ESSAY

WHO'S AFRAID OF THE ELEVENTH AMENDMENT? THE LIMITED IMPACT OF THE COURT'S SOVEREIGN IMMUNITY RULINGS

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This Essay argues that critics have exaggerated the impact and importance of the Rehnquist Court's Eleventh Amendment cases. This is not to deny that revived judicial security for states' rights became the signature issue of the Rehnquist Court. Rather, a series of doctrines, both internal and external to the Eleventh Amendment, basically allows the federal government to achieve its policy objectives. Preventing private plaintiffs from suing states for retrospective money damages poses only a minor barrier to national goals when damages actions against state officers and injunctive actions realistically against state governments are readily available to effectively accomplish all federal ends, and when the national political branches may widen the liability of state officers, or completely overcome sovereign immunity by joining a private lawsuit or using other federal powers such as the Spending or Treaty Clauses.

We suggest that the Court's real lodestar here may not be federalism, but separation of powers. That is, perhaps the Court is not as interested in protecting states as it is (a) in centralizing the enforcement of federal law in the executive branch and (b) in pressing Congress to make clear cost-benefit decisions on the use of lawsuits to enforce federal policy. Seminole Tribe and its progeny have the effect of giving the administration greater discretion to decide whether states should be liable for money damages for violations of federal law, thus increasing democratic accountability, and of prodding the legislative branch to essentially pay the states to waive sovereign immunity.

INTRODUCTION

When it comes to the Eleventh Amendment,¹ we wonder why so many are so concerned about so little. By “little,” we mean the actual consequences of the Rehnquist Court majority’s effort, beginning in

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1. “The judicial power of 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.” U.S. Const. amend. XI.
1996, to resurrect state sovereign immunity as part of its revival of judicial protection for states' rights.\(^2\) The Court's Eleventh Amendment jurisprudence has come in for heavy scholarly criticism. It has been called unconstitutional, anachronistic, based on discredited legal principles, and inconsistent with constitutional text, structure, and history.\(^3\) It is fair to say that, in general, scholarship in the federal courts area has been critical of the justifications for the doctrine of state sovereign immunity, even in its pre-Rehnquist Court incarnations.\(^4\) For example, Vicki Jackson declared that the Court's "Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars."\(^5\) Daniel Meltzer has argued that Eleventh Amendment doctrine is "harming legitimate national objectives" without providing any redeeming benefits.\(^6\) Even those who have generally supported the Court's principles admit that "the Eleventh Amendment is a mess" and lacks theoretical or doctrinal coherence.\(^7\)


5. Jackson, Principle, supra note 3, at 953.


7. John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 47 (1998); see also Caleb Nelson, Sovereign Immunity as a Doctrine of Personal
We do not undertake any further qualitative appraisal of the Court’s product on this subject. Rather, our position is that these concerns overstate the influence of the Rehnquist Court’s Eleventh Amendment cases on what really matters: enforcement of federal policy. To be sure, these rulings are significant as symbols of a reinvigorated federalism. Yet as with its work in the Commerce Clause area, the Rehnquist Court’s decisions imposed few meaningful barriers in the way of a central government intent on achieving certain goals. In fact, the recent cases only remove a single tool—individual civil actions against states as entities for retroactive money damages—from the universe of options available to the federal political branches to establish uniform national policy over those areas within its constitutional competence.

This is not to say that the inability of an individual harmed by state action to seek monetary compensation directly against the state itself for damages already suffered (and apart from the opportunity for future restitution if there are further violations) may not lead to some underenforcement of constitutional or statutory norms in certain cases. Our point, however, is that such actions are not the sole or even the primary means by which the federal government can accomplish its ends, and that the assertion—that “[t]he doctrine of sovereign immunity threatens the goals of [federal statutory benefits] by barring suits for money damages against states and thereby closing off the single most important avenue for those individuals to enforce their rights against states”—represents a serious overstatement.


9. All political subdivisions of the state—including cities, counties (and instrumentalities such as hospitals and community colleges), local school boards, and various regional authorities—fall outside this protective umbrella. Of course, nice questions may arise as to how a particular agency should be characterized—especially one that “may administer state laws, be subject to some control by state authorities, and share fiscal responsibility for its operations with the state.” Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler’s The Federal Courts and the Federal System 986 (5th ed. 2003); see also Roger C. Hartley, The Alden Trilogy: Praise and Protest, 23 Harv. J.L. & Pub. Pol’y 323, 370–73 (2000) (downplaying importance of the Court’s distinction between state and its political subdivisions for purposes of sovereign immunity).

As shall be discussed, alternative methods exist both internally and externally to Eleventh Amendment doctrine. Although several will unquestionably fall somewhat short of being full equivalents of unqualified state liability, and others will raise their own problems of policy and efficiency, collectively they would appear to adequately satisfy the nation's enforcement needs. Internally, as Professor Jeffries has amplified in detail, § 1983 permits damage actions against state officers for violations of both statutory and constitutional rights. Certain constitutional provisions, such as the Due Process and Takings Clauses, appear to require self-executing judicial remedies for compensation. A number of other internal exceptions to the Eleventh Amendment, such as suits for prospective relief and suits brought or joined by the federal government, also allow national authorities to use litigation to enforce federal rules directly against states. Externally, the Constitution provides Congress with a host of other means, such as Section 5 of the Fourteenth Amendment, the Spending Clause, and the foreign affairs power, that could allow either abrogation of state sovereign immunity or regulation of state conduct without resort to the courts.

This Essay contends that critics of the Court's Eleventh Amendment rulings have focused their gaze too narrowly. They have been concerned with whether individual plaintiffs can receive monetary damages from the states themselves for harms already wrought by state action, and have contended that imposing a complicated web of restrictions on private damages actions against states may undermine the Court's legitimacy. No doubt these matters are important, but the broader issue is whether state sovereign immunity significantly prevents the implementation of national policy goals, whether expressed in the Constitution or by Congress. On this score, we think that the answer is no. Although concededly not flaw-

11. See Jeffries, supra note 7, at 49-50 ("Very generally, a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment."); see also 42 U.S.C. § 1983 (2000) (creating cause of action for individuals who are deprived "of any rights, privileges, or immunities secured by the Constitution and laws" by anyone acting "under color of any statute, ordinance, regulation, custom, or usage" of state).


13. See Ex parte Young, 209 U.S. 123, 154 (1908) (holding suit to prevent individuals as officers of state from enforcing unconstitutional enactment is not suit against state within meaning of Eleventh Amendment).


15. U.S. Const. art. 1, § 8, cl. 1.

16. Id. art. 11, § 3.
less, national tools which can ensure that states as well as individuals obey federal law continue to exist.

It seems to have become the conventional wisdom that constitutional norms are underenforced because of the various justiciability doctrines—such as standing, ripeness, and mootness—that prevent injured plaintiffs from seeking remedies in federal court. The expansion of sovereign immunity has added yet another obstacle and perhaps provides a further explanation for the hostile academic reaction to the judicially broadened Eleventh Amendment doctrine. Still, as Richard Fallon and Daniel Meltzer point out, "the aspiration to effective individual remediation for every constitutional violation represents an important remedial principle, but not an unqualified command."17 Rather, the Court’s approach should be one that keeps the government “tolerably within the bounds of law.”18 We contend that the emphatic commitment to judicial review19 and, more particularly, to compensation for injured plaintiffs, has led scholars to ignore alternative techniques available to the federal government to enforce national values. The ample array of powers at hand to ensure state compliance with federal law, both internal to the Eleventh Amendment and external to the courts, strongly suggests that the criticism of the Court’s sovereign immunity cases is considerably exaggerated.20

17. Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1789 (1991); see also Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 93 Colum. L. Rev. 309, 338 (1993) [hereinafter Fallon, Confusions] (restating argument that demand for individual remediation for every constitutional violation "is better viewed as a flexible normative principle than as an unbending rule of constitutional law"); Mark Tushnet, Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration, 115 Harv. L. Rev. 29, 75 (1999) ("[L]ess-than-maximally effective remedies are not strangers even to constitutional law, and should be no more peculiar in a regime of reduced constitutional aspirations."). Thus, it has been suggested that various remedies—beyond retroactive money damages from the state—available for government violations of federal rights (to be discussed at length in this Essay) may well satisfy the Constitution. See Jay Tidmarsh, A Dialogic Defense of Alden, 75 Notre Dame L. Rev. 1161, 1177-79 (2000) (listing injunctions, federal enforcement of rights, and damages actions against individual state officials as possible remedies); Carlos Manuel Vázquez, What Is Eleventh Amendment Immunity?, 106 Yale L.J. 1683, 1693 (1997) [hereinafter Vázquez, Immunity] (suggesting that availability of damages from individual state officials makes Eleventh Amendment immunity unproblematic). Whether elimination of all productive remedies would violate due process is, of course, a totally different issue.

18. Fallon, Confusions, supra note 17, at 311.

19. This is a commitment that both of us have shared, albeit in quite different ways. See Jesse H. Choper, Judicial Review and the National Political Process 64-65 (1980) [hereinafter Choper, Judicial Review] (describing antimajoritarian theory of Constitution as justifying judicial review); Saikrishna B. Prakash & John C. Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887, 887-92 (2003) (discussing recent academic assault on judicial review but opposing it on largely textual, structural, and original intent grounds).

20. William Van Alstyne has described the effect of the recent sovereign immunity decisions as rather puny counter-measures, such as they are. They are, in brief, far less like impassable roadblocks placed in Congress’s pathway (as it presumes to sweep its
Part I of this Essay recounts the Court's sovereign immunity doctrine, both its modern resurgence and what may be a recent cresting. Part II discusses the internal elements of Eleventh Amendment doctrine that still permit the federal government to make its policies binding. Part III examines the doctrines and federal powers external to the Eleventh Amendment that provide national authorities with the ability to implement federal standards of conduct that apply to states as well as private parties.

1. THE REVIVAL OF THE ELEVENTH AMENDMENT

It has been accurately said that the Eleventh Amendment and state sovereign immunity create "a Byzantine aggregation of rules and doctrines." Recent decisions have created a "maze of precedents that only a specialist could navigate with confidence." This Part seeks to describe the recent cases that have created this muddle, beginning with Seminole Tribe v. Florida, decided in 1996, and ending with Tennessee v. Lane, decided in 2004. Throughout, there has been a trend toward reinvigorating state sovereign immunity, but repeated concessions have also made clear that the federal government retains significant ways to achieve its ends.

The Constitution's recognition of state sovereign immunity, of course, did not originate with the Rehnquist Court, but with the Eleventh Amendment in 1798. The story is familiar history. During the ratification debates, several leading Framers such as James Madison, Alexander Hamilton, and John Marshall gave assurances that the historic state immunity from lawsuits would be preserved. Nonetheless, the text of the Constitution made no mention of the concept. In Chisholm v. Georgia, the

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way through and over the states by imposing ever more restrictions, costs, and liabilities upon them) than like mere "traffic bumps" along the federal juggernaut road.

William Van Alstyne, When Can a State Be Sued?, Popular Gov't, Spring 2001, at 44, 45; see also Jeffries, supra note 7, at 81 ("[M]y research shows that the area where Eleventh Amendment immunity actually bars all relief (functionally) against states is vanishingly small."). See generally Carlos Manuel Vázquez, Eleventh Amendment Schizophrenia, 75 Notre Dame L. Rev. 859 (2000) [hereinafter Vázquez, Schizophrenia] (identifying two conflicting analytical strains in recent Eleventh Amendment jurisprudence, one positing that sovereign immunity does not deny means necessary to enforce federal obligations of states, the other that protection which immunity offers is real and fundamental to federalism).


25. See Field, supra note 4, at 527–36 (collecting sources); Fletcher, supra note 4, at 1045–54 (same).
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Supreme Court held that an out-of-state plaintiff could sue a state, as seemingly permitted by Article III, Section 2’s grant of jurisdiction over controversies between a state and the citizen of another state.\(^2\) Although the case was between a citizen of South Carolina and the state of Georgia, it had clear implications for the dispute over payment of prerevolutionary debts (then held by many states) owed to British creditors.\(^2\) In response, Congress proposed what would become the Eleventh Amendment to overrule *Chisholm*: “The Judicial power of 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 States.”\(^2\) The amendment, introduced only two days after the *Chisholm* decision, met no serious opposition during ratification.\(^2\)

On its face, the Eleventh Amendment’s text appears only to bar diversity suits between out-of-state citizens and states,\(^3\) precisely altering the text of Article III, Section 2 so as to eliminate the jurisdiction granted by the Court in *Chisholm*. Since the Amendment contains the phrase “any suit in law or equity,” some have argued that the text also prohibits federal question jurisdiction between states and out-of-state citizens.\(^3\) In *Hans v. Louisiana*, however, went beyond any plausible textual readings, holding that the Eleventh Amendment also established sovereign immunity for states from federal question suits by its own citizens.\(^3\) In several cases since *Hans*, the Court has cut back on sovereign immunity, holding in *Ex parte Young* that individuals could sue state officials for prospective relief in federal question cases,\(^3\) and recognizing in *Fitzpatrick v. Bitzer* that the Reconstruction Amendments overrode the Eleventh Amendment.\(^3\)

Indeed, by 1989, a plurality Court in *Pennsylvania v. Union Gas Co.* decided

\(^{26}\) 2 U.S. (2 Dall.) 419, 480 (1793).


\(^{28}\) U.S. Const. amend. XI.

\(^{29}\) See, e.g., 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 736–37 (1971) (describing process of ratification following *Chisholm*).

\(^{30}\) See, e.g., Fletcher, supra note 4, at 1060 (analyzing text of various proposed drafts of Eleventh Amendment and concluding that drafters intended that the amendment limit only Article III, Section 2’s Diversity Clause); Gibbons, supra note 4, at 1926–27 (arguing that Eleventh Amendment was only intended to narrowly redefine jurisdictional clauses of Article III because of policy concerns unique to era).

\(^{31}\) See, e.g., Marshall, supra note 4, at 1346.

\(^{32}\) 134 U.S. 1, 21 (1890). The text of the Eleventh Amendment nowhere mentions suits between a citizen and his or her own state.


\(^{34}\) 427 U.S. 445, 456 (1976).
that Congress could override state sovereign immunity in the exercise of its Article I powers.35

Seminole Tribe began the Rehnquist Court's drive to reenergize state sovereign immunity. Overruling Union Gas, the Court reasoned that this shield went well beyond the text of the Eleventh Amendment, not only barring suits by noncitizens against states, but also prohibiting all actions (including federal question cases) by both noncitizens and citizens against their own states.36 According to the Court, the original understanding of the Constitution was that Article III did not grant federal courts jurisdiction over any suits by private persons against nonconsenting states. The Eleventh Amendment's text specifically addresses only cases between noncitizens and states because that was the extent to which Chisholm had upended that settled understanding:

The text dealt in terms only with the problem presented by the decision in Chisholm; in light of the fact that the federal courts did not have federal-question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.37

As the Court made emphatically clear a few years later in Alden v. Maine, which held that states retained sovereign immunity in their own courts, the Constitution had in fact established the rule of state sovereign immunity even before the ratification of the Eleventh Amendment.38

The state sovereign immunity cases would probably not provoke as much criticism were it not for the Court's concurrent narrowing of congressional authority under Section 5 of the Fourteenth Amendment. Beginning with City of Boerne v. Flores, a majority of the Rehnquist Court set out meaningful limits on Congress's authority to act in furtherance of the Reconstruction Amendments.39 Although acknowledging that Section 5 permits Congress to pass prophylactic legislation to prevent and deter unconstitutional conduct, the Court cautioned that Congress cannot use Section 5 as a subterfuge to work a "substantive change in the governing law."40 The line between a constitutional remedy and an unconstitutional effort to redefine interpretive standards depends on whether the legislation displays "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."41 In Boerne, the Court concluded that the Religious Freedom Restoration

35. 491 U.S. 1, 19–20 (1989) (plurality opinion); see also id. at 57 (White, J., dissenting in part) (disagreeing with plurality's determination of threshold issue, but concurring in conclusion that Congress may abrogate States' sovereign immunity under its Commerce Clause power).
37. Id. at 69–70.
40. Id. at 519.
41. Id. at 520.
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Act 42 represented an invalid attempt to change the Justices' construction of the Free Exercise Clause,43 while in United States v. Morrison the Court found that the Violence Against Women Act44 sought to expand Congress's regulatory powers beyond those permitted by the Fourteenth Amendment (as well as the Commerce Clause).45 In reaching these results, the Court found that Congress had failed to display a record of a history and pattern of constitutional violations that would justify the exercise of its remedial powers under Section 5.

The combination of the sovereign immunity and Section 5 cases produced a string of controversial decisions striking down recent, highly visible acts of Congress. Because Section 5 had provided one of the few ways that Congress could revoke state immunity, its narrowing has meant that civil rights statutes imposing duties on states could not be enforced against them through damages lawsuits—unless Congress had acted to prevent and deter discrimination that the Justices would find to be unconstitutional under the Fourteenth Amendment. Interestingly, this confluence in the case law began to become clear in a noncivil rights case, Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank (Florida Prepaid I).46 In that case, Congress had unambiguously provided an action for damages when a state failed to respect a patent.47 The Act's purpose was to establish a "uniform remedy for patent infringement" that placed "states on the same footing as private parties under that regime."48 The Court ruled that in the absence of any pattern or history of a state's unconstitutionally refusing to provide a remedy for its own patent infringement, the Act could not override state immunity.49 Applying similar logic, the Court subsequently disapproved of damage suits for state violations of the Age Discrimination in Employment Act (ADEA) of 196750 and Title I of the Americans with Disabilities Act (ADA) of 1990.51 It again reasoned that the federal legislation was unsupported by a pattern or history of violations of the Fourteenth Amendment, which had

43. 521 U.S. at 533-36.
46. 527 U.S. 627 (1999); see also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd. (Florida Prepaid II), 527 U.S. 666, 672-75 (1999) (finding no genuine property interest at issue, thus no possibility that Due Process Clause of Fourteenth Amendment could be implicated through Section 5 to abrogate state sovereign immunity).
47. Florida Prepaid I, 527 U.S. at 632.
48. Id. at 647-48.
49. See id. at 645-46.
not been read by the Supreme Court to prohibit discrimination based on age or disability unless it had no rational basis.

In more recent Terms, the Court defined the limits of this line of cases while sustaining several congressional statutes. *Nevada Department of Human Resources v. Hibbs* upheld damages actions against states that violated the Family and Medical Leave Act (FMLA) of 1993. The Court agreed that Congress had assembled a sufficient record demonstrating sex-based discrimination in employment with regard to parenting leave. Although this record did not approach the one assembled in the voting rights cases that had served as the paradigm for the proportionality and congruence test, Chief Justice Rehnquist's majority opinion explained that unlike the age discrimination and disability laws, here “Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny . . . [that makes it] easier for Congress to show a pattern of state constitutional violations.” A year later, the Court upheld a claim against a state under Title II of the ADA in *Tennessee v. Lane*, even though it had invalidated similar claims under Title I of the same law. Plaintiffs were paraplegics who could not gain access to courtrooms on their own because of the stairs. The Court ruled that the Fourteenth Amendment right at issue did not involve employment discrimination against the disabled (which is subject only to rationality review), but equal access to the courtroom. Congress had provided a sufficient record—indeed, one that exceeded that in *Hibbs*—of a history and pattern of deprivation of the fundamental right of court access secured by the Due Process Clause (which is judged by heightened scrutiny).

This is a propitious time to evaluate the state of Eleventh Amendment developments. Now that we have cases in which Congress has succeeded in overriding the state privilege, the point where the line has been drawn separating valid exercises of Congress’s Section 5 power from unconstitutional efforts to change governing law may be more readily visible. Just as importantly, *Hibbs* and *Lane* may have indicated the crest of the Rehnquist Court’s undertaking to resurrect federalism by restoring the institutional autonomy of states. Taken together with cases such as

53. Id. at 728–34.
55. *Hibbs*, 558 U.S. at 736.
56. 541 U.S. 509, 533–34 (2004) (holding ADA Title II valid as basis for claim against State with respect to access to courthouses).
Seminole Tribe and Alden, the Section 5 cases define the outer boundaries of state sovereign immunity.

These decisions have generated substantial criticism among academics. Some, such as Vicki Jackson, characterize cases such as Alden as promoting "government nonaccountability" and placing "the fiscal interests of the states over the supremacy of federal law" and conclude that state sovereign immunity is itself unconstitutional and the Supreme Court has gotten matters completely wrong. Erwin Chemerinsky argues that "[s]overeign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law," because it allows a judicially created "common law doctrine to reign supreme over the Constitution and federal law." Sovereign immunity violates the basic principles of government accountability inherent in the Constitution, according to this view, because "[c]onstitutional and statutory rights can be violated, but individuals are left with no remedies." Judging the Court's cases to be "under-theorized," Daniel Meltzer argues that Eleventh Amendment doctrine "fails to promote any coherent conception of states' rights or state autonomy while harming legitimate national objectives."

These and other critics generally subscribe to the diversity thesis, mentioned above, that the Eleventh Amendment prohibits only diversity suits between states and out-of-state plaintiffs. An intermediate argument claims that sovereign immunity also includes federal question cases between out-of-state citizens and states, but not cases between states and their own citizens. Whichever variation is used, however, scholarly detractors are usually in agreement that the Eleventh Amendment does not seem to serve any functional purpose in regulating federal-state relations. If the Court wants to strengthen states' rights, why not simply limit the reach of national power instead of reducing the number of remedies for constitutional violations? As Ernest Young has put it, sovereign immunity "is a poor way to protect state prerogatives in a federal system."

Academic defenders have been rare, and some scholars instead have limited their strategy to that of downplaying the significance of the cases. Professor Jeffries persuasively argues that the "Eleventh Amendment almost never matters," because "[i]n almost every case where action against a state is barred by the Eleventh Amendment, suit against a state officer is

60. Chemerinsky, supra note 3, at 1201, 1211.
61. Id. at 1215.
62. Meltzer, Five Authors, supra note 6, at 1011–12.
63. See supra note 30 and accompanying text.
64. See Marshall, supra note 4, at 1349–51 (arguing that such an intermediate theory is most faithful to the text of the Amendment, and that competing theories fail to offer compelling reasons to depart from straightforward textualist approach).
permitted under Section 1983," which permits suits against state officers for violations of federal law (constitutional or statutory). Although § 1983 prohibits such actions when reasonable officers believed their conduct to be lawful, Professor Jeffries views the reliance upon a fault-based standard for constitutional remedies as a positive. Pursuing a similar vein, Professor Henry Monaghan concludes that "little has changed" because *Ex parte Young* permits suits for prospective relief to enforce federal law.

The next Part identifies the exceptions and wrinkles within Eleventh Amendment doctrine itself that deprive it of substantial force as an obstacle to the implementation of federal policy goals. The focus is not primarily on the federal government's ability to enact additional legislation authorizing lawsuits by individuals as a means of enforcing federal norms. Nonetheless, if this is the course that national policymakers wish to pursue, we will thereafter discuss a number of ways that the Court's jurisprudence still permits Congress to create enhanced litigation remedies to control the conduct of states.

**II. Enforcement of Federal Law Internal to the Eleventh Amendment**

State sovereign immunity prohibits all suits against states brought by private persons or entities. This raises the prospect that states can violate federal law without fear of having to answer in court: Without the threat of lawsuits, states will not encounter the proper level of deterrence desired by Congress, nor will those who suffer harm at the hands of a state receive compensation. Yet the Court has recognized a series of important exceptions to its principle of state sovereign immunity that allow the judicial enforcement of federal law. While these may not take the form of damages as compensation for an injury, they still ensure that states observe the Constitution in their future conduct. Retrospective state liability, while certainly valuable, is not critical.

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66. Jeffries, supra note 7, at 49; see also supra notes 8–16 and accompanying text (discussing internal exceptions and external alternatives to the Eleventh Amendment that limit sovereign immunity).

67. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) (stating that "a qualified immunity is available to officers of the executive branch of government" based on their good-faith and reasonable belief that their conduct was lawful).

68. Henry Paul Monaghan, Comment, The Sovereign Immunity "Exception," 110 Harv. L. Rev. 102, 103, 126–32 (1996). Caleb Nelson has recently sought to characterize sovereign immunity as based in part on a limitation imposed by Article III, on federal courts' ability to exercise personal jurisdiction over states, and has suggested the possibility that Congress has no power to weaken this limitation. Nelson, supra note 7, at 1638–52.
A. Suits Against State Officers

Perhaps the most extensive qualification to state sovereign immunity was created by *Ex parte Young*. Widely recognized to have relied on a legal fiction, the decision allows suits against state officers, in their official capacity, for prospective relief to stop violations of federal law. It reasons that when a government official violates federal law, the act is ultra vires and no longer entitled to the immunity that benefits the state: The state officer is “stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct.” *Seminole Tribe* left *Ex parte Young* essentially untouched. Thus, in order to evade the barriers of state sovereign immunity, a plaintiff must simply name the governor or other state official in the pleading and limit the requested relief to an injunction.

Nor is sovereign immunity’s prohibition of monetary relief universal. The Eleventh Amendment does not ordinarily bar, for example, suits against state officers in their personal capacity for retrospective damages. It only disallows them, it is said, if there is a “virtual certainty” that they will be paid from the state treasury and “not from the pockets of individual state officials.” In *Edelman v. Jordan*, an action for federal welfare benefits under the Aid to the Aged, Blind, or Disabled program, lower federal courts had ordered Illinois state officials, in their personal capacity, to release aid that had been illegally withheld. The Supreme Court reversed because the individual officers “obviously” could not pay the retrospective damages, which would inevitably come from the state, thus realistically making the action one against the state as an entity. The limited significance of the *Edelman* doctrine, however, is accentuated

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70. Id. at 160.
71. See David P. Currie, Response, *Ex parte Young After Seminole Tribe*, 72 N.Y.U. L. Rev. 547, 547 (1997) (“*Ex parte Young* is alive and well and living in the Supreme Court.”); Monaghan, supra note 68, at 128 (“*Seminole Tribe* will have no significant impact on the actual authority of federal courts to enforce these federal laws prospectively against states in suits by private persons.”).
72. Vázquez, Schizophrenia, supra note 20, at 874 (“[T]he Court [has] recognized that all suits against state officials seeking compliance with federal law were for all practical purposes against the state. They are permitted as an exception to the Eleventh Amendment because of the need to vindicate the supremacy of federal law.”).
73. See, e.g., Vázquez, Immunity, supra note 17, at 1793.
75. Id. at 656.
by the widespread system of indemnification of state officers\textsuperscript{77} and the fact that the Eleventh Amendment has not been held to forbid lawsuits against them even though they will be indemnified by their government, thus often resulting in state liability as a matter of practical result.\textsuperscript{78}

State indemnification creates an obvious functional loophole to state sovereign immunity. While we know of no definitive review of just how these systems operate in practice, if states fully indemnify their officials for judgments against them in their private capacity for violations of federal law (or provide them with insurance for such liability), one might fairly conclude that state treasuries are effectively being held responsible for the entire amount of money damages suffered by persons because federal law has been ignored.\textsuperscript{79} Though there is substantial truth to this, there is also reason to think that complete indemnification does not take place. First, since a state is not legally obliged, but instead voluntarily chooses, to indemnify its officials, there will be instances where individual state employees truly will have to pay these retrospective damages out of their own pockets.\textsuperscript{80} Second, a state will likely set a maximum for indemnification, which, when added to the official’s personal financial resources, creates a limit to the amount of compensation that a plaintiff might obtain (although a potential judgment that would consume most of the state officer’s wealth should serve as a powerful safeguard against any violation at all).\textsuperscript{81} This could be far less than the amounts involved in complying with orders such as that in \textit{Edelman}. Third, though states generally indemnify for damages caused by their employees,\textsuperscript{82} some do not indemnify for gross negligence or willful misconduct,\textsuperscript{83} thus creating another indemnification gap. Limiting indemnification to the official’s own assets for the damages caused by intended conduct makes sense if deterrence is the primary goal: Discouraging violations of federal law would

\textsuperscript{77} Fallon, Conservative, supra note 22, at 464; Jeffries, supra note 7, at 50.

\textsuperscript{78} See Vázquez, Schizophrenia, supra note 20, at 880 (“[T]he state either pays the judgment directly, indemnifies the officer, pays the employee more to enable him to obtain insurance, or gets a less competent employee.”).

\textsuperscript{79} Carlos Manuel Vázquez, Sovereign Immunity, Due Process, and the \textit{Alden} Trilogy, 109 Yale L.J. 1927, 1950 (2000) [hereinafter Vázquez, Trilogy] (“In the end, de jure officer liability is likely to mean de facto state liability.”); see also Jeffries, supra note 7, at 61 (questioning why fact that “state would be coerced by [employment market] necessity or bound by conscience to hold the officers harmless” does not result in “virtual certainty” of state payment forbidden under \textit{Edelman}, 415 U.S. at 668).

\textsuperscript{80} Vázquez, Schizophrenia, supra note 20, at 886.

\textsuperscript{81} A number of states authorize direct collection against themselves of the full indemnifiable amount while others continue to reimburse the state officials for payments made after judgments against them. For a fuller description and informative discussion of collection procedures available to successful plaintiffs, see Daniel J. Meltzer, Overcoming Immunity: The Case of Federal Regulation of Intellectual Property, 55 Stan. L. Rev. 1331, 1360 n.105 (2001) [hereinafter Meltzer, Overcoming Immunity].

\textsuperscript{82} See Vázquez, Schizophrenia, supra note 20, at 880 (“[I]n reality, damages judgments rendered against individual state officers are usually paid by the state.”).

not be served by creating liability for unintentional conduct or by imposing damages beyond the capacity of the official to pay.\textsuperscript{84}

Of course, the point just made analyzes the function of monetary damages as deterrence rather than compensation. Limited indemnification may frustrate federal laws when Congress's overall purpose is not just deterrence, but rather seeks to make the beneficiaries of federal rights financially whole. Still, while limited indemnification means that all of Congress's goals may not be fully achieved, and that optimal deterrence would likely occur only when the state itself must respond for the full amount of damages, we are doubtful that the shortfall between total state responsibility and the lesser sum provided by state indemnification programs will produce more than marginal instances of uncompensated state violations of federal law.

An ambiguity in the Court's distinction to support sovereign immunity in \textit{Edelman} could further whittle away at its significance. The roots of the \textit{Edelman} doctrine can be found in \textit{Ford Motor Co. v. Department of Treasury}, which also held that even though individual officials may be the nominal defendants, the Eleventh Amendment still bars suit if the action essentially seeks to recover from the state.\textsuperscript{85} This idea, that mere pleading should not allow the evasion of the Eleventh Amendment, is a theme repeated in more recent cases.\textsuperscript{86} At the same time, even though "the distinction between personal- and official-capacity action suits... continues to confuse lawyers and confound lower courts,"\textsuperscript{87} the reality is that it may be resolved by properly styling the complaint.\textsuperscript{88} Thus, it appears that the overwhelming number of claimants that seek recovery under 42 U.S.C. \textsection 1983 succeed in achieving jurisdiction over state officers, especially for claims involving constitutional violations.\textsuperscript{89} Because the cause of action created by \textsection 1983 is not against states but rather their officers, it is doubtful that any distinction may be drawn on the ground that the Eleventh Amendment applies differently to remedial suits based on the Fourteenth Amendment and those that involve seemingly less important constitutional provisions (or at least ones that predate the Civil War Amendments), such as the Contracts Clause and other provisions in Article I.\textsuperscript{90} Of course, in cases where the Fourteenth Amendment is impli-

\textsuperscript{84} See Vázquez, Schizophrenia, supra note 20, at 883–86 (describing how availability of indemnification reduces deterrence).
\textsuperscript{85} 323 U.S. 459, 463 (1945).
\textsuperscript{86} See, e.g., Idaho v. Coeur d’Alene Tribe, 521 U.S. 261, 270 (1997) ("The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading.").
\textsuperscript{88} See Jeffries, supra note 7, at 62–65 (discussing how lower courts tend to accept properly phrased pleadings).
\textsuperscript{89} Id. at 62–63.
\textsuperscript{90} This does not mean, of course, that this way of cutting back on circumvention of the Eleventh Amendment through officer suits cannot be followed by the Court in future decisions.
cated, there is no constitutional sovereign immunity problem whatsoever in having plaintiffs recover money damages from state officers, because the state itself could be made directly liable.

Still, the constitutional source of the claimant's cause of action may help explain some failures to succeed. As we will see in our fuller discussion of § 1983, plaintiffs can recover under this legislative provision for federal constitutional and statutory violations against state officials who are at fault. Following Edelman, it may be that measures to enforce the Contracts Clause and some statutory benefits account for many exceptions to recovery. Because § 1983 requires that state officials have acted unreasonably based on the existing state of the law at the time of their conduct, the matter may really boil down to a distinction between contract and tort. Tort claims seem to overcome state sovereignty immunity under § 1983 more readily than cases that sound closer to the historical origins of the Eleventh Amendment, which had sought to prevent suits against states based on broken executory contracts (most particularly, state defaults on its bonds). Even this may not pose much of a barrier, because certain kinds of contract breaches may possibly be repleaded in tort, representing yet another path around Edelman. It could even be that one may plead a contract right as a property right, which, as we shall see, might also require an adequate remedy from the states. Thus, the Eleventh Amendment's bar on lawsuits, which though nominally against individual state officers are functionally against the state, may itself be limited to cases involving the narrow enforcement of contracts or certain statutory benefits—regardless of the retrospective/prospective distinction.

91. There are, of course, various ambiguities that are likely to arise with respect to the meaning of "at fault." The Court hinted at some limit to potential liability for any state official who happens to be connected to the challenged action when it spoke of "unconstitutional or wrongful conduct fairly attributable to the officer himself." Alden v. Maine, 527 U.S. 706, 757 (1999). How this would be applied to a government employee who was obligated under state law to act in the allegedly unlawful way, a seemingly not infrequent situation, remains to be resolved—although obtaining a jury verdict against the official in this situation presents real obstacles.

92. For a review of older cases supporting this position, see Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 21–29 (1963).

93. Jeffries suggests this "rather shaky" ground for the denial of officer liability in Edelman. Jeffries, supra note 7, at 61–62 ("Although the welfare benefits allegedly withheld in Edelman were not exactly like the defaulted debts involved in the early cases, there was an apparent similarity."); see also Alfred Hill, In Defense of Our Law of Sovereign Immunity, 42 B.C. L. Rev. 485, 585 (2001) ("The government's ability to escape liability in tort, at least when the tort consists of negligence, as is usually the case, arguably presents even less of a rule-of-law problem than the government's ability to evade responsibility for defaulted bonds.").


95. See infra text accompanying notes 193–197.
Ex parte Young permits suits only against state officials. Still, while a state cannot be sued for even prospective relief in eo nomine, neither the Eleventh Amendment nor state sovereign immunity prohibit Ex parte Young suits against individual officers even though they may require the state to engage in expenditures to provide prospective remedies. Then-Justice Rehnquist’s opinion for the Court in Edelman—involving a federal statutory right created under Article I—made clear that

the fiscal consequences to state treasuries in . . . [such] cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court’s decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young . . . .

While this principle plainly falls short of providing a full remedy for damages to be paid from government coffers, it does appear to limit the unaccounted for amount if not to “one bite” only, then only to those “bites” that are taken before the injunction first issues. Nonetheless, the possibility of a substantial number of uncompensated beneficiaries (which can seriously affect state incentives to comply with the federal law involved) may be more significant than the “one bite” characterization suggests.

96. Edelman v. Jordan, 415 U.S. 651, 667–68 (1974). One proffered justification for treating retroactive damages differently than prospective liability is that the former “may threaten the financial integrity of the States” and “could create staggering burdens,” Alden, 527 U.S. at 750, whereas the latter would more readily be anticipated (and thus budgeted for) after the issuance of an injunction.

97. This point is not rebutted by the existence of some significant limitations on prospective actions under Ex parte Young. That federal statutes, such as the Fair Labor Standards Act, 29 U.S.C. § 211(a) (2000), and the FMLA, id. § 2617(d), do not expressly permit individuals to bring actions for injunctive relief against individual officers may, of course, be cured by desired congressional action. Nor would the “one bite” consequence be changed because injunctive relief would not be appropriate if plaintiffs sought a remedy for violations that are no longer ongoing, or if the state government altered its operations to bring them into line with federal requirements. On the other hand, there is a series of cases, in which the Court has invoked several nonjusticiability and equitable relief doctrines that make it difficult to prospectively stop some abridgments of federal law, especially regarding law enforcement misconduct. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983); Rizzo v. Goode, 423 U.S. 362, 371–73 (1976); O’Shea v. Littleton, 414 U.S. 488, 493 (1974). For further discussion of obstacles posed by challenging government practices in enforcing laws, see Fallon et al., supra note 9, at 234–43.

98. Additionally, for a description of the ability of “non-acquiescent officials” to make it difficult for plaintiffs to recover for violations of their statutory rights, see Louise Weinberg, Of Sovereignty and Union: The Legends of Alden, 76 Notre Dame L. Rev. 1113, 1142 & n.146 (2001); see also Ruth Colker, The Section Five Quagmire, 47 UCLA L. Rev. 653, 660 & n.32 (2000) (arguing that damages cause of action is the most effective way for an individual to enforce his rights and suits seeking only injunctive relief have proved ineffective).
Examples of state liability for conduct following injunctions include *Milliken v. Bradley*, in which the Court upheld desegregation decrees that ordered programs such as remedial education and training, whose cost was borne by the state treasury. Even though the programs were compensatory in nature, the Court found that they were still a part of a remedy that prospectively sought to bring about a desegregated school system. Similarly relying on "ancillary effects," in *Hutto v. Finney*, the Court upheld the imposition on state officers of attorneys' fees, as a sanction for bad faith, after they had violated prospective mandates to reform the state prison system. It also found that an order that the fees come from state agency funds did not violate the Eleventh Amendment. Thus, an individual state officer can be held in contempt for refusing to obey a prospective injunction, even if it seems that the money for the contempt sanction will be paid from the state treasury. While the actions in both *Milliken* and *Hutto* involved enforcement of Fourteenth Amendment rights and therefore were not subject to the sovereign immunity defense, neither opinion placed any real weight on this opportunity to relieve the Eleventh Amendment problem and avoid any broader rule.

As mentioned earlier, apart from *Ex parte Young*, another productive avenue exists to sue state officers: 42 U.S.C. § 1983, which holds state employees acting under color of law liable for violations of the Constitution or other federal laws. Section 1983 suits not only afford damages to those injured by violations of federal law, but also provide a means to sue the state as an institution where it has chosen to indemnify its officials, as also discussed above.

Section 1983, however, has its limitations as a comprehensive remedy, the most significant and immediate being immunity. Legislators and judges generally enjoy absolute immunity for their official actions. State executive branch officials receive qualified immunity if they could have reasonably believed that their conduct did not contravene federal

100. Id. at 289-90.
102. Id.
103. See Karlan, supra note 94, at 1328 (stating that payments from state treasury to enforce injunctions do not violate Eleventh Amendment because injunctions are prospective in nature); Meltzer, Overcoming Immunity, supra note 81, at 1335 n.17 (collecting cases in which courts have upheld sanctions paid from state treasury); Meltzer, Five Authors, supra note 6, at 1017 (arguing that potential liability may motivate state officials to better comply with federal duties).
104. See, e.g., *Milliken*, 433 U.S. at 290 n.23 (declining to address Eleventh Amendment issues beyond narrow facts of case); cf. *Hutto*, 437 U.S. at 698 n.31 (explaining why Eleventh Amendment does not preclude award of attorneys' fees payable by state under relevant statute).
ELEVENTH AMENDMENT

law, which depends on the facts of their actions and the nature of the federal rule in existence at the time.\textsuperscript{106} Thus, as suggested in our earlier discussion, § 1983 essentially establishes a tort-based exception to state sovereign immunity because recovery requires that a government official have acted unreasonably. Professor Jeffries believes that this is a "basically sound" system of liability for government actions because it properly compensates only wrongful injuries, and fixes the appropriate level of deterrence for future violations.\textsuperscript{107}

This creates two gaps between a strict liability regime for state violations of federal law and the Eleventh Amendment/Section 1983 framework. First, there is the absolute immunity of legislative and judicial officers, and second, there are government actions that appeared, ex ante, to be reasonable and thus immune, but are determined ex post to be violations of federal law.\textsuperscript{108} Professor Jeffries raises the important point that a system based on deterrence should relieve reasonable conduct of any liability—a policy which, of course, state liability fulfills while at the same time serving the goal of compensation for those injured by abridgments of their rights under federal regulations.

The critical point, however—seemingly applicable to virtually all the possible obstacles to § 1983 compensation for victims of federal law violations—is that the defenses that may be raised by state officials appear to be matters of legislative policy rather than being constitutionally compelled.\textsuperscript{109} For example, local governments are not subject to unqualified § 1983 liability, even though they are not constitutional beneficiaries of state immunity. Instead, liability is imposed against them only for those actions of their agents that are pursuant to the local governmental unit’s custom or policy.\textsuperscript{110} Similarly, other important national legislation—such as the Fair Labor Standards Act (FLSA),\textsuperscript{111} ADEA,\textsuperscript{112} ADA, and

108. It is uncertain whether this second class of cases is significant. For differing views, compare id. (arguing that although qualified immunity defense is available in such cases, it is “functionally irrelevant”), with Hartley, supra note 9, at 397–404 (arguing that limiting liability to knowing law violators “defeats federal regulatory legislation’s goals by underinclusively compensating and deterring violations”).
109. See Meltzer, Overcoming Immunity, supra note 81, at 1336 n.19 (finding “no constitutional barrier to a federal statute providing that when welfare benefits are withheld in violation of federal statutes or regulations, the responsible state officials are personally liable for monetary relief” despite the fact that “under traditional agency principles, a state official might not be personally liable for the state’s wrongful failure to pay benefits”).
110. Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 690–91 (1978). For the view that the Court has interpreted § 1983 so as to “make it exceedingly difficult to prove that local governments are causally responsible, and thus directly liable, for wrongs committed by their officials,” see Fallon, Conservative, supra note 22, at 463.
112. Id. §§ 621–634.
FMLA—has limited the range of remedies and potential defendants available to the statutory rightsholders. The Court has articulated neither a rule nor rationale that firmly grounds any form of official immunity in separation of powers or federalism. If immunity for official conduct were constitutionally compelled, the varying degrees of absolute, to qualified, to no immunity should not exist. Thus, it would appear that Congress could eliminate all these immunities (and any other defenses), either statute-by-statute or by amending § 1983 as a whole, and create a retrospective damages remedy against state officers that could clearly satisfy the Eleventh Amendment while providing potentially full equivalence to a lawsuit for money damages against the state.

On the one hand, this possibly wholly effective alternative to state liability would be significantly enhanced were states to continue indemnification, or increase it in order to encourage individuals to serve, thus having the effect of placing state treasuries on the line for damages. On the other hand, this consequence would plainly undermine the goals of the Court's Eleventh Amendment jurisprudence. The Rehnquist Court, of course, might not have permitted such an effort to functionally make states liable for violations of federal law, but it seems that this option rests within Congress's powers as the sovereign immunity doctrine stands today. That state officials have not yet encountered significant legislative liability for violations of federal law is Congress's policy choice, not the Court's.

115. For a fuller discussion, see Brent W. Landau, Note, State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws, 39 Harv. J. on Legis. 169 (2002); see also Hartley, supra note 9, at 386-92 (noting that many federal statutes do not provide right of action against state officers).
116. A parallel situation involving federal sovereign immunity arose in United States v. Stanley, 483 U.S. 669 (1987). A 5-4 majority held that in addition to the government's immunity from any damages for injury resulting from plaintiff's being the subject of unlawful human medical experimentation when he was in the military, "no Bivens remedy is available [against the federal officers responsible] for injuries that 'arise out of or are in the course of activity incident to service.'" Id. at 684 (quoting Feres v. United States, 340 U.S. 135, 146 (1950)). Wholly apart from the dissenters' position that the Due Process Clause guarantees such compensation, id. at 710 (O'Connor, J., concurring in part and dissenting in part); id. at 691-708 (Brennan, J., joined by Marshall & Stevens, JJ., concurring in part and dissenting in part), it is clear that the situation is curable by Congress.
117. Of course, there may be good reason for Congress to hesitate before taking this path. As discussed above, there is no guarantee that state indemnification would follow this encompassing officer liability, and the national legislature may not wish to impose an "unfair" financial burden on state and local employees who are guilty of no more than doing their jobs.
118. For example, the Justices could rule that the hypothetical congressional enactments just discussed impose a nonconsensual burden on the states to indemnify, thus abridging their sovereign immunity.
119. Vázquez, Immunity, supra note 17, at 1798.
120. For the view that the current Congress is "not discontent" with the Court's decisions and therefore does not wish to change them, see Barry Friedman & Anna L.
B. Suits by the United States

Another internal exception to state sovereign immunity, with the potential to completely defeat it, is lawsuits in which the federal government is a party. The Court recognized this point in a footnote in Seminole Tribe,\(^\text{121}\) and then discussed it more extensively in Alden, explaining that the original understanding of sovereign immunity was that it prevented lawsuits brought by private individuals against state governments.\(^\text{122}\) Actions by the United States would not run afoul of this concern because they "require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."\(^\text{123}\) To avoid the Eleventh Amendment, the national government itself need only bring more enforcement actions against states or move to intervene in privately filed suits.

There are various ways to engage in this pursuit. It is well settled that Congress may authorize the executive branch to sue to enforce federal law, even when the proprietary interests of the United States are not involved.\(^\text{124}\) This has been included in a number of significant statutes.\(^\text{125}\) Indeed, the very federal regulation that the Court refused to enforce via private lawsuit in Alden—the FLSA, which governs minimum wages and overtime hours—allows the Secretary of Labor to file suit against states seeking damages.\(^\text{126}\) This suggests multiple congressional options to evade state sovereign immunity. Most broadly, Congress could provide that the executive branch may sue to enforce any federal law for the ben-

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Harvey, Electing the Supreme Court, 78 Ind. L.J. 123, 125 (2003) ("[I]f anything, the fact that the Court at present is unusually active in striking congressional statutes could be a clear signal that the Court faces an ideologically congenial sitting Congress.").

121. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.14 (1996) (citing United States v. Texas, 143 U.S. 621, 644–45 (1892)) (noting that the federal government can bring suit against states in order to "ensur[e] the States' compliance with federal law").

122. Alden v. Maine, 527 U.S. 706, 755–56 (1999) (explaining that in ratifying the Constitution, states have consented to suits by federal government, and that such suits differ from those by private citizens because government is charged with ensuring faithful execution of laws).

123. Id. at 756.

124. See United States v. Raines, 362 U.S. 17, 27 (1960) (finding Congress "perfectly competent" to authorize the United States to bring suits supporting private constitutional rights); Meltzer, Overcoming Immunity, supra note 81, at 1362–63 (stating that Congress can authorize federal government to bring suits in which it has no proprietary interest and transfer resulting award to injured private parties, and that although the Rehnquist Court might have seen such measures as an "end run," defeating them would require "significant change in existing doctrine"); Jonathan R. Siegel, Congress's Power to Authorize Suits Against States, 68 Geo. Wash. L. Rev. 44, 69 (1999) (noting that Congress can constitutionally pursue claims on behalf of private parties against states and transfer any award to the party because such actions enforce federal law).


126. 29 U.S.C. § 216(c).
benefit of persons injured by states.\textsuperscript{127} If compensation of victims, rather than deterrence of state officials, remains the primary national goal, then Congress could even allow any damages won by the federal government to be transferred to the private individual who suffered the original harm resulting from violation of federal law.\textsuperscript{128}

The primary objection raised by those who doubt the efficacy of this course is that the United States does not have the resources to bring as many lawsuits as private parties. Noting that private FLSA suits are ten times more numerous than FLSA suits filed by the United States, some have argued that the proper amount of compensation and deterrence cannot be achieved by government enforcement alone.\textsuperscript{129} Second, relying on the national government to sue places enforcement decisions at the whim of different presidential administrations, which may well have varying enforcement priorities. The executive branch as an institution, or the political culture in the future, may have different preferences than the Congress that enacted the statute. Third, it is unrealistic to believe that Congress at this time will devote more funds and personnel to the creation of new agencies or to the hiring of more attorneys to carry out these new enforcement responsibilities.\textsuperscript{130}

Our point is not that vindication of federal rights is presently as effective as it was before the recent sovereign immunity rulings, but rather that there are a number of ways to avoid these problems—if Congress truly wants to. For example, by allowing the federal government to seek double or treble damages, or even larger penalties, in its lawsuits against states, Congress could increase the sanctions available to account for its enhanced litigation costs and could offset the eliminated recoveries from private actions so as to provide adequate compensation and deterrence.\textsuperscript{131} Further, since there appears to be no constitutional impediment to the United States joining with private parties to pursue states that violate federal law, the executive branch could have them shoulder more (or most) of the burden. Government lawyers could initiate and oversee

\textsuperscript{127} See Siegel, supra note 124, at 69 (noting that Congress has constitutional power to create remedies for private citizens "injured by state violations of federal law").

\textsuperscript{128} Cf. Kansas v. Colorado, 533 U.S. 1, 9 (2001) (citing Texas v. New Mexico, 482 U.S. 124, 132 n.7 (1987)) (stating that in suit by one state against another seeking damages suffered by certain of its citizens, prevailing state can keep judgment or transfer it to injured citizens).

\textsuperscript{129} Meltzer, Five Authors, supra note 6, at 1021–25.

\textsuperscript{130} Id. at 1022; see also Alden v. Maine, 527 U.S. 706, 810 (1999) (Souter, J., dissenting) (arguing that without a "significant expansion of National Government's litigating forces to provide a lawyer whenever private litigation is barred . . . the [majority's] allusion to enforcement of private rights by the National Government is probably not much more than whimsy").

\textsuperscript{131} Meltzer, Overcoming Immunity, supra note 81, at 1370–72; see also William P. Marshall, Understanding Alden, 31 Rutgers L.J. 803, 816–17 & n.78 (2000) (noting that authorizing federal government to seek litigation costs would offset many financial disincentives for suits and that fees, penalties, and liquidated damages could discourage "state recalcitrance").
the case, while the outside attorneys conduct much of the actual litiga-
tion, although the burden of oversight by federal officials would not be
insignificant. In rare situations, the United States has hired private
counsel, and it could make more of this method by developing fee ar-
rangements with independent lawyers that would allow it to enlarge the
pool of those who could bring suits against states.

Since Congress has not taken any of these steps since Seminole Tribe
and Alden, it would seem that the political will does not currently exist to
expand the level of federal enforcement of various constitutional and
statutory provisions against the states. There are a number of possible
explanations for congressional inertia, including high internal transac-
tion costs for the enactment of legislation, reluctance to expand federal
enforcement bureaucracies and budgets, and agreement with the Court’s
efforts to curtail private lawsuits against states. Although a variety of these
and other factors may produce legislative inaction, recognition of impor-
tant differences between enforcement through private lawsuits and ac-
tions by the United States may affect this hesitation on the part of the
lawmaking process.

Judicial restriction of private actions against states has significant sep-
aration of powers effects at the national level. Congressional creation of
causes of action to be brought by private parties against states effectively
delegates some law enforcement power beyond the control of the execu-
tive branch. Whether a private party chooses to bring suit will have little
to do with the President’s own enforcement priorities.

State sovereign immunity has the effect of centralizing decisionmak-
ing on federal enforcement decisions concerning damages actions within
the executive branch, which controls litigation brought by the United
States through the Justice Department or other federal agencies. This
makes implementation of national law more directly accountable to the
political process. If decisions within the Justice Department on whether
and how to seek damages are not supported, opposition can take the
form of congressional hearings, partisan political criticism, or disapproval
in opinion polls. Decisions by the national government to decline such
suits are more likely to come to the attention of the public than are the
litigation decisions of private parties. Therefore, presidents are far more
likely to receive and be responsive to negative reaction than private par-
ties, and will be much more likely to adjust the number of lawsuits in
accord with the broader wishes of the political system.

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132. See Meltzer, Overcoming Immunity, supra note 81, at 1365 n.119. Meltzer
explains the drawbacks to such a regime:

[A]uthorizing unknown lawyers to represent the United States with little effective
supervision would raise serious questions; litigants might take litigating positions
or engage in conduct that the Department of Justice (or some other federal
agency) would never have permitted had the litigation been conducted by regular
federal employees subject to ordinary supervision.

Id.
This explanation for the Court’s direction—centralizing federal law enforcement in the executive—helps explain some recent developments in Eleventh Amendment doctrine that could otherwise prove puzzling. In *Federal Maritime Commission v. South Carolina State Ports Authority*, for example, a private party alleged that a South Carolina government entity had refused to grant permission to berth a ship in Charleston harbor in violation of the federal Shipping Act. The complaint was brought before the Federal Maritime Commission (FMC), an independent agency established by Congress. Even though the text of the Eleventh Amendment applies only to exercises of “the judicial power of the United States,” and the Framers could not anticipate the development of the administrative state, the Court held that state immunity extends to formal adjudications before independent agencies.

The Court reached this conclusion by carefully comparing the characteristics of an FMC proceeding to a federal judicial action. Quoting *Butz v. Economou*, the Court observed that “[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is ‘functionally comparable’ to that of a judge.” Because the FMC conducted its proceedings in a manner very similar to civil litigation in federal courts, states must enjoy the same protection before it.

*Federal Maritime Commission* applied a more nuanced approach to the organization of the executive branch that is consistent with our theory about the Court’s purposes in the sovereign immunity area. The Justices did not allow the simple placement of the law enforcement function in an administrative agency to dictate the result, as we might expect if the Court were following a formalist approach to the Eleventh Amendment’s text. Rather, they evaluated the organization, authorities, and function of the agency to determine whether it really operated as part of the unitary executive, rather than independently of it. The similarity of the FMC to a federal court, rather than to an executive branch agency within the President’s control, drove the outcome. Had the FMC action actually resembled the usual processes that govern other executive branch decisions to bring a civil suit, with the normal space for discretion, we have little doubt that the Court would not have found the state to enjoy sovereign immunity. In that case, the President could have brought to bear broader considerations and remained accountable to Congress in deciding whether to subject a state to suit. That decision rested with a private party before the FMC, however, which does not employ a calculus that takes public costs and benefits into account.

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134. Id. at 747.
Ironically, reliance on suits brought by the United States promises to reduce conflict between the national and state governments. Congress will have already encountered state resistance in passing the legislation authorizing the bill and, more importantly, leaving enforcement judgments in executive branch control will give states a meaningful voice in such decisions. As one of us has observed in previous work, the states can influence executive branch decisions in a number of ways, including using relationships between state and federal executive branch officials, lobbying by state executive branch interest groups, and putting state pressure on federal regional field offices. When private parties make the determination, states have virtually no influence over whether a damages lawsuit is brought. When the call rests with the executive branch, however, states may participate—through, for example, direct lobbying by state officials, pressure from state organizations such as the National Governors Association, or efforts by members of Congress representing their states' interests.

Assigning decisionmaking on damages actions against states to the executive branch also has an interesting and unnoticed intertemporal effect that more closely aligns enforcement with present wishes. When Congress creates a private right of action, it sets a level of enforcement, compensation, and deterrence that is desired at the time of its passage. Once private parties are delegated the power to sue, however, future lawmakers have only blunt tools available to make modifications, such as eliminating or amending the cause of action or its sanctions. These options would require new legislation, and the vetogates in place that impede such legislation create strong obstacles to congressional success in adjusting litigation efforts by private persons. Centralization in the executive, however, affords Congress far more flexibility—for example, the ability to cut or add to enforcement budgets, to expand or restrict the number of personnel who work on enforcement, or to use oversight hearings to encourage or discourage lawsuits. Most importantly, the level of enforcement will be more sensitive to the desires of the current Congress, rather than the Congress and electorate that had originally enacted the law.

137. But see Jackson, Seductions, supra note 59, at 703 (arguing that Rehnquist Court "seem[ed] to be wishing on the United States more political confrontations with the states").


139. The False Claims Act, under which private parties may file qui tam actions to recover damages against those who defraud the federal government, presents an additional dimension with regard to suits by the United States. 31 U.S.C. § 3730(b)-(d) (2000). The private-party plaintiff is usually considered to be suing on behalf of the United States, even though not accountable to the executive branch. It is possible, therefore, that because the United States remains a "real party in interest" in qui tam actions, such actions would benefit from the exception to state sovereign immunity for lawsuits brought by the federal government. See Evan H. Caminker, State Immunity
One criticism of this theory would ask why the Constitution ought to be read to deprive Congress of the choice of enforcement methods in favor of centralized executive control. Congress, for example, might wish to delegate federal law implementation to private parties because it disagrees with the President's priorities or it wants to insulate law enforcement from political pressures. One similarly might question, however, any constitutional rule validating Congress's ability to create an independent law enforcement entity. Even though Congress may appear to have a strong reason to deviate from the model of centralized presidential control over law enforcement, the present Court may well find that these experiments must yield before the Constitution's structural requirements.\footnote{Waivers for Suits by the United States, 98 Mich. L. Rev. 92, 132–35 (1999). Caminker argues, inter alia, that qui tam cases are different than private lawsuits because the government is compensated for its own damages. Id. at 132–33, 135 & n.179. We are doubtful, however, that this position will be upheld. First, the Court's language in \textit{Alden v. Maine} strongly suggests the contrary: “A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty . . . differs in kind from the suit of an individual . . . .” 527 U.S. 706, 755 (1999). Second, although in the course of interpreting the False Claims Act not to permit the inclusion of states as defendants in qui tam actions the Court did not reach the question, it did express “serious doubt” that a qui tam relator could abrogate Eleventh Amendment immunity. \textit{Vt. Agency of Natural Res. v. United States ex rel. Stevens}, 529 U.S. 765, 787 (2000) (quoting \textit{Ashwander v. TVA}, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).}

The independent counsel statute\footnote{28 U.S.C. § 591 (2000).} affords an example: Although the Court upheld Congress's ability to shield special prosecutors from direct presidential removal, it nonetheless found that the separation of powers requires that the Chief Executive have the authority to direct their activities.\footnote{Morrison v. Olson, 487 U.S. 654, 693–96 (1988).}

Congress also might wish to outsource enforcement to private parties in order to reduce the costs and size of the federal bureaucracy. Why should the Constitution be read to require Congress to choose either less effective levels of enforcement or an enlarged administrative machinery? Of course, the line of argument being advanced need not be that blunt. The Court might find (as it has) not that Congress is barred from relying on outside plaintiffs to enforce federal law against states, but only that it cannot allow them to use damages actions (rather than injunctive relief) to achieve that end. In order to judge with greater precision whether the Court has seriously erred, one must measure this reduction in law enforcement tools against the increase in institutional independence on the part of the states. We cannot hazard with any certainty how this balance

\begin{itemize}
\item \textit{Lujan v. Defenders of Wildlife}, he wrote that “[t]o permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ [is] to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’” 504 U.S. 555, 577 (1992) (quoting U.S. Const. art. II, § 3).
\end{itemize}
would come out, but it seems to us that the stakes on either side of this equation would be relatively low.

C. Fourteenth Amendment Remedies: Section Five

The Reconstruction Amendments provide three substantial avenues to create damages actions against states directly for violations of national regulations. The first avenue is legislation pursuant to Section 5 of the Fourteenth Amendment to enforce the Amendment's substantive provisions. Cases such as City of Boerne v. Flores and Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank (Florida Prepaid I) created new hurdles for Congress in justifying its exercise of this power, and more recent cases have clarified modifications of the barriers. Second, the Fourteenth Amendment's Due Process Clause itself appears to require a damages action against the state in certain circumstances. Third, the Takings Clause seems to automatically trigger a suit for compensation against the states. These will be addressed in this and the next subparts.

As discussed earlier, Boerne expressed the Court's concern that Congress might exceed its power under Section 5 by changing the substantive law of the Fourteenth Amendment, rather than simply enforcing it. The Court held that Congress could not create new rights or otherwise alter the interpretation of the Fourteenth Amendment, but was limited to enacting remedies for the prevention and violation of Fourteenth Amendment guarantees as defined by the federal judiciary. To ensure that the legislative branch was achieving only the latter purpose, the Court mandated that a law possess both "congruence" and "proportional-

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145. 521 U.S. at 519 ("The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."); see also supra text accompanying notes 40-45.
146. 521 U.S. at 519. This principle was sharply illustrated in United States v. Morrison, 529 U.S. 598 (2000), in which the Court rejected "a voluminous congressional record of gender-motivated bias," id. at 619-20, in the operation of state criminal justice systems as a justification for the exercise of Section 5 power in the Violence Against Women Act: "Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions," id. According to the Court, "Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence." Id. Nonetheless, because the challenged statutory provision "is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias," id. at 626, and because the Fourteenth Amendment prohibits only state action, The Civil Rights Cases, 109 U.S. 3 (1883), the Court held that Congress could not use Section 5 to create a damages action against a private individual.
“ity” to the prevention and remedying of a constitutional wrong. Only a statute that meets these requirements is valid under Section 5.

The cases following Boerne plainly indicated that the new approach to Section 5 would place serious boundaries around Congress's authority to enforce the Reconstruction Amendments and thus to override state sovereign immunity. Boerne itself identified only the Voting Rights Act of 1965, which had responded to systematic and widespread official efforts in the South to deny African Americans the right to vote, as meeting its test. Subsequent decisions emphasized the importance of a record of findings that constitutional rights had indeed been violated on a widespread and systematic basis. In Florida Prepaid I, for example, the Court examined the Patent and Plant Variety Protection Remedy Clarification Act, which provided a civil cause of action for money damages against states for patent infringement. The Court agreed that patents qualified as property within the protection of the Fourteenth Amendment. Nonetheless, the Court invalidated the Act because Congress had not identified a pattern of unconstitutional patent infringement by the states: "The legislative record thus suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic Section 5 legislation."

Further rulings confirmed that the congruence and proportionality test, as measured through the congressional record, would be purposively applied by the Court. In Kimel v. Florida Board of Regents, the Court found that the ADEA could not override state sovereign immunity because there was no history of unconstitutional conduct by the state. Since age discrimination was subject only to rational basis review, the Court observed, state discrimination on the basis of age was not violative of equal protection if the measures were rationally related to a legitimate government objective, such as ordinary employment decisions. In University of Alabama v. Garrett, the Court invalidated a private cause of action for money

147. 529 U.S. at 625-26 (quoting Florida Prepaid I, 527 U.S. at 639).
149. 521 U.S. at 528.
151. 527 U.S. at 635.
152. Id. at 642.
153. Id. at 645 (quoting Boerne, 521 U.S. at 526).
154. 528 U.S. 62, 88-91 (2000) (“Although that lack of support is not determinative of the § 5 inquiry, Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.” (citations omitted)).
155. Id. at 83-86 (“Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases.” (quoting Gregory v. Ashcroft, 501 U.S. 452, 473 (1991))).
damages against states that failed to observe Title I of the ADA. Title I requires reasonable accommodations at work for the disabled and prohibits employment discrimination against them. As in *Kimel*, Garrett found that discrimination against the disabled need only meet the rational basis test in order to comply with the Equal Protection Clause, and that the ADA prohibited conduct that would survive such scrutiny. It then concluded that the ADA was not congruent and proportional under *Boerne* because "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." Chief Justice Rehnquist compared what he judged to be the "minimal evidence of unconstitutional state discrimination" assembled by Congress with the extensive legislative findings of race discrimination made in enacting the Voting Rights Act of 1965. After *Garrett*, many observers believed that few statutes enacted after the Civil Rights Act of 1964 and the Voting Rights Act of 1965 could surmount the Court's Section 5 test.

Yet the Court's two most recent pronouncements have shown that its strict application of the *Boerne* test relates only to situations in which Congress's effort reaches beyond the Court's definition of the outer boundaries of rights secured by the Fourteenth Amendment. In *Nevada Department of Human Resources v. Hibbs*, the Court upheld a private action for damages against states that violated the FMLA, which allows employees to take up to twelve weeks of unpaid leave to care for an ailing relative. Chief Justice Rehnquist's opinion for six members of the Court observed that in this instance, unlike *Garrett* and *Kimel*, Congress had sought to implement the Equal Protection Clause's bar on gender discrimination, which is subject to heightened scrutiny rather than the rational basis test, and for this reason "it was easier for Congress to show a pattern of state constitutional violations." After a survey of the Court's sex-based bias cases and Congress's findings that employers had administered family leave policies in a gender discriminatory manner, he found that "Congress could reasonably conclude that such discretionary family leave programs would do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate." The Court found that the narrowness of the Act—a family leave measure, rather than a wholesale effort to regulate every aspect of the "faultline between work and family"—also showed that it was congruent and proportional to the problem of eliminating gender stereotypes in the

158. 531 U.S. at 968.
159. Id. at 370.
161. 538 U.S. at 728, 736.
162. The Court also noted that leave policies did not significantly vary between public and private employers. Id. at 730 n.3.
163. Id. at 784.
workplace. The dissenters complained that the legislative record before Congress did not remotely approach that which had supported the Voting Rights Act; in particular, Justice Kennedy pointed out that most of the evidence went to discrimination by private companies, not the systematic and widespread violation of constitutional rights by public employers required by Boerne.

Further clarification of the Court's approach to Congress's Section 5 power came in Tennessee v. Lane, upholding a private suit for damages against a state for violating Title II of the ADA. The case involved a paraplegic criminal defendant who could not reach the courtroom on the second floor of the county courthouse in which he was scheduled to appear without crawling up the stairs or being carried by officers and who alleged denial of his due process right of "access to the courts." Justice Stevens, joined by Justices O'Connor, Souter, Ginsburg, and Breyer, found that Congress had assembled a sufficient record of deprivation of fundamental rights caused by unequal treatment of the disabled in the administration of state services and programs. The legislative documentation of state discrimination did not significantly exceed that in Kimel or Garrett (although it certainly appeared to be greater than the record in Hibbs). The difference was not the number of witnesses present in committee hearings or pages in committee reports, but the distinction that was also critical in Hibbs: the standard of review. Whereas in Hibbs, the standard of review for gender-based discrimination was heightened scrutiny, in Lane, the Court declared that because access to the courts was a fundamental right, the standard of review equaled or surpassed that in Hibbs.

To recapitulate, Congress plainly has more flexibility to enact legislation under Section 5 of the Fourteenth Amendment (and to override state sovereign immunity) than many feared before the last two rulings. First, Congress has a much stronger chance of surviving the congruence and proportionality tests if it begins by aligning the rights at issue with those that the Court has already recognized as subject to more than rational basis review. Statutes designed to defeat discrimination based on race and national origin should experience few obstacles because state

164. Id. at 738.
165. Id. at 742 (Scalia, J., dissenting); id. at 746–54, 756–57 (Kennedy, J., dissenting).
166. Id. at 746 (Kennedy, J., dissenting).
168. Id. at 525–30.
169. Id. at 515. The ruling did not decide that plaintiff was entitled to damages. Rather, the Court upheld the Sixth Circuit's affirmation of the federal district judge's denial of the state's motion to dismiss on Eleventh Amendment grounds. The Sixth Circuit "noted that the case presented difficult questions that 'cannot be clarified absent a factual record,' and remanded for further proceedings." Id. at 515 (quoting Lane v. Tennessee, 315 F.3d 680, 683 (6th Cir. 2003)).
efforts to classify on these grounds are subject to strict scrutiny. Congressional protection of fundamental rights, under either equal protection or due process, will have the same chance at survival. After Hibbs, Congress also should have a much easier time enacting regulations that enforce rights against gender discrimination, which is reviewed under a heightened scrutiny standard that in application seems to be approaching strict scrutiny.

D. Fourteenth Amendment Remedies: Due Process and Property

Avenues also exist for overriding sovereign immunity at the intersection of due process and property. In contrast to the previously discussed cases, which involve the scope of congressional enforcement power, there are several constitutional rights that have been interpreted by the Court to automatically require states to provide a remedy.

The Takings Clause is the most obvious example of a self-executing constitutional provision. The Fifth Amendment, applied to the states by the Fourteenth, states that "nor shall private property be taken for public use, without just compensation." This does not prohibit the government from taking certain property; it only demands just compensation when it does. Though Congress could plainly authorize an implementing cause of action against states pursuant to Section 5 of the Fourteenth Amendment under present doctrine, it has not done so, and takings claims are not ordinarily pursued against state officers under 42 U.S.C. § 1983. Nonetheless, in First English Evangelical Lutheran Church v. County of Los Angeles, the Court observed that "in the event of a taking, the compensation remedy is required by the Constitution," and held that precedent refuted the United States' argument that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." These cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.

172. U.S. Const. amend. V.
175. Id. at 316 n.9 (citation omitted). For the view that the Court's statement in First English is not authoritative, see Richard H. Seamon, The Asymmetry of State Sovereign Immunity, 76 Wash. L. Rev. 1067, 1072-79 (2001). Seamon suggests that the conflict between the just compensation guarantee and the sovereign immunity principle may be reconciled "through non-judicial procedures (as well as through officer suits)." Id. at 1109. For a discussion of the ambiguity regarding whether the federal government may be sued for just compensation without its consent, see Vázquez, Trilogy, supra note 79, at 1952-53.
Even without federal relief, it appears that all (or virtually all) states\textsuperscript{176} have provided a remedy for takings by consenting to inverse condemnation suits in their own courts.\textsuperscript{177} Moreover, even in its most forceful sovereign immunity rulings, the Court has made quite plain that, where the states have not done so, Congress could provide a remedy for such constitutional violations. Thus, in \textit{Florida Prepaid I}, the Court found that a significant factor demonstrating that the Patent Remedy Act did not meet the congruence and proportionality test is that it was not limited to constitutional violations by the state:

Despite subjecting States to this expansive liability, Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed. Nor did it make any attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy, or providing for suits only against States with questionable remedies or a high incidence of infringement.\textsuperscript{178}

Accordingly, it is apparent that Congress could override sovereign immunity when a state takes property—here, a patent—without providing an appropriate remedy,\textsuperscript{179} through its courts or perhaps even by some legislative avenue.\textsuperscript{180} (On the other hand, it also appears clear that negligent deprivation of at least certain kinds of property does not violate Due Process and hence does not give rise to a possible enforcement statute under Section 5.\textsuperscript{181})

\textit{Florida Prepaid I} contains a potential path toward a second area where the Constitution might be self-executing: procedural due process. If property rights can include intangible property created by the government, such as a patent, then it logically includes a host of other statutory benefits. In \textit{Florida Prepaid I} (and other cases in its recent spate of rulings solidifying states’ rights), the Court could have interpreted the constitutional security for state sovereign immunity (1) to prevail over all claims of damages for infringements of property (especially those established

\textsuperscript{176} For detail, see Seamon, supra note 175, at 1118–19.
\textsuperscript{177} Hill, supra note 95, at 578.
\textsuperscript{179} Vázquez, Immunity, supra note 17, at 1754–55. For consideration of hurdles facing Congress in drafting an appropriate statute that would overcome sovereign immunity by means of a jurisdictional hook, see id. at 1755–56; see also Meltzer, Overcoming Immunity, supra note 81, at 1346 & n.56 (suggesting that Congress create a cause of action authorizing federal suit if plaintiff can show state has not provided adequate opportunity for some form of hearing).
\textsuperscript{180} See supra note 12 and accompanying text.
\textsuperscript{181} Cf. Meltzer, Overcoming Immunity, supra note 81, at 1345 (discussing \textit{Florida Prepaid I}’s holding that state infringement of private patent is not necessarily deprivation without due process).
ELEVENTH AMENDMENT

through legislation), including those created by the Constitution as well as by congressional action, or (2) to require only some form of reasonable remedy against state officials, but it did not. (In fact, a mid-1930s decision of the Court adopted this position in respect to similar Fifth Amendment claims when made in an effort to overcome the federal government's own sovereign immunity. The Court's rejection of these options appears to suggest that denials of "new property" rights—benefits created by the state—will be subject to a requirement of procedural due process. Such property includes welfare benefits and tenured employment, which have been held to require some form of procedural due process before their termination. As one example of new possibilities, suppose the state (or the federal government) creates an income assistance program. If the payments were considered to be property under the Due Process Clause, because government "rules or understandings" create "legitimate" expectations of future income flows, then the sovereign cannot terminate the program without providing some form of notice and hearing. Under the Florida Prepaid I rationale for protection of property, sovereign immunity would not protect a state's refusal to provide these procedures from a remedy established either by Congress or the federal courts. The difficulty, however, is that the Court seems to have rejected this argument sub silentio in Alden, Kimel, and Garrett, because a due process claim in those cases should have led the Court to override sovereign immunity. Nonetheless, since the Court has not explicitly ruled out such reasoning, it provides a post-Rehnquist Court with a means to reverse course in the Eleventh Amendment area without having to overrule its precedents, thus affording Congress (or the Court itself) substantial flexibility to overcome sovereign immunity on this point.

Reich v. Collins, decided just before the Court's recent major sovereign immunity cases, outlines the possible contours of the clash between sovereign immunity and a state's violation of procedural due process. In Reich, the plaintiff had paid taxes to the state of Georgia that were later found to be unconstitutional. Georgia had a refund statute, but the state courts ruled that it did not apply to taxes that were paid and subsequently declared illegal.

182. For further discussion, see Vázquez, Immunity, supra note 17, at 1746-50.
185. Roth, 408 U.S. at 577.
187. Id. at 108.
188. Id. at 109.
figure its system in midcourse to block some taxpayers from access to any remedy.\textsuperscript{189} Sovereign immunity notwithstanding, the Court required Georgia to provide retrospective relief.\textsuperscript{190} Reich thus stands for the proposition that, at least in certain circumstances, the Constitution itself requires a remedy for a violation of procedural due process, even if § 1983 or other federal statutes do not authorize one. In Reich, it was to be supplied in state courts, but there is no apparent reason why this would prevent Congress from implementing a remedy for due process violations through the federal courts as well.\textsuperscript{191}

While Reich is about state taxation, and may therefore be subject to an argument that tax law is sui generis, the Court relied on cases outside the tax context for the notion that “[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.”\textsuperscript{192} Suppose, for example, that a state withholds portions of salary earned by state workers and provides no procedure for them to seek a “refund” of the illegally retained compensation. Reich plainly implies that state sovereign immunity imposes no bar on the federal government’s forcing states to create a remedial process for retrospective damages.

In combination with Florida Prepaid I’s recognition that state-created property can provide the trigger for procedural due process rights, Congress’s flexibility to override state sovereign immunity in this way may be limited only by whether the Court will place limits on what counts as “property” for due process purposes.\textsuperscript{193} While it restricted, for example,

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  \item Id. at 110–11; see also Eric Rakowski, Harper and Its Aftermath, 1 Fla. Tax Rev. 445, 477–78 (1993) (arguing before Supreme Court decided Reich that Georgia Supreme Court’s decision not to allow refund did not comport with due process).
  \item Reich, 513 U.S. at 114.
  \item Cf. Vázquez, Immunity, supra note 17, at 1688–89 (noting that McKesson Corp. v. Div. of Alcohol, Beverages & Tobacco, 496 U.S. 18 (1990), does not “foreclose the exercise of federal judicial power to enforce such remedies, but merely defers the involvement of the federal judiciary in enforcing federal liabilities of the states until the state courts have had a chance to afford the required relief”).
  \item Reich, 513 U.S. at 113 (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457–58 (1958)).
  \item This plainly appears to be the course taken by the majority in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid II), when it rejected a claim concerning the Lanham Act’s creation of “(1) a right to be free from a business competitor’s false advertising about its own product, and (2) a more generalized right to be secure in one’s business interests,” because it did not qualify as “a property right protected by the Due Process Clause.” 527 U.S. 666, 672–75 (1999). It may well be that interference with either right articulated by the Lanham Act would not amount to a “taking” requiring just compensation, id. at 675, but it does not follow that state impairment of these legislatively shaped rights does not require some form of procedural due process. Indeed, it would seem that the Lanham Act’s protection for “the activity of doing business, or the activity of making a profit,” id. (emphasis omitted), is no less a form of property nor any more involves the majority’s criterion for property of “the right to exclude others,” id. at 673, than a state’s employment agreement affording tenure or other
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the reach of Goldberg v. Kelly in respect to predeprivation hearings for the termination of welfare benefits in Matheus v. Eldridge, the Court still found that disability benefits did create a property interest of some kind that deserved protection under the Due Process Clause.\footnote{Mathews v. Eldridge, 424 U.S. 319, 332 (1976).} Under this doctrine, Congress could next attempt to recharacterize federal statutory rights as "new property" in several different ways.\footnote{Cf. Ann Woolhandler, Old Property, New Property, and Sovereign Immunity, 75 Notre Dame L. Rev. 919, 920 (2000) (arguing that recent sovereign immunity cases are not alarming because their model of individual liability has successfully balanced government accountability with sovereign immunity).} It could assert that holders of federal rights have a specific right to sue, which has been considered a type of property.\footnote{Cf. Vázquez, Immunity, supra note 17, at 1742-43.}

Or, subject to the major qualification already noted regarding efforts by Congress to establish statutory rights as property,\footnote{See supra note 181 and accompanying text.} Congress could seek to define certain rights as property rights. For example, if a tenured position with a state school grants a sufficient property interest to trigger procedural due process protections, Congress should be able to create property interests in other aspects of the employment relationship that may give rise to similar expectations. Tenure provides a certain expectation interest in future employment; could Congress not also create expectations that if persons become state employees, their wage will not fall below a certain minimum or they will not experience certain forms of discrimination? Not only would Congress have the ability, under this approach, to enact legislation overriding state sovereign immunity if states refuse to provide a remedy, but it also points the way for the Court to shift directions on the Eleventh Amendment without overruling existing precedent.

III. ENFORCEMENT OF FEDERAL LAW EXTERNAL TO THE ELEVENTH AMENDMENT

This Part of the Essay examines methods for achieving state compliance, in addition to the Fourteenth Amendment, that might be called "external" because they are independent of and unrelated to the Court's sovereign immunity jurisprudence but may still allow the federal government to convince states to obey federal law. As with the devices internal to the Eleventh Amendment, the external modes that involve exercises of congressional power (discussed in Parts III.A and III.B below) raise serious questions about the efficacy of the Court's defense of state sovereign immunity. Moreover, like Section 5 and suits by the United States, these two sources of national authority appear to allow the federal gov-
ernment to fully overcome state immunity while increasing the accountability of the federal government in making that choice.

A. Spending Power

Potentially the most expansive authority available to force state compliance with federal goals is through the Spending Clause, which grants Congress the "Power . . . to pay the Debts and provide for the . . . general Welfare of the United States."198 In the Republic's first few years, James Madison and Alexander Hamilton split over the interpretation of the provision's scope. Madison argued that the central government could spend funds only on those subjects enumerated in Article I, Section 8, while Hamilton considered the objects of federal spending to be independent of Congress's other powers. In 1936, the Court stated its agreement with Hamilton,199 and thereafter has given Congress great flexibility to define the "general welfare" advanced by federal spending. To be sure, the Court's recent narrowing of the Commerce Clause may lead it to reconsider the toothless test announced in United States v. Gerlach Live Stock Co.200 For present purposes, however, we do not predict the Court's future approach to the Spending Clause, but only apply it as it stands today.

Congress could use its power of the purse in three ways to achieve its regulatory aims. First, Congress could refuse prospectively to provide funds to any state that has a past record of violating national policy. If, for example, a state has infringed patent rights, Congress could reduce any further federal grants to state universities or research institutions. If a state violates the rights of the disabled or the aged in violation of federal law, Congress could reduce block grants to that state during the next appropriations cycle. To be sure, such drastic action that could result in denying benefits to the disabled or aged will not help the situation of those groups, which have already suffered harm at the hand of the state. At the same time, however, withholding federal payments would expose the state's political leadership to significant criticism and place it at a disadvantage in comparison to its neighbors in attracting citizens and business. This may help explain why there are so few examples of any states refusing to obey federal policy.

Second—and closely related to the first but more familiar and operationally less drastic—Congress could place prior conditions on funding to induce a state to conform to federal policy. Congress currently uses this technique in many areas, ranging from the environment to antidiscrimination to drinking ages.201 As the Court made clear in 1987, this

200. 339 U.S. 725, 738 (1950) (holding that spending power is "limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose").
201. For an informative discussion of the spending clause, see generally Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911 (1995). For our
power allows Congress to use the Spending Clause to achieve results that it could not command through Article I, Section 8 legislation. In *South Dakota v. Dole*, the Court sustained a federal statute that withheld five percent of allocable highway funds from any state that did not impose a twenty-one-year-old drinking age.\footnote{202} Even though the Twenty-first Amendment barred Congress from setting a nationwide drinking age, the Court upheld the condition because it was "directly related to one of the main purposes" of the interstate highway system: safe travel.\footnote{203}

The Court has not found any spending condition to violate this direct relationship test. Moreover, a frequently cited proposal advanced by Justice O'Connor in her dissenting opinion in *Dole*—that the Court distinguish between conditions that only generally relate to the purposes of Congress's grant (and thus realistically amount to regulations) and conditions that expressly specify how the money should be spent—\footnote{204}—seems just as malleable.\footnote{205}

If anything, recent cases suggest that the Justices are not about to attempt to significantly tighten the required link between spending conditions and federal funds. Two terms ago, in a largely overlooked decision, the Court rejected a Spending Clause challenge to a federal criminal prohibition on bribery of state and local officials whose entities receive at least ten thousand dollars in federal funds.\footnote{206} According to the Court, Congress could attach such a broad condition, even without requiring proof that the bribery related to conduct actually involving the use of any federal funds, because the Spending Clause (as enabled by the Necessary and Proper Clause) provides the authority "to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars."\footnote{207} Still, despite the essentially boundless authority that *Sabri*'s rationale implies,\footnote{208} its relevance to state sovereign immunity may be limited by the Court's observation that the

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own contribution to the literature, see Choper, Taming, supra note 8, at 762–69; Choper & Yoo, supra note 8, at 855–58.  
\footnote{202} 483 U.S. 203, 205–06 (1987).  
\footnote{203} Id. at 208.  
\footnote{204} See id. at 215–18 (O'Connor, J., dissenting). For a similar, but more developed approach, see Baker, supra note 201, at 1962–78.  
\footnote{205} See Choper, Taming, supra note 8, at 766–67.  
\footnote{206} Sabri v. United States, 541 U.S. 600, 602 (2004).  
\footnote{207} Id. at 605.  
\footnote{208} See id. at 611, 613–14 (Thomas, J., concurring). Justice Thomas states that the Court appears to hold that the Necessary and Proper Clause authorizes the exercise of any power that is no more than a "rational means" to effectuate one of Congress' enumerated powers. . . . [But it] does not explain how there could be any federal interest in "prosecut[ing] a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of $10,000."
statute in Sabri "is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain, not a means for bringing federal economic might to bear on a State’s own choices of public policy."209

Examples of conditional spending authority reveal its enormous potential to accomplish federal policy goals either specifically or globally. To take the problem in Florida Prepaid I, although it may “require navigating some difficult jurisdictional shoals in Congress,”210 if the lawmakers have the will to do so, they could attach as a condition to one or more federal spending programs that states not infringe on patent rights. As to the rights of the disabled or the aged, Congress could require that all recipients of any federal funds to support state employment programs not discriminate on prohibited grounds. So long as Congress can identify a reasonable nexus between the subject matter of the required waiver of sovereign immunity and the goals of a federal spending program, it should have little difficulty in forcing states to waive their Eleventh Amendment rights. Broad federal spending programs in domestic areas such as education, crime, welfare, and transportation, to name just a few, should provide ample grounds for Congress to achieve state waivers of sovereign immunity. Congress might straightforwardly satisfy Justice O’Connor’s approach, if necessary, by specifying that its employment funds allocation be spent for designated purposes, e.g., avoidance of discrimination on the basis of disability, age, gender, or race.211

One possible objection may be that Congress has little political incentive to use the Spending Clause in this way. In fact, however, Congress took this approach in two significant civil rights laws, § 5 of the Rehabilitation Act of 1973212 and Title VI of the Civil Rights Act of 1964.213 Congress, moreover, regularly uses its spending powers to achieve uniform policy changes through state adoption of federal standards, rather than through direct federal regulation of uniform nationwide rules through legislation. Title IX of the Civil Rights Act of 1964, which requires that colleges and universities receiving federal funds not discriminate on the basis of gender,214 and its subsequent interpretation

209. Id. at 608.
210. Meltzer, Overcoming Immunity, supra note 81, at 1380.
211. Similarly, though it has been pointed out that "statutory provisions purporting to abrogate sovereign immunity . . . in bankruptcy proceedings . . . are not now, and could not easily be, associated with federal spending programs," Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1996 Sup. Ct. Rev. 1, 55, current Spending Clause doctrine would not seem to pose an insuperable obstacle if Congress acts determinedly. For the view that allowing states to decide whether to assert or waive immunity from bankruptcy actions is consistent with most articulations of bankruptcy policy, see Adam Feibelman, Federal Bankruptcy Law and State Sovereign Immunity, 81 Tex. L. Rev. 1381, 1414–15 (2003).
to require equal funding of men's and women's intercollegiate sports teams, provides just one noteworthy example.\textsuperscript{215} The No Child Left Behind Act, which conditions federal education funding on state adoption of mandatory standardized testing to measure school performance, is another.\textsuperscript{216} Cooperative federal-state programs in the health care and welfare areas provide yet another fertile area where Congress is already using funding to achieve state adoption of federal norms and where a waiver of state sovereign immunity could be included.\textsuperscript{217}

Congress could exercise this power more selectively in different forms, perhaps because of the possible tightening of the \textit{Dole} test. Federal agencies such as the National Institutes of Health, the National Science Foundation, the National Endowment for the Arts, the Department of Energy, and the Defense Department provide extensive funding to state universities and research hospitals.\textsuperscript{218} Congress could condition these individual spending programs, which generate intellectual property themselves, with an obligation to respect federal patent rights. A variation would require states and their institutions to observe federal patents in exchange for the right to receive patents themselves. While not strictly within the Spending Clause, this would involve a similar federal benefit that could be withheld as a matter of discretion unless states comply with national standards.\textsuperscript{219}

Third, Congress could condition federal spending on states assuring remedies for violations of substantive federal policies either by waiving sovereign immunity in federal court or supplying a state remedy (effectively waiving immunity in their own courts).\textsuperscript{220} To achieve this result, Congress's action would have to survive the second part of \textit{Dole} 's test, which mandates that spending conditions not induce states to engage in unconstitutional conduct or coerce states rather than offering them a true choice.\textsuperscript{221} The first prong of this test basically addresses matters of individual liberties, such as an effort by the federal government to use the spending power to convince states to violate their citizens' equal protec-

\begin{itemize}
  \item \textsuperscript{215} 45 C.F.R. § 86.41 (2003).
  \item \textsuperscript{216} 20 U.S.C. § 6311.
  \item \textsuperscript{217} See Mark Andrew Ison, Two Wrongs Don't Make a Right: Medicaid, Section 1983 and the Cost of an Enforceable Right to Health Care, 56 Vand. L. Rev. 1479, 1513 (2003) (arguing that Congress could force states to voluntarily abrogate their sovereign immunity as condition of participating in Medicaid program).
  \item \textsuperscript{219} See id. at 1441 (describing proposed legislation that would allow states the right to hold patents conditioned on their waiver of sovereign immunity in federal patent suits).
  \item \textsuperscript{220} See Jennifer Polse, Note, Holding the Sovereign's Universities Accountable for Patent Infringement After \textit{Florida Prepaid} and \textit{College Savings Bank}, 89 Cal. L. Rev. 507, 592–33 (2001) (arguing that submitting to federal jurisdiction in patent disputes as condition of receiving federal research grants satisfies Justice O'Connor's germaneness test).
  \item \textsuperscript{221} South Dakota v. Dole, 483 U.S. 203, 210–11 (1987).
\end{itemize}
tion rights. Although the Court has not provided much explanation, the coercion criterion might present more difficulties for an effort to secure a state's waiver of immunity. A court might judge coercion to have occurred if a sanction is dramatically out of proportion to the failure to follow federal law. So, for example, if all of a state's federal funding were contingent on its waiver of sovereign immunity where state liability for damages is not a significant aspect of the federal regulatory regime, the Court might be convinced that coercion has taken place.

An exchange between the majority and the dissent in *Florida Prepaid II* briefly addressed this issue. As we have seen, the case involved a federal law providing that states that use false or misleading advertising while engaging in activities regulated by the Lanham Act are subject to suit in federal court. In dissent, Justice Breyer argued that state participation in federally controlled commercial activity constituted a constructive waiver of sovereign immunity, just as an acceptance of a federal grant could constitute a waiver. In response, Justice Scalia observed that the federal government could demand an explicit waiver of sovereign immunity in exchange for a gift or benefit, but could not impose it as a sanction by excluding a state "from otherwise permissible activity." Justice Breyer replied, persuasively, that "[g]iven the amount of money at stake, it may be harder, not easier, for a State to refuse highway funds [or 'funds needed to educate its children'] than to refrain from entering [business regulated by the Lanham Act]." Justice Scalia's rejoinder was that a "financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." But this does no more than restate long-established doctrine that, as we have seen, is singularly toothless. More promising for proponents of new judicial strictures on the spending power—but less subject to generating optimism because of its narrowly stated and conclusory quality—was Justice Scalia's final sentence: "In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of


223. See supra note 193.


225. Id. at 687 (majority opinion).

226. Id. at 697 (Breyer, J., dissenting).

227. Id. at 687 (majority opinion) (quoting South Dakota v. Dole, 483 U.S. 203, 211 (1987)).
the State[s] from otherwise lawful activity."\(^\text{228}\) Seemingly, this means only that there is a simpler rule for finding "coercion" when the "penalty" imposed on the states is a bar on engaging in desired conduct rather than just a loss of funds. While this edict would appear to be established by fiat rather than reason, it does not limit Congress's capacious ability to work its will by use of the purse. But if the Court intended instead to fashion a new definition of "coercion" (i.e., its "automatic existence") when the condition on the federal carrot is the stick of loss of sovereign immunity, then Congress's spending authority has been seriously curtailed.\(^\text{229}\)

**B. Foreign Affairs Power**

A final possibility for congressional enforcement of federal rights rests on the central government's powers over foreign affairs. Leading foreign relations authorities contend that the President and Senate can make policy for the whole nation on virtually any subject, regardless of the limited enumeration of federal powers. The Tenth Amendment presents no bar, they argue, because its reservation is inapplicable to the treaty power, which was expressly delegated to the federal government.\(^\text{230}\)

\(^{228}\) Id.; see also Meltzer, Overcoming Immunity, supra note 81, at 1381–85 (discussing some of the complexity involved in determining what constitutes "lawful activity").

\(^{229}\) It is also possible that conditional preemption could be used to convince states to waive their sovereign immunity. See Young, State Sovereign Immunity, supra note 65, at 61. While the Court has made clear that the federal government cannot commandeersate legislatures, see New York v. United States, 505 U.S. 144, 175 (1992), it has acknowledged that Congress can require the states to select between enacting a certain regulatory scheme and having federal supercession of the field: "[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation," id. at 167. Thus, it has been suggested that Congress could prohibit states from operating a railroad unless they agreed to waive sovereign immunity for tort suits by railroad employees. Young, State Sovereign Immunity, supra note 65, at 61. This approach need not be precluded by Florida Prepaid II, which may be read as only refusing to construe state participation in a realm governed by a federal regulatory scheme as a constructive waiver of sovereign immunity, rather than as barring all conditions on states (including explicit consents) that engage in a "permissible activity." For further perspective on this issue, see Meltzer, Five Authors, supra note 6, at 1065 n.211. Whether the Supreme Court would allow such "coercion" of states through conditional preemption is an open question, but we think it is doubtful in light of its overruling of the constructive waiver doctrine, initially outlined in Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964), in Florida Prepaid II, 527 U.S. at 680.

\(^{230}\) See, e.g., Restatement (Third) of the Foreign Relations Law of the United States §§ 302–303 (1986) ("Tenth Amendment . . . does not limit the power to make treaties or other agreements"); Louis Henkin, Foreign Affairs and the Constitution 190–93 (2d ed. 1996) (noting that Supreme Court has repeatedly rejected argument that treaties cannot deal with matters reserved to the states through constitutional scheme and Tenth Amendment).
Anything that the treaty power can touch upon is, by definition, excluded from the Tenth Amendment.\footnote{231}  

In Missouri v. Holland, the Court stated its agreement with this proposition.\footnote{232} Although federal laws regulating the hunting of migratory birds had previously been invalidated as beyond the scope of the Commerce Clause, a similar statute was subsequently upheld in Missouri because it had been enacted to implement a treaty with Great Britain protecting migratory birds.\footnote{233} Justice Holmes's opinion reasoned that the treaty power was not restricted in the same way as Congress's Article I, Section 8 powers because treaties concern "a national interest of very nearly the first magnitude," control over which had to be vested somewhere in the national government.\footnote{234} Subsequent expansion of the Commerce Clause during the New Deal period (and the relative absence of treaties of a regulatory nature) alleviated any need for the federal government to press the issue of limits on this approach. 

There has been much debate of late among scholars concerning the correctness of Justice Holmes's view and whether the treaty power should be subject to the Rehnquist Court's recent decisions, such as United States v. Lopez,\footnote{235} Printz v. United States,\footnote{236} and Seminole Tribe v. Florida,\footnote{237} which revive judicial protection of states' rights.\footnote{238} Without entering this discussion in any depth, there are several reasons to believe that federalism applies differently to the treaty power than it does to the Commerce Clause. First, the two powers are distinct, and there is no inherent reason why federalism ought to apply in the same way to both. As we have seen in Fitzpatrick v. Bitzer, for example, the Fourteenth Amendment is not sub-

\footnote{231} See Henkin, supra note 230, at 191 (stating that this argument is "clear and indisputable").
\footnote{233} Id. at 432. The treaty barred the hunting or capture of any of the birds protected by it, an action that the federal courts at the time had held lay outside Congress's Commerce Clause powers. See id. (citing lower court decisions).
\footnote{234} Id. at 435.
\footnote{236} 521 U.S. 898 (1997).
\footnote{237} 517 U.S. 44 (1996).
ject to the same restrictions as are imposed on the Commerce Clause by state sovereign immunity. This is especially true of the Treaty Clause which, like the Fourteenth Amendment, is located in an entirely different article of the Constitution than the Commerce Clause, and unlike both the Fourteenth Amendment and the Commerce Clause, contains no textual subject matter limitation. While commerce laws may deal only with matters of interstate commerce and laws enforcing the Fourteenth Amendment involve only the topics set out in Section 1, treaties encounter no stated restriction on their use.

If the Court were to adhere to its rationale in Missouri, then the case should serve as a means to trump state sovereign immunity. As a matter of original understanding, the Court’s current approach treats the Eleventh Amendment exclusively as an effort to reverse Chisholm v. Georgia and to restore the constitutional system to where it stood before that erroneous decision. If that earlier regime had already included sovereign immunity, it must have been comprehended within the Tenth Amendment as there is no other textual location for it in the Constitution as it existed before Chisholm. Therefore, if the Tenth Amendment does not apply to treaties, then as a matter of constitutional text and structure, it would seem that sovereign immunity would not either. Gerald Neuman, for example, has argued that Congress might have leeway to reenact the Religious Freedom Restoration Act as an effort to implement the International Covenant on Civil and Political Rights (ICCPR). Since the ICCPR was ratified as an Article II treaty, it might also provide the grounds for abrogating sovereign immunity in certain antidiscrimination areas regulated by the agreement. While in approving these treaties the President and Senate declared them to be nonself-executing, this does not render them meaningless as sources of authority, but rather leaves it to Congress to choose whether and how to implement them. Similar logic would allow the use of the treaty power to evade sovereign immunity as well as the limits on Congress’s powers under Section 5 of the Fourteenth Amendment.

Even if Missouri provides the national government with a freewheeling power to override state sovereign immunity on any subject affecting foreign affairs, its use might prove limited due to the shift toward the use of congressional-executive agreements in making international agreements. Such agreements are made as statutes, rather than treaties, and so formally would not be entitled to Missouri v. Holland’s benefits. Intellectual property provides an illustration. Peter Menell has argued that Congress should be able to take advantage of Missouri to avoid Florida Prepaid I

240. 2 U.S. (2 Dall.) 419 (1793).
in order to implement the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the North American Free Trade Agreement (NAFTA), and the World Intellectual Property Organization Copyright Treaty.\(^{243}\) TRIPS, for example, requires that governments guarantee that procedures for the enforcement of intellectual property rights will be "expeditious" and "effective," with damage remedies and judicial review.\(^{244}\) Congress could determine that to comply with these international obligations, the United States must ensure that these consequences apply to states as well as private persons that infringe intellectual property rights. The United States adopted both NAFTA and TRIPS, however, as congressional-executive agreements by simple majorities of both houses of Congress, rather than as Article II treaties.\(^{245}\) As one of us has observed elsewhere, since congressional-executive agreements are simply statutes, they should not be entitled to the benefits of Missouri, which applies only to treaties.\(^{246}\)

To be sure, there may be ways to avoid sovereign immunity in the foreign affairs context apart from Missouri v. Holland. This would be particularly important for intellectual property, which is not the subject of existing treaties (but of statutory congressional-executive agreements), or for the disabled, who are not protected by any current international agreement to which the United States is a party. The keystone decision is United States v. Curtiss-Wright, which reasoned that the foreign affairs power was an aspect of the sovereignty of the United States that directly passed from the British Crown, rather than ever being granted and regulated by the Articles of Confederation and the Constitution.\(^{247}\) Following this rationale, the Court subsequently upheld the ability of the President alone, acting through an executive agreement that did not undergo approval by the Senate or Congress, to preempt inconsistent state law.\(^{248}\) The Curtiss-Wright approach also supports the idea that, analogously to

\(^{243}\) Menell, supra note 218, at 1460–64.


\(^{246}\) John C. Yoo, Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements, 99 Mich. L. Rev. 757, 816–20, 822–25 (2001) (arguing that congressional-executive agreements should not be treated as interchangeable with treaties because that would allow lawmakers to avoid restrictions on their own power).

\(^{247}\) 299 U.S. 304, 318 (1936).

the Dormant Commerce Clause, state law that interferes with federal control over foreign affairs can be preempted, even in the absence of any formal regulation such as a treaty, statute, or executive agreement. Under that approach, the Court in Zschernig v. Miller invalidated a state inheritance law that discriminated against citizens of communist countries. While some had suggested that Zschernig was anomalous, in American Insurance Ass'n v. Garamendi, the Court recently rejected a state statute that interfered with presidential foreign policy on the resolution of Holocaust era claims against German companies, an executive strategy never formalized in any way.

We wish to stress that our discussion of the foreign affairs power as a basis for overriding state sovereign immunity remains speculative. As far as we are aware, the federal government has yet to use either the treaty power, in its Missouri v. Holland dimension, or its broader authority over international relations to force states to waive sovereign immunity. One of us has even raised doubts about the expansive reading of the treaty power on the part of academics. Nonetheless, existing doctrine clearly allows the federal government to regulate matters under the foreign affairs power that would normally be within the province of the states were only domestic affairs involved. This certainly raises the possibility that Congress could attempt to use the foreign affairs power to force states to waive their sovereign immunity even though they would otherwise be unable to in an area of purely domestic law.

C. Nonfederal Alternatives

Finally, there are state remedies that remain available in the face of the state sovereign immunity established under the federal Constitution. These state rules do not directly pursue national policy goals and they may not afford damages identical to those created by federal statutes. Nevertheless, the Eleventh Amendment only bars plaintiffs from recovering damages from nonconsenting states under federal law; it does not reach a state's decision to consent to relief against itself under its own law.

First, remedies may exist thanks to parallel state regulatory schemes. In both Kimel and Garrett, for example, the Court observed that state employment laws could provide the plaintiffs with a cause of action even when state sovereign immunity barred congressionally set damages against the state for violations of the ADEA and ADA. Every state has some type of statute providing remedies for age or disability discrimination. Along with the FLSA, most states also have their own minimum

252. See Landau, supra note 115, at 189 (discussing enforcement avenues for employee rights).
wage and maximum hour laws.\textsuperscript{253} Several studies have found, however, that these enactments generally do not match the coverage provided by federal standards—some states exempt their government as an employer, or have less generous minimum wages and maximum hours, or do not provide a full damages remedy or attorneys' fees.\textsuperscript{254} Similarly, in the area of intellectual property, plaintiffs may be able to pursue a variety of actions against a state that allegedly has infringed a patent. In \textit{Florida Prepaid I}, for example, the Court observed that, under the Florida constitution's version of the Takings Clause, plaintiffs could claim inverse condemnation against the state for infringing intellectual property rights created by federal law.\textsuperscript{255} As the Court recognized,\textsuperscript{256} however, these state avenues are sometimes procedurally more difficult to navigate than their federal counterparts and do not provide the uniformity of a single national standard.\textsuperscript{257}

Second, state common law may provide further possibilities for recourse. Thus, Peter Menell has shown how intellectual property owners could sue state infringers under a variety of common law torts, such as conversion, unjust enrichment, misappropriation, unfair competition, deceit, and misrepresentation.\textsuperscript{258} While states generally enjoy a right of sov-

\textsuperscript{253} See id. at 191.

\textsuperscript{254} See id. at 193–94 (noting that state laws often do not afford same rights as national laws); see also Ruth Colker & Adam Milani, The Post-Garrett World: Insufficient State Protection Against Disability Discrimination, 53 Ala. L. Rev. 1075, 1083 (2002) (discussing lack of enforcement mechanisms provided by state law).


\textsuperscript{256} Id. at 644.

\textsuperscript{257} The matter of national symmetry was of particular significance in \textit{Florida Prepaid I} (Congress having provided for all patent appeals to be heard by a special Court of Appeals for the Federal Circuit), and even the Rehnquist majority agreed with the House Report that "[t]he need for uniformity in the construction of patent law is undoubtedly important." Id. at 645. This too, however, would appear to be within Congress's province despite the Court's sovereign immunity emphasis, assuming a constitutionally proper exercise of federal regulatory power apart from Eleventh Amendment constraints. Id.

Although the issue has never been authoritatively resolved, there is authority for the proposition that Congress may give an inferior federal court appellate jurisdiction over the decision of the highest court of a state—at least where the United States Supreme Court may thereafter review the decision of the inferior federal court.

Meltzer, Overcoming Immunity, supra note 81, at 1356 n.93. See generally James E. Pfander, An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After \textit{Seminole Tribe}, 46 UCLA L. Rev. 161, 213–22 (1998) (arguing that Congress has authority to authorize lower courts to exercise appellate jurisdiction over state court decisions); Preble Stolz, Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity, 64 Cal. L. Rev. 943, 945–48 (1976) (same). In addition, it has also been suggested that Congress might "create a new mechanism by which litigants in state court could seek certification of issues of federal law directly to the Court of Appeals for the Federal Circuit." Meltzer, Overcoming Immunity, supra note 81, at 1357 n.93.

\textsuperscript{258} Menell, supra note 218, at 1417.
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259. Id. at 1418.

260. Id. at 1425 & nn.119–120 (collecting sources); see also Joanne C. Brant, The Ascent of Sovereign Immunity, 83 Iowa L. Rev. 767, 801 (1998) (discussing Ohio’s sovereign immunity scheme).

261. Menell, supra note 218, at 1425–26 & n.121 (collecting sources).

262. Id. at 1426–27; see also Brant, supra note 260, at 801–03 (noting remedies available in federal court compared to state court).

263. Menell, supra note 218, at 1428–32.


266. At least fourteen states filed an amicus brief in Garrett opposing state sovereign immunity in that context. See Landau, supra note 115, at 207.
states may waive their immunity, although the waiver must be explicit since the Florida Prepaid II Court overruled the notion of constructive waiver of sovereign immunity by mere participation in a regulatory scheme. Nonetheless, anecdotal evidence suggests that state institutions do not seek to violate federal law to reduce state liabilities and that state government generally seeks to comply with national rules.

This is not to say that states will not periodically choose to claim sovereign immunity. An important parallel may be found under the Federal Tort Claims Act (FTCA). The national government, one would expect, would be subject to the same concerns about democratic accountability as the states. Nonetheless, while the FTCA waives federal sovereign immunity for many garden variety torts, it continues to preserve it for several significant categories of activity. The most notable exception is for torts caused in the exercise of a discretionary function, those thought not to involve the day-to-day operations of the federal government, such as the driving of post office trucks and actions in its proprietary capacity, but instead concern policymaking decisions. Similarly, states may not wish to waive their immunity in areas where they wish to preserve a similar core sphere of authority.

CONCLUSION

As we write, the Rehnquist Court has drawn to a close. The Court’s academic observers have probably reserved their toughest criticism for the Rehnquist majority’s jurisprudence on state sovereign immunity. Scholars have attacked the Court’s grant of this protection to states from damages as wrong, unconstitutional, anachronistic, incoherent, and justifying resistance.

This Essay has sought to show that these challenges have exaggerated the impact and importance of the Eleventh Amendment cases. This is not to deny that revived judicial security for states’ rights became the signature issue of the Rehnquist Court. Nor have we sought to undertake an original examination of whether the majority has properly interpreted either the Eleventh Amendment or the principle of sovereign immunity. Rather, we have sought to examine whether the subject deserves the enormous importance that many, including a number of commentators and several Justices, have given it. We conclude that it does not. A series

271. Id. § 2674.
272. Id. § 2680(a).
of doctrines, both internal and external to the Eleventh Amendment, allows the federal government to achieve its policy objectives. Preventing private plaintiffs from suing states for retrospective money damages poses, at most, a minor barrier to national goals when damages actions against state officers and injunctive actions realistically against state governments are readily available to effectively accomplish all federal ends, and when the national political branches may widen the liability of state officers, or completely overcome sovereign immunity by joining a private lawsuit or using other federal authority such as the Spending or Treaty Clauses or foreign affairs power.

Overstatement of the effects of the Eleventh Amendment cases has obscured more interesting questions about the subject. If state sovereign immunity has such little practical effect, why has the Court invested so much of its time and resources in the Seminole Tribe line of rulings? Although the matter is well beyond the scope of this Essay, it may be that the Court's real lodestar here is not federalism, but separation of powers. That is, perhaps the Court is not so much interested in protecting states as it is (a) in centralizing the enforcement of federal law in the executive branch and (b) in pressing Congress to make clear cost-benefit decisions on the use of lawsuits to enforce federal policy. Seminole Tribe and its progeny have the effect of giving the administration greater discretion to decide whether states should be liable for money damages for violations of federal law, thus increasing democratic accountability, and of prodding the legislative branch to essentially pay the states to waive sovereign immunity. Whether these consequences of the Court's approach to the Eleventh Amendment are beneficial or detrimental may be the real question that should be debated.