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THE SOVEREIGN IMMUNITY OF STATES IN THEIR OWN COURTS

Richard H. Seamon*

I. INTRODUCTION

The United States Supreme Court decision in *Seminole Tribe v. Florida*¹ makes it important to determine when, if ever, Congress can compel state courts to hear private lawsuits against their own state. The *Seminole Tribe* Court held that Congress cannot use its Article I powers to authorize private lawsuits brought against unconsenting states in the lower federal courts.² The Supreme Court explained that the Eleventh Amendment bars such suits and Congress cannot use its Article I powers to abrogate the Eleventh Amendment.³ Yet the Court has reaffirmed Congress's power under Article I to impose substantive obligations on the states, such as an obligation to pay its employees a minimum wage.⁴ After *Seminole Tribe*, if Congress wants these Article I obligations to be enforced through private lawsuits, it must rely on state courts. The unresolved question, now before the Court, is whether the states have sovereign immunity in their own courts from private actions based on Article I statutes.⁵

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¹ 517 U.S. 44 (1996).

² *Id.* at 72-73.

³ *See id.* at 73-76 (citing U.S. CONST. amend. XI ("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.")).

⁴ *See* *New York v. United States*, 505 U.S. 144, 160 (1992) (finding it unnecessary to "revisit" *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and other decisions that upheld federal statutes enacted under Article I "subject[ing] state governments to generally applicable laws").

⁵ *See* *Alden v. Maine*, 715 A.2d 172 (Me. 1998), *cert. granted*, 119 S. Ct. 443 (1998) (No. 98-436); *see also infra* notes 39-43 and accompanying text (describing conflict among courts on this issue). Whether Congress can require state courts to hear private, federal lawsuits

This Article concludes that, under Supreme Court precedent, the answer is yes; states do have such immunity. This conclusion rests primarily on the

against their own state is one aspect of the broader, unsettled question of the extent to which Congress can compel state courts to enforce federal law. See, e.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 165 (2d ed. 1990) ("[T]here exists confusion about whether the Constitution provides the states with a right to protect their courts from being overburdened by congressionally-imposed obligations to adjudicate federal cases."); CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 45, at 271 (4th ed. 1983) ("The Supreme Court has not yet considered whether Congress can require state courts to entertain federal claims when there is no analogous state-created right enforceable [sic] in the state courts."); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1212 (1988) ("The lurking constitutional question . . . is whether Congress can require the state courts to take jurisdiction of federal statutory causes of action when they would not entertain comparable state law cases."); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 516 (1977) [hereinafter Field, *Part One*] (stating there is "little agreement" about the question "Can Congress, legislating under article I, remove a state's immunity from suit in state court, without the state's consent?"); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1044 (1983) [hereinafter Fletcher, *A Historical Interpretation*] (Court has not resolved whether "a state could be required to defend a private suit in its own state courts even though the eleventh amendment protects it against such a suit in federal court."); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 242 n.113 (1997) (describing "state courts' obligations to entertain causes of action created by federal law" as "a very subtle problem"); Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 503-04 (1997) [hereinafter Jackson, *Potential Evisceration*] (stating "the question of whether state courts must entertain certain suits against states that are barred from federal court by the Eleventh Amendment is not entirely clear"); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 57-58 (stating "[n]o [Supreme Court] decision, however, holds unambiguously that the states may not invoke sovereign immunity to resist enforcement of federal law in their own courts"); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 595 n.170 (1994) [hereinafter Pfander, *Rethinking*] (noting that "[s]cholars today disagree as to whether the state courts owe a positive duty to entertain federal claims against the state"); Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 312 (1976) (describing as "confused" the "issue of a state court's 'obligation' to hear federal causes of action when it does not wish to do so"); Terrance Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 203 (describing as "open question . . . whether [a state court] must provide a forum for enforcement of [a] federal claim even when it does not entertain similar suits arising under local law"); Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551, 1551 (1960) ("Historically, the extent to which states are obliged to enforce federal rights of action has been unclear.").

"anticommandeering principle" of the Tenth Amendment,⁶ which the Court applied in *New York v. United States*⁷ and *Printz v. United States*.⁸ The anticommandeering principle prohibits Congress from using its Article I powers to commandeer the machinery of state government to achieve federal ends.⁹ The thesis of this Article is that, although *New York* and *Printz* concerned congressional commandeering of state legislatures and executive officials, the anticommandeering principle bars the commandeering of a state's judiciary as well.

The Court in *New York* and *Printz* observed that the Supremacy Clause sometimes obligates state courts to enforce federal law.¹⁰ In support of that observation, the Court cited a line of cases the best-known of which is *Testa v. Katt*.¹¹ Commentators dispute the meaning of *Testa* and its progeny.¹² As this author understands the *Testa* cases, they construe the Supremacy Clause of the Constitution (1) to invalidate state laws that permit or require state courts to discriminate against federal claims; and (2) to require state courts to hear federal claims if the courts have power to do so under the state law that remains intact after such discriminatory state laws are disregarded. The *Testa* cases do not construe the Clause as otherwise expanding the jurisdiction of state courts. Thus, the Clause does not compel a state court to hear a private, federal claim if the court lacks power to do so under neutral state law.

Under this reading of *Testa*, the Supremacy Clause does not invalidate nondiscriminatory state laws that give the state immunity from private actions in their own courts. Thus, the Clause would not invalidate a state law that barred *all* private actions against the state. The Clause could come into play, however, if a state waived immunity in its own courts from certain private claims. In that situation, the Clause would require a state court to hear any federal claim that arose from the same facts as did claims as to which the state had waived its immunity. Suppose, for example, a state authorized a former employee to sue it in state court on the ground that his or her discharge

⁶ U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

⁷ 505 U.S. 144 (1992). See also *id.* at 202 (White, J., concurring in part and dissenting in part) (describing majority opinion as articulating an "anticommandeering" principle).

⁸ 117 S. Ct. 2365 (1997).

⁹ See *id.* at 2380; *New York*, 505 U.S. at 166.

¹⁰ See *Printz*, 117 S. Ct. at 2370-72; *New York*, 505 U.S. at 178-79.

¹¹ 330 U.S. 386 (1947), cited in *Printz*, 117 S. Ct. at 2381; *New York*, 505 U.S. at 178.

¹² See *infra* notes 78-80 and accompanying text.

constituted a breach of contract under state law. In such a suit, the Supremacy Clause would require a state court to hear a claim that the discharge also violated federal law. The Clause would not, however, require the state court to hear federal claims against the state that did not arise out of the discharge.

New York and *Printz* establish that Congress cannot use Article I to require the state courts to hear claims that the Supremacy Clause does not require them to hear. The Court in those cases determined that congressional commandeering of state government causes three harms to the system of dual sovereignty established by the Constitution. Congressional commandeering (1) diverts state resources from matters of local concern; (2) interferes with the power of state citizens to set an agenda for state legislative action; and (3) blurs the lines of political accountability between state and federal officials. All three harms could occur if Congress could compel state courts to hear federal claims that the courts lacked power to hear under neutral state law. The harms would be particularly acute if Congress could compel state courts to hear private claims against their own state without its consent.

Whereas this Article traces the states' immunity in their own courts to the Tenth Amendment, Professor Carlos Vázquez has traced it to the Eleventh Amendment.¹³ This Article explains that a connection exists between the states' Tenth Amendment immunity in their own courts and their Eleventh Amendment immunity in federal court.¹⁴ The connection is that both the Tenth and Eleventh Amendments, as construed by the Supreme Court, protect the system of dual sovereignty. That common underpinning probably explains why the Court has looked to the states' immunity in their own courts to determine their immunity in federal court, and vice versa. Nonetheless, the states' immunity in the two forums is not wholly congruent. For example, a state can extend its state-court immunity to its cities and counties. In contrast, cities and counties lack Eleventh Amendment immunity in federal court.

¹³ Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

¹⁴ By "Eleventh Amendment immunity," I mean the constitutional immunity that states enjoy in private actions brought in a lower federal court. Beginning in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court construed that immunity to extend beyond that described in the Eleventh Amendment. The Court has justified that extension on the ground that the states' sovereign immunity reflects one of the "postulates" of the Constitution, see *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934), of which the Eleventh Amendment is "but an exemplification," *In re New York*, 256 U.S. 490, 497 (1921).

The states' immunity in their own courts is limited by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause requires states to provide adequate procedures when they deprive someone of life, liberty, or property. Those procedures may well have to include remedies in state court against state officers who cause wrongful deprivations. Furthermore, to enforce the Due Process Clause, Congress may well have power in certain circumstances to compel state courts to hear actions directly against their own state.

This Article proceeds in five parts. Part II describes why the *Seminole Tribe* decision has made it important to understand Congress's power to compel state courts to hear private, federal claims against their own state. It includes a discussion of the division among the courts on this issue. Part III argues that Congress lacks the power to exert such compulsion under Article I because of the anticommandeering principle of the Tenth Amendment. Part IV explores the connection between the states' Tenth Amendment immunity in their own courts and their Eleventh Amendment immunity in federal court. Part V discusses the extent to which the Fourteenth Amendment limits the states' immunity in their own courts. Part VI concludes by discussing the implications of accepting the thesis that states have an immunity rooted in the Tenth Amendment from private lawsuits in their own courts alleging rights under Article I statutes.¹⁵

¹⁵ Other commentators have addressed whether the Constitution requires, or Congress can force, state courts to hear private, federal claims against their own state. See Daniel J. Cloherty, *Exclusive Jurisdiction and the Eleventh Amendment: Recognizing the Assumption of State Court Availability in the Clear Statement Compromise*, 82 CAL. L. REV. 1287, 1313-15 (1994); Field, *Part One*, *supra* note 5, at 546-49; William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1286 n.129 (1989) [hereinafter Fletcher, *A Reply to Critics*]; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1937 & n.256 (1983); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1151 (1984); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989); Redish & Muench, *supra* note 5, at 340-46; Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998); Vázquez, *supra* note 13; Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CAL. L. REV. 189 (1981); see also Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 41-46 (summarizing author's view that history shows state courts traditionally have been understood to be unable, or at least not compelled, to hear certain federal claims); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 111-25 (1997) (discussing 19th-century Supreme Court decisions suggesting

II. CURRENT LAW ON THE IMMUNITY OF STATES IN THEIR OWN COURTS

Under current law, Congress can use Article I to impose substantive obligations on the states but not to authorize private enforcement of those obligations in federal court. Congress may well respond to this situation by providing for private enforcement actions against the states in their own courts. It is unsettled whether Congress can force the state courts to entertain such actions without the state's consent. That issue has divided the lower courts and is now before the United States Supreme Court.¹⁶

In *Seminole Tribe*, the Court held that Congress cannot use Article I to open the doors of the federal courts to people who want to sue an unconsenting state.¹⁷ There, the Court struck down a federal law authorizing Native American tribes to sue states in federal court to compel them to negotiate about gambling on tribal reservations.¹⁸ The federal law was based on the Commerce Clause.¹⁹ The Court held that Congress cannot use the

state courts were sometimes obligated to hear actions against their officers for constitutional violations). Of these commentators, only Professor Vázquez has argued, as I do, that states have a constitutional immunity from federal claims in their own courts. He traces that immunity to the Eleventh Amendment; however, whereas I trace it to the Tenth Amendment. *See infra* notes 256-365 and accompanying text (discussing this point of disagreement and its significance). Although other commentators have referred to the possibility that the Tenth Amendment supports state-court immunity from federal claims, I believe this is the first detailed analysis of the issue. *Cf.* RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 477 (4th ed. 1996) [hereinafter HART & WECHSLER 4th ed.] (questioning whether *New York* "establish[es] Congress's power to impose jurisdiction on otherwise competent state courts . . . where necessary and proper to implement federal policy"); REDISH, *supra* note 5, at 166-67 ("Any search for a constitutional state enclave [from an obligation by its courts to enforce federal law] logically begins with the tenth amendment . . ."); *id.* at 168-69 (concluding that Tenth Amendment does not create such an enclave); Fletcher, *A Historical Interpretation*, *supra* note 5, at 1111-12 (proposing that inquiry into general issue of state sovereign immunity "may be based on the tenth amendment"); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 99 n.394 (1988) [hereinafter Jackson, *State Sovereign Immunity*] ("forcing state courts to adjudicate [certain federal] claims poses federalism problems"); Meltzer, *supra* note 5, at 59-60 ("the anticommandeering principle might be seized upon to raise doubts about Congress's constitutional power to require the states' courts to enforce federal law against the states").

¹⁶ *See Alden v. Maine*, 715 A.2d 172 (Me. 1998), *cert. granted*, 119 S. Ct. 443 (1998) (No. 98-436).

¹⁷ *See Seminole Tribe v. Florida*, 517 U.S. 44, 57-73 (1996).

¹⁸ *See id.* at 45-47 (describing Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994)).

¹⁹ *See id.* at 47 (stating that the Indian Gaming Regulatory Act "was passed by Congress

Commerce Clause to abrogate the states' Eleventh Amendment immunity from private actions brought in federal court.²⁰ At the same time, the Court reaffirmed Congress's power to abrogate the Eleventh Amendment under Section 5 of the Fourteenth Amendment.²¹ The Court reasoned that, unlike the Commerce Clause, the Fourteenth Amendment postdated the Eleventh Amendment and "operated to alter the pre-existing balance between state and federal power achieved by Article III [of the Constitution] and the Eleventh Amendment."²² As the dissent in *Seminole Tribe* observed, this reasoning appears to preclude Congress from using any of its Article I powers to abrogate the Eleventh Amendment.²³

Although Congress can no longer use Article I to authorize private suits

under the Indian Commerce Clause, Art. I, § 8, cl. 3"); see also U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause) ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

²⁰ See *Seminole Tribe*, 517 U.S. at 56-75.

²¹ See *id.* at 65-66; see also U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce this article by appropriate legislation.").

²² *Id.*

²³ See *id.* at 77-78 & n.1 (Stevens, J., dissenting); see also *id.* at 73 ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."); *Close v. New York*, 125 F.3d 31, 38 (2d Cir. 1997) (joining "the long list of courts that have concluded, after *Seminole*, Congress cannot abrogate the States' Eleventh Amendment sovereign immunity pursuant to any Article I power"); see also *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998) (holding that Congress lacked power under War Powers to abrogate Eleventh Amendment immunity), *vacated in relevant part as superseded by statute*, 165 F.3d 593 (7th Cir. 1999). But see *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 n.9 (1st Cir. 1996) (holding that, notwithstanding *Seminole Tribe*, Congress had power to abrogate Eleventh Amendment using its War Powers). Although *Seminole Tribe* appears to bar Congress's use of Article I to authorize private, federal-court actions against unconsenting states, the Court's decision does not appear to bar Congress's use of Article I to encourage the states to consent to such actions. For example, Congress presumably can still use its Spending Power to obtain such consent, by conditioning grants of federal money to the states on their consenting to suits associated with the use of that money. See U.S. CONST. art. I, § 8, cl. 1 (Spending Clause); Kit Kinports, *Implied Waiver After Seminole Tribe*, 82 MINN. L. REV. 793, 822-27 (1998) (arguing this use of Spending Clause survives *Seminole Tribe*); see also Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 102 (1996) (describing *Seminole Tribe* as holding that "Congress lacks authority under its Article I, Section 8 regulatory powers to subject unconsenting states to suits initiated in federal court by private persons") (emphasis added). It is also possible that, even after *Seminole Tribe*, the Eleventh Amendment would not bar private, federal court suits brought directly under provisions in Article I that specifically forbid certain activities by the states, such as the coining of money. See James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1330 (1998) [hereinafter Pfander, *History*] (discussing historical support for this view).

against the states in federal court, Congress can still use Article I to impose substantive obligations on the states. In *Garcia v. San Antonio Metropolitan Transit Authority*,²⁴ the Court upheld the application of the federal minimum-wage and overtime law to state and local governments against a Tenth Amendment challenge.²⁵ The Court treated the federal law, the Fair Labor Standards Act²⁶ (FLSA), as an exercise of the Commerce Clause.²⁷ In more recent decisions, the Court has said *Garcia* sustained Congress's power under Article I to subject states to "generally applicable" laws, which also regulate private conduct.²⁸ With that characterization in mind, the Court has declined to "revisit" *Garcia* and other decisions upholding Congress's power under Article I to subject states to generally applicable laws.²⁹

²⁴ 469 U.S. 528 (1985).

²⁵ See *id.* at 555-57.

²⁶ 29 U.S.C. §§ 201-219 (1994).

²⁷ See *Garcia*, 469 U.S. at 532, 537, 547-48 (discussing Congress's Commerce Clause power).

²⁸ See *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997) (distinguishing "a federal law of general applicability" from one the object of which is "to direct the functioning of the state executive"); *New York v. United States*, 505 U.S. 144, 160 (1992) (declining to "revisit" *Garcia* and other cases upholding Congress's power under Article I to enact "generally applicable laws" subjecting a state "to the same legislation applicable to private parties"); *id.* at 177 (distinguishing case before it from cases addressing "whether the Tenth Amendment limits the ability of Congress to subject state governments to generally applicable laws"); *id.* at 178 (even if "a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, . . . [n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate"); *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988) (holding federal statute did not violate Tenth Amendment because it was a "generally applicable federal regulation[]") (internal quotation marks omitted); see also *FERC v. Mississippi*, 456 U.S. 742, 759 (1982) (distinguishing issue of "extent to which state sovereignty shields the States from generally applicable federal regulations" from issue of permissibility of federal government's "attempt[] to use state regulatory machinery to advance federal goals").

²⁹ See *New York*, 505 U.S. at 160 (declining to "revisit" *Garcia* and other cases upholding Congress's power under Article I to enact "generally applicable laws" subjecting a state "to the same legislation applicable to private parties"). *Seminole Tribe* was not the first Supreme Court decision to open a gap between Congress's imposition of substantive obligations on the states and Congress's authorization of private actions to enforce those obligations against the states. In *Employees of Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), the Court held that, although Congress intended in the FLSA to regulate the wages of state employees like the plaintiffs, Congress had not made sufficiently clear an intention to authorize private suits against the states by those employees for violations of the FLSA. See *id.* at 283-88; see also *Fletcher, A Historical Interpretation*, *supra* note 5, at 1112 ("It is one thing for the federal government to regulate state conduct by creating certain

The fallout of *Seminole Tribe* may well lead Congress to use state courts for private enforcement of the "generally applicable" federal requirements that, under *Garcia*, Congress can still impose on the states under Article I.³⁰ In the wake of *Seminole Tribe*, the lower federal courts have held that states are immune from private actions under the FLSA in those courts.³¹ The lower federal courts have also relied on *Seminole Tribe* to strike down provisions authorizing private, federal-court actions against the states under the Copyright Act and the Bankruptcy Code.³² These decisions cast doubt on the validity of private enforcement of other federal statutes in federal court, such

federal obligations It may be another for it to create private federal causes of action and particular remedies to enforce these obligations"). Unlike *Seminole Tribe*, which was a case about congressional *power* to authorize such suits, *Employees* concerned congressional *intent* to authorize such suits. Nonetheless, the Court's insistence, in *Employees*, on a clear statement of congressional intent arguably foreshadowed the Court's holding in *Seminole Tribe*. Cf. Martha A. Field, *The Eleventh Amendment & Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203, 1241 (1978) [hereinafter Field, *Other Doctrines*] ("unarticulated doubts concerning congressional power contribute to holdings grounded upon an absence of congressional intent").

³⁰ See, e.g., Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315 (amending the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-04, 4311-18, 4321-26, 4331-33 (1994 & Supp. 1996), to permit private actions to enforce Article I statute to be brought exclusively in state court); see also *Velasquez v. Frapwell*, 165 F.3d 593 (7th Cir. 1999) (discussing this amendment). See generally John T. Cross, *Intellectual Property and the Eleventh Amendment After Seminole Tribe*, 47 DEPAUL L. REV. 519, 520 (1998) ("Although Congress may still invoke Article I to impose substantive liability on the states, *Seminole Tribe* forces it to turn to state courts for the actual adjudication of most lawsuits brought against state defendants."); *Meltzer*, *supra* note 5, at 57-62 (discussing "possibility" after *Seminole Tribe* that Congress can "rely upon the state courts to require state governments to provide retrospective relief authorized by federal law"); Monaghan, *supra* note 23, at 126 (observing that, in light of *Seminole Tribe*, "the federal government may come to rely upon state courts" to enforce some federal rights).

³¹ See *Powell v. Florida*, 132 F.3d 677, 678 (11th Cir. 1998) (holding state could not be sued in private, federal-court action under FLSA and citing decisions of seven other circuits so holding).

³² See *Chavez v. Arte Publico Press*, 157 F.3d 282, 287-91 (5th Cir. 1998) (holding Congress could not abrogate state's Eleventh Amendment immunity from private suit for copyright infringement); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1146-47 (4th Cir. 1997) (holding Congress could not abrogate Eleventh Amendment under the Bankruptcy Code). Cf. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343, 1347-55 (Fed. Cir. 1998), *cert. granted*, 119 S. Ct. 790 (1999) (No. 98-531) (holding federal statute authorizing patent infringement suits in federal court against states was valid abrogation of Eleventh Amendment, because it fell within Section 5 of Fourteenth Amendment).

as certain environmental laws enacted under Article I that apply to state and private entities alike.³³ If these decisions are correct and if Congress wants these Article I statutes to be enforced against the states through private actions,³⁴ it will have to provide for the actions to be brought in state courts.³⁵

Congress's power to do that is unsettled. The Court often said in nineteenth and early twentieth century decisions that states are immune from lawsuits in their own courts.³⁶ In more recent decisions, however, the Court has hinted that unconsenting states might be privately sued on federal claims

³³ See, e.g., ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY 373 (2d ed. 1998) (discussing "*Seminole's* holding in its environmental law context"); Dennis A. Whitaker, *Interdisciplinary Aspects of Seminole Tribe v. Florida: Environmental Law*, 23 OHIO N.U. L. REV. 1441 (1997).

³⁴ While private suits are an important means of enforcing statutory obligations, they are not the only means. For example, the United States can bring a federal-court action against a state to enforce its substantive obligations. See *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 285 (1973) (although federal statute could not be enforced against states by private lawsuits in federal court, statute could be enforced by enforcement actions against states brought by United States). Such actions are not barred from federal courts by the Eleventh Amendment. See, e.g., *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 643-45 (1892). This Article is agnostic on the question whether the United States could bring an action against an unconsenting state in the state's own courts to enforce an Article I statute.

³⁵ This Article argues the Tenth Amendment prohibits Congress from using its Article I powers to authorize private actions against a state in its own courts, if those courts lack power under neutral state law to hear the action. This Article does not explore Congress's power to compel the courts of State A to hear such actions against the courts of State B. The Court has suggested, however, that the Tenth Amendment also limits that exercise of Congress's Article I powers. See *Nevada v. Hall*, 440 U.S. 410 (1979), discussed *infra* note 247.

³⁶ See, e.g., *Palmer v. Ohio*, 248 U.S. 32, 34 (1918) ("The right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States."); *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883) ("It may be accepted as a point of departure unquestioned, that neither a state nor the United States may be sued as defendant in any court in this country without their consent . . ."); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (upholding dismissal of private suit against state in its own court alleging constitutional violation, stating that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission"). In addition to the foregoing cases, in which the Court has specifically said states cannot be sued in their own courts, the Court has described the states' immunity in terms that do not limit that immunity to federal court. See, e.g., *In re New York*, 256 U.S. 490, 497 (1921) ("a State may not be sued without its consent"); *Briscoe v. President of Bank of Commonwealth of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1837) ("No sovereign state is liable to be sued, without her consent."). Cf. *Hans v. Louisiana*, 134 U.S. 1, 16 (1890) ("The suability of a State, without its consent, was a thing unknown to the law.").

in their own courts.³⁷ The Court has never squarely addressed Congress's power to force a state court to hear private claims against its own state without the state's consent.³⁸

In the absence of guidance from the Court, the highest state courts have disagreed whether state courts must hear private actions against their own state to enforce Article I statutes despite the state's sovereign immunity under state law. Most recently, the Maine Supreme Court, in *Alden v. Maine*,³⁹ held that Maine is immune from private suits under the FLSA brought in its own courts.⁴⁰ That holding squarely conflicts with a recent decision by the Arkansas Supreme Court holding that courts in that state must hear private FLSA actions despite the state's sovereign immunity.⁴¹ The holding in *Alden* also conflicts with suggestions by several federal courts of appeals that state courts must entertain private FLSA actions.⁴² These conflicting views in post-*Seminole Tribe* decisions reflect a division that pre-dates *Seminole Tribe*.⁴³

³⁷ See *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 207 (1991) (stating that when Congress clearly expresses its intention that a federal statute be enforceable against a State in state court, "the Supremacy Clause makes that statute the law in every State, fully enforceable in state court"); see also *Reich v. Collins*, 513 U.S. 106, 109-10 (1994) (asserting, in dicta, that state court's denial of private claim for recovery of state taxes collected in violation of federal law was itself a violation of Fourteenth Amendment, "the sovereign immunity that States traditionally enjoy in their own courts notwithstanding").

³⁸ See, e.g., Meltzer, *supra* note 5, at 57-58 (stating that "[n]o [Supreme Court] decision . . . holds unambiguously that the states may not invoke sovereign immunity to resist enforcement of federal law in their own courts"); see also *supra* note 5. Cf. *Howlett v. Rose*, 496 U.S. 356 (1990) (holding state court was obligated to hear federal claim against public school district when it entertained similar state-law claims and when school district was not shown to share state's Eleventh Amendment immunity), discussed *infra* notes 327-30 and accompanying text.

³⁹ 715 A.2d 172 (Me. 1998), *cert. granted*, 119 S.Ct. 443 (1998) (No. 98-436).

⁴⁰ *Id.* at 175.

⁴¹ See *Jacoby v. Arkansas Dep't of Educ.*, 962 S.W.2d 773 (Ark. 1998), *petition for cert. filed*, 67 U.S.L.W. 3024 (U.S. June 24, 1998) (No. 98-4); see also ARK. CONST. art. 5, § 20 ("The State of Arkansas shall never be made a defendant in any of her courts.").

⁴² See, e.g., *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996), *modified*, 107 F.3d 358 (6th Cir. 1997).

⁴³ Compare *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422, 424-32 (Mass. 1991) (holding Eleventh Amendment barred private action against state in its own court alleging claims under federal Jones Act, general admiralty law, and state law, except to extent that state waived its immunity in state tort claims act); *Maloney v. New York*, 144 N.E.2d 364, 365-67 (N.Y. 1957) (holding sovereign immunity barred private action against state in its own court under federal Jones Act); *Mossman v. Donahey*, 346 N.E.2d 305, 307-15 (Ohio 1976) (holding Eleventh Amendment barred private action against state in its own court to enforce FLSA); and *Gross v. Washington State Ferries*, 367 P.2d 600, 602-05 (Wash. 1961) (holding sovereign

Recently, the United States Supreme Court has granted certiorari in *Alden* to resolve the issue.⁴⁴ This Article proposes the resolution that the author believes is most faithful to the Court's precedent.⁴⁵

immunity barred private action against state toll bridge authority in state court alleging claims under federal Jones Act and general maritime law), with *Clover Bottom Hosp. & Sch. v. Townsend*, 513 S.W.2d 505, 507 (Tenn. 1974) (holding sovereign immunity did not bar private action against state in its own court under FLSA). See also *Ribitzki v. School Bd. of Highlands County*, 710 So. 2d 226 (Fla. Dist. Ct. App. 1998) (holding Eleventh Amendment did not bar private action under FLSA against school board); *Wepler v. School Bd. of Dade County*, 311 So. 2d 409 (Fla. Dist. Ct. App. 1975) (holding contra); *Bunch v. Robinson*, 712 A.2d 585, 588-96 (Md. Ct. Spec. App. 1998) (same); *Lyons v. Texas A & M Univ.*, 545 S.W.2d 56, 58-59 (Tex. App. 1976) (holding sovereign immunity barred private action against state university in state court under federal Jones Act, general maritime law, and state tort claims act). Cf. *Board of Comm'rs v. Splendour Shipping & Enters. Co.*, 255 So. 2d 869 (La. Ct. App. 1971) (holding sovereign immunity barred admiralty tort suit in state court against state agency), *rev'd*, 273 So. 2d 19 (La. 1973) (holding state boards and agencies were not entitled to sovereign immunity and casting doubt on validity of immunity doctrine).

⁴⁴ *Alden v. Maine*, 119 S. Ct. 443 (1998) (No. 98-436). The questions presented by the petition for certiorari in *Alden* are:

1. May a state court refuse to entertain a federal statutory private party cause of action against a State or a state agency—such as the present state employee action against the State of Maine under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*—on the basis of state sovereign immunity?
2. If a state court may properly refuse to entertain such a federal statutory private party action on the basis of state sovereign immunity in certain circumstances but not in others, may a state court do so in the circumstance in which that court entertains analogous state statutory actions?

Petition for a Writ of Certiorari at i, *Alden v. Maine*, 715 A.2d 172 (Me. 1998), *cert. granted*, 119 S. Ct. 443 (1998) (No. 98-436). The Court could decide the case without resolving either of these issues. The action in *Alden* was brought in the Superior Court of Maine under a provision in the FLSA that authorizes private actions to be brought "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b) (1994). One could argue that Section 216(b) does not authorize this action, because the Superior Court of Maine was not "competent" to hear an action barred by the state law of sovereign immunity. See Brief of the National Conference of State Legislatures et al., as *Amici Curiae* In Support of Respondent at 6 n.6, *Alden v. Maine*, 715 A.2d 172 (Me. 1998), *cert. granted*, 119 S. Ct. 443 (1998) (No. 98-436).

⁴⁵ In the interest of full disclosure, the author notes that he has filed a brief *amicus curiae* in support of respondent (the State of Maine) in *Alden*, on behalf of various state and local government organizations and officials.

III. THE APPLICABILITY OF THE ANTICOMMANDEERING PRINCIPLE TO PRIVATE ACTIONS AGAINST STATES IN THEIR OWN COURTS

This Part concludes that the Tenth Amendment bars Congress from using Article I to compel state courts to hear private actions that the Supremacy Clause would not require the courts to hear. It further concludes that the Supremacy Clause does not compel a state court to hear a private action against its own state if the state court lacks power to hear that action under neutral state law—*i.e.*, state law that does not discriminate against federal claims, including a state's law of sovereign immunity.

The first conclusion follows from Supreme Court decisions holding that the Tenth Amendment bars Congress from “commandeering” state government.⁴⁶ So far, the Court has applied the anticommandeering rule to strike down only federal laws that commandeered state legislative and executive officials. This Part argues that the rule also bars congressional commandeering of state courts.

The second conclusion follows from a line of cases the most famous of which is *Testa v. Katt*. Commentators have long disputed the meaning of the *Testa* cases. This Article concludes that those cases establish a nondiscrimination principle that does not disturb neutral state laws that give a state total or partial immunity from private actions in its own courts.

This Part begins by describing the Court's decisions on the anticommandeering principle. It then discusses the *Testa* cases. It ends by integrating the two lines of cases.

A. The Anticommandeering Cases

1. *New York v. United States*

In *New York v. United States*,⁴⁷ the Court held that a provision in the federal Low-Level Radioactive Waste Policy Amendments Act of 1985⁴⁸

⁴⁶ See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (using the term “commandee[r],” apparently for the first time in a Supreme Court decision, in dicta, stating that Congress cannot “commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”), quoted in *New York v. United States*, 505 U.S. 144, 161 (1992); see also *Printz v. United States*, 117 S. Ct. 2365, 2381 (1997) (explaining that federal statutory provisions were upheld in prior decision “precisely because they did not *commandeer* state government”) (emphasis added).

⁴⁷ 505 U.S. 144 (1992).

⁴⁸ 42 U.S.C. § 2021(e)(d)(2)(c) (1994).

exceeded Congress's power under the Commerce Clause and thereby violated the Tenth Amendment.⁴⁹ The provision required each state to take title to all low-level radioactive waste generated in the state unless it met a deadline for adopting a program to dispose of the waste.⁵⁰ The Court construed this "take title" provision as requiring state legislatures to enact waste-disposal laws or to implement an administrative solution (or both).⁵¹ In invalidating the provision, the Court declared Congress cannot "commandeer[] the legislative processes of the State[] by directly compelling them to enact and enforce a federal regulatory program."⁵² The Court made clear that this "anticommandeering principle" was absolute;⁵³ it barred Congress from using Article I to compel state legislatures to enforce federal law, no matter how strong the federal interest was in their doing so.⁵⁴

⁴⁹ See *New York*, 505 U.S. at 184 (provision was "irreconcilable with the powers delegated to Congress by the Constitution and hence with the Tenth Amendment's reservation to the States of those powers not delegated to the Federal Government").

⁵⁰ See *id.* at 153-54, 174-76 (describing "take title" provision of Low-Level Radioactive Waste Policy Amendments Act of 1985).

⁵¹ See *Printz*, 117 S. Ct. at 2380 (describing *New York*); *New York*, 505 U.S. at 174-76.

⁵² *New York*, 505 U.S. at 176 (internal quotation marks and citation omitted).

⁵³ See *id.* at 202 (White, J., concurring in part and dissenting in part) (describing majority's opinion as adopting an "'anticommandeering' principle").

⁵⁴ See *id.* at 178. The Court left unclear whether the anticommandeering principle restricts only Congress's power under the Commerce Clause, some or all of Congress's powers under Article I, or all of Congress's powers under the Constitution. This Article follows the widely held assumption that the principle restricts most of the powers in Article I. See, e.g., Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1006 n.13 (1995) [hereinafter Caminker, *Subordinacy*]. That assumption accords with some, but not all, of the language of the opinion. Some language in the opinion suggested that the Court was addressing Congress's power under all of, but only, Article I. See *New York*, 505 U.S. at 155 (describing case law on "ascertaining the constitutional line between federal and state power" as framing the issue in two different ways: as "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution" or as "whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment") (emphasis added); *id.* at 157 (Tenth Amendment required the Court in that case to determine "whether an incident of state sovereignty is protected by a limitation on an Article I power") (emphasis added); *id.* at 207 n.3 (White, J., concurring in part and dissenting in part) (criticizing majority for reading history "so selectively as to restrict the proper scope of Congress's powers under Article I") (emphasis added). Other language in the opinion suggested that the anticommandeering rule limited all of Congress's power under the Constitution. See *id.* at 176 ("[T]he Constitution does not empower Congress to subject state governments to this type of instruction," namely, "a simple command to state governments to implement legislation enacted by Congress."); *id.* at 188 (The Constitution does not "authorize Congress simply to direct the States to provide for the disposal

The Court in *New York* distinguished federal statutes that commandeer state legislatures from federal statutes that are enforceable in state courts.⁵⁵ The Court acknowledged, "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them."⁵⁶ But "this sort of federal 'direction' of state judges," the Court explained, "is mandated by the text of the Supremacy Clause."⁵⁷ The Court was referring to the second part of the Supremacy Clause, which commands state judges to follow federal law.⁵⁸ The

of the radioactive waste generated within their borders."). Moreover, it is quite possible that some of Congress's Article I powers, such as the War Powers, are not subject to the anticommandeering principle. See Transcript of Oral Argument at 39-40, *Printz v. United States*, 117 S. Ct. 2365 (1997) (Nos. 95-1478 & 95-1503) (remark by Rehnquist, C.J., suggesting Congress's War Powers might be treated differently from other Article I powers for purposes of Tenth Amendment); see also *National League of Cities v. Usery*, 426 U.S. 833, 854 n.18 (1976) (striking down Commerce Clause statute on Tenth Amendment grounds, but noting Court was not addressing "the scope of Congress's authority under its war power"), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985). Indeed, several Article I provisions could be read expressly to permit limited commandeering of state officials. Examples of such provisions include the provision empowering Congress to regulate the time, place, and manner of congressional elections, see U.S. CONST. art. I, § 4, cl. 1, and the provision authorizing Congress and the President to train and call up the State militia, U.S. CONST. art. I, § 8, cl. 16; art. II, § 2, cl. 1. See *Printz*, 117 S. Ct. at 2371-72 (indicating that Congress can enact law implementing obligation of States' executive authorities under Extradition Clause, U.S. CONST. art. IV, § 2); *Condon v. Reno*, 155 F.3d 453, 463 n.3 (4th Cir. 1998) (distinguishing federal statute before it, which court held violated anticommandeering rule, from federal "motor voter" law, which had been upheld against Tenth Amendment challenge in, e.g., *Association of Community Orgs. for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995)); see also Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 213 n.41 [hereinafter Caminker, *Limits of Formalism*] (noting that the Militia Clauses, U.S. CONST. art. I, § 8, cls. 15 & 16, and Time, Place, and Manner Clause, U.S. CONST. art. I, § 4, cl. 1, may authorize federal commandeering of state officers); Caminker, *Subordinacy*, *supra* at 1032-34 (arguing existence of constitutional provisions specifically authorizing commandeering should not be read to preclude commandeering under other provisions); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1992 & nn.186-89 (1993) (citing, in addition to provisions already mentioned, the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, cl. 3). For simplicity's sake, this Article describes *New York* and the Court's later decision in *Printz v. United States* as holding that Congress cannot use its "Article I" powers to commandeer the states. This description is not meant to imply that commandeering is prohibited when specifically permitted by Article I.

⁵⁵ *New York*, 505 U.S. at 178.

⁵⁶ *Id.* at 178-79.

⁵⁷ *Id.*

⁵⁸ See U.S. CONST. art. VI, cl. 2 (Supremacy Clause) ("This Constitution, and the Laws of the United States which shall be made pursuant thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and

Court observed, "No comparable constitutional provision authorizes Congress to command state legislatures to legislate."⁵⁹

2. *Printz v. United States*

In *Printz v. United States*,⁶⁰ the Court struck down provisions of the federal Brady Handgun Violence Prevention Act⁶¹ (Brady Act) that required state and local law enforcement officials to conduct background checks on prospective handgun purchasers.⁶² The Court concluded that the provisions violated the "rule" articulated in *New York* that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."⁶³ The Court described this rule as rooted in the "essential postulate," which was made "express" in the Tenth Amendment, that the Constitution establishes a "system of dual sovereignty."⁶⁴ As in *New York*, the

the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

⁵⁹ *New York*, 505 U.S. at 179. Before *New York*, the Court had upheld in *FERC v. Mississippi*, 456 U.S. 742 (1982), a federal law that required state utility commissions to implement regulations promulgated by FERC. The Court construed the federal law to permit state commissions to implement the FERC regulations by adjudicating disputes of the same sort that they were already authorized to resolve under state law. *See id.* at 760. Based on that interpretation, the Court in *FERC* found *Testa v. Katt*, 330 U.S. 386 (1947), to be "instructive and controlling." *See id.* The *FERC* Court described *Testa* as holding that a state court had to entertain a federal claim that was "analogous" to state-law claims of which the state court had jurisdiction under state law. *See Testa*, 330 U.S. at 386. *See also infra* notes 81-83 and accompanying text. The Court in *FERC* said: "So it is here. The Mississippi Commission has jurisdiction to entertain claims analogous to those granted [by the federal law], and it can satisfy [the federal law's] requirements simply by opening its doors to claimants." *FERC*, 456 U.S. at 760. Thus, *FERC* extends *Testa* to encompass state officials who carry out judicial functions. *See Printz*, 117 S. Ct. at 2381 n.14. For simplicity's sake, however, this Article will generally refer to *Testa* as imposing an obligation on state "courts" or state "judges." The Court's extension of *Testa*'s obligation to officials other than state judges may not be supported by the portion of the Supremacy Clause that specifically refers to state judges. *See Caminker, Subordinacy*, *supra* note 54, at 1040. The extension may well be justified, however, by the Supremacy Clause as a whole and by the Supreme Court's role in enforcing that Clause. *See infra* note 363.

⁶⁰ 117 S. Ct. 2365 (1997).

⁶¹ 18 U.S.C. § 925A (1994).

⁶² *Printz*, 117 S. Ct. at 2368-69 (describing Brady Act).

⁶³ *Id.* at 2383 (quoting *New York*, 505 U.S. at 188).

⁶⁴ *Id.* at 2384 (Brady Act provisions requiring background checks were "fundamentally incompatible with our constitutional system of dual sovereignty"); *id.* at 2376-77 (identifying among "essential postulates" that "the Constitution established a system of dual sovereignty," which was "rendered express" by Tenth Amendment (internal quotation marks omitted)).

Court said the anticommandeering rule was an absolute bar to Congress's use of Article I powers.⁶⁵

As in *New York*, the Court in *Printz* distinguished the enforcement of federal law by state courts from its enforcement by the other branches of state government.⁶⁶ The Court explained that state courts are "viewed distinctively" in regard to their obligation to enforce federal laws, as shown by the specific mention of state judges in the Supremacy Clause.⁶⁷

B. *The Testa Line of Cases*

The Court observed in *New York* and *Printz* that state courts sometimes have a duty under the Supremacy Clause to enforce federal laws enacted under Article I.⁶⁸ In making that observation, the Court cited a line of cases the most famous of which is *Testa v. Katt*.⁶⁹ In this author's view, the *Testa* cases establish that the Supremacy Clause, of its own force, (1) invalidates state laws that require or permit state courts to discriminate against federal claims; and (2) requires state courts to hear federal claims that they have power to hear under the state law that remains intact when any discriminatory state laws are disregarded. Apart from invalidating such discriminatory state laws, the Supremacy Clause does not enlarge the jurisdiction of state courts. Thus, the Supremacy Clause, standing alone, would not compel a state court to hear a private federal claim against its own state if state law barred the state courts from hearing *any* private claim against the state. The Clause would, however, compel a state court to hear a federal claim against a state if state law waived the state's immunity in its courts from a state-law claim arising on the same facts as did the federal claim.⁷⁰

⁶⁵ See *id.* at 2383.

⁶⁶ See *id.* at 2381 n.14.

⁶⁷ See *id.* at 2371; see also *supra* note 58 (reproducing Supremacy Clause).

⁶⁸ See *Printz*, 117 S. Ct. at 2381; *New York*, 505 U.S. at 178.

⁶⁹ 330 U.S. 386 (1947), cited in *Printz*, 117 S. Ct. at 2381; *New York*, 505 U.S. at 178; see, e.g., Collins, *supra* note 15, at 45 (describing *Testa* as "the modern starting point for discussions of state court jurisdictional duties"); see also HART & WECHSLER 4th ed., *supra* note 15, at 469-79 (treating *Testa* as main case on obligation of state courts to enforce federal law).

⁷⁰ This obligation applies, of course, only to federal claims that Congress has not confided to the exclusive jurisdiction of the federal courts. See generally *Tafflin v. Levitt*, 493 U.S. 455, 459-60 (1990) (holding that Congress can defeat presumption of state courts' concurrent jurisdiction by making clear its intention to confer exclusive jurisdiction on federal courts).

1. *The Testa Principle*

Testa concerned a federal price-control statute authorizing someone who had bought goods for a price exceeding the federal ceiling to sue the seller for treble damages in "any court of competent jurisdiction."⁷¹ The Rhode Island state courts dismissed a private action under the federal statute, because of a state policy against enforcing the "penal" laws of a "foreign" jurisdiction.⁷² The Court held that the state courts could not decline jurisdiction on this ground⁷³ and that those courts had an obligation under the Supremacy Clause to hear the federal claim.⁷⁴ In announcing that obligation, the Court emphasized that "this same type of claim arising under Rhode Island law would be enforced by that State's courts."⁷⁵ The Court determined that those courts accordingly had "jurisdiction adequate and appropriate under established local law to adjudicate" actions under the federal statute.⁷⁶ "Under these circumstances," the Court concluded, "the State courts are not free to refuse enforcement of [the plaintiff's federal] claim."⁷⁷

Commentators disagree on the meaning of *Testa*.⁷⁸ Some believe it established a nondiscrimination principle. The principle is commonly described as one that forbids state courts from refusing to hear federal claims that are "analogous" to state-law claims that the courts would have power to hear under state law.⁷⁹ Other commentators read *Testa* more broadly to hold

⁷¹ *Testa*, 330 U.S. at 387-88 & n.1 (quoting federal statute).

⁷² *See id.* at 388.

⁷³ *See id.* at 389-94.

⁷⁴ *See id.* at 389. *But cf.* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1162 (1986) (questioning whether *Testa* rests on Supremacy Clause, in course of arguing that Court's "inadequate state ground" doctrine rests on federal common law, rather than Supremacy Clause).

⁷⁵ *Testa*, 330 U.S. at 394.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See* Jackson, *State Sovereign Immunity*, *supra* note 15, at 99 n.394 (describing possible readings of *Testa*); *see also* Collins, *supra* note 15, at 166-70 (discussing ambiguity of *Testa*); Gordon & Gross, *supra* note 15, at 1159-60 (same); REDISH, *supra* note 5, at 166 (same).

⁷⁹ *See, e.g.*, WRIGHT, *supra* note 5, § 45, at 271 ("The Supreme Court has not yet considered whether Congress can require state courts to entertain federal claims when there is no analogous state-created right enforceable [*sic*] in the state courts."); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 643 n.50 (1993) (describing *Testa* as holding "state courts may not refuse to hear federal claims if they are open to analogous state claims"); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV.

state courts must "entertain all federal causes of action."⁸⁰ As explained next, this Article favors the narrow reading of *Testa*; however, the Article disagrees that, under this reading, state courts must entertain any federal claim that is somehow "analogous" to state-law claims within their jurisdiction.

Each side in the *Testa* debate has some support in Supreme Court precedent. In *FERC v. Mississippi*,⁸¹ the Court said that the state courts in *Testa* heard state-law claims "analogous" to the federal claim that they were obligated to hear.⁸² That statement supports the narrow reading of *Testa*, but

682, 692 n.62 (1976) (similar description of *Testa*); Note, *supra* note 5, at 1552 n.6 (understanding *Testa* to premise state court's obligation to enforce federal law upon "whether a state enforces an analogous right"); see also Massey, *supra* note 15, at 145 ("[T]he holding in *Testa* commands states to provide a state forum for federal claims to the extent the state courts would entertain parallel state claims under established jurisdictional rules of local law.").

⁸⁰ Caminker, *Subordinacy*, *supra* note 54, at 1038. See *id.* at 1024 (under *Testa*, "state courts generally must enforce federal law by entertaining federal claims"); Cloherty, *supra* note 15, at 1313 (under *Testa*, "[s]tate courts are obligated to hear claims of federal statutory rights when Congress requires them to do so"); Alan D. Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1, 35 (1967); Gordon & Gross, *supra* note 15, at 1171-77; Jackson, *State Sovereign Immunity*, *supra* note 15, at 38 nn.157-58, 74 n.304, 99 & n.394; Redish & Muench, *supra* note 5, at 350-59; Wolcher, *supra* note 23, at 241-44 (arguing *Testa* should be read to require state court to entertain federal claims, even if "state law denies jurisdiction to state courts over any and all causes of action for damages against the state"); see also Meltzer, *supra* note 5, at 58 ("the better argument favors upholding the state courts' obligation" to enforce federal law regardless of state sovereign immunity). Cf. Fletcher, *A Historical Interpretation*, *supra* note 5, at 1095-98 ("*Testa* strongly suggests that the federal government may require state courts to entertain federal causes of action in perhaps all but extraordinary circumstances. Yet difficulties arise in applying *Testa* to suits brought against states by private citizens and in finding in the case the principle that the state courts must hear federal causes of action that are barred in federal court."); Sandalow, *supra* note 5, at 205-06 (finding that *Testa* provides "[s]ome support" for view that state courts must adjudicate federal claim "even in the absence of discrimination," yet also finding it "difficult to perceive the federal interest that justifies so substantial an intrusion upon the power of the states to determine the purposes to be served by agencies of state government").

⁸¹ 456 U.S. 742 (1982).

⁸² See *id.* at 760 (stating that, in *Testa*, "[t]he courts of Rhode Island refused to entertain [federal] claims, although they heard analogous state causes of action" and reasoning that Mississippi state agency had obligation to adjudicate federal claims "analogous" to claims that it was empowered to hear under state law); see also *id.* at 784 (O'Connor, J., concurring in part and dissenting in part) (describing *Testa* as holding that "state trial courts may not refuse to hear a federal claim if 'th[e] same type of claim arising under [state] law would be enforced by that State's courts'" (quoting *Testa*, 330 U.S. at 394) (internal bracketed text added by Justice O'Connor). Cf. Powell, *supra* note 79, at 643 n.50 (describing Justice O'Connor's "handling" of *Testa* in her partial dissent in *FERC* as "remarkably grudging").

it does not foreclose the broad reading. On the other hand, the Court hinted at a broad reading of *Testa*, without conclusively adopting it, in *Hilton v. South Carolina Public Railways Commission*.⁸³ The *Hilton* Court cited one of *Testa*'s progeny, *Howlett v. Rose*,⁸⁴ for the proposition that, when a federal statute creates a private cause of action against a state, "the Supremacy Clause makes that statute . . . fully enforceable in state court."⁸⁵ This statement was dicta insofar as it suggested that states lack immunity from such causes of action. The issue before the Court in *Hilton* was "a pure question of statutory construction:"⁸⁶ namely, whether Congress intended the Federal Employers' Liability Act (FELA) to create a cause of action in state court against a state-owned railroad.⁸⁷ Nonetheless, *Hilton*'s failure to suggest that states had immunity in their own courts from these FELA actions implies that no such immunity exists, an implication at odds with the thesis of this Article. Moreover, Justice Marshall expressly rejected the existence of such immunity, based on a broad reading of *Testa*, in his concurring opinion in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*.⁸⁸ Justice Marshall agreed with the majority that the Eleventh Amendment barred private suits under the FLSA against the States in federal court; he also believed, however, that the state courts had an obligation under *Testa* to entertain those suits.⁸⁹

⁸³ 502 U.S. 197 (1991).

⁸⁴ 496 U.S. 356, 373-74 (1990) (discussing *Testa*).

⁸⁵ *Hilton*, 502 U.S. at 207 (citing *Howlett*, 496 U.S. at 367-68).

⁸⁶ *Id.* at 205. In its briefs to the Court, the state in *Hilton* emphasized that it was not claiming sovereign immunity from the FELA claim asserted against it. See Brief on the Merits by Respondent at 21, *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) (No. 90-848) ("The State of South Carolina has not asserted sovereign immunity as an affirmative defense to a federal cause of action under which it would be liable but for the defense."); see also *id.* at 2 ("The South Carolina Public Railways Commission assumes, but does not concede, that Congress has the Constitutional authority to subject it to the FELA."). I therefore do not share Professor Vázquez's view of *Hilton* as holding that Congress has the power to impose damage liability on a state despite the state's invocation of sovereign immunity. See Vázquez, *supra* note 13, at 1788-89.

⁸⁷ See *Hilton*, 502 U.S. at 205.

⁸⁸ 411 U.S. 279, 289 (1973) (Marshall, J., concurring in the result).

⁸⁹ See *id.* at 298 (Marshall, J., concurring in the result) ("While constitutional limitations upon federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights.") (citing *Testa v. Katt*, 330 U.S. 386 (1947)); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240 n.2 (1985) (citing Justice Marshall's concurrence to rebut dissent's criticism that majority's decision—which held states immune

Justice Marshall's reading "clearly oversteps *Testa*'s bounds."⁹⁰ In *Testa* and the line of cases of which it is a part, the Court struck down state laws that permitted or required state courts to discriminate against federal claims.⁹¹ The Court made clear in *Testa* that such state laws violate the Supremacy Clause.⁹² In the cases involving such laws, the Court held that the Clause obligated the state courts to hear the federal claims. The Court premised that obligation, however, on the state courts' having power to do so under the state law that remained intact when the discriminatory state law was disregarded.⁹³ The Court never suggested that, apart from invalidating discriminatory state laws, the Supremacy Clause expanded the state courts' jurisdiction.

Moreover, such a suggestion would conflict with the "valid excuse" doctrine. That doctrine holds that state courts can decline to hear a federal action if they have a valid excuse for doing so.⁹⁴ An excuse is "valid" if it

under Eleventh Amendment from federal-court actions under a federal statute—made private relief wholly unavailable and adding, in dicta, "It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land.").

⁹⁰ Tribe, *supra* note 79, at 692 n.62.

⁹¹ The earliest case in the *Testa* line was *Mondou v. New York, New Haven, & Hartford Railroad Co. (Second Employers' Liability Cases)*, 223 U.S. 1 (1912). In *Mondou*, the Court held that a state court erred in refusing to entertain a private action under a federal statute because of disagreement with the policy underlying the statute. *Id.* at 55-59. The Court concluded that rights arising under a federal statute are enforceable in state courts "when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Id.* at 55. The next case in the *Testa* line was *McKnett v. St. Louis & San Francisco Railway Co.*, 292 U.S. 230 (1934). There, the Court struck down a state law that allowed state courts to hear state-law, but not federal-law, causes of action arising in other states. *Id.* at 231-34. The Court observed that the state courts had "general jurisdiction of the class of actions to which [the federal cause of action at issue] belong[], in cases between litigants situated like those in the case at bar." *Id.* at 232. The Court accordingly determined that the plaintiff in that case was barred from state court "because he is suing to enforce a federal act." *Id.* at 234. The Court declared, "A state may not discriminate against rights arising under federal laws." *Id.* Following *McKnett* and *Testa*, the Court held in *Howlett v. Rose*, 496 U.S. 356 (1990), that a state court violated the Supremacy Clause by refusing to hear a claim against a local school board under 42 U.S.C. § 1983. *See id.* at 375-83. The Court based that holding, in part, on the fact that the state courts would have had jurisdiction over the subject matter of the lawsuit had it been based on state, rather than federal, law. *See id.* at 377-80.

⁹² See *Testa v. Katt*, 330 U.S. 386, 389 (1946).

⁹³ See *Howlett*, 496 U.S. at 378 (discussing state law that gave the courts jurisdiction over the federal claim); *Testa*, 330 U.S. at 394 & n.13 (same); *Mondou*, 223 U.S. at 55 (concluding that rights under federal statute at issue were enforceable in state courts "when their jurisdiction, as prescribed by local laws, is adequate to the occasion").

⁹⁴ See, e.g., *Howlett*, 496 U.S. at 357, 369.

relates to judicial administration and neither discriminates against nor is inconsistent with federal law.⁹⁵ Thus, in the absence of a valid federal statute, a state may neutrally control the volume and types of cases that its courts can hear.⁹⁶ For example, a state can have a doctrine of *forum non conveniens* under which its courts decline to hear certain federal claims (as well as state-law claims).⁹⁷ A state can also put territorial restrictions on its courts that prevents them from hearing federal (as well as state-law) causes of action that arise outside their territory.⁹⁸

2. Applying the Testa Principle to State-Court Actions Against States that Have Wholly Preserved Their State-Court Immunity

Under the reading of *Testa* proposed above, the Supremacy Clause does not compel a state court to hear a federal claim that it lacks power to hear under a neutral state law of judicial administration. So read, *Testa* strongly implies that the Clause would not compel state courts to hear any federal claims against a state if state law barred *all* state-court actions against the state.⁹⁹ Such a law would not discriminate against federal claims.¹⁰⁰ Moreover, the law would relate to judicial administration; it would concern the state courts' competence over parties and subject matter.¹⁰¹

⁹⁵ See *id.* at 372.

⁹⁶ See, e.g., *Douglas v. New York, New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387-88 (1929).

⁹⁷ See *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3-5 (1950); cf. *Douglas*, 279 U.S. at 387-88 (upholding state statute that permitted courts to dismiss both federal and state-law claims in cases in which neither plaintiff nor defendant was state resident; remarking, however, that result might be different if federal statute required state courts to hear federal claims notwithstanding discretionary state-law doctrines to the contrary).

⁹⁸ See *Herb v. Pitcairn*, 324 U.S. 117, 123 (1945).

⁹⁹ Tribe, *supra* note 79, at 692 n.62; see also Massey, *supra* note 15, at 145 (observing that, under *Testa*, "a state could theoretically deny a forum for a private federal claim against the state on the ground that, pursuant to its sovereign immunity from suit in its courts, it does not permit parallel private state claims," but arguing that *General Oil Co. v. Crain*, 209 U.S. 211 (1908), restricts states' ability to do this); Wolcher, *supra* note 15, at 241 (recognizing that, notwithstanding *Testa*, a "difficult question arises [as to state court's obligation to hear federal claim] where state law denies jurisdiction to state courts over any and all causes of action for damages against the state"); *infra* notes 122-31 and accompanying text.

¹⁰⁰ See Tribe, *supra* note 79, at 692 n.62. ("How can a state be charged with discriminating against a federal claim when it allows no suits in state courts against the sovereign?").

¹⁰¹ See *Howlett v. Rose*, 496 U.S. 356, 381 (1990) (suggesting that rules are jurisdictional when they concern court's "power over the person and competence over the subject matter"); see also *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934) (describing rules subject to "valid excuse" doctrine as ones that "determine the limits of the jurisdiction of [state]

This subsection examines precedent that supports *Testa*'s implication that the Supremacy Clause does not, of its own force, compel a state court to hear an action against a state that has wholly preserved immunity in its own courts. The precedent both postdates and predates *Testa*.

a. Post-Testa Decision Supporting State-Court Immunity

The relevant post-*Testa* case is *Georgia Railroad & Banking Co. v. Musgrove*,¹⁰² decided two years after *Testa*. In a one-paragraph, per curiam opinion, the Court dismissed an appeal from a decision by the Georgia Supreme Court because that court's judgment was "based upon a non-federal ground adequate to support it."¹⁰³ The Georgia Supreme Court had dismissed an action brought in state court against the Georgia Commissioner of Revenue challenging the constitutionality of a state tax law.¹⁰⁴ The dismissal was based on the Georgia court's determination that the action was "in substance and effect an action against the State and was not maintainable, the State not having consented to be thus sued."¹⁰⁵ The United States Supreme Court's conclusion that this was an adequate, non-federal basis for dismissal indicates that nothing in federal law, including in the Constitution, required the state court to hear the private action against its own state alleging a violation of the Constitution.¹⁰⁶

In a recent dissent, Justice Souter argued "the posture of the [*Musgrove*] case suggests that the Court may have viewed the lower court's decision as based on a valid state law regarding the timing and not the existence of state remedies."¹⁰⁷ Justice Souter further argued that, in light of the Court's prior decision in *General Oil Co. v. Crain*,¹⁰⁸ state courts indeed have a constitutional duty to remedy unconstitutional state conduct.¹⁰⁹ Justice Souter

courts [and] the character of the controversies which shall be heard in them").

¹⁰² 335 U.S. 900 (1949) (per curiam).

¹⁰³ *Id.*

¹⁰⁴ See *Musgrove v. Georgia R.R. & Banking Co.*, 49 S.E.2d 26, 36 (Ga. 1948), *appeal dismissed*, 335 U.S. 900 (1949) (per curiam).

¹⁰⁵ *Id.* at 37.

¹⁰⁶ See Fallon, *supra* note 5, at 1210 n.316 (stating *Musgrove* "clearly implied that the state court was under no constitutional obligation to entertain the suit").

¹⁰⁷ *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2057-58 n.14 (1997) (Souter, J., dissenting) (quoting Fallon, *supra* note 5, at 1211 n.317).

¹⁰⁸ 209 U.S. 211 (1908).

¹⁰⁹ See *Coeur d'Alene Tribe*, 117 S. Ct. at 2058 n.14 (Souter, J., dissenting) (discussing *Crain*); see also Gibbons, *supra* note 15, at 1937 n.256 (arguing for a similar reading of *Crain*).

was joined in this dissent by three other Justices,¹¹⁰ and his view of *Musgrove* is shared by some commentators.¹¹¹ Other commentators, in contrast, have suggested *Musgrove* implicitly limited or overruled *Crain*.¹¹² The two decisions, however, are compatible.

Musgrove was a state-court suit that, according to the Georgia Supreme Court, would have been barred by the Eleventh Amendment if brought in federal court.¹¹³ In holding that the suit was "in substance and effect" against the state, the Georgia court cited United States Supreme Court cases in which state officers were sued in federal court.¹¹⁴ Those cases held that the Eleventh Amendment bars an officer suit in federal court if the suit seeks specific performance of a contract between the plaintiff and the state, because such suits are really suits against the state.¹¹⁵ The Georgia Supreme Court

¹¹⁰ See *Coeur d'Alene Tribe*, 117 S. Ct. at 2047 (indicating Justice Souter's dissent was joined by Justices Stevens, Ginsburg, and Breyer).

¹¹¹ See Fallon, *supra* note 5, at 1211 n.317; see also Wolcher, *supra* note 15, at 244 n.234 (reading *Musgrove* as merely reflecting absence of constitutional right to injunction against state taxes).

¹¹² See PAUL BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM* 935 (2d ed. 1973) (suggesting that *Crain* may have been overruled *sub silentio* by *Musgrove*); 16B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4024, at 363 (2d ed. 1996) (stating that "the broader implications" of *Crain* "might have been abandoned" in *Musgrove*); *id.* § 4231, at 566 n.26 (stating that "[t]he doctrine of the *Crain* case may have been repudiated by" *Musgrove*); *cf.* Woolhandler, *supra* note 15, at 150 n.382 ("The result in *Musgrove* may reflect a greater respect for state judge-made law than the result in *Crain*."). *But cf.* Fallon, *supra* note 5, at 1210 n.315 (observing that third edition of *HART & WECHSLER* did not repeat suggestion in second edition that *Musgrove* may have silently overruled *Crain*). The suggestion likewise does not appear in the fourth edition. *Cf.* *HART & WECHSLER* 4th ed., *supra* note 15, at 856 n.9 (questioning whether, in light of *Musgrove*, *Crain*'s "suggestion"—*i.e.*, that state courts have obligation to entertain constitutional claims—holds true only if plaintiff establishes that no federal court remedy exists).

¹¹³ See *Musgrove v. Georgia R.R. & Banking Co.*, 49 S.E.2d 26, 36 (Ga. 1948).

¹¹⁴ See *id.* at 37 (citing, among other cases, *Ex parte Ayers*, 123 U.S. 443 (1887), *Hans v. Louisiana*, 134 U.S. 1 (1890), and *North Carolina v. Temple*, 134 U.S. 22 (1890)).

¹¹⁵ See *Ayers*, 123 U.S. at 504 (holding that federal-court officer suit based on state contract "the object of which is . . . its specific performance . . . is in substance a suit against the State itself" and hence barred by Eleventh Amendment); *Hans*, 134 U.S. at 20 ("the state cannot be compelled by suit to perform its contracts"); *id.* at 10 (citing *Ayers*); *Temple*, 134 U.S. at 30 (finding it "perfectly clear" that officer suit seeking injunctive relief from state laws that allegedly violated Contract Clause "was virtually a suit against the state" and so "within the principle" of, among other cases, *Ayers*), *all cited in Musgrove*, 49 S.E.2d at 37. See also *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 285 (1906) (finding that state was bound by decision in prior litigation in which its officers participated and in which state was "directly

determined that those cases governed the case before it, because that case, too, involved an attempt by a plaintiff to enforce a contract with the state.¹¹⁶ The Georgia court recognized that United States Supreme Court decisions, such as *Ex parte Young*,¹¹⁷ had established "the general rule that a suit to restrain a State official from executing an unconstitutional statute in violation of the plaintiff's rights and to his irreparable damage is not a suit against the State."¹¹⁸ The Georgia court apparently determined the action before it did not fall within the *Ex parte Young* rule not only because of the specific-performance remedy sought but also because there was no imminent threat that the allegedly unconstitutional state statute was going to be executed against the plaintiff; the Georgia Revenue Commissioner had "done nothing more than threaten to make assessments" under the statute.¹¹⁹ In light of the reasoning underlying the Georgia Supreme Court's decision in *Musgrove*, the United States Supreme Court's dismissal of the appeal from that decision implies that state courts do not have to entertain actions against their own state that do not fall within the *Ex parte Young* model. That implication arises from a case in which the plaintiff alleged a violation of the U.S. Constitution. It

interested" because of alleged limitations on its taxing power arising from "contract" between it and plaintiff). See generally Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 168-74 (1998) (discussing Supreme Court cases holding that officer suits for specific performance of government contracts were barred by sovereign immunity).

¹¹⁶ See *Musgrove*, 49 S.E.2d at 37. The railroad in *Musgrove* claimed that its state charter constituted a contract that exempted certain railroad property from ad valorem taxes. See *id.* at 36. The railroad further claimed that later state laws attempting to eliminate the tax exemption violated the Contract Clause of the U.S. Constitution. See *id.*; see also U.S. CONST. art. I, § 10, cl. 1 (Contract Clause) ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

¹¹⁷ 209 U.S. 123 (1908).

¹¹⁸ *Musgrove*, 49 S.E.2d at 36. *Ex parte Young* generally permits federal-court actions against state officials for prospective relief from violations of federal law. See, e.g., *Green v. Mansour*, 474 U.S. 64, 68 (1985); but cf. *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2040-43 (1997) (holding action that effectively sought quiet title judgment against state did not fall within *Ex parte Young* doctrine). The Court in *Young* held that such actions are not barred by the Eleventh Amendment because they are not suits against the state. See *Young*, 209 U.S. at 167. The Court explained that, when a state official administers an unconstitutional state law, he or she is "stripped" of official authority, and therefore cannot claim the state's immunity as protection. See *id.* at 159-60. Commentators have pointed out, as the Court in *Young* itself did, that its holding was supported by the Court's precedent. See *id.* at 150-56; see also, e.g., Fletcher, *A Historical Interpretation*, *supra* note 5, at 1041 & n.24; Meltzer, *supra* note 5, at 6.

¹¹⁹ *Musgrove*, 49 S.E.2d at 38.

would seem to follow *a fortiori* that state courts also need not entertain a private claim based on the state's violation of a federal statute if the suit falls outside the *Ex parte Young* model.¹²⁰

So understood, *Musgrove* fully accords with *General Oil Co. v. Crain*, the case cited by Justice Souter.¹²¹ In *Crain*, the Court found a federal question presented by, and accordingly exercised appellate jurisdiction over, a Tennessee Supreme Court decision.¹²² In that decision, the Tennessee Supreme Court, like the Georgia Supreme Court in *Musgrove*, dismissed on sovereign immunity grounds an action against a state officer challenging a state tax law as unconstitutional.¹²³ Unlike the state-court action in *Musgrove*, however, the state-court action in *Crain* would not have been barred by the Eleventh Amendment had it been brought in federal court.¹²⁴ For one thing, the plaintiff in *Crain* was not seeking to enforce a contract with the state.¹²⁵ For another, unlike the officer-defendant in *Musgrove*, the officer-defendant

¹²⁰ See *Brown v. Gerdes*, 321 U.S. 178, 191 (1944) (Frankfurter, J., concurring) ("For the Supremacy Clause does not give greater supremacy to [a federal statute] over the free scope of the States to determine what shall be litigated in their courts and under what conditions, than it gives with reference to rights directly secured by the Constitution . . ."). Cf. *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 292 n.8 (1973) (Marshall, J., concurring) ("It seems to me a strange hierarchy that would provide a greater opportunity to enforce congressionally created rights than constitutionally guaranteed rights in federal court."); Field, *Other Doctrines*, *supra* note 29, at 1257-58 (explaining why it "would be plausible" to recognize power of federal courts to enforce federal statutes against states in private actions but no similar power to enforce constitutional provisions if Eleventh Amendment "were to limit the [federal] judiciary while imposing no limitations upon Congress," but finding "[n]othing in the eleventh amendment [to] support[] the view that it was intended only to affect the powers of the [federal] judiciary and not those of Congress"); but cf. John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1422, 1430 (1975) (arguing that Eleventh Amendment limits only federal courts' power to imply cause of action against States, not Congress's power to create such causes of action); Tribe, *supra* note 79, at 693 (arguing that Eleventh Amendment gave states sovereign immunity rights against federal courts, not against Congress).

¹²¹ See *Coeur d'Alene Tribe*, 117 S. Ct. at 2057-58 (Souter, J., dissenting).

¹²² See *General Oil Co. v. Crain*, 209 U.S. 211, 228 (1908).

¹²³ See *id.* at 220-28 (citing *General Oil Co. v. Crain*, 95 S.W. 824 (Tenn. 1906)).

¹²⁴ See *id.* at 226-28.

¹²⁵ The plaintiff in *Musgrove* claimed state tax laws violated the Contract Clause by impairing a state charter granting the plaintiff a tax exemption. See *Musgrove v. Georgia R.R. & Banking Co.*, 49 S.E.2d 26, 36 (1948). In contrast, the plaintiff in *Crain* alleged that state tax laws violated the Commerce Clause by taxing property in interstate commerce. See *Crain*, 209 U.S. at 214.

in *Crain* had done more than merely “threaten” to make assessments under the allegedly unconstitutional state tax law; he had actually made them.¹²⁶ *Crain* thus fell outside the case law holding sovereign immunity barred officer suits seeking to compel specific performance of a state contract, and it fell within the principle, affirmed in *Ex parte Young*, that a state officer could be enjoined from “taking or injuring the plaintiff’s property” in violation of federal law, notwithstanding sovereign immunity.¹²⁷

In sum, *Musgrove* did not fall within *Ex parte Young* (in the state supreme court’s view), but *Crain* did.¹²⁸ The Court’s disposition of *Musgrove* and *Crain* indicates when the Constitution does not, and when it may, require a state court to hear a private suit alleging the state violated federal law. Under *Musgrove*, the state court need not hear the suit if it would be barred from federal court by the Eleventh Amendment.¹²⁹ Under *Crain*, the state court may have to hear the suit if it would fall within *Ex parte Young* and, therefore, could be asserted in federal court, despite the Eleventh Amendment.¹³⁰

¹²⁶ See *Crain*, 209 U.S. at 213-14. Cf. *Ex Parte Young*, 209 U.S. 123, 133-34 (1908) (indicating state officer had attempted to enforce allegedly unconstitutional state law in violation of federal court order).

¹²⁷ *Crain*, 209 U.S. at 226.

¹²⁸ Today, it seems odd that the question whether an officer suit was “really” a suit against the sovereign could depend on whether the plaintiff’s claim was based on a contract with the government and whether an officer had merely threatened to interfere with the plaintiff’s property or had actually done so (or was about to do so). At the time of *Crain* and *Young*, however, the distinction was important. It reflected the notion that courts could entertain officer suits, despite sovereign immunity, only if those suits established the actual commission, or imminent occurrence, of a wrong for which a private person would be liable at common law. See, e.g., *Idaho v. Coeur d’Alene Tribe*, 117 S. Ct. 2028, 2035 (1997); *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890); *Ex parte Ayers*, 123 U.S. 443, 497, 501-02 (1887) (distinguishing impermissible officer suits seeking specific performance of state contracts from permissible officer suits for personal wrongs committed by officer); see also Seamon, *supra* note 115, at 163-70. Cf. *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 306 (1952) (holding, in later federal-court proceeding involving same controversy as *Musgrove*, Eleventh Amendment did not bar suit, because it fell within *Ex parte Young* doctrine).

¹²⁹ See *Georgia R.R. & Banking Co. v. Musgrove*, 335 U.S. 900 (1949) (per curiam).

¹³⁰ See *Crain*, 209 U.S. at 226-28. *Crain*’s suggestion that state courts have a constitutional duty to entertain constitutional claims asserted in *Ex parte Young*-type actions is supported by *Poindexter v. Greenhow*, 114 U.S. 270 (1885), in which the Court rejected an immunity claim asserted by a state in an action brought in state court against a state officer seeking prospective relief for a violation of the Constitution—a classic *Ex parte Young*-type action. See *id.* at 293-301. Indeed, the Court in *Ex parte Young* relied on *Poindexter*, even though *Poindexter* involved an action brought in state court. See *Young*, 209 U.S. at 151. Professor Wolcher relies on *Crain* and *Poindexter* to argue the Constitution requires state courts to entertain actions

Musgrove strongly suggests the existence of a state-court immunity that, *Crain* indicates, has limits. *Crain* does not, however, conflict with the later decision in *Musgrove* any more than *Ex parte Young* conflicts with later decisions holding the Eleventh Amendment bars some private actions against state officers in federal court challenging the constitutionality of a state tax.¹³¹

b. Pre-Testa Decisions Supporting State-Court Immunity

Two cases decided before *Testa* strongly suggest states are immune from federal claims in their own courts. The Court in *Testa* did not cite either case, much less suggest it intended to narrow or overrule them. These two pre-*Testa* cases, therefore, support reading *Testa* to establish only a nondiscrimination principle that would allow state courts to refuse to hear federal claims if the state has preserved its state-court immunity from *all* claims.

One of the cases, *Palmer v. Ohio*,¹³² resembled *Musgrove*. In *Palmer*, the Court dismissed, for lack of a federal question, a writ of error from a state supreme court decision.¹³³ The state supreme court had upheld the dismissal, on sovereign immunity grounds, of a state-court action brought directly against the state by landowners.¹³⁴ The landowners claimed that the state's flooding of their land violated the Just Compensation Clause of the Fifth Amendment and that the state court's denial of relief violated the Due Process

against the state itself, even though he recognizes they both concerned claims against state officers. See *Wolcher*, *supra* note 15, at 267-68. As discussed in the text, the cases indicate, instead, that the Constitution requires state courts to entertain at least some actions that, under *Ex parte Young*, would not be considered to be suits against the state and, therefore, would not be barred by the Eleventh Amendment if brought in federal court. The Court in *Crain* did not clearly identify what part of the Constitution obliges states to entertain *Ex parte Young*-type actions. As discussed below, although the *Crain* Court appeared to rely on the Supremacy Clause, the result in that case may be justified, instead, under the Due Process Clause. If so, the state courts' obligation to hear *Ex parte Young*-type suits does not completely correspond to the power of federal courts to hear such suits. See *infra* notes 380-91 and accompanying text.

¹³¹ See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 462-66 (1945) (holding Eleventh Amendment barred action against state officers and other defendants for order requiring them to refund from state treasury taxes collected under allegedly unconstitutional state statute); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 48-53 (1944) (holding same). Read together, *Musgrove* and *Crain* also suggest the scope of the states' immunity in their own courts generally corresponds to their immunity in federal court, a correspondence that is explored in Part IV of this Article. See *infra* notes 291-301 and accompanying text.

¹³² 248 U.S. 32 (1918).

¹³³ See *id.* at 34.

¹³⁴ See *id.* at 33.

Clause of the Fourteenth Amendment.¹³⁵ The United States Supreme Court's denial of review, which was based on its determination that the state-court decision involved only a question of local state law, implies, as does *Musgrove*, that the Constitution does not require a state court to hear a federal claim against the state.¹³⁶

The same implication arises from *Hopkins v. Clemson Agricultural College*.¹³⁷ *Hopkins* involved a suit against a public college by a nearby landowner who asserted that the college's erection of a dike had caused his land to flood.¹³⁸ He contended this conduct violated the Fourteenth Amendment by taking his property without due process.¹³⁹ The Court rejected the college's argument that the landowner's claim for money damages was really a suit against the state, relying on Eleventh Amendment case law to do so.¹⁴⁰ In contrast, the Court sustained the college's objection to the landowner's claim for an injunction requiring the removal of the dike, finding that form of relief *would* entail a suit against the state:

The title to the land and everything annexed to the soil is in the state The state, therefore, may be a necessary party to any proceeding which seeks to affect the land itself, or to remove any structure thereon which has become a part of the land. If so, and unless it consents to be sued, the court cannot decree the removal of the embankment which forms a part of the state's property.¹⁴¹

Thus, the Court gave partial effect to the state's assertion of immunity in its

¹³⁵ See *id.* at 33-34. The main difference between *Palmer* and *Musgrove* was that the suit in *Palmer* was directly against the state, rather than a state officer, and, therefore, it did not even arguably fit within the *Ex parte Young* doctrine.

¹³⁶ *Id.* at 34. Professor Wolcher disputes this implication by observing that, in the short opinion dismissing the writ, the *Palmer* Court summarily rejected the plaintiff's Just Compensation claim. See Wolcher, *supra* note 15, at 262-63. The Court's passing remark on the merits does not account for the jurisdictional disposition of the case—a dismissal on the ground that the judgment rested on an inadequate state question. See *Palmer*, 248 U.S. at 34. Moreover, Professor Wolcher's reliance on the *Palmer* Court's view of the merits forces him to make the untenable argument that state-court immunity bars a suit if the plaintiff's constitutional claim lacks merit, but does not bar a suit if the plaintiff's constitutional claim has merit. See Wolcher, *supra* note 15, at 268. This argument conflates two quite distinct issues: the issue of immunity from a claim and the issue of the merits of the claim.

¹³⁷ 221 U.S. 636 (1911).

¹³⁸ See *id.* at 637.

¹³⁹ See *id.* at 641.

¹⁴⁰ See *id.* at 642-48.

¹⁴¹ *Id.* at 648-49.

own courts from a constitutional claim.¹⁴² This aspect of the opinion is difficult to explain other than as a holding that the states enjoy immunity in their own courts and that, because the immunity limits recovery for an alleged constitutional violation, the immunity itself is constitutional in nature.¹⁴³

3. *Applying the Testa Principle to States that Have Partially Waived Their State-Court Immunity*

Testa's nondiscrimination principle is harder to apply when a state has waived immunity in its courts from some private claims, as most states have done.¹⁴⁴ This author believes the Supremacy Clause only obligates a state court to apply federal law to a dispute that the court has power to hear under state law. The Clause, therefore, does not require a state court to hear a federal claim if the court lacks power to decide a state-law claim arising from the same facts.

This conclusion is based on the Court's precedent in an analogous setting. The precedent concerns actions in federal court to which the state has consented. The precedent establishes that a state cannot restrict its consent so as to prevent a federal court from applying relevant federal law. Such a

¹⁴² As the quote from *Hopkins* reproduced in the text illustrates, the Court frequently used "necessary" or "indispensable" party terminology to mean relief was barred by sovereign immunity. See, e.g., *Missouri v. Fiske*, 290 U.S. 18, 28 (1933) ("[W]hen it appears that a state is an indispensable party to enable a federal court to grant relief sought by private parties, and the state has not consented to be sued, the court will refuse to take jurisdiction"); see also Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 436, 438-39 (1962); see also Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1482, 1493-99 (1962) (discussing dismissal of suits against federal officers for failure or inability to join indispensable party).

¹⁴³ Professor Wolcher suggests the *Hopkins* Court refused injunctive relief because the Just Compensation Clause of the Fourteenth Amendment only requires an award of damages. See Wolcher, *supra* note 15, at 263 & n.335. This is not, however, the reason the Court gave in *Hopkins* for denying injunctive relief. The Court denied that relief because it could only be awarded in a suit against the state, and the state was immune from such a suit in its own courts without its consent. See *Hopkins*, 221 U.S. at 649. Professor Wolcher's explanation of *Hopkins*, like his explanation of *Palmer*, see *supra* note 136, does not account for the actual basis of the Court's decision.

¹⁴⁴ See *Owen v. City of Independence*, 445 U.S. 622, 645 n.28 (1980) (stating that all but a "handful of States" have waived their immunity from tort suits for nondiscretionary governmental functions); John Evans Taylor, Note, *Express Waivers of Eleventh Amendment Immunity*, 17 GA. L. REV. 513, 527-32 (1983) (surveying state laws statutorily waiving sovereign immunity).

restriction would require the federal court to violate the Supremacy Clause. The precedent also establishes, however, that a state's consent cannot be enlarged beyond that necessary for a federal court to comply with the Supremacy Clause.

The leading case is *Gardner v. New Jersey*.¹⁴⁵ In *Gardner*, the state filed a claim against the bankruptcy estate in a federal reorganization proceeding.¹⁴⁶ The state argued that the Eleventh Amendment barred the federal court from considering objections to the state's claim.¹⁴⁷ The Supreme Court rejected that argument.¹⁴⁸ The Court held, "When the State becomes the actor and files a claim . . . it waives any immunity which it otherwise might have had respecting the adjudication of the claim."¹⁴⁹ The Court has made clear, however, that a sovereign's waiver does not extend beyond matters "respecting the adjudication of the [sovereign's] claim."¹⁵⁰ The defendant to the claim "may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim."¹⁵¹ The defendant can assert such a counterclaim, however, only to reduce or eliminate affirmative recovery by the sovereign.¹⁵² Furthermore, the defendant's counterclaim must arise from

¹⁴⁵ 329 U.S. 565 (1946); see also *Wisconsin Dep't of Corrections v. Schacht*, 118 S. Ct. 2047, 2056 (1998) (Kennedy, J., concurring) (citing *Gardner* with approval).

¹⁴⁶ *Gardner*, 329 U.S. at 570.

¹⁴⁷ See *id.* at 571.

¹⁴⁸ See *id.* at 572-74.

¹⁴⁹ *Id.* at 574 (citing *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 274 (1906); *Clark v. Barnard*, 108 U.S. 436 (1883)). Accord *Gunter*, 200 U.S. at 284 ("[W]here a State voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibition of the [Eleventh] Amendment."); *Clark*, 108 U.S. at 447 ("The immunity from suit belonging to a state, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction."). Cf. *Missouri v. Fiske*, 290 U.S. 18, 25 (1933) (agreeing with lower court that state's intervention in federal-court action "was too limited in character to constitute a waiver of the immunity given by the [Eleventh] amendment").

¹⁵⁰ *Gardner*, 329 U.S. at 574.

¹⁵¹ *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 511 (1940) (citing *Bull v. United States*, 285 U.S. 247, 261 (1935)); see also 3 MOORE'S FEDERAL PRACTICE § 13.50, at 13-69 (3d ed. 1988).

¹⁵² See, e.g., *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 947-48 (Fed. Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) (holding defendant could assert against state any compulsory counterclaims to reduce or eliminate state's recovery on its claims); *Livera v. First Nat'l State*

the same facts as the sovereign's claim.¹⁵³

The recoupment doctrine honors a sovereign's immunity while ensuring federal courts honor the Supremacy Clause. A state may waive its immunity by submitting a claim to a federal court.¹⁵⁴ The state cannot, however, limit that waiver so as to prevent the federal court from following federal law applicable to the claim. Such a limitation would require the federal court to

Bank, 879 F.2d 1186, 1195 (3d Cir. 1989), *cert. denied*, 493 U.S. 937 (1989) (quoting *United States v. Penn*, 632 F. Supp. 691, 693 (D.V.I. 1986)); *United States v. 2116 Boxes of Boned Beef*, 726 F.2d 1481, 1490 (10th Cir. 1984), *cert. denied sub nom.*, *Jarboe-Lackey Feedlots, Inc. v. United States*, 469 U.S. 825 (1984) (Lower court holding that defendant could not assert counterclaim against *United States* in seizure proceeding under recoupment theory, because "recoupment is merely 'the right of the defendant to have the plaintiff's monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of the very [matter] giving rise to the plaintiff's claim.'" (quoting *National Bank of Louisville v. Master Auto Serv. Corp.*, 693 F.3d 308, 310 n.1 (4th Cir. 1982)) (bracketed text supplied by the court). *Cf. State of Georgia Dep't of Taxation v. Burke (In re Burke)*, 146 F.3d 1313 (11th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3394 (U.S. Dec. 1, 1998) (No. 98-906) (holding that, by filing claim in bankruptcy proceeding, state waived immunity from compulsory counterclaim for costs and attorney's fees associated with state's violation of automatic stay).

¹⁵³ See, e.g., *Burke*, 146 F.3d at 1318 n.10 (holding that, by filing claim in bankruptcy proceeding, state waived immunity from counterclaim because it arose out of same transaction or occurrence as state's claim); *Schlossberg v. Maryland Comptroller of Treasury (In re Creative Goldsmiths of Washington, D.C., Inc.)*, 119 F.3d 1140, 1147-50 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998) (holding that, by filing claim in bankruptcy proceeding, state did not waive its immunity from bankruptcy trustee's claim, because trustee's claim did not arise out of same transaction or occurrence as did state's claim); *Livera*, 879 F.2d at 1195-96 (holding that federal government waived immunity from defendant's counterclaim because counterclaim arose out of same loan agreement as government sought to recover on); *In re Monongahela Rye Liquors, Inc.*, 141 F.2d 864, 868-70 (3d Cir. 1944) (state did not waive its immunity in bankruptcy proceeding from bankruptcy trustee's unrelated counterclaim); *Commonwealth v. Matlack*, 4 U.S. (4 Dall.) 303 (1804).

¹⁵⁴ A state's voluntary submission of an affirmative claim to a federal court differs greatly from conduct that the Court has held insufficient to constitute a waiver of sovereign immunity. See *Wisconsin Dep't of Corrections v. Schacht*, 118 S. Ct. 2047, 2056-57 (1998) (Kennedy, J., concurring); see also *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (seeing "no place for" doctrine of "[c]onstructive consent" in determining whether state had waived its Eleventh Amendment immunity). *Gardner*, therefore, does not support the doctrine of "constructive waiver" associated with *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 192 (1964), *overruled in part by Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987); other precedent of the Court has cast serious doubt on, if not invalidated, that doctrine, see *Chavez v. Arte Publico Press*, 157 F.3d 282, 285-87 (5th Cir. 1998). See generally ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 7.6, at 406-10 (2d ed. 1994) (discussing constructive waiver).

violate the Supremacy Clause by disregarding federal law. No such violation occurs, however, when a federal court declines to hear counterclaims against the state that do not arise from the same facts as does the state's claim. The court's refusal to hear such counterclaims respects sovereign immunity to the extent permitted by the Supremacy Clause.

The same reasoning applies when a state waives its immunity, not by filing a claim in federal court, but by consenting to claims against it in its own courts. The state cannot limit its consent so as to prevent its courts from applying relevant federal law in resolving the claims.¹⁵⁵ The state can, however, refuse to consent to claims that do not arise from the same facts as do the claims to which it has consented. The state's withholding of such consent does not require the state courts to violate the Supremacy Clause.

Suppose, for example, that a state authorized a discharged employee to sue it on the ground that her discharge violated an employment contract. The state could not prevent the employee from arguing that her discharge also violated a valid federal statute. That restriction would require the state court to disregard federal law governing the dispute over the discharge. Such disregard by the state court would violate the Supremacy Clause. No similar violation would occur if the state consented to suits for wrongful discharge but not to suits for unrelated claims arising during the term of employment. The Supremacy Clause is offended only when the state allows its courts to hear a state-law claim but prohibits them from hearing a federal claim arising from the same facts. It is only in that situation that the state's restriction on its consent to suit would require the state courts to violate the Supremacy Clause.

4. Applying the Testa Principle to Federal Claims Against Non-State Defendants

Although this Article focuses on private, federal claims against the states, it has proposed a reading of *Testa* that has implications for private, federal claims against non-state defendants. This subsection briefly examines those implications. As a doctrinal matter, the implications accord with precedent outside the *Testa* line of cases. As a practical matter, the implications are fairly minor.

¹⁵⁵ See, e.g., REDISH, *supra* note 5, at 165 ("[T]here has never existed doubt that state courts are obligated to consider and apply relevant principles of federal law which become applicable in the course of the adjudication of a state cause of action.") (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)).

Testa's nondiscrimination principle governs the obligation of state courts to hear private, federal actions against any defendant. Under that principle, the Supremacy Clause requires a state court to hear a private, federal claim if the court has power under state law to hear a state-law claim arising from the same facts. The requirement applies whether or not the defendant is a state. By the same token, the Supremacy Clause does not require a state court to hear a private, federal claim against any type of defendant if the court lacks power to hear a state-law claim arising from the same facts. Thus, states can, consistently with the Supremacy Clause, prevent their courts from hearing private, federal claims against any defendants, as long as the states do not discriminate against federal claims.

This conclusion is consistent with precedent. The Court has long recognized the states' authority "to establish the structure and jurisdiction of their own courts."¹⁵⁶ The Court has also recognized that the exercise of that authority "is commonly, if not always, a question for the State itself," rather than a question of federal law.¹⁵⁷ Accordingly, the Court said in *Howlett v. Rose*, "The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented."¹⁵⁸ That statement reflects the "general rule" that "federal law takes the state courts as it finds them."¹⁵⁹

As a practical matter, though, states have not shut their courthouse doors to federal claims and cannot do so. Every state has courts of general jurisdiction.¹⁶⁰ Many states supplement those courts with courts of specialized jurisdiction.¹⁶¹ State courts of some kind are open to nearly every type of state-law claim against a private defendant. And the Supremacy Clause requires a state court to hear any federal claim that arises from the same facts as does a state-law claim that the court would have power to decide. The result is that state courts will remain open to virtually all federal claims

¹⁵⁶ *Johnson v. Fankell*, 117 S. Ct. 1800, 1805 (1997).

¹⁵⁷ *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937).

¹⁵⁸ *Howlett v. Rose*, 496 U.S. 356, 372 (1990).

¹⁵⁹ *Id.* (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

¹⁶⁰ See Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1774 (1992).

¹⁶¹ See, e.g., Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1763 (1997) (noting that, "in almost every state some functional specialization has occurred for areas like family law, wills and probate, and small claims").

against private defendants (except claims within the exclusive jurisdiction of the federal courts).¹⁶² The debate about *Testa* thus has significance primarily for federal claims against the states, local governments, and officials of those entities.

5. Implications of the Testa Principle for Congress's Power to Compel State Courts to Hear Federal Claims

The *Testa* cases address the state courts' obligation to enforce federal law under the Supremacy Clause standing alone. Those cases do not directly address Congress's power to enlarge that obligation. One of the *Testa* cases, however,—*Mondou v. New York, New Haven, & Hartford R.R. Co.*¹⁶³—strongly suggests that Congress lacks such power, at least under the original Constitution. That suggestion accords with dicta in earlier precedent concerning Congress's power to confer jurisdiction on state courts.¹⁶⁴ The suggestion is in some tension, however, with early federal statutes that appeared to require state courts to enforce federal law. On balance, the Court's precedent before *New York* and *Printz* implies, without deciding, that Congress cannot compel a state court to hear a federal claim that the Supremacy Clause would not require it to hear.

In *Mondou*, the Court held that a state court erred in refusing to hear a private action based on an Article I statute because it disagreed with the policy underlying the statute.¹⁶⁵ The Court concluded that rights arising under federal law are enforceable in state courts "when their jurisdiction, as prescribed by local laws, is adequate to the occasion."¹⁶⁶ Thus, the state

¹⁶² See Weinberg, *supra* note 160, at 1777; but cf. *infra* notes 346-52 and accompanying text (discussing state-court immunity of cities and counties).

¹⁶³ 223 U.S. 1 (1912).

¹⁶⁴ See Collins, *supra* note 15, at 163 (cases leading up to *Testa* "suggested that constitutional problems would surround any insistence that the state courts hear cases other than those they ordinarily heard"); Note, *supra* note 5, at 1555 (stating that *Testa* and other FELA decisions by Supreme Court "implied that constitutional difficulties might arise if Congress attempted to compel states to enforce federally created rights when no analogous state-created right existed"). Dicta in a pre-*Testa* case had gone further, suggesting that Congress can *never* compel state courts to enforce federal law over the state's objection (even if the federal law were analogous to state laws enforced by them). See *United States v. Jones*, 109 U.S. 513, 520 (1883) (relevant passage quoted *infra* note 175). *Testa* plainly limits that dicta by forbidding States from authorizing their courts to discriminate against federal claims. See *Testa v. Katt*, 330 U.S. 386 (1947).

¹⁶⁵ See *Mondou*, 223 U.S. at 55-58.

¹⁶⁶ *Id.* at 59.

courts' duty to enforce federal rights depends on "[t]he existence of the jurisdiction."¹⁶⁷ The Court in *Mondou* emphasized that the case did not involve "any attempt by Congress to enlarge or regulate the jurisdiction of state courts."¹⁶⁸ The federal statute at issue, "instead of granting jurisdiction to the state courts, presuppose[d] that they already possessed it."¹⁶⁹

In emphasizing that the federal statute before it did not seek to force jurisdiction on the state courts, the *Mondou* Court may well have reflected doubt about Congress's power to do so. In earlier cases, the Court had made clear that, even when state courts adjudicate federal actions, they are exercising jurisdiction derived from state law.¹⁷⁰ More to the point, the Court had said, in dicta, that Congress cannot confer jurisdiction on state courts.¹⁷¹

¹⁶⁷ *Id.* at 58.

¹⁶⁸ *Id.* at 56.

¹⁶⁹ *Id.* See also *Herb v. Pitcairn*, 324 U.S. 117, 120 (1945) (citing this passage). *Cf.* *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 219 (1916) ("proceedings in state courts [under the federal statute at issue] deriv[e] their authority from state law"); *id.* at 222 (*Mondou* "in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that, for the purpose of enforcing that [federal] right, the state court was to be treated as a Federal court, deriving its authority not from the state creating it, but from the United States.").

¹⁷⁰ See, e.g., *Clafflin v. Houseman*, 93 U.S. 130, 137 (1876) (holding that state courts could entertain actions authorized by federal law even though "a State court derives its existence and functions from the State laws"); see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337 (1816) (stating that state courts have concurrent jurisdiction over Article III cases "only . . . in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority"). *Cf.* *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807) (Marshall, C.J.) (state courts "emanate from a different authority, and are creatures of a distinct government").

¹⁷¹ See, e.g., *Clafflin*, 93 U.S. at 141 (denying "that Congress could confer jurisdiction upon the State courts"); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 27-28 (1820) (Washington, J.) ("For I hold it to be perfectly clear, that Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States, although the State Courts may exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal Courts."); *id.* at 67 (Story, J., dissenting) ("There is no pretence to say, that Congress can compel a State Court Martial to convene and sit in judgment on [a federal criminal] offence."); see also *Holmgren v. United States*, 217 U.S. 509, 517 (1910) ("It is undoubtedly true that the right to create courts for the states does not exist in Congress."). *Cf.* *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821 (1824) (asserting that state tribunals "may be closed to any claim asserted under a law of the United States"); *Stearns v. United States*, 22 F. Cas. 1188, 1192 (C.C.D. Vt. 1835) (No. 13,341) (Thompson, J.) ("Congress cannot compel a state court to entertain jurisdiction in any case . . ."); *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9662) (Story, J.) ("It is clear, that congress has no right to require, that the state courts shall

Those statements seem to reflect the then-“undoubted truth” that “there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit.”¹⁷²

Despite the Court’s early suggestions that Congress could not confer jurisdiction on the state courts, the Court in *Testa* described several early federal statutes as “conferr[ing] jurisdiction upon the state courts.”¹⁷³ The Court may have meant only that the statutes gave state courts enforcement authority that could have been given exclusively to federal courts.¹⁷⁴ In any event, the early federal statutes did not unambiguously compel state courts to enforce federal law if they lacked power to do so under state law. Neither the Court nor such an eminent historian as Charles Warren understood them to do so.¹⁷⁵ Moreover, to the extent that these early statutes could be read to reflect an assertion of broader congressional power, their constitutionality was consistently disputed.¹⁷⁶ The history of these statutes thus serves to highlight

entertain [bankruptcy] suits . . .”).

¹⁷² *Missouri v. Lewis*, 101 U.S. 22, 31 (1879). See also *Newton v. Commissioners*, 100 U.S. 548, 559 (1879).

¹⁷³ *Testa v. Katt*, 330 U.S. 386, 389-90 (1945); see also *Printz v. United States*, 117 S. Ct. 2365, 2370-71 (1997) (describing early federal statutes that state courts were apparently required to enforce); Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 577-84 (1925) (same).

¹⁷⁴ See *Claflin*, 93 U.S. at 139-40.

¹⁷⁵ See *Printz*, 117 S. Ct. at 2370 n.1; see also *Holmgren*, 217 U.S. at 517 (state courts can enforce federal law “[u]nless prohibited by state legislation”); *United States v. Jones*, 109 U.S. 513, 520 (1883) (“And though the jurisdiction thus conferred [by early federal statutes] could not be enforced against the consent of the states, yet, when its exercise was not incompatible with state duties, and the states made no objection to it, the decisions rendered by the state tribunals were upheld.”); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 108-09 (1860); Collins, *supra* note 15, at 135-64; Warren, *supra* note 173, at 546 (reviewing early federal statutes but concluding that “Congress has no power to force jurisdiction upon a State Court”); *id.* at 594 (Congress “has only power to authorize” a state-court trial for a federal crime, “and the State may or may not assent.”).

¹⁷⁶ See Caminker, *Subordinacy*, *supra* note 54, at 1035 (“The questions of whether and when state courts must entertain federal causes of action have been fiercely controverted episodically since the early nineteenth century.”); Collins, *supra* note 15, at 135-64 (detailing history of this controversy); *id.* at 167 (summarizing that “the historical record of cooperation” by states in enforcing early federal statutes is “scanty,” and that “state court objections to the assumption of unwanted jurisdiction were made early on”); Fletcher, *A Historical Interpretation*, *supra* note 5, at 1094 n.237 (noting that it was not “established” in 19th century that state courts had obligation to entertain federal causes of action); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 70-71 (1924) (describing how “State-Rightists” who originally advocated federal statutes that were

the longstanding uncertainty about congressional power to compel state courts to hear federal claims.

In light of this history, it is quite doubtful that the *Testa* Court meant to imply that Congress could compel state courts to hear federal claims that the Supremacy Clause did not require them to hear. The unanimous decision in *Testa* did not signal that it broke new ground.¹⁷⁷ The Court's analysis in *Testa* consisted mostly of describing its prior holdings.¹⁷⁸ In particular, the *Testa* Court found the argument against state-court jurisdiction in that case "strikingly similar" to the one it had rejected in *Mondou*.¹⁷⁹ Thus, as the Court later said, "[T]he sense of the *Testa* opinion was that it merely reflected longstanding constitutional decision and policy represented by such cases as *Claflin* . . . and *Mondou*."¹⁸⁰

enforceable in state courts later argued that Congress lacked power to provide for enforcement of federal laws in state courts); *id.* at 71 n.50 (citing case law and commentary debating constitutional issue).

¹⁷⁷ In keeping with the pre-*Testa* case law discussed *supra* in notes 170-72 and the accompanying text, the Solicitor General admitted in *Testa* that "there is no obligation upon the states to provide a forum for the enforcement of [a] federally created right where there is otherwise no state court of appropriate jurisdiction." Brief for the Petitioners at 15, *Testa v. Katt*, 330 U.S. 386 (1947) (No. 431) (citation omitted). The Solicitor General, however, contended that the state court's dismissal of a federal cause of action in that case conflicted with "repeated[]" holdings by the U.S. Supreme Court "that state courts cannot discriminate against federal rights and refuse to entertain causes of action based on federal statutes where they would entertain a similar action brought under a state statute." *Id.*

¹⁷⁸ See *Testa*, 330 U.S. at 390-94.

¹⁷⁹ *Id.* at 392.

¹⁸⁰ *Palmore v. United States*, 411 U.S. 389, 402 (1973) (citations omitted). It may be significant that the *Testa* Court relied without comment on scholars who believed Congress could not force state courts to hear federal claims over the states' objection. See *Testa*, 330 U.S. at 390 n.5. In discussing early federal statutes that Congress made enforceable in state court, the Court cited Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925), and James D. Barnett, *The Delegation of Federal Jurisdiction to State Courts*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW (Association of Am. Law Schs. ed. 1938). See *Testa*, 330 U.S. at 390 n.5. Both Warren and Barnett believed that Congress could not force a state court to hear federal causes of action over the state's objection. See Warren, *supra*, at 546 ("While Congress has no power to force jurisdiction upon a State Court, it has the power to leave jurisdiction to a State Court."); *id.* at 594 (stating that Congress "has only power to authorize such a trial [*i.e.*, a trial in state court of a person charged with a federal crime] and the State may or may not assent"); Barnett, *supra*, at 1213 ("With the exception of a few cases in which the supremacy of Federal law is interpreted to render the exercise of jurisdiction both lawful and compulsory, the courts invariably have held, either without argument, because apparently the matter is too clear for argument, or upon the expressly stated ground of the

6. Summary

As construed in the *Testa* cases, the Supremacy Clause does two things. It invalidates state laws that permit or require state courts to discriminate against federal claims. It also requires state courts to hear federal claims if, aside from such discriminatory laws, the courts "otherwise" have power under state law to hear the federal claims.¹⁸¹ Thus, the Supremacy Clause does not require a state court to hear a claim against its own state if state law bars all claims against the state in state court. The Clause does, however, require a state court to hear a federal claim if the court has power under state law to hear a state-law claim arising from the same facts. Thus, if a state waives immunity in its courts from a state-law claim, its courts must hear federal claims against the state that arise from the same facts.

The *Testa* cases do not resolve Congress's power to compel state courts to hear federal claims that the Supremacy Clause would not require them to hear. The *Testa* cases imply, however, that Congress lacks such power under the original Constitution. That implication is consistent with dicta in other Supreme Court precedent expressly denying Congress such power.

C. Integration of Anticommandeering Cases and *Testa* Cases

The Court reaffirmed in *New York* and *Printz* that the Supremacy Clause sometimes obligates state courts to enforce federal law.¹⁸² As

independent position of the States, that the exercise of jurisdiction in such cases is wholly optional with the State authorities." It bears emphasis that the *Testa* Court did *not* cite these sources for the proposition that the Constitution forbids Congress from forcing the adjudication of federal claims on a non-consenting state. The Court cited them merely for their discussion of early federal statutes that were enforceable in federal court. See *Testa*, 330 U.S. at 390 n.5. It nonetheless seems significant, in light of other evidence that the Court in *Testa* did not view its decision as breaking new ground, that the Court cited these commentators without mentioning, much less disavowing, their position that the state courts were not obligated to enforce federal law.

¹⁸¹ See *Howlett v. Rose*, 496 U.S. 356, 374 (1990). When state courts are obligated to entertain a federal claim (or a federal defense), they also must follow federal procedure in resolving that claim (or defense), if those procedures are intertwined with the federal right being asserted. See, e.g., *Felder v. Casey*, 487 U.S. 131, 151 (1988) (holding that state law requiring plaintiff to give notice of suit to federal officer sued in state court under 42 U.S.C. § 1983 was preempted because it would "interfere[] with and frustrate[] the substantive right Congress created"); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (holding that state court was required to conduct a jury trial in action under FEHA).

¹⁸² See *Printz v. United States*, 117 S. Ct. 2365, 2371 (1997); *New York v. United States*,

discussed in the last section, that obligation has limits. The question remains whether Congress can expand those limits by requiring state courts to hear federal claims that the Supremacy Clause would not require them to hear.¹⁸³ The Court's reasoning in *New York* and *Printz* dictates a negative answer when Congress attempts to impose such requirements under Article I.

To understand this conclusion, one must initially recognize what is at stake. The Supremacy Clause, standing alone, leaves a state with significant control over the volume and types of cases that its courts can hear. The Clause does not prevent a state court from declining, on the basis of a neutral rule of judicial administration, to hear a federal action.¹⁸⁴ Those neutral rules include doctrines that limit the volume and type of litigation, including, as discussed above, the doctrine of sovereign immunity.¹⁸⁵ At stake, then, is Congress's power to compel state courts to hear federal claims that would be barred from those courts under neutral state laws of judicial administration, including the state law of sovereign immunity.

This Section argues that such congressional compulsion would harm the system of dual sovereignty in the same ways that led the Court, in *New York* and *Printz*, to strike down federal statutes that commandeered state legislatures and executive officials. Subsection one identifies the harms that the Court found congressional commandeering of the legislative and executive branches of state government caused. Subsection two demonstrates that those same harms would result from congressional commandeering of state courts. Subsection three establishes that the injury to dual sovereignty would be particularly grave if Congress compelled state courts to hear private actions against their own state without the state's consent.

1. The Concerns Underlying the Anticommandeering Principle

The Court has identified three harms that occur when Congress uses Article I to commandeer a state's legislative or executive branch. One concerns resource allocation. A second concerns the power of a state's

505 U.S. 144, 178-79 (1992).

¹⁸³ The Supremacy Clause itself, of course, does not give Congress such power. The Supremacy Clause is not a grant of congressional power at all. It merely makes a federal statute the supreme law of the land if the statute falls within a grant of congressional power provided for elsewhere in the Constitution and is otherwise constitutional.

¹⁸⁴ See, e.g., *Howlett*, 496 U.S. at 374; see also *supra* notes 94-98 and accompanying text (discussing "valid excuse" doctrine).

¹⁸⁵ See *Howlett*, 496 U.S. at 372.

residents to set a legislative agenda. The third concerns the lines of accountability between the federal and state government. The harms are best described by tracing their identification in the Supreme Court's decisions chronologically.¹⁸⁶

Although *New York* was the first case in which a majority of the Court applied the anticommandeering principle, the concerns underlying the principle were first articulated in *FERC v. Mississippi*¹⁸⁷ in a partial dissent by Justice O'Connor, the author of the majority opinion in *New York*.¹⁸⁸ Justice

¹⁸⁶ The Court based the anticommandeering rule not only on the harms that commandeering causes the system of dual sovereignty but also on history that indicates Congress lacked the power to commandeer the legislative and executive branches of state government. See *Printz*, 117 S. Ct. at 2370-83; *New York*, 505 U.S. at 155-69, 175-77. Commentators debate the accuracy of the Court's understanding of history. See Caminker, *Subordinacy*, *supra* note 54, at 1042-50 (arguing that history of Constitution and early congressional practice "strongly support" congressional commandeering of state executives but is "ambiguous" with respect to congressional commandeering of state legislatures); Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 KAN. L. REV. 493, 517 (1993) (arguing that history of Constitution does not support any anticommandeering principle); Powell, *supra* note 79, at 661-64 (arguing that history of Constitution does not support "autonomy of process" principle on which *New York* is based); Prakash, *supra* note 54, at 1959-60, 1990-2032 (arguing that history of Constitution supports congressional commandeering of state executive officials, but not congressional commandeering of state legislatures). Cf. Martin H. Redish, *Doing It with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 603-04 (1994) (criticizing *New York*'s reliance on constitutional history regardless of accuracy of Court's understanding of history). In any event, there is no clear historical support for congressional commandeering of state courts. As discussed above, there were some early federal statutes that could be construed to compel state courts to enforce federal law. In light of their ambiguity and persistent doubts about their constitutionality, these early federal statutes provide little historical support for congressional power to commandeer state courts. The relevant history is examined in great detail in Collins, *supra* note 15, at 135-64. See also Prakash, *supra* note 54, at 1967-71 & 2007-30 (examining history of congressional commandeering of state courts). Cf. Powell, *supra* note 79, at 652-81 (examining history of congressional commandeering in general).

¹⁸⁷ 456 U.S. 742 (1982).

¹⁸⁸ See *id.* at 775-97 (O'Connor, J., concurring in part and dissenting in part); see also *id.* at 781 n.8 (O'Connor, J., concurring in part and dissenting in part) ("Although the congressional goal is a noble one, appellants have not shown that Congress needed to commandeer state utility commissions to achieve its aims.") (emphasis added). At issue in *FERC* were several provisions of the federal Public Utility Regulatory Policies Act of 1978 (PURPA). See *id.* at 745 (citing Public Utility Regulatory Policies Act of 1978, Titles I-III, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.)). The challenged provisions consisted of: (1) what the Court called "the consideration

O'Connor argued that a fundamental attribute of state sovereignty is the power to decide the subjects to which state government should devote its attention: the power to "set an agenda."¹⁸⁹ The federal statute at issue in *FERC* intruded on that power, in her view, by requiring state utility commissions to consider the adoption of federal rate-making standards.¹⁹⁰ Justice O'Connor explained that the federal statute was more intrusive than a federal statute that simply preempted state utility regulation: "[A]fter Congress pre-empt[s] a field, the States may simply devote their resources elsewhere. . . . [The Act], however,

provisions," requiring state utility commissions to consider the adoption of federally prescribed rate-making standards designed primarily to encourage energy conservation; (2) "procedural provisions," requiring the state commissions to follow certain procedures when considering the federal rate-making standards; and (3) Section 210 of PURPA, requiring the state commissions to implement regulations adopted by FERC to encourage the development of certain energy resources. *See id.* at 746-51, 770. The Court held that these provisions fell within Congress's power under the Commerce Clause and did not violate the Tenth Amendment. *See id.* at 753-70. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, dissented from the part of the majority's decision that rejected a Tenth Amendment challenge to the consideration provisions and the procedural provisions. *See id.* at 775 (O'Connor, J., concurring in part and dissenting in part). These provisions were invalid, in the Justice's view, because they "conscript[ed] state utility commissions into the national bureaucratic army." *Id.* (O'Connor, J., concurring in part and dissenting in part). In a separate partial dissent, Justice Powell argued that the procedural provisions violated the Tenth Amendment. *See id.* at 771-75 (Powell, J., concurring in part and dissenting in part). The Justices unanimously agreed that all of the provisions fell within the Commerce Clause and that Section 210 of PURPA did not violate the Tenth Amendment. *See id.* at 775 (Powell, J., concurring in part and dissenting in part) (finding that, in contrast to procedural provisions, precedents of the Court support the constitutionality of the substantive provisions of this Act); *id.* at 775 n.1 (O'Connor, J., concurring in part and dissenting in part) (expressing agreement with the majority's rejection of the Commerce Clause challenges and Tenth Amendment challenge to Section 210 of PURPA).

¹⁸⁹ *See id.* at 778-79 (O'Connor, J., concurring in part and dissenting in part) (identifying statute's "Tenth Amendment defect[]" as arising from its "structuring the regulatory agenda of a state agency"); *id.* at 779 (O'Connor, J., concurring in part and dissenting in part) ("The power to make decisions and set policy . . . embraces more than the ultimate authority to enact laws; it also includes the power to decide which proposals are most worthy of consideration, the order in which they should be taken up, and the precise form in which they should be debated."); *id.* at 780-81 (O'Connor, J., concurring in part and dissenting in part) (stating Act intrudes on state sovereignty by "set[ting] the agendas of agencies exercising delegated legislative power"); *id.* at 785 n.14 (O'Connor, J., concurring in part and dissenting in part) (distinguishing prior Court decision holding that state trial courts could not refuse to hear a federal claim if a similar state law claim would be heard in that state's courts on the ground that "[s]tate legislative bodies possess at least one attribute of state sovereignty, the power to set an agenda, that trial courts lack").

¹⁹⁰ *See supra* note 188.

drains the inventive energy of state governmental bodies.”¹⁹¹ Justice O’Connor also identified “a second reason” why federal preemption was less intrusive than a federal command requiring state quasi-legislative bodies to consider federal regulatory proposals:

Local citizens hold their utility commissions accountable for the choices they make. Citizens, moreover, understand that legislative authority usually includes the power to decide which ideas to debate, as well as which policies to adopt. Congressional compulsion of state agencies, unlike pre-emption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.¹⁹²

Thus, the problems with federal commandeering, according to Justice O’Connor, are that it diverts state resources from matters of local concern; interferes with the ability of state residents to set a legislative agenda; and makes it difficult for people to tell who to blame for the policies that the states are commandeered to implement.¹⁹³

Justice O’Connor largely repeated these concerns for the majority in *New York*. The Court found that two adverse consequences flowed from federal statutes that compel states to regulate according to federal dictates. First, those statutes prevent states from “devot[ing] [their] attention and resources” to problems that their citizens want addressed.¹⁹⁴ Second, they diminish the accountability of government to the electorate. When state officials are forced to implement federal policy, people who do not like the policy cannot tell which group of elected government officials—state or federal—to blame for the policy.¹⁹⁵

The Court in *New York* found that these concerns distinguished federal commandeering from other “methods, short of outright coercion, by

¹⁹¹ *FERC*, 456 U.S. at 787 (O’Connor, J., concurring in part and dissenting in part).

¹⁹² *Id.* (O’Connor, J., concurring in part and dissenting in part).

¹⁹³ Justice O’Connor’s concern for the public perception of governmental action in the commandeering context resembles a similar concern that she has expressed in cases presenting challenges based on the Establishment Clause. See, e.g., *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 635-36 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (arguing that relevant inquiry is whether “reasonable observer” would perceive challenged government action as endorsing religion).

¹⁹⁴ *New York v. United States*, 505 U.S. 144, 168 (1992).

¹⁹⁵ *Id.* at 169 (“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”).

which Congress may urge a State to adopt a legislative program consistent with federal interests.”¹⁹⁶ First, Congress may *encourage* states to regulate by offering federal funds conditioned on their doing so.¹⁹⁷ Second, Congress may *threaten* the states with preemptive federal regulation of a subject unless the states regulate it in a manner acceptable to Congress.¹⁹⁸ Third, Congress can skip the threat and enact federal laws that immediately preempt state regulation of the subject covered by the federal laws.¹⁹⁹ The first two types of congressional action leave states with a choice of whether or not to regulate according to federal dictates: “The States thereby retain the ability to set their legislative agendas.”²⁰⁰ The third type of congressional action allows states to devote their attention and resources to matters of local concern. In all three situations, the states remain accountable to the electorate for their choices and actions.²⁰¹

The Court again pointed to the resource-allocation and accountability concerns in *Printz*. There, the Court did so by rejecting the government’s argument that the Brady Act provisions should be upheld because they, unlike the “take title” provision struck down in *New York*, required only “discrete, ministerial tasks.”²⁰² The Court found that, even accepting that characterization, the Brady Act provisions implicated the concerns underlying

¹⁹⁶ *Id.* at 166.

¹⁹⁷ *See id.* at 167 (“under Congress’s spending power, ‘Congress may attach conditions on the receipt of federal funds’ [if the conditions] bear some relationship to the purpose of the federal spending”) (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)); *see also id.* at 158 (discussing Congress’s power under Spending Clause).

¹⁹⁸ *See id.* at 167 (“where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’s power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation”).

¹⁹⁹ *See id.* at 188 (“The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests.”); *see also id.* at 159 (discussing Supremacy Clause).

²⁰⁰ *Id.* at 185. *See also id.* at 167-69, 173-74.

²⁰¹ *See id.* at 168 (“If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program. . . . Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”); *see also id.* at 185 (when Congress encourages state regulation by offering federal money or threatening preemption, “[t]he States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate”).

²⁰² *See Printz v. United States*, 117 S. Ct. 2365, 2382 (1997).

the anticommandeering principle.²⁰³ Specifically, “[b]y forcing state governments to absorb the financial burden of implementing [a background-check system], Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes.”²⁰⁴ Even if Congress reimbursed the states for the expense of implementing the Brady Act, the states were “still put in the position of taking the blame for its burdensomeness and for its defects.”²⁰⁵ Thus, the Brady Act’s background-check provisions forcibly diverted state resources to matters of federal concern and blurred lines of accountability.²⁰⁶

2. *The Harms to Dual Sovereignty Caused by Congressional Commandeering of State Courts*

In *Printz*, the Court examined the concerns underlying the anticommandeering principle to determine whether Congress had power under Article I to commandeer state executive officials. If the Court takes the same approach in assessing Congress’s power under Article I to commandeer state courts, it should conclude Congress has no such power. Recall that congressional commandeering of state courts would consist in compelling state courts to hear federal claims that would be barred under neutral state laws related to judicial administration.²⁰⁷ Such compulsion could cause the same harms caused by congressional commandeering of the other branches of state government.

First, congressional commandeering of state courts would divert state time and resources from matters of local concern.²⁰⁸ Simply put, the more time and money that Congress required state courts to devote to hearing federal cases, the less the courts would have for hearing state cases.²⁰⁹

²⁰³ See *id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ In addition to the concerns discussed in the text, the Court in *Printz* briefly mentioned the concern that federal commandeering of state executive officials undermined the authority of the President to execute federal law. See *id.* at 2378. The brevity of the Court’s discussion of this controversial and complicated issue led one commentator to “wonder[] about *Printz*’s precedential value on this point.” Caminker, *Limits of Federalism*, *supra* note 54, at 226. The thesis of this Article does not rely on this aspect of *Printz*.

²⁰⁷ See *supra* notes 184-85 and accompanying text.

²⁰⁸ Cf. *New York v. United States*, 505 U.S. 144, 168 (1992).

²⁰⁹ See Caminker, *Subordinacy*, *supra* note 54, at 1052 (“The more federal claims a state court must hear, the fewer state claims it can adjudicate.”). Professor Caminker makes this point to argue the Court was wrong to prohibit federal commandeering of state executive and

Congressional commandeering of state courts could consume just as much state energy as could congressional commandeering of the other branches of state government. In this respect, congressional commandeering of state courts undermines dual sovereignty in a way that does not occur when Congress assigns the adjudication of certain matters exclusively to the federal courts.²¹⁰

Second, congressional commandeering of state courts would interfere with the power of a state's citizens to set an agenda for state legislative action.²¹¹ A state legislature often responds to local problems by enacting laws that must be enforced in state courts. The legislature cannot effectively respond in that way when the state courts are already clogged with federal cases. Moreover, in that situation the legislature cannot expedite the adjudication of urgent cases in the state courts.²¹²

Finally, congressional commandeering of state courts would blur the lines of accountability between state and federal officials.²¹³ A state legislature could react in two ways to the congressional commandeering of its courts. It could expand its court system, but that would take money. It could do nothing, but that would cause the quality and speed of state-court adjudication to deteriorate. Either route would cause state residents to blame members of the state legislature, rather than members of Congress, for the increase in costs or the decrease in efficiency.²¹⁴

legislative officers. *See id.* In contrast, this Article makes the point to argue that the commandeering principle extends to judicial officers as well.

²¹⁰ *Cf.* *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in part and dissenting in part) (federal commandeering of state agency "drains" time and energy that agency needs to address local matters and, in that respect, is more intrusive than federal preemption of matter regulated by state agency).

²¹¹ *Cf.* *New York*, 505 U.S. at 185; *see also id.* at 167-69, 173-74; *FERC*, 456 U.S. at 779 (O'Connor, J., concurring in part and dissenting in part).

²¹² *Cf.* Caminker, *Subordinacy*, *supra* note 54, at 1052 ("[T]hrough the jurisdictional and procedural rules it imposes, the state legislature *does* shape the agenda of its courts through a process of exclusion. . . . This type of agenda setting is as much an aspect of state sovereignty as any other sort of agenda setting."); *see also New York*, 505 U.S. at 185 (referring to state's power to set a legislative agenda); *FERC*, 456 U.S. at 779 (O'Connor, J., concurring in part and dissenting in part) (same).

²¹³ *Cf.* *Printz v. United States*, 117 S. Ct. 2365, 2382 (1997); *New York*, 505 U.S. at 169.

²¹⁴ It is possible that congressional commandeering of state courts would cause another sort of accountability problem: People who disliked the federal laws being enforced by state courts would blame the state judges for the laws, rather than Congress. *Compare* Jackson, *State Sovereign Immunity*, *supra* note 15, at 99 n.394 ("Requiring state, rather than federal, judges

One could argue that these harms do not justify the total bar that would result from applying the anticommandeering rule to congressional control of state courts.²¹⁵ Short of a total bar, though, it would be difficult to devise a principled way to limit Congress's power to commandeer the state courts.²¹⁶ Without any limit, Congress's control over state courts would be broad indeed, even if one considers only the Commerce Clause.²¹⁷ When one also considers Congress's other Article I powers, one cannot easily imagine any limit whatsoever on Congress's ability to compel adjudication by state courts. It seems unlikely, of course, that Congress would attempt such broadscale compulsion;²¹⁸ yet it seems no more unlikely than the risk of broadscale congressional commandeering of the other branches of state government. Particularly without a principled way to limit commandeering, short of wholly prohibiting it, the categorical rule of *New York* and *Printz* has

to take the political heat for ordering substantial state expenditures [in suits asserting monetary claims against States under federal law] might be thought, in the long run, to undermine the vitality of state courts as an independent judicial system capable of acting as a check on abuse of government power.") with Caminker, *Subordinacy*, *supra* note 54, at 1070 n.264 (discussing same possibility; arguing that same risk attends federal commandeering of legislative and executive officials; and concluding that risk is small, given ability of state judges and other officials to publicize when their conduct is mandated by federal law).

²¹⁵ See *Printz*, 117 S. Ct. at 2383 (stating its conclusion "categorically, as [the Court] concluded categorically in *New York*").

²¹⁶ But cf. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2182-83 (1998) (summarizing author's suggestions for judicially enforced limits on congressional commandeering of state legislative and executive branches).

²¹⁷ See *New York*, 505 U.S. at 157-58 (discussing breadth of Commerce Clause).

²¹⁸ Although the hypothetical exercise of power described in the text is unlikely today, it would produce a state of affairs that was contemplated when the Constitution was adopted. Under the "Madisonian Compromise," the Constitution itself did not establish lower federal courts, but it gave Congress the power to create them. See, e.g., *Printz*, 117 S. Ct. at 2371 (discussing the compromise). If Congress had not done so, cases arising under federal law that did not fall within the United States Supreme Court's original jurisdiction would have to have been filed in state courts. See generally CHARLES WARREN, THE MAKING OF THE CONSTITUTION 325-27 (1928) (describing debate at Convention on creation of inferior federal courts). Because of the possibility that Congress would not create any lower federal courts, some commentators have argued that state courts must have a duty to adjudicate federal causes of action; otherwise, cases might arise under federal law that could not be heard in any court. See, e.g., Gordon & Gross, *supra* note 15, at 1154 ("Congress's ability to restrict federal jurisdiction implies a state court obligation to assume jurisdiction over federal claims."). As Professor Collins has shown, however, "this is precisely the line of inferential, Supremacy Clause reasoning that does not seem to have commended itself to the generation which struck [the Madisonian Compromise] as much as it has occupied our own." Collins, *supra* note 15, at 143.

much to commend it, including as it applies to the commandeering of state courts.²¹⁹

By the same token, it makes little sense to conclude that Congress can commandeer the state courts but not the other branches of state government. Under *New York* and *Printz*, Congress could not use Article I to compel a state legislature to enact, and the governor to sign, a statute requiring state courts to hear federal claims.²²⁰ Congress should not be able to enact an identical law itself.²²¹

3. The Particular Harm Caused by Congressional Commands that State Courts Hear Actions Against Their Own State Without Its Consent

Congress could cause particular harm to the system of dual sovereignty if it could use Article I to compel state courts to hear private actions against their own states without their consent. Such a use of Article I turns the state against itself. This form of commandeering poses a sufficiently grave threat to dual sovereignty that the Court could appropriately find it beyond Congress's power, without foreclosing Congress's power to compel state courts to hear Article I claims against other types of defendants.

The situation under discussion is illustrated by *Alden v. Maine*.²²² *Alden* is an action by current and former probation officers and juvenile caseworkers against their employer, the State of Maine.²²³ The plaintiffs seek overtime compensation plus liquidated damages under the FLSA.²²⁴ The underlying dispute concerned how the plaintiffs should be classified under the

²¹⁹ Cf. Powell, *supra* note 79, at 684 (stating that "[t]he prudential argument" underlying *New York* is "powerful").

²²⁰ Cf. Howlett v. Rose, 496 U.S. 356, 372 (1990) (asserting that "[t]he requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented."); Mondou v. New York, New Haven, & Hartford R.R. Co., 223 U.S. 1, 57-58 (1912), quoted *supra* in text accompanying notes 168-69.

²²¹ Cf. Holmgren v. United States, 217 U.S. 509, 517 (1910) ("It is undoubtedly true that the right to create courts for the states does not exist in Congress.").

²²² See, e.g., *Alden v. Maine*, 715 A.2d 172 (Me. 1998), *cert. granted*, 119 S. Ct. 443 (1998) (No. 98-436).

²²³ See *id.* at 173 & n.1.

²²⁴ See *id.* at 173; see also 29 U.S.C. § 216(b) (1994) (authorizing private actions for overtime and liquidated damages to be brought "in any Federal or State court of competent jurisdiction").

FLSA for purposes of entitlement to the time-and-a-half rate of pay generally prescribed by the FLSA.²²⁵ The issue now before the Court is whether plaintiffs can sue the State of Maine in its own courts for Maine's asserted improper classification of the plaintiffs under the FLSA.²²⁶

Alden pits the state's judicial branch against its executive branch. The case requires the state court to decide whether the coequal branch has complied with the FLSA. If the state court determines the executive has not done so, it may enter an award payable out of the state treasury. That would pit the state judiciary against the third branch, the Maine legislature, which, like most state legislatures, has exclusive control over the treasury.²²⁷

This form of commandeering intrudes severely on state sovereignty. Decisions by the people of a state allocating powers among the branches of their state government "go to the heart of representative government."²²⁸ That is especially true of decisions about control of the state treasury.²²⁹ Concern for preserving that control explains why Congress cannot use Article I to empower the federal courts to tap the state treasury.²³⁰ The same concern

²²⁵ See Brief for Respondent at 1-5, *Alden v. Maine*, 715 A.2d 172 (Me. 1998) (No. 98-436), *cert. granted*, 119 S. Ct. 443 (1998).

²²⁶ See Petition for a Writ of Certiorari at i, *Alden v. Maine*, 715 A.2d 172 (Me. 1998) (No. 98-436), *cert. granted*, 119 S. Ct. 443 (1998).

²²⁷ See ME. CONST. art. 5, pt. 3, § 4; see also James M. Hirschhorn, *Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1837 n.120 (1984) (stating that most state constitutions forbid disbursements from the state treasury except by legislative appropriation); cf. U.S. CONST. art. I, § 9, cl. 7 (similar provision). The legislature's traditional exclusive control over appropriations predates the Framing of the Constitution, when most states required people with monetary claims against them to petition the legislature and forbade expenditures from the state treasury except pursuant to an appropriation statute. See Pfander, *History*, *supra* note 23, at 1303-04; see also *id.* at 1328 (prior to adoption of Constitution, "state legislatures had complete control over the payment of state obligations").

²²⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks and citation omitted). See *id.* at 460 ("Through the structure of its government, a State defines itself as a sovereign."); see also *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

²²⁹ See *Louisiana v. Jumel*, 107 U.S. 711, 727-28 (1883); *President & Dirs. of Bank of Wash. v. Arkansas*, 61 U.S. (20 How.) 530, 532 (1857).

²³⁰ See *Seminole Tribe v. Florida*, 517 U.S. 44, 54-73 (1996), discussed *supra* notes 17-23 and accompanying text; see also *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) ("Adoption of the [Eleventh] Amendment responded most immediately to the States' fear that 'federal courts would force them to pay their Revolutionary War debts, leading to their

suggests that Congress should not be able to use Article I to compel state courts to tap the state treasury.

Indeed, such a use seems to conflict with *New York*. The Court there held that Congress could not compel a state that failed to meet a federal deadline to take title to low-level radioactive waste.²³¹ The Court reasoned that "[s]uch a forced transfer . . . would in principle be no different than a congressionally compelled subsidy from governments to radioactive waste producers."²³² That reasoning implies that Congress cannot compel the legislature of a state that has violated federal law to make a payment from the state treasury to private parties. The result should not change when Congress seeks to exert the same compulsion through a state's courts. If anything, that route seems more offensive, since state courts lack control over the state treasury from which the payment would come.²³³

The threat to dual sovereignty posed by a congressional command that a state court hear a private claim against its own unconsenting state is not limited to claims for retroactive monetary relief. A congressional command that a state court entertain suits for non-monetary relief, such as injunctive relief, poses an equally grave threat to state sovereignty.²³⁴ A state-court action directly against the state could give the state court much greater contempt and injunctive power than it would have in an *Ex parte Young*-type action.²³⁵ In a direct action, a state court could plausibly assert power to enjoin whole parts of the state government, such as the legislature. That power is doubtful in a case against a state officer.²³⁶ In effect, if Congress

financial ruin."') (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 151 (1984) (Stevens, J., dissenting)).

²³¹ See *New York v. United States*, 505 U.S. 144, 175 (1992).

²³² *Id.*

²³³ See *supra* note 227 (citing authority indicating that state courts lack control over their treasuries).

²³⁴ Cf. *Seminole Tribe*, 517 U.S. at 58 ("The Eleventh Amendment does not exist solely in order to preven[t] federal court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.") (internal quotation marks and citations omitted; brackets supplied by the Court).

²³⁵ See Hirschhorn, *supra* note 227, at 1836-51, 1853-70 (discussing remedial limitations in *Ex parte Young* actions).

²³⁶ Cf. *Spallone v. United States*, 493 U.S. 265 (1990) (holding that federal district court abused its discretion when it imposed personal contempt fines on city council members, rather than imposing fines on the council as a body, because fines on individual legislators would unduly interfere with local legislative process).

could compel the state courts to hear federal claims for injunctive relief directly against their own state, it could use the state courts to commandeer the other branches of state government.

These considerations suggest one reasonable way to limit the anticommandeering rule as it applies to state courts: The limit would distinguish between federal laws that compel state courts to hear private, federal actions against their own state and federal laws that compel state courts to hear private, federal actions against other types of defendants. The former laws undermine dual sovereignty to a much greater degree than do the latter. Moreover, precedent other than *New York* and *Printz* establishes that states have immunity from private actions in their own courts.²³⁷ It would be consistent with that precedent for the Court to hold that Congress cannot use Article I to compel state courts to hear private federal actions against their own state without the state's consent, even though Congress may be able to use Article I to compel state courts to hear private federal actions against other sorts of defendants.²³⁸

On the other hand, one could argue this limited form of the anticommandeering rule has things exactly backwards and Congress should be able to compel state courts to hear claims against their own state even if the courts cannot be compelled to hear claims against private defendants. The argument would begin with the proposition that state courts are supposed to be "the primary guarantors of constitutional rights."²³⁹ The argument would continue that, in light of that role, it is more important for state courts to hear private, federal claims against states (and other defendants acting under color of state law) than to hear private, federal claims against private defendants.

²³⁷ See *supra* notes 99-143 and accompanying text.

²³⁸ Some prominent scholars have found historical support for that precedent. Specifically, Professor William Fletcher found it "clear" that the framers of the Eleventh Amendment "did not contemplate" that "Congress could require state courts to hear cases barred from federal courts by the eleventh amendment." Fletcher, *A Historical Interpretation*, *supra* note 5, at 1095. Professor James Pfander has come to a similar conclusion with respect to the Framers of the original Constitution. See Pfander, *Rethinking*, *supra* note 5, at 596 ("It seems unlikely . . . that the framers would have chosen to compel the state courts to entertain federal claims against their will and in violation of their own jurisdictional limits."); Pfander, *History*, *supra* note 23, at 1362 n.415 ("the framers did not intend to impose suability upon the states in their own courts"). Other commentators have found history unclear on this issue. See Vázquez, *supra* note 13, at 1722-23; Wolcher, *supra* note 15, at 247.

²³⁹ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

This is because private defendants generally cannot violate the Constitution unless they act under color of state law.²⁴⁰ The argument would emphasize that the state courts' role in enforcing federal law against the states has become still more important in the wake of *Seminole Tribe* because that decision limits the ability of federal courts to do so. This line of argument would conclude that, assuming the anticommandeering rule limits the commandeering of state courts at all, it should not prohibit the commandeering of state courts for the purpose of hearing federal—or at least constitutional—claims against the states.²⁴¹

The argument is cogent but ultimately unconvincing to this author. First, it conflicts with the precedent discussed earlier establishing that the Constitution protects states from private actions in their own courts.²⁴² As Professor Vázquez has observed, fidelity to precedent protects the rule of law, which in turn protects individual rights.²⁴³ That consideration countervails the indisputable value of judicial relief for government violations of individual rights.²⁴⁴ Second, the argument described in the last paragraph depends heavily on a fortuity of timing. It emphasizes the importance of state courts in the wake of *Seminole Tribe*. The same argument could have been made against the result in *Seminole Tribe*, if, before deciding that case, the Court had held that Congress could not use the Commerce Clause to compel state courts to hear claims against their own state. Such a holding arguably would have given the federal courts an especially important role in enforcing federal law against the states. Relatedly, the argument described in the last paragraph

²⁴⁰ See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.4, at 343 (5th ed. 1995) (“Almost all of the constitutional protections of individual rights and liberties restrict only the actions of governmental entities.”).

²⁴¹ See generally Ellen D. Katz, *State Courts and the Mandatory Exercise of Jurisdiction After Seminole Tribe and Printz* (unpublished manuscript, on file with the author, making the argument discussed in the text).

²⁴² See *supra* notes 99-143 and accompanying text.

²⁴³ See Vázquez, *supra* note 13, at 1805-06.

²⁴⁴ See *United States v. Lee*, 106 U.S. 196, 220 (1882) (holding that sovereign immunity did not bar action against federal officials in wrongful possession of private land and that to hold otherwise would ignore that “[a]ll the officers of the government, from this highest to the lowest, are creatures of the law, and are bound to obey it”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-63 (1803) (stating that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,” and suggesting that the protection generally should be available from the courts); see also, e.g., Jackson, *State Sovereign Immunity*, *supra* note 15, at 3-4 (asserting that sovereign immunity conflicts with the rule of law).

seems ultimately premised on the view that state courts should be able to remedy a violation of the Constitution whenever a federal court cannot do so.²⁴⁵ So understood, the argument rests on the premise that judicial relief should be available in some court for every violation of a constitutional right.²⁴⁶ Perhaps that ideally "should" be true, but, historically, it has never been so.²⁴⁷ Moreover, the argument begs the question whether individual

²⁴⁵ See Gordon & Gross, *supra* note 15, at 1154 (identifying as "essential premise" of that article "that an adjudicative forum must always be available to vindicate federal rights" and that state courts are therefore "the ultimate guarantors of federal rights"); Wolcher, *supra* note 15, at 242 (arguing that, "if a remedy against a state is called for by the Constitution and federal courts cannot give it because of the eleventh amendment," it must be true that state courts are obligated to provide the remedy). Cf. Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 956 (1991) (analyzing Court's decisions on federal jurisdiction from author's perspective, which "[p]lac[es] the highest value on the enforcement of individual rights").

²⁴⁶ Professor Wolcher's argument against recognition of state-court immunity for states appears to rest heavily on the "basic assumption . . . that constitutional government requires that some court, state or federal, always be available to test the legitimacy of a plaintiff's claim that he is entitled by the Constitution to a given remedy." Wolcher, *supra* note 15, at 242. That is likewise an "essential premise" of the Gordon and Gross article. See Gordon & Gross, *supra* note 15, at 1154; see also *id.* at 1174.

²⁴⁷ See Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1786 (1991) ("[T]he existence of constitutional rights without individually effective remedies is a fact of our legal tradition, with which any theory having descriptive pretensions must come to terms."). Apart from relying on the normative view that state courts should provide adequate remedies for constitutional violations, especially when they are not available in federal court (see *supra* note 246), Professor Wolcher primarily relies on two Supreme Court decisions—*Nevada v. Hall*, 440 U.S. 410 (1979), and *Maine v. Thiboutot*, 448 U.S. 1 (1980)—to argue that states do not enjoy an immunity in their own courts corresponding to their immunity in federal court. See Wolcher, *supra* note 15, at 248-61, 267-68. I respectfully disagree that either case supports his argument. In *Nevada v. Hall*, the Court held that the Constitution does not immunize State A from a lawsuit in the courts of State B. See *Hall*, 440 U.S. at 414-27. The Court began its analysis by distinguishing "two quite separate concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Id.* at 414. The case before the Court in *Nevada v. Hall* involved the latter type of immunity, which, the Court held, existed only as a matter of comity, and not as a matter of constitutional law. See *id.* at 416. The Court's analysis of a state's immunity in the courts of another sovereign has no bearing on the question whether the Constitution affords states immunity in their own courts. See generally Pfander, *Rethinking*, *supra* note 5, at 559, 581-88 (discussing historical differences between the two types of immunity); see also Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 886 (1970) (describing as "regrettable" the "equation" in some cases of domestic sovereign immunity to foreign sovereign immunity). *Nevada v. Hall* could be read to suggest

liberty is better served by the availability of judicial relief in the situation under discussion or by a federalism-based restriction on such relief.²⁴⁸

that Congress can require courts of State B to entertain federal claims against State A. Even that reading is questionable in light of a footnote in the Court's opinion remarking that, in that case, State B's exercise of jurisdiction over State A "pose[d] no substantial threat to our constitutional system of cooperative federalism." *Hall*, 440 U.S. at 424 n.24. For reasons similar to those discussed above, forcing one state's courts to hear federal suits against another state could pose a severe threat to cooperative federalism. In the terminology of *New York*, Congress would be "commandeering" State B to work Congress's will on State A. In *Thiboutot*, the Court held that 42 U.S.C. § 1983 creates a cause of action enforceable in state court against persons acting under color of state law for violations of not only the Constitution but also federal statutes. See *Thiboutot*, 448 U.S. at 5-8. The Court also held in *Thiboutot* that state courts that entertained § 1983 claims could, under 42 U.S.C. § 1988, award attorney's fees, payable out of the state treasury, to a prevailing plaintiff. See *id.* at 8-11. The Court accordingly affirmed an award of attorney's fees to a plaintiff who successfully sued a state's officers in state court for violating the federal Social Security Act. See *id.* at 3-4. Professor Wolcher finds it significant that the *Thiboutot* Court upheld monetary relief against the state in its own court on the basis of a violation of an Article I statute. See Wolcher, *supra* note 15, at 258. In his view, this aspect of *Thiboutot* "implies either that no [state-court] immunity doctrine exists, or that it is so clearly subject to congressional modification as not to warrant discussion." *Id.* at 259. Even if this is a plausible reading of *Thiboutot*, it was drastically undermined by *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), a case that was decided after Professor Wolcher wrote his article and that held that a state cannot be sued in a state court under § 1983, because Congress did not intend the statute to apply to states or to officials sued in their official capacity. See *infra* notes 313-26 and accompanying text. Moreover, Professor Wolcher's reading of *Thiboutot* is questionable without regard to *Will*, in my opinion. The award of attorney's fees in *Thiboutot* was authorized under a federal statute, 42 U.S.C. § 1988, that falls within Congress's power under Section 5 of the Fourteenth Amendment, as the Court has recognized elsewhere. See *Hutto v. Finney*, 437 U.S. 678, 693-94 (1978). Under Section 5, Congress can abrogate the states' Eleventh Amendment immunity in federal-court, despite the constitutional nature of that immunity. See, e.g., *Seminole Tribe v. Florida*, 571 U.S. 44, 65-66 (1996). That Congress can likewise eliminate the states' state-court immunity under Section 5 does not cast doubt on the constitutional nature of that immunity or, in particular, on its imperviousness to attempted breaches by Congress using Article I powers. This conclusion is not affected by the fact that the fee award under § 1988 upheld in *Thiboutot* was made to a plaintiff who prevailed by establishing a violation of a federal statute enacted under Article I (in that case, the Social Security Act). See *Thiboutot*, 448 U.S. at 2-3. The Court held, in *Maher v. Gagne*, 448 U.S. 122, 127 n.9, 130-32 (1980), that Congress can use Section 5 of the Fourteenth Amendment to authorize attorney's fees in a case in which a "substantial constitutional claim" is asserted and in which the plaintiff prevails on a claim that arises out of the same facts as does the constitutional claim.

²⁴⁸ See *Printz*, 117 S. Ct. at 2378 (explaining that the system of dual sovereignty "is one of the Constitution's structural protections of liberty").

4. *Commandeering of State Courts Versus Commandeering of Other Branches of State Government*

This Part of the Article has argued that, under the Commerce Clause, Congress has no greater power to commandeer state courts than it has to commandeer the other branches of state government. As construed in *Testa*, however, the Supremacy Clause sometimes obligates state courts to enforce federal law, including statutes that fall within the Commerce Clause. For example, a state court must hear a minimum-wage claim under the FLSA, if the court has jurisdiction to do so under neutral state law. Thus, the Supremacy Clause does enable Congress to enlist state courts in the enforcement of federal law. The Supremacy Clause does not impose any similar affirmative enforcement obligation on the other branches of state government.

The Court in *New York* and *Printz* plausibly traced this difference to the Supremacy Clause.²⁴⁹ As the Court observed, the Supremacy Clause treats state judges “distinctively.”²⁵⁰ It specifically obligates state judges to follow federal law, without mentioning officials in other branches of state government.²⁵¹ The history of the Clause shows that state judges were singled out because they have a special role under the Constitution. The Supremacy Clause was first proposed, and then quickly adopted by the Framers, right after they rejected a proposal to permit Congress to strike down state laws that conflicted with the federal Constitution.²⁵² This chronology reflected a decision to replace the congressional negative on state laws with a judicial negative.²⁵³ The Framers knew that this judicial negative would be exercised by state courts; they expected state courts to hear cases arising under federal

²⁴⁹ See *id.* at 2371; *New York v. United States*, 505 U.S. 144, 178-79 (1992).

²⁵⁰ See *Printz*, 117 S. Ct. at 2371; see also *New York*, 505 U.S. at 178-79 (discussing state courts’ obligation under Supremacy Clause to enforce federal law).

²⁵¹ U.S. CONST. art. VI, cl. 2 (Supremacy Clause), reproduced *supra* note 58.

²⁵² See *FERC v. Mississippi*, 456 U.S. 742, 792-94 (1982) (O’Connor, J., concurring in part and dissenting in part).

²⁵³ See, e.g., *id.* at 794-95 (O’Connor, J., concurring in part and dissenting in part) (linking Framers’ adoption of Supremacy Clause to their rejection of proposed congressional negative on state laws); Caminker, *Subordinacy*, *supra* note 54, at 1036-38 (same); Pfander, *Rethinking*, *supra* note 5, at 590-91 (same); see also EDWARD DUMBAULD, *THE CONSTITUTION OF THE UNITED STATES* 443-44 (1964) (relating Supremacy Clause to judicial power to hold statutes unconstitutional); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’s Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 46-49 (1981) (same).

law (including cases challenging state laws on federal grounds).²⁵⁴

One might say, therefore, that the Supremacy Clause “commandeers” state courts by requiring them to apply federal law to decide cases over which they have jurisdiction under neutral state law. It is not that Congress has more power to commandeer state courts than it has to commandeer the other branches. Rather, it is that the Constitution itself imposes an obligation on state judges that other state officials do not have.²⁵⁵

²⁵⁴ See, e.g., *Clafflin v. Houseman*, 93 U.S. 130, 138-41 (1876) (discussing material “show[ing] the prevalent opinion which existed, that the State courts were competent to have jurisdiction in cases arising wholly under the laws of the United States”); Caminker, *Subordinacy*, *supra* note 54, at 1037-38 (discussing Framers’ recognition that state courts would decide federal issues); Pfander, *History*, note 23, at 1300 (same); Redish & Muench, *supra* note 5, at 311 (same).

²⁵⁵ Professor Caminker believes that, “with respect to arguments concerning formal notions of sovereignty, *New York* cannot stand alongside *Testa*.” Caminker, *Subordinacy*, *supra* note 54, at 1060. That belief rests on an overly broad reading of *Testa* and an unduly narrow reading of the portion of the Supremacy Clause that is directed to state judges, which Professor Caminker calls the “Judges Clause.” Professor Caminker reads *Testa* to mean state courts must “entertain all federal causes of action.” *Id.* at 1038; see also *id.* at 1006, 1007, 1011, 1024, 1059 (referring to state courts’ obligation under *Testa* in similarly broad terms). Based on that reading, he criticizes the *New York* decision for tracing the state courts’ obligation under *Testa* to the Judges Clause. See *id.* at 1034-42. In his view, the Judges Clause “cannot comfortably be read as a rigid injunction that state courts of competent jurisdiction must entertain every federal cause of action.” *Id.* at 1039; see also *id.* at 1035 (“the [Judges] Clause does not provide unique authority for judicial commandeering, in which case its presence cannot reasonably imply the exclusion of a more general commandeering authority”).

Testa does not impose such a rigid injunction; it imposes only a duty of nondiscrimination toward federal claims (as well as federal defenses). See *supra* notes 90-98 and accompanying text. That duty of nondiscrimination is justified by a refined version of what Professor Caminker admits is a plausible reading of the Judges Clause. He says the Clause can plausibly be read, in light of its text and history, “as imposing a ‘nullification rule.’” *Id.* at 1036. He explains that, under this rule, “when state judges exercise their state law jurisdiction to hear a case, and the case poses conflicting claims of federal and state law, the judges are ‘bound’ to prioritize the former over the latter.” *Id.* Yet Professor Caminker understands this duty “merely [to] require[] state courts to recognize federal defenses to state law causes of action.” *Id.* (emphasis added). On the contrary, *Testa*’s insight is that the “nullification rule” embodied in the Supremacy Clause obligates state courts to prioritize federal law over state law, not only when federal law is asserted as a defense, but also when it is asserted to support a claim for affirmative relief in a case that a state court has power to decide under neutral state law. See *supra* notes 144-55 and accompanying text. In short, when *Testa* is read, as it should be, to impose on state courts only a duty of nondiscrimination, but a duty that entails recognition of federal law whether it is raised to support a claim or a defense within the state court’s jurisdiction under neutral state law, *Testa* accords with the “nullification” rule prescribed by the

IV. THE LINK BETWEEN THE STATES' TENTH AMENDMENT, STATE-COURT IMMUNITY AND THEIR ELEVENTH AMENDMENT, FEDERAL-COURT IMMUNITY

In a recent, scholarly article, Professor Carlos Vázquez traced the states' immunity from liability in their own courts to the Eleventh Amendment.²⁵⁶ In contrast, this Article traces that immunity primarily to the anticommandeering principle of the Tenth Amendment. Part III attempted to explain the doctrinal support for that conclusion. This Part examines the connection between the states' Tenth Amendment immunity in their own

Judges Clause, when that rule is correctly perceived as requiring state courts to recognize both federal claims and federal defenses. The Court, therefore, properly relied on that Clause in *New York* and *Printz* to explain why the Constitution imposes an affirmative obligation on state courts that, under the Court's anticommandeering rule, cannot be imposed on other branches of state government.

²⁵⁶ See Vázquez, *supra* note 13, at 1702, 1785-90. As Professor Vázquez recognizes, *see id.* at 1685 n.6, the Court has frequently said that the Eleventh Amendment does not apply to state courts. *See, e.g.,* *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204-05 (1991) (referring to "the jurisdiction of state courts to entertain a suit free from Eleventh Amendment constraints"); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989) ("the Eleventh Amendment does not apply in state courts"); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'"); *see also* *Reich v. Collins*, 513 U.S. 106, 109-10 (1994) (holding state was required to refund unlawfully collected taxes in state-court action, even though "the sovereign immunity States enjoy in federal court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum"); *Nevada v. Hall*, 440 U.S. 410, 420 (1979) (holding Eleventh Amendment does not bar action against State A brought in the state courts of State B); Meltzer, *supra* note 5, at 57 (remarking Eleventh Amendment's reference to federal courts "is one textual limitation that the Supreme Court has observed"). Professor Vázquez therefore uses the term "Eleventh Amendment immunity" as a shorthand for the federal-court immunity that states enjoy under the constitutional "postulate," *see* *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934), of which the Eleventh Amendment is "but an exemplification," *In re New York*, 256 U.S. 490, 497 (1921). *See* Vázquez, *supra* note 13, at 1685 n.6. Professor Vázquez finds support in the Court's precedent for two distinct interpretations of Eleventh Amendment immunity. One interpretation treats the Amendment as conferring "only an immunity from the original jurisdiction of the federal courts," which he calls the "forum-allocation" interpretation. *See id.* at 1691, 1702. The other interpretation treats the Amendment, more broadly, as also conferring "(effectively) an immunity from liability to individuals under federal law," an interpretation that he calls the "immunity-from-liability" interpretation. *Id.* Professor Vázquez concludes that the Court's Eleventh Amendment precedent provides stronger support for the immunity-from-liability interpretation than for the forum-allocation interpretation. *See id.* at 1785-90.

courts and their Eleventh Amendment immunity in federal court. In doing so, it explains the differences between Professor Vázquez's position and mine. This Part concludes that a connection exists between the states' Tenth Amendment immunity in their own courts and their Eleventh Amendment immunity in federal court, but the immunities are not wholly congruent.

A. Decisions that Determine Eleventh Amendment Immunity by Reference to State-Court Immunity

Three features of Eleventh Amendment immunity rest on the Court's perception of the scope of state-court immunity. Those features are the following: the Eleventh Amendment's ban on federal-court suits brought against a state by its own citizens; its ban on federal-court suits against a state that arise under federal law; and the unavailability of Eleventh Amendment immunity to cities and counties. None of these features is readily discernible on the face of the Eleventh Amendment. The Court has adopted them to make the states' immunity in federal court congruent with their traditional immunity in their own courts.

The Court established the first two features in *Hans v. Louisiana*.²⁵⁷ In *Hans*, a citizen of Louisiana sued that state in federal court, arguing that the state's failure to pay interest on its bonds violated the Contract Clause of the United States Constitution.²⁵⁸ The Court framed the question before it as "whether a state can be sued in a circuit court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the constitution or laws of the United States."²⁵⁹ The Court answered no.²⁶⁰

That answer rested on the Court's understanding of the extent to which states could be sued in their own courts when the Constitution was adopted. The Court believed that "the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States."²⁶¹ The Court thus found it determinative that "[t]he suability of a state, without its consent, was a thing unknown to the law" at that time.²⁶² The Court was

²⁵⁷ 134 U.S. 1 (1890).

²⁵⁸ See *id.* at 13; see also *supra* note 116 (reproducing the Contract Clause).

²⁵⁹ *Hans*, 134 U.S. at 4.

²⁶⁰ See *id.* at 16.

²⁶¹ *Id.* at 15.

²⁶² *Id.* at 16. But cf. Gibbons, *supra* note 15, at 1895-99 (arguing that *Hans* misread history); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 926-62

referring to the suability of a state in its own courts. The Court made that clear by saying that the nonsuability of the states "was fully shown" in Justice Iredell's dissenting opinion in *Chisholm v. Georgia*.²⁶³ In that opinion, Justice Iredell had first determined that no state statute "authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act [of 1789] was passed."²⁶⁴ Justice Iredell then turned to the common law suability of a sovereign in its own courts.²⁶⁵ He concluded that, at common law, the courts could not award monetary relief against their sovereign without the consent of the sovereign's legislature.²⁶⁶ Although Justice Iredell focused on monetary claims against the states, the Court in *Hans* disregarded this limitation, stating, for example, that Justice Iredell "conclusively showed" in *Chisholm* that "subjecting sovereign states to actions at the suit of individuals . . . was never done before."²⁶⁷

The *Hans* Court recognized the text of the Eleventh Amendment did not bar suits against a state brought by the state's own citizens, but observed that a departure from the text would avoid two anomalies.²⁶⁸ The better-known anomaly that the Court sought to avoid was that "a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other states, or of a foreign state."²⁶⁹ The

(1997) (making similar argument).

²⁶³ *Hans*, 134 U.S. at 16 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 429 (1793) (Iredell, J.)).

²⁶⁴ *Chisholm*, 2 U.S. at 434-35 (Iredell, J.).

²⁶⁵ *See id.* at 437-46 (Iredell, J.).

²⁶⁶ *See id.* (Iredell, J.).

²⁶⁷ *Hans*, 134 U.S. at 12.

²⁶⁸ *See id.* at 10-11.

²⁶⁹ *Id.* at 10. With respect to this anomaly, the Court reasoned:

Suppose that congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

Id. at 15. Critics of *Hans* have argued that *Hans* was wrong because this anomaly did not exist; the Eleventh Amendment did not prevent a citizen of one state from suing another state in federal court on a cause of action arising under federal law. *See, e.g., Fletcher, A Historical Interpretation, supra* note 5, at 1039 & n.18, 1130; Gibbons, *supra* note 15, at 1893-94; Jackson, *State Sovereign Immunity, supra* note 15, at 9 (describing *Hans* as based on this anomaly); *id.* at 32-39 (arguing that Eleventh Amendment did not bar federal-question claims); *see also* Monaghan, *supra* note 23, at

lesser-known, but equally important, anomaly that the Court wanted to avoid in *Hans* was that a state “may be thus sued in the federal courts, although not allowing itself to be sued in its own courts.”²⁷⁰ This second anomaly—between a state’s suability in its own courts and in federal court—was central to the Court’s decision, given its belief that the Constitution did not give federal courts “cognizance of suits and actions unknown to the law” when the Constitution was adopted.²⁷¹

Hans produced later Court decisions expanding the states’ federal-court immunity beyond the text of the Eleventh Amendment in other ways. *Hans* was at the center of the Court’s decisions: in *Smith v. Reeves*,²⁷² which held that the states were immune from suits by federally created

105-06 (describing *Hans* as based on avoidance of this anomaly).

²⁷⁰ *Hans*, 134 U.S. at 10.

²⁷¹ *Id.* at 15. The second anomaly described by the Court in *Hans* was one between the suability of states in federal court (under the interpretation advanced by the plaintiff) and their suability in their own courts *at the time the suit in Hans was brought*. Thus, the anomaly does not correspond exactly to the basis for the Court’s holding, which rested on the nonsuability of states in their own courts *at the time the Constitution was adopted*. The Court in *Hans*, however, did not sharply differentiate among the suability of the states in their own courts at these two points in time, perhaps because it did not perceive much difference in the state of the law at those points. The Court’s failure to differentiate between the states’ suability when the Constitution was adopted and their suability at the time of its decision is evident in its discussion of the Judiciary Act of 1789. The Court held the suit before it was not within the circuit court’s jurisdiction under that Act, which was then still in effect. The Court observed the Act gave circuit courts only jurisdiction “concurrent with the courts of the several states.” *Hans*, 134 U.S. at 18 (quoting Judiciary Act of 1789, 1 Stat. 73). Based on that language, the Court determined that Congress, in 1789, “did not intend to invest its courts with any new and strange jurisdictions.” *Id.* The Court determined construing the Act to authorize circuit jurisdiction over the case before it would conflict with that intention because “[t]he state courts have no power to entertain suits by individuals against a state without its consent.” *Id.* (emphasis added). This use of the present tense shows the Court did not distinguish between the suability of states in their own courts in 1789 and their suability 100 years later. See also *id.* at 21 (using the present tense in this statement: “It is not necessary that we should enter upon an examination of the reason or expediency of the rule which *exempts* a sovereign state from prosecution in a court of justice at the suit of individuals.”) (emphasis added). In any event, in light of *Hans*’s reliance on the nonsuability of states in their own courts at the time the *Hans* case arose, I respectfully disagree with one commentator’s suggestion that the *Hans* Court “may have assumed that the plaintiff had an adequate remedy available in state court.” Cloherty, *supra* note 15, at 1313.

²⁷² 178 U.S. 436 (1900).

corporations;²⁷³ in *In re New York*,²⁷⁴ which held that states were immune from suits in admiralty, notwithstanding the Eleventh Amendment's reference only to suits "in law or equity";²⁷⁵ and in *Principality of Monaco v. Mississippi*,²⁷⁶ which held that the states were immune from suits by foreign countries, even though foreign countries are not mentioned in the Eleventh Amendment.²⁷⁷ More generally, "[f]or over a century [the Court] ha[s] reaffirmed [*Hans*' determination] that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"²⁷⁸ That determination lies at the core of the Court's expansive notion of the states' constitutional immunity in federal court.²⁷⁹ That determination rests in large part on the Court's view of the scope of the states' traditional immunity in their own courts.

The scope of this traditional immunity has also been the source of one of the few restrictions on the states' federal-court immunity that is not evident on the face of the Eleventh Amendment. "[T]he Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities"²⁸⁰ In what appears to be the first and most-often cited case addressing the issue, the Court relied primarily on a state statute authorizing state-court suits against the state's

²⁷³ See *id.* at 446 (finding that the immunity of states from federal-court suits by federal corporations "is controlled by the principles announced in *Hans*").

²⁷⁴ 256 U.S. 490 (1921).

²⁷⁵ See *id.* at 498 ("In *Hans v. Louisiana*, . . . the court demonstrated the impropriety of construing the [Eleventh] [A]mendment so as to leave it open for citizens to sue their own State in the federal courts; and it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction . . .").

²⁷⁶ 292 U.S. 313 (1934).

²⁷⁷ See *id.* at 322, 325-27 (quoting *Hans* extensively and also citing *In re New York* and *Reeves*).

²⁷⁸ *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15).

²⁷⁹ Most commentators and several Members of the Court have argued that *Hans* was wrong. See Vázquez, *supra* note 13, at 1694, 1698; see also *id.* at 1694 n.42 (citing commentary critical of *Hans*). But cf. David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 547 (1997) (author identifying himself as "that *rara avis*, a law professor who thinks *Hans v. Louisiana* was correctly decided") (citation omitted). This Article does not enter the fray over the correctness of *Hans*, given the objective of this Article and the Court's steadfast adherence to *Hans*. See, e.g., *Seminole Tribe*, 517 U.S. at 54 & n.7 (observing the Court has adhered to *Hans* "[f]or over a century"); see also *id.* at 64 (criticizing dissent's challenge to *Hans*).

²⁸⁰ *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979). See also *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) ("[C]ities and counties do not enjoy Eleventh Amendment immunity.") (citation omitted).

counties.²⁸¹ The significance of the Court's reliance on state law in this context should not be overstated. The Court typically consults state law to determine whether a subdivision of the state shares the state's federal-court immunity.²⁸² Nonetheless, the Court's reliance on state law governing the suability of counties in state court suggests the same instinct that is evident in *Hans*: to make state-court and federal-court immunity congruent.²⁸³

B. Decisions that Determine State-Court Immunity by Reference to Eleventh Amendment Immunity

The Court has not only looked to the states' immunity in their own courts to determine the scope of their immunity in federal court. The Court has also looked to the states' immunity in federal court to determine the scope of their immunity in their own courts. The Court followed the latter approach in five cases decided in the last quarter of the nineteenth century and the first quarter of the twentieth.²⁸⁴ These cases are hard to understand in light of the many recent cases in which the Court has said, without mentioning these earlier cases, that the Eleventh Amendment does not apply to state-court suits.²⁸⁵ It is possible that these early cases signify the Court's belief that the immunity principle underlying the Eleventh Amendment protects the states when sued in state court, as Professor Vázquez argues.²⁸⁶ If so, the Court's later statements that the Eleventh Amendment does not apply in state court must be read to concern only the text of the Eleventh Amendment.²⁸⁷ A second possibility is that the Court discussed the Eleventh Amendment in these five cases on the assumption that the Eleventh Amendment barred the

²⁸¹ See *Lincoln County v. Luning*, 133 U.S. 529, 530-31 (1890); see also Fletcher, *A Historical Interpretation*, *supra* note 5, at 1101-02 (discussing *Luning*).

²⁸² See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (stating issue whether defendant was an "arm of the State partaking of the State's Eleventh Amendment immunity" depended on "the nature of the entity created by state law").

²⁸³ As in *Hans*, the Court in *Lincoln County* looked to the suability of the defendant entity at the time of the lawsuit. See *supra* note 271. Also as in *Hans*, the suability of the defendant entity at the time of the lawsuit did not differ from its suability at the time of the adoption of the Eleventh Amendment or of the original Constitution. See Fletcher, *A Historical Interpretation*, *supra* note 5, at 1100 ("The common understanding in the 1790's was that the sovereign immunity of the states was not shared by their subdivisions.").

²⁸⁴ See *Hopkins v. Clemson Agric. College*, 221 U.S. 636 (1911); *General Oil Co. v. Crain*, 209 U.S. 211 (1908); *Louisiana ex rel. New York Guar. & Indem. Co. v. Steele*, 134 U.S. 230 (1890); *Chaffin v. Taylor*, 114 U.S. 309 (1885); *Poindexter v. Greenhow*, 114 U.S. 270 (1885).

²⁸⁵ See *supra* note 256 (citing cases).

²⁸⁶ See *supra* note 256; see also Vázquez, *supra* note 13, at 1735-36 (discussing *Poindexter*).

²⁸⁷ See *supra* note 256 (citing cases).

Court's exercise of appellate jurisdiction over cases coming from the state courts.²⁸⁸ That possibility is unlikely, however, because such an assumption would have conflicted with the Court's holding in *Cohens v. Virginia*,²⁸⁹ that the Eleventh Amendment did not restrict the Court's appellate jurisdiction.²⁹⁰ In this author's view, the early cases do not signify the Court's belief that the Eleventh Amendment was the source of the states' state-court immunity or restricted the Court's appellate jurisdiction; instead, they reflect the Court's view that the states' constitutional immunity in state court should be generally coextensive with their constitutional immunity in federal court. In other words, this is the same belief that underlay the Court's reliance on the scope of state-court immunity in cases, such as *Hans*, that involved federal-court immunity.

We have already seen two decisions that used Eleventh Amendment principles to address a claim of state-court immunity: *General Oil Co. v. Crain* and *Hopkins v. Clemson Agricultural College*. The prior discussion of *Crain* reconciled it with *Musgrove*, a post-*Testa* decision strongly suggesting the Constitution does not require state courts to entertain private claims that would be barred by the Eleventh Amendment.²⁹¹ *Hopkins* was discussed as a pre-*Testa* case supporting the same conclusion.²⁹² Whereas the earlier discussion of these cases emphasized the way in which they support the existence of state-court immunity, now we will focus on the way they connect that immunity to Eleventh Amendment immunity.

The Court in *Crain* asserted jurisdiction to review a state supreme court decision dismissing on sovereign immunity grounds an officer suit challenging the constitutionality of a state tax law.²⁹³ The Court asserted jurisdiction only after determining that the state-court suit was not a suit against the state. In support of that determination, the Court emphasized that, whether an officer suit was brought in state court or federal court, "a distinction must be made between valid and invalid state laws."²⁹⁴ The Court said state officers could be enjoined from enforcing state statutes violative of federal law, regardless of the sovereign's immunity "in the state tribunals . .

²⁸⁸ See Vázquez, *supra* note 13, at 1736 (offering this explanation for *Poindexter*).

²⁸⁹ 19 U.S. (6 Wheat.) 264 (1821).

²⁹⁰ See *id.* at 405-12.

²⁹¹ See *supra* notes 102-31 and accompanying text.

²⁹² See *supra* notes 137-43 and accompanying text.

²⁹³ See *General Oil Co. v. Crain*, 209 U.S. 211, 221-28 (1908).

²⁹⁴ *Id.* at 226.

[and] national tribunals.”²⁹⁵ The Court explained that a contrary conclusion would undermine the Constitution:

If a suit against state officers is precluded in the national courts by the [Eleventh] Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the [Fourteenth] Amendment, which is directed at state action, could be nullified as to much of its operation.²⁹⁶

The Court directed the reader interested in a fuller explanation to see *Ex parte Young*, an Eleventh Amendment case decided the same day as *Crain*.²⁹⁷ Thus, the Court in *Crain* at once recognized that an immunity existed in both state and federal court and, at the same time, found it necessarily limited, in each forum, by the need to ensure state compliance with federal law.²⁹⁸

The Court's reliance on Eleventh Amendment principles in *Crain* cannot be explained on the grounds that the Court overlooked the state-court origin of the case or believed that the Eleventh Amendment restricted its appellate jurisdiction. The first ground is not tenable because, as the discussion above makes clear, the Court differentiated between the state's immunity in the “state” and the “national” tribunals.²⁹⁹ Moreover, Justice Harlan, in concurrence, complained that the majority's discussion of the Eleventh Amendment was “entirely irrelevant” because “[t]hat amendment relates wholly to the judicial power of the United States, and has absolutely nothing to do with the inquiry as to the jurisdiction of the inferior state court.”³⁰⁰ The second explanation for *Crain*'s reliance on Eleventh Amendment principles is untenable in light of Justice Harlan's further observation that the Eleventh Amendment was also irrelevant to the Supreme Court's appellate jurisdiction; as he said, “it was long ago settled that a writ of error to review the final judgment of a state

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *See id.* at 227; *see also id.* at 211 (indicating decision date of March 23, 1908); *Ex parte Young*, 209 U.S. 123 (1908) (same).

²⁹⁸ *See Woolhandler, supra* note 15, at 151 (“Interestingly, the Court's decisions [in *Poindexter* and *Crain*] appeared to treat sovereign immunity as equally inapplicable in state and federal court actions against individual officers to remedy trespassory harms.”).

²⁹⁹ *Crain*, 209 U.S. at 226; *see also id.* at 224-25 (“[N]or were all of the cases cited by plaintiff in error to sustain the jurisdiction of this court cases in the Federal Courts. *Poindexter v. Greenhow* and *Chaffin v. Taylor* were brought in the state courts of Virginia . . .”) (citations omitted).

³⁰⁰ *Id.* at 233 (Harlan, J., concurring).

court, even when a state is a formal party and is successful in the inferior court, is not a suit within the meaning of the [Eleventh] Amendment.”³⁰¹

As it did in *Crain*, the Court in *Hopkins v. Clemson Agricultural College* rejected a claim of state-court immunity from money damages only after determining, based on Eleventh Amendment case law, that the suit was not one against the state.³⁰² The *Hopkins* Court upheld a claim of state-court immunity from the injunctive relief sought by the plaintiff, however, because the injunction would have entailed an action against the state.³⁰³ Thus, *Hopkins* supports not only the existence of state-court immunity from constitutional claims but also its general congruence with federal-court immunity.

In two of the remaining three cases, *Poindexter v. Greenhow*³⁰⁴ and a companion case, *Chaffin v. Taylor*,³⁰⁵ the Court used Eleventh Amendment case law to reject state claims of immunity in actions brought in state court asserting constitutional claims.³⁰⁶ These two cases support the existence and federal-court correspondence of state-court immunity in the same way *Crain* does: Although the Court rejected state-court immunity claims, it did so on the basis of an Eleventh Amendment analysis that was unnecessary unless the Court believed the states had an immunity in their own courts that corresponded to their federal-court immunity.

The remaining case is *Louisiana ex rel. New York Guaranty & Indemnity Co. v. Steele*.³⁰⁷ As in the other cases discussed in this section, the Court in *Steele* relied on Eleventh Amendment case law to analyze a state’s claim of immunity from an action that was brought in state court against a state officer alleging a violation of the Constitution.³⁰⁸ Unlike the other cases in this

³⁰¹ *Id.* (Harlan, J., concurring) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)). *Cohens* was a state-court proceeding brought by the State. See *Cohens*, 19 U.S. (6 Wheat.) at 378. In contrast, *Crain* was a state-court proceeding brought against the State. See *Crain*, 209 U.S. at 220. Nonetheless, the reasoning of *Cohens* supported the conclusion the Eleventh Amendment did not bar the Court’s appellate jurisdiction in either situation, and the Court’s “consistent practice since *Cohens* confirm[ed] this broader understanding.” *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 27 (1990); see also *infra* notes 357-62 and accompanying text.

³⁰² See *Hopkins v. Clemson Agric. College*, 221 U.S. 636, 642-45 (1911).

³⁰³ See *id.* at 648-49; see *supra* notes 137-43 and accompanying text for further discussion.

³⁰⁴ 114 U.S. 270 (1885).

³⁰⁵ 114 U.S. 309 (1885).

³⁰⁶ See *id.* at 310 (relying on analysis in *Poindexter*); *Poindexter*, 114 U.S. at 285-301.

³⁰⁷ 134 U.S. 230 (1890).

³⁰⁸ See *id.* at 230-31.

section, the Court in *Steele* wholly sustained the claim of immunity.³⁰⁹ *Steele* is useful in confirming the congruence of the states' state-court immunity and their federal-court immunity. This is weak precedent, though, because its continuing vitality is doubtful in light of the modern doctrine of *Ex parte Young*.³¹⁰

In determining whether the Court would accord states immunity from private, federal claims in their own courts, one must account for these decisions in which the Court used Eleventh Amendment principles to evaluate claims of immunity in cases brought in state court. They cannot be dismissed as the result of an oversight by the Court. There are too many of them, and some, like *Crain*, indicate the Court understood that the Eleventh Amendment applied only in federal court. It is also unlikely that the decisions reflect a belief by the Court that the Eleventh Amendment restricted its appellate jurisdiction of state-court cases, given its early expression of the contrary view. The most likely explanation is that the Court believed that state-court immunity existed and was generally coextensive with federal-court immunity.

*C. Will v. Michigan Department of State Police and Later Decisions
Reflecting the Court's View on the Congruence of the States' Liability in
State and Federal Court*

The cases discussed in Sections A and B evince the Court's view that states have an immunity in their own courts that corresponds to their federal-court immunity. But those decisions are old. The most recent decision was *Musgrove*, a per curiam decision from 1949.³¹¹ In later cases, the Court has said the Eleventh Amendment does not apply to suits brought in state court, without

³⁰⁹ See *id.* at 232.

³¹⁰ The plaintiff in *Steele* sought injunctive relief against a state officer for unconstitutional conduct, see *id.* at 230-31, relief that is now understood generally to be permitted under the *Ex parte Young* doctrine and, if sought in federal court, not to be barred by the Eleventh Amendment. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996). The *Young* doctrine has not always been understood so broadly; at least one scholar apparently understood *Young* to authorize only "negative" injunctive relief, prohibiting certain conduct by a state official, rather than affirmative injunctive relief that would require the official to take certain actions. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 516 (1954), discussed in Fletcher, *A Historical Interpretation*, *supra* note 5, at 1120 n.324. Under this narrower view, *Steele* differed from *Young* because the plaintiff in *Steele* sought affirmative injunctive relief: an order requiring the state auditor to collect taxes to pay the overdue interest on bonds held by the plaintiff. See *Steele*, 134 U.S. at 230. Cf. *Ex parte Young*, 209 U.S. 123, 159 (1908) (emphasizing that injunction "which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment" entails no affirmative relief).

³¹¹ See *supra* notes 102-31 and accompanying text.

suggesting that a cognate state-court immunity exists.³¹² It is therefore important to take into account three recent cases in which the Court has endorsed a similar form of congruence between the states' liability to private suits in state court and federal court. These three cases furnish modern, though indirect, support for the existence of a state-court immunity that is coextensive with federal-court immunity.

The lead case is *Will v. Michigan Department of State Police*.³¹³ To understand *Will*, however, one must know what preceded it. Before *Will*, the Court had held that 42 U.S.C. § 1983 does not abrogate the states' Eleventh Amendment immunity from private suits in federal court.³¹⁴ In so holding, the Court determined Congress had not made its intention to abrogate the Eleventh Amendment in § 1983 sufficiently clear.³¹⁵ That holding left open the question whether states could be sued under § 1983 in their own courts.³¹⁶ That question was one of statutory interpretation: whether, in authorizing actions against any "person" acting under color of law who violated the plaintiff's federal rights, Congress intended the term "person" in § 1983 to include states.³¹⁷

In *Will*, the Court held that "neither a State nor its officials sued in their official capacities are 'persons'" within the meaning of 42 U.S.C. § 1983.³¹⁸ The Court accordingly affirmed the dismissal of a private, state-court suit under § 1983 brought in state court against state officials and agencies alleging a violation of the Constitution.³¹⁹ In construing § 1983 not to apply to the states, the Court held that, when Congress intends to make states liable in private

³¹² See *supra* note 256 (citing cases).

³¹³ 491 U.S. 58 (1989).

³¹⁴ See *Quern v. Jordan*, 440 U.S. 332, 341 (1979) (citing 42 U.S.C. § 1983 (1994 & Supp. 1996)).

³¹⁵ See *id.* at 341-45.

³¹⁶ See *Will*, 491 U.S. at 63-64.

³¹⁷ Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (1994 & Supp. 1996).

³¹⁸ *Will*, 491 U.S. at 71.

³¹⁹ See *id.* at 60-61, 71. *Will* claimed that he was denied a promotion in the state police department because his brother was a "student activist." See *id.* at 60.

actions under a federal statute, it must express that intention clearly.³²⁰ The Court derived this clear statement rule primarily from the cases in which it had required a "clear statement" by Congress to abrogate the Eleventh Amendment.³²¹ The Court recognized that the scope of the Eleventh Amendment and of § 1983 were "certainly" separate issues.³²² The Court, nonetheless, believed that, "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration."³²³ The Court based that belief partly on the anomalous result of construing § 1983 to apply to states but not to abrogate the Eleventh Amendment.³²⁴ The Court explained that, given Congress's evident purpose in § 1983 to "provide a federal forum for civil rights claims,"³²⁵ it would be odd for Congress not to authorize § 1983 actions against states in *federal* courts, but to do so in *state* courts.³²⁶

In two cases after *Will*, the Court has similarly recognized it would be anomalous to permit federal claims against a state in its own courts that could not be asserted in a federal court. In *Howlett v. Rose*,³²⁷ the Court remarked that *Will* prevented the "anomaly" that "a State might be forced to entertain in its own courts suits from which it was immune in federal court."³²⁸ The Court also said, however, this anomaly did not justify extending state-court immunity "not only to the State and its arms but also to municipalities, counties, and school districts that might otherwise be subject to suit under § 1983 in federal court."³²⁹ Accordingly, the Court held that the state courts were obligated—under *Testa*, among other decisions—to hear a § 1983 claim against a county school board that was not shown to have immunity from such a suit in federal court.³³⁰

In *Hilton v. South Carolina Public Railways Commission*,³³¹ the Court found "much to commend" in the "symmetry" of *Will*'s clear statement rule, which "mak[es] a State's liability or immunity, as the case may be, the same in

³²⁰ See *id.* at 64-65.

³²¹ See *id.* at 65 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)).

³²² See *id.* at 66-67.

³²³ *Id.*

³²⁴ See *id.*

³²⁵ *Id.* at 66.

³²⁶ See *id.*

³²⁷ 496 U.S. 356 (1990).

³²⁸ *Id.* at 365.

³²⁹ *Id.* at 366.

³³⁰ See *id.* at 373-74, 381 n.24.

³³¹ 502 U.S. 197 (1991).

both federal and state courts.”³³² The *Hilton* Court added that *Will*’s clear statement rule “avoids the federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a federal statute.”³³³ The Court in *Hilton*, nonetheless, construed the Federal Employers Liability Act (FELA) to create a private cause of action enforceable against a state in state court, even though, in a prior case, the Court had construed a statute that incorporated FELA’s remedial scheme not to abrogate the states’ Eleventh Amendment immunity in federal court.³³⁴ The *Hilton* Court found the concerns of symmetry and federalism to be outweighed by *stare decisis*. The latter doctrine was triggered by a decision that predated *Will*’s clear statement rule and had construed the FELA to cover states.³³⁵

The Court’s reliance on an “anomaly” in *Will* and its recognition of that anomaly in *Howlett* and *Hilton* do not directly establish that states have an immunity in their own courts that is similar in scope to their Eleventh Amendment immunity in federal court. Just because it would be “anomalous” for Congress to make states liable in state court for claims that would be barred from federal court by the Eleventh Amendment, that does not mean Congress lacks the power under Article I to do so. It bears emphasis that the Court in *Will* relied on the anomaly only to impose a clear statement requirement on Congress, not to deny it power.³³⁶

Will and decisions referring to the anomaly identified in *Will* do, however, furnish indirect support for a state-court immunity that is generally coextensive with federal-court immunity. *Will*’s use of Eleventh Amendment principles suggests the liability of states in their own courts raises constitutional

³³² *Id.* at 206.

³³³ *Id.*

³³⁴ See *id.* at 199-200 (discussing *Welch v. Texas Dep’t of Highways & Pub. Transp.*, 483 U.S. 468 (1987), which held Eleventh Amendment was not abrogated by the Jones Act, which incorporated FELA’s remedial scheme, and which overruled the holding in *Parden v. Terminal Ry. of Ala. State Docks Dep’t*, 377 U.S. 184 (1964), that states had waived their Eleventh Amendment immunity from liability under FELA).

³³⁵ See *id.* at 201 (“Our analysis and ultimate determination in this case are controlled and informed by the central importance of *stare decisis* in this Court’s jurisprudence.”); see also *id.* at 201-02 (discussing *Parden*, which reflected “a 28-year-old interpretation” of the FELA as applying to states); *supra* notes 83-87 and accompanying text (explaining that *Hilton* did not address state-court immunity issue).

³³⁶ See *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 66-67 (1989) (scope of Eleventh Amendment “is a consideration” in “deciphering congressional intent as to the scope of § 1983”).

concerns.³³⁷ *Hilton* determined that "federalism-related concerns" supported *Will*'s clear statement rule.³³⁸ The constitutional flavor of *Will*'s clear statement rule could be significant, in light of what happened in *Seminole Tribe* to the clear statement rule that the Court had used in earlier decisions to determine whether federal statutes, including statutes based on Article I, abrogated the Eleventh Amendment.³³⁹ *Seminole Tribe* held that, whether or not they contain a clear statement, Article I statutes cannot abrogate the Eleventh Amendment.³⁴⁰ It is, therefore, by no means inconceivable that *Will*'s clear statement rule will meet the same fate, giving way to a holding that Congress lacks power under Article I to override the states' immunity from private Article I lawsuits in their own courts.

D. Implications of the Link Between the States' State-Court and Federal-Court Immunity for the Scope of Their State-Court Immunity

The link between the states' immunity in their own courts and their immunity in federal court reflects a link between the Tenth Amendment and the Eleventh Amendment, from which those immunities respectively spring. The Court has construed each Amendment to mean more than it says. For example, the Court has held that, although the Tenth Amendment is worded as "but a truism," it forbids federal commandeering of state government,³⁴¹ and that, although the text of the Eleventh Amendment does not go so far, the principle of which it is "but an exemplification"³⁴² bars all private, federal-court actions against unconsenting states.³⁴³ Each Amendment, the Court has said, reflects

³³⁷ See *Hilton*, 502 U.S. at 209 (O'Connor, J., dissenting) (*Will*'s clear statement rule "derives from the Constitution itself.").

³³⁸ See *id.* at 206 ("[f]ederalism-related concerns . . . arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute.").

³³⁹ See *Welch*, 483 U.S. at 475-76 (plurality opinion) (applying clear statement rule to determine whether federal statute enacted under Article I abrogated Eleventh Amendment, while reserving issue whether Congress can use Article I to abrogate).

³⁴⁰ See *Seminole Tribe v. Florida*, 517 U.S. 44, 65-66 (1996) (citing prior decisions applying clear statement rule to Article I statutes as "merely assum[ing] for the sake of argument" that Congress had power to abrogate under Article I).

³⁴¹ See *New York v. United States*, 505 U.S. 144, 156-57 (1992) ("The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself," which is "but a truism" and "essentially a tautology.").

³⁴² *In re New York*, 256 U.S. 490, 497 (1921).

³⁴³ See *Seminole Tribe*, 517 U.S. at 54 ("Although the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts," the Court has construed it more broadly to bar all private, federal-court actions against unconsenting states).

“postulates” implicit in the system of dual sovereignty established by the Constitution.³⁴⁴ Because of the link between the constitutional provisions underlying the two immunities, those immunities have some common features.³⁴⁵ Because the origins of the two immunities are nonetheless discrete, the immunities are not identical. This Section explores the common features and the differences.

1. *State-Court Claims Against Cities and Counties*

Part III of this Article argued that the Supremacy Clause, of its own force, does not expand the jurisdiction of state courts except by invalidating discriminatory restrictions on their jurisdiction. Part III also argued that Congress cannot, under Article I, compel a state court to hear a private action that the Supremacy Clause would not require it to hear—*i.e.*, an action that the state court lacks power to hear under neutral state law.

Those principles fully apply to state-court actions against cities and counties (as well as other non-state defendants). Thus, the Supremacy Clause would not invalidate a state law that gave cities and counties immunity from all private actions in state court. Nor would the Clause invalidate a state law that allowed only some claims to be brought against cities and counties, as long as the law did not discriminate against federal claims in the manner already discussed.³⁴⁶ Moreover, Congress could not use Article I to compel state courts to hear actions against cities and counties that the courts could not hear under state laws that comported with the Supremacy Clause.

³⁴⁴ See, *e.g.*, *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934):

Manifestly, we cannot rest with a mere literal application of the words of section 2 of Article 3, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against unconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a ‘surrender of this immunity in the plan of the convention.’

Id. at 322-23 (citations omitted). *United States v. Printz*, 117 S. Ct. 2365, 2376 (1997) (including among “essential postulate[s]” to which *Monaco* referred the principle of “dual sovereignty,” which was “rendered express” by the Tenth Amendment).

³⁴⁵ See *supra* notes 257-310 and accompanying text; see also *Welch v. Texas Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 483 n.14 (1987) (Because Constitution does not expressly abrogate states’ sovereign immunity, “the principle that States cannot be sued without their consent is broadly consistent with the Tenth Amendment,” which reserved to states powers not delegated to federal government.).

³⁴⁶ See *supra* notes 68-181 and accompanying text.

In effect, then, cities and counties can have immunity in state court from private actions based on Article I statutes, even though they do not have such immunity in federal court. The same is true of other governmental entities that would not be considered "arms of the State" for purposes of the Eleventh Amendment.³⁴⁷ This result accords with Supreme Court precedent recognizing that cities and counties are protected by the Tenth Amendment,³⁴⁸ but not by the Eleventh Amendment.³⁴⁹

The Tenth Amendment does not, however, protect cities and counties from private actions in state court to enforce federal statutes enacted under Section 5 of the Fourteenth Amendment. The Court has held cities and counties may be sued in state court under 42 U.S.C. § 1983, even if they have immunity under state law.³⁵⁰ In so holding, the Court explained, "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress . . . abolished whatever vestige of the State's sovereign immunity the municipality possessed."³⁵¹ Because § 1983 falls within Section 5 of the Fourteenth Amendment, however, that holding does not foreclose state-court immunity from claims based on Article I statutes.³⁵²

³⁴⁷ See, e.g., *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (Eleventh Amendment bars actions against entities that function as "arms" of the state).

³⁴⁸ See *National League of Cities v. Usery*, 426 U.S. 833, 855 n.20 (1976) (stating Tenth Amendment principle announced by majority applied to political subdivisions of states), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

³⁴⁹ See, e.g., *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Auth.*, 440 U.S. 391, 401 (1979) ("[T]he Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities. . . ."); see also *supra* notes 280-83 and accompanying text (discussing Supreme Court precedent on status of cities and counties under Eleventh Amendment).

³⁵⁰ 42 U.S.C. § 1983 (1994 & Supp. 1996).

³⁵¹ *Owen v. City of Independence*, 445 U.S. 622, 647-48 (1980). See also *Howlett v. Rose*, 496 U.S. 356, 367-83 (1990) (holding that state court was obligated to entertain § 1983 action against local public school district, despite state law barring § 1983 actions against such entities).

³⁵² See *Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (Section 1983 "was enacted for the express purpose of enforc[ing] the Provisions of the Fourteenth Amendment") (internal quotation marks omitted); see also Act of Apr. 20, 1871, 17 Stat. 13 (entitling statutory predecessor of § 1983 "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes"). In *Howlett*, the Court held the Supremacy Clause required a state court to hear a § 1983 action against a local public school district. See *Howlett*, 496 U.S. at 367-83. The state courts had refused to hear the action because of a state statute that the state courts had construed to "confer[] a blanket immunity on governmental entities from federal civil rights actions under § 1983." *Id.* at 364. From the opinion in *Howlett*, it appears that, aside from that discriminatory construction, the state courts

2. State Waivers of Immunity

A state can waive immunity from suits in its own courts, just as it can do so with respect to suits in federal court.³⁵³ In each forum, there is an important and identical limitation on the state's waiver "power." There is also one important, though obvious, difference.

As discussed above, a state cannot limit the scope of its consent to a suit in a way that would require the court hearing the suit to violate the Supremacy Clause.³⁵⁴ When a state submits a claim to a federal court, it exposes itself to defenses and counterclaims in the nature of recoupment. Similarly, when a state consents to suit in its own court, it exposes itself to both defenses and claims, including federal claims, arising from the same facts as the suit to which it has consented. Thus, the Supremacy Clause imposes an identical limit on the state's ability to restrict the scope of its consent to suit in federal court and its ability to do so in its own courts.

In one sense, though, a state's power to waive its immunity in its own courts exceeds its power to do so in federal court. Obviously, a state can waive immunity in its own courts from suits based solely on state law.³⁵⁵ By contrast, a state cannot consent to be sued on a state-law claim in federal court, unless the claim falls within the federal court's subject-matter jurisdiction. A state, like other parties, cannot confer subject-matter jurisdiction on the federal courts by consent.³⁵⁶ This really reflects a limit on the federal courts, rather than a limit

had power to hear a claim arising from the same facts as did the § 1983 claim in *Howlett*. See *id.* at 362-64 & nn. 4, 10 & 11; *id.* at 378-79. If so, the holding in *Howlett* can be justified solely on the basis of the Supremacy Clause, without regard to the fact that the federal claim was based on a statute enacted under Section 5 of the Fourteenth Amendment. The Supremacy Clause, of its own force, invalidated the state law (*i.e.*, the judicial interpretation of the state statute) because it discriminated against federal claims. In addition, the Supremacy Clause required the state courts to hear the claim, because they had power to do so under the state laws that remained intact when the discriminatory state law was disregarded.

³⁵³ See, *e.g.*, *DeSaussure v. Gaillard*, 127 U.S. 216, 232-34 (1888) (holding that state can waive immunity in its own courts); *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (holding that Eleventh Amendment waiver was effected "by the voluntary appearance of the State in intervening as a claimant of the fund in [federal] court"). Cf. *Massey*, *supra* note 15, at 143-44 (arguing that state lacks immunity in either its own courts or federal court unless it is granted by state constitution).

³⁵⁴ See *supra* notes 144-55 and accompanying text.

³⁵⁵ See, *e.g.*, *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (remarking that a state "may, if it thinks proper, waive this privilege [*i.e.*, against suit], and permit itself to be made a defendant in a suit").

³⁵⁶ See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152-54 (1908) (federal

on the states' power to waive their immunity.

3. Appellate Review by the United States Supreme Court

A state cannot prevent the United States Supreme Court from reviewing a final decision of the highest court of that state, even in a case brought against the state without its consent. In *Cohens v. Virginia*,³⁵⁷ the Court held the Eleventh Amendment did not bar the Court's appellate review of a case that had been brought by the state in state court and that raised a federal question.³⁵⁸ In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*,³⁵⁹ the Court held that its appellate jurisdiction also extends to actions that are brought against a state in state court and that raise a federal question.³⁶⁰ Although the Court in both *Cohens* and *McKesson* suggested various reasons why its power of appellate review overcomes the Eleventh Amendment, the Court seemed ultimately to rely on the need to ensure "state-court compliance with, and national uniformity of, federal law."³⁶¹ Thus, the dual foundations for the Court's appellate jurisdiction are the Supremacy Clause and the Court's role in enforcing that Clause by reviewing state-court decisions.³⁶² These foundations

court has independent obligation to determine existence of subject-matter jurisdiction, even if parties do not question it).

³⁵⁷ 19 U.S. (6 Wheat.) 264 (1821).

³⁵⁸ See *id.* at 405-12.

³⁵⁹ 496 U.S. 18 (1990).

³⁶⁰ See *id.* at 26-31.

³⁶¹ *Id.* at 29; see also *Cohens*, 19 U.S. (6 Wheat.) at 381, 391-92 (rejecting argument that Article III did not authorize federal courts to review state court decisions in cases brought by state against its own citizens in which federal defense was raised; citing Supremacy Clause and Constitution's general objective of "preservation of the constitution and laws of the United States, so far as they can be preserved by *judicial authority*") (emphasis added); *id.* at 415-16 (citing need for uniformity in rejecting argument that Court could not review decisions of state courts even in cases to which state was not party).

³⁶² See *McKesson*, 496 U.S. at 28 (Court's appellate review of state-court decisions is "consistent with this Court's role in our federal system"). Professor Vázquez focuses on the following statement in *McKesson*: "when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case." See Vázquez, *supra* note 13, at 1710-11 (quoting *McKesson*, 496 U.S. at 30). He regards this and a similar statement in *Seminole Tribe* as evidence that the Eleventh Amendment gives states an immunity from liability, rather than merely an immunity from private actions in federal court. See *id.* at 1702-03, 1710-11 (quoting statement in *Seminole Tribe* that Supreme Court can exercise appellate jurisdiction "where a State has consented to suit," *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996), and arguing that these statements support "immunity from liability" interpretation of Eleventh Amendment). In his view, the United States Supreme Court cannot review a state court decision in a suit against a state that has not waived immunity from the suit.

support appellate review by the Supreme Court despite the immunity that this Article contends the states enjoy in their own courts.³⁶³

4. Abrogation of Immunity Under the Fourteenth Amendment

Congress can abrogate the states' immunity in their own courts using Section 5 of the Fourteenth Amendment. Congress can do so for the same reason that it can use Section 5 to abrogate the states' Eleventh Amendment

See Vázquez, supra note 13, at 1692. With respect, I do not share this view. The statement in *Seminole Tribe* is dicta in a footnote that purports only to describe *Cohens v. Virginia*. Moreover, I believe the language of "consent," similar to the language of "constructive waiver," is merely shorthand for the notion that Eleventh Amendment immunity is overcome by the Supremacy Clause and the Court's role in enforcing that Clause. For the same reason, I do not attach significance to the reference to the state's "assent[]" in *McKesson*. Furthermore, the Court's reference to the consent theory in *McKesson* reflects the state's actual consent, by statute, to the state-court action before the Court for review. *See McKesson*, 496 U.S. at 24-25 & n.4 (describing Florida's "Repayment of Funds" statute). It was, therefore, appropriate for the *McKesson* Court to use "consent" terminology. The Court's use of it does not, in my view, preclude the existence of the Supremacy Clause rationale that would support the Court's appellate jurisdiction over a claim brought against the state in a state-court case to which it had not consented.

³⁶³ These same considerations arguably support the Court's holding in *FERC v. Mississippi* that *Testa*'s duty of nondiscrimination extends to state executive officers who perform judicial functions. *See FERC v. Mississippi*, 456 U.S. 742, 760-61, 768-69 (1982); *see also supra* note 188. The Court said in *Printz*, "It is within the power of the States . . . to transfer some adjudicatory functions to administrative agencies, with opportunity for subsequent judicial review." *United States v. Printz*, 117 S. Ct. 2365, 2381 n.14 (1997) (citations omitted) (emphasis added). The italicized statement implies that, when a state delegates adjudicatory power to a state agency, the state must provide for judicial review of at least the federal issues that arise in the agency's adjudications. Such judicial review could be impaired if state agencies had no obligation to address federal claims. If a state agency could refuse to address federal claims, the federal claims might not be capable of effective resolution by a state court on review of the agency's decision. *Cf. Felder v. Casey*, 487 U.S. 131, 146-50 (1988) (holding that state law was preempted by 42 U.S.C. § 1983, in part, because it operated like an administrative exhaustion requirement). If so, the agency's disregard of the federal claim would prevent the state court from treating the federal claim and state claims evenhandedly, as *Testa* requires. It could, in turn, also hamper effective appellate review by the Supreme Court of the state court's decision on the federal claim. Thus, it may be true, as Professor Caminker argues, that the extension of *Testa* in *FERC* is not justified by the "Judges Clause" portion of the Supremacy Clause. *See Caminker, Subordinacy, supra* note 54, at 1040 (asserting "[t]he [*FERC*] Court's unreflective extension of the *Testa* principle to 'adjudication' conducted by a state official other than a 'judge' rests somewhat uneasily with *New York's* notion that the duty to enforce federal law stems directly from the literal text of the Judges Clause"). The extension does seem justified, however, by the Supremacy Clause as a whole and the Court's role in enforcing that Clause.

immunity in federal court: "the Fourteenth Amendment, adopted well after the adoption of the [Tenth] Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the [Tenth] Amendment."³⁶⁴ Applied to state-court immunity, that rationale accords with precedent in which the Court has rejected Tenth Amendment challenges to federal legislation enacted to enforce the Civil War Amendments.³⁶⁵ Because of the importance and complexity of Congress's use of Section 5 to abrogate the states' state-court immunity, that issue is the subject of the next Part of this Article. Part V concludes that the Fourteenth Amendment, of its own force, sometimes requires state courts to entertain actions against state officers. It further concludes that Congress can use Section 5 of the Fourteenth Amendment to authorize suits in state court directly against unconsenting states under the same circumstances as it could authorize such suits in federal court.

V. LIMITS IMPOSED BY THE FOURTEENTH AMENDMENT ON THE STATES' IMMUNITY IN THEIR OWN COURTS

A. *The Due Process Clause Obligations of States*

The Due Process Clause of the Fourteenth Amendment requires states to provide adequate procedures when they deprive someone of life, liberty, or property.³⁶⁶ Supreme Court precedent leaves unclear when, if ever, the

³⁶⁴ *Seminole Tribe v. Florida*, 517 U.S. 44, 65-66 (1996) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454 (1976)).

³⁶⁵ See, e.g., *Rome v. United States*, 446 U.S. 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'"); see also *Gregory v. Ashcroft*, 501 U.S. 452, 463, 469 (1991) (states' freedom under Tenth Amendment to specify qualifications of their governmental officials is subject to constitutional limitations, "most notably" those of Fourteenth Amendment, but "the Fourteenth Amendment does not override all principles of federalism."); *EEOC v. Wyoming*, 460 U.S. 226, 243 & n.18 (1983) (reaffirming that federalism restraints on Congress's Commerce Clause powers are attenuated when Congress acts under Section 5 of Fourteenth Amendment); *Fitzpatrick*, 427 U.S. at 456 (upholding Title VII's authorization of suits against the states as valid exercise of Congress's power under Section 5 of Fourteenth Amendment and stating "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment") (citation omitted); *Ex parte Virginia*, 100 U.S. 339, 345 (1879) (Thirteenth and Fourteenth Amendments "were intended to be, and really are, limitations of the power of the States and enlargements of the power of Congress.").

³⁶⁶ See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."). In addition to ensuring adequate procedures, the Due Process Clause limits government intrusion on fundamental rights that are either explicitly

procedures must include a state-court suit directly against a state that has not waived immunity from the suit. The precedent suggests, however, that when a state has retained its state-court immunity, its courts merely must entertain private actions against the state official who causes the deprivation. The timing and nature of this action depends on the nature of the deprivation. For random and unauthorized deprivations, state courts must hear post-deprivation actions for damages against the offending official personally. For most predictable and state-authorized deprivations, as distinguished from those that are random and unauthorized, the state courts must entertain pre-deprivation *Ex parte Young*-type actions—*i.e.*, actions against the offending official for prospective relief.

When due process requires an individualized, judicial-style proceeding,³⁶⁷ the required timing of that proceeding depends on whether the deprivation is “random and unauthorized [by state law],” or is instead predictable and state-authorized.³⁶⁸ Examples of the first sort of deprivation include cases brought by: a company claiming that state officials destroyed food in the company’s care, which the officials mistakenly believed was contaminated;³⁶⁹ a public school student whom a teacher hit with a wooden paddle for misconduct;³⁷⁰ and a prisoner whose hobby kit was lost by prison officials.³⁷¹ For random and unauthorized deprivations of property or liberty

protected by the Constitution and incorporated in the Clause’s protection of “liberty,” or implicitly protected by the Constitution, according to the doctrine of substantive due process. *See, e.g.,* *Zinerman v. Burch*, 494 U.S. 113, 125 (1990). The author’s own limitations prevent an exploration in this Article of the extent to which the doctrine of substantive due process requires state courts to entertain actions against their own state or state officials.

³⁶⁷ The Due Process Clause requires states to provide individualized, judicial-style procedures only for state action that affects people in an individualized, rather than an across-the-board, way. *See generally* BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* §§ 5.6-5.8, at 232-41 (3d ed. 1991). For example, a state need not give every property owner the right to a hearing before it enacts a law raising the property tax rate. On the other hand, the state does have to give a property owner an opportunity for an individual hearing in connection with its valuation of his or her property for tax purposes. *Compare* *Londoner v. Denver*, 210 U.S. 373 (1908) with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

³⁶⁸ *See Zinerman*, 494 U.S. at 128-30 (quoting *Hudson v. Palmer*, 468 U.S. 517, 533 (1984)).

³⁶⁹ *See North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908).

³⁷⁰ *See Ingraham v. Wright*, 430 U.S. 651 (1977).

³⁷¹ *See Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part by* *Daniels v. Williams*, 474 U.S. 327 (1986); *see also* *Palmer v. Ohio*, 248 U.S. 32, 33-34 (1918) (dismissing, for lack of federal question, writ of error from state-court decision dismissing, on sovereign immunity grounds, action against state by landowners claiming that state’s flooding of their land violated Just Compensation Clause, and that state court’s denial of relief “somehow deprives them of property without due process of law”).

such as these, the Court has held that states only need to afford post-deprivation remedies for wrongful deprivations.³⁷² A Supreme Court case illustrating the second type of deprivation—a predictable and state-authorized one—was brought by a man who claimed that state officials allowed him to commit himself to a mental institution without his understanding what he was doing.³⁷³ The Court held that, for this sort of deprivation, the Due Process Clause ordinarily requires a pre-deprivation means of avoiding a wrongful deprivation.³⁷⁴

For random and unauthorized deprivations, the Court has held that a sufficient post-deprivation remedy consists of a state-court action against the offending official personally for money damages.³⁷⁵ Notice two features of this remedy. First, it would not be barred by the Eleventh Amendment if sought in a federal court, because actions seeking to hold state officers personally liable for damages are not considered suits against the state.³⁷⁶ If sought in a state court, the remedy, therefore, would not infringe on a state-court immunity that corresponded to federal-court immunity. Second, the remedy may be illusory in many cases. It might be barred by the doctrine of official immunity, under which most officials can avoid liability for most wrongs if they show their conduct did not violate “clearly established” law.³⁷⁷ The Court has not decided whether the doctrine protects officials in suits mandated by the Due Process Clause.³⁷⁸ In any event, some officials will be judgment proof. The Court has

³⁷² See *Zinerman*, 494 U.S. at 128; *Hudson*, 468 U.S. at 533-36; *Parratt*, 451 U.S. at 543-44; *Ingraham*, 430 U.S. at 682; *North Am. Cold Storage Co.*, 211 U.S. at 306; see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

³⁷³ See *Zinerman*, 494 U.S. at 114-15.

³⁷⁴ See *id.* at 132-39. The main exceptions to this requirement of a pre-deprivation proceeding for predictable, state-authorized deprivations are the state's collection of taxes and its taking of private property for public use. See *infra* notes 397, 402 and accompanying text.

³⁷⁵ See *Hudson*, 460 U.S. at 535-36 (holding that due process was satisfied by existence of state tort remedy against individual officer); see also *Parratt*, 451 U.S. at 543-44 (rejecting plaintiff's claim that state-law remedy in state court was inadequate because it authorized suit against state, rather than against officer).

³⁷⁶ See, e.g., *Papasan v. Allain*, 478 U.S. 265, 278 & n.11 (1986) (noting that Eleventh Amendment does not apply “[w]hen a state official is sued [in federal court] and held liable in his individual capacity” for damages).

³⁷⁷ See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Butz v. Economou*, 438 U.S. 478, 507 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

³⁷⁸ See Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U.L. REV. 277, 294-97 (1988) (describing as unsettled the question whether state officials can raise official-immunity defense when sued for violations of Due Process Clause); Mark R. Brown, *De-Federalizing Common Law Torts: Empathy for*

never suggested that the Due Process Clause requires states to satisfy judgments against such officers when those judgments are entered by a federal court.³⁷⁹ If no such requirement exists for federal-court judgments, there should be no such requirement for state-court judgments against judgment-proof officials. Otherwise, federal courts would be rendering judgments that were inadequate to satisfy due process. It seems, then, that the Due Process Clause requires state courts to hear private actions for personal damages against a state official who deprives someone of life, liberty, or property in a random and unauthorized way if no state-court remedy is available directly against the state.

For deprivations that are predictable and state-authorized, the Due Process Clause might be satisfied as long as state courts entertain pre-deprivation, *Ex parte Young*-type actions against the responsible state officials.³⁸⁰ Recall that *General Oil Co. v. Crain*³⁸¹ implies that the Constitution does indeed require state courts to entertain *Ex parte Young*-type actions, even if state law bars private, state-court actions directly against the state.³⁸² The *Crain* Court left unclear whether that requirement rests on the Supremacy Clause alone or on the Fourteenth Amendment. The Court reasoned:

"If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a state to its courts, . . . it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation."³⁸³

In support of that reasoning, the Court cited *Ex parte Young*,³⁸⁴ a decision that the Court has linked to the Supremacy Clause.³⁸⁵

Parratt, Hudson, and Daniels, 28 B.C. L. REV. 813, 832-43 (1987) (same).

³⁷⁹ Cf. *DeKalb County Sch. Dist. v. Schrenko*, 109 F.3d 680, 687-90 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 601 (1997) (holding that Eleventh Amendment and principles of federalism barred claims by local school district for reimbursement from state for costs of complying with desegregation order); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252-53 (1985) (holding that Eleventh Amendment barred county's cross-claim against state for indemnity and that indemnity claim raised only issue of state law).

³⁸⁰ See *supra* notes 117-31 and accompanying text (discussing *Ex parte Young*).

³⁸¹ 209 U.S. 211 (1908); see *supra* notes 121-31 and accompanying text (discussing *Crain*).

³⁸² See *Crain*, 209 U.S. at 220-28.

³⁸³ *Id.* at 226.

³⁸⁴ See *id.* at 227 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

³⁸⁵ See, e.g., *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause"); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-06 (1984) (*Ex parte Young* doctrine rests

Under the analysis of the Supremacy Clause proposed in this Article, however, the holding in *Crain* should rest on the Fourteenth Amendment, rather than the Supremacy Clause. This Article has argued the Supremacy Clause does not, of its own force, expand the jurisdiction of state courts except by invalidating discriminatory state-law restrictions on their jurisdiction. In the absence of such a restriction, the Supremacy Clause does not compel a state court to hear any action that falls outside its jurisdiction, even an action against a state officer alleging a constitutional violation. As discussed above, however, the Due Process Clause generally requires a state to provide a meaningful pre-deprivation remedy for predictable and state-authorized deprivations. An *Ex parte Young*-type suit in state court seems to provide the remedy required by due process in this situation.³⁸⁶

The interpretation of *Crain* proposed here—which would base its result on the Due Process Clause rather than the Supremacy Clause alone—has two main implications. First, it would mean a state would not have to allow its courts to entertain *Ex parte Young*-type actions, as long as the state provided an adequate alternative remedy.³⁸⁷ That is because of the remedial flexibility allowed to states under due process precedent.³⁸⁸ Second, even in the absence of an alternative remedy, state courts would not have to hear *Ex parte Young*-type actions that did not allege a wrongful deprivation of life, liberty, or property without due process. As a result, state courts would not have to hear some *Ex parte Young*-type actions that could be brought in federal court. Specifically, the state courts would not have to hear actions that alleged a violation of federal law that did not entail a deprivation of life, liberty, or

on the need to “vindicate the supreme authority of federal law”); see also *Papasan v. Allain*, 478 U.S. 265, 277 (1986) (explaining that *Ex parte Young* actions will not lie in federal courts for violations of state law, because in such actions “federal supremacy is not implicated”). Cf. David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 83-84 (1984) (expressing qualified praise for *Pennhurst*’s “emphasis on the subordination of immunity doctrine to federal interests”).

³⁸⁶ Accord Vázquez, *supra* note 13, at 1710.

³⁸⁷ In any event, all 50 states appear to allow *Ex parte Young*-type actions to be brought in their own courts. See *Idaho v. Coeur d’Alene Tribe*, 117 S. Ct. 2028, 2058 n.15 (1997) (citing cases). But cf. *id.* at 2035-36 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (arguing that *Ex parte Young* actions have been justified primarily when no relief was available in state court).

³⁸⁸ See, e.g., *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 51 (1990) (observing that state had discretion in crafting remedies for illegal taxation); see also *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981), *overruled by Daniels v. Williams*, 474 U.S. 327 (1986) (rejecting argument that state did not satisfy due process because it authorized a suit against itself for official’s destruction of property but did not allow a suit against official).

property, even though federal courts can hear such actions under the *Ex parte Young* doctrine.³⁸⁹ By the same token, state courts *would* have to hear actions alleging a violation of state law that entailed a deprivation of life, liberty, or property,³⁹⁰ even though federal courts cannot hear such actions under the *Ex parte Young* doctrine.³⁹¹

The foregoing analysis indicates that due process is satisfied as long as state courts hear private actions against the state officials responsible for due process violations. This analysis may conflict, however, with a line of cases that could be read to mean that the Due Process Clause is not always satisfied by the availability of a state-court remedy against the responsible official.³⁹²

The best known case in that line is *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*. There, the Court held that the Due Process Clause required a state to provide a "clear and certain remedy for any erroneous or unlawful tax collection" and that this remedy would sometimes have to consist of a refund by the state.³⁹³ The scope of the *McKesson* holding is unclear. In that case and later cases citing its "clear and certain remedy" holding, the state let taxpayers sue it for refunds in its own courts.³⁹⁴ It is

³⁸⁹ The Court has always assumed that *Ex parte Young* actions will lie in federal court not only for violations of the Constitution but also for violations of rights conferred by federal statutes. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996) ("[W]e often have found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law.") (internal quotation marks omitted).

³⁹⁰ Cf. *Woolhandler*, *supra* note 13, at 83-84, 133 (arguing that early Supreme Court case law indicates that "remedies for some state law violations may be constitutionally required").

³⁹¹ See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (holding that Eleventh Amendment bars federal-court action against state official for violations of state law).

³⁹² See, e.g., *McKesson*, 496 U.S. at 18.

³⁹³ *Id.* at 39 (internal quotation marks and citation omitted); see also *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587 (1995) (observing that *McKesson* principle may entail state refund); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755 (1995) (discussing when *McKesson* requires state to refund taxes under unconstitutional state law).

³⁹⁴ See *McKesson Corp.*, 496 U.S. at 24-25 & n.4; see also *Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904, 904 (1998) (per curiam); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 329, 346 (1996) (citing *McKesson* in case brought in state court under state tax refund statute); *Reich v. Collins*, 513 U.S. 106, 108-09 (1994); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90-91 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 533 (1991). Cf. *National Private Truck Council, Inc.*, 515 U.S. at 585-86 (state permitted state-court suits for refund of unconstitutional state taxes); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 339, 348-49 (1992) (citing *McKesson* to indicate remedial obligations of state in case brought against state official in its own courts apparently without immunity objection by state); *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 199-200, 205 (1991) (state court

possible the *McKesson* principle is limited to situations in which the state has consented to suits directly against it.³⁹⁵ If *McKesson* is so limited, then it would not prevent a state from meeting its due process obligations by allowing its courts to entertain actions against its officers rather than against itself. On the other hand, *McKesson* could be read to require state courts to hear tax refund suits directly against the state even if state law forbids state-court suits against the state.³⁹⁶ So read, *McKesson* would establish that, at least with respect to illegal taxation, the Due Process Clause compels a state court to entertain an action directly against the state.³⁹⁷

held that federal statute did not create cause of action against state in state court, and Court reviewed this "pure question of statutory interpretation," without addressing immunity issue); *Dennis v. Higgins*, 498 U.S. 439, 441-42 (1991) (state court heard action against state officials under 42 U.S.C. § 1983 apparently without immunity objection by state). *But cf.* *Ward v. Board of County Comm'rs*, 253 U.S. 17, 24 (1920) (holding, in action brought in state court under state refund statute, that county had to refund taxes collected in violation of federal law; and stating in dicta that "no statutory authority was essential to enable or require the county to refund the money"); HART & WECHSLER 4th ed., *supra* note 15, at 850 (suggesting that *Ward* may have "merely ensur[ed] that the state courts were applying state remedial rules on a non-discriminatory basis to a claim based on federal law"). In two of the cases following *McKesson*, the state court unexpectedly interpreted a state refund statute so as to deny relief under that statute to a taxpayer who sought a post-deprivation remedy in state court, on the ground that the taxpayer should have sought pre-deprivation relief. *See Newsweek*, 118 S. Ct. at 904; *Reich*, 513 U.S. at 111. The Court properly rejected this "bait and switch" gambit, for the gambit itself violated the Due Process Clause. *See Newsweek*, 118 S. Ct. at 905; *Reich*, 513 U.S. at 111; *see also* *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 679-82 (1930) (holding due process violated by state court interpretation denying relief because of exhaustion requirement that did not exist under prior state court precedent).

³⁹⁵ In *Reich*, the Court described *McKesson* broadly, to "stand for the proposition that 'a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment,' the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Reich*, 513 U.S. at 109-10 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930)) (emphasis added) (internal quotation marks omitted). This statement is dictum, because the state in *Reich* had enacted a tax refund scheme that had been construed, until the decision before the Court in *Reich*, to authorize post-deprivation refund suits against the state to recover state taxes collected in violation of federal law. *See id.* at 111; *see also supra* note 394 (discussing "bait and switch" decisions).

³⁹⁶ *See, e.g.*, HART & WECHSLER 4th ed., *supra* note 15, at 379 (reading *Reich* this way); Fallon & Meltzer, *supra* note 247, at 1824-28 (apparently reading *McKesson* this way); Monaghan, *supra* note 23, at 125 (reading *Reich* this way); Vázquez, *supra* note 13, at 1689 (same); *Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 188, 192-98 (1990) (apparently reading *McKesson* this way).

³⁹⁷ Some commentators have argued that, in addition to the Due Process Clause, the Just Compensation Clause of the Fifth Amendment (which applies to the states under the Fourteenth

Amendment) overrides any immunity that states enjoy in their own courts. See *Dolan v. City of Tigard*, 512 U.S. 374, 383-84 (1994) (stating that Fourteenth Amendment incorporates Just Compensation Clause). They base this argument on *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). See Fallon, *supra* note 5, at 1211 n.318 (describing *First English* as holding that the Just Compensation Clause obligates state courts to provide damages for temporary or permanent takings); Scott P. Glauber, *Citizen Suits Against States: The Exclusive Jurisdiction Dilemma*, 45 J. COPYRIGHT SOC'Y U.S.A. 63, 96 n.194 (1997) (citing *First English* for the proposition that "the state cannot exert sovereign immunity in state court against a takings claim"); see also Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVT'L. L. 37, 57 (1995) (stating that, "after *First English*, no state court is free to reject a compensation award where a taking is found"); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 370 (1993) (citing *First English* as "requir[ing] state courts to give remedies for Takings Clause . . . violations"). Cf. Beermann, *supra* note 378, at 283 & n.22 (1988) (citing *First English* to argue that "state sovereign and official immunities, insofar as they bar recovery when private parties would be liable for similar conduct, are unconstitutional under the takings clause"). *First English*, however, did not hold that the Just Compensation Clause overrides a state's immunity in its own courts by requiring state courts to hear Just Compensation claims against their own state. See *First English*, 482 U.S. at 318. Instead, the Court in *First English* held that the Just Compensation Clause requires the government to compensate a landowner for "temporary" regulatory takings—i.e. "for the period of time during which regulations deny a landowner all use of his land." *Id.* See also *id.* at 321 ("We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."). The *First English* Court further held that the government's duty to pay compensation under the Just Compensation Clause is self-executing. See *id.* at 315. This means the Clause itself creates a cause of action against the government. The state court in *First English* had therefore erred by dismissing a claim for compensation on the ground that state law did not supply a cause of action to support the claim. See *id.* (observing that "[s]tatutory recognition [of right to compensation for governmental taking] was not necessary") (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)). The question whether a plaintiff has a cause of action in a state court, however, is distinct from the question whether the defendant has immunity from that cause of action. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 112 (1984) (criticizing dissent's position for confusing issue of sovereign immunity with issue of existence of cause of action); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 692-93 (1949) (criticizing plaintiff's theory for "confus[ing] the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action"); see also *Loeffler v. Frank*, 486 U.S. 549, 565 (1988) (distinguishing issue whether Title VII authorized recovery of interest from issue whether Congress had waived federal government's sovereign immunity from interest award); *supra* notes 83-87 and accompanying text (discussing *Hilton*). *First English* held only that the Just Compensation Clause created a cause of action for a temporary taking. The Court did not address whether the Clause also overrides state sovereign immunity. See *First English*, 482 U.S. at 304.

While the Just Compensation Clause may not override a state's immunity in its own

Under the latter reading, taxpayers would be treated better than some other due process claimants.³⁹⁸ The Court has established that the victims of "random and unauthorized" deprivations of liberty and property are entitled only to sue the offending state officer in state court.³⁹⁹ As discussed above, that remedy may be illusory.⁴⁰⁰ A broad reading of *McKesson* would give the victims of wrongful taxation, in contrast, a "clear and certain remedy" in state court directly against the state. This difference seems unfair, considering that the victims of random and unauthorized deprivation may include victims of police misconduct and other state action that violates liberty interests, as distinguished from property interests.⁴⁰¹

courts, the Due Process Clause may do so. The Due Process Clause does not require pre-deprivation procedures when the government takes property for public use, just as that Clause does not require pre-deprivation procedures for the government's collection of taxes. See, e.g., *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) ("[T]he Fifth Amendment does not require that just compensation be paid in advance of or even contemporaneously with the taking." (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)); *United States v. Dow*, 357 U.S. 17, 21 (1958) (stating that federal government can exercise eminent domain by entering into physical possession of property without a court order, in which case property owner's remedy lies in post-deprivation suit under Tucker Act); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932). The Due Process Clause does, however, require "the existence of a 'reasonable, certain and adequate provision for obtaining compensation' at the time of the taking." *Preseault*, 494 U.S. at 11 (citing *The Regional Rail Reorg. Act Cases*, 419 U.S. 102, 124-25 (1974)). The question remains whether a state's obligation under the Due Process Clause to provide "an adequate process for obtaining compensation," *id.* (quoting *Hamilton Bank*, 473 U.S. at 194-95), can be met only by allowing itself to be sued in its own courts. *McKesson* suggests an affirmative answer to that question, as discussed in the text. See also *United States v. Printz*, 117 S. Ct. 2365, 2381 n.14 (1997) ("It is within the power of the States . . . to transfer some adjudicatory functions to administrative agencies, with opportunity for subsequent judicial review.") (emphasis added) (citation omitted). In any event, if state courts have an obligation to hear claims against their own state for Just Compensation claims (as well as claims for wrongfully collected taxes), notwithstanding the state's retention of immunity in its own courts, that obligation stems from the Due Process Clause, rather than the Just Compensation Clause. In hereafter discussing the possible existence of such an obligation, references in the text to claims by taxpayers should be understood also to include claims by victims of governmental takings.

³⁹⁸ See Fallon & Meltzer, *supra* note 247, at 1827.

³⁹⁹ See *supra* note 375 and accompanying text (discussing state-court remedy required by Due Process Clause for "random and unauthorized" deprivations of liberty or property).

⁴⁰⁰ See *supra* notes 377-79 and accompanying text.

⁴⁰¹ Justice O'Connor cited this disparity as a reason to allow states to assert a type of qualified immunity defense against retroactive liability for the collection of taxes later found to be unconstitutional. See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 135-36 (1993) (O'Connor, J., dissenting) ("I do not see why the Due Process Clause would require a full, backwards-looking compensatory remedy whenever a governmental official reasonably taxes

A plausible reason to treat tax cases differently from others may exist. A "clear and certain," post-deprivation, state-court remedy directly against the state might be justified in tax cases as a trade-off for the state's freedom from having to provide the pre-deprivation remedy that the Due Process Clause requires for other predictable, state-authorized deprivations.⁴⁰² If the state were required to provide pre-deprivation means by which a taxpayer could avoid wrongful taxation—by, say, getting a state-court injunction against the collector of taxes—taxpayers would have a "clear and certain" remedy. The state's strong interest in collecting taxes without judicial interference justifies dispensing with the pre-deprivation timing of a remedy, but does not justify dispensing with its "clear and certain" quality.⁴⁰³ This trade-off does not occur with respect to other predictable, state-authorized deprivations, for which the state generally cannot dispense with pre-deprivation procedures.⁴⁰⁴ And the trade-off is not possible for random and unauthorized deprivations, because, by their nature, they cannot be prevented before they occur.⁴⁰⁵ This trade-off theory is plausible because it imposes a special burden on states to counterbalance their special latitude in tax cases to dispense with pre-deprivation procedures. The theory is no better than plausible, though, because it does not come to grips with the inequitable treatment of taxpayers, on the one hand, and certain victims of liberty deprivations, on the other.

This difference in treatment would disappear if *McKesson* were read narrowly, as establishing a remedial principle applicable only, but whenever, the state allowed itself to be sued in its own courts. So read, *McKesson* would require a state itself to provide a "clear and certain remedy" for other types of deprivations, besides the collection of taxes, to the extent that the state

a citizen under what later turns out to be an unconstitutional statute but not where the officer deprives a citizen of her bodily integrity or her life.").

⁴⁰² See *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586-87 (1995) (discussing "the longstanding federal reluctance to interfere with state taxation").

⁴⁰³ See *id.* at 587 ("As long as state law provides a 'clear and certain remedy,' the states may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford post-deprivation relief (e.g., a refund).") (internal quotation marks omitted) (citations omitted); Fallon & Meltzer, *supra* note 247, at 1826.

⁴⁰⁴ See, e.g., *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) ("[T]he Court usually has held that the Constitution requires some kind of hearing before the State deprives a person of liberty or property."); see also *id.* at 125-26 ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.") (quoting *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

⁴⁰⁵ See *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

consented to suit on claims for non-tax-related deprivations.⁴⁰⁶ If, for example, a state permitted state-court suits against it for the torts of its employees, it would be obligated to provide a clear and certain remedy—including an award out of the state treasury—when those torts constituted violations of the Due Process Clause. On the other hand, if the state preserved its immunity from lawsuits in its own courts, victims of wrongful taxation, as well as victims of random and unauthorized deprivations, could only sue the responsible officers in post-deprivation, state-court suits.⁴⁰⁷

A narrow reading of *McKesson* is supported by two other considerations. First, it construes the Due Process Clause to be congruent with the historical remedy for wrongful tax collections, which was a suit against the tax official for personal damages.⁴⁰⁸ Second, it makes the remedy available for wrongful state taxation in state court more congruent with the remedy available for wrongful state taxation in federal court. A taxpayer cannot obtain a refund from the state treasury in a federal-court action because of the Eleventh

⁴⁰⁶ See *supra* notes 144-55 and accompanying text (discussing state waiver of state-court immunity); cf. *The Supreme Court, 1989 Term: Leading Cases*, *supra* note 396, at 197 ("McKesson's requirement of redress for unconstitutional taxes . . . may not be generalizable.").

⁴⁰⁷ See Fallon & Meltzer, *supra* note 247, at 1825 (explaining that, broadly read, *McKesson* "poses something of a puzzle" considering that, "[i]n the vast majority of cases, sovereign immunity and related doctrines bar unconsented suits for payment of funds directly out of state and federal treasuries").

⁴⁰⁸ See *Barney v. Rickard*, 157 U.S. 352, 355 (1895) ("Actions against collectors for money had and received depended originally on common-law principles."); *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 156-57 (1836) (discussing English case law allowing suits against collectors of government revenue); see also, e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280, 285-86 (1912) (holding that taxpayer who paid unconstitutional state tax under duress was entitled to "clear and certain" remedy, which consisted in that case of suit against state taxing official); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 249 (1965) (including "[t]he suit against an officer for improper collection of taxes" among the "traditional" cases in which judicial remedy was available for governmental wrongdoing). See generally JOSEPH STORY, *COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW* § 307, at 380-81 (Charles P. Greenough ed., 9th ed. 1882) (recounting that public officers could be held personally liable for illegally, but under color of office, taking money or other property from third parties), *id.* § 320, at 398 (discussing tort liability of public officers in general) (5th ed. 1857); cf. Pfander, *History*, *supra* note 23, at 1303 (when Constitution was drafted, "suits against federal officers were expected to provide a method of securing a judicial determination of the legality of much executive action."). Under the Court's precedent, a remedy's long history supports the conclusion that it satisfies the Due Process Clause. See *Burnham v. Superior Court of California*, 495 U.S. 604, 619 (1990); *Ingraham v. Wright*, 430 U.S. 651, 672-76 (1977); *Hurtado v. California*, 110 U.S. 516, 528-29 (1884).

Amendment.⁴⁰⁹ Instead, the taxpayer may only sue the taxing official personally, in an action under 42 U.S.C. § 1983 (and then only if no adequate state remedy is available).⁴¹⁰ Under a narrow reading of *McKesson*, such a personal action likewise would be the only remedy that due process would require in state court.

In sum, the Due Process Clause of the Fourteenth Amendment does not appear to require a state court to hear private actions against its own state for violations of the Clause. If the state immunizes itself from such actions, however, the Clause compels state courts to entertain actions against the responsible officials. When the violation consists of a random and unauthorized deprivation of life, liberty, or property, the victim can, after the deprivation occurs, sue the responsible state official in state court for money damages out of the official's own pocket. When the violation consists of a predictable and state-authorized deprivation, the victim can, before the deprivation occurs, sue the responsible state official in state court for prospective relief.⁴¹¹

⁴⁰⁹ See, e.g., *Reich v. Collins*, 513 U.S. 106, 110 (1994).

⁴¹⁰ See *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981) (construing § 1983, in light of principles of comity, to bar action under that provision challenging state tax system on federal grounds); see also *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 589 (1995) (holding that § 1983 does not require state courts to award declaratory or injunctive relief against state taxation that violates federal law as long as adequate state remedy exists).

⁴¹¹ Professor Vázquez believes that the *McKesson* line of cases should be reinterpreted so as to rest on the Supremacy Clause instead of the Due Process Clause. See Vázquez, *supra* note 13, at 1744-90. As he reads *McKesson*, it "appears to require a damage remedy from the state for every violation of mandatory obligations imposed on the state by federal statute for the benefit of individuals, even if Congress has chosen not to provide a damage remedy." *Id.* at 1764. He argues that, so read, *McKesson* has two doctrinal defects. See *id.* at 1766. First, it conflicts with "the many decisions affirming Congress's power to impose mandatory obligations on states without subjecting them or their officials to damage liability." *Id.* Second, it enables Congress easily to avoid the holding in *Seminole Tribe* that Congress cannot use Article I to abrogate the Eleventh Amendment. See *id.* at 1746. It does so by allowing Congress to use its Article I powers to create "property" protected by the Due Process Clause and then to use its power under Section 5 of the Fourteenth Amendment to authorize private actions directly against the states for deprivations of that "property." See *id.* at 1691 (describing this potential for circumvention, and calling it the "abrogation reductio"); *id.* at 1744-90 (proposing reinterpretation of *McKesson* as Supremacy Clause decision in order to avoid the "reductio" and to make *McKesson* consistent with Congress's remedial discretion for state violations of federal statutory rights). He contends that these defects would disappear if the Supremacy Clause replaced the Due Process Clause as the basis for the *McKesson* line of cases. See *id.* at 1782. First, the Supremacy Clause would leave Congress with the flexibility to prescribe the remedies for state violations of federal statutory rights. See *id.* at 1782-83. Second, Supremacy Clause precedent would require state courts to provide a damages remedy only against state officers,

rather than the state itself; the Supremacy-Clause reinterpretation, thus, would prevent Congress from using its Article I powers to override the immunity that states enjoy under the Eleventh Amendment from private lawsuits directly against them in federal and, as Professor Vázquez interprets the Eleventh Amendment, *see supra* note 256 and accompanying text, in their own courts. *See id.* at 1770-77.

The doctrinal problems identified by Professor Vázquez are real, but I do not think it is necessary to reinterpret *McKesson* as a Supremacy Clause case to avoid them. As I understand his reading of *McKesson*, it rests on the premises that: (1) whenever Congress imposes on states a mandatory obligation that confers individual benefits, Congress has created a "property" interest protected by the Fourteenth Amendment's Due Process Clause; (2) the Due Process Clause requires the courts of a state that has wrongfully deprived someone of the property so created to award damages for that deprivation, even if Congress did not intend damages to be available; and (3) *McKesson* holds that the damages remedy must be available directly against the state. I dispute each premise. First, the Court has indicated that there are limits on Congress's power to create property. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) ("Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance."); *see also City of Boerne v. Flores*, 117 S. Ct. 2157, 2166 (1997) (Section 5 of Fourteenth Amendment does not empower Congress "to legislate generally upon life, liberty, and property") (internal quotation marks and citation omitted). Just because Congress can—under the Commerce Clause, for example—impose substantive obligations on states and, thereby, create private benefits, that does not mean every such obligation creates "property" for due process purposes. Second, even if Congress acts under a constitutional power that encompasses the power to create "property" for due process purposes—the Patent Clause, as a possible example—that does not automatically give Congress the power under Section 5 to authorize suits against the states for deprivations of that property, for the reason recognized by Professor Vázquez and discussed in Section B: Congress can protect property from state deprivations under Section 5 only if it reasonably concludes that the states are not themselves providing the remedies required by due process for such deprivations. *Cf. Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990) (violation of procedural due process "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process"). *See infra* notes 420-23, 441 and accompanying text. Nor does Congress's creation of "property" in an Article I statute necessarily deprive Congress of the discretion to limit the remedies available for the states' violations of that statute. Professor Vázquez believes that this discretion is defeated by the Court's rejection of the "bitter with the sweet" rationale articulated by Chief Justice Rehnquist, in an opinion joined by two other Justices, in *Arnett v. Kennedy*, 416 U.S. 134 (1974). *See Vázquez, supra* note 13, at 1768. The bitter-with-the-sweet rationale held that, when the government creates a private benefit and limits its own discretion to terminate that benefit, thereby creating a "property" interest protected by due process, the government can prescribe whatever procedures it wishes to terminate the benefit; those procedures provide all the process that is constitutionally due. *See Arnett*, 416 U.S. at 153-55 (plurality opinion). In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Court rejected the bitter-with-the-sweet rationale, holding that the procedures prescribed in a statute that created a property right were subject to judicial review to determine whether they provided the process that was "due" under the Constitution. *See id.* at 541. The bitter-with-the-sweet rationale

B. Congress's Power to Enforce the Due Process Clause

Even if the Due Process Clause, of its own force, never compels a state court to entertain a private action directly against its own state, the question remains whether Congress can exert such compulsion to enforce the Due Process Clause of the Fourteenth Amendment. That is an especially difficult question after the recent decision in *City of Boerne v. Flores*.⁴¹² The Court there announced for the first time that, when Congress legislates under Section 5, "[t]here must be a congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end."⁴¹³ The Court did not explain precisely how this new standard restricts Congress's power under Section 5. The Court did offer some guidance, however, that illuminates Congress's power under Section 5 to force state courts to hear claims against their own state.

The Court in *Boerne* confirmed Congress's power under Section 5 to

concerned a context quite different from that under discussion. It concerned whether the government had discretion to determine the procedures for *its own* deprivation of the benefit that it had created. In rejecting the rationale, the Court did not address its validity for a situation in which one sovereign (the federal government) creates property and prescribes the remedies for deprivation of that property by other sovereigns (the states). That situation does not present the danger that the government is trying to reserve its own latitude to take away the property arbitrarily or invidiously, a danger that may well have underlain the Court's rejection of the "bitter with the sweet" rationale. See *Schwabe v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (hearing required by due process necessary to ensure against "invidiously discriminatory" action); *Dent v. West Virginia*, 129 U.S. 114, 123 (1889) (concept of due process came from England, where it was "designed to secure the subject against the arbitrary action of the crown"). For that reason, I do not believe that the Court's rejection of the bitter-with-the-sweet rationale prevents Congress from deciding what remedies are appropriate for a state's violation of property rights created by a federal statute. At the very least, in light of the difference between this context and the one in which the "bitter with the sweet" rationale was rejected, the "many decisions" cited by Professor Vázquez, see Vázquez, *supra* note 13 at 1766, would support a strong presumption that the procedures prescribed by Congress for remedying the states' infringement of a federal statutory right were all that were constitutionally "due." Finally, as to Professor Vázquez's third apparent premise, the *McKesson* line of cases need not be read to hold that the Due Process Clause requires a state-court monetary remedy directly against the state, for the reason discussed above in the text accompanying note 394: In each of the *McKesson* cases, the state authorized suits directly against it in its own courts and thereby waived immunity.

⁴¹² 117 S. Ct. 2157 (1997).

⁴¹³ *Id.* at 2164.

enforce the Fourteenth Amendment's Due Process Clause.⁴¹⁴ The Court emphasized, however, that Section 5 does not encompass "[t]he power to 'legislate generally upon' life, liberty, and property."⁴¹⁵ Instead, the Court described Congress's power under Section 5 as "remedial and preventive."⁴¹⁶ The Court meant that, when the states are violating the Fourteenth Amendment, Congress can pass a law to remedy past violations and prevent future ones. Congress can also use Section 5 to regulate or prohibit some state conduct that does not violate the Constitution.⁴¹⁷ For example, the Court held that Congress could, under its "parallel power" to enforce the Fifteenth Amendment, suspend all literacy tests for voting—even though the only ones that violated the Fifteenth Amendment were ones that were adopted or maintained intentionally to discriminate against blacks—because Congress reasonably concluded many of the tests were adopted or maintained because of intentional discrimination.⁴¹⁸ But Congress cannot use a cannon to kill a flea; the means prescribed by the law to remedy or prevent constitutional violations must be proportional to those violations.⁴¹⁹

These principles place two major conditions on Congress's power under Section 5 to enforce the Due Process Clause. First, Congress must be able reasonably to conclude that the states are violating the Clause. *Boerne* suggests that the perceived violations would have to be widespread and numerous for Congress to pass a law that applied nationwide and indefinitely.⁴²⁰ In striking down a federal law enacted under Section 5, the Court in *Boerne* stressed the lack of evidence of recent constitutional violations of the sort that the law was designed to prevent.⁴²¹ By comparison, the *Boerne* Court remarked that, in prior decisions upholding federal laws enacted to enforce the Civil War Amendments, it had found a legislative record of "subsisting and pervasive" constitutional violations.⁴²² The Court left unclear whether Congress must have evidence of

⁴¹⁴ See *id.* at 2163 ("The 'provisions of this article,' to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment.").

⁴¹⁵ *Id.* at 2166 (quoting *The Civil Rights Cases*, 109 U.S. 3, 15 (1883)).

⁴¹⁶ *Id.*

⁴¹⁷ See *id.* at 2170.

⁴¹⁸ See *id.* at 2163 (discussing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), and *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959)).

⁴¹⁹ See *id.* at 2164 ("There must be a congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end").

⁴²⁰ See *id.* at 2167.

⁴²¹ See *id.* at 2169.

⁴²² *Id.* at 2167.

a “widespread pattern” of such violations before acting.⁴²³ The Court nonetheless implied that some evidence of current and prevalent violations must exist.

Second, Congress must enact a law that targets the perceived due process violations. In *Boerne*, the Court said Congress can prohibit “certain types” of state laws “when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.”⁴²⁴ The Court struck down the statute in *Boerne* as overly broad because it subjected to strict judicial scrutiny any state or local law a person could show substantially burdened his or her exercise of religion.⁴²⁵ It thus “intru[ded] at every level of government, displacing laws . . . of almost every description and regardless of subject matter.”⁴²⁶ The Court also noted the statute “ha[d] no termination date or termination mechanism.”⁴²⁷ That distinguished it from the federal statute the Court had upheld in *South Carolina v. Katzenbach*,⁴²⁸ which was limited in both duration and geographic scope.⁴²⁹ Thus, *Boerne* suggests Congress must aim with some precision at the state practices that cause the constitutional violations Congress seeks to remedy or prevent.

One can envision facts that would empower Congress to enforce the Due Process Clause against the states. Suppose Congress found widespread evidence of excessive brutality by state and local police. Such conduct violates fundamental rights—specifically, the freedom from unreasonable seizures—protected by the Due Process Clause.⁴³⁰ Suppose Congress also found that, in many areas of the country: high-level state and local officials condoned the brutality; state law required victims of the brutality to exhaust lengthy and often futile administrative procedures before they could present a claim in state

⁴²³ *Id.* at 2169 (finding no evidence before Congress of “widespread pattern of religious discrimination”).

⁴²⁴ *Id.* at 2170.

⁴²⁵ See *id.* at 2162 (describing Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (1994)).

⁴²⁶ *Id.* at 2170.

⁴²⁷ *Id.*

⁴²⁸ 383 U.S. 301 (1966).

⁴²⁹ See *Boerne*, 117 S. Ct. at 2170 (noting that federal statutory provisions upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), “were confined to those regions of the country where voting discrimination had been most flagrant, and affected a discrete class of state laws,” and had termination provisions triggered by covered state’s showing an absence of substantial discrimination for past five years).

⁴³⁰ See *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

court; state law imposed other unreasonable requirements for this sort of state-court claim, such as too-short statutes of limitation; and victims of police brutality who obtained money judgments against the offending police officers in state court could seldom collect on those judgments because so many police officers were judgment-proof. It seems plain these circumstances would justify legislation under Section 5.

Even in this setting, *Boerne* would place some legislation out of bounds. Congress probably could not forbid the state and local governments from having police departments and create, in their stead, a nationwide, permanent, federal police force.⁴³¹ That would be "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of its citizens."⁴³² It would be much less intrusive—and almost certainly permissible—for Congress to create a federal cause of action for unconstitutional police brutality that was enforceable in state court by an injunction or an award of money damages against the state. Congress could probably go even further, by making states liable for specific police practices, such as chokeholds, which, it found, may not always violate the Constitution but do so in many instances.⁴³³

Although the hypothetical statute involves deprivations of liberty interests, Congress could respond in a similar way to egregious and widespread deprivations of property. Legislation proposed in the last Congress provides a possible example. The legislation was premised on Congress's belief that many states and localities are violating the landowners' due process rights by failing to provide adequate remedies for land use regulation that, in some instances, takes property without just compensation.⁴³⁴ The legislation responded to this perceived problem by cutting back judicially-developed restrictions on takings claims brought in federal court against state officials under § 1983.⁴³⁵

⁴³¹ Cf. *United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power").

⁴³² *Boerne*, 117 S. Ct. at 2171.

⁴³³ Cf. *Los Angeles v. Lyons*, 461 U.S. 95, 115 (1983) (Marshall, J., dissenting) (describing use of chokehold in case holding that plaintiff lacked standing to seek injunction against continued use of chokeholds).

⁴³⁴ See Citizens Access to Justice Act of 1998, H.R. 1534, 105th Cong. § 2(1) (1998) (finding that "property rights have been abrogated" by state and local regulations "that adversely affect the value and the ability to make reasonable use of private property"); H.R. REP. NO. 105-323 (finding that local land use process "can take years for property owners who are left in regulatory limbo due to the local entities' failure to make a final decision as to what land use is permitted").

⁴³⁵ See H.R. 1534, 105th Cong. § 6(c) (restricting federal courts' use of abstention and

A difficult question remains about Congress's power under Section 5 to enforce the Due Process Clause: To what extent can Congress use its Article I powers to create "property" protected by the Due Process Clause and then use its Section 5 powers to authorize private suits against states for "depriv[ations]" of that property?⁴³⁶ For example, could Congress use its Commerce Clause powers to create a "property" interest in the receipt of a minimum wage and use its Section 5 powers to authorize private, federal-court actions against states that "deprived" their employees of that right by paying them lower wages? If so, Congress seemingly could circumvent *Seminole Tribe*, which prevents Congress from using Article I powers to abrogate the Eleventh Amendment directly. The question has arisen, so far, only in the context of federal laws that abrogate the Eleventh Amendment by authorizing private suits against the states in federal court.⁴³⁷ Nonetheless, the same question would be posed by Article I laws authorizing such suits in state court, if Congress lacks power under Article I to compel state courts to hear such suits. In each setting, the limit on Congress's use of Article I to authorize private actions against states would be no limit at all if Congress could routinely overcome it by relying on Section 5 of the Fourteenth Amendment.⁴³⁸

A complete exploration of this question would require the author to begin a new article even as this one draws to a close. It is worth noting, however, there are two important restrictions on Congress's ability to circumvent *Seminole Tribe* in the way just described. First, Congress does not

ripeness doctrines).

⁴³⁶ See, e.g., Vázquez, *supra* note 13, at 1691-92, 1744-66.

⁴³⁷ Compare *Chavez v. Arte Publico Press*, 157 F.3d 282, 287-91 (2d Cir. 1998) (holding that federal provision authorizing suits against states for copyright violations was not valid exercise of Section 5, partly because recognition of broad power under Section 5 to enforce Article I property rights would negate *Seminole Tribe*); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 357-62 (3d Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999) (No. 98-149) (holding that Lanham Act was unconstitutional as applied in private suit against state for false advertising), and *Schlossberg v. Maryland Comptroller of Treasury (In re Creative Goldsmiths of Washington, D.C., Inc.)*, 119 F.3d 1140, 1146-47 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998) (using same rationale to hold that federal provision allowing bankruptcy claims against states exceeded Section 5), with *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343, 1355 (Fed. Cir. 1998), *cert. granted*, 119 S. Ct. 770 (1990) (No. 98-531) (holding that federal provision authorizing suits against states for patent infringement was a valid exercise of Section 5).

⁴³⁸ See *Creative Goldsmiths*, 119 F.3d at 1146-47 (finding *Seminole Tribe* "inconsistent with any reading that would extend Congressional power under § 5 of the Fourteenth Amendment to reincorporate express Article I powers").

have unlimited power to create "property" under Article I.⁴³⁹ In particular, it is not clear that Congress's authority to "regulate" interstate commerce empowers it to create a "property" right, say, to be free from state laws that burden such commerce.⁴⁴⁰ Second, Congress's creation of a property interest under Article I does not automatically trigger its power under Section 5. If the states themselves provide constitutionally adequate procedures for preventing or remedying their wrongful deprivations of congressionally-created property interests—by, for example, authorizing post-deprivation tort suits against state officers for "random and unauthorized" deprivations and pre-deprivation, *Ex parte Young*-type suits for predictable, state-authorized derivations—Congress would lack the factual predicate that *Boerne* seems to require for a Section 5 response.⁴⁴¹

Nonetheless, Congress can sometimes enforce the Due Process Clause by authorizing suits directly against a state in its own courts, even if the state has retained its immunity from such suits and even if the Due Process Clause, standing alone, would never require the state to permit such a suit. It is hard under current precedent to identify all of the circumstances in which Congress can do so. The precedent does strongly suggest, though, that the power is not

⁴³⁹ See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) ("Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance."); see also *City of Boerne v. Flores*, 117 S. Ct. 2157, 2166 (1997) (Section 5 of Fourteenth Amendment does not empower Congress "to legislate generally upon life, liberty, and property") (internal quotation marks and citation omitted); *College Sav. Bank*, 131 F.3d at 360-61 (holding that tort of unfair competition created by Lanham Act did not constitute "property" for purposes of Due Process Clause). Cf. *College Sav. Bank*, 148 F.3d at 1352 (holding that patent constituted "property" for purposes of Due Process Clause).

⁴⁴⁰ Cf. *College Sav. Bank*, 131 F.3d at 361 ("If a state's conduct impacting on a business always implicated the Fourteenth Amendment, Congress would have almost unrestricted power to subject states to suit through the exercise of its abrogation power. . . . This result would be unacceptable and would conflict directly with the strict limits on Congress's powers to abrogate a state's Eleventh Amendment immunity."). But cf. *Dennis v. Higgins*, 498 U.S. 439, 443-51 (1991) (holding that suits for violation of Commerce Clause may be brought under § 1983, because Clause creates a "right" protected by § 1983).

⁴⁴¹ See *Vázquez*, *supra* note 13, at 1753-63. Cf. *Zinerman v. Burch*, 494 U.S. 113, 125-26 (1990) (violation of procedural due process "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process"); *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998) (holding that provision of Americans with Disabilities Act authorizing private, federal-court actions against states fell within Section 5 of the Fourteenth Amendment; relying in part on congressional finding that disabled people suffered from "a history of purposeful unequal treatment,") (citing 42 U.S.C. § 12101(a)(7) (1994)), *cert. granted*, 119 S. Ct. 901 (1999) (No. 98-791).

routine.

VI. CONCLUSION

This Article attempts to answer an important question posed by the Supreme Court's decision in *Seminole Tribe v. Florida* in a way that is faithful to the Court's precedent. Under *Seminole Tribe*, Congress cannot use its Article I powers to abrogate the states' Eleventh Amendment immunity from private actions in federal court. Yet, Congress can still use Article I to impose generally applicable, substantive obligations on the states, such as an obligation to pay its employees a minimum wage. This Article has addressed the question whether Congress can, in the exercise of its Article I powers, compel state courts to hear private actions to enforce these obligations against their own state. The Article concludes Congress cannot do so, because of the Tenth Amendment.

The states' Tenth Amendment immunity in their own courts is limited, however, by the Supremacy Clause and the Due Process Clause of the Fourteenth Amendment. The Supremacy Clause invalidates state laws that permit or require state courts to discriminate against federal claims, including claims against the state. In addition, the Clause requires state courts to hear those federal claims if they have power to do so under the neutral state law that remains when discriminatory laws are disregarded. The Due Process Clause requires states to provide adequate procedures in connection with deprivations of life, liberty, or property. Those procedures include an obligation on the part of state courts to entertain actions against state officials responsible for wrongful deprivations. Moreover, under Section 5 of the Fourteenth Amendment, Congress can, under some circumstances, compel state courts to entertain actions directly against their own state.

Recognition that the Tenth Amendment protects states from private suits in their own courts would represent a major doctrinal development, but it would not radically change things, as a practical matter. Congress has never forced state courts to hear claims against their own state over the state's objection.⁴⁴² The question whether Congress can do so arises only because *Seminole Tribe* gives Congress an incentive to try. Moreover, while this Article argues Congress cannot use Article I to force state courts to hear suits against states that have preserved their immunity in state court, nothing prevents the

⁴⁴² Cf. *Brown v. Gerdes*, 321 U.S. 178, 191 (1944) (Frankfurter, J., concurring) ("The simple fact is that from 1789 to this day no act of Congress has attempted to force upon state courts the duty of enforcing any right created by federal law on terms other than those on which like litigation involving rights other than federal rights is required to be conducted in a state court.").

states from waiving immunity. Indeed, many states have wholly or partly waived their state-court immunity in recent years,⁴⁴³ and, under *Testa v. Katt*, such a state-court waiver exposes a state to suits on claims arising from the same facts as do the claims permitted under the waiver. It is doubtful that states will reverse the trend of waiving their immunity as long as Congress does not begin indiscriminately enacting laws exposing them to private lawsuits in their own courts.

⁴⁴³ See *Owen v. City of Independence*, 445 U.S. 622, 645 n.28 (1980) (stating all but a handful of states waive their immunity from tort suits for governmental functions); John Evans Taylor, Note, *Express Waiver of Eleventh Amendment Immunity*, 17 GA. L. REV. 513, 527-32 (1983) (surveying state laws waiving sovereign immunity).