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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 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. The Supreme Court explained that the Eleventh Amendment bars such suits and Congress cannot use its Article I powers to abrogate the Eleventh Amendment. 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. 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.

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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.")).
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

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\(^6\) 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.


\(^12\) *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. 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. 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.

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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

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.\(^6\)

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.\(^7\) 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.\(^8\) The federal law was based on the Commerce Clause.\(^9\) 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”).


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.\textsuperscript{20} At the same time, the Court reaffirmed Congress's power to abrogate the Eleventh Amendment under Section 5 of the Fourteenth Amendment.\textsuperscript{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."\textsuperscript{22} As the dissent in \textit{Seminole Tribe} observed, this reasoning appears to preclude Congress from using any of its Article I powers to abrogate the Eleventh Amendment.\textsuperscript{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 . . . ").\textsuperscript{20} See \textit{Seminole Tribe}, 517 U.S. at 56-75.\textsuperscript{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.").\textsuperscript{22} Id.\textsuperscript{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 \textit{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), \textit{vacated in relevant part as superseded by statute}, 165 F.3d 593 (7th Cir. 1999). \textit{But see} Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609, 616 n.9 (1st Cir. 1996) (holding that, notwithstanding \textit{Seminole Tribe}, Congress had power to abrogate Eleventh Amendment using its War Powers). Although \textit{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, \textit{Implied Waiver After Seminole Tribe}, 82 MINN. L. REV. 793, 822-27 (1998) (arguing this use of Spending Clause survives \textit{Seminole Tribe}); see also Henry Paul Monaghan, \textit{The Sovereign Immunity "Exception,"} 110 HARV. L. REV. 102, 102 (1996) (describing \textit{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 \textit{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, \textit{History and State Suability: An "Explanatory" Account of the Eleventh Amendment}, 83 CORNELL L. REV. 1269, 1330 (1998) [hereinafter Pfander, \textit{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

25 See id. at 555-57.
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 enacting "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 enacting "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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{32} These decisions cast doubt on the validity of private enforcement of other federal statutes in federal court, such

\textsuperscript{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).

\textsuperscript{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).

as certain environmental laws enacted under Article I that apply to state and private entities alike.\textsuperscript{33} If these decisions are correct and if Congress wants these Article I statutes to be enforced against the states through private actions,\textsuperscript{34} it will have to provide for the actions to be brought in state courts.\textsuperscript{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.\textsuperscript{36} In more recent decisions, however, the Court has hinted that unconsenting states might be privately sued on federal claims.


\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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. 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.

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*, held that Maine is immune from private suits under the FLSA brought in its own courts. 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. The holding in *Alden* also conflicts with suggestions by several federal courts of appeals that state courts must entertain private FLSA actions. These conflicting views in post-*Seminole Tribe* decisions reflect a division that pre-dates *Seminole Tribe*.

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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.


40 Id. at 175.


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).

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


*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).

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. 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, the Court held that a provision in the federal Low-Level Radioactive Waste Policy Amendments Act of 1985

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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).
exceeded Congress’s power under the Commerce Clause and thereby violated the Tenth Amendment.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.”\textsuperscript{52} The Court made clear that this “anticommandeering principle” was absolute;\textsuperscript{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.\textsuperscript{54}

\textsuperscript{49} See \textit{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”).


\textsuperscript{52} \textit{New York}, 505 U.S. at 176 (internal quotation marks and citation omitted).

\textsuperscript{53} See \textit{id.} at 202 (White, J., concurring in part and dissenting in part) (describing majority’s opinion as adopting an “‘anticommandeering’ principle”).

\textsuperscript{54} See \textit{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, \textit{State Sovereignty and Subordinacy: May Congress Commander State Officers to Implement Federal Law?}, 95 COLUM. L. REV. 1001, 1006 n.13 (1995) [hereinafter Caminker, \textit{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 \textit{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); \textit{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); \textit{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 \textit{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.”); \textit{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. The Court acknowledged, "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them." But "this sort of federal 'direction' of state judges," the Court explained, "is mandated by the text of the Supremacy Clause." The Court was referring to the second part of the Supremacy Clause, which commands state judges to follow federal law. 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, cl. 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 Act\(^{61}\) (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).


\(^{62}\) *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

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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." 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. The Court held that the state courts could not decline jurisdiction on this ground and that those courts had an obligation under the Supremacy Clause to hear the federal claim. 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." The Court determined that those courts accordingly had "jurisdiction adequate and appropriate under established local law to adjudicate" actions under the federal statute. "Under these circumstances," the Court concluded, "the State courts are not free to refuse enforcement of [the plaintiff's federal] claim."

Commentators disagree on the meaning of Testa. 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. Other commentators read Testa more broadly to hold

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71 Testa, 330 U.S. at 387-88 & n.1 (quoting federal statute).
72 See id. at 388.
73 See id. at 389-94.
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.” 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, the Court said that the state courts in Testa heard state-law claims “analogous” to the federal claim that they were obligated to hear. 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.”).

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”).


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.\(^89\)

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\(^84\) 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.
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. 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. 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). 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.

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. Such a law would not discriminate against federal claims. Moreover, the law would relate to judicial administration; it would concern the state courts’ competence over parties and subject matter.

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95 *See id. at 372.*
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

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102 335 U.S. 900 (1949) (per curiam).
103 Id.
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").
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, and his view of Musgrove is shared by some commentators. Other commentators, in contrast, have suggested Musgrove implicitly limited or overruled Crain. 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. 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. 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. The Georgia Supreme Court

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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).


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.\textsuperscript{116} The Georgia court recognized that United States Supreme Court decisions, such as \textit{Ex parte Young},\textsuperscript{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."\textsuperscript{118} The Georgia court apparently determined the action before it did not fall within the \textit{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.\textsuperscript{119} In light of the reasoning underlying the Georgia Supreme Court's decision in \textit{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 \textit{Exparte Young} model. That implication arises from a case in which the plaintiff alleged a violation of the U.S. Constitution. It

\textsuperscript{116} See \textit{Musgrove}, 49 S.E.2d at 37. The railroad in \textit{Musgrove} claimed that its state charter constituted a contract that exempted certain railroad property from ad valorem taxes. See \textit{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 \textit{id.; see also U.S. CONST. art. I, § 10, cl. 1 (Contract Clause) ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .")}.

\textsuperscript{117} 209 U.S. 123 (1908).

\textsuperscript{118} \textit{Musgrove}, 49 S.E.2d at 36. \textit{Ex parte Young} generally permits federal-court actions against state officials for prospective relief from violations of federal law. See, e.g., \textit{Green v. Mansour}, 474 U.S. 64, 68 (1985); \textit{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 \textit{Ex parte Young} doctrine). The Court in \textit{Young} held that such actions are not barred by the Eleventh Amendment because they are not suits against the state. See \textit{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 \textit{id.} at 159-60. Commentators have pointed out, as the Court in \textit{Young} itself did, that its holding was supported by the Court's precedent. See \textit{id.} at 150-56; see also, e.g., \textit{Fletcher, A Historical Interpretation, supra} note 5, at 1041 & n.24; \textit{Meltzer, supra} note 5, at 6.

\textsuperscript{119} \textit{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.\(^{130}\)

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\(^{127}\) *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).


\(^{130}\) 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. 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.

The same implication arises from Hopkins v. Clemson Agricultural College. 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. He contended this conduct violated the Fourteenth Amendment by taking his property without due process. 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. 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.

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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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. \textit{See}, \textit{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"); \textit{see also} Kenneth Culp Davis, \textit{Suing the Government by Falsely Pretending to Sue an Officer}, 29 U. CHI. L. REV. 435, 436, 438-39 (1962); \textit{see also} Clark Byse, \textit{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).

\textsuperscript{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. \textit{See} Wolcher, \textit{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. \textit{See} Hopkins, 221 U.S. at 649. Professor Wolcher's explanation of Hopkins, like his explanation of Palmer, \textit{see supra} note 136, does not account for the actual basis of the Court's decision.

\textsuperscript{144} \textit{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, \textit{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*. In *Gardner*, the state filed a claim against the bankruptcy estate in a federal reorganization proceeding. The state argued that the Eleventh Amendment barred the federal court from considering objections to the state’s claim. The Supreme Court rejected that argument. 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.” The Court has made clear, however, that a sovereign’s waiver does not extend beyond matters “respecting the adjudication of the [sovereign’s] claim.” The defendant to the claim “may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim.” The defendant can assert such a counterclaim, however, only to reduce or eliminate affirmative recovery by the sovereign. Furthermore, the defendant’s counterclaim must arise from

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 (“Where 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.
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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{153} See, \textit{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 (\textit{In re} Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1147-50 (4th Cir. 1997), \textit{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); \textit{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).

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. 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.” 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. 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.” That statement reflects the “general rule” that “federal law takes the state courts as it finds them.”

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. Many states supplement those courts with courts of specialized jurisdiction. 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.

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

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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.
The 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., Claflin 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., Claflin, 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

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


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.\(^7\) The Court's analysis in Testa consisted mostly of describing its prior holdings.\(^8\) 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.\(^9\) 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."\(^10\)

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).

\(^7\) 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.

\(^8\) See Testa, 330 U.S. at 390-94.

\(^9\) Id. at 392.

\(^10\) 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. 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. As independent position of the States, that the exercise of jurisdiction in such cases is wholly optional with the State authorities.

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 FELA).

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.\textsuperscript{183} The Court's reasoning in \textit{New York} and \textit{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.\textsuperscript{184} Those neutral rules include doctrines that limit the volume and type of litigation, including, as discussed above, the doctrine of sovereign immunity.\textsuperscript{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 \textit{New York} and \textit{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. \textit{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

\textsuperscript{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.

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

\textsuperscript{185} See \textit{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.\textsuperscript{186}

Although \textit{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 \textit{FERC v. Mississippi}\textsuperscript{187} in a partial dissent by Justice O’Connor, the author of the majority opinion in \textit{New York}.\textsuperscript{188} Justice

\textsuperscript{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. \textit{See Printz}, 117 S. Ct. at 2370-83; \textit{New York}, 505 U.S. at 155-69, 175-77. Commentators debate the accuracy of the Court’s understanding of history. \textit{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, \textit{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, \textit{supra} note 79, at 661-64 (arguing that history of Constitution does not support “autonomy of process” principle on which \textit{New York} is based); \textit{Prakash}, \textit{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). \textit{Cf} Martin H. Redish, \textit{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 \textit{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, \textit{supra} note 15, at 135-64. \textit{See also Prakash, supra note 54}, at 1967-71 & 2007-30 (examining history of congressional commandeering of state courts). \textit{Cf} Powell, \textit{supra} note 79, at 652-81 (examining history of congressional commandeering in general).

\textsuperscript{187} 456 U.S. 742 (1982).

\textsuperscript{188} \textit{See id.} at 775-97 (O’Connor, J., concurring in part and dissenting in part); \textit{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 \textit{FERC} were several provisions of the federal Public Utility Regulatory Policies Act of 1978 (PURPA). \textit{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.” 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. 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-empts 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).

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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

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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 governmental action as endorsing religion).
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.\textsuperscript{196} First, Congress may encourage states to regulate by offering federal funds conditioned on their doing so.\textsuperscript{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.\textsuperscript{198} Third, Congress can skip the threat and enact federal laws that immediately preempt state regulation of the subject covered by the federal laws.\textsuperscript{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."\textsuperscript{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.\textsuperscript{201}

The Court again pointed to the resource-allocation and accountability concerns in \textit{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 \textit{New York}, required only "discrete, ministerial tasks."\textsuperscript{202} The Court found that, even accepting that characterization, the Brady Act provisions implicated the concerns underlying

\textsuperscript{196} \textit{Id.} at 166.

\textsuperscript{197} \textit{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 \textit{South Dakota v. Dole}, 483 U.S. 203, 206 (1987)); \textit{see also id.} at 158 (discussing Congress's power under Spending Clause).

\textsuperscript{198} \textit{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").

\textsuperscript{199} \textit{See id.} at 188 ("The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests."); \textit{see also id.} at 159 (discussing Supremacy Clause).

\textsuperscript{200} \textit{Id.} at 185. \textit{See also id.} at 167-69, 173-74.

\textsuperscript{201} \textit{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."); \textit{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").

the anticommandeering principle. 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." 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." Thus, the Brady Act's background-check provisions forcibly diverted state resources to matters of federal concern and blurred lines of accountability.

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. 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. 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.

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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.
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.\footnote{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).}

Second, congressional commandeering of state courts would interfere with the power of a state’s citizens to set an agenda for state legislative action.\footnote{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).} 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.\footnote{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).}

Finally, congressional commandeering of state courts would blur the lines of accountability between state and federal officials.\footnote{Cf. Printz v. United States, 117 S. Ct. 2365, 2382 (1997); New York, 505 U.S. at 169.} 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.\footnote{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 legislative officers. See id. In contrast, this Article makes the point to argue that the commandeering principle extends to judicial officers as well.}
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.\textsuperscript{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.\textsuperscript{216} Without any limit, Congress’s control over state courts would be broad indeed, even if one considers only the Commerce Clause.\textsuperscript{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;\textsuperscript{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 \textit{New York} and \textit{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).

\textsuperscript{215} See \textit{Printz}, 117 S. Ct. at 2383 (stating its conclusion “categorically, as [the Court] concluded categorically in \textit{New York}”).


\textsuperscript{217} See \textit{New York}, 505 U.S. at 157-58 (discussing breadth of Commerce Clause).

\textsuperscript{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. \textit{See}, e.g., \textit{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. \textit{See generally} CHARLES WARREN, THE \textit{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. \textit{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

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219 Cf. Powell, supra note 79, at 684 (stating that “[t]he prudential argument” underlying
New York is “powerful”).
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
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”).
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FLSA for purposes of entitlement to the time-and-a-half rate of pay generally prescribed by the FLSA. 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.

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.

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.” That is especially true of decisions about control of the state treasury. Concern for preserving that control explains why Congress cannot use Article I to empower the federal courts to tap the state treasury. The same concern

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.”).
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. 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." 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.

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.

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. 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. In effect, if Congress


Id.

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

Cf: Seminole Tribe, 517 U.S. at 58 ("The Eleventh Amendment does not exist solely in order to prevent 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).

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

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.

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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.

This is because private defendants generally cannot violate the Constitution unless they act under color of state law. 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.

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. As Professor Vázquez has observed, fidelity to precedent protects the rule of law, which in turn protects individual rights. That consideration countervails the indisputable value of judicial relief for government violations of individual rights. 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

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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).
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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. 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”).

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.

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.\textsuperscript{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." \textit{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 \textit{New York}, Congress would be "commandeering" State B to work Congress's will on State A. In \textit{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. \textit{See Thiboutot}, 448 U.S. at 5-8. The Court also held in \textit{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. \textit{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. \textit{See id.} at 3-4. Professor Wolcher finds it significant that the \textit{Thiboutot} Court upheld monetary relief against the state in its own court on the basis of a violation of an Article I statute. \textit{See Wolcher, supra} note 15, at 258. In his view, this aspect of \textit{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." \textit{Id.} at 259. Even if this is a plausible reading of \textit{Thiboutot}, it was drastically undermined by \textit{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. \textit{See infra} notes 313-26 and accompanying text. Moreover, Professor Wolcher's reading of \textit{Thiboutot} is questionable without regard to \textit{Will}, in my opinion. The award of attorney's fees in \textit{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. \textit{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. \textit{See, e.g.}, \textit{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 \textit{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). \textit{See Thiboutot}, 448 U.S. at 2-3. The Court held, in \textit{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.

\textsuperscript{248} \textit{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


\(^{250}\) 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.


\(^{253}\) 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., Claflin 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. 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.

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.* 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. 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." The Court answered no.

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." 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. The Court was
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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. 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." Justice Iredell then turned to the common law suability of a sovereign in its own courts. He concluded that, at common law, the courts could not award monetary relief against their sovereign without the consent of the sovereign's legislature. 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."

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. 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."

(1997) (making similar argument).

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

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

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

See id. (Iredell, J.).

Hans, 134 U.S. at 12.

See id. at 10-11.

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." 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.

*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*, which held that the states were immune from suits by federally created

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

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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).
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corporations;\textsuperscript{273} in \textit{In re New York},\textsuperscript{274} which held that states were immune from suits in admiralty, notwithstanding the Eleventh Amendment’s reference only to suits “in law or equity”;\textsuperscript{275} and in \textit{Principality of Monaco v. Mississippi},\textsuperscript{276} which held that the states were immune from suits by foreign countries, even though foreign countries are not mentioned in the Eleventh Amendment.\textsuperscript{277} More generally, “[f]or over a century [the Court] ha[s] reaffirmed [\textit{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.’”\textsuperscript{278} That determination lies at the core of the Court’s expansive notion of the states’ constitutional immunity in federal court.\textsuperscript{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 . . . .”\textsuperscript{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

\begin{footnotesize}
\textsuperscript{273} See \textit{id.} at 446 (finding that the immunity of states from federal-court suits by federal corporations “is controlled by the principles announced in \textit{Hans”}).

\textsuperscript{274} 256 U.S. 490 (1921).

\textsuperscript{275} See \textit{id.} at 498 (“\textit{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 ... “}).

\textsuperscript{276} 292 U.S. 313 (1934).

\textsuperscript{277} See \textit{id.} at 322, 325-27 (quoting \textit{Hans} extensively and also citing \textit{In re New York} and \textit{Reeves}).


\textsuperscript{279} Most commentators and several Members of the Court have argued that \textit{Hans} was wrong. See Vázquez, \textit{supra} note 13, at 1694, 1698; see also \textit{id.} at 1694 n.42 (citing commentary critical of \textit{Hans}). \textit{But cf.} David P. Currie, \textit{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 \textit{Hans v. Louisiana} was correctly decided”) (citation omitted). This Article does not enter the fray over the correctness of \textit{Hans}, given the objective of this Article and the Court’s steadfast adherence to \textit{Hans}. See, \textit{e.g.}, \textit{Seminole Tribe}, 517 U.S. at 54 & n.7 (observing the Court has adhered to \textit{Hans “[f]or over a century”}; see also \textit{id.} at 64 (criticizing dissent’s challenge to \textit{Hans}).

\end{footnotesize}
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. 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.

**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. 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. 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. 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. A second possibility is that the Court discussed the Eleventh Amendment in these five cases on the assumption that the Eleventh Amendment barred the

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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.”).


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. That possibility is unlikely, however, because such an assumption would have conflicted with the Court’s holding in Cohens v. Virginia that the Eleventh Amendment did not restrict the Court’s appellate jurisdiction. 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. Hopkins was discussed as a pre-Testa case supporting the same conclusion. 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. 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.” 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.
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.

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. 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.

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. 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." 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

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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.\footnote{301}

As it did in \textit{Crain}, the Court in \textit{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.\footnote{302} The \textit{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.\footnote{303} Thus, \textit{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, \textit{Poindexter v. Greenhow}\footnote{304} and a companion case, \textit{Chaffin v. Taylor},\footnote{305} the Court used Eleventh Amendment case law to reject state claims of immunity in actions brought in state court asserting constitutional claims.\footnote{306} These two cases support the existence and federal-court correspondence of state-court immunity in the same way \textit{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 \textit{Louisiana ex rel. New York Guaranty & Indemnity Co. v. Steele}.\footnote{307} As in the other cases discussed in this section, the Court in \textit{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.\footnote{308} Unlike the other cases in this

\footnote{301}{Id. (Harlan, J., concurring) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)). \textit{Cohens} was a state-court proceeding brought by the State. \textit{See Cohens}, 19 U.S. (6 Wheat.) at 378. In contrast, \textit{Crain} was a state-court proceeding brought against the State. \textit{See Crain}, 209 U.S. at 220. Nonetheless, the reasoning of \textit{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 \textit{Cohens} confirm[ed] this broader understanding.” McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 27 (1990); \textit{see also infra} notes 357-62 and accompanying text.}

\footnote{302}{\textit{See Hopkins v. Clemson Agric. College}, 221 U.S. 636, 642-45 (1911).}

\footnote{303}{\textit{See id. at} 648-49; \textit{see supra} notes 137-43 and accompanying text for further discussion.}

\footnote{304}{114 U.S. 270 (1885).}

\footnote{305}{114 U.S. 309 (1885).}

\footnote{306}{\textit{See id. at} 310 (relying on analysis in \textit{Poindexter}); \textit{Poindexter}, 114 U.S. at 285-301.}

\footnote{307}{134 U.S. 230 (1890).}

\footnote{308}{\textit{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.\textsuperscript{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 \textit{Will v. Michigan Department of State Police}.\textsuperscript{313} To understand \textit{Will}, however, one must know what preceded it. Before \textit{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.\textsuperscript{314} In so holding, the Court determined Congress had not made its intention to abrogate the Eleventh Amendment in § 1983 sufficiently clear.\textsuperscript{315} That holding left open the question whether states could be sued under § 1983 in their own courts.\textsuperscript{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.\textsuperscript{317}

In \textit{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.\textsuperscript{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.\textsuperscript{319} In construing § 1983 not to apply to the states, the Court held that, when Congress intends to make states liable in private

\begin{itemize}
\item \textsuperscript{312} See supra note 256 (citing cases).
\item \textsuperscript{313} 491 U.S. 58 (1989).
\item \textsuperscript{315} See id. at 341-45.
\item \textsuperscript{316} See \textit{Will}, 491 U.S. at 63-64.
\item \textsuperscript{317} Section 1983 provides in relevant part:
\begin{quote}
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 . . . .
\end{quote}
\item \textsuperscript{319} \textit{Will}, 491 U.S. at 71.
\end{itemize}

Will claimed that he was denied a promotion in the state police department because his brother was a "student activist." See \textit{id.} at 60.
actions under a federal statute, it must express that intention clearly.\textsuperscript{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.\textsuperscript{321} The Court recognized that the scope of the Eleventh Amendment and of § 1983 were “certainly” separate issues.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{324} The Court explained that, given Congress’s evident purpose in § 1983 to “provide a federal forum for civil rights claims,”\textsuperscript{325} it would be odd for Congress not to authorize § 1983 actions against states in federal courts, but to do so in state courts.\textsuperscript{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,\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{330}

In Hilton v. South Carolina Public Railways Commission,\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{320} See id. at 64-65.
  \item \textsuperscript{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)).
  \item \textsuperscript{322} See id. at 66-67.
  \item \textsuperscript{323} Id.
  \item \textsuperscript{324} See id.
  \item \textsuperscript{325} Id. at 66.
  \item \textsuperscript{326} See id.
  \item \textsuperscript{327} 496 U.S. 356 (1990).
  \item \textsuperscript{328} Id. at 365.
  \item \textsuperscript{329} Id. at 366.
  \item \textsuperscript{330} See id. at 373-74, 381 n.24.
  \item \textsuperscript{331} 502 U.S. 197 (1991).
\end{itemize}
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both federal and state courts. 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.” 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. 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.

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.

Will and decisions referring to the anomaly identified in Will do,
however, furnish indirect support for a state-court immunity that is generally
coeextensive 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. Hilton determined that “federalism-related concerns” supported Will’s clear statement rule. 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. Seminole Tribe held that, whether or not they contain a clear statement, Article I statutes cannot abrogate the Eleventh Amendment. 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, and that, although the text of the Eleventh Amendment does not go so far, the principle of which it is “but an exemplification” bars all private, federal-court actions against unconsenting states. Each Amendment, the Court has said, reflects

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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).
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. Because of the link between the constitutional provisions underlying the two immunities, those immunities have some common features. 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. 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.

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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. This result accords with Supreme Court precedent recognizing that cities and counties are protected by the Tenth Amendment, but not by the Eleventh Amendment.

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. 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.” 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.

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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).
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. 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. 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. 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. 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.

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).

See supra notes 144-55 and accompanying text.

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").

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*, 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. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 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. 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." 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. 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.
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.

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." 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. 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. Supreme Court precedent leaves unclear when, if ever, the


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, 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. 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; a public school student whom a teacher hit with a wooden paddle for misconduct; and a prisoner whose hobby kit was lost by prison officials. 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., Zinermon 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.

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).


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. 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. The Court held that, for this sort of deprivation, the Due Process Clause ordinarily requires a pre-deprivation means of avoiding a wrongful deprivation.

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. 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. 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. The Court has not decided whether the doctrine protects officials in suits mandated by the Due Process Clause. In any event, some officials will be judgment proof. The Court has


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).


never suggested that the Due Process Clause requires states to satisfy judgments against such officers when those judgments are entered by a federal court.\textsuperscript{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, \textit{Ex parte Young}-type actions against the responsible state officials.\textsuperscript{380} Recall that \textit{General Oil Co. v. Crain}\textsuperscript{381} implies that the Constitution does indeed require state courts to entertain \textit{Ex parte Young}-type actions, even if state law bars private, state-court actions directly against the state.\textsuperscript{382} The \textit{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."

In support of that reasoning, the Court cited \textit{Ex parte Young},\textsuperscript{384} a decision that the Court has linked to the Supremacy Clause.\textsuperscript{385}


\textsuperscript{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).

\textsuperscript{380} See supra notes 117-31 and accompanying text (discussing \textit{Ex parte Young}).

\textsuperscript{381} 209 U.S. 211 (1908); see supra notes 121-31 and accompanying text (discussing \textit{Crain}).

\textsuperscript{382} See \textit{Crain}, 209 U.S. at 220-28.

\textsuperscript{383} Id. at 226.

\textsuperscript{384} See id. at 227 (citing \textit{Ex parte Young}, 209 U.S. 123 (1908)).

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

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\(^{386}\) 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).

property, even though federal courts can hear such actions under the *Ex parte Young* doctrine. 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, even though federal courts cannot hear such actions under the *Ex parte Young* doctrine.

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. 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. 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. 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”).


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).

possible the *McKesson* principle is limited to situations in which the state has consented to suits directly against it. 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. 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.
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. Glauberman, 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 & ENVTL. 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.\textsuperscript{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.\textsuperscript{399} As discussed above, that remedy may be illusory.\textsuperscript{400} A broad reading of \textit{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.\textsuperscript{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. \textit{See, e.g.}, \textit{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)); \textit{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); \textit{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." \textit{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," \textit{id.} (quoting \textit{Hamilton Bank}, 473 U.S. at 194-95), can be met only by allowing itself to be sued in its own courts. \textit{McKesson} suggests an affirmative answer to that question, as discussed in the text. \textit{See also} \textit{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, \textit{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.

\textsuperscript{398} \textit{See} Fallon \& Meltzer, \textit{supra} note 247, at 1827.
\textsuperscript{399} \textit{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).
\textsuperscript{400} \textit{See supra} notes 377-79 and accompanying text.
\textsuperscript{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. \textit{See} \textit{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. 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. 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. And the trade-off is not possible for random and unauthorized deprivations, because, by their nature, they cannot be prevented before they occur. 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

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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)).
consented to suit on claims for non-tax-related deprivations. 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.

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. 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).
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). 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.

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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 1782-83. 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 Schware 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.

413 Id. at 2164.
enforce the Fourteenth Amendment's Due Process Clause. The Court emphasized, however, that Section 5 does not encompass "[t]he power to 'legislate generally upon' life, liberty, and property." Instead, the Court described Congress's power under Section 5 as "remedial and preventive." 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.

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. 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.

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. 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. 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. The Court left unclear whether Congress must have evidence of

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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.\textsuperscript{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 \textit{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."\textsuperscript{424} The Court struck down the statute in \textit{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.\textsuperscript{425} It thus "intrud[ed] at every level of government, displacing laws . . . of almost every description and regardless of subject matter."\textsuperscript{426} The Court also noted the statute "ha[d] no termination date or termination mechanism."\textsuperscript{427} That distinguished it from the federal statute the Court had upheld in \textit{South Carolina v. Katzenbach},\textsuperscript{428} which was limited in both duration and geographic scope.\textsuperscript{429} Thus, \textit{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.\textsuperscript{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

\textsuperscript{423} Id. at 2169 (finding no evidence before Congress of "widespread pattern of religious discrimination").
\textsuperscript{424} Id. at 2170.
\textsuperscript{426} Id. at 2170.
\textsuperscript{427} Id.
\textsuperscript{428} 383 U.S. 301 (1966).
\textsuperscript{429} See \textit{Boerne}, 117 S. Ct. at 2170 (noting that federal statutory provisions upheld in \textit{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).
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. 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." 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.

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. 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.


\[431\] Boerne, 117 S. Ct. at 2171.


\[433\] 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").

\[434\] See H.R. 1534, 105th Cong. § 6(e) (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? 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. 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.

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

\[\text{\textsuperscript{436}}\text{ See, e.g., Vázquez, supra note 13, at 1691-92, 1744-66.} \]
\[\text{\textsuperscript{437}}\text{ Compare Chavez v. Arte Publico Press, 157 F.3d 282, 287-91 (2d Cir. 1998) (holding that federal provision authorizing suits against states for copyright violations was not valid exercise of Section 5, partly because recognition of broad power under Section 5 to enforce Article I property rights would negate Seminole Tribe); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353, 357-62 (3d Cir. 1997), cert. granted, 119 S. Ct. 790 (1999) (No. 98-149) (holding that Lanham Act was unconstitutional as applied in private suit against state for false advertising), and Schlossberg v. Maryland Comptroller of Treasury (In re Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1146-47 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517 (1998) (using same rationale to hold that federal provision allowing bankruptcy claims against states exceeded Section 5), with College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 148 F.3d 1343, 1355 (Fed. Cir. 1998), cert. granted, 119 S. Ct. 770 (1999) (No. 98-531) (holding that federal provision authorizing suits against states for patent infringement was a valid exercise of Section 5).} \]
\[\text{\textsuperscript{438}}\text{ See Creative Goldsmiths, 119 F.3d at 1146-47 (finding Seminole Tribe “inconsistent with any reading that would extend Congressional power under § 5 of the Fourteenth Amendment to reincorporate express Article I powers”).} \]
have unlimited power to create "property" under Article I. 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. 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.

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
(1991) (holding that suits for violation of Commerce Clause may be brought under § 1983,
because Clause creates a "right" protected by § 1983).

(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)
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 waivered their state-court immunity in recent years, 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.

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