitory nature of the Fifth Amendment . . . combined with principles of sovereign immunity").

44. *See id.* at 321 ("We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

## 2. Due Process Tax Refund Cases

The tax refund cases are roughly analogous to takings cases; both involve plaintiffs suing a government for the return of property unjustly taken from them. Like regulatory takings cases, in particular, these are instances in which the plaintiff seeks monetary relief and in which the state presumably could raise an Eleventh Amendment defense.<sup>45</sup> In *Ward v. Love County*,<sup>46</sup> the Supreme Court reversed an Oklahoma Supreme Court decision that found that a state law barring recovery of voluntarily paid taxes precluded the Choctaw Indian Tribe's claim to recover taxes, which the Tribe alleged were coercively collected.<sup>47</sup> Contrary to the Oklahoma court's findings, the Supreme Court found that the taxes had been "obtained by coercive means—by compulsion," and held that "money got through imposition may be recovered back."<sup>48</sup> Because the suit here was against the county and not the state itself,<sup>49</sup> sovereign immunity issues would not have come up, but *Ward* nevertheless laid the foundation for a due process right to recover from government unfairly coerced taxes.

The Court has returned to this line more recently in *McKesson Corporation v. Division of ABT*<sup>50</sup> and *Reich v. Collins*.<sup>51</sup> In *McKesson*, the plaintiffs demanded a refund of Florida state taxes paid under a discriminatory tax that had been held unconstitutional.<sup>52</sup> Although it struck down the tax under the Dormant Commerce Clause, the state court did not refund the taxes plaintiffs had already paid.<sup>53</sup> The Supreme Court reversed, holding unanimously that when a state requires a taxpayer to pay a tax before challenging its legality, the Due Process Clause requires the state to afford a meaningful opportunity to secure postpayment relief.<sup>54</sup> Thus, *McKesson*

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45. One could argue that tax refunds do not constitute damages, because an injunction is theoretically all that is needed to force a government to return taxes to an individual. The Court in *Edelman v. Jordan*, however, did not see the issue that way. See *Edelman v. Jordan*, 415 U.S. 651, 668–69 (1974) (ruling that *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), compelled the decision that the Eleventh Amendment barred an action to recover unpaid welfare benefits, notwithstanding plaintiff's effort to characterize relief sought as "equitable restitution").

46. *Ward v. Love County*, 253 U.S. 17 (1920).

47. See *id.* at 25 (noting the Oklahoma Supreme Court's position that "if the payment was voluntary, the moneys could not be recovered back in the absence of a permissive statute").

48. *Id.* at 23–24 (internal quotation marks omitted).

49. *Id.* at 17.

50. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

51. *Reich v. Collins*, 513 U.S. 106 (1994).

52. *McKesson*, 496 U.S. at 22.

53. *Id.*

54. *Id.* at 22; see also HART & WECHSLER, *supra* note 8, 851–52 (discussing *McKesson*).



suggests that state and local governments might have certain constitutional due process obligations to their citizens, even though no applicable statute enforces the obligation and traditional immunities might otherwise bar a suit against the state.<sup>55</sup>

What is most striking about *McKesson* is not that the Court required a post-deprivation remedy, but that it determined that in some instances only a monetary refund would suffice.<sup>56</sup> This is particularly significant for our purposes because sovereign immunity usually does not bar suits entirely but rather bars suits against the state for money damages. As Professors Fallon and Meltzer note, *McKesson* therefore "poses something of a puzzle when compared with doctrines applicable to other suits seeking monetary relief against the government. In the vast majority of cases, sovereign immunity and related doctrines bar uncontested suits for payment of funds directly out of state and federal treasuries."<sup>57</sup> So the question remains: "why does the Constitution mandate a damages remedy against the government for unlawful exactions of taxes (and for takings) but not for other constitutional violations?"<sup>58</sup>

*Reich* addressed the implications of this due process right, confronting the issue of sovereign immunity more directly and stating the constitutional obligation more forcefully. While again unanimously affirming that due process requires a state to provide "clear and certain" remedy for taxes collected in violation of federal law, the Court also emphasized that the obligation exists

55. See *McKesson*, 496 U.S. at 26–31 (finding that the Eleventh Amendment did not bar appellate review by the Supreme Court). One should not, however, overstate *McKesson*'s implications on state sovereign immunity doctrine. The Court did place some emphasis on Florida's willingness to open its courts to refund actions, in essence waiving any sovereign immunity defense they might have had. HART & WECHSLER, *supra* note 8, at 852; see also *McKesson*, 496 U.S. at 30–31 (noting that when a state court takes "cognizance of a case, the state assents to appellate review" by the Supreme Court).

56. See *McKesson*, 496 U.S. at 31–35 (requiring a monetary refund in certain circumstances).

57. Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1825 (1991) (footnotes omitted); see also *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100–01 (1993) (requiring the state to provide a remedy for a tax that violated federal law).

58. Fallon & Meltzer, *supra* note 57, at 1826 n.537 (citing *First English* in footnote to support the proposition that the Constitution mandates damages remedies for takings). One possible answer, of course, is that the tax refund cases are straight due process cases. See *id.* at 1826–29 (suggesting various answers to the question). Note that, whatever the answer, Professors Fallon and Meltzer's question assumes that *First English*'s footnote nine is binding. They might be correct, but not necessarily, particularly given the Court's most recent sovereign immunity cases, all of which were decided after their excellent article was published. See *infra* notes 92–109 (discussing the recent sovereign immunity cases).

notwithstanding "the sovereign immunity States traditionally enjoy in their own courts."<sup>59</sup>

Though significant, cases like *McKesson* and *Reich* must be read in light of other doctrinal limitations. Perhaps most importantly, these decisions, both handed down prior to *Alden v. Maine*,<sup>60</sup> arose out of state court cases.<sup>61</sup> In other words, these cases were decided before *Alden* extended state sovereign immunity to state courts,<sup>62</sup> so the Court's due process requirements did not trump active sovereign immunity barriers. Moreover, in federal court actions for due process tax refunds, the Supreme Court has upheld state sovereign immunity.<sup>63</sup> But while it is important not to require too much of *McKesson* and *Reich*, these cases, like takings cases, do seem to collide with sovereign immunity decisions.<sup>64</sup>

### B. State Sovereign Immunity Doctrine

State sovereign immunity doctrine may have expanded even more than takings doctrine during the past decade. It was not always such an important part of American constitutional landscape. In 1793, the Court in *Chisholm v. Georgia*<sup>65</sup> rejected Georgia's claim that an unconsenting state was immune

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59. *Reich v. Collins*, 513 U.S. 106, 110 (1994); see also HART & WECHSLER, *supra* note 8, at 852 (quoting *Reich*).

60. *Alden v. Maine*, 527 U.S. 706 (1999).

61. See *McKesson Corp.*, 496 U.S. at 22 (arising out of a Florida state court); *Reich*, 513 U.S. at 106 (arising out of a Georgia state court).

62. See *Alden*, 527 U.S. at 760 (affirming the dismissal of the suit against Maine on grounds of state sovereign immunity).

63. See, e.g., *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 55 (1944) (finding that the "legislature of Oklahoma was consenting to suit in its own courts only").

64. There are, of course, significant differences between takings and tax refund cases. One potential difference is that because the tax cases provide a "refund" equal to the tax unjustly exacted, the remedy in such cases resembles "restitution" more than money damages in a regulatory takings case, where the initial harm was not cash actually taken from the property owner, but a regulation impairing that owner from reaping the full benefit of her land's value. As restitution at common law usually fell under equity and not law, *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993), one can view *Reich* and *McKesson* as providing injunctive relief more in line with *Ex parte Young*'s and *Edelman*'s requirements. See *infra* Part III.B (discussing *Ex parte Young* and *Edelman*). But see *supra* note 45 (noting that the Court rejected this argument in *Edelman v. Jordan*). Another potential difference between tax refund and takings cases is that tax cases are more likely to affect large classes, making it potentially difficult for the government to provide full remediation. See Fallon & Meltzer, *supra* note 57, at 1828–29 (noting that "tax cases, unlike constitutional tort suits and just compensation claims, typically affect large classes").

65. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

from suit by a citizen of another state.<sup>66</sup> Article III, Section 2, after all, extends the federal judicial power to "Controversies . . . between a State and Citizens of another State."<sup>67</sup> However, in a famous lone dissent, Justice Iredell argued that the Supreme Court's original jurisdiction should be interpreted with reference to common law principles and assumed that the Court could exercise only jurisdiction that Congress had conferred.<sup>68</sup> He asserted that English common law would only have permitted a suit for damages against the government with the king's consent, and that, therefore, in the absence of sovereign consent, Congress had to affirmatively waive state immunity for such a suit to proceed.<sup>69</sup>

Justice Iredell might have lost the battle, but he won the war. According to some, the *Chisholm* decision "fell upon the country with a profound shock."<sup>70</sup> Just five years later, in 1798, the Eleventh Amendment was ratified, overruling *Chisholm*.<sup>71</sup> The Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>72</sup> Some have argued that the quick passage of the Eleventh Amendment demonstrates the "shock of surprise" *Chisholm* created,<sup>73</sup> though many scholars dispute that interpretation.<sup>74</sup>

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66. See *id.* at 480 (finding that the suit could be brought against the state of Georgia).

67. U.S. CONST. art. I, § 2.

68. See *Chisholm*, 2 U.S. at 432–35 ("[A]ll the Courts of the *United States* must receive . . . all their authority . . . from the legislature only."); see also HART & WECHSLER, *supra* note 8, at 1047 (discussing *Chisholm*).

69. See *Chisholm*, 2 U.S. at 445–47 (analogizing the instant case to the common law of England).

70. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 96 (rev. ed. 1926).

71. See Akhil Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1473 (1987) (stating that the passage of the Eleventh Amendment "was undeniably designed to repudiate the majority analysis in *Chisholm* and overrule its holding").

72. U.S. CONST. amend. XI.

73. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

74. See, e.g., JOHN ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 27 (1987) (stating that "speedy adoption [of the Eleventh Amendment] is not significant"); Amar, *supra* note 71, at 1481–84 (arguing that, given its current interpretation, the Eleventh Amendment's passage did not necessarily vindicate Justice Iredell's views); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *COLUM. L. REV.* 1889, 1926 (1983) (arguing that "Congress's initial reaction to the *Chisholm* decision hardly demonstrates the sort of outrage so central to the profound shock thesis"); see also HART & WECHSLER, *supra* note 8, at 1048 (summarizing literature on "shock of surprise" theory).

*Hans v. Louisiana*<sup>75</sup> in 1890 marks the crucial turn in Eleventh Amendment jurisprudence. While the express language of the amendment applies only to suits against one state "by Citizens of another State,"<sup>76</sup> Justice Bradley's *Hans* opinion reads the Amendment more broadly to prohibit suits against a state by citizens of the same state.<sup>77</sup> Although Justice Iredell's primary objection in *Chisholm* was statutory—the jurisdiction granted by the Judiciary Act of 1789, he argued, did not extend to unheard-of remedies like a suit against a state<sup>78</sup>—Justice Bradley emphasized Justice Iredell's doubts that Congress could constitutionally enact a statute subjecting the states to federal court suit.<sup>79</sup> Phrasing his originalist argument in a series of rhetorical questions, Justice Bradley asks:

Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States?<sup>80</sup>

Justice Bradley, with little historical evidence, scoffs at the notion, dismissing it as "almost an absurdity on its face,"<sup>81</sup> and *Hans*'s interpretation, which found the state immune from suit on a claim for damages arising under the Constitution's Contracts Clause, remains controlling over a century later.<sup>82</sup>

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75. *Hans v. Louisiana*, 134 U.S. 1 (1890).

76. U.S. CONST. amend. XI.

77. *Hans*, 134 U.S. at 15.

78. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 436–37 (1793) (concluding that the Court "[could] exercise no authority . . . consistently with the clear intention of the act, but such as a proper State Court would have been at least [competent] to exercise at the time the act was passed").

79. See Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 9 (discussing Justice Bradley's treatment of Justice Iredell's *Chisholm* dissent).

80. *Hans*, 134 U.S. at 15.

81. *Id.*

82. In a fascinating article, Professor Nelson argues that sovereign immunity originally applied as a doctrine of personal jurisdiction, which could be waived, but that the Eleventh Amendment created a second type of immunity sounding in subject matter jurisdiction, which therefore could not be waived. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1566 (2002). Out of this two-track system of jurisdictional immunities, however, the Court created a single doctrine of sovereign immunity reflecting an odd cross between the two tracks. *Id.*

The most important exception to Eleventh Amendment doctrine is *Ex parte Young*,<sup>83</sup> which recognized suits against state officers for injunctive relief.<sup>84</sup> However, the *Young* exception hardly renders state sovereign immunity meaningless. First, plaintiffs must allege that the officer is acting in violation of federal law.<sup>85</sup> Second, *Ex parte Young* actions are limited to injunctive relief; a plaintiff cannot access the state treasury via a state official.<sup>86</sup> Moreover, *Edelman v. Jordan*<sup>87</sup> halted any possibility that money remedies could be attained by characterizing the money sought as restitution, and therefore equitable, rather than legal, damages.<sup>88</sup> In an opinion that foreshadows his later victories in this area, then-Justice Rehnquist reminds us that "the relief awarded in *Ex Parte Young* was prospective only."<sup>89</sup> By way of contrast, the "retroactive" relief sought in *Edelman* "stands on quite a different footing."<sup>90</sup>

*Edelman* is generally significant because it restricted courts' ability to offer plaintiffs money from the state treasury by characterizing the remedy as "equitable restitution." For our purposes, it is especially important because, as applied to takings cases, it requires that takings plaintiffs suing a state should only receive a prospective injunction, rather than retrospective damages. In other words, if a state regulation has burdened private property, *Edelman* permits injunctive relief but seems to bar any suit for retrospective damages compensating the landowner for the duration of the taking. Under this reasoning, a property owner whose land was once burdened by a state regulation could not receive money compensating him for this temporary regulatory taking. But, as we have already seen, *First English* holds that property owners are entitled to money damages for these exact cases.<sup>91</sup>

Notwithstanding cases like *Hans* and *Edelman*, Eleventh Amendment immunity has its limits. States are free to consent to suit by waiving their

83. *Ex parte Young*, 209 U.S. 123 (1908).

84. *See id.* at 155 ("The State has no power to impart to [its officer] any immunity from responsibility to the supreme authority of the United States.").

85. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (concluding that *Ex parte Young* is inapplicable in a suit against state officials on the basis of state law).

86. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (stating that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment").

87. *Edelman v. Jordan*, 415 U.S. 651 (1974).

88. *See id.* at 665–69 (rejecting the petitioner's "equitable restitution" argument).

89. *Id.* at 664.

90. *Id.*

91. *See supra* note 28 and accompanying text (discussing possible claims arising from a temporary taking).

sovereign immunity, and Congress in some circumstances may also abrogate states' sovereign immunity, thereby subjecting unconsenting states to certain kinds of lawsuits. Although it is not always clear what constitutes a valid waiver, waiver is conceptually relatively straightforward. Congressional abrogation—the process by which Congress legislates to remove state sovereign immunity for certain types of cases—however, is more complicated and has changed significantly in recent years.

Under *Fitzpatrick v. Bitzer*,<sup>92</sup> Congress can abrogate state sovereign immunity pursuant to its Fourteenth Amendment, Section 5 powers.<sup>93</sup> The Court recognized that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment."<sup>94</sup> Although *Fitzpatrick*'s holding is still not controversial, the Court has subsequently cut back on Congress's ability to abrogate pursuant to its other powers. Indeed, as it stands today, it seems that Congress may not abrogate pursuant to any of its Article I powers. In *Seminole Tribe of Florida v. Florida*,<sup>95</sup> the Court, overruling its 1989 decision in *Pennsylvania v. Union Gas Co.*,<sup>96</sup> held that Congress could not abrogate state sovereign immunity pursuant to the Indian Commerce Clause.<sup>97</sup> In so doing, the Court limited congressional power to abrogate state immunity, so that Congress could do so only pursuant to its powers under Section 5 of the Fourteenth Amendment and the other Reconstruction amendments.<sup>98</sup> And, under *City of Boerne v. Flores*,<sup>99</sup> the Court, not Congress, defines the scope of those Fourteenth Amendment

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92. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

93. *Id.* at 456.

94. *Id.* (citation omitted).

95. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

96. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

97. *Id.* at 72.

98. Though abrogation pursuant to Section 5 of the Fourteenth Amendment is more common, precedent suggests that Congress can also abrogate state sovereign immunity pursuant to the other Reconstruction amendments. See *City of Rome v. United States*, 446 U.S. 156, 179–80 (1980) (upholding Voting Rights Act as proper exercise of Fifteenth Amendment power and explaining that "*Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation'"); *United States v. Nelson*, 277 F.3d 164, 181 n.17 (2d Cir. 2002) (reasoning that Congress's Thirteenth Amendment Section 2 powers seemingly do not fall under the scope of *Seminole Tribe* and its progeny); see also Struve, *supra* note 8, at 573 n.8 (collecting cases indicating that Congress can abrogate state sovereign immunity pursuant to Thirteenth, Fourteenth, and Fifteenth Amendment powers).

99. *City of Boerne v. Flores*, 521 U.S. 507 (1999).

powers.<sup>100</sup> Finally, merely suggesting abrogation is not enough; Congress must provide a "clear statement" of its intent to abrogate immunity or the Court will not view the abrogation as valid.<sup>101</sup>

*Seminole Tribe* and *Boerne* collectively scale back Congress's power to abrogate state sovereign immunity,<sup>102</sup> but *Alden v. Maine* is in some ways more remarkable because it prevents Congress from subjecting states to suit in state courts. By rooting state sovereign immunity in principles outside the Eleventh Amendment itself, *Alden* reconceptualizes the entire doctrine.<sup>103</sup> By its own terms, the Eleventh Amendment applies to "[t]he Judicial power of the United States."<sup>104</sup> In holding that state sovereign immunity applies also in state court—more specifically, by holding that Congress cannot abrogate in state court where it cannot abrogate in federal court<sup>105</sup>—the Court significantly

100. See *id.* at 527–29 (finding that Congress cannot decide the scope of its own power under the Fourteenth Amendment). *Boerne* requires that there be "a congruence or proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. Following *Boerne*'s lead, the Court has further narrowed Congress's power to abrogate Eleventh Amendment immunity under its Section 5 powers. See *Univ. of Ala. v. Garrett*, 531 U.S. 356, 373–74 (2001) (holding unconstitutional Congress's attempt to use Section 5 to abrogate state sovereign immunity for damages actions brought to enforce the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 63–64 (2000) (holding that Section 5 could not furnish a basis for overcoming a state's immunity from private suit under the Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999) (holding unconstitutional provisions in Patent Remedy Act that abrogated states' Eleventh Amendment immunity so that "[a]ny State" and "any instrumentality of a State" could be sued for patent infringement). But see *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (holding that Title II of Americans with Disabilities Act constitutes a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737–40 (2003) (holding that state employees may recover money damages in federal court in the event of the state's failure to comply with the family-care provision of the Family and Medical Leave Act because protection of equal employment opportunity for women falls under the scope of the Fourteenth Amendment).

101. See *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 541–42 (2002) (requiring a "clear statement of an intent to abrogate state sovereign immunity"); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (noting the requirement that "Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in Federal court").

102. See, e.g., Marcia L. McCormick, *Federalism Re-Constructed: The Eleventh Amendment's Illogical Impact on Congress' Power*, 37 IND. L. REV. 345, 357 (2004) (arguing that the new test in *Boerne* restricted Congress's Fourteenth Amendment powers by essentially removing Congress's power to deter potential constitutional violations).

103. See *Alden v. Maine*, 527 U.S. 706, 728 (1999) (noting that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself").

104. U.S. CONST. amend. XI.

105. See *Alden*, 527 U.S. at 748 (finding that "the States retain an analogous constitutional

expanded the immunity's scope and called into question previous assumptions about the relatively limited scope of Eleventh Amendment doctrine.<sup>106</sup> Indeed, there is no reason to think that the current Court is finished in this area. In *Federal Maritime Commission v. South Carolina State Ports Authority (FMC)*,<sup>107</sup> for instance, it held that state sovereign immunity also applies in administrative agency adjudicatory hearings.<sup>108</sup> *First English's* footnote may once have qualified as the final word on this issue, but, in light of these developments, Eleventh Amendment bars might not falter against a takings claim.<sup>109</sup> Of course, *Seminole Tribe* and the other cases do not create a new

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immunity from private suits in their own courts").

106. See James E. Pfander, *Once More unto the Breach: Eleventh Amendment Scholarship and the Court*, 75 NOTRE DAME L. REV. 817, 820 (2002) (noting that before *Alden* "a variety of ways around the Eleventh Amendment were available").

107. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).

108. *Id.* at 769 (concluding that applying sovereign immunity in administrative hearings is likely consistent with the framers' intent).

109. Although state sovereign immunity has certainly become more robust in recent years, the story of its growth is not without exceptions. The Court, for instance, recently suggested that sovereign immunity's scope in some instances can be quite narrow. In *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), the Court held that an undue hardship determination sought by respondent in Bankruptcy Court did not constitute a suit against the state for purposes of Eleventh Amendment immunity. *Id.* at 451. However, while this does suggest that litigation affecting state interests will not necessarily trigger the Eleventh Amendment, the opinion is too specific to glean just how narrowly the Court views sovereign immunity. Thus, while certain *in rem* actions enjoy an exception to usual state sovereign immunity bars, this is not reason to think that such an exception extends more generally to all suits involving property. Indeed, the Court in *Tennessee Student Assistance* carefully circumscribed the scope of its holding. It stated that it was not claiming that "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity but rather that the court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State." *Id.* at 451 n.5 (internal citations and quotation marks omitted).

As this Article was going to press, the Supreme Court subsequently took the additional step of resolving what *Tennessee Student Assistance* had left unresolved. Specifically, the Court held that the Bankruptcy Clause of the Constitution does not contravene state sovereignty. *Central Va. Comm. Coll. v. Katz*, No. 04-885, 2006 U.S. LEXIS 917 (2006). Accordingly, under the Bankruptcy Clause, "Congress may, at its option, either treat States in the same way as other creditors insofar as concerns 'Laws on the subject of the Bankruptcies' or exempt them from operation of such laws." *Id.* at \*39. As *Tennessee Student Assistance* had already suggested, this is in part because of bankruptcy courts' *in rem*, rather than *in personam*, jurisdiction. See *id.* at \*23-29 (noting bankruptcy's *in rem* jurisdiction). This distinction, of course, is worthy of note, but it likely will have little impact on the takings context, since inverse condemnation suits are generally regarded as not falling under courts' *in rem* jurisdiction. See, e.g., *Hage v. United States*, 51 Fed. Cl. 570, 574-75 (2002) (finding that plaintiffs' claim for just compensation does not constitute a suit for *in rem* relief). Indeed, given the Court's careful analysis of the unique features of bankruptcy jurisdiction, *Central Virginia* is probably best read as narrowly confined to the bankruptcy context.

*Central Virginia's* primary significance to the larger narrative of Eleventh Amendment



conflict, but the new vigor of state sovereign immunity does raise questions about *First English's* quick resolution of an old one.

### C. *The Unanswered Questions*

As should now be clear, because the Fourteenth Amendment incorporated the Takings Clause against the states, Congress could abrogate state sovereign immunity over takings claims pursuant to its Section 5 powers.<sup>110</sup> To this point, however, it has not chosen to do so.<sup>111</sup> We must therefore ask if Congress must abrogate that immunity or if the Takings Clause automatically abrogates any immunity the state might have in other kinds of cases.

To the extent that past Courts have addressed this issue, the answers have been terse and contradictory. In his well-known decision in *Lynch v. United States*,<sup>112</sup> Justice Brandeis asserted that the government must always consent to suit; sovereign immunity, then, is never automatically abrogated. He argued that:

[C]onsent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. . . . The sovereign's

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jurisprudence may be that the newly confirmed Chief Justice Roberts voted with the dissent (written by Justice Thomas, and also joined by Justices Scalia and Kennedy). Although it is misleading to read too much into any single vote, Chief Justice Roberts's vote indicates that he, like Chief Justice Rehnquist before him, will likely support a vigorous state sovereign immunity doctrine. As a curious aside, Justice O'Connor, in one of her last actions on the Court, voted with the majority (written by Justice Stevens, and joined also by Justices Souter, Ginsburg, and Breyer). While this vote is somewhat explicable in light of the Court's attention to the unique history and policy behind the Bankruptcy Clause, it is also surprising in light of her previous votes in state sovereign immunity cases.

110. Because the Takings Clause applies to the states by incorporation through the Fourteenth Amendment, Congress may abrogate state sovereign immunity to enforce that clause under *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), which held that Congress can abrogate Eleventh Amendment immunity when enforcing Section 5 of the Fourteenth Amendment.

111. The statute most frequently invoked by plaintiffs seeking a private right of action against state officials for the deprivation of constitutional rights, 42 U.S.C. § 1983, does not abrogate state sovereign immunity. See *Quern v. Jordan*, 440 U.S. 332, 345 (1979) (finding that § 1983 does not abrogate the states' sovereign immunity). The Court later held in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), that state governments are not persons under § 1983. *Id.* at 66–67; see also *Tenney v. Brandhove*, 341 U.S. 367, 378–79 (1951) (holding that state legislators sued in their personal capacity under § 1983 may use immunity doctrines to shield themselves from damages liability if "acting in a field where legislators traditionally have power to act"). Section 1983, therefore, creates no remedy against the State. See *Arizona v. Arizona*, 520 U.S. 43, 69 (1997) ("We have held . . . that § 1983 actions do not lie against a State.").

112. *Lynch v. United States*, 292 U.S. 571 (1934).

immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress . . . and to those arising from some violation of rights conferred upon the citizen by the Constitution.<sup>113</sup>

*Lynch's* treatment of the issue is straightforward, but dictum. In that case, Justice Brandeis found Congress's repeal of all laws pertaining to war insurance policies unconstitutional and thus determined that Congress could not take away the previously promised right and remedy (that is, the previous consent to suit).<sup>114</sup>

The most authoritative recent Supreme Court statement on the matter is in the *First English* footnote where the Court takes a very different approach, refuting the United States' argument that "the prohibitory nature of the Fifth Amendment . . . combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision."<sup>115</sup> There the Court asserted that "[t]hrough arising in various factual and jurisdictional settings, [takings] cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking."<sup>116</sup> Some years later, the Court seemed to backtrack when it noted in *City of Monterey v. Del Monte Dunes*<sup>117</sup> that "[e]ven if the sovereign immunity rationale retains its vitality in cases where [the Fifth] Amendment is applicable . . . it is neither limited to nor coextensive with takings claims."<sup>118</sup> *Del Monte* then suggests the possibility that, given the

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113. *Id.* at 581–82 (citing *Schillinger v. United States*, 155 U.S. 163, 166–68 (1894)) (suggesting that sovereign immunity applies as strongly when suit arises under Constitution as when it arises under statutory law) (other citations omitted).

114. *Id.* at 581–88. Also, it is worth noting that the defendant in *Lynch* was the federal government, not a state government. Although there might be reason to think that the sovereign immunity laws are analogous—that if one must waive its immunity, then so too must the other, e.g., *Webster v. Doe*, 486 U.S. 592, 612–13 (1988) (Scalia, J., dissenting)—that is not necessarily the case. *But see* *Seamon*, *supra* note 8, at 1090–94 (arguing that there is symmetry between federal and state sovereign immunity).

115. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987).

116. *Id.*

117. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

118. *Id.* at 714. The issue in *Del Monte* was whether the plaintiff's § 1983 takings claim was properly submitted to the jury. *Id.* at 694. The Court determined that it had been properly submitted, reasoning in part that just compensation is a monetary, compensatory remedy and that the denial of just compensation amounted to a constitutional tort. *Id.* at 709–11. This kind of action, therefore, falls squarely within the Seventh Amendment's promise of a jury trial for actions at law. *Id.* As part of this discussion, the Court noted that sovereign immunity would not have barred the suit in *Del Monte* because a city was the defendant, not the state. *Id.* at 714. This analysis vaguely suggests that sovereign immunity might have barred the suit were the

opportunity, the Court might revisit the *First English* footnote, but it offers little guidance.

We, therefore, have nothing concrete to go on; indeed, neither *First English* nor *Del Monte* presented the instant question directly. The government in *First English* was the County of Los Angeles and thus was not entitled to a straight sovereign immunity defense.<sup>119</sup> In *Del Monte*, the question was whether the plaintiff had a right to jury trial in a federal court inverse condemnation claim against a city under 42 U.S.C. § 1983;<sup>120</sup> the sovereign immunity issue arose in response to the dissent's argument that government power to shield itself from suit must include the lesser power to permit such suits without providing a jury trial.<sup>121</sup> Given this sparse and inconclusive precedent, we must explore the nature of the competing constitutional doctrines more deeply. Indeed, the Court's cursory references to this problem highlight its reluctance to arbitrate between competing constitutional provisions. Of course, none of these cases presented directly the question at issue here, but the Court's willingness to brush aside the problem quickly speaks to an unwillingness to wrestle with paradoxes created by separate lines of precedent. This Article, therefore, attempts both to address in detail the doctrinal conflict and to identify a more thorough approach to such conflicts than the cryptic statements offered by the Court.

#### IV. The Textual Argument

The simplest and most straightforward argument in favor of automatic abrogation is textual. The Fifth Amendment Takings Clause is that rare constitutional clause that dictates a particular remedy,<sup>122</sup> stipulating that private property shall not "be taken for public use, without just compensation."<sup>123</sup>

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defendant the state, but the discussion is too brief to discern much about the Court's views on the *First English* footnote.

119. See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978) (noting that there is no basis for concluding that the Eleventh Amendment is a bar to municipal liability).

120. *Del Monte*, 526 U.S. at 721–22.

121. See *id.* at 742 (Souter, J., dissenting) (noting that some courts have rested on sovereign immunity to allow legislatures to qualify and condition the right to bring suits against the sovereign).

122. The Constitution refers explicitly to remedies only in the Fifth Amendment's Just Compensation Clause and in safeguarding the remedy of habeas corpus against "Suspension" by Congress. HART & WECHSLER, *supra* note 8, at 849; see also *infra* Part V.A (discussing the unique nature of the remedially oriented Takings Clause and Suspension Clause).

123. U.S. CONST. amend. V.

Unlike many rights for which the Constitution merely curtails government power to act, this provision expressly dictates a particular remedy.

"Just compensation" traditionally has been thought to amount to money damages equal to the fair market value of the property taken by the condemning government.<sup>124</sup> Presumably, in eminent domain cases, the state could choose to return the property rather than pay the fair market value. Unless the government mis-estimated the court's determination of "fair value," however, this seems unlikely—the condemning authority has taken the property knowing, most likely, that it will have to pay fair market value for it.<sup>125</sup> Extending this principle to regulatory takings cases, once the regulation has ceased, under *First English*, the government must pay actual money to compensate the landowner for the period of the taking. There is, of course, the possibility that the Court could overrule *First English*, but that chance seems extremely remote, especially given the robust nature of contemporary takings jurisprudence.

Given that the Constitution requires "just compensation," the straight textual argument seems to require the government to provide money damages, notwithstanding otherwise applicable sovereign immunity bars.<sup>126</sup> This is so not just because the Fifth Amendment commands it, but also because there is no Eleventh Amendment language that would require a different outcome. The term "just compensation" must mean money damages; there is no other remedy that could possibly constitute "just compensation" in a temporary takings case.<sup>127</sup>

Of course, there is a potential state sovereign immunity bar to recovering this money from the state. The doctrines limiting the available relief might be wise, but, as a strict textual matter, the Constitution itself does not require this immunity in any federal question case, let alone takings cases brought under the Fifth Amendment. The Eleventh Amendment states: "The Judicial power of

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124. DANA & MERRILL, *supra* note 24, at 169.

125. Of course, a state that knowingly takes property can initiate condemnation proceedings for a determination of how much compensation is due. Such proceedings derive from the same Fifth Amendment right to money damages, but concede the landowner's right to receive just compensation. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 711–12 (1999) (distinguishing condemnation proceedings from § 1983 actions).

126. *See, e.g., SDDS, Inc. v. South Dakota*, 650 N.W.2d 1, 8–9 (S.D. 2002) (finding that sovereign immunity is not a bar to money damages and that "the remedy does not depend on statutory facilitation").

127. *See Del Monte Dunes*, 526 U.S. at 710–11 ("[J]ust compensation is, like ordinary money damages, a compensatory remedy . . . [and therefore] legal relief," so that a suit alleging a taking seeks "not just compensation *per se* but rather damages for the unconstitutional denial of such compensation").

the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>128</sup> Nothing in this language would seem to extend state sovereign immunity to cases in which a state citizen sues his own state to recover "just compensation" for property that the state has taken.<sup>129</sup>

Indeed, state sovereign immunity doctrine strays far from the Constitution's text.<sup>130</sup> *Hans* marked the most significant departure from the Eleventh Amendment's text, extending the states' immunity to suits in which a citizen sues her own state,<sup>131</sup> even though Article III authorizes such suits and the language of the Eleventh Amendment includes only suits by citizens of one state against the government of a different state. As Professor Nelson explains, the Court since *Hans* "has been holding that federal courts cannot entertain suits against states in a variety of contexts that apparently *are* covered by Article III's grants of subject matter jurisdiction and are *not* covered by any

128. U.S. CONST. amend. XI.

129. Indeed, nothing in the Eleventh Amendment's language would support much of today's sovereign immunity doctrine, even though Justices Scalia and Thomas, the Court's two most ardent textualists, are both strong proponents of vigorous state sovereign immunity. Professor Ernest Young emphasized how unmoored state sovereign immunity has become from the Eleventh Amendment text when he titled a section in his article "A Tough Day for Textualists, or, Did Justice Scalia Really Sign This Thing?" Ernest Young, Alden v. Maine and the Jurisprudence of Structure, 41 WM. & MARY L. REV. 1601, 1617 (2000); see also John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1667 (2004) (noting that the text of the Eleventh Amendment cannot bear the Court's interpretations).

130. See, e.g., Gibbons, *supra* note 74, at 1895 ("[F]rom a textual standpoint, the suggestion that states were immune from suit in federal court seems preposterous on its face."); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1351-71 (1989) (arguing that there is no rational justification for departing from the plain meaning of the text); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 97-142 (1989) (providing the historical development of Eleventh Amendment jurisprudence and reasons why the Court departed from the text).

131. See *Hans v. Louisiana*, 134 U.S. 1, 16-17 (1890) (invoking historical practices and precedent to support the statement that a state may not be sued without its consent). See generally Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts"*, 81 N.C. L. REV. 1927 (2003) (arguing that *Hans* gave voice not to the intent of the 1790s but to the compromise of the 1890s in which white Americans, driven in part by racism, allowed the South limited independence in imposing white rule and repudiating its state debts in exchange for national reconciliation and unity); Mark Strasser, *Hans, Ayers, and Eleventh Amendment Jurisprudence: On Justification, Rationalization, and Sovereign Immunity*, 10 GEO. MASON L. REV. 251 (2001) (arguing that *Hans* makes sense in light of precedent precluding federal courts from taking control of state treasuries and in light of the fact that any other decision would have been unenforceable).

plausible reading of the Eleventh Amendment."<sup>132</sup> This detextualization of the Eleventh Amendment, itself central to more than a century of state sovereign immunity doctrine, has become even more pronounced in the Court's recent decisions, especially *Alden*, where the Court announced that "the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."<sup>133</sup>

Of course, relying on history is not necessarily contrary to a textualist reading. Originalist-textualists seek to reconcile their approaches to constitutional interpretation by searching for the commonly understood meaning of the text at the time of ratification.<sup>134</sup> But in this instance, the *Alden* majority's controversial view of original understanding of the Eleventh Amendment<sup>135</sup> is so at odds with the plain meaning of the text, that the Court's approach, faithfully characterized, simply abandons textualism. Indeed, the Court's opinion does not even attempt to determine what the words of the Eleventh Amendment would have meant in the 1790s,<sup>136</sup> focusing instead on the Founders' "intent to preserve the States' immunity from suit in their own courts."<sup>137</sup> The Court even admits that the phrase "Eleventh Amendment immunity" is:

[C]onvenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) . . . .<sup>138</sup>

However persuasive the historical and structural arguments might be, they are decidedly unmoored from the Constitution's text.

132. Nelson, *supra* note 82, at 1563 (emphasis in original).

133. *Alden v. Maine*, 527 U.S. 706, 729 (1999).

134. See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132 (1998) (describing the rationale behind originalist interpretation); see also Young, *supra* note 129, at 1620 (discussing potential overlaps between textualist and originalist arguments).

135. See *infra* Part VI.B (discussing the original understanding of state sovereign immunity).

136. See Young, *supra* note 129, at 1622 ("There is no effort . . . to use historical evidence to determine what the words of the Eleventh Amendment would have been understood to mean at the time that the Amendment was adopted.").

137. *Alden*, 527 U.S. at 741.

138. *Id.* at 713.

Although doctrines of statutory interpretation are rarely applied to the Constitution, the maxim *expressio unius est exclusio alterius*<sup>139</sup> is helpful here. In fact, it is probably even more appropriate than in the statutory context. One drawback to *expressio unius* in statutory interpretation is that the doctrine assumes a kind of legislative omniscience; it is unfair and unrealistic to expect a legislature to include statutory language dealing with every scenario that it might intend to fall under a law's ambit.<sup>140</sup> By way of contrast, *Chisholm* brought the issue of state immunity to the forefront of the nation's constitutional consciousness. In amending the Constitution, the framers of the Eleventh Amendment must have been aware that states might try to raise sovereign immunity defenses in other kinds of cases. Indeed, the Pennsylvania ratification debates make clear that some Founders did not expect immunity to necessarily extend to federal question cases.<sup>141</sup> And though one need not assume that the Eleventh Amendment's framers considered every possible variation (for example, whether sovereign immunity should not extend to constitutional claims or to all federal claims), one can assume they understood the basic divide between federal question and diversity suits well enough (and implicit enough in the federalist system) that it is unrealistic to think that they would not have considered those distinctions.

That the response to *Chisholm* was to codify state sovereign immunity only for suits brought by citizens of another state or foreign citizens cuts strongly against the current Court. Of course, *Chisholm* was a diversity case, so one could argue that the Eleventh Amendment addressed only the mischief caused by that case and left undisturbed sovereign immunity in federal question cases, upon which *Chisholm* had not intruded. But this response is a weak one because the framers of the Eleventh Amendment surely anticipated that sovereign immunity issues would have arisen in contexts other than diversity cases and recognized that the Eleventh Amendment would figure significantly in future generations' views of that immunity.

Professor Manning similarly contends that the specificity canon, itself a close relation of *expressio unius*, has at least as much force for precise constitutional provisions as for precise statutory ones.<sup>142</sup> The rigorous processes of constitutional amendment set forth in Article V of the Constitution

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139. The Latin translates into "inclusion of one thing indicates exclusion of the other." WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 824 (3d ed. 2001).

140. See *id.* (describing inherent flaws in the maxim).

141. See *infra* note 430 and accompanying text (discussing the Pennsylvania debate in further detail); see also *infra* Parts V.B.1 & VI.B (providing additional historical perspective).

142. Manning, *supra* note 129, at 1671.

require judges to carefully respect any amendment's lines of compromise.<sup>143</sup> The fact that Article V's requirements are more stringent than those necessary to enact mere legislation should militate towards an especially close reading of the relevant text; a broader reading might permit an interpretation that the necessary super-majorities could not have ratified.<sup>144</sup> Confronted with a specific, rule-like amendment, courts thus can reasonably infer a negative implication from the text's specificity.<sup>145</sup> Applied to the Eleventh Amendment, this interpretive approach would read the text to mean what it says and only what it says: states enjoy sovereign immunity in suits brought by citizens of another state or a foreign state. Because the text reflects the compromise necessary to ratify the amendment, it should not apply to other kinds of suits, such as federal question actions brought by citizens of the same state. States, therefore, would not be protected against taking suits, except, arguably, those brought by citizens of another state.<sup>146</sup>

Of course, even though the textual hook for the Eleventh Amendment is especially weak, the takings textual argument has its weaknesses as well. While the Just Compensation Clause does provide for an explicit remedy, its language does not promise compensation for temporary (or, for that matter, regulatory) takings. Nor does it, by its own terms, apply against the states.<sup>147</sup> To be sure, the extension to temporary and regulatory takings seems to be a logical outgrowth of the Just Compensation Clause in the sense that the purpose inherent in the Clause's language cannot be satisfied without extending it to such takings. And because the Takings Clause incontrovertibly applies against the states through the Fourteenth

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143. See *id.* at 1672, 1692–1720 (arguing that the text of amendments is entitled to great deference because of the nature of the amendment process).

144. *Id.* at 1702, 1719–20 (arguing that, given the constitutional protections Article V gives to political minorities, a strict reading of the amendments is necessary to ensure that judges do not enforce a provision that was not properly ratified); see also Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 125–26 (1996) (discussing Article V's design, which permits a very small number of states to prevent constitutional amendment and requires super-majorities of both houses of Congress).

145. See Manning, *supra* note 129, at 1671, 1702 (noting that, in regard to rule-like amendments such as the Eleventh Amendment, "textual precision should be understood to reflect the adopters' willingness or ability to go so far and no farther in pursuit of the desired constitutional objective").

146. If the narrower reading of the Eleventh Amendment were to ever win the day, an interesting question would be whether it would extend only to diversity suits against a state or also to federal question suits that happened to be brought by out-of-state individuals.

147. Of course, in many areas of constitutional law settled doctrine does not rest on constitutional text. See *infra* Part VII (arguing that many constitutional principles are products of judicial interpretation due, in large part, to the brevity of the Constitution).



Amendment,<sup>148</sup> this extension satisfies the Just Compensation Clause's purpose within the context of the new post-Civil War federalism.<sup>149</sup> But one must concede that both of these significant developments are judge-made.

The difference, however, is that while *First English* purports to interpret the Takings Clause, *Alden* does not claim to interpret the Eleventh Amendment at all.<sup>150</sup> The requirement that the government compensate property owners for temporary takings closes a potential loophole in the Takings Clause and effectuates its purpose more fully; without it, the government could repeatedly take property temporarily and then return it without having to compensate the owners. By way of contrast, it is impossible to see how the extension of Eleventh Amendment immunity to suits by states' own citizens furthers the achievement of the Amendment's language, which gives the states' protection against suits brought by citizens of other states. From a textualist perspective then, it would be very strange for the essentially common law sovereign immunity to prevent damages actions for violations of the Takings Clause.

### V. *The Structural Arguments*

Of course, although it is wise to begin with the text, the inquiry cannot end there. Indeed, were it to end there, the vast majority of our sovereign immunity jurisprudence would not exist, for the Court has found its roots in structural and originalist arguments. We should not forget the Constitution's text—and it is in fact perhaps worth emphasizing to demonstrate that our absurdly complicated Eleventh Amendment doctrine was far from inevitable<sup>151</sup>—but we must place it aside both because there are other arguments to be made and because we must address the arguments in favor of sovereign immunity on the Court's own terms.

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148. See *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897) (finding that Fourteenth Amendment due process requires just compensation when a state government takes private land for public use).

149. Admittedly, as the Fourteenth Amendment does not explicitly incorporate the Bill of Rights, the force of the textualist argument is somewhat diminished.

150. *Alden v. Maine*, 527 U.S. 706, 713 (1999); see also *supra* note 133 and accompanying text (discussing *Alden*).

151. See, e.g., JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 41–85 (2002) (critiquing the elaborate complexities of Eleventh Amendment doctrine).

### A. Which Reading Does Less Damage?

Any resolution will damage one line of case law or the other. The Court could keep silent and ignore the incompatibility, but even that approach would probably prioritize takings over sovereign immunity because refusing to address the issue in a case would side step immunity altogether. This is essentially what happened in *Palazzolo*.<sup>152</sup> Judicial politics might encourage this result, but it leaves in place significant doctrinal contradictions.

One way to resolve the collision is to ask which outcome damages an existing doctrine least. Although unorthodox, this approach admits that one constitutional doctrine will necessarily be pruned back, so it seeks to arrive at the solution that requires the least pruning. Of course, there are other factors one might use to decide what to "prune,"<sup>153</sup> but an advantage of this approach is that it seeks neutrality.

From this perspective, the Takings Clause should be automatically abrogating. The main point of the Takings Clause is to limit the government's power of eminent domain,<sup>154</sup> frequently by forcing the government to pay for private property it takes, even when it would prefer not to. If the government could bar suits for just compensation, the Takings Clause would be stripped of much meaning. State governments could take property whenever it wanted to without providing any compensation to landowners. The state could, of course, choose to waive its immunity, but the whole purpose of the Takings Clause is to require just compensation and give the government no decision in the matter.<sup>155</sup> Requiring formal congressional abrogation would give the legislature the very power that the Constitution seeks to deny it. One could argue that it looks bad for a government to take private property and then block itself from suit by invoking sovereign immunity (and that, therefore, it would have incentives to abrogate its immunity). But because takings affect potentially only a small minority, it is unrealistic to think that political safeguards would necessarily lead to abrogation or waiver.<sup>156</sup>

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152. See generally *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (failing to discuss sovereign immunity in finding a taking); see also *supra* note 6 and accompanying text (discussing *Palazzolo*).

153. Of course, normatively some might prefer an outcome that does the most damage to one or both doctrines.

154. DANA & MERRILL, *supra* note 24, at 2–3.

155. But see Brauneis, *supra* note 8, at 60 (arguing that takings clauses in state constitutions did not always require just compensation but rather nullified legislation that effected a taking); *infra* Part VI.A (discussing the development of the "Just Compensation" requirement).

156. One must not overstate the potential failures of the political marketplace for property

This, of course, is a rather extreme reading, depicting sovereign immunity as necessarily draining the Takings Clause of all its content. A more charitable reading is that sovereign immunity really only kills *First English's* judicially imposed requirement that the government compensate landowners for temporary takings. Even if a state uses state sovereign immunity to shield itself from suit in a physical takings case, a plaintiff can still sue a state official for injunctive relief forcing the return of her property. Such a plaintiff cannot recover money for the duration of the taking, whether regulatory or physical, but if the state refuses to compensate her, she can still get her property back. Given the availability of *Ex parte Young* injunctive relief and suits against officers in their personal capacities, sovereign immunity's interference is minimal, affecting mostly temporary takings.

This rejoinder is significant, but it underestimates how central *First English* is to just compensation doctrine and values. *First English* itself recognizes this, stating "that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."<sup>157</sup> Just compensation principles thus rest not on the duration or permanence of a taking, but rather on the idea that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>158</sup> Because the value of using land for a fixed period of time "can be great indeed,"<sup>159</sup> it

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owners. As a class, they surely have more political clout than many groups seeking protection under the Constitution, such as criminal defendants. *See, e.g.,* Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 282 (1992) (stating that a citizen with voting rights has less reason than a nonconstituent to fear uncompensated takings). But because takings can affect property owners scattered over a large area, affected property owners will frequently be unable to act as a political unit. Government failure is, then, a distinct possibility, potentially resulting in a compensation system that is neither efficient nor just. *See, e.g.,* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 620–23 (1984) (discussing political fiscal illusion, which occurs when the governmental body discounts the cost of its action because it does not explicitly appear as a budgetary expense); William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI-KENT L. REV. 865, 887–88 (1991) (discussing the Takings Clause as a means of protecting individuals from bearing burdens that should be borne by the public as a whole); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306 (1990) (noting that the legal system regards organized interest groups differently than it does an individual citizen or a collection of citizens, who but once in lifetime face a common burden).

157. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

158. *Id.* at 318–19 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

159. *Id.* at 319.

would not make sense for the Takings Clause to cover permanent takings but not temporary ones that could last years and deprive a property owner of millions of dollars. Indeed, even Justice Stevens, who dissented in *First English*, admits that "[t]here may be some situations in which even the temporary existence of a regulation has such severe consequences that invalidation or repeal will not mitigate the damage enough to remove the 'taking' label."<sup>160</sup>

Permitting sovereign immunity doctrine to trump the Takings Clause would accomplish just this, effectively overruling *First English*, at least as applied to the states.<sup>161</sup> Without the obligations created by *First English*, a state could render private property unusable indefinitely and return it without compensating the landowner at all for the period of its use. Because the state would have no incentive to minimize the duration of a taking, government possession could last for the duration of the plaintiff's lawsuit; the state would thus have incentives to draw out the case, filing motions and appeals to make sure the process takes as long as possible.<sup>162</sup> This scenario, of course, assumes the worst behavior and might not accurately reflect the way most states would behave most of the time. But to the extent that the very existence of the Takings Clause presupposes a distrust of government, it would be odd to design a jurisprudence that left so much to the good will of the state and did not force government to internalize the costs of its takings.<sup>163</sup> This result might tempt

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160. *Id.* at 328 (Stevens, J., dissenting).

161. *First English* does not actually find that a regulatory taking had occurred; rather, it holds that the government must pay just compensation to a landowner if a regulatory taking occurs. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 1176 (4th ed. 1998).

162. That Eleventh Amendment immunity extends to a state but not its subdivisions poses not only doctrinal complications but also curious policy incentives. To the extent that the Constitution, particularly as interpreted by the Rehnquist Court, represents a laissez-faire model of governance (though, granted, not nearly as emphatically capitalist as during the *Lochner* Court), this constitutional baseline discouraging regulation makes sense, even if it is normatively controversial. To the extent, though, that it encourages state regulation and discourages equivalent locality regulation, the result seems odd. For an originalist who opposes big government, our original federal structure existed not merely to protect sovereign states, but also to localize decisionmaking, preserving a kind of small town, Jeffersonian democracy. This might be a controversial—or idealized, or naïve—conception of our constitutional heritage, but it is an important part of the anti-federalist tradition. (By "anti-federalist," I refer not so much to the Anti-Federalists who opposed the Constitution, but rather to the supporters of the Constitution who nevertheless wanted to protect local rule from a large centralized government.) Sovereign immunity doctrine theoretically encourages state rather than local regulation, a policy trend that is not necessarily desirable (though, admittedly, the politicians creating policy might not be thinking at all about the Eleventh Amendment when drafting their policies). *But see* Roberts, *supra* note 8, at 623 n.2 (noting that many takings claims are filed against local governments).

163. *See, e.g.*, RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 64 (5th ed. 1998) (providing

policy makers to believe the "fiscal illusion" that the resources they take have no opportunity cost, thus leading to overzealous regulators with no concern for the misallocation of resources.<sup>164</sup>

Allowing state sovereign immunity to bar recovery in *First English* suits would thus undermine the very principles upon which just compensation rests. By way of contrast, the opposite outcome, privileging Fifth Amendment takings over Eleventh Amendment sovereign immunity, leaves most of current sovereign immunity doctrine intact. Were the Court to hold that a state cannot raise a sovereign immunity defense against a takings claim, the rest of sovereign immunity doctrine could still stand. A takings exception to sovereign immunity doctrine could rest on various theories, such as the Fifth Amendment's remedial command. Under this reading, current state sovereign immunity case law would only be disturbed with regards to interim takings; *Seminole Tribe*, *Alden*, and *FMC* would remain unaffected. Sovereign immunity would still have bite against other constitutional rights, statutory rights, and state law. A narrow exception for takings therefore would not defang sovereign immunity nearly as much as the alternative approach would nullify the Takings Clause.

## *B. The Marbury Principle and the Problem of Constitutional Remedies*

### *1. Just Compensation and the Remedial Promise*

As suggested at the end of the last section, one can also make a broader argument that, as a structural matter, it does not make sense to bar suits against a state for federal constitutional violations because removing the remedy often constrains the right. Under this theory, state sovereign immunity should apply to federal statutes and state laws, but not to the federal Constitution, because the very purpose of enshrining these rights in the Constitution is to protect them regardless of the political whims of the state. The Takings Clause would then provide a kind of *Bivens*<sup>165</sup> action against the states, creating a cause of action for damages out of a constitutional violation.<sup>166</sup> Of course, *Bivens* itself applies

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examples of the perverse economic decisions the government might make were it able to obtain land freely).

164. See Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999–1001 (1999) (discussing the deterrence function served by the just compensation requirement).

165. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

166. See *id.* at 397 (holding that when a federal agent acting under color of his authority

to federal officials, not state governments, so it provides no direct doctrinal support for this position.<sup>167</sup> Instead, it suggests that the violation of constitutional rights can itself give rise to an action for damages; a crucial role of the judiciary in this model, therefore, is to protect individuals against government incursions on their constitutional rights. Though one could make the broader argument that any federal constitutional right should always automatically abrogate a state's immunity, this section seeks more modestly to apply such arguments only to just compensation cases.

Underlying this argument is the famous aphorism, traced back to Blackstone, that for every right there must be a remedy.<sup>168</sup> Chief Justice Marshall articulated this principle in *Marbury v. Madison*,<sup>169</sup> stating that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>170</sup> Thus, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."<sup>171</sup> As the Court later stated, "Adjudication is of no value as a remedy unless enforcement follows."<sup>172</sup> Given this reasoning and the tremendous importance assigned to Chief Justice Marshall's *Marbury* opinion, it would follow that the Takings Clause assigns a specific duty by law, so that its violation—if the government takes property without providing just compensation—gives the injured property owner the right to seek that compensation in the judicial system.

*Marbury's* principle is fundamental and persuasive, but, as might be expected, the matter is not so simple. Although an injured property owner clearly has a constitutional right, that right alone does not entitle her to the remedy of her choice. Our judiciary considers distinct such concepts as cause of action, jurisdiction (both personal and subject matter), justiciability, remedy, and sovereign immunity, and satisfying judicial requirements in one category

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violates the Fourth Amendment, the plaintiff has a cause of action for damages if he can show a resulting injury).

167. See *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (finding that the Eleventh Amendment precludes *Bivens*-type actions against state governments in federal court unless the states consent to such suits).

168. See, e.g., Daniel Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2554 (1998) (discussing Blackstone and constitutional remedies).

169. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

170. *Id.* at 163.

171. *Id.* at 166.

172. *R.R. Co. v. Tennessee*, 101 U.S. 337, 339 (1879).

often will have no effect on another.<sup>173</sup> Merely having a cause of action, therefore, is not enough to guarantee judicial review on its own, nor is it sufficient to guarantee an appropriate remedy,<sup>174</sup> even if there is review.<sup>175</sup> As Professors Meltzer and Fallon point out, "*Marbury's* apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule, and its ideal is not always attained."<sup>176</sup> Indeed, claims against the government implicate two competing interests: the individual's interest in receiving compensation for a meritorious claim and society's interest in maintaining democratic control over the allocation of limited public funds.<sup>177</sup>

Keeping in mind these traditional bars on *Marbury's* principle that every right deserves a remedy, it becomes much easier to see why sovereign immunity is an obstacle at all. And yet, there is good reason to think that sovereign immunity doctrine should not apply to the Takings Clause. There is something deeply contradictory about including a right in the Constitution and then constructing a sovereign immunity barrier to prevent injured parties from enforcing it. For some constitutional rights, this phenomenon is troubling but explicable. In a First Amendment setting, for instance, a state might pass a law banning a particular protest. Sovereign immunity will bar the protesters from suing for damages, but if they file their action early enough, the plaintiffs can receive injunctive relief forcing the state officer to permit the protest. Eleventh Amendment immunity here limits the range of possible remedies, but in many instances an equitable remedy will in fact be what the protesters want.<sup>178</sup> By

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173. Even though these categories are usually thought of as analytically distinct, judicial analysis sometimes blurs them together. As I shall demonstrate, the issues of remedy and sovereign immunity are especially intertwined in the context of takings.

174. Traditional remedies for constitutional violations include "damages, restitution, injunctions, mandamus, ejectment, declaratory judgments, exclusion of evidence, remand for retrial or reconsideration untainted by constitutional error, and writs of habeas corpus." Fallon & Meltzer, *supra* note 57, at 1778.

175. *But see* Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 292 (1995) (arguing that the Constitution should be self-executing and that "enforcement of the Constitution is not dependent on the assent of the political branches or of the states").

176. Fallon & Meltzer, *supra* note 57, at 1778.

177. Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 626 (1985).

178. Of course, the scenario becomes more complicated if, for instance, the protesters do not have time to file an action in time to strike down the law before the protest. Presumably, the state could play its cards so that the law prevents a protest, and then sovereign immunity would block plaintiffs' ability to receive money damages. If the protest were a one-time event (so that a future protest on the same issue would be worthless), then the injunctive relief afforded to plaintiffs through an *Ex parte Young* suit would do the protesters no good. In this instance,

way of contrast, in temporary takings cases, damages are the only remedy that will protect the plaintiff's rights. A sovereign immunity bar thus eviscerates the property right. Congressional abrogation, of course, can restore the right and the remedy, but requiring abrogation essentially demotes the Takings Clause as applied to the states to the status of a statute.

While this argument could apply to other constitutional rights, it is strongest for takings cases. The Takings Clause is not merely "another protection of the few against the many,"<sup>179</sup> but one of only two constitutional provisions that are remedially oriented. The other is the Suspension Clause, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>180</sup> The original Constitution and Bill of Rights thus offered its most vigorous protections for liberty and property. Indeed, the Constitution emerged partially out of a recognition that the Articles of Confederation had failed to protect these two rights. At the beginning of the American Revolution, Americans did not think that democracy could threaten such property and liberty rights.<sup>181</sup> The experience of the 1780s under the Articles of Confederation, however, taught them otherwise; America, as it turned out, was not that different from other societies, and these rights needed special protection.<sup>182</sup> After all, liberty was central to the American project and, as Madison pointed out, only a minority (those with property) would be interested in protecting property rights.<sup>183</sup>

Takings, like habeas, then would seem to be an area where the Eleventh Amendment has little traction. As the nineteenth century Court explained in *United States v. Lee*:<sup>184</sup>

If this constitutional provision [protecting the writ of habeas corpus] is a sufficient authority for the court to interfere to rescue a prisoner from the

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sovereign immunity permits some remedies, but not the only meaningful one.

179. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 97 (1980).

180. U.S. CONST. art. I, § 9, cl. 2.

181. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–87*, at 410 (1998) (describing early American political theory).

182. *Id.* at 410–11.

183. *Id.* at 411. There may be normative arguments today to prefer other rights over property rights, but the Constitution's scarcity of remedial provisions would suggest that property and liberty are prioritized in our constitutional system. Though problematic in ways, this result at least avoids the danger of letting constitutional rights hinge on judges' own values. See ELY, *supra* note 179, at 43 (discussing the perils of judges' prejudices influencing their constitutional jurisprudence).

184. *United States v. Lee*, 106 U.S. 196 (1882).



hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?<sup>185</sup>

To an extent, the analogy is inexact because habeas claims are directed to state officers<sup>186</sup> and, therefore, do not implicate the core of state sovereign immunity.<sup>187</sup> Nevertheless, they necessarily intrude upon the prerogative of the state, and no one would suggest that Congress must abrogate the state's sovereign immunity for those habeas statutes to be functional.<sup>188</sup> As Justice Souter has pointed out, habeas statutes are directed against "the State."<sup>189</sup> One provision of the habeas corpus statute, for instance, requires that "*the State* shall produce part of the record and the Federal court shall direct *the State* to do so by order directed to an appropriate State official."<sup>190</sup> To be sure, the statute provides that the court shall direct the order to the "appropriate State official." But the language of the statute—and, indeed, the nature of the habeas remedy—comprehends that the remedy is one that intrudes upon the state's sovereignty. And yet, though Congress may impose various restrictions on habeas actions, it may not entirely bar them under the Constitution except "in Cases of Rebellion or Invasion [when] the public Safety may require it."<sup>191</sup> Habeas, then, is an example of an action that intrudes greatly on the state but cannot be blocked by sovereign immunity.

Of course, another important distinction is that habeas claims, unlike temporary takings claims, do not seek a monetary remedy; in this way, they more closely resemble *Ex parte Young* actions.<sup>192</sup> But to the extent that *Young*

185. *Id.* at 218.

186. *See, e.g.*, 28 U.S.C. § 2243 (2004) ("The writ . . . shall be directed to the person having custody of the person detained.").

187. Moreover, *Lee* was decided about a century before *First English*, so the damages remedy in temporary regulatory takings cases was not yet required. Rather, the condemning authority could choose instead to return the property.

188. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 312 n.10 (1997) (Souter, J., dissenting) (noting that habeas statutes were not "intended to abrogate an immunity under the Eleventh Amendment").

189. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 181 (1996) (Souter, J., dissenting).

190. 28 U.S.C. § 2254(f) (2004) (emphasis added).

191. U.S. CONST. art. I, § 9, cl. 2.

192. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 312 & n.10 (1997) (Souter, J., dissenting) (citing a habeas case while discussing the "intrusiveness" of *Ex parte Young* actions); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 178 (1996) (Souter, J., dissenting) (recognizing that "when a habeas corpus petitioner sues a state official alleging detention in violation of federal law and seeking the prospective remedy of release from custody, it is the doctrine identified in *Ex parte Young* that allows the petitioner to evade the jurisdictional bar of

itself is a recognition that courts must offer an appropriate remedy to protect constitutional rights, its doctrine also stands for the proposition that the Constitution can be used as a sword to vindicate remedies explicitly protected in the Constitution. If we accept this principle at such a general level of abstraction, it would seem to follow that using the Takings Clause as a sword would necessarily command the damages remedy implicit in "just compensation."

Indeed, a damages remedy arising from the Constitution is itself not alien to our case law; *Bivens* already decided that the Constitution—in that case the Fourth Amendment—could give rise to a cause of action for damages against federal agents for unconstitutional conduct.<sup>193</sup> It did so, in fact, with specific reference to liberty interests, arguing that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."<sup>194</sup> And the Court has more than once noted specifically that property and liberty are uniquely important interests. In addition to *Lee*, the Supreme Court in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*<sup>195</sup> noted that:

Due protection of the rights of property has been regarded as a vital principle of republican institutions. Next in degree to the right of personal liberty . . . is that of enjoying private property without undue interference or molestation. The requirement that the property shall not be taken for public use without just compensation is but an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen [sic].<sup>196</sup>

The notion that Fifth Amendment just compensation is different from other constitutional remedies has surfaced in other Supreme Court decisions as well. In *Jacobs v. United States*,<sup>197</sup> for instance, the Court argues with regards to a federal partial regulatory takings claim that:

The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of

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the Eleventh Amendment (or, more properly, the *Hans* doctrine)").

193. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

194. *Id.* at 395.

195. *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

196. *Id.* at 235–36 (internal quotation marks and citations omitted).

197. *Jacobs v. United States*, 290 U.S. 13 (1933).

eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.<sup>198</sup>

Significantly, even the Court's most recent sovereign immunity decisions agree that sovereign immunity does not attach as vigorously to claims arising from the Constitution itself. In *Alden*, the Court admits that *Reich v. Collins*

arose in the context of tax-refund litigation, where a State may deprive a taxpayer of all other means of challenging the validity of its tax laws by holding out what appears to be a "clear and certain" postdeprivation remedy. In this context, due process requires the State to provide the remedy it has promised. *The obligation arises from the Constitution itself. . . .*<sup>199</sup>

This language is admittedly somewhat cryptic, but the idea that certain rights emanating from the Constitution enjoy special protections is not wholly anomalous. Over a century earlier, the Court in *Lee* opined that the principle of immunity was "as applicable to each of the states as it is to the United States, except in those cases where by the constitution a state of the Union may be sued in this court."<sup>200</sup>

These statements are potentially of great significance, but it is important to admit that their exact meanings are unclear. In *Reich*, Georgia had legislatively altered the remedy against officers, substituting traditional trespass or *assumpsit*

198. *Id.* at 16. In addition to *Jacobs*, the Court has several times explained that the Constitution requires the compensation remedy for takings. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (finding a constitutional requirement that condemnations be compensated); *United States v. Clarke*, 445 U.S. 253, 257 (1980) (noting that the Constitution provides a landowner with a self-executing claim to compensation after condemnation); see also Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 200 (1996) (claiming that courts regularly abrogate sovereign immunity when requiring compensation for takings). But see *Malone v. Bowdoin*, 369 U.S. 643, 646-47 (1962) (finding that sovereign immunity barred an action to eject a federal forest service officer from land to which both plaintiffs and the federal government claimed title). Note, however, that because the actions in *Jacobs* were brought under the Tucker Act, there was no sovereign immunity to hurdle.

199. *Alden v. Maine*, 527 U.S. 706, 740 (1999) (emphasis added); see also *Reich v. Collins*, 513 U.S. 106, 108 (1994) (noting the long line of cases establishing the constitutional requirement of remedies for unconstitutional taxes); *supra* Part III.A.2 (discussing due process tax refund cases).

200. *United States v. Lee*, 106 U.S. 196, 206-07 (1882).

actions with a direct action against the state. The state supreme court, however, found the refund remedy unavailable when the tax-collection statute was declared unconstitutional.<sup>201</sup> In citing *Reich*, *Alden* may simply be asserting that a state cannot withdraw its promise for a remedy for unlawful taxes. From this perspective, *Reich* might be a narrow due process case rather than a novel application of constitutional remedies.<sup>202</sup> Indeed, keeping in mind that *Alden* argues that sovereign immunity barred a suit arising under the Constitution in *Hans*,<sup>203</sup> it becomes clear that its treatment of *Reich* does not endorse a theory of automatic abrogation for suits to enforce constitutional rights. To the contrary, it explicitly rejects "any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States."<sup>204</sup> And yet, the inclusion of the word "necessarily" seems to give the Court some wiggle room: federal law may not, as a general rule, override Eleventh Amendment immunity, but in some instances it may. Given *Alden*'s subsequent suggestion that obligations arising from the Constitution itself might deserve special treatment—and given that the Fifth Amendment's remedial promise grants takings a special place even among constitutional rights—this "necessarily" might hint that takings would trump the Eleventh Amendment. In other words, if some federal actions can override the sovereign immunity of the states, then surely suits sounding in inverse condemnation should be such an action. Indeed, even if *Reich* is a narrow due process case that depends on the state's denial of the remedy it has promised, it still might apply to takings cases because just compensation clauses—either in the federal or state constitution—can be read as making such a remedial promise.

*Reich* thus suggests that sovereign immunity concerns might be diminished in certain cases alleging unconstitutional state action. And *Alden*'s treatment of *Reich* helps highlight, albeit obscurely, ways in which takings of property might be treated differently in our jurisprudence. Moreover, given that *Alden* addresses Congress's power to abrogate state sovereign immunity (as opposed to automatic abrogation), the Court's discussion of *Hans* is inapposite to the present problem.<sup>205</sup>

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201. *Reich*, 513 U.S. at 110.

202. See *infra* Part V.B.2 (discussing further *Alden*'s treatment of *Reich*); see also *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527–28 (6th Cir. 2004) (interpreting *Reich* as a reaffirmation that a remedy for unconstitutional taxes does not trump the sovereign immunity that states enjoy in federal court).

203. See *Alden*, 527 U.S. at 732 (viewing the *Hans* Court's decision as a bar to federal question suits against states absent a waiver).

204. *Id.* (emphasis added).

205. The dispute in *Alden* focused on "new property," namely Maine's refusal to pay petitioners overtime payments required under the Fair Labor Standards Act (FLSA). (Maine

Other cases rejecting constitutionally implied remedies are also not wholly analogous. In *Parratt v. Taylor*,<sup>206</sup> for instance, the Court provided no due process remedy for a prisoner plaintiff seeking to recover for the loss of his hobby kit by prison officials.<sup>207</sup> This rule was extended to intentional losses of property in *Hudson v. Palmer*.<sup>208</sup> Both these cases, however, hinged on the state's provision of a post-deprivation remedy, namely the state's tort system.<sup>209</sup> A pre-deprivation remedy in those cases was "simply 'impracticable,'"<sup>210</sup> but the state could satisfy its constitutional obligations by providing adequate post-deprivation remedies through the tort system.

*Parratt* and *Hudson* suggest, once again, that rights do not require the full spectrum of remedies, but these cases are significantly different from a takings case. First, by characterizing these as procedural due process cases, the Court permits the state to cure the injury by providing an adequate hearing. In a straightforward takings case, the government's constitutional obligations to the plaintiff exist regardless of post-deprivation procedures; whereas the tax cases hinge on the availability of an adequate procedure, the Takings Clause itself

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had paid straight overtime as back pay; the dispute arose over the FLSA's enhanced overtime protections.) See generally *Mills v. Maine*, 853 F. Supp. 551 (D. Me. 1994) (calculating past overtime and damages owed), *dismissed* No. 92-410-P-H, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd* 118 F.3d 37 (1st Cir. 1997). In *Reich*, however, the state wrongfully required the payment of taxes, so that the property involved was actual cash money. *Reich*, 513 at 108. *Alden* and *Reich* can thus be distinguished in a number of ways. First, as the Court suggests, the right in *Alden* was statutory whereas the right in *Reich* is constitutional. *Alden*, 527 U.S. at 740. Second, to the extent that both involved "property," *Alden* only addressed "new property," which would seem entitled to fewer constitutional protections. Third, as a practical matter, providing the plaintiff with relief would have burdened the state far more in *Alden* than in *Reich*. In *Alden*, Maine still paid its labor under state law; it only failed to pay the additional money under the FLSA. Had the Court required payment under the FLSA, Maine would have needed to pay plaintiffs a fair sum of money, thus resembling the retrospective relief against which the states are protected under *Edelman*'s interpretation of the Eleventh Amendment. In *Reich*, by way of contrast, the state had already illegally collected money from the plaintiff. This remedy seems more in line with straight due process—providing the post-deprivation remedy promised by the state—and hints of an injunction merely forcing the state to keep its promise. It is therefore more realistic to expect it to be able to repay that money than to comply with the FLSA's accrued statutory obligation in *Alden*.

206. *Parratt v. Taylor*, 451 U.S. 527 (1981).

207. See *id.* at 545 (finding that the state had not denied respondent due process because it made available a state remedy for the prisoner's claim).

208. See *Hudson v. Palmer*, 468 U.S. 517, 536 (1984) (finding no due process violation for an intentional "shakedown search" where the state law provided an adequate remedy).

209. See *Parratt*, 451 U.S. at 543–44 (finding that the state tort system provided the appropriate means of redress); *Hudson*, 468 U.S. at 533 (same).

210. *Hudson*, 468 U.S. at 533.

requires actual compensation, not mere procedural safeguards.<sup>211</sup> Moreover, the Court in *Parratt* and *Hudson* did not invoke sovereign immunity principles. Plaintiffs were denied their remedy not because the Eleventh Amendment barred suit, but rather because § 1983 is not so broad a cause of action as to encompass a tort against a state official.<sup>212</sup> Accordingly, even though *Parratt* and *Hudson* resemble takings cases, the Court treats them like tort cases so that the post-deprivation remedy available is not a § 1983 claim, but rather a state tort law claim. By way of contrast, the state's taking of real property must trigger the Fifth Amendment Takings Clause so that the claim is clearly constitutional and the state's tort system clearly irrelevant. Thus, the calculus is different when the injury arises from a constitutional violation for which there is no realistic remedy other than judicial vindication of the constitutional right. Our legal system might not promise the full spectrum of remedies for every injury, but straight constitutional violations deserve some degree of special treatment.

It makes sense that the relevant case law does not foreclose the possibility of a self-executing and automatically abrogating constitutional property right. Immediately prior to the Constitutional Convention, people began to realize that the judiciary needed to play a bigger role in government. Before the 1780s, judicial review was hardly taken for granted; legislative supremacy was the norm.<sup>213</sup> But the legislatures' increased interference in judicial and other matters during the 1780s convinced many that a stronger judiciary was essential to healthy democracy.<sup>214</sup> Many state courts, for instance, gingerly began to impose previously unthinkable restraints on the legislatures.<sup>215</sup> Thus were

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211. *But see* Seamon, *supra* note 8, at 1116 (arguing that due process creates an obligation on a state to make reasonable procedures for addressing taking in state, not federal, court). Professor Seamon argues that due process obligates states to meet their remedial obligations in state courts, but that courts of another sovereign cannot meet this obligation. *Id.* Such significant differences between state and federal court remedies seem odd in light of *Alden*.

212. *See Hudson*, 468 U.S. at 533 (finding that, in cases of intentional deprivations of property, there is no due process violation if the state provides an adequate post-deprivation remedy); *Parratt*, 451 U.S. at 537 (finding that plaintiff's claim hinged on "whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process").

213. *See* WOOD, *supra* note 181, at 453–63 (describing the period of legislative ascendancy over the judiciary).

214. *See id.* at 454 ("[O]nce legislative interference in judicial matters had intensified as never before in the eighteenth century, a new appreciation of the role of the judiciary in American politics could begin to emerge.").

215. *See id.* at 454–55 (referring to the New Jersey, Virginia, New York, Rhode Island, and North Carolina judiciaries). Professor Wood also cites to *Rutgers v. Waddington* (N.Y. 1784) for a more detailed example of the challenge to the theory of legislative sovereignty. *Id.* at 457–59.

Americans becoming more concerned with using the judiciary as a check on the other branches; for the first time, declaring unconstitutional laws void was seen not as usurping the legislature's power but rather as vindicating "fundamental law."<sup>216</sup>

Consistent with this history, early defenses of the Constitution also recognized that the judiciary existed to safeguard individual rights against the states.<sup>217</sup> Alexander Hamilton wrote in *Federalist 80*:

The States, by the plan of the convention, are prohibited from doing a variety of things . . . . No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, *or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of the Union*. There is no third course that I can imagine. *The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States.*<sup>218</sup>

Elsewhere in *The Federalist*, Hamilton also argues that "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments."<sup>219</sup> Madison too saw courts playing this protective role, noting in a speech proposing the Bill of Rights that "[i]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."<sup>220</sup> Those tribunals were especially suited for such a function, partially because judges with life tenure are less subject to the political temptations. Only courts could operate as a sufficient

check upon the legislative body . . . who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are . . . compelled . . . to qualify their attempts. This is circumstance

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216. *Id.* at 461.

217. As Professor Wood notes, the American Founders, in enhancing the power of the judiciary, "rejected the conventional British theory of the necessity of the legislature being absolute in all cases." WOOD, *supra* note 181, at 462 (internal quotations omitted).

218. THE FEDERALIST NO. 80, at 508 (Alexander Hamilton) (Robert Scigliano ed., 2000) (emphasis added).

219. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 218, at 500; *see also* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. REV. 899, 946 (1997) (arguing that the framers expected courts to have a special role in enforcing constitutional limits on government action).

220. JAMES MADISON, SPEECH PROPOSING THE BILL OF RIGHTS (1789), *reprinted in* 12 JAMES MADISON, THE PAPERS OF JAMES MADISON 197, 207 (Charles F. Hobson et al. eds., 1979).

calculated to have more influence upon the character of our governments, than but few many imagine.<sup>221</sup>

With this backdrop, it becomes clear that the "state sovereign immunity" the Framers discuss might have been more limited than the current Court reads it. In *Federalist No. 81*, Hamilton actually addresses the sovereign immunity issue directly, admitting that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."<sup>222</sup> However, Hamilton raises these concerns to assuage fears that "an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities."<sup>223</sup> This focus on diversity suits between citizens of one state and the government of another is a narrower view of sovereign immunity than that embraced since *Hans*, more akin to the immunity ultimately codified in the Eleventh Amendment. Extending that immunity to protect states from suits by their own citizens for the vindication of constitutional rights would eliminate the very judicial check on the states that Hamilton considers central to the protection of federal individual rights.

Of course, given our expansive federal government today, Congress can also check the states' power by, among other things, preempting state law with federal law. But national legislation does not always sufficiently protect individual rights because (among many other reasons) rights can slip beneath Congress's radar screen. Infractions of such rights are especially likely to go unnoticed if they occur in small numbers in a few states. Property owners as a class may have more political clout than many groups, but because takings generally affect a small portion of that class, it is rare that they would act together as a coherent political unit.<sup>224</sup> If the federal judiciary were intended, as

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221. *Id.* at 501.

222. THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 218, at 521 (emphasis in original).

223. *Id.*

224. There are, of course, exceptions to this general proposition. For instance, *60 Minutes* recently featured a story about attorneys at the Institute for Justice, a libertarian group, who were filing suit against cities seeking to take private homes through eminent domain. See *60 Minutes: Eminent Domain: Being Abused?* (CBS television broadcast Sept. 28, 2003), available at <http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml>. These cases were noteworthy in that the cities were trying to use eminent domain to force people off their land so that private developers could build more expensive homes and offices, thus increasing the cities' tax bases. Such a case eventually made its way up to the Supreme Court, which recently held that the particular development plan at issue did not offend the Takings Clause's "public use" requirement. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005) (holding that use of property in the city's development plan, which a private entity developed and was to carry out, constituted a public use). (In cases where that requirement was



Hamilton argues, to check not only the federal government but also the states, it would be deeply contradictory to then let those same states circumvent federal judicial review through sovereign immunity, essentially leaving the legislature to decide whether or not to protect the right. To be sure, Hamilton's views are not the only ones from the founding period, but to the extent that *The Federalist* is seminal in our constitutional jurisprudence, his theory of the judiciary cuts against the Supreme Court's current interpretation that a sovereign immunity extending to federal question jurisdiction was hardwired into the Constitution in 1787.<sup>225</sup>

Another counter-argument to Marshall and Hamilton's theory of federal courts is that the Eleventh Amendment was added after the passage of the Constitution and the Bill of Rights, which included the Takings Clause. Even if one were to accept Hamilton's original vision of the federal judiciary as a check upon the states, the Eleventh Amendment, as a rejection of *Chisholm*, changed that. But note that this is not the current Court's sovereign immunity argument. Indeed, for that argument, one must confine oneself to the narrower text of the Eleventh Amendment, which relates only to certain diversity cases and would not include a property owner suing her own state to recover just compensation for a taking. Even if today's vigorous sovereign immunity had been part of the common law at the time of the founding, as the *Alden* majority asserts (so that the Eleventh Amendment is merely a placeholder for the concept), then one can read the Fifth Amendment's requirement of a monetary remedy to overrule that immunity with regards to takings claims, just as a statute can overrule common law. (Common law, of course, can be changed by statute,<sup>226</sup> so surely it can be changed by the Constitution.) Alternatively, one

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offended, the takings plaintiffs would arguably have an even stronger claim for a temporary takings damages action against the state, as the state action at issue would appear to be even more illegitimate than in a garden-variety temporary takings scenario.) The lawyers' involvement, the national publicity, and the grant of certiorari all suggest that property owners, more so than other groups at least, can protect themselves in the judicial and political systems.

225. General federal question jurisdiction did not exist until 1875, see Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, but it is convenient to separate out what has become federal question and diversity jurisdiction because state sovereign immunity does not necessarily apply to both. Moreover, because Article III of the Constitution extends the judicial power of the United States to "all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made," U.S. CONST. art. III, the concept of federal question jurisdiction would have been understood during the ratifying debates and the first years of the early republic.

226. And if Eleventh Amendment immunity is in fact common law, then we might think of *Fitzpatrick*'s authorization of Section 5 abrogation as an example of a statute changing common law. See Henry P. Monaghan, *The Supreme Court 1974 Term: Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975) (putting forward theory of constitutional common law which, unlike "pure" constitutional law, Congress can overturn).

can read it to consent to suits for just compensation.<sup>227</sup> If, on the other hand, sovereign immunity were actually part of the Constitution, as the *Alden* majority seems to argue, then that constitutional immunity for takings claims might have been amended out of the Constitution when the Court incorporated the Fifth Amendment against the states via the Fourteenth Amendment. Under any of these theories, it seems strange that a pre-constitutional doctrine of sovereign immunity barring money damages would have survived the Just Compensation Clause's promise of such damages. And, assuming it does not, nothing in the Eleventh Amendment would resurrect such a bar.

None of this should be surprising, because sovereign immunity is notoriously difficult to square with other features of our constitutional democracy. As Professor Hart argued:

[N]o democratic government can be immune to the claims of justice and legal right. The force of those claims of course varies in different situations. If private property is taken, for example, the claim for just compensation has the moral sanction of an express constitutional guarantee . . . . And where constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity, or of withdrawing jurisdiction, in order to defeat them.<sup>228</sup>

The Court at times, even in the *Hans* era, has also articulated an ill regard for immunity, especially in constitutional property cases, all but admitting that the very notion of immunity rests upon a fiction. For example, in an action to recover one office desk seized following plaintiff's failure to pay taxes to the State of Virginia,<sup>229</sup> the Court recognized the "distinction between the government of a State and the State itself," finding that "whatever wrong is attempted in [the State's] name is imputable to its government, and not to the State . . . ." <sup>230</sup> The fiction seems almost identical to the officer-suit fiction that

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227. Another theory, put forward by Justice Stevens, is that Article III's general grant of jurisdiction to federal courts can be treated as adequate indication of the sovereign's consent to suits against itself. See John Paul Stevens, *Is Justice Irrelevant?*, 87 Nw. U. L. REV. 1121, 1126 (1993) (discrediting the argument that immunity springs from "nothing more mysterious than the sovereign's right to determine what suits may be brought in the sovereign's own court"). See also *infra* Part V.C (arguing that the Fourteenth Amendment incorporates the Takings Clause against the states, which bolsters the argument for automatic abrogation); *infra* note 320 and accompanying text (listing state court cases in which the court read the state's just compensation clause as state consent to suits).

228. Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371 (1953).

229. See *Poindexter v. Greenhow*, 114 U.S. 270, 273-74 (1885) (describing the underlying facts).

230. *Id.* at 290.

is so central to current sovereign immunity law, and yet it suggests a broader incursion into the immunities the state enjoys because "both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof."<sup>231</sup> This would suggest that the fiction has its limits, and that the state—whatever one chooses to call it—is subject to certain kinds of suits, particularly those arising out of the Constitution.

Even more remarkable is the discussion of sovereign immunity in *Lee*, an ejectment action to recover possession of an estate owned once by the family of General Robert E. Lee that the government had taken and turned into a military fort and later Arlington National Cemetery.<sup>232</sup> The Court explained that when the rights of the citizen collide with acts of the government, "there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name."<sup>233</sup> The Court denounced, at times emphatically, immunity bars to suits against the government, particularly suits regarding the liberty and property interests most firmly secured in the Constitution.<sup>234</sup> Indeed, both the executive and legislative branches are "absolutely prohibited" from depriving anyone of "life, liberty, or property without due process of law, or [taking] private property without just compensation."<sup>235</sup> Central to this proposition was the understanding that "[c]ourts of justice are established . . . to decide upon . . . rights in controversy between [citizens] and the government."<sup>236</sup> The contrary notion—"that courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation"<sup>237</sup>—was not only wrong, but deeply opposed to our system's most cherished values:

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

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231. *Id.*

232. *See* *United States v. Lee*, 106 U.S. 196, 197–200, 219 (1882) (describing the facts of the case and discussing the Court's jurisdiction to hear the case).

233. *Id.* at 218–19.

234. *See id.* at 219–23 (arguing that government officers should not be placed above the law).

235. *Id.* at 220.

236. *Id.*

237. *Id.* at 221.

It cannot be, then, that . . . though the nature of the controversy is one peculiarly appropriate to the judicial function . . . though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the [government] can interpose an absolute veto upon that judgment . . .<sup>238</sup>

And to the extent that sovereign immunity had roots in English common law, *Lee* explained that the English legal system made available "the petition of right" to "subjects" involved in property disputes against the crown;<sup>239</sup> in such disputes "the petition of right presented a judicial remedy,—a remedy which this court . . . held to be practical and efficient."<sup>240</sup> Thus, even the English system—from which our immunity sprang—provided means for plaintiffs to protect their property rights against an encroaching state. Coming from the Court just a few years before *Hans*, this proclamation is all the more striking.

*Lee* is not anomalous. Drawing heavily on it, the Court in *Tindal v. Wesley*<sup>241</sup> explained that "the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law."<sup>242</sup> To be fair, some of this conclusion rested on the proposition that suits protecting a plaintiff's property from state-inflicted injury were deemed suits against the officer seeking to enforce an unconstitutional statute; they did not proceed against the state itself.<sup>243</sup> But the *Tindal* Court also noted that the opposing view would leave the plaintiff "remediless so long as the State, by its agent, chooses to hold his property."<sup>244</sup> Ruling in an era long before temporary takings became part of our legal landscape, the *Tindal* Court appears to have guarded against precisely that mischief. To be sure, *Tindal* offers no direct doctrinal support for an action for damages against the state itself, but its conclusion that the Eleventh Amendment did not bar the action in that case emphasized that if the state had improperly taken private property, the government actor should not be able to shield itself from suit.<sup>245</sup>

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238. *Id.* Of course, *Lee* is a federal takings case, but the concerns regarding sovereign immunity closely mirror those in state takings cases. See Seamon, *supra* note 8, at 1090–94 (arguing that there is symmetry between federal and state sovereign immunity).

239. *Id.* at 208.

240. *Id.*; see also *infra* note 440 and accompanying text (quoting *United States v. Lee* on the petition of right).

241. *Tindal v. Wesley*, 167 U.S. 204 (1897).

242. *Id.* at 222.

243. *Id.* at 220–21.

244. *Id.*

245. See *id.* at 222 (finding that the Eleventh Amendment does not impart to officers immunity from suit for actions taken under unconstitutional laws); see also Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 686–87 (1982) (discussing this aspect of *Tindal*).

The counters to these views—defenses of sovereign immunity—are not wholly persuasive. Of course, scholars have long criticized state sovereign immunity and, for the most part, these attacks have not carried the day in the Supreme Court. This Article, therefore, will offer only a summary of the main arguments. It is worth noting, though, that these familiar arguments have their greatest traction here in the takings context. In other words, one might view statutory claims against the state, non-Fourteenth Amendment constitutional claims, Fourteenth Amendment claims, and Takings claims as concentric circles in which arguments against immunity grow increasingly strong. That the attacks on the Eleventh Amendment have failed—in say, the statutory context then—does not necessarily mean that those same arguments should not prevail in the takings context.

Moreover, although attacks on sovereign immunity have obvious doctrinal limitations in that they do not confront Eleventh Amendment doctrine on its own terms, they also suggest that, unlike takings, state sovereign immunity rests on somewhat shaky footing. Though this analytic approach is unusual in American law, it bears asking in the case of a direct constitutional collision: which doctrine is more certainly right?<sup>246</sup> From this perspective, too, the familiar attacks on state sovereign immunity doctrine are very relevant to the instant collision.

Sovereign immunity originally derived from the English law assumption that "the King can do no wrong;"<sup>247</sup> one could not sue the Crown of England without its consent.<sup>248</sup> This reasoning had a logical place in the monarchical system, but to rely on it still today is not only anachronistic but clearly contrary to our own history and democratic principles.<sup>249</sup> As the Court argued in *Lee*, unlike the English monarchy, "[u]nder our system the *people*, who are there called *subjects*, are the sovereign."<sup>250</sup> The United States, in fact, became a country largely through its rejection of the English monarchy.<sup>251</sup> The *Alden* Court is certainly correct that the Founders absorbed some English common

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246. See *infra* notes 520–23 and accompanying text (discussing this approach to resolving doctrinal conflicts).

247. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001).

248. *Id.*

249. See *United States v. Lee*, 106 U.S. 196, 205–06 (1882) (arguing that reasons protecting king from suit in his own court do not exist in our government).

250. *Id.* at 208.

251. See Chemerinsky, *supra* note 247, at 1202 ("The United States was founded on a rejection of a monarchy and of royal prerogatives.").

law into our own fledgling legal system,<sup>252</sup> but surely royal prerogatives are a common law remnant incompatible with our nation's revolutionary heritage.<sup>253</sup>

Another defense of sovereign immunity more closely tethered to the American experience is that it protects states' dignity.<sup>254</sup> In *FMC*, for instance, Justice Thomas noted that the doctrine's "central purpose is to accord the States the respect owed them as joint sovereigns."<sup>255</sup> In our federal structure, the issue of what powers to reserve to the states is a crucial one, and the Court's recent decisions instruct us that one should not disregard these principles lightly. However, it is not clear exactly how protecting a state from suit preserves its dignity. One might disagree with the Court's decisions in cases like *New York v. United States*<sup>256</sup> and *Printz v. United States*,<sup>257</sup> but at least there is some logic to holding that the federal government cannot order state officials to carry out a federal plan.<sup>258</sup> But why should those same principles necessarily shield a state from suits by private parties? If dignity were in fact such a real concern, then the *Ex parte Young* suit against state officers would also seem untenable, but no one would suggest eviscerating that line of precedent.<sup>259</sup> Indeed, if one believes the reasoning of recent commandeering cases, one might think that injunctive relief ordering the state to act or not act is more intrusive than merely requiring

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252. See *Alden v. Maine*, 527 U.S. 706, 715–16 (1999) (noting that, despite the fact the United States had abandoned some English practices, it absorbed the idea that a sovereign could not be sued unless it consented).

253. See generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992) (arguing that the American Revolution was a fundamentally radical social event that rejected social and political values of English monarchy to establish, first, a republic and, ultimately, a democracy). See also Chemerinsky, *supra* note 247, at 1202–03 (arguing that sovereign immunity "is inconsistent with a central maxim of American government: no one, not even the government, is above the law").

254. See, e.g., *Alden*, 527 U.S. at 749 (linking state sovereign immunity with concerns about the dignity of the state); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (citing states' dignity as a reason for state sovereign immunity).

255. *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 765 (2002) (internal quotations omitted).

256. *New York v. United States*, 505 U.S. 144 (1992).

257. *Printz v. United States*, 521 U.S. 898 (1997).

258. See *id.* at 925 ("[L]ater opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."); *New York*, 505 U.S. at 188 ("[T]he Federal Government may not compel the States to enact or administer a federal regulatory program.").

259. See *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645–48 (2002) (finding that the core of *Young* doctrine is alive even in federal statutory rights cases). *Verizon Maryland* reaffirmed *Ex parte Young* notwithstanding the exception for submerged tribal lands articulated in *Coeur d'Alene*. See *Coeur d'Alene*, 521 U.S. at 291 (O'Connor, J., concurring) (concurring that Court should not apply the *Ex parte Young* doctrine to the case because its application would effectively grant the Tribe title to the land at issue).

it to pay money to compensate for damages it has inflicted.<sup>260</sup> Additionally, a state that avoids suits against it seems far less "dignified" than one that meets its challengers directly; legitimate government, one would hope, would be accountable government.<sup>261</sup> Moreover, because states appear in both state and federal courts frequently as plaintiffs or prosecutors, one cannot say that allowing a court to determine its rights in suits against citizens is degrading.<sup>262</sup>

Professor Lee offers a more historically grounded presentation of this sovereign dignity argument. According to Lee, Justice Iredell and other early supporters of state sovereign immunity understood state dignity to entitle states to similar treatment due foreign nations in the Supreme Court.<sup>263</sup> Under this theory, "[d]eference was due . . . because sovereignty itself was the most fundamental law [so that] . . . [t]o acknowledge that [one] who had no claim to that sovereignty could seek relief in the general courts . . . would contradict that most fundamental law and cast the fate of the system into jeopardy."<sup>264</sup> Thus,

260. See Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1311 (2001) (arguing that expanded scope of Eleventh Amendment immunity will encourage more suits for injunctive relief, which may be more intrusive because they may involve "more invasive judicial supervision of state entities and because some of the defenses that would be available in after-the-fact litigation, [such as] qualified immunity, are unavailable in cases seeking prospective relief"). Injunctive relief, in fact, is typically available only if another adequate remedy at law is not. See 13 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 65.06[1] (Daniel R. Coquillette et al. eds., 3d ed. 2005) (noting that an injunction remedy is usually one of last resort). The Eleventh Amendment, then, is one of the rare areas where injunctive relief is the baseline, rather than the exception.

261. Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 54 (remarking that trust in our system derives from government accountability); see also Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1927–28 (2003) ("[B]ecause of revised understandings of the import of human dignity, law ought not to rely on institutional role-dignity to permit an entity to avoid accounting for its behavior towards individuals."); Katherine H. Ku, Comment, *Reimagining the Eleventh Amendment*, 50 UCLA L. REV. 1031, 1063 (2003) (noting that the dignity rationale does not adequately justify current Eleventh Amendment doctrine). For a thorough and fascinating discussion of dignity's role in conceptions of sovereignty, see generally Resnik & Suk, *supra*.

262. See *United States v. Lee*, 106 U.S. 196, 206 (1882) ("Nor can it be said that the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment."); see also Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANN. AM. ACAD. POL. & SOC. SCI. 81, 83–91 (2001) (concluding that dignity rationale is "flimsy foundation" for state sovereign immunity doctrine).

263. See Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1095 (2002) (noting that the Constitution sometimes speaks of the States as nations and explaining how this parallel to foreign nations related to Justice Iredell's and others' understanding of the Constitution).

264. *Id.*

sovereign immunity derives exclusively from the state's inherent sovereignty so that "[s]overeign liability is a matter of sovereign grace, not of republican right, and therefore indistinguishable in scope as between, say, an absolute monarchy and a republic."<sup>265</sup>

While these ideas surely animate theories of state sovereign immunity, they carry more force in the abstract than the concrete. In particular, this approach ignores the courts' role as a check upon the other branches. If the Constitution did in fact grow partially out of a desire for an enhanced judiciary capable of suppressing legislatures' supremacy,<sup>266</sup> then an unconquerable immunity would have defeated that purpose. Moreover, Justice Iredell and others necessarily rooted notions of sovereignty in the experiences of nations long observed, namely monarchies. Though they might not have seen a difference in this regard between an absolute monarchy and a republic, this does not mean that no difference existed. To the contrary, in the American republic, sovereignty resides with the people,<sup>267</sup> so it will not do to assert merely that the government's sovereign grace protects it from suit by all entities except other sovereigns. That one as erudite as Justice Iredell might not have fully comprehended this does not suggest that he willfully imposed an anachronistic view, but rather that it took a long time for many to grasp the full import and radicalism of the American Revolution.<sup>268</sup> From this perspective, the Court should determine the scope of sovereign immunity by reference to the values of our own constitutional system, rather than by an abstract hierarchy of foreign and domestic governments.<sup>269</sup>

A more persuasive argument in favor of sovereign immunity is that state treasuries need to be protected. Unlike the "king can't be sued" and the "sovereign dignity" arguments, this one addresses current and practical concerns. The Court invoked this rationale in *Alden*, arguing:

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265. Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1836 (2004); see also Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 51 (2003) (arguing that Court's use of dignity argument draws on concept of foreign state dignity).

266. See *supra* text accompanying notes 213–16 (describing the judiciary's growth as a check upon the legislative branch).

267. See *infra* text accompanying notes 278–82 (noting that individual sovereignty should take precedence over that of the government).

268. See generally WOOD, *supra* note 253.

269. See Lee, *supra* note 265, at 1837–38 (using a mathematical approach in which the foreign sovereign "quantum of sovereignty" exceeds the sovereignty of semi-sovereign American state, which exceeds the sovereignty of non-sovereign mere citizen).



Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.<sup>270</sup>

This is a legitimate argument, and it helps explain why the full spectrum of judicial remedies are not and should not always be available.

Indeed, unlike the other justifications, this one genuinely appreciates separation-of-powers principles for it hesitates to give courts control over the legislatures' and executives' budgets. But it seems to overstate the danger, at least with regard to takings cases, because opening the judiciary to one kind of cause of action and thus authorizing one particular remedy would not significantly increase the courts' control over the legislatures' purse strings. Moreover, this argument does not account for the multiple ways in which the judiciary does influence spending decisions.<sup>271</sup> The desegregation of our schools,<sup>272</sup> the indigent defendant's right to counsel<sup>273</sup> and on appeal a free trial transcript,<sup>274</sup> and the requirement that detainees in the war on terror receive some amount of judicial process<sup>275</sup> are all rights recognized in Supreme Court decisions that cost significant government resources, even though the stated remedy was not money damages. From this perspective, relief other than damages can affect the budget as significantly as a monetary remedy.

The "purse strings" argument also cannot explain why state budgets are necessarily more important than those of state subdivisions. To be sure, state governments have a special place in our federalist system, but if the protection of the legislature's budget was such an overriding concern, then the absence of county and city immunity would have proven disastrous. But it has not done so. Finally, the budget argument does not account for the fact that states

270. *Alden v. Maine*, 527 U.S. 706, 749 (1999).

271. See William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and Alden v. Maine*, 75 NOTRE DAME L. REV. 1069, 1082 (2000) ("There are simply too many ways remaining after *Alden* through which the state fisc may be invaded to suggest that budgetary accountability is the governing rationale.").

272. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

273. See *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (finding "counsel must be provided for defendant unable to employ counsel").

274. See *Griffin v. Illinois*, 351 U.S. 12, 19–20 (1956) (denouncing policies that give the well-to-do a larger chance at justice than poor defendants).

275. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (noting that Hamdi "is entitled [to process] under the Due Process Clause"); *Rasul v. Bush*, 542 U.S. 466, 466 (2004) ("United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals capture abroad in connection with hostilities and incarcerated at Guantanamo Bay.").

themselves should be able to limit how frequently they are sued by not encroaching on their citizens' rights. Indeed, the concern for state resources might cut against sovereign immunity, because that immunity fails to provide incentives for the state not to violate citizens' rights.<sup>276</sup> Current law thus prioritizes the state treasury over governmental accountability,<sup>277</sup> an outcome that seems both normatively suspect and contrary to our constitutional goals for a healthy democracy.

More generally, sovereign immunity prioritizes the states over the people for no discernible reason. As Professor Monaghan asks, "Should not accountability to the people—both to the majority at the polls and to wronged individuals in the courts—be 'inherent in the nature of sovereignty?'"<sup>278</sup> The Court, in other words, has it backwards, prioritizing the state governments' sovereignty rather than the people.<sup>279</sup>

Whatever the benefits of "sovereignty" might be, they should be enjoyed by the people, not the governments. State power and sovereignty should be subject to federal constitutional limits on state violations of individual rights.<sup>280</sup> Indeed, the states owe their very existence and their plenary power to the Founders' desire to create a political system that would protect individuals from too powerful a government.<sup>281</sup> The Court, itself a champion of states' rights, has articulated this view in one of its recent well-known federalism decisions:

[T]he Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.<sup>282</sup>

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276. See Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 688 (2000) (arguing that "states might abuse freedom the Court has preserved for them" and that they might take advantage of Eleventh Amendment immunity by depriving citizens of their legal rights, for example "by not paying workers overtime to which federal law entitles them, flouting valid patents and trademarks, [and] polluting the environment").

277. Chemerinsky, *supra* note 247, at 1217.

278. Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 123 (1996) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996) (quoting THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

279. See generally Amar, *supra* note 71.

280. See THE FEDERALIST NO. 45 (James Madison), *supra* note 218, at 294 ("[A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.").

281. See Amar, *supra* note 71, at 1426 (noting that the Founders created a limited government).

282. *New York v. United States*, 505 U.S. 144, 181 (1992).

Current sovereign immunity doctrine is very hard to square with a federalism premised on "the protection of individuals."<sup>283</sup> *Marbury's* principle—that for every right there is a remedy—is certainly descriptively, and arguably normatively, over-simplistic. Clearly there are other values at play in our legal system. But if the Court's vigorous defense of states' rights in fact rests on a theory of individual rights, then there should be no place in that jurisprudence for a sovereign immunity doctrine so robust that it protects the states from suits, even in cases where the Constitution prescribes a specific remedy.

## 2. Alden and the Symmetry of State Sovereign Immunity

Even if we agree that sovereign immunity is incompatible with our Constitution's defense of certain individual rights, we must briefly address the argument that state sovereign immunity applies differently in federal court than it does in state court. In other words, even if state sovereign immunity cannot bar all takings suits, might it nevertheless bar federal court suits but permit state court actions? The Eleventh Amendment's language, after all, seems to apply only to the "Judicial power of the United States"<sup>284</sup> and not to state courts. Though this interpretation of the amendment was long assumed—and is still accepted by some<sup>285</sup>—it seems to be no longer correct after *Alden v. Maine*.<sup>286</sup>

Unlike prior precedents, *Alden* explicitly discusses the symmetry of state sovereign immunity, linking the state's immunity in federal court to its immunity in state court.<sup>287</sup> Thus, the same preconstitutional common law

283. *Id.*

284. U.S. CONST. amend. XI.

285. See, e.g., *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527 (6th Cir. 2004) (suggesting that state sovereign immunity does not apply symmetrically in state and federal court); Seamon, *supra* note 8, at 1116 (same).

286. See *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that "the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation").

287. See *id.* at 713–54 (discussing the history of states' sovereign immunity); see also Seamon, *supra* note 8, at 1096–97 (examining the *Alden* Court's approach to sovereign immunity). The *Alden* Court also linked the immunity of the state to the immunity of the United States. It asserted:

It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege.

*Alden*, 527 U.S. at 749–50; see also *Tindal v. Wesley*, 167 U.S. 204, 213 (1897) ("[I]t cannot be doubted that the question whether a particular suit is one against the State, within the meaning

underlying the state's sovereign immunity in federal courts applied with equal strength in state courts, and the Court found there was no "compelling evidence" that states ratifying the Constitution understood themselves to be empowering Congress to subject states to suits in their own courts.<sup>288</sup> As the Court argued, the fact that some state statutory and constitutional provisions specifically authorized suits against the states in their own courts suggests "the prevalence of the traditional understanding that a State could not be sued [in state court] in the absence of an express waiver."<sup>289</sup> To the extent that the Eleventh Amendment, according to the *Alden* Court, sought only to restore the pre-*Chisholm* state of the law,<sup>290</sup> the amendment's failure to mention state courts is inapposite. Because sovereign immunity applied in state courts under our original constitutional understanding—and because the immunity question in *Chisholm* did not arise out of state court proceedings<sup>291</sup>—there was no reason to believe that the states' immunity in state courts had ever been disrupted. Indeed, the state's immunity from suit in its own court was a compelling reason for the *Ex parte Young* decision; were states not to retain immunity from suit in their own courts, the need for *Young* would have been less pressing.<sup>292</sup> Thus, as the *Alden* Court summarized, the rationale behind not subjecting states to suit in federal court "applies with even greater force in the context of a suit prosecuted against a sovereign in its own courts, for in this setting, more than any other, sovereign immunity was long established and unquestioned."<sup>293</sup>

There is a logic to the *Alden* decision, but the "shock of surprise" it provoked may well have been comparable to that caused two centuries earlier by *Chisholm*. Prior to *Alden*, a state's sovereign immunity applied only in

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of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States."); Fla. Dep't of State v. Treasure Salvors, 458 U.S. 670, 687 n.21 (1982) (quoting *Tindal*); Seamon, *supra* note 8, at 1097–98 (drawing connections between sovereign immunity in state court and state sovereign immunity in federal court).

288. *Alden*, 527 U.S. at 730–31.

289. *Id.* at 724.

290. *See id.* (noting that the swift passage of the Eleventh Amendment indicated that the *Chisholm* Court might have misinterpreted the Constitution).

291. The question posed in *Chisholm* was:

Can the State of Georgia, being one of the United States of America, be made a party-defendant in any case, in the Supreme Court of the United States, at the suit of a private citizen, even although he himself is, and his testator was, a citizen of the State of South Carolina?

*Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793).

292. *Alden v. Maine*, 527 U.S. 706, 748 (1999).

293. *Id.* at 742; *see also* Seamon, *supra* note 8, at 1097 (discussing the "preservation" rationale).

federal court, so that the Eleventh Amendment functioned mostly as a forum selection clause.<sup>294</sup> Thus, before *Alden*, a takings plaintiff could have brought her claim in state court. As *Alden*'s holding addresses only Congress's authority to use its Article I powers to abrogate state sovereign immunity in state courts, it is not necessarily broad enough to change the rules of the game entirely in state court. But given Justice Kennedy's rhetoric of symmetry, sovereign immunity might apply with equal force in state and federal courts.

Interestingly, not all commentators and courts agree that *Alden* necessarily requires identical sovereign immunity rules in state and federal court for certain kinds of claims. As this Article has already noted, Professor Seamon argues that, while sovereign immunity would bar an inverse condemnation claim against the state in federal court, due process requires that the state provide some kind of procedural remedy, including, potentially, state court suits.<sup>295</sup> But Professor Seamon's argument relies on the strength of the Due Process Clause and does not address whether the Just Compensation Clause might, by its own force, also require a particular remedy beyond mere procedural safeguards.

The Sixth Circuit in *DLX, Inc. v. Kentucky*<sup>296</sup> recently followed reasoning similar to Professor Seamon's. There the court held that state sovereign immunity barred a federal takings claim in federal court but continued to explain that no such bar existed in state court, notwithstanding *Alden*.<sup>297</sup> Relying on *Reich*, the Sixth Circuit emphasized that, because the Constitution requires effective remedies for takings and the coercive collection of taxes, it must also require state courts to provide such remedies notwithstanding traditional immunity bars.<sup>298</sup> But the Sixth Circuit, reasoning that both *Reich* and the *First English* footnote applies only to state court suits,<sup>299</sup> found that no such requirement exists in federal court.<sup>300</sup>

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294. Monaghan, *supra* note 278, at 125.

295. Seamon, *supra* note 8, at 1116; *see also supra* note 8 (summarizing Professor Seamon's argument).

296. *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004).

297. *Id.* at 527–28.

298. *Id.* at 527; *see also Reich v. Collins*, 513 U.S. 106, 110 (1994) (noting that the requirement of a remedy for unconstitutional taxes does not trump the state's sovereign immunity in federal court); *Boise Cascade Corp. v. Oregon*, 991 P.2d 563, 568 (Or. Ct. App. 1999) (holding that states can be sued in state court for takings claims); *SDDS, Inc. v. South Dakota*, 650 N.W.2d 1, 9 (S.D. 2002) (following *Boise Cascade*).

299. *First English* began as a state court suit in the California court system. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 306–09 (1987).

300. *DLX*, 381 F.3d at 527.

Turning to *Alden*, the Sixth Circuit continued that, although it "might seem to foreclose the requirement that states be susceptible to suit in their own courts . . . , a close reading of *Alden* reveals that it would present no bar to such a claim."<sup>301</sup> *Alden*, argued the Sixth Circuit, "specifically preserved *Reich*'s promise of a state-court remedy, noting, 'The obligation arises from the Constitution itself; *Reich* does not speak to the power of Congress to subject States to suits in their own courts.'<sup>302</sup> *DLX* concluded by asserting that where the Constitution requires a particular remedy, such as through the Takings Clause or the Due Process Clause, "the state is required to provide that remedy in its own courts, notwithstanding sovereign immunity."<sup>303</sup>

The Sixth Circuit, like Professor Seamon, makes its point well, but it is not clear that *Alden* ought to be construed this way. *Alden* and *Reich* could be read, as apparently *DLX* reads them, as granting a broad right to seek constitutional remedies against the state in state courts; under this theory, state sovereign immunity could never bar a state court action seeking a remedy required by the Constitution. Given *Alden*'s aforementioned attention to the symmetry of state and federal court sovereign immunity, however, this conclusion seems odd, particularly in light of the current Court's willingness to expand the scope of Eleventh Amendment immunity and its insistence that that immunity was part of our original constitutional fabric. Another reading of *Alden*'s treatment of *Reich*, more in keeping with the remainder of the *Alden* opinion, is that when the state promises a particular remedy, as it did in *Reich*, due process prevents it from welching on that promise. Under this reading, state and federal court immunity rules in a takings case would not necessarily be different, because the cause of action would be rooted in the Just Compensation Clause, rather than the Due Process Clause.<sup>304</sup>

Along these lines, it is important to remember that *Reich* itself makes clear that Georgia's chief failing was to "hold out what plainly appeared to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists."<sup>305</sup> *Reich*'s holding—and *Alden*'s preservation of *Reich*—then are not directly on point for the takings claimant who objects not to state procedural inadequacies but to the lack of compensation; a landowner could have a takings claim against the state without being able to point to the kind of egregious procedural deprivation

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301. *Id.* at 528.

302. *Id.* at 528 (quoting *Alden v. Maine*, 527 U.S. 706, 740 (1999)).

303. *Id.*

304. Of course, a due process action might also be possible, particularly if the state, like Georgia in *Reich*, offered and then removed a postdeprivation remedy.

305. *Reich v. Collins*, 513 U.S. 106, 108 (1994).

committed by Georgia in *Reich*.<sup>306</sup> *Alden*'s own language seems to bolster this interpretation. The Court emphasized that in *Reich*, "due process requires the State to provide the remedy it has promised."<sup>307</sup> Contrary to *DLX*'s reasoning, then, *Alden* and *Alden*'s treatment of *Reich* do not compel the conclusion that state sovereign immunity cannot bar takings claims in state court. Nor do they support an asymmetrical immunity for takings claims. Instead, those cases dealt with a related but different problem, sounding in due process, not takings. And because *Alden* and *Reich* are not exactly on point, the Court's most direct statement on the matter remains the *First English* footnote, which finds that takings trumps sovereign immunity, without regard to whether the action is brought in state or federal court. *First English* began as a state court action,<sup>308</sup> to be sure, but nothing in its language suggests that the immunity rules for takings claims would differ between state and federal court. In suggesting otherwise, the Sixth Circuit is relying on distinctions the Supreme Court itself has not recognized.

It is interesting that the Sixth Circuit uses the ostensible availability of a state court action to help justify its dismissal of the federal court suit. After determining that the Eleventh Amendment required dismissal of the case before it, the *DLX* court need not have reached the question of whether the same action could have overcome an immunity claim in state court. And yet, the Sixth Circuit apparently felt that an appropriate remedy had to lie somewhere in the judicial system; given the Constitution's promise of a just compensation remedy, sovereign immunity could not absolutely bar such a case. Therefore, in a curious and indirect way, it assumed what this Article argues explicitly: given the remedial nature of the Fifth Amendment Just Compensation Clause, plaintiffs must be able to bring their takings actions somewhere in the judicial system. Ironically, to the extent *Alden* suggests that Eleventh Amendment immunity applies symmetrically in state and federal court, it can also be used to argue in favor of a Takings Clause that automatically abrogates state sovereign immunity in both state and federal court. Any other result would leave the takings plaintiff unable to protect her property rights in any judicial forum, an outcome virtually impossible to square with our constitutional structure.

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306. *Alden* can also be read more narrowly to address only Congress's power to abrogate state immunity in state courts, though as mentioned above, its reasoning has far wider implications in state sovereign immunity law.

307. *Alden v. Maine*, 527 U.S. 706, 740 (1999).

308. *Supra* note 299.

### 3. *The Availability of Alternative Remedies*

Though the theoretical arguments are strongly in favor of a self-executing Takings Clause that automatically abrogates state sovereign immunity in both state and federal court, it is less clear that this outcome is a practical necessity. Even if the Takings Clause did not provide a damages remedy that automatically abrogates state sovereign immunity, many takings litigants would still have judicial recourse. In *Marbury* terms, while the system does not provide the full spectrum of remedies, it does provide a good amount, even accounting for sovereign immunity. First, property owners can protect their rights to a significant extent through traditional suits against the offending state official in both his official and personal capacities. Second, many states have consented to suits sounding in inverse condemnation, either by statute or judicial decision. Though these existing legal structures might not offer the perfect remedy in every case, they often do a decent enough job.

The officer suit, long a part of our legal tradition though not formally canonized until *Ex parte Young*, frequently provides adequate remedies for those seeking to sue a state. Because its legal fiction permits suits in equity against state officials, the *Young* line provides judicial relief for ongoing constitutional violations. What it does not offer is money damages for past violations, such as interim takings. It can, though, get the government off a person's land, not only returning the property to its owner but also, at least theoretically, shortening the duration of the interim taking.

The plaintiff who successfully wins back her land in this way is not wholly without further remediation: She can sue the officer in his personal capacity for damages to recover for the duration of the taking. Two obstacles remain. First, most state officials enjoy qualified immunity.<sup>309</sup> To win damages, the plaintiff would need to demonstrate that such immunity should not apply. Second, the officer is unlikely to have deep pockets, so even if the plaintiff does win a judgment at law, she may not be fully compensated.<sup>310</sup>

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309. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 529 (4th ed. 2003) (stating that executive branch officials are normally entitled to qualified immunity from suit).

310. Some states, in certain situations, do indemnify their employees to a certain extent, but that indemnification is neither widespread nor complete enough to consistently make the takings plaintiff whole. See, e.g., Kenneth B. Bley, *Use of the Civil Rights Acts to Recover Damages in Land Use Cases*, SD14 ALI-ABA 213, 434 (1998) (noting that "because indemnification is frequently available to government employees, a judgment against an employee in his or her personal capacity may be paid sometimes by the government"); James D. Cole, *Defense and Indemnification of Local Officials: Constitutional and Other Concerns*, 58 ALB. L. REV. 789, 789-90 (1995) (noting that New York common law does not relieve public employees, including officers, of responsibility for torts committed during their public employment); George C. Hanks, Jr., *Contribution and Indemnity After HB4*, 67 TEX. B.J. 288, 298 (2004)



To surmount the qualified immunity hurdle, the landowner injured by an interim takings violation would have to establish that the offending officer knew or should have known that the taking—without just compensation—clearly violated established federal takings doctrine.<sup>311</sup> Though this immunity certainly protects the officer to some degree, it is hardly as bulletproof as absolute immunity and, realistically, might deter some state officers from taking property that they know will lead to interim takings violations. Of course, this incentive is not as strong as the direct suit against the state, because an officer can hide behind a claim that the "taking" was not intentional and that the return of the property demonstrated the officer's good faith. He similarly can claim that he thought a particular regulatory scheme authorized the taking.<sup>312</sup> Nevertheless, coupled with the potential of injunctive relief, this remedy offers property owners considerable protection.

It is also notable that many state laws offer protections that duplicate or exceed those under the federal Constitution. The constitutions of most states

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(noting Texas statutory provisions creating a right to indemnification, including the state's statutory duty to indemnify its employees for actual damages, court costs, and attorney's fees when they have been sued in their official capacity); Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 230–31 (1997) (noting that some states forbid and others permit indemnification of public employees for punitive damages); Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1211 (2001) (noting that municipalities and states "frequently indemnify their employees to protect them from liability for unlawful conduct within the scope of their employment"); Sherman P. Willis, Note, *Iowa School Counselors Had Better Get It Right*, 89 IOWA L. REV. 1093, 1119 n.189 (2004) (noting that the Iowa Municipal Tort Claims Act "requires school districts and boards to 'defend, indemnify, and hold harmless' any employee who is named in a civil suit for an act or omission arising out of the employee's job"); see also Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927, 1950 (2000) (noting that officer liability often translates into de facto state liability and contending that "it may simply be easier for all concerned for the state to establish an adequate remedy against itself"). See generally Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 76–79 (1999) (discussing indemnification and the result of the *Bivens* system of liability for government officials).

311. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that "[g]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"); see also *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984) (finding that relevant inquiry under *Harlow* is whether officer violated clearly established federal law rights).

312. See, e.g., *Sonoda v. Cabrera*, 255 F.3d 1035, 1043 (9th Cir. 2001) (noting defendants' argument that they are entitled to qualified immunity because they merely followed an executive order which the Commonwealth of Northern Mariana Islands senate had approved).

have versions of the Fifth Amendment's Takings Clause,<sup>313</sup> and many states also have statutes for inverse condemnation actions.<sup>314</sup> Many takings actions could thus proceed without the Fifth Amendment's Takings Clause. Indeed, in many instances, the state constitution or statute provides more than the federal Constitution does. For instance, some state statutes specifically provide not only for just compensation suits but also for attorneys' fees for victorious plaintiffs.<sup>315</sup> Some also offer a separate administrative remedy for recovering from the state.<sup>316</sup> California even statutorily provides market-rate postjudgment interest for condemnation awards.<sup>317</sup>

Even more important, many states have consented to suits sounding in inverse condemnation, expressly authorizing suits for money damages. Some have done so through express legislation.<sup>318</sup> Others have done so through their courts, so that even though sovereign immunity is theoretically sufficient to defeat an action against a state's taking,<sup>319</sup> the state's constitutional just compensation clause constitutes consent to suit, thus waiving that immunity.<sup>320</sup>

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313. 1 JULIUS SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 1.3 (rev. 3d ed. 1998) [hereinafter *NICHOLS ON EMINENT DOMAIN*]. North Carolina is the only state that lacks such a provision. *Id.* at 1-95.

314. *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-972(B) (West 2001) (providing for inverse condemnation action); CAL. CIV. PROC. CODE §§ 1250.110, 1268.311 (West 2000) (same); COLO. REV. STAT. § 24-56-116 (2002) (same); CONN. GEN. STAT. ANN. § 48-17b (West 2000) (same); HAW. REV. STAT. § 113-4 (1999) (same); N.C. GEN. STAT. § 40A-51 (1999) (same); OR. REV. STAT. § 20.085 (2003) (same); VT. STAT. ANN. tit. 19, § 512 (1999) (same); WYO. STAT. ANN. § 1-26-516 (2005) (same); *see also* Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 578 (2001) (noting that many states have enacted statutes for inverse condemnation actions) Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1414 & n.60 (2000) (same).

315. *See* ARIZ. REV. STAT. ANN. § 11-972(B) (providing reasonable attorney's fees in an inverse condemnation suit); COLO. REV. STAT. § 24-56-116 (same); CONN. GEN. STAT. ANN. § 48-17b (same); HAW. REV. STAT. § 113-4 (same); OR. REV. STAT. § 20.085 (same).

316. *See* Menell, *supra* note 314, at 1414 & n.60 (providing a sample of state laws authorizing a separate administrative remedy).

317. CAL. CIV. PROC. CODE § 1268.311 (West 2000).

318. *See, e.g.*, N.Y. CT. CL. ACT § 9(2) (McKinney 2001) (stating that a court of claims can hear monetary actions "against the state for the appropriation of any real or personal property or interest therein"); UTAH CODE ANN. § 63-30-10.5(1) (1997) (repealed 2004) (providing that "immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation"); *see also* Seamon, *supra* note 8, at 1118 n.249 (noting that New York and Utah expressly waive immunity from just compensation suits).

319. *See* 6A *NICHOLS ON EMINENT DOMAIN*, *supra* note 313, § 30.01[2] (stating that a state's sovereign immunity from suit is sufficient to defeat an eminent domain action).

320. *See, e.g.*, *Rose v. California*, 123 P.2d 505, 510 (Cal. 1942) (finding that the California takings clause is self-executing and therefore an action for damages is permissible);

In short, "[t]he rigors of sovereign immunity are thus 'mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.'<sup>321</sup>

However, though many states offer protections more robust than that under the federal Constitution, not all do. Some state courts have yet to overrule cases refusing to find the state liable for exercising its eminent domain powers.<sup>322</sup> Some states have also limited takings suits to either direct physical invasion or damage to specific rights.<sup>323</sup> And in some states, it is unclear

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State *ex rel.* *Smith v.* 0.24148, 0.23831 & 0.12277 Acres of Land, 171 A.2d 228, 231 (Del. 1961) (finding that the Delaware constitutional provision stipulating that no person's property shall be taken for public use without his consent and without compensation is a self-executing waiver of sovereign immunity); *Angelle v. State*, 34 So. 2d 321, 323 (La. 1948) (finding that the Louisiana constitutional provision that private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid is "self-executing" and, hence, where private property has been appropriated by state for public purposes, the right of the owner to recover adequate compensation will be entertained by courts as an exception to the general principle that a sovereign cannot be sued without its consent); *Schmutte v. State*, 22 N.W.2d 691, 694 (Neb. 1946) (finding that the Nebraska constitutional provision that property shall not be taken for public use without just compensation protects property rights from invasion by the state and is self-executing, so no further legislative consent is necessary); *Cereghino v. State ex rel. State Highway Comm'n*, 370 P.2d 694, 696 (Or. 1962) (finding that where the state exercises power of eminent domain without bringing a condemnation action, the owner may sue to recover the value of the property and damages under the Oregon and United States Constitutions); *Chick Springs Water Co. v. State Highway Dep't*, 157 S.E. 842, 850 (S.C. 1931) (finding no immunity from suit under the South Carolina Constitution where the act complained of constitutes a taking of private property without just compensation); *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589, 596 (Tex. App. 1991) (finding that the eminent domain provision of the Texas Constitution constitutes a waiver of governmental immunity for the taking or damage of property for public use). Of course, along similar lines, one could read the states' ratification of the Bill of Rights and the Fourteenth Amendment as together consenting to just compensation suits. Given that many states' own takings clauses are very similar to the clause in the Fifth Amendment—and given that many states have construed their own clauses to satisfy this consent requirement—this analysis seems correct, if roundabout. See *infra* Part VI.C (tracing the development of claims under the Takings Clause); see also 6A NICHOLS ON EMINENT DOMAIN, *supra* note 313, § 30.01[2], at 30–10 & n.12 (noting that states' compensation clauses constitute consent to suit).

321. *Alden v. Maine*, 527 U.S. 706, 755 (1999) (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

322. See, e.g., *Zoll v. St. Louis County*, 124 S.W.2d 1168, 1173 (Mo. 1938) (concluding that "[i]t is the prerogative of the state to determine when suit may be maintained against it"); *Westmoreland Chem. & Color Co. v. Pub. Serv. Comm'n*, 144 A. 407, 410 (Pa. 1928) (noting that, absent legislation to the contrary, there could be no liability); *Starrett v. Inhabitants of Thomaston*, 137 A. 67, 69 (Me. 1927) (pointing to a provision in the relevant act disclaiming any state liability).

323. See, e.g., *Hamer v. State Highway Comm'n*, 304 S.W.2d 869, 871 (Mo. 1957) (discussing the requirement that property be "directly affected"). See also Robert Keith Johnston, *Federal Regulatory Takings Jurisprudence and Missouri Inverse Condemnation Proceedings*, 58 UMKC L. REV. 421, 430 n.77 (1990) (noting that Missouri inverse

whether immunity has been waived<sup>324</sup> or even if a cause of action for inverse condemnation exists.<sup>325</sup> Moreover, in those states in which the courts, rather than the legislature, have found sovereign immunity waived, the issue may not be permanently settled; given recent Supreme Court developments, there is reason to think some state courts might revisit their earlier decisions on the matter.<sup>326</sup> Indeed, because many state courts that have construed their respective just compensation clauses to provide state consent to suit were considering the issue prior to *Alden*, some of those courts might want to revisit the issue in light of *Alden*'s decision that state sovereign immunity in fact does apply in state courts. This is not to say that the "consent" theory necessarily rested on the absence of sovereign immunity in state courts; however, that absence certainly facilitated such a conclusion. Thus, even though sovereign immunity might not present an obstacle to such a suit under state law, the protection provided by state law suits is limited and uncertain.<sup>327</sup>

Indeed, some states that "consent" to suit do so not in traditional courts but in quasi-judicial courts of claims. Illinois, for instance, requires that cases filed against the state be filed in the Court of Claims, a fact-finding body that is not a court in the constitutional sense.<sup>328</sup> Illinois courts, thus, usually refuse to

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condemnation law is far from clear).

324. See, e.g., *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1493 n.12 (11th Cir. 1993) (indicating that Florida law is uncertain regarding whether courts recognize a cause of action for inverse condemnation temporary takings claims); *Austin v. City of Honolulu*, 840 F.2d 678, 681 (9th Cir. 1988) (indicating that Hawaii case law is also unclear); see also Seamon, *supra* note 8, at 1118–19 & n.250 (indicating that there are states where the law is still unclear).

325. See *Austin*, 840 F.2d at 681 (stating that Hawaii case law is unclear as to whether there exists an inverse condemnation cause of action); *Johnston*, *supra* note 323, at 430 (stating that Missouri law is unclear as to whether such a cause of action exists); see also DANIEL R. MANDELKER ET AL., *FEDERAL LAND USE LAW* § 4A.02[5][D] (1998) (noting that the availability of compensation remedies in land use cases remains muddy in many states).

326. As Professor Seamon argues, some of those state courts have blurred together takings clauses' creation of a monetary cause of action with the waiver or abrogation of sovereign immunity. Seamon, *supra* note 8, at 1120. In light of *City of Monterey v. Del Monte Dunes*, states might need to revisit that approach. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 714–15 (1998) (discussing the distinction between a cause of action and waiver of sovereign immunity).

327. See Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 *STAN. L. REV.* 1331, 1335–37 (2001) (discussing the remedial gap created by current Eleventh Amendment doctrine with particular attention to intellectual property suits).

328. See *Rossetti Contracting Co. v. Court of Claims*, 485 N.E.2d 332, 334 (Ill. 1985) (noting that the Court of Claims is not "a court within the meaning of the judicial article" of the Illinois Constitution); 3 RICHARD A. MICHAEL, *ILLINOIS PRACTICE: CIVIL PROCEDURE BEFORE TRIAL* § 2.3 (2004) ("Cases against the State of Illinois are also outside the jurisdiction of the

assume jurisdiction over suits against the state.<sup>329</sup> But the Illinois Court of Claims lacks the procedural protections afforded in "constitutional" courts, and under Illinois law, the circuit courts can review only the administrative procedures used by the Court of Claims, not the substance of the case.<sup>330</sup> Were the Takings Clause not to trump state sovereign immunity and permit an action against the state in state or federal court, Illinois would then offer only limited administrative review, not the full panoply of judicial protections for takings plaintiffs.

Moreover, for those plaintiffs who seek to vindicate their rights in federal courts, the *Williamson* doctrine already poses sizeable barriers to takings litigants not faced by other constitutional rights plaintiffs.<sup>331</sup> As one commentator argues, the lower federal courts have an "overwhelming predisposition to dismiss federal land use cases on jurisdictional grounds such as abstention and ripeness."<sup>332</sup> The quintuple threat of sovereign immunity, qualified immunity, and, under the *Williamson* trap, ripeness, abstention, and preclusion then poses multiple pitfalls, some unique to the takings plaintiff.<sup>333</sup>

Nevertheless, the general point is that state law in many instances fills some of the gaps that might exist were the Court to hold that the Eleventh Amendment does limit the remedies that plaintiffs can receive in takings suits against the state. Such a holding would lead more plaintiffs to file their takings suits in state court, but that often happens anyway because of *Williamson*'s ripeness requirements and (arguably) faulty reasoning about the asymmetry of state sovereign immunity.<sup>334</sup> Moreover, the combination of *Ex parte Young* actions and suits against officers in their personal capacities can help to further deter temporary regulatory takings. If the officer suit option and state laws

subject matter of the circuit courts and must be filed in the Court of Claims.").

329. See MICHAEL, *supra* note 328, at § 2.3 (listing arguments, rejected by the Illinois courts, asserted by litigants in attempts to join the state as a party to litigation).

330. See *id.* (describing the circuit courts' subject matter jurisdiction).

331. John J. Delaney et al., *Who Will Clean Up the "Ripeness" Mess?: A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 201 (1999) (describing the Takings Clause as being marginalized in comparison with the other Bill of Rights protections). These barriers seem particularly unfair (or, at the least, asymmetrical) given that federal official defendants can easily remove federal takings actions to federal court while plaintiffs in such cases usually are forced to go to state court first under *Williamson*.

332. *Id.* at 196.

333. See *San Remo Hotel, L.P. v. City of San Francisco*, 125 S. Ct. 2491, 2509 (2005) (Rehnquist, C.J., concurring) (noting that the *Williamson* trap creates burdens unique to takings plaintiffs).

334. See *supra* Part V.B.2 (discussing the symmetry of state sovereign immunity in state and federal courts and citing some arguments against such symmetry for certain kinds of claims).

collectively provide adequate protection to property rights in many instances, is this all much ado about nothing?

The answer from the property owner for whom an adequate remedy is not otherwise available is, of course, certainly not. The foregoing discussion demonstrates there will be gaps in the coverage, and to the extent that the Constitution ought to protect everyone to the same degree, those gaps are disquieting. After all, "[c]onstitutional provisions are based on the possibility of extremes,"<sup>335</sup> so the fact that the unprotected right is the exception rather than the norm should count for little as a constitutional argument. This is even more the case considering that the small property owner of modest means will tend to have less political clout and be more vulnerable to the system's gaps. On the federal law front, official immunity can be difficult to overcome, and an injunction offers nothing to the victim of a temporary taking. Similarly, the suit against the officer in his personal capacity might help deter uncompensated takings on the margins, but it will offer little in the way of satisfying compensation. Indeed, before we celebrate the existing safeguards, we should keep in mind that the system currently functions mostly without state sovereign immunity<sup>336</sup> and poses litigation barriers serious enough to merit congressional attention. The problem, in fact, has been perceived as so serious that a bill addressing these concerns made it all the way through the House before falling short in the Senate.<sup>337</sup>

The state law front might be rosier on the whole, but as noted above, some states do better than others. If a state were intent on denying reasonable procedures, it is plausible that that same state would neither waive its immunity nor offer much in the way of state law remedies. The direct collision between takings and state sovereign immunity, in fact, presupposes a state that is unwilling to compensate an alleged taking, because a suit that has progressed to that point must involve a state unwilling to provide certain compensation. State

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335. *Gen. Oil Co. v. Crain*, 209 U.S. 211, 226–27 (1908).

336. Because the Court suggested in *First English* that takings trumps the Eleventh Amendment, and because it has not held to the contrary, takings cases in many instances can proceed unmolested by sovereign immunity. Such was the case in *Palazzolo*, when the Court ignored a potential sovereign immunity problem. *See supra* note 6 and accompanying text (noting that the Supreme Court had an opportunity to address the problem but declined to do so). *See also* *Boise Cascade Corp. v. Oregon*, 991 P.2d 563, 568 (Or. Ct. App. 1999) (concluding that "at least some constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity"); *SDDS, Inc. v. South Dakota*, 650 N.W. 1, 9 (S.D. 2002) (finding that a sovereign immunity claim can not overcome the Takings Clause's just compensation requirement). *But see supra* note 4 (citing federal appellate cases finding that the Eleventh Amendment barred takings suit against the state).

337. *See* *Delaney et al.*, *supra* note 331, at 195–98 (discussing the Private Property Rights Implementation Act).

court protections in fact are frequently limited, as evidenced by the fact that many takings plaintiffs try to get into federal court notwithstanding the procedural complications.<sup>338</sup> Thus, even though the law would offer some protections were the Supreme Court to hold that state sovereign immunity precluded just compensation suits, those remedies would not always protect property owners as well as an automatically abrogating Takings Clause would. Such a holding, then, would not be a policy disaster, but that does not mean it is preferable. Given that some already see procedural hurdles as having rendered the Takings Clause a "poor relation" compared to the other Bill of Rights protections,<sup>339</sup> a clearly articulated state sovereign immunity hurdle would make it that much more difficult for plaintiffs to protect their property rights.

### *C. The Fourteenth Amendment, Incorporation, and Automatic Abrogation*

Another structural argument in favor of automatic abrogation relies on the Fourteenth Amendment Due Process Clause's incorporation of the Takings Clause against the states. This reading reasons that, in its radical realignment of the relationship between the federal and state governments, the Fourteenth Amendment also reconfigured Eleventh Amendment immunity. To the extent that the Eleventh Amendment was passed after the Bill of Rights, there are problems in arguing that those rights automatically abrogate state sovereign immunity—although not insurmountable ones, because current jurisprudence treats the Eleventh Amendment as a placeholder for sovereign immunity, not as an affirmative creator of the doctrine. However, because the Fourteenth Amendment was passed after the Eleventh—and because those rights did not previously apply against the states anyway—there is reason to think the Fourteenth Amendment disrupted pre-Civil War immunity principles.

The current Court acknowledges that the Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution."<sup>340</sup> In theory, this fundamental alteration could automatically abrogate state sovereign immunity for all rights incorporated through the Fourteenth Amendment. Interestingly, the Court has never rejected this principle, even suggesting that automatic abrogation might apply in some instances. Even the *Alden* Court noted that, in adopting the Fourteenth Amendment, the people required states to surrender a portion of sovereignty

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338. *See id.* at 200 (discussing ripeness and preclusion doctrine as complicating factors in federal litigation).

339. *Id.* at 201.

340. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996).

preserved to them in the original Constitution.<sup>341</sup> This is a view not terribly different from that of many state courts, which read the states' ratification of the Fifth Amendment and, later, the Fourteenth Amendment as collectively consenting to takings suits.<sup>342</sup>

Still, doctrinally it seems extreme to assert that incorporation did not merely apply the Bill of Rights against the states but also abrogated state immunity for those rights. Nevertheless, this theory does illustrate important ways of thinking about the Fourteenth Amendment's impact on sovereign immunity. As the Bill of Rights did not initially apply against the states, the original discussions of state sovereign immunity—whether in the ratification debates for the original Constitution, the Bill of Rights, or the Eleventh Amendment—often did not focus on the issue of constitutional rights.<sup>343</sup> Indeed, those debates had in mind particular phenomena, such as war debts and the connected debates on fiscal policy.<sup>344</sup> Though this historical backdrop<sup>345</sup> certainly does not foreclose the possibility that Eleventh Amendment or, alternatively, common law state sovereign immunity applied to constitutional suits, it also does not prove that a state's immunity was so powerful as to block constitutional suits.

The Court's recent decisions permit Congress to abrogate state sovereign immunity under its Fourteenth Amendment Section 5 powers, while limiting its ability to abrogate pursuant to other powers.<sup>346</sup> This focus suggests that the Court might not see the Fourteenth Amendment as automatically abrogating anything. And yet, though automatic abrogation has not been embraced by the current Court, the Court's own precedent suggests at least some incorporated rights should not be subject to Eleventh Amendment bars. Interestingly, *Fitzpatrick v. Bitzer*, which establishes that Congress can abrogate Eleventh

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341. *Alden v. Maine*, 527 U.S. 706, 756 (1999). *Alden*'s discussion focuses on Congress's power to abrogate state sovereign immunity under Section 5, but its analysis does not foreclose the possibility of some instances of automatic abrogation. *Id.*

342. *See supra* Part V.B.3 (discussing state consent and waiver case law).

343. *But see* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 421–25 (1793) (discussing enforcement of the Constitution against the states in federal court).

344. *See* ORTH, *supra* note 74, at 18 (noting the pre-*Chisholm* "national debate on fiscal policy"); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1281–1313 (1998) (exploring the historical backdrop behind state government amenability to suit).

345. *See infra* Part VI for historical arguments. For ease of presentation, I treat structural arguments here and historical ones in Part VI, though, of course, there is substantial overlap between the two.

346. *See Alden*, 527 U.S. at 756 (discussing congressional intervention pursuant to Section 5); *Seminole Tribe*, 517 U.S. at 59 (upholding *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).



Amendment immunity pursuant to its Section 5 powers,<sup>347</sup> notes that the Fourteenth Amendment's substance is not limited to Congress's action. It explains that "the substantive provisions of the Fourteenth Amendment . . . themselves embody significant limitations of state authority."<sup>348</sup> The fact of congressional abrogation might militate against automatic abrogation, but the Court does not address automatic abrogation because that question is not raised. *Fitzpatrick*, then, unanimously addresses only the easier question of Section 5 abrogation,<sup>349</sup> not the harder "automatic abrogation" question. To the extent it acknowledges that the substantive provisions of Section 1 of the Fourteenth Amendment themselves constrain state authority, *Fitzpatrick* might be a relatively contemporary admission that some constitutional rights might be self-executing in this sense.

Justice Brennan's concurrence embraces these principles more explicitly than do his fellow Justices. Not only does Brennan read the Eleventh Amendment only to mean what it says—that "only federal-court suits against States by citizens of other States" are barred<sup>350</sup>—but he also suggests that the states waived their sovereign immunity for constitutional claims when they granted Congress specifically enumerated powers.<sup>351</sup> Similarly, in his own concurrence, Justice Stevens notes, "I am not sure that the 1972 Amendments [to Title VII abrogating state sovereign immunity] were 'needed to secure the guarantees of the Fourteenth Amendment' . . ."<sup>352</sup> Thus, when the right in question emerges from the Constitution itself, the state's immunity, under this theory, may be automatically surrendered.<sup>353</sup>

Curiously, the current Court might support this argument. In *City of Boerne v. Flores*,<sup>354</sup> the Court, in limiting Congress's powers under Section 5, emphasized that Section 1 of the Fourteenth Amendment has meaning independent of Congress's actions. Section 5 thus merely gives Congress "remedial powers."<sup>355</sup> *Boerne* has often been seen as part of the Rehnquist

347. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

348. *Id.* at 456.

349. No one dissented in *Fitzpatrick*. Justice Brennan and Justice Stevens each filed a concurring opinion.

350. *Id.* at 457 (Brennan, J., concurring).

351. *Id.* at 457–58 (Brennan, J., concurring).

352. *Id.* at 458 (Stevens, J., concurring) (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

353. *Id.* at 458 (Brennan, J., concurring); see also *Alden v. Maine*, 527 U.S. 706, 740 (1999) (distinguishing *Reich v. Collins* because in that case the state's obligation derived from the Constitution rather than congressional action).

354. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

355. See *id.* at 531 (finding that the Religious Freedom Restoration Act of 1993 (RFRA)

Court's federalism movement, curtailing Congress's power to legislate. But in retaining the final say over the Fourteenth Amendment's meaning, the *Boerne* Court explains that "[a]s enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."<sup>356</sup> Of course, this does not necessarily mean that one can sue the state directly for damages; it might only mean that these rights can be raised without statutory authorization as a defense or as a cause of action in an officer suit for injunctive relief. But the suggestion is that these rights must have real bite without congressional action.

As this Article acknowledged earlier, case law will not conclusively determine the outcome of this doctrinal collision. Case law created the collision, so to rely on it too heavily would be to beg the question. However, case law can help illuminate the judiciary's primary concerns. Indeed, as vigorous as the Court's defense of federalism has been over the past decade, the focus has been mostly on limiting Congress's intrusions on the states, not on shielding the states from its constitutional duties. The Court in recent years has reined in Congress's power to legislate in cases involving the Commerce Clause,<sup>357</sup> Tenth Amendment,<sup>358</sup> and Section 5 of the Fourteenth Amendment.<sup>359</sup> Indeed, the Court's deep concern over congressional overreaching has arisen in separation-of-powers cases as well.<sup>360</sup> Collectively, these decisions suggest that the recent Court's federalism is bothered more by congressional aggrandizement—and more concerned with its own power vis-à-vis the other branches—than by constitutional requirements that might attach against the states.

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"contradicts vital principles necessary to maintain separation of powers and the federal balance").

356. *Id.* at 536.

357. *See* *United States v. Morrison*, 529 U.S. 598, 607–19 (2000) (holding that the Commerce Clause does not empower Congress to enact the civil remedy provision of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549, 552–68 (1995) (holding that the Commerce Clause does not empower Congress to enact the Gun-Free School Zones Act).

358. *See* *Printz v. United States*, 521 U.S. 898, 904–33 (1997) (rejecting congressional authority to compel state law enforcement officers to enforce federal law); *New York v. United States*, 505 U.S. 144, 174–77 (1992) (noting that congressional authority does not extend to forcing state governments to implement federal legislation).

359. *See* *City of Boerne v. Flores*, 521 U.S. 507, 529–36 (1999) (holding that Section 5 does not empower Congress to enact RFRA).

360. *See* *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (noting that congressional participation must end once legislation is enacted); *INS v. Chadha*, 462 U.S. 919, 958 (1982) (explaining that further legislation is the proper means for Congress to affect the execution of laws already in effect); *see also* Choper & Yoo, *supra* note 8, at 213 (suggesting that the Court's real "lodestar" is separation of powers, not federalism).

This is, of course, an oversimplification of the Rehnquist Court's federalism decisions. However, it is notable that the trend has been to limit Congress, not to aggrandize the states in other ways. Indeed, though liberal critics have been quick to disparage the contemporary Court, one could argue that it has proven to be a willing defender of some constitutional rights. As this Article has already noted, certainly its takings and due process cases defend an individual against the state. In fact, the Court has recently vindicated a host of constitutional individual rights, sometimes even at the expense of state government. To mention just a few, it has held that the Sixth Amendment right to a jury trial prohibits trial judges from imposing "exceptional" sentences based on judicially determined facts;<sup>361</sup> that due process requires that United States citizens being held as enemy combatants be given meaningful opportunity to contest the factual basis for detention;<sup>362</sup> that foreign national detainees held in the Guantanamo Bay facility may file habeas petitions in United States courts;<sup>363</sup> that the First Amendment likely protects adults' access to some material banned by Child Online Protection Act;<sup>364</sup> and that the Due Process Clause prohibits states from making homosexual sodomy criminal.<sup>365</sup> Of course, this is a very limited survey and does not help settle the doctrinal issue here. However, if one is to search for a unifying theme to the past fifteen years of constitutional jurisprudence, it would certainly be limitations on Congress's power, not on individual rights. Indeed, this brief list of cases suggests that the Court is deeply concerned with constitutionally protected rights, arguably sometimes at the expense of workable government.<sup>366</sup> To this

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361. See *Blakely v. Washington*, 542 U.S. 296, 305 (2004) (holding the judge's use, in sentencing, of a fact neither admitted nor found by the jury to be a Sixth Amendment violation); see also *United States v. Booker*, 543 U.S. 220, 288 (2005) (finding that the Sixth Amendment was incompatible with the mandatory Federal Sentencing Act).

362. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that "due process demands . . . a meaningful opportunity to contest the basis for detention").

363. See *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (allowing habeas corpus petitions by Guantanamo Bay detainees).

364. See *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004) (finding COPA to be a likely violation of the First Amendment).

365. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (finding consensual, adult homosexual activity to be a protected liberty under the Due Process Clause).

366. See, e.g., *Blakely*, 542 U.S. at 306–08 (suggesting that the United States Sentencing Guidelines might be unconstitutional and thereby arguably creating serious practical problems for criminal attorneys and for courts all over the country); *New York v. United States*, 505 U.S. 144, 171–75 (1992) (striking down three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required states to provide for disposal of waste generated within their borders, even though the Act resulted from efforts of state leaders to achieve a state-based set of remedies for the waste problem).

extent, the automatic abrogation thesis, though perhaps still controversial, is not so out of line with the Court's current philosophy.

Indeed, recent sovereign immunity jurisprudence is consistent with this view. *Seminole Tribe* and *Alden*, the two most important recent statements on the Eleventh Amendment, focus on Congress's power to abrogate immunity.<sup>367</sup> Keeping that in mind, it becomes apparent that congressional abrogation and self-executing constitutional abrogation might be very different in this Court's mind. There is a tendency to assume that if the Court has limited Congress's power to abrogate, then the Constitution certainly would also limit any automatic abrogation, because the latter would infringe on states' dignity more than the former. But, given the aforementioned case law, this is not necessarily the case.

This interpretation not only fits with recent case law's admittedly cryptic remarks but makes sense given the Founders' initial intentions. To alleviate fears that the federal government would swallow the smaller states, Alexander Hamilton argued that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."<sup>368</sup> Such delegations included cases "where [the Constitution] granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority."<sup>369</sup> Significantly, even Justice Iredell, the lone dissenter in *Chisholm* and, obviously, a supporter of state sovereign immunity, reasoned similarly, arguing that each state is sovereign as to the powers reserved to the state but not for those powers of which the Constitution deprives the state.<sup>370</sup> Of course, the Fourteenth Amendment would not exist for another eighty years, but presumably the same founding principles would apply to constitutional amendments.<sup>371</sup> Thus, once the Fourteenth Amendment limited state authority,

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367. Of course, *Alden* in particular might have significant implications outside the abrogation context. See *supra* Part V.B.2 (discussing whether *Alden* requires state sovereign immunity to apply symmetrically in state and federal court).

368. THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 218, at 192.

369. *Id.*

370. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting) ("Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered.").

371. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 148 (1996) (Souter, J., dissenting) (interpreting *Federalist No. 32* to include "subjects over which state authority is expressly negated"). Justice Souter's interpretation, which this Article accepts here, might not fit with the exact language of Hamilton's essay. However, it seems uncontroversial to assert that this interpretation is implicit and applies to the Fourteenth Amendment. First, the relevant clause grammatically separates authority "granted" to the union and authority "prohibited" in the states,

the states' sovereignty in those areas must have disappeared. Although that "sovereignty" would not necessarily include sovereign immunity, it would be strange for it to not.<sup>372</sup> In fact, because the Fourteenth Amendment contains judicially enforceable restraints on the states independent of Congress's Section 5 powers, it would be contradictory for sovereign immunity then to bar suits seeking to enforce those rights against the states.

The predictable counter to all this is that we should let the political safeguards of federalism work out these details. Because protection of the states lies with Congress, Congress should decide if sovereign immunity is a defense states need. Permitting abrogation is thus a way to remain respectful of principles of federalism without insisting that the judiciary impose those principles on the other branches.

While this theory makes sense for statutory rights, it seems less appropriate for constitutional rights. After all, one main reason for enshrining a right in the Constitution is to take the issue out of the political branches' hands. Permitting the government to decide whether it wants to subject itself to takings suits weakens the constitutional protection almost into a statute; if a plaintiff cannot sue in the absence of a waiver or abrogation of sovereign immunity, then the constitutional right has little bite. Indeed, the complicated politics of these issues could result in a political process failure that prevents or permits abrogation for the wrong reasons.

One could argue, of course, that congressional failure to abrogate demonstrates insufficient support for abrogation, so the system works. Political realities obstruct much legislation, yet surely such hurdles do not justify judicial involvement. However, when the right is constitutional, we should be more hesitant to leave the issues to the political branches. Dozens of "veto-gates,"<sup>373</sup> obstacles in the legislative process, might prevent

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thus suggesting two discrete categories. Second, even if this is not the best reading of the sentence, it would be odd to read the states' sovereignty as existing still in areas where the Constitution expressly negates state authority. Third, one can argue that the Fourteenth Amendment does grant power in one instance to Congress (in Section 5) and prohibits the states from exercising similar authority (in Section 1).

372. As Professor Manning queries:

How should one understand sovereign immunity in a dual republic in which the states seem to have ceded some measure of sovereignty to the federal government on matters within a limited sphere of federal power and, beyond that, seem to have agreed to certain express constitutional restrictions on their own sovereign powers?

Manning, *supra* note 129, at 1676; *see also* Amar, *supra* note 71, at 1426 (describing "sovereign immunity" as an "oppressive" feature of state "sovereignty").

373. *See, e.g.,* ESKRIDGE ET AL., *supra* note 139 (referring to hostile or indifferent committee leaders, filibusters, presidential vetoes and the host of other potential killers of legislation as "veto-gates").

legislators from enacting a desirable law or even from passing a law that reflects the preferences of a majority.<sup>374</sup> Congress is also less likely to act on a complicated issue underneath the media's radar, even if the majority of the public and of legislators themselves might view abrogation favorably. This baseline of inaction is, of course, typical of our legislative processes<sup>375</sup>—arguably one of the great strengths of our democracy—but it seems particularly dangerous to entrust our constitutional rights to such arbitrary political winds.

Federalism, then, has more resonance in the realm of congressional legislation, where structural obstacles help prevent our government from acting "tyrannically."<sup>376</sup> To the extent those same obstacles ensure state power, they will help achieve some other goals commonly associated with federalism: experimentation, individual choice, and democracy.<sup>377</sup> It is entirely unclear how state sovereign immunity—especially as applied to constitutional rights—might further any justifications for our federalism; crucially, with or without immunity, the states "retain something to do."<sup>378</sup> State sovereign immunity not only prevents the vindication of individual rights, but also does little actually to further principles of federalism. State governments can in fact carry out their regulatory authority even if they are subject to lawsuits.<sup>379</sup> Considering that the framers of the original Constitution and the Fourteenth Amendment saw our federalist system as protecting individuals against the excesses of government, the Fourteenth Amendment should be viewed as doing more than merely placing the abrogation decision in Congress's hands for all constitutional rights.

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374. See S. 2271, 105th Cong. (1998) (noting that Senate supporters of the property rights bill were unable to overcome filibuster); see also Delaney et al., *supra* note 331, at 59 (describing how the property bill passed in the House but needed eight additional votes to defeat an anticipated filibuster).

375. See generally JAMES MORONE, *THE DEMOCRATIC WISH* (1989) (arguing that Americans are profoundly wary of government power and that our constitutional structure reflects that wariness by making it difficult for government to act and change status quo).

376. See, e.g., THE FEDERALIST NO. 45 (James Madison), *supra* note 218, at 294, 298 (arguing that state sovereignty exists to protect individual liberty); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 385–99 (discussing federalism as a method of preventing tyranny).

377. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW 150–54* (3d ed. 1996) (presenting most of the common explanations and defenses for a federalist system).

378. Young, *supra* note 261, at 43.

379. See *id.* at 52–53 (arguing that sovereign immunity does little to advance genuine federalism concerns).

## VI. *The Historical Arguments*

While it is frequently possible to garner significant historical evidence for opposing sides of a constitutional debate, the fact remains that originalist arguments are persuasive for the current Supreme Court. Some Justices might take history more seriously than others, but most, or even all, of the current Justices seem to consider history relevant to their task. This is particularly true in sovereign immunity cases; *Seminole Tribe* and *Alden* both contained scholarly, historically minded majority and dissenting opinions. The student of the constitutional collision must therefore address the historical roots of the competing doctrines.

### A. *Originalist Views of the Takings Clause and the Evolution of "Just Compensation"*

At common law, property rights were seen as absolute.<sup>380</sup> According to Blackstone, when the government took private property it was "considered as an individual, treating with an individual for an exchange."<sup>381</sup> Though the sovereign's authority was usually unquestioned and unquestionable, when Parliament took private property, it did so "not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained."<sup>382</sup> To take property, the sovereign would thus have to enter the marketplace as an ordinary participant and pay the fair market value for the land in question.<sup>383</sup> However, though English common law certainly formed an important backdrop to the nation's founding, theories of eminent domain were far from the framers' chief concerns.<sup>384</sup>

Evidence of the origins of the Fifth Amendment Takings Clause is scanty. The idea seems to have been Madison's, and it encountered little opposition, either in the Constitutional Convention or in the states.<sup>385</sup> Given that the Clause was unremarkable and uncontroversial, it is probably safe to assume, as do Professors Dana and Merrill, that the Constitution merely codified existing

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380. WILLIAM BLACKSTONE, 1 COMMENTARIES \*134.

381. *Id.* at 135; see also DANA & MERRILL, *supra* note 24, at 24 (describing Blackstone's view of property rights).

382. BLACKSTONE, *supra* note 380, at \*135.

383. DANA & MERRILL, *supra* note 24, at 24.

384. See *id.* at 25 (discussing the drafting of the Takings Clause).

385. *Id.* at 13–14.

practices of providing just compensation when government appropriated land for public use.<sup>386</sup> This practice was to provide compensation when the government forced a private property owner to surrender title to it.<sup>387</sup> Of course, the eighteenth century framer would have been concerned mostly with physical takings,<sup>388</sup> but this establishes that regulatory takings were less likely to have been on his radar screen, not that he would have been categorically opposed to the extension of a takings clause to such cases in a future regulation-heavy era. Indeed, the fact that many nineteenth century state constitutional takings clauses included provisions requiring just compensation when property was "taken or damaged"<sup>389</sup> suggests that regulatory-type takings were on people's minds by the time the Fifth Amendment Takings Clause was incorporated. Interestingly, even in Blackstone's era, road commissioners were liable in tort and, according to Blackstone, subject to punitive damages for road repairs that obstructed light or passage to nearby houses.<sup>390</sup> The notion of compensating indirect damage to property owners, then, was not wholly foreign to Anglo-American jurisprudence in the era of the founding.

From its conception, the Takings Clause was unique in its specific provision of a monetary remedy. Such a view is consistent with historical theories that the Constitution was written with an eye towards protecting the

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386. *Id.* at 15–16; *see also* Farber, *supra* note 156, at 281 (noting that a takings clause was included in Northwest Ordinance of 1787 to protect nonresident investors and alleviate fears that state legislators would seize lands owned by outsiders); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785 n.12 & n.13 (1995) (citing Massachusetts Body of Liberties and 1669 Fundamental Constitutions of Carolina).

387. DANA & MERRILL *supra* note 24, at 16. As one scholar notes:

When substantial parcels of land were taken for public facilities—courthouses, prisons, churches, fortifications—statutes normally specified that the landowner would receive compensation equivalent in value to the land taken. Compensation was also generally provided when government took temporary possession of private property, as in the compulsory lodging of troops.

John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1283 (1996). Interestingly, Professor Hart's findings suggest that the government provided just compensation not only for permanent takings, but for temporary takings as well. *First English*, then, seems consistent with original practices and understanding.

388. *See* Treanor, *supra* note 386, at 798–801 (arguing that the originalist understanding of the Takings Clause was that compensation was only mandated when the government physically took property).

389. *See* Brauneis, *supra* note 8, at 64 (describing the addition of "taking or damages" provisions in the nineteenth century).

390. *See* *Leader v. Moxton*, (1773) 95 Eng. Rep. 1157, 1160 (K.B.) (Blackstone, J.) (ruling that the road commissioners had acted "arbitrarily and tyrannically" and awarding damages); *see also* Brauneis, *supra* note 8, at 86 (discussing *Leader v. Moxton*).



wealth and property rights of the colonies' elite aristocrats.<sup>391</sup> Of course, this broader Marxist reading of the constitutional convention need not dictate the content of the Takings Clause, but it would help affirm that the Clause provided a monetary remedy to property owners whose land was taken by the government. Indeed, this understanding was apparently also dominant a century later when judges understood that "[t]he fact that the just compensation clause itself referred to payment for the appropriation of property made the clause a special case even within the tradition of recognizing implied damages action."<sup>392</sup> This reading would suggest that the Clause could trump sovereign immunity (though admittedly not state sovereign immunity, because the Takings Clause did not yet apply to the states) and that the Tucker Act's waiver of immunity is redundant for takings actions. Given the eighteenth century principle that "the burdens of the State should be borne equally by all, or in just proportion"<sup>393</sup> and that Blackstone viewed property as an "absolute right,"<sup>394</sup> it seems that takings cases constituted that rare exception where the government—or, in England, the king—could be sued. In fact, because just compensation clauses and statutes, by definition, address only instances when the sovereign effects a taking, to then require a plaintiff to surmount an independent sovereign immunity hurdle would be paradoxical.

This argument, originally applicable only to federal takings, should also extend to the states after 1868.<sup>395</sup> To be sure, federal courts under the 1875 general federal question jurisdiction statute would not have considered a claim that property had been taken as an issue of federal law. Rather, federal courts entertained such suits only in diversity, where in that era they would be circumscribed by the remedies available under state law.<sup>396</sup> As Professor

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391. See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913) (reviewing the Founders' economic interests and concluding, in part, that the Constitution was drafted with an eye towards protecting private wealth). Interestingly, the American emphasis on constitutional property rights is not unique; in European constitutions, for instance, property is the most widely recognized right, appearing in every European constitution. Terence Daintith, *The Constitutional Protection of Economic Rights*, 2 INT'L J. CONST. L. 56, 75 (2004).

392. Brauneis, *supra* note 8, at 113.

393. 3 E. DE VATTTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 96 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758), *quoted in* DANA & MERRILL, *supra* note 24, at 22.

394. BLACKSTONE, *supra* note 380, at \*134.

395. Whether the framers of the Fourteenth Amendment sought to incorporate the Bill of Rights is a matter of historical debate, but it is doctrinally clear today that many such rights, including takings, do apply against the states.

396. Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 151–52 (1997); see also Henry M. Hart, Jr., *The Relations*

Woolhandler puts it, "a federal due process claim was not ordinarily presented when the allegation was that the state had collected taxes (or taken property) in violation of its own law."<sup>397</sup> But because the Takings Clause was not incorporated against the states until 1897,<sup>398</sup> it makes sense that federal courts would have thought of takings claims against a state or state official as a state law action prior to that date. The doctrine's limitations prior to incorporation then should have little import on the application of the Clause today against the states.

Another more serious counter is that takings clauses in the nineteenth century did not promise damages to successful plaintiffs but rather invalidated legislation effecting unlawful takings. According to Professor Brauneis, most antebellum state courts did not initially award just compensation under their state constitutions when determining whether an act amounted to a taking.<sup>399</sup> Rather, they "asked whether the act purportedly authorized by the legislation amounted to a taking, and if so, whether the legislation itself provided for just compensation."<sup>400</sup> If not, the legislation was void: The legislature had exceeded its competence, which the Constitution limited to the authorization of "takings-with-just-compensation."<sup>401</sup> However, as Brauneis explains, as a practical matter, the difference between antebellum interpretations of the Takings Clause and contemporary ones is not quite so stark. Though just compensation provisions were originally intended to limit legislative competence, they nevertheless operated within a complicated common law context that included damage remedies. A just compensation provision's limitation on legislative competence, then, also limited the legislature's ability to abolish damage remedies. A legislature could only bar damages if it offered an alternative, constitutionally adequate remedy; monetary compensation was thus always part of the takings equation.<sup>402</sup>

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*Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) (discussing the intersection of federal and state law).

397. Woolhandler, *supra* note 396, at 157.

398. *See* Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 238–39 (1897) (discussing the incorporation of the Takings Clause).

399. Brauneis, *supra* note 8, at 60. To the extent that Brauneis's argument informs our understanding of takings jurisprudence, it is important to remember that his focus is primarily on takings clauses in state constitutions, which were amended frequently and, of course, are not legally binding on federal courts construing the federal Constitution. Nevertheless, these clauses were similar enough in language and purpose to the federal Takings Clause that his analysis remains instructive for our purposes.

400. *Id.* at 60.

401. *Id.* at 60–61.

402. *Id.* at 61–62.

In fact, not only were damages possible, but state courts sometimes held individual officers in just compensation suits liable in money damages, notwithstanding potential immunity bars.<sup>403</sup> The special nature of just compensation clauses is then highlighted by the fact that official immunity did not always extend to actions for violations of property rights, either because courts chose to make an explicit exception or because they refused to raise immunity issues in opinions considering such actions.<sup>404</sup> And though plaintiffs formulated these suits against the offending officers, as opposed to directly against the states, the fact that courts carved an exception for official immunities at least suggests the possibility that the states' sovereign immunity could also be pierced by just compensation clauses.<sup>405</sup> This possibility was not always realized at once; some courts adopting a constitutional tort model of takings actions did not immediately entertain suits that previously would have been obstructed by sovereign immunity.<sup>406</sup> But by the 1920s and 1930s, many states did take that next step, finding that just compensation provisions in fact abrogated state sovereign immunity.<sup>407</sup> And today, many state courts, as noted

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403. See *McCord v. High*, 24 Iowa 336, 350 (1868) (Dillon, J., concurring) (finding that the plaintiff must be given a remedy despite the highway supervisor's lack of malice); *Cubit v. O'Dett*, 51 Mich. 347, 351 (1883) (holding the overseer of highways and his assistant liable for the flooding of a landowner's property); see also *Brauneis*, *supra* note 8, at 82–83 (noting that general doctrine of quasi-judicial immunity suggested property owner could recover from public officer for injury to his property and that, after the Civil War, courts specifically held that those officials could not use sovereign immunity to shield themselves from just compensation litigation).

404. *Brauneis*, *supra* note 8, at 136.

405. Of course, the parallel is inexact. Unlike state sovereign immunity, which is rooted (at least somewhat) in the Constitution, official immunities are determined with reference to the "immunity historically accorded the relevant official at common law." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). Courts thus frequently look at the common law of immunities as it existed when 42 U.S.C. § 1983 was adopted to determine issues of official immunity. *CHEMERINSKY*, *supra* note 309, at 495. Accordingly, courts' willingness to narrow official immunity does not necessarily bear on the scope of the Constitution's protection of state sovereign immunity. But the willingness to narrow official immunity is not wholly irrelevant either, for it demonstrates courts' willingness to seek appropriate remedies, notwithstanding doctrinal limitations. Moreover, to the extent that state sovereign immunity is itself deeply rooted in our common law heritage, see *supra* Part V.B.1 (discussing case law on constitutional remedies, the historical backdrop of the Eleventh Amendment, and the common law roots of sovereign immunity), and *infra* Part VI.B (discussing Supreme Court's conflicting accounts of the original understanding of state sovereign immunity), the judiciary's treatment of common law official immunities is indicative of the inherent flexibility of these common law hurdles.

406. *Brauneis*, *supra* note 8, at 136.

407. See, e.g., *Board of Comm'rs v. Adler*, 194 P. 621, 622 (Colo. 1920) (finding that the state's just compensation clause was "a consent by the state to the bringing of suits against a county"); see also *Brauneis*, *supra* note 8, at 138–40 (describing the abrogation of state sovereign immunity).

above, view just compensation clauses as either abrogating state sovereign immunity or consenting to suit.<sup>408</sup>

Supreme Court precedent hints at the same evolution but is less overt about it. Some cases, such as *Schillinger v. United States*<sup>409</sup> and *Lynch v. United States*,<sup>410</sup> suggest that the United States was immune from just compensation suits except to the extent the Tucker Act waived that immunity.<sup>411</sup> Given that the Court often treated the United States's sovereign immunity as symmetrical to the states' sovereign immunity,<sup>412</sup> these cases would suggest that the Fifth Amendment Just Compensation Clause does not automatically abrogate any immunity, whether federal or state. But precisely because of the Tucker Act, this issue rarely arose in the federal context. *Schillinger* was decided before the Court had determined that the Takings Clause itself created a cause of action, so it would be dangerous to assume that its treatment of sovereign immunity still applies.<sup>413</sup> And although a cause of action is certainly analytically distinct from sovereign immunity, the application of sovereign immunity to a constitutional claim in an era when the Constitution did not give rise to such a claim carries less weight in an era when the Constitution does give rise to such a claim.

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408. See *supra* notes 318 & 320 and accompanying text (discussing state consent to suit).

409. *Schillinger v. United States*, 155 U.S. 163 (1894).

410. *Lynch v. United States*, 292 U.S. 571 (1934).

411. See *id.* at 581–82 (stating that "[t]he sovereign's immunity from suit exists whatever the character of the proceedings" and that "[t]he character of the cause of action . . . may be important in determining (as under the Tucker Act) whether consent to sue was given"); *Schillinger*, 155 U.S. at 169–72 (finding that a just compensation claim was one "sounding in tort" and that, as Congress had not consented to such suits in the Court of Claims, the court had no jurisdiction to hear the case).

412. See, e.g., *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 686 n.21 (1982) (noting cases treating state sovereign immunity similarly to federal sovereign immunity); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944) ("The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government."); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (noting that because state officers can be sued for injunctive relief so too can federal officers); *Tindal v. Wesley*, 167 U.S. 204, 213 (1897) (stating that, in the sovereign immunity context, "the question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States"); *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883) ("It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent."); see also *Seamon*, *supra* note 8, at 1090–91 n.115 (discussing symmetry and relevant cases).

413. See *Seamon*, *supra* note 8, at 1092 (noting that "the predicate for the Court's sovereign-immunity ruling in *Schillinger* is no longer valid").

Even the Court's 1962 decision in *Glidden Co. v. Zdanok*,<sup>414</sup> which affirmed the validity of sovereign immunity, does not speak to the contrary.<sup>415</sup> In sustaining the Article III status of Courts of Claims, *Glidden* echoed past decisions finding that the United States could not be sued without its consent.<sup>416</sup> But by 1962, the federal government had long ago waived immunity in most contract claims and common legal claims in the 1887 Tucker Act.<sup>417</sup> Contrary to Justice Scalia's view, the Tucker Act then can be read not as evidence that Congress is required to abrogate sovereign immunity for constitutional claims like takings,<sup>418</sup> but rather as the reason why the Supreme Court never overruled sovereign immunity doctrine. If the Tucker Act and similar legislation waived most federal sovereign immunity—and if individuals prior to *Alden* could circumvent state immunity by suing states in state court—then the Supreme Court would have had little opportunity and no reason to disrupt sovereign immunity principles, even if such principles were incorrect. It is also possible that courts declined to address the issue because they agreed with scholarship of the era arguing that sovereign immunity was obsolete.<sup>419</sup> As Professor Shimomura argues, "Thus, the sovereign immunity doctrine remained the federal rule in theory largely because immunity had become the decided exception in practice."<sup>420</sup> Indeed, a similar point can be made about whether the Takings Clause trumps the Eleventh Amendment: Because the officer suit provided the most consistently reliable remedy, plaintiffs would have been foolish to bring direct just compensation claims against the state.<sup>421</sup>

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414. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (plurality opinion).

415. *Id.* at 584–85.

416. *See id.* 564–65 (invoking past decisions to conclude that the United States could not be sued without its consent).

417. *Id.* at 565.

418. *See Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) (stating that "no one would suggest that, if Congress had not passed the Tucker Act, the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation"). *But see United States v. Mitchell*, 463 U.S. 206, 216–17 (1983) (suggesting that the sovereign must waive immunity before plaintiff can seek compensation mandated by Constitution).

419. *See Brauneis, supra* note 8, at 139 & n.348 (citing, for instance, articles by Edwin Borchart).

420. Shimomura, *supra* note 177, at 691. The Court itself has hinted that the Tucker Act might not be necessary to abrogate federal sovereign immunity against takings claims, stating that the Just Compensation Clause is "self-executing . . . with respect to compensation." *United States v. Clarke*, 445 U.S. 253, 257 (1980) (internal quotations omitted) (quoting 6 P. NICHOLS, *EMINENT DOMAIN* § 25.41 (3d. rev. ed. 1972)).

421. *See Seamon, supra* note 8, at 1083 (noting that "the Court never had a case that required it squarely to decide whether the Just Compensation Clause overrode the state's sovereign immunity").

The fact that the ostensible immunity bar persisted after the Takings Clause was applied to the states, then, does not suggest that the Court would have been unwilling to find sovereign immunity automatically abrogated but rather that litigants naturally were content to proceed under the existing framework, which often provided adequate remedy.<sup>422</sup>

More important, to the extent that we must take seriously doctrinal complications, the evolution of takings clauses indicates that our constitutional history has been in constant flux. Though we must recognize that just compensation clauses did not always give rise to damages actions by their own force (even if they did sometimes require such a remedy be made available in the common law), that nineteenth century understanding need not bind us today. If anything, courts' eventual decisions to view takings clauses as giving rise to a cause of action for damages and, later, as waiving or abrogating state sovereign immunity demonstrates that judges needed this added flexibility to protect such clauses' core principles. From this perspective, the *Bivens*-type action arising out of the Fifth Amendment's Takings Clause is not so much an abandonment of our constitutional heritage but an attempt to vindicate the Constitution's original purpose.<sup>423</sup> And although this approach might seem to ring with the shrill call of judicial activism, the clause's evolution suggests that it is in fact what courts have been doing for over a century-and-a-half.

### B. Original Understandings of State Sovereign Immunity

The original understanding of state sovereign immunity is decidedly more controversial than that of takings. A majority of the Rehnquist Supreme Court believed that sovereign immunity was hard-wired into the original Constitution, but, as Justice Souter's dissents demonstrate, it is debatable whether this is the case and, even if it is, what that sovereign immunity included. Indeed, notwithstanding the Court's recent case law, there is strong evidence to suggest that state sovereign immunity, if it existed at all, applied only to diversity cases in which a citizen of one state sued the government of another state. The stakes

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422. Prior to *First English*, the availability of the temporary regulatory taking suit would have been open to doubt, so there would have been far fewer instances when plaintiffs sought damages in takings cases. And as the Court in *First English* obviously did not feel constrained by the absence of temporary takings in the past, one might expect similar agnosticism on the question of direct just compensation suits against the states.

423. See generally Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (arguing that readings of the Constitution, whether changed or consistent, standing alone are not sufficient to establish fidelity or infidelity, rather the practice of interpretation, the translation of the Constitution, permits fidelity when context changes constitutional meaning).

in this debate are high. In arguing that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself,"<sup>424</sup> the Court is using historical arguments to extend state sovereign immunity beyond the limited text of the Eleventh Amendment. However, as Justice Souter counters, Justice Kennedy's arguments might well rest on faulty assumptions.<sup>425</sup>

The Court's originalism argument contains two parts, what might be called a common law and a natural law argument.<sup>426</sup> The first contention is that sovereign immunity was an integral part of the English common law inherited by the Constitution and that the founding generation intended to preserve that immunity.<sup>427</sup> The Court argues that the Founders' silence on the issue "suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution."<sup>428</sup>

The Court's common law argument is misleading in two fundamental ways. First, it fails to acknowledge the extent to which sovereign immunity was a controversial topic even in the 1780s. The Court might be right that a majority of the Constitution's framers and ratifiers believed that such immunity was, and should be, included in the new governmental structure, but it seems undoubtedly wrong that the principle was uncontroversial, at least as applied to federal question cases. The states themselves, at the time of the Constitutional Convention, had different sovereign immunity practices, but none included that immunity in their constitutional declarations of the inalienable and natural rights of statehood.<sup>429</sup> Indeed, to the extent that sovereign immunity was an issue, some of the Founders seemed to assume it would apply only in diversity cases. In the Pennsylvania ratification debate, for instance, James Wilson

424. *Alden v. Maine*, 527 U.S. 706, 728 (1999).

425. *Id.* at 761 (Souter, J., dissenting) (noting that the majority's positions concerning the Tenth Amendment, historical inherent sovereign immunity, and American federalism prompt a suspicion of error).

426. *See id.* at 765–66 n.4 (Souter, J., dissenting) (explaining how common law conception of sovereign immunity differed from natural law conception); Young, *supra* note 129, at 1667–70 (separating out common law and natural law arguments and arguing that majority jumbles the two together).

427. *See Alden*, 527 U.S. at 741 (noting that the Constitution's silence on the issue evidences that no one, even those opposed to the Constitution, considered that the document would abolish such immunity); *see also* Hill, *supra* note 314, at 497 (arguing that when Constitution was adopted, "it was generally assumed that the states were protected by sovereign immunity if sued in their own courts" and that some Founders expected this immunity would extend to federal court).

428. *Alden*, 527 U.S. at 741.

429. *Id.* at 772 (Souter, J., dissenting) (citing the Pennsylvania Constitution).

stated that federal judges could force states to pay back debt owed to English merchants, thus implying that the states' immunity would apply in only some cases.<sup>430</sup>

The common law argument is also misleading because the supposedly sovereign states had in fact possessed their sovereignty for a very short time. As Justice Souter points out in his *Alden* dissent, "the American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone."<sup>431</sup> Thus, as Justice Story has argued, "antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states."<sup>432</sup> Given that American states gained their sovereignty so shortly before the ratification of the Constitution, the majority's argument that the states' sovereignty was a "well-established" principle seems to assume that American law would blindly incorporate English law without adapting it to the new circumstances.<sup>433</sup>

This was not the case. The framers, in fact, were generally averse to the federal reception of common law and drew from a variety of "reception" doctrines to determine exactly how the English common law should and should not be included in American law.<sup>434</sup> The majority's finding of common law sovereign immunity principles, then, should only be the first step of the analysis. Even if the Court is right that those principles extended to federal question suits—itsself a controversial proposition—it has been sloppy in not examining more closely just how the framers in the 1780s thought about receiving English common law. Evidence suggests, in fact, that the framers rejected the idea of incorporating the common law into the Constitution because that incorporation would render it immune from legislative alteration.<sup>435</sup> Moreover, anti-English hostility was such that many states adopted only so much common law as they thought necessary for their local

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430. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 105 n.4 (1996) (Souter, J., dissenting) (quoting 2 J. ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 490 (2d ed. 1836)); see also Jackson, *supra* note 8, at 55 (demonstrating that debates about sovereign immunity at time of founding revolved around diversity cases, not federal question cases).

431. *Alden v. Maine*, 527 U.S. 706, 764 (1999) (Souter, J., dissenting).

432. 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION* § 207, at 149 (5th ed. 1891), quoted in *Alden*, 527 U.S. at 764 (Souter, J., dissenting).

433. See Young, *supra* note 129, at 1666 n.298 (arguing that the "short-lived nature of preconstitutional state sovereignty in America suggests caution in importing English sovereignty concepts to the American Constitution, as the ways in which those concepts would have to be adapted to the new American context had not had much time to settle out by 1789").

434. See *id.* at 1647 n.235 (noting the "reception" doctrines which questioned "how to treat common law doctrines imported from the mother country").

435. *Seminole Tribe*, 517 U.S. at 104–05 (Souter, J., dissenting).



conditions.<sup>436</sup> As for the federal Constitution, it explicitly referenced a few concepts from English common law, such as habeas and the distinction between law and equity, thus reflecting, in Justice Souter's words, "widespread agreement that ratification would not itself entail a general reception of the common law of England."<sup>437</sup> Keeping this in mind, it would seem that the current Court has assumed a more whole-hearted embrace of the common law principle than in fact occurred. To the extent that the states did believe in sovereign immunity, it appears not to have been the "indefeasible" sort embraced by the Court today.<sup>438</sup> And, even if the Court accurately characterized 1780s common law, Congress should be able to amend it by statute, unlike the common law that was explicitly included in the Constitution, such as the right to a jury trial.

Interestingly, even in the nineteenth century, the Supreme Court acknowledged that the English justifications for sovereign immunity did not translate well into the American context. The Court in *United States v. Lee* noted that the king of England was not suable "in the courts of that country, except where his consent had been given," but continued that "it is a matter of great uncertainty whether prior to that time he was not suable in his own courts and in his kingly character as other persons were."<sup>439</sup> The Court went on to explain that the petition of right was established "as the appropriate manner of seeking relief where the ascertainment of the parties' rights required a suit against the King" and "has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the King in legal controversies among themselves."<sup>440</sup> Though the petition of right might be construed as the monarch's consent to suit, *Lee* recognizes that even in the English judicial system, "the rights of suitors against the crown" were secured.<sup>441</sup>

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436. *Id.* at 136 (Souter, J., dissenting).

437. *Id.* at 138 (Souter, J., dissenting); see also Letter from John Marshall to St. George Tucker (Nov. 27, 1800), reprinted in Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1326 app. A (1985) ("I do not believe one man can be found" who maintains "that the common law of England has . . . been adopted as the common law of America by the Constitution of the United States."), quoted in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 138 (1996) (Souter, J., dissenting).

438. See *Alden v. Maine*, 527 U.S. 706, 770 n.9 (1999) (Souter, J., dissenting) (stating that the spectrum of state thought and practice allows for sovereign immunity but not to the extent adopted by the Court).

439. *United States v. Lee*, 106 U.S. 196, 205 (1882).

440. *Id.*

441. *Id.*

The other primary originalist argument in defense of sovereign immunity more resembles natural law. Under this reading, law exists by the sovereign's good graces, so it is paradoxical to let mere subjects use that law as a sword against the sovereign without its consent. However, as Justice Souter points out, that theory of sovereign immunity can only be asserted in cases where it was the sovereign's own law that was sued upon.<sup>442</sup> In Professor Young's words, "there is no warrant in a system of *dual* sovereignty for state sovereign immunity vis-à-vis a claim based on *federal* law."<sup>443</sup>

Souter's argument is a clever one—and it might well be right—but one important potential rejoinder is that the states ratified the Constitution, so federal law comes from the states in a sense. Federal law, then, is not wholly outside the states' purview, because it needed the states to approve it before that law took effect. This counter is not insignificant, but it ignores the very nature of our federal system. In ratifying the Constitution—and especially in ratifying the Fourteenth Amendment<sup>444</sup>—the states accepted a federal system in which their sovereignty was no longer absolute.

A final hole in the Court's originalist argument lies in *Chisholm v. Georgia*<sup>445</sup> and the enactment of the Eleventh Amendment. To be sure, opponents of sovereign immunity today cannot rely much on *Chisholm* because it was rejected so quickly by constitutional amendment. But what is crucial—and what is extraordinary for the Court to ignore—is that the Eleventh Amendment reaction against *Chisholm* expressly limited state sovereign immunity to suits "against one of the United States by Citizens of another State."<sup>446</sup> Far from supporting the Court's common law argument, the Eleventh Amendment's language instead strongly suggests the country decided to constitutionalize only a limited form of sovereign immunity. While legal language does not always mean what it says, it creates a presumption of meaning. The Court's originalist arguments do not overcome that presumption and thus rest on shaky footing for federal question cases and, even more so, takings cases.

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442. *Alden*, 527 U.S. at 763–67 (Souter, J., dissenting).

443. Young, *supra* note 129, at 1671.

444. See *supra* Part V.C (discussing a theory of automatic abrogation based on the Fourteenth Amendment's incorporation of the Takings Clause).

445. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

446. U.S. CONST. amend. XI.

*C. The Evolution of Actions Against the Government and the Rise  
of the Judiciary*

Because the Fourteenth Amendment incorporated the Takings Clause, we must also consider the background understanding of constitutional remedies at the time of its ratification. I have already argued that the Constitution's structure following the adoption of the Fourteenth Amendment supports my theory of automatic abrogation. That structural argument should, however, also be viewed in light of the history surrounding the Fourteenth Amendment.

The ratification debates lend little insight into the framers' views on constitutional remedies.<sup>447</sup> Not surprisingly, the technicalities of constitutional litigation were far from the center of the Reconstruction Congress's debates, which dwelt more on issues such as pardons,<sup>448</sup> the franchise,<sup>449</sup> taxing,<sup>450</sup> and frustration with President Johnson.<sup>451</sup> And although the structure of the Fourteenth Amendment was certainly central to these debates, the framers' focus was racial equality under the law in the wake of the abolition,<sup>452</sup> not the particulars of incorporation. Indeed, though today accepted as a constitutional given, it is still a matter of debate whether incorporation was intended by the 1866 Congress.<sup>453</sup>

Given that there is no smoking gun in the legislative history,<sup>454</sup> we must try to deduce the framers' probable understanding. This understanding was likely based on some dominant features of mid-nineteenth century practices:

447. See generally CONG. GLOBE, 39th Cong., 1st Sess. 2433–2545 (1866) (House debates); CONG. GLOBE, 39th Cong., 1st Sess. 2763–3042 (1866) (Senate debates); CONG. GLOBE, 39th Cong., 1st Sess. 3144–49 (1866) (House debates) [hereinafter CONG. GLOBE]; Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (examining the legislative history of Fourteenth Amendment in light of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

448. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2462–64 (House debates).

449. See, e.g., *id.* at 2466–70 (House debates).

450. See, e.g., *id.* at 2474–78 (House debates).

451. See, e.g., *id.* at 2493 (Senate debates).

452. See, e.g., *id.* at 3037 (Senate debates).

453. See NATHAN NEWMAN & J.J. GASS, *A NEW BIRTH OF FREEDOM: THE FORGOTTEN HISTORY OF THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS* 10–12 (2004) (arguing that constitutional law treatises of the era read the amendment as not only applying but also enforcing the Bill of Rights against the states).

454. See John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1458 (1975) ("There is no discussion in the debates of the ability of federal courts to entertain damage actions against state governments under the fourteenth amendment without congressional authorization.").

(1) officer suits based on claims of private right were the predominant form of relief against unconstitutional action; (2) the Constitution's principal effect was to nullify statutes, so that it was raised defensively as a shield, not offensively as a sword; and, accordingly, (3) most constitutional litigation involved the validity of statutes rather than the legitimacy of nonlegislative governmental actions.<sup>455</sup> Just as the Takings Clause, in particular, was seen as creating a legislative disability rather than a remedial duty, so too were courts reluctant to view constitutional rights as bestowing upon the litigant a broad range of potential remedies.

The remedies available in most suits were therefore limited by preexisting forms of action at common law. The Supreme Court tended to feel bound by those common law limitations and therefore respected the state law out of which its cases emerged. Thus, where states provided no remedy against themselves, the Court typically did not compel an unwilling state court to provide remedies.<sup>456</sup> Indeed, the officer suit was limited to actions for injunctive relief and damages out of the officer's own pocket; it was not a means of accessing the state treasury.<sup>457</sup> In short, the Court would not permit the officer suit to "oust" the political power of its "jurisdiction" and set the judiciary "in its place."<sup>458</sup>

With this backdrop, the drafter of the Fourteenth Amendment (or the informed member of the ratifying public) might well have found excessive any implied damages constitutional remedy, even in the Takings Clause. Constitutional rights might have been thought of as "self-executing," in the sense that they could be raised defensively against the state—for example, in a criminal prosecution or in an officer suit—but that did not mean that they

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455. Meltzer, *supra* note 168, at 2551; *see also* Pfander, *supra* note 219, at 966 (noting that Marshall Court, faced with limited jurisdiction over claims against government, relied extensively upon officer suits to secure government accountability).

456. Woolhandler, *supra* note 396, at 151–52; *see also* Henry M. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state court as it finds them."). As a result, state assertions of sovereign immunity in state court were historically respected. Woolhandler, *supra* note 396, at 152. Interestingly, this history, though inconsistent with the text of the Eleventh Amendment, supports the Supreme Court's decision in *Alden*.

457. *See* Edelman v. Jordan, 415 U.S. 651, 663 (1974) (stating that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"); *Louisiana v. Jumel*, 107 U.S. 711, 727–28 (1883) (holding that the Supreme Court is not "authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State").

458. *Jumel*, 107 U.S. at 727–28.

automatically abrogated any sovereign immunity or created a monetary remedy. Additional remedies, such as damages, would not have been forever barred but would have required additional legislation by Congress under Section 5.<sup>459</sup>

A competing view contends that the debates make clear that both the drafters and opponents of the Fourteenth Amendment assumed that federal courts would have an inherent power to enjoin state activities failing to conform to the amendment.<sup>460</sup> Of course, if this is the case, it would still not necessarily speak directly to sovereign immunity issues because injunctive relief is available anyway.<sup>461</sup> However, the ratification debates certainly do not foreclose the federal courts' power to hear damage actions against the states;<sup>462</sup> to the contrary, they suggest a general willingness to allow federal courts to force compliance with the Constitution and, similarly, to ignore the Eleventh Amendment. Specifically, it was understood that Section 1 of the amendment empowered courts to enforce Article IV's Comity Clause against the states, notwithstanding any potential Eleventh Amendment barriers.<sup>463</sup> Moreover, the Amendment's supporters several times decried federal courts' prior inability to protect individual rights against state incursions;<sup>464</sup> only a self-executing Fourteenth Amendment that authorized damages actions could fully resolve that concern. Indeed, even the Fourteenth Amendment's opponents understood that if it were ratified it would subject state action to federal court review.<sup>465</sup>

As Professor Meltzer argues, we must remember that the framers of the original Constitution, the Bill of Rights, and the Fourteenth Amendment were practical men seeking to create a workable government and to protect

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459. Of course, because these legal technicalities were far from the forefront of the framers' mind, these assumptions carry less weight than they might were they articulated clearly during the congressional debates.

460. Nowak, *supra* note 454, at 1455.

461. Though *Ex parte Young* was not decided until 1908, the officer suit was the dominant mode of adjudicating takings claims in the mid-nineteenth century. See generally Brauneis, *supra* note 8 (discussing the extension of the scope of just compensation protection). The officer suit, as an end run around sovereign immunity, was then nothing novel. *Ex parte Young* was novel in the sense that it permitted the officer suit for a violation of federal, rather than state, law and for a constitutional, rather than a common law, violation. Meltzer, *supra* note 168, at 2556. Given the deep roots of the officer suit, however, it is best seen as adapting the available remedies and cementing them in Supreme Court precedent.

462. Nowak, *supra* note 454, at 1458.

463. *Id.* at 1456 n.208.

464. *Id.* at 1455.

465. *Id.* at 1457; see also CONG. GLOBE, *supra* note 447, at 1064–65 (discussing the powers Congress and the Federal Courts may arrogate to themselves if the Fourteenth Amendment is ratified).

individual liberties.<sup>466</sup> Given that the Constitution lays out a basic structure but leaves the particulars to be realized through experience,<sup>467</sup> it is not surprising that the methods of constitutional enforcement were left unspecified in both 1791 and 1866.<sup>468</sup> So, though the officer suit began as the predominant mode of constitutional enforcement, when this and other traditional remedies began to fall short, "federal courts strained, even in the years shortly after ratification of the Fourteenth Amendment, to reformulate them to ensure that relief was not denied, even when doing so departed from pre-existing state or general law rules."<sup>469</sup> In *Belknap v. Schild*,<sup>470</sup> for instance, the Court found that, though injunctive relief was inappropriate in a patent infringement suit, damages were still potentially available on remand. The Court found that "no ground for equitable relief, by injunction, by account of profits, or otherwise, [had been] shown, [so] the proper remedy of the plaintiff against the defendants for such damages is by action at law."<sup>471</sup>

Indeed, consistent with this surprisingly flexible approach to remedies, the early Court was quite candid about the significance of the officer suit fiction; Chief Justice Marshall admitted in *Osborn v. United States Bank*<sup>472</sup> that the officer action runs "substantially, though not in form, against the State."<sup>473</sup> Accordingly, the Court was willing to vindicate individual rights, even if doing so interfered with the workings of government. In the *Virginia Coupon Cases*,<sup>474</sup> the Court reinstated the state legislature's repeal of mandamus and trespass actions against revenue officers after the legislature had effectively abrogated the mandamus remedy so that plaintiffs would only be entitled to the remedy of a refund.<sup>475</sup> Specifically, the Court held in *Poindexter v.*

466. Meltzer, *supra* note 168, at 2555.

467. *E.g.*, FEDERALIST NO. 37 (Madison), *supra* note 218, at 220–27.

468. Meltzer, *supra* note 168, at 2555.

469. *Id.*; see also Woolhandler, *supra* note 396, at 91–111 (discussing ways in which federal courts, in diversity actions raising constitutional claims, departed from state law so as to permit effective remediation).

470. *Belknap v. Schild*, 161 U.S. 10 (1896).

471. *Id.* at 26. *But see id.* at 18 (stating that "no injunction can be issued against officers of a State, to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced").

472. *Osborn v. U.S. Bank*, 22 U.S. (9 Wheat.) 738 (1824).

473. *Id.* at 846.

474. *The Virginia Coupon Cases*, 114 U.S. 269 (1884).

475. See *Poindexter v. Greenhow*, 114 U.S. 270, 306 (1884) (holding that the federal legislation "in all its parts, as to creditors affected by it and not consenting to it, must be pronounced null and void"); see also Woolhandler, *supra* note 396, at 120, 125 (discussing the Supreme Court's decision to direct "the state court to make available to the taxpayer the trespass remedy against the officer").

*Greenhow*<sup>476</sup> that the state could not repeal the previously available tort action against the officer.<sup>477</sup> As Professor Woolhandler argues, the Court thus suggested that a common law remedy for trespass was constitutionally compelled.<sup>478</sup> In this light, the Court's tax refund cases, beginning with *Ward v. Love County*<sup>479</sup> in 1920, might be understood as other examples of the Court reaching beyond traditionally available constitutional remedies to ensure that relief against an encroaching government would not be denied. So too might *Atchison, Topeka & Santa Fe Railway v. O'Connor*,<sup>480</sup> in which the Court held that a tax payment had been under duress and that a refund action was therefore available.<sup>481</sup> These departures still issued a remedy against the officer, as opposed to the government itself, but they suggest a greater judicial flexibility than one might initially assume.

*United States v. Lee* articulates even more forcefully the notion that legal technicalities like sovereign immunity must not interfere with the protection of rights.<sup>482</sup> There the Court argued, in a takings case, that judicial tribunals were the sole protectors for the safety of citizens whose rights had been invaded by the government.<sup>483</sup> This was especially so in the property context:

When [the citizen], in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.<sup>484</sup>

And in *General Oil Co. v. Crain*,<sup>485</sup> the Court suggested that if the Eleventh Amendment barred a suit in federal court, then relief must be available through the state courts because a contrary rule would impermissibly close both federal

476. *Poindexter v. Greenhow*, 114 U.S. 270 (1884).

477. *Id.* at 302–03.

478. Woolhandler, *supra* note 396, at 121. For a very interesting discussion of the remedies available in state and federal courts for both diversity and federal question cases, see generally *id.*

479. *Ward v. Love County*, 253 U.S. 17 (1920); see also *supra* Part III.A.2 (discussing due process tax refund cases).

480. *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280 (1912).

481. *Id.* at 286–87; see also Woolhandler, *supra* note 396, at 133–38 (discussing remedies made available in various tax cases).

482. See *supra* text accompanying notes 185, 200, 232–50, 439–40 (discussing the implications of *United States v. Lee*).

483. *United States v. Lee*, 106 U.S. 196, 219–20 (1882); see also *supra* text accompanying notes 232–238 (discussing the sovereign immunity argument asserted in *United States v. Lee*).

484. *Lee*, 106 U.S. at 208–09.

485. *Gen. Oil Co. v. Crain*, 209 U.S. 211 (1908).

and state courts to a constitutional claim.<sup>486</sup> More recently, it has asserted that "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."<sup>487</sup>

As this brief discussion illustrates, even though the historical practice of limited constitutional remedies is real, so too is there history, even in the nineteenth century, of a strong, if not unyielding, presumption that there should be individually effective remedies for constitutional violations.<sup>488</sup> Moreover, there has been "a more general, but also more unyielding, structural principle that constitutional remedies must be adequate to keep government generally within the bounds of law."<sup>489</sup> Of course, these presumptions can give way to practical imperatives, but the historical picture is incomplete without recognizing courts' general goals of protecting individual rights and limiting governmental overreaching. In this way, a Court that has approached immunity issues primarily with a formalist eye<sup>490</sup> has sometimes permitted the twin pragmatic necessities—protecting individual rights and guarding against governmental overreaching—to override rigid doctrinal thinking.

One must concede that the Court's willingness to craft new remedies had its limits and that, in many (though not all) instances, the officer suit was itself the newly created remedy. To this extent, it more frequently represented the ceiling rather than the floor of permissible remedies. However, even if the

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486. See *id.* at 226 (discussing the possibility that no court would be available to hear suits against state officers). The *Crain* Court noted that:

If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation.

*Id.* Curiously, *Alden* invokes *Crain* for the proposition that where *Ex parte Young* allows a federal court action against a state official to enjoin a constitutional violation, a state court must permit the same remedy. See *Alden v. Maine*, 527 U.S. 706, 747–48 (1999) ("[S]overeign immunity bars relief against States and their officers in both state and federal courts, and . . . certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land."); see also *supra* Part V.B.2 (discussing whether state sovereign immunity applies symmetrically in state and federal court).

487. *Bell v. Hood*, 327 U.S. 678, 684 (1946); see also *Bivens v. Six Unknown Named Officers*, 403 U.S. 388, 396 (1971) (quoting *Bell*).

488. Meltzer, *supra* note 168, at 2559.

489. *Id.*

490. See Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 MICH. L. REV. 1463, 1479 (2003) (describing Eleventh Amendment case law as highly formalist).



more persuasive historical argument is that officer suits were the predominant (and, arguably, lone) form of relief against unconstitutional action in the mid-nineteenth century,<sup>491</sup> the dominance of that practice should be less persuasive to a constitutional adjudicator today given the historical context. Significantly, our system of claims against the government shifted from a legislative to a judicial model in the eighty years following the Civil War. That shift radically altered the means by which individuals sought redress from a government that had violated their rights, and the tradition of the officer suit cannot be properly assimilated into our current constitutional understanding without accounting for the nature of that shift.

Though the judiciary was not wholly absent from the Founders' minds and though some of our early writings recognized that the judiciary would play a crucial role in protecting people from government's excesses,<sup>492</sup> the "legislative model" of claims determination was the dominant one at the founding.<sup>493</sup> Courts in fact recognized that claims against the government were the province of the legislature, not the judiciary. We are used to thinking of the Judiciary Act as Congress's first major action in determining how the young country would settle claims, but even earlier, the First Congress, in 1789, invested the Treasury Department with the authority to review claims against the government.<sup>494</sup> Interestingly, even at the time, there were murmurs that this function perhaps belonged best in the judiciary; James Madison himself thought this function "part[ook] of a Judiciary quality,"<sup>495</sup> and sought to permit a right to review in the Supreme Court to insure impartiality.<sup>496</sup> Congress rejected the idea, "preferring to maintain control over claims without judicial interference."<sup>497</sup> This little episode and, indeed, the subsequent story of

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491. See, e.g., John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2521 (1998) (noting that officer suits were the predominant form of relief for unconstitutional acts but, also, arguing that Section 1 of Fourteenth Amendment nullifies state law conflicting with constitutional provisions but does not give rise to affirmative remedy such as injunction or damages); see also Meltzer, *supra* note 168, at 2549–65 (discussing Harrison's thesis).

492. See *supra* notes 217–25 and accompanying text (discussing the framers' expectations for the judicial system).

493. Shimomura, *supra* note 177, at 637; see also Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1446 (1998) (arguing that in early eighteenth century, consensus was that the legislature was the appropriate authority to determine obligations of government).

494. Shimomura, *supra* note 177, at 637.

495. 1 ANNALS OF CONG. 611–14 (Joseph Gales ed., 1834).

496. Shimomura, *supra* note 177, at 638.

497. *Id.*

*Chisholm* and the adoption of the Eleventh Amendment<sup>498</sup> demonstrate that these tensions have been with us since the beginning.

For decades, Congress's right to exercise this power was uncontroversial.<sup>499</sup> As Professor Shimomura argues, given the judiciary's silence, this legislative function seems better understood as an extension from colonial history than a deduction of logic from the Constitution.<sup>500</sup> Its historical roots, however, could not quell brewing dissatisfaction with the system. By the Civil War era, Congress had recognized that it simply could not keep up with the ever-increasing number of claims. The model that thus developed was a hybrid, in which Congress and the federal judiciary shared responsibility for hearing and determining claims against the federal government.<sup>501</sup> This model lasted until about World War I, when it too began to break down.<sup>502</sup> By World War II, the hybrid model itself was all but dead, and Congress turned over to the Article III judiciary responsibility over most legal claims against the United States.<sup>503</sup> Thus, since the Supreme Court's decision in *Glidden Co. v. Zdanok*, the Court of Claims's status as an Article III court has been unchallenged.<sup>504</sup>

The triumph of the "judicial model" of claims determination<sup>505</sup> demonstrates that our modern government structure recognizes courts' preeminent role in vindicating individuals' legal claims against the government. To be sure, there is no straight linear progression to be traced in which the Court consistently makes available more remedies each generation. But nor is the Brennan Court anomalous in creatively using its remedial powers to vindicate constitutional rights that might otherwise go unprotected. Of course, even *Glidden* itself recognized that the Court of Claims's jurisdiction could not waive sovereign immunity by its own force.<sup>506</sup> But the judiciary's place in

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498. Cf. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 409–10 (1792) (discussing the fact that the Supreme Court did not need to rule on the *Hayburn Case* because the legislature provided another method of relief).

499. See, e.g., *Emerson v. Hall*, 38 U.S. (13 Pet.) 409, 413–14 (1839) (holding that Congress has the power to enact a statute providing for payment of money directly to heirs of claimants).

500. Shimomura, *supra* note 177, at 646.

501. *Id.* at 670.

502. *Id.* at 678. See, e.g., *Williams v. United States*, 289 U.S. 553, 581 (1933) (determining that salaries of Court of Claims judges were permissible because the Court of Claims was an Article I court and therefore not protected by Article III salary protection).

503. Shimomura, *supra* note 177, at 682.

504. See *supra* text accompanying notes 414–20 (discussing sovereign immunity and the Court of Claims).

505. See Shimomura, *supra* note 177, at 687–90 (discussing "'A Judicial Model' of Article III").

506. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 564 (1962) (plurality opinion) (reiterating

settling claims against the government is now firmly established, and the Supreme Court has recognized Article III as a basis for all claims against the government.<sup>507</sup> Moreover, the Court has now recognized, in limited circumstances, that sovereign immunity is not an impenetrable barrier to suits against the government for money.<sup>508</sup>

The story of this evolution is even more significant for interpretive purposes than the original practice it superseded. In *Federalist No. 37*, Madison recognized that it would take time to elucidate the Constitution's meaning. As he explained, "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meanings can be liquidated and ascertained by a series of particular discussions and adjudications."<sup>509</sup> Jefferson voiced similar sentiments, writing to Madison that "the earth belongs in usufruct to the living; that the dead have neither powers nor rights over it."<sup>510</sup> The Founders, then, seem not to have envisioned a Constitution etched in stone but rather expected constitutional meaning to adapt after more considered "discussions and adjudications."<sup>511</sup> The triumph of the judicial model demonstrates the gradual recognition that courts are better suited than legislatures to adjudicate individual legal claims against the government.

that a government may not be sued without its consent).

507. See *id.* (noting that Article III's extension of authority over controversies to which the United States is a party does not depend on whether the United States is a plaintiff or defendant).

508. See *Reich v. Collins*, 513 U.S. 106, 109–10 (1994) (noting that sovereign immunity does not completely bar state tax refund claims); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 27 (1990) (stating that the Eleventh Amendment does not bar federal jurisdiction "to review issues of federal law in suits brought against states in state court"); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (stating that the Fifth Amendment "dictates a remedy" for takings despite principles of sovereign immunity); see also Pfander, *supra* note 219, at 972 ("[W]here the Constitution requires the government . . . to make victims . . . of constitutional violations whole, remedial obligations apply whether or not the government has adopted an effective waiver of sovereign immunity."). Of course, it would be circular to cite the *First English* footnote for the proposition that it is correct. But to the extent historical practice commands attention, *First English*, among other cases, suggests a general willingness on the part of the Court to apply appropriate remedies, even in the face of a potential sovereign immunity hurdle.

509. THE FEDERALIST NO. 37, (James Madison), *supra* note 218, at 226.

510. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 5 THE WRITINGS OF THOMAS JEFFERSON 116 (Paul L. Ford ed., 1895) (internal quotations and emphasis omitted); see also ELY, *supra* note 179, at 11 (noting that Jefferson suggested the Constitution naturally expire every nineteen years).

511. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) (arguing that framers did not think originalism appropriate as an interpretive strategy for the Constitution).

Of course, none of this history definitively settles our larger question about the interaction of the Takings Clause and state sovereign immunity. But the triumph of the judicial model of claim adjudication coupled with *Federalist No. 37*'s evolutionary vision of constitutional interpretation undermines the vigor of originalist arguments insisting that the king cannot be sued. It similarly calls into question the applicability of the nineteenth century assumption that an individual could never sue the government for damages without its consent so that the officer suit was the only means of obtaining redress for constitutional violations. This assumption was, of course, dominant then, but the limits of that assumption were unlikely to be questioned given the legislature's role in claims adjudication. Though sovereign immunity was—and still is—part of our legal fabric, the historical argument in its favor is weakened by the fact that nineteenth century courts rarely heard legal claims against the government.

Given that the whole model for adjudicating these claims has radically changed over the past two hundred years, the historical roots of sovereign immunity—themselves controversial, as Justice Souter and others have pointed out—carry less persuasive force.<sup>512</sup> As noted above, original understanding sometimes ought to be "translated" into a modern context.<sup>513</sup> Such a translation here should recognize that the very notion of immunity—and the corresponding notion that the officer suit frequently constituted the lone means of appropriate relief—became dominant in an era when it was feasible for the legislature to consider all claims for damages in private bills. Because that is no longer feasible, Congress has delegated that responsibility to the courts. Of course, the history of permissible remedies should be part of our understanding, but in translating the history to the contemporary setting, we should not limit ourselves to a remedy that was predominant before our cause of action even existed. Put differently, if the entire method for seeking redress for a taking has changed—and if the historical trend has generally favored the *Marbury* principle—then surely sovereign immunity too plays a different role in the system.

To this extent, a contemporary translation of historical practices is a way to reconcile competing stories, not a means of subverting consistent historical practice. The limited remedy of the officer suit on the one hand, and the argument that the judiciary has generally sought to impose remedies that will

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512. See Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260, 1262 (1990) (arguing that legal circumstances have changed so much since 1890 that adherence to *Hans*' strict rule of sovereign immunity under the Eleventh Amendment is not justified).

513. See Lessig, *supra* note 423, at 1263–68 (arguing that "translation"—as Lessig uses the term—"accommodate[s] changes in context so as to preserve meaning across contexts").

vindicate important rights on the other, represent competing notions of courts' role in our constitutional system. History, from this perspective, cannot vindicate one theory over the other; rather it reflects different ages' efforts to reconcile these competing tensions. Notwithstanding the originalists' insistence, history does not settle this score decisively in favor of the Eleventh Amendment. If anything, its complexities and ambiguities demonstrate not only the loose historical foundation upon which the Court's Eleventh Amendment theory rests, but also the danger of applying that theory to the instant problem.

### VII. Conclusion

It is time to tally score. On textualism, takings is a clear winner over state sovereign immunity. While I must concede that the Takings Clause does not specifically mention temporary takings, *First English* and its progeny are earnest interpretations of the Just Compensation Clause. Without protection for temporary takings, it would be too easy for government to "borrow" property and return it eventually without offering any compensation. Temporary takings doctrine, therefore, closes a loophole and helps the Takings Clause operate. By way of contrast, state sovereign immunity doctrine is decidedly—and unabashedly—unmoored from the text of the Eleventh Amendment. Takings might not rout state sovereign immunity on textualism, but the victory is sound.

Structural arguments are more complicated, and more normatively based, but again the Takings Clause emerges victorious. A "just compensation exception" to Eleventh Amendment doctrine would carve but a small piece out of current state sovereign immunity law, leaving the remainder, including the *Seminole Tribe* line of abrogation cases, unimpeded. The contrary holding would leave the property owner mostly unprotected against temporary takings by the state. And though we must be careful not to delegate too much power to the courts, the promise that rights be protected by remedies coupled with the Fourteenth Amendment suggests that we should not take lightly explicit constitutional protections and remedies.

Policy and historical considerations are closer calls. As noted above, an Eleventh Amendment bar to takings suits against the states would not be a policy disaster, though it poses yet another hurdle for the takings plaintiff.<sup>514</sup> But automatic abrogation also would not be a disaster. The policy arguments, then, seem mostly equivocal, and as we shall see in a moment, given the

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514. See *supra* Part V.B.3 (discussing alternative remedies).

abstractness and subjectivity of the inquiry, they ought not play too important a role.<sup>515</sup>

As for history, given the sparse material on the origins of the Takings Clause and the controversy over the scope of the Eleventh Amendment in relation to *Chisholm*, it is hard to rely with confidence on original intent. Nineteenth century practices, to be fair, tended to favor sovereign immunity, but history is never static, so these understandings changed. Takings clauses started to be used as causes of action; courts, rather than legislatures, began to hear claims against the government and became more concerned with protecting the individual from government encroachment. Though novel, in ways these developments seem more faithful to original understanding. Given these complications, it is easy to see why scholars and judges cannot agree either on the content of these histories or on their relevance.

The question posed to the historical inquiries might well be asked of all the methodologies: Exactly how are we to reconcile a great deal of complicated and conflicting information? If text, structure, and "evolutionist" history weigh in favor of takings and originalist history weighs (albeit slightly) in favor of sovereign immunity, what is the constitutional jurist to do?

In American jurisprudence over the past few decades, it has been common to sidestep doctrinal conflicts and make potentially competing doctrines fit with one another. These cases have tended to focus on one doctrine or to find that a potentially conflicting doctrine has in fact not been implicated.<sup>516</sup> This approach, of course, has the aura of objectivity and avoids damage to already existing lines of law. Indeed, as we have seen, the instant problem offers a

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515. See *infra* notes 523–27 and accompanying text (discussing the "funnel of abstraction"). Courts' core institutional competence is also not policy decisions.

516. See, e.g., *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450–51 (2004) (holding that Eleventh Amendment was not implicated because undue hardship determination in Bankruptcy Court did not constitute a suit against the state for purposes of Eleventh Amendment immunity); *Printz v. United States*, 521 U.S. 898, 923–25 (1997) (finding that the Tenth Amendment prohibits "commandeering" of state officials under the Commerce Clause, and therefore the Necessary and Proper and Supremacy Clauses are not applicable); *New York v. United States*, 505 U.S. 144, 174–80 (1992) (giving scant consideration to arguably competing constitutional provisions, such as the Necessary and Proper Clause, in relying on the Tenth Amendment to hold that Congress cannot force state legislatures to enact federal regulatory plans under the Commerce Clause); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992) (relying on First Amendment exclusively when case arguably also implicated Reconstruction Amendments); *Edelman v. Jordan*, 415 U.S. 651, 663–71 (1974) (drawing prospective-retrospective line for *Young* actions without balancing surrounding legal arguments); see also Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 151–60 (1992) (arguing that Supreme Court decision in *R.A.V.* should have considered the Reconstruction Amendments in addition to First Amendment doctrine).

supposed solution of this kind: the Fourteenth Amendment makes temporary takings doctrine applicable to the states, and though constitutional provisions are generally not self-executing, the unique nature of the Takings Clause, when applied against the states, trumps whatever immunity might usually bar such an action. The Fourteenth Amendment naturally supersedes the Eleventh Amendment, and so the immunity bar is hurdled.<sup>517</sup>

Though this interpretation is probably correct, it is not the entire story. Instead, it is a post-hoc rationalization of a more complicated inquiry that should consider the text, structure, and history behind the competing doctrines. It is understandable why judges and, for that matter, scholars sometimes shy away from the more explicit balancing that this Article presents. First, the inquiry is hard to focus; the questions are so numerous and intricate that it is not always easy to know when to stop digging and start assessing. Second, judicial weighing necessarily involves subjectivity out of vogue in American jurisprudence. Third, even if we can come up with a reasonable ledger of pros and cons, that ledger will not help us determine if there is a hierarchy among the various inquiries. Fourth, the common law roots of our legal system pressure judges to decide all cases by finding the relevant precedent.<sup>518</sup> Fifth, a careful inquiry takes time and many pages. But, notwithstanding these concerns, courts, usually silently, do perform this kind of balancing in certain cases. Instead of pretending to reconcile the irreconcilable, courts should be more straightforward about the real factors shaping their decisions.

There are two primary ways of balancing the principles here. The first is to ask which principle—temporary takings or state sovereign immunity—is more important in context. When plaintiffs sue state governments to recover for past takings, should sovereign immunity be able to bar the action? The answer here seems easy. To sum up, temporary takings are no "different in

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517. Note that Professor Seamon offers a different way of reconciling the two doctrines. He takes state sovereign immunity as a bedrock principle and finds no chinks in its armor that will necessarily fail against a takings claim. *See* Seamon, *supra* note 8, at 1080–1101 (arguing that unconsenting states are generally immune from takings suits in both federal and state courts). Relying on century-old case law, he then argues that due process sometimes requires state courts to provide rights of action for takings claimants against the states. *See id.* at 1101–17 (arguing that due process trumps state sovereign immunity when a state does not provide a "reasonable, certain and adequate provision" for just compensation). Thus, sovereign immunity doctrine is not damaged but rather made to fit with turn-of-the-century due process cases.

518. *See* Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 636–37 (2004) (noting that, in constitutional adjudication, common law judges, in contrast to civil law judges, are constrained much more by precedent in their interpretive choices). This reliance on stare decisis is usually straight forward and appropriate—except in a case such as this one.

kind from permanent takings."<sup>519</sup> Because sovereign immunity does not bar regular takings suits—and because there is no argument that it should—it seems strange to extend that immunity to temporary takings. Accordingly, state sovereign immunity should not bar the vindication of this important right.

A related, but different, means of balancing is to ask which principle we are more confident is correct.<sup>520</sup> American law commonly treats propositions of law as either correct or incorrect; as Professor Lawson eloquently explains, "the law does not even consider applying to legal propositions any of the varied principles that govern the proof of factual propositions."<sup>521</sup> But, as we have seen, propositions of law can be called into question, and not just because a change in the make-up of the Supreme Court could alter a doctrine. A doctrine like state sovereign immunity does have some significant historical roots and a practical justification. But it also seems contrary to many of our fundamental legal principles, and the history, at best, is controversial. Temporary takings doctrine, by way of contrast, though less rooted in historical practice, is generally accepted as uncontroversial (though the boundaries of what constitutes a taking are, of course, debatable). Presenting the problem this way, we pit a strong doctrine against a weak doctrine. American courts do not resolve problems this way, frequently for good reason. If law exists, it should not generally be treated as less definite because it is controversial. But in a case like this, where doctrines conflict and one must yield, it seems not only acceptable but desirable that we should account for the fact that one doctrine is more likely correct than the other. As Professor Lawson asks rhetorically: "Why is it important that courts always be able to give definitive interpretations of the law? The law certainly does not require that decisionmakers always be able to reach definitive conclusions about *facts* . . . and the system nonetheless works quite well."<sup>522</sup>

To carry out this second type of balancing—to weigh our confidence in competing laws—one might use what Professor Eskridge and others have called "the funnel of abstraction," an approach common in statutory interpretation but less often employed explicitly in constitutional law.<sup>523</sup>

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519. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

520. Obviously, these two methods can blend into each other and frequently will, as here, point in the same direction.

521. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 895 (1992).

522. *Id.* at 896.

523. ESKRIDGE ET AL., *supra* note 139, at 804–05 (describing "funnel of abstraction"). The funnel is presented as a descriptive theory of statutory interpretation that explains how judges go about deciding statutory cases, *id.* at 805, but because it gives more weight to the concrete inquiries that limit the range of arguments, it could also be said to be a normative presentation



Recognizing that different inquiries in statutory interpretation can point to different results, scholars have arranged the inquiries from most concrete to most abstract.<sup>524</sup> Though each inquiry figures into the equation, the more concrete ones deserve more weight in the determination of the final answer.<sup>525</sup> Thus, statutory text, the most concrete inquiry, receives the greatest weight, followed by specific and general legislative history, legislative purpose, statutory evolution, and current policy.<sup>526</sup> A similar approach to constitutional interpretation would consider constitutional text; specific and general constitutional history (in this case, both the specific original intent behind the Takings Clause, Eleventh Amendment, and Fourteenth Amendment and the more general assumptions underlying our constitutional framework); the purpose behind the relevant provisions and the Constitution generally; the evolution of our constitutional understanding; and current policy concerns.<sup>527</sup> This funnel does not find a precise niche for structural arguments, but they can be thought of as both textual, because a structuralist approach might be mandated by the Constitution itself,<sup>528</sup> and purposive, because our constitutional values were arranged into a lean document from which we must discern meaning.<sup>529</sup>

of how judges should cabin themselves in deciding statutory questions.

524. *Id.*

525. *Id.*

526. *Id.*

527. Professor Fallon offers a similar hierarchy of modes of constitutional interpretation, prioritizing text and then, in order, original intent, constitutional theory, precedent, and values. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1209 (1987) (developing a "typology of constitutional argument"). Some have attempted to argue that, so long as one legitimate "modality" of argument is employed, the constitutional jurist need not select between approaches. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11–30 (1991) (discussing the "modalities" of constitutional argument and asserting that the modalities should not be used to justify particular ideologies of constitutional interpretation). While the challenge of selecting among "modalities" is very real, to deny the existence of interpretative hierarchy seems to ignore the fact that some inquiries are more subjective than others (though, admittedly, no inquiry is wholly objective) and that judges, recognizing this, frequently debate the relative legitimacy of different interpretative approaches. See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1787–90 (1997) ("Supreme Court opinions abound with self-conscious justifications of the modalities . . . . To describe constitutional law accurately thus requires an account of justification."). See generally Tribe, *supra* note 8, at 85–89 (discussing approaches to constitutional analyses when competing modes of interpretation collide and summarizing Fallon, Bobbitt, and Dorf).

528. See, e.g., Young, *supra* note 129, at 1625–30 & 1675 n.333 (arguing that the Guarantee Clause, "proper" in the Necessary and Proper Clause, and the use of the word "state" throughout the Constitution are textual mandates for structural arguments).

529. More so than in statutory interpretation, the different inquiries bleed into each other,

Indeed, the nature of structural constitutional arguments and the leanness of the Constitution itself suggest that the constitutional adjudicator need not follow the funnel as closely as the interpreter of statutes. Because our Constitution is so short, much of its meaning is not contained in the literal text; many of our most important constitutional principles are the product of judicial interpretation. We must therefore acknowledge that, at least in some instances, the Constitution's text, unlike a statutory text, is often not decisive<sup>530</sup> and, accordingly, that the funnel exists more as a guide than a directive. In fact, in different constitutional cases, different factors turn out to be decisive. From this perspective, if there is any "hierarchy," as Professor Fallon insists,<sup>531</sup> it is a loose one.

Though the funnel's hierarchy is only marginally helpful to the constitutional adjudicator, the process of forcing the adjudicator to think through the different modes of argumentation is crucial. It is this kind of inquiry that will help identify which doctrine is more fundamental, both generally and in the context of the given doctrinal conflict. This balancing is far more common in foreign courts than in ours.<sup>532</sup> In most cases, our

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as our understanding of constitutional structure and purpose, for instance, is necessarily colored by our reading of the text, history, and evolution. In this way, no interpreter will be wholly neutral, as each will be influenced by his or her own hermeneutical biases. As Professor Ely pointed out, it is no earth-shattering insight that judges, whether consciously or unconsciously, "slip their personal values into their [judicial] reasonings." ELY, *supra* note 179, at 44. The inherent fallibility of judges might be reason to let the legislature decide whether or not to abrogate immunity. But that is a cop out. If it is emphatically the province of the judiciary to say what the law is, then the judiciary must decide whether congressional abrogation is required.

530. There are exceptions of course. The Constitution's requirement that the President of the United States be at least thirty-five years of age, for instance, is a strict textual requirement that invites no judicial gloss. See U.S. CONST. art. II, § 1, cl. 5 ("[N]either shall any Person be eligible to that office who shall not have attained to the Age of Thirty-five Years . . .").

531. See Fallon, *supra* note 527, at 1243–48 (arguing for hierarchy of "modalities").

532. The South African Constitution, for instance, contains one clause seeking the promotion of human dignity and another recognizing the constraints of economic realities. See S. AFR. CONST. ch. 2, § 39 (requiring courts interpreting South African constitution to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom"); *id.* § 36 (permitting courts interpreting South African Bill of Rights to take into account "all relevant factors" when considering limitations of rights). It thus balances competing constitutional principles against each other. See MATTHEW CHASKALSON ET AL., CONSTITUTIONAL LAW OF SOUTH AFRICA §§ 12–13(c) (5th ed. 1999) (noting balancing in this area of South African constitutional law). A comprehensive comparative study exceeds the scope of this Article, but it is uncontroversial that many other court systems also employ open balancing, particularly when examining the scope of constitutional rights. See Donald L. Beschle, *Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L.Q. 187, 188–89 (2001) (noting that whereas Canadian Charter of Rights and Freedoms instructs Canadian courts to balance competing interests, United States Constitution encourages adherence to absolute principles and eschews such

precedent-driven common law system works well. But as many other legal systems around the world have acknowledged, some sort of balancing is necessary when two doctrines do not mesh. A funnel-like approach is a good way to line up the factors, even if we choose not to be constrained by a rigid hierarchy of "modalities." Indeed, though out of fashion in American jurisprudence, this kind of balancing offers a rigorous methodology for arbitrating irreconcilable collisions of this sort. As one commentator has explained:

Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational concept of how he arrives at them—more particularized and more rational at least than the familiar parade of hallowed abstractions, elastic absolutes, and selective history. Moreover, this approach should make it more difficult for judges to rest on their predispositions without ever subjecting them to the test of reason. It should also make their accounts more rationally auditable.<sup>533</sup>

There is, of course, as Ely warned, the danger that the balancing test will "become intertwined with ideological predispositions of those doing the balancing."<sup>534</sup> But where doctrine cannot solve the problem, it is inevitable that

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balancing); Michael D. Birnhack & Jacob H. Rowbottom, *Shielding Children: The European Way*, 79 CHI.-KENT L. REV. 175, 192 (2004) (noting that emerging constitutional and human rights jurisprudence, embedded in Article 10 of European Convention of Human Rights, does not shy away from explicit balancing); Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705, 1712–13 (2004) (noting activist trend in European constitutional courts that embraces open ended inquiries like balancing); William E. Forbath & Lawrence Sager, *Comparative Avenues in Constitutional Law: An Introduction*, 82 TEX. L. REV. 1653, 1654 (2004) (noting that European constitutional courts tend to address problems more directly—and be more "active"—than United States courts, in part, because as constitutional courts, they have nothing else to do); Kevin W. Goering et al., *Why U.S. Law Should Have Been Considered in the Rwanda Media Convictions*, COMM. LAW., Spring 2004, at 10, 11 (2004) ("Whereas European courts (and others) balance constitutional . . . freedoms against one another, the United States begins with enumerated and absolute prohibitions and then proceeds by allowing exceptions in certain discrete situations."); Lorenzo Zucca, Book Review, 53 INT'L & COMP. L.Q. 247, 247 (2004) (reviewing ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers trans., Oxford Univ. Press 2002 (1986))) (noting that balancing constitutional rights is method used in European courts).

533. Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825–26 (1962).

534. John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975); see also Kathleen M. Sullivan, *Supreme Court Term 1991: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 97 (1992) (explaining that historical swings demonstrate that "substantive theories of rules as conservative and standards as liberal—or vice versa—are wrong").

judges' predispositions will at least color—if not entirely shape—their decisions. If anything, balancing in a scenario such as this helps judges avoid deciding a case without at least testing their convictions. It also forces judges to try to place the doctrines at issue in the broader legal landscape, so as not to lose the forest for the trees.

After completing this balancing and lining up all the factors, the instant case, though doctrinally intricate, is in the end less controversial than it initially appeared.<sup>535</sup> Though many of the inquiries are complicated, most suggest that takings should trump state sovereign immunity. And while the originalist might disagree, even that is not certain. It then seems that the dicta in the *First English* footnote had it right.

It should not be too surprising that the various inquiries here point towards the same answer, because there is substantial overlap among them.<sup>536</sup> As the foregoing analysis has sought to demonstrate, text, structure, history, policy, and norms are not purely discrete categories but artificial organizing principles. To this extent, most arguments from a given approach will borrow at least somewhat from another methodology. And one's interpretive biases in one area will likely affect one's interpretations in another.<sup>537</sup> There is a disquieting subjectivity to this admission, but that does not mean that the judicial enterprise cannot be taken seriously. Indeed, although judges' interpretations of a given problem will necessarily be colored by their interpretive biases, most can and will take the interpretive process seriously, seeking the right answer in each of the various modes of inquiry. Thus, while the inquiries are likely to bleed into each other, the mere effort to keep them discrete will help judges treat each one seriously. Quite often, this will be enough, for the answer will become obvious.

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535. This is perhaps unsurprising. As Professor Fallon posits in his "constructivist coherence theory," various categories of constitutional argument, though distinct, are sufficiently interconnected so that it usually is possible for a constitutional interpreter to reach "constructivist coherence" in which the various factors are not inconsistent with a single result. Fallon, *supra* note 527, at 1191–94. Nevertheless, it is important to keep in mind that just because the various factors point in the same direction does not mean that the question was an easy one on first impression.

536. See *supra* note 16 (noting that the categories of textual, structural, and historical arguments are not rigid).

537. Professor Eskridge and others have referred to this phenomenon as the hermeneutical circle. See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 650 (1990) (discussing Gadamer's Truth and Method and Gadamer's use of "hermeneutical circle"); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 351–52 (1990) (explaining the hermeneutical circle idea that no interpretive thread can be viewed in isolation so that each interpretive thread will be evaluated in relation to other threads).

The instant conflict is such a case; unlike some constitutional dilemmas, resolving this one does not greatly risk the imposition of judges' values on an unwilling democracy.<sup>538</sup> Rather, with a doctrinal collision, one must admit that both lines of precedent exist for a reason and try to pick the solution that honestly recognizes the problem while doing the least collective damage. Of course, it would be naïve to assume that judges' initial weighing within each category will not be suspect to personal values, but as Ely, Bickel, and others have long recognized, this is inevitable.

This case has no easy doctrinal solution; in fact, it has no doctrinal "solution" at all because the governing case law is irreconcilable. Many important and fascinating legal questions are about thinking small—about wrestling with the finer points of statutes and case law and coming up with the answer that the sources command. In this case, however, thinking small does not resolve the problem. It is important to see how we got where we are, and it can be useful to ask if precedent leans one way or the other. But to resolve a case like this, courts must think about their very role in our democracy.

The danger, of course, is that this is countermajoritarian and places more power in the hands of judges. A case like this is different, however, because it not only involves the Constitution but competing constitutional provisions. If constitutional rights are to be truly constitutional—and are to demand protection regardless of majority whim—then the judiciary must play some role in arbitrating these conflicts.<sup>539</sup> Notwithstanding perfectly legitimate concerns about the countermajoritarian problem, it is inevitable that these questions will come before courts, and it is essential that courts themselves decide them. The Constitution, and particularly the Bill of Rights, exist partially to protect individuals from the excesses of government, and when those protected rights are challenged, it would be contrary to the Constitution's text, structure, and purpose to throw them right back to the legislature. But that is what the Court would do were it to require congressional abrogation of takings claims against the states.

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538. See ELY, *supra* note 179, at 71 (noting that Professor Bickel recognized that "[i]t wouldn't do . . . for the justices simply to impose their own values").

539. As Madison explained:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST NO. 51 (James Madison), *supra* note 218, at 331.

The states as sovereign entities are surely central in our constitutional plan, but to hold their sovereignty as more essential than the individual rights they were created to safeguard is to prioritize the means before the ends. This is not to say that these questions are easy, and surely there is value in retaining—or, as it were, reviving—a healthy federalism. There is a real danger of subjecting state treasuries to the avarice of pecuniary minded citizens, and it would be simplistic not to admit that protecting these state treasuries is, in a way, also protecting citizens' individual rights. But when we step back and ask how better to protect individual rights—permitting a suit claiming a constitutional violation or barring such a suit to preserve a state's dignity—the former is clearly more convincing. This answer, of course, assumes that individual rights are our core constitutional value, but given the Founders' own appeal to this value in defense of the new government's federalist structure, this assumption seems consistent with our Constitution's history and structure. That our government leaves much to process is incontrovertible, but the ultimate decision to enshrine some individual rights in the text itself takes certain issues out of that process. This is to put the discussion at a high level of abstraction, to be sure, but the question must be asked: What is a constitutional right if its protection must be ensured first by the legislature?

For most rights, the answer to that question is complicated because our judiciary does not have the power to award any remedy it wishes. The tension between individual rights and the protection of the legislature's budget runs deep. But the Takings Clause is different because, unlike most other provisions, it promises a specific remedy.<sup>540</sup> Nothing in the Eleventh Amendment purports to trump this.<sup>541</sup> Indeed, text, structure, and, I would

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540. What might be troubling for liberals in this analysis is that it prioritizes property over other rights that might seem more fundamental. Why should individuals with takings claims be entitled to remedies not available to those who suffer physical abuse at the hands of the government? The easy answer here is that the Constitution, by conferring upon property rights an anomalous constitutionally compelled remedy, makes this decision for us. Judges wary of constraining regulation too much might scale back what constitutes a taking, but once triggered, the clause demands a particular remedy. See, e.g., Fallon & Meltzer, *supra* note 57, at 1825–26 (“[T]he just compensation clause mandat[es] government compensation for takings of property.”).

541. A more controversial argument would be that all individual constitutional rights should trump state sovereign immunity. Sovereign immunity would still apply for statutory rights and state law but would avoid potential constitutional conflict by steering clear of those particular rights. Indeed, to the extent that current immunity doctrine rests on highly contested accounts of a preconstitutional common law, it seems wrong that it can block suits against states involving constitutional rights. The Court's recognition that Mr. Bivens deserved a damages remedy, then, is a normatively powerful argument in favor of automatic abrogation of state sovereign immunity of other constitutional rights. As a legal matter, this is an even harder issue than my narrower takings hypothetical, but it is not hopeless. After all, the Court in *Alden* did

argue, history all suggest that the Takings Clause should trump state sovereign immunity. But, admitting that these inquiries, individually and collectively, are difficult, there comes a point when the jurist must step back from a thorny issue and ask which answer is more closely tethered to our deepest constitutional values. From that perspective, placing aside all the complexities, this is an easy case.

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note that there was something different when an "obligation arises from the Constitution itself."  
*Alden v. Maine*, 527 U.S. 706, 740 (1999)