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DAMAGES FOR UNCONSTITUTIONAL AFFIRMATIVE ACTION: AN ANALYSIS OF THE MONETARY CLAIMS IN *HOPWOOD V. TEXAS*

*Richard H. Seamon**

INTRODUCTION

Courts and commentators have focused on the constitutionality of government affirmative action programs but have largely ignored an important remedial question: When may a court award money to people injured by programs that are unconstitutional?¹ This Article explores that question by analyzing the monetary claims in *Hopwood v. Texas*.² *Hopwood* concerns the affirmative action program used in the early 1990s for admission to the University of Texas School of Law.³ This Article concludes that the monetary claims in *Hopwood*, except for the claim for attorney's fees, are barred by sovereign and official immunity.⁴

The ease of stating that conclusion belies the tortuous path necessary to reach it. Indeed, one aim of this Article is to show how complicated and irrational the principles governing sovereign and official immunity have become.⁵ Those principles are far removed from the considerations that should govern monetary relief for illegal government action.⁶ Ironically, the remoteness of the immunity doctrines from the substantive contexts in which they apply "immunizes" them from scrutiny by most of the legal profession.⁷ By applying those

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1. For extensive legal bibliographies on affirmative action, see ROBERT K. FULLINWIDER, *THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS* 277-91 (1980); KATHANNE W. GREENE, *AFFIRMATIVE ACTION AND PRINCIPLES OF JUSTICE* 177-80 (1989); RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION*, 322-37 (1996).

2. 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

3. Although the judicial opinion in *Hopwood* that drew national attention was decided in March 1996, the case remains alive and may eventually be reviewed by the United States Supreme Court. See Part I *infra* for a discussion of the facts and procedural history of *Hopwood*.

4. See *infra* Part III for a discussion of why the monetary claims, aside from those for attorney's fees, are barred by sovereign and official immunity.

5. See *infra* Parts II and IV for a discussion of immunity principles applicable to *Hopwood*.

6. See *infra* Part IV for a discussion of the principles currently governing sovereign and official immunity.

7. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow*

doctrines to a case that has received national attention, I hope to involve a broader segment of the profession in reexamining sovereign and official immunity.⁸

This Article pays particular attention to the principles developed by the Supreme Court for interpreting statutes that eliminate sovereign immunity. Those principles warrant special attention because they appear to defeat certain statutory claims for monetary damages in *Hopwood* despite strong evidence that Congress intended to authorize such relief.⁹ The claims are those based on Title VI of the Civil Rights Act of 1964; a statute that Congress amended in 1986 specifically to abrogate the states' sovereign immunity.¹⁰ Although the lower federal courts have held that the 1986 Amendment exposes the states to liability in monetary damages,¹¹ this Article concludes otherwise, because the 1986 Amendment does not express with sufficient clarity that Congress intended to hold states liable for monetary damages.¹² In any event, the question whether a state in a federal court action can be held liable for money damages under the 1986 Amendment warrants the Court's attention, and may well receive it in *Hopwood* or another case in the near future.¹³

Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033, 1038 (1983) (noting that few in legal profession are familiar with modern Eleventh Amendment law).

8. See David G. Savage, *Court Lets Stand Ruling Against Race Preference*, L.A. TIMES, July 2, 1996, at A1 (stating that Fifth Circuit decision in *Hopwood* has "gained national attention"); see also Michael S. Greve, *Hopwood and Its Consequences*, 17 PACE L. REV. 1, 1 & n.1 (1996) (reporting that *Hopwood* "sent shockwaves through the world of higher education" and citing published reaction); Richard H. Seaton, *Affirmative Action at the Crossroads*, 36 WASHBURN L.J. 248, 248 (1997) (stating that *Hopwood* "sent shock waves through the American academy").

9. See *infra* notes 161-256 and accompanying text for an analysis of claims in *Hopwood* that are based on Title VI of Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d-4 (1994).

10. 42 U.S.C. § 2000d; see *infra* notes 187, 216-20 & 252 and accompanying text for a discussion of the text and purpose of the 1986 amendments to Title VI.

11. See *infra* notes 176-78 and accompanying text for a discussion of federal courts that have held that the 1986 amendment to Title VI authorizes the imposition of monetary damages against states.

12. See *infra* notes 193-256 and accompanying text for the author's argument that the 1986 amendment was not sufficiently clear to abrogate states' sovereign immunity.

13. Although the Supreme Court denied certiorari in *Hopwood*, 518 U.S. 1033 (1996), that denial occurred when the case was in an interlocutory posture because the Fifth Circuit decision that the *Hopwood* defendants asked the Supreme Court to review was remanded by the Fifth Circuit for further proceedings in the district court. See *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir.), cert. denied, 518 U.S. 1033 (1996). The Supreme Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); but cf. *Mazurek v. Armstrong*, 520 U.S. 968, 971-76, 117 S. Ct. 1865, 1868 (1997) (per curiam) (reviewing appellate decision at interlocutory stage). The district court has now entered a final judgment against the *Hopwood* defendants, who have since appealed to the Fifth Circuit. See *Hopwood v. Texas*, 999 F. Supp. 872, 923-24 (W.D. Tex. 1998) (entering final judgment); Rex Bossert, *Texas AG Abandons 'Hopwood' But Case May Get Back to Supreme Court on Appeal*, NAT'L L.J., May 11, 1998, at A10 (noting that plaintiffs have appealed from final judgment denying monetary claims). The Supreme Court could grant certiorari to review the Fifth Circuit's decision on the pending appeal from the final judgment. One reason for granting certiorari would be to resolve the question whether states can be held liable in monetary damages in federal court under Title VI. As discussed *infra*, that is an important issue, because the statute that may make

Part I of this Article briefly describes the facts and procedural history of *Hopwood*. Part II explains the principles of sovereign and official immunity governing monetary claims in federal-court actions against state and local governments and their officials. Part III applies those principles to the monetary claims in *Hopwood*, with extended analysis of the Title VI claims. Finally, Part IV identifies the arbitrary features of the immunity doctrines that become manifest when they are applied in *Hopwood*.¹⁴

I. FACTS AND PROCEDURAL HISTORY OF *HOPWOOD*

Hopwood concerns the admission program in use during the early 1990s at the University of Texas School of Law ("Law School").¹⁵ The program, as described by the Fifth Circuit in words suggestive of its fate in that court, "granted preferential treatment in admissions" to "blacks and Mexican Americans."¹⁶ The program was challenged in a federal court action filed by four white residents of Texas who applied for, but were denied, admission to the Law School in 1992.¹⁷

The *Hopwood* plaintiffs sued several defendants, under a variety of legal provisions, for various types of relief. They named as defendants the State of Texas; the University of Texas Board of Regents ("Board"); the nine members of the Board in their official capacity; the University of Texas at Austin ("University"); the President of the University; the Law School; the Dean of the Law School in his official capacity; and the Chairman of the Law School's Admission

States liable in money damages applies not only to actions based on Title VI, but also to those based on three other important federal anti-discrimination statutes: the Age Discrimination Act of 1965, Section 504 of the Rehabilitation Act of 1973, and Title IX of the Education Amendments of 1972. See *infra* notes 171-74 and accompanying text for a discussion of these anti-discrimination statutes.

14. This Article does not discuss the immunity principles applicable to the federal government and its officials. For a discussion of these principles, see Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 699-700 nn.17 & 19 (1997) (discussing federal government's sovereign immunity from tort claims); Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 159-79 (1998) (discussing federal government's sovereign immunity from contract claims). Nor does this Article discuss immunity principles applicable to state court actions against the states. For a discussion of these principles, see Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 1 (forthcoming Apr. 1999) (unpublished manuscript, on file with the *Brandeis Law Journal*) (discussing immunity of states from lawsuits in their own courts); Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CAL. L. REV. 189, 234-35 (1981) (same).

15. See *Hopwood v. Texas*, 861 F. Supp. 551, 582 n.87 (W.D. Tex. 1994) (noting that challenged admission program was used in 1992, 1993, and 1994), *rev'd and remanded in part, and appeal dismissed in part*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

16. 78 F.3d at 936 n.4. An analysis of the Fifth Circuit's holding on the constitutionality of the Law School's program is beyond the scope of this article. For commentary on that holding, see, e.g., David J. Jannuzzi, Comment, *Hopwood, Equal Protection, and Affirmative Action: Can Anyone's Ox Be Gored?*, 14 TOURO L. REV. 549 (1998); Robert A. Lauer, *Hopwood v. Texas: A Victory for "Equality" That Denies Reality*, 28 ST. MARY'S L.J. 109 (1996); see also *supra* note 8 (citing additional commentary on *Hopwood*).

17. *Hopwood*, 78 F.3d at 938.

Committee in his official capacity.¹⁸ The plaintiffs claimed that the program violated the Equal Protection Clause of the Fourteenth Amendment and three federal statutes: 42 U.S.C. § 1981; 42 U.S.C. § 1983; and Title VI of the Civil Right Act of 1964.¹⁹ They sought injunctive and declaratory relief, as well as compensatory and punitive damages.²⁰ In later proceedings, they also sought an award of attorney's fees under 42 U.S.C. § 1988.²¹

The defendants moved for summary judgment, arguing, among other things, that the action was barred by the Eleventh Amendment.²² The district court denied the motion in an unpublished order, and the case proceeded to a bench trial.²³

After the trial, the district court held that the Law School's admission program violated the Equal Protection Clause, but that only limited relief was warranted for the violation.²⁴ The court declared that the plaintiffs were entitled to

18. *Id.* at 938 n.13; *see also infra* notes 56-61, 97-98 and accompanying text for a discussion of the significance of the fact that individual defendants were sued in their "official" capacities.

19. *Hopwood*, 861 F. Supp. at 553. The Equal Protection Clause provides, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Amendment's central command is an injunction against intentional racial discrimination by a state or someone acting under color of state law. *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (describing prohibition of governmentally imposed racial discrimination as "core purpose" of Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239-42 (1976) (holding that proof of discriminatory intent necessary to establish violation of Equal Protection Clause). Section 1983 creates a cause of action for violations of the Constitution by persons acting under color of state law. *See* 42 U.S.C. § 1983 (1994); *see also* *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (noting that purpose of Section 1983 is to deter state actors from violating federally guaranteed rights). Section 1981 guarantees each person "the same right ... to make and enforce contracts, ... as is enjoyed by white citizens" and protects that right "against ... impairment under color of State law." 42 U.S.C. § 1981(a), (c) (1994). Thus, for example, Section 1981 prohibits racial discrimination by state schools in their admission process (i.e., in the terms under which they contract to provide education). *See* *Runyon v. McCrary*, 427 U.S. 160, 172 (1976) (describing schools' exclusion of students because of their race as "classic violation" of Section 1981). Finally, Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994). Title VI thus bars a state school that receives federal money from intentionally discriminating in admission on the grounds of race. *See, e.g.,* *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 277-78, 281 (1978) (addressing racial discrimination claim against state medical school based on Title VI).

20. *Hopwood*, 78 F.3d at 938.

21. *Hopwood v. Texas*, 999 F. Supp. 872, 911 (W.D. Tex. 1998) (stating that plaintiffs sought one-and-a-half million dollars in fees for more than 7,200 attorney hours). 42 U.S.C. § 1988(b) (1994) permits courts to award "a reasonable attorney's fee" to parties who prevail in actions to enforce, among other provisions, Sections 1981 and 1983, and Title VI.

22. *See* *Petition for a Writ of Certiorari, Texas v. Hopwood*, 518 U.S. 1033 (1996), No. 95-1773, at 3 [hereinafter *Hopwood* cert. petition] (describing procedural history of case). The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

23. *See Hopwood* cert. petition, *supra* note 22, at 3.

24. *Hopwood*, 861 F. Supp. at 584-85. The district court analyzed the program only under the Equal Protection Clause, observing that "[t]he plaintiffs' Title VI, § 1981, and § 1983 claims serve as

apply for admission to the Law School for the 1995-1996 school year without paying any application fees, and it ordered the Law School to consider their applications "along with all other applications for that school year."²⁵ The court did not order the Law School to admit the plaintiffs automatically because they had not proven that they would have been admitted under a constitutional admission program.²⁶ For the same reason, the court declined to award any money damages other than one dollar in nominal damages to each plaintiff.²⁷

The Fifth Circuit affirmed the district court's equal protection ruling,²⁸ but largely rejected the district court's rulings on remedies.²⁹ In its most significant ruling on remedial issues, the Fifth Circuit held that the district court erred in requiring the plaintiffs to prove that they would have been admitted under a con-

vehicles to enforce underlying rights guaranteed by the Fourteenth Amendment." *Id.* at 553 n.2; see also *supra* note 19 for a description of these provisions.

25. *Id.* at 585. The court determined that the admission program used for the school year 1995-1996 "appear[ed] to remedy the defects the Court has found in the 1992 procedure." *Id.* at 582.

26. *Id.* at 579-83.

27. *Id.* at 582-83.

28. *Hopwood v. Texas*, 78 F.3d 932, 938 (5th Cir. 1996). Like the district court, the Fifth Circuit focused on the plaintiffs' equal protection claim, finding their statutory claims to be merely "derivative" of the equal protection claim. *Id.* Also like the district court, the Fifth Circuit applied "strict scrutiny" in analyzing the equal protection claim. Compare 861 F. Supp. at 569 with 78 F.3d at 940-41. A government program can survive such scrutiny only if it serves "compelling" government interests in a "narrowly tailored" way. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding, in review of federal government's race-conscious program for subcontracting, that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny[, which means that] such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests"); cf. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J.) (stating, in review of affirmative action program for higher education, that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"). Although both courts in *Hopwood* held that the Law School's admission program failed strict scrutiny, the Fifth Circuit based that holding on a much broader rationale than did the district court. The district court held that the program served two government interests that were "compelling": those of ensuring a diverse student body and remedying past unconstitutional discrimination in the Texas public education system. 861 F. Supp. at 569-73. The district court invalidated the program, however, on the ground that it was not "narrowly tailored" to further those interests, because, in the district court's view, it did not require the Law School's admissions committee to compare "minority" applicants to "nonminority" applicants. *Id.* at 578-79. That holding reflected a relatively minor defect in the program that was easily cured. *Id.* at 582 & n.87 (determining that, on its face, admission program used in 1995 cured the constitutional defect identified by the court). In contrast, the Fifth Circuit found it unnecessary to decide whether the admission program was "narrowly tailored," because in its view the program did not serve any "compelling" government interest. *Hopwood*, 78 F.3d at 955. The Fifth Circuit held that the Government's interest in achieving a diverse student body is not "compelling"; that only past unconstitutional discrimination by the Law School itself (as distinguished from the university system) could justify the program; and that the Law School had not proven such past discrimination. *Id.* at 941-55. Those holdings make it difficult for any state school to devise a race-conscious affirmative action program for admissions. See Greve, *supra* note 8, at 2 (stating that *Hopwood* decision will force public colleges and universities in Fifth Circuit "to dismantle overtly race-conscious admissions programs"); Seaton, *supra* note 8, at 253 (stating that *Hopwood* decision would "put in jeopardy a large percentage of the admission plans used in limited-enrollment state institutions").

29. *Hopwood*, 78 F.3d at 962.

stitutional admission program; instead, the appellate court held, the *defendants* bore the burden of proving that the plaintiffs would *not* have been admitted under a constitutional program.³⁰ The Fifth Circuit added that the defendants' failure to meet that burden on remand would "open[] a panoply of potential relief," including money damages,³¹ and it directed the district court on remand "to reconsider the question of damages."³² The Fifth Circuit, however, did not address whether damages would be barred by the Eleventh Amendment, because the defendants had not raised that issue on appeal.³³

The *Hopwood* defendants unsuccessfully sought Supreme Court review of the Fifth Circuit's decision in a petition for a writ of certiorari prepared by Professor Laurence Tribe.³⁴ In his petition, Professor Tribe briefly revived the eleventh amendment argument that the defendants had made in the district court but had not pressed on appeal.³⁵ The focus of his attack, however, was on the Fifth Circuit's equal protection analysis.³⁶ While attacking that analysis, Professor Tribe did not defend the constitutionality of the program under which the plaintiffs had been denied admission to the Law School in 1992. Presumably he failed to do so because, after 1992, the defendants significantly revised the admission program.³⁷ In any event, the defendants' revision of the program and their failure in the petition for certiorari to defend the version under which the plaintiffs had been denied admission probably explain the Court's denial of certiorari. As two Justices observed in an opinion accompanying the denial of certiorari, there was no longer a genuine controversy about the constitutionality of the program that led to the lawsuit.³⁸

On remand, the district court denied the plaintiffs' request for approximately two-and-one half million dollars in compensatory damages and allowed them less than half of the one-and-one-half million dollars in attorney's fees that they sought.³⁹ In the court's view, the defendants had proven that the plaintiffs would not have been admitted under a constitutional admission program.⁴⁰

30. *Id.* at 955-57.

31. *Id.* at 957.

32. *Id.* at 962.

33. *Id.* at 957 n.56 (stating: "[w]e do not opine on any Eleventh Amendment immunity in this case. This issue is simply not before us.") (citation omitted). For a possible explanation of why the defendants did not raise the Eleventh Amendment issue on appeal, see *infra* note 44.

34. See *Hopwood* cert. petition, *supra* note 22 (reverse side of cover).

35. *Hopwood* cert. petition, *supra* note 22, at 22-24.

36. *Hopwood* cert. petition, *supra* note 22, at 12-21.

37. See *Hopwood*, 861 F. Supp. at 582 & n.87 (discussing changes in admission program made for selecting the entering class of 1995, and holding that those changes appeared to cure constitutional defect).

38. See *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J. joined by Souter, J.) (respecting the denial of the petition for a writ of certiorari) (stating that "we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition").

39. See *Hopwood v. Texas*, 999 F. Supp. 872, 902-04, 908-11 (setting forth each plaintiff's damages claim and total request for attorney's fees).

40. *Id.* at 884.

Thus, they had suffered no actual damages.⁴¹

Both sides in *Hopwood* have again appealed to the Fifth Circuit. The plaintiffs have appealed the district court's decision on their claims for money damages and attorney's fees.⁴² The defendants have cross-appealed from the portion of the district court's judgment that enjoins them from considering race in admissions.⁴³

II. THE IMMUNITY OF STATE AND LOCAL GOVERNMENTS AND THEIR OFFICIALS

The failure of the *Hopwood* defendants to press their eleventh amendment claim on appeal to the Fifth Circuit is somewhat surprising in light of Supreme Court decisions construing the Amendment to give the states broad sovereign immunity from federal-court actions.⁴⁴ More understandable is the failure of the *Hopwood* plaintiffs to seek to hold the individual defendants personally liable in damages. The recovery of money damages out of these officials' own pockets

41. *Id.* at 923 (awarding each plaintiff nominal damages of only one dollar).

42. See Bossert, *supra* note 13, at A10 (noting that plaintiffs have appealed from final judgment denying monetary claims).

43. See Janet Elliott, *Switch in Tactics in Hopwood Appeal*, NATL L.J., June 8, 1998, at A6 (noting that defendants have appealed injunction prohibiting consideration of race in admissions). On the cross-appeal by the *Hopwood* defendants, the Fifth Circuit may well rely on the "law of the case" doctrine to decline to review the portion of the final judgment that bars the defendants from considering race in admissions, because the Fifth Circuit considered this matter in its initial decision. *Hopwood*, 78 F.3d at 958. "The law of the case doctrine generally precludes the reexamination of issues decided on appeal, either by the district court on remand or by the appellate court itself on subsequent appeal." *National Labor Relations Bd. v. Houston Bldg. Servs., Inc.*, 128 F.3d 860, 864 n.5 (5th Cir. 1997) (citation omitted). Nonetheless, the defendants had to file a cross-appeal in order to enable the Supreme Court to review that portion of the judgment. See *United States v. Generix Drug Corp.*, 460 U.S. 453, 461 n.12 (1983) (observing that government's failure to cross appeal prevented it from obtaining Supreme Court review of district court determination underlying portions of judgment adverse to government). Unlike the Fifth Circuit, the Supreme Court would not be precluded by the "law of the case" doctrine from reviewing that aspect of the judgment; in particular, its prior denial of certiorari would not preclude such review. See *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365-66 n.1 (1973) (holding that prior denial of certiorari did not bar Court's review of issue addressed in lower court decision as to which certiorari was previously denied).

44. See *infra* notes 46-82 and accompanying text (Part II.A) for a discussion of states' Eleventh Amendment sovereign immunity defense. The defendants may have concluded that they did not have a plausible Eleventh Amendment defense because such a defense seemed to be so plainly eliminated by Title VI. See *infra* notes 161-256 and accompanying text for a discussion of Title VI claims. By the same token, Professor Tribe may have decided to revive the eleventh amendment argument because of a Supreme Court decision, issued ten days after the Fifth Circuit's decision in *Hopwood*, that cast doubt on Congress's power in Title VI to abrogate the States' eleventh amendment immunity. See *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (stating that Eleventh Amendment prohibits Congress from making state capable of being sued in federal court; decided Mar. 27, 1996); *Hopwood*, 78 F.3d at 932 (decided Mar. 18, 1996); see also Robert Elder, Jr., *State Immunity Rears Its Head*, TEX. LAW., Aug. 12, 1996, at 1 (noting that *Seminole Tribe* made sovereign immunity "live issue"). As discussed in greater detail *infra* notes 69-71 and accompanying text, *Seminole Tribe* held that Congress cannot use its Article I powers to abrogate the states' eleventh amendment immunity. *Seminole Tribe*, 517 U.S. at 72-73. Because Title VI has been regarded as a statute enacted under the Spending Clause of Article I, *Seminole Tribe* raises doubts about whether Title VI effectively abrogates the Eleventh Amendment.

was barred by yet another immunity doctrine: that of official immunity.⁴⁵ This Part discusses the principles of sovereign and official immunity applicable in the *Hopwood* case and elucidates their irrational features.

A. Eleventh Amendment Sovereign Immunity

The states, as well as their agencies and their officials (when sued in their official capacity), generally enjoy sovereign immunity from private actions brought in federal court.⁴⁶ The Supreme Court has described this immunity as conferred by the Eleventh Amendment.⁴⁷ Nonetheless, to understand the breadth of the immunity, one must largely ignore the text of the Amendment itself.⁴⁸ One must also bear in mind three exceptions to that immunity, that, like its otherwise broad scope, cannot be gleaned from the Eleventh Amendment's text.

By its terms, the Eleventh Amendment limits the power of federal courts to decide just two kinds of cases. It states, "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

45. See *infra* notes 83-104 and accompanying text (Part II.B) for a discussion of state officials' immunity from money damages under the doctrine of official immunity.

46. See, e.g., *Seminole Tribe*, 517 U.S. at 54 (describing Eleventh Amendment as confirming that "federal jurisdiction over suits against unconsenting states 'was not contemplated by the Constitution when establishing the judicial power of the United States'" (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890))). Although the Eleventh Amendment immunizes States from actions filed in a lower federal court, it does not immunize them from actions filed in state court, or from appellate review by the United States Supreme Court of state-court decisions in the latter actions. See 28 U.S.C. § 1257(a) (1994) (authorizing Supreme Court to review certain decisions by state courts raising federal issues); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 26-31 (1990) (holding that Eleventh Amendment did not bar review by the U.S. Supreme Court of decision of state court in action seeking monetary relief from state agencies). Nor does the Eleventh Amendment bar original actions in the Supreme Court between the states. See *Kansas v. Colorado*, 206 U.S. 46, 83 (1907) (holding that Court could exercise original jurisdiction over suit between states); see also U.S. CONST. art. III, § 2, cl. 2 (giving Supreme Court original jurisdiction of cases "in which a State shall be a Party"); *Monaco v. Mississippi*, 292 U.S. 313, 328 (1934) (explaining that Court's exercise of original jurisdiction over suits between States "was essential to the peace of the Union"); see generally RICHARD H. FALLON, ET AL., *HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1047 (4th ed. 1996) (discussing history of Eleventh Amendment) [hereinafter "HART & WESCHLER"]. Finally, the Eleventh Amendment does not bar actions that are brought against a State by the United States. See, e.g., *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (rejecting State's argument that Congress exceeded its constitutional powers in authorizing State as defendant); *United States v. Texas*, 143 U.S. 621, 643-45 (1892) (stating that Constitution grants federal courts jurisdiction in cases brought by federal government against states).

47. See, e.g., *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (stating that Eleventh Amendment "is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity").

48. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) (stating "The Court's recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment"); *Seminole Tribe*, 517 U.S. at 54 (stating: "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition ... which it confirms" (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991))).

Citizens or subjects of any Foreign State.”⁴⁹ Thus, the Eleventh Amendment bars federal-court actions brought against a state by: (1) a citizen of another state; or (2) an alien.

The Supreme Court has construed the Eleventh Amendment much more broadly than that, on the ground that the Amendment reflects, without exhaustively defining, an immunity implicit in the Constitution as a whole.⁵⁰ As construed, the Eleventh Amendment bars not only an action against a State that is brought by the citizen of *another* state but also one that is brought by the State’s *own* citizen.⁵¹ It bars not only an action brought by an alien, but also one brought by a foreign country.⁵² The Amendment bars not only actions in law or equity but also those in admiralty concerning property in possession of the state.⁵³ Finally, the Eleventh Amendment bars not only actions that name a state as the defendant but also actions that are nominally against other parties, such as a state official, if the State is the “real party in interest.”⁵⁴

The “real party in interest” feature of eleventh amendment immunity needs some elaboration, for it plays a key role in analyzing the claims in *Hopwood*. It means, for one thing, that the Eleventh Amendment prevents actions against any

49. U.S. CONST. amend. XI.

50. See, e.g., *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (“[W]e cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control”); *Ex parte New York*, 256 U.S. 490, 497 (1921) (stating “[t]hat a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the [Eleventh] Amendment is but an exemplification”); see also *Employees of the Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 292 (1973) (Marshall, J., concurring in the result) (stating that “despite the narrowness of the language of the [Eleventh] Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally,” so as to foreclose suits beyond those described in its text).

51. See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 10-21 (1890) (holding that Eleventh Amendment barred federal-court suit by Louisiana citizen against Louisiana).

52. See *Monaco*, 292 U.S. at 332-33 (holding that Eleventh Amendment barred federal-court suit against State by a foreign country).

53. See *Ex parte New York*, 256 U.S. at 497-98 (holding that Eleventh Amendment bars admiralty suits against States); cf. *California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464, 1470-73 (1998) (holding that Eleventh Amendment does not bar admiralty suit where court’s *in rem* jurisdiction based on property that, though claimed by State, is not within State’s possession).

54. See, e.g., *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (stating that Eleventh Amendment applies “when the action is in essence one for the recovery of money from the state.”) because in such case “the state is the real, substantial party in interest” (quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945)); *Hagood v. Southern*, 117 U.S. 52, 67 (1886) (holding that Eleventh Amendment barred suit against state officer for injunctive relief that, in effect, constituted specific performance of State’s contract, because State was “the real party to the controversy”); see also *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974) (stating, “[i]t is well established that the [Eleventh] Amendment bars suits not only against the State when it is the named party but also when it is the party in fact.”); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 173 (1909) (holding that federal court actions for injunction against members of state liquor dispensary “were suits against the state of South Carolina, and within the inhibition of the Eleventh Amendment”); *North Carolina v. Temple*, 134 U.S. 22, 30 (1890) (holding that Eleventh Amendment barred action against state auditor that “was virtually a suit against the State”).

agency that is considered an "arm of the State," such as a state department of treasury.⁵⁵ In addition, with the exception discussed in the next paragraph, the Amendment bars an action against a state official, if the action is brought against the official in his or her "official capacity."⁵⁶ In an official-capacity suit, the plaintiff seeks injunctive or declaratory relief against the official's office⁵⁷—relief that may bind not only the named official but also his or her successors in office⁵⁸—or seeks monetary relief that is to be paid, not out of the official's own pocket, but rather out of the state treasury.⁵⁹ Distinct from an official-capacity suit is one brought against an official in his or her "individual," or "personal," capacity.⁶⁰ In a personal-capacity suit, the plaintiff seeks to hold the official personally liable, usually for money damages.⁶¹

Thus, the Eleventh Amendment generally bars private, federal-court actions against the State, an arm of the State, or a state official in his or her official capacity. There are, however, three important exceptions to that bar.

One exception, which has been traced to the Court's decision in *Ex parte Young*,⁶² permits federal-court actions against state officials for prospective relief from violations of federal law.⁶³ Most significantly, plaintiffs can use the *Ex*

55. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 460-64 (1945) (Eleventh Amendment barred action against state department of treasury and officials constituting its board for money out of state treasury); see also *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) (holding that Eleventh Amendment barred action against state police department); *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (noting that Eleventh Amendment bars actions against agencies that function as "arms" of State); cf. *Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194, 199 (1929) (holding that state highway commission was not "citizen" for purposes of diversity jurisdiction because it "was but the arm or *alter ego* of the State with no funds or ability to respond in damages").

56. See *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (stating official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent," and therefore that "an official-capacity suit is . . . to be treated as a suit against the entity").

57. See *Will*, 491 U.S. at 71 (official capacity suit "is a suit against the official's office").

58. See FED. R. CIV. P. 25(d) (providing for automatic substitution of successors to officials who are sued in their official capacity and leave office while case is pending); FED. R. APP. P. 43(c)(1) (same); S. CT. R. 35.3-4 (same); see also *Brandon v. Holt*, 469 U.S. 464, 470 & n.18 (1985) (noting that in federal-court action against official in his official capacity that successor in office was automatically substituted as defendant while case pending on appeal). *But see Spomer v. Littleton*, 414 U.S. 514, 520-23 (1974) (vacating lower court decision granting injunctive relief against official and remanding because of absence of evidence that original defendant's successor in office continued unconstitutional practices of predecessor).

59. See *Graham*, 473 U.S. at 166 & n.11 (stating that in official capacity suit for damages, plaintiff "must look to the government entity itself"); see also *Brandon*, 469 U.S. at 471-72 (stating explicitly that "judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents" as long as entity receives notice and opportunity to respond to suit).

60. See *Graham*, 473 U.S. at 165 n.10 (observing that "[p]ersonal-capacity actions are sometimes referred to as individual-capacity actions").

61. See *id.* at 166 (stating that "award of damages against an official in his personal capacity can be executed only against the official's personal assets").

62. 209 U.S. 123 (1908).

63. See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) (referring to doctrine of *Ex parte Young* as "exception" to general rule of immunity for states and holding that federal-court suit

parte Young exception to get declaratory and injunctive relief from unconstitutional state laws.⁶⁴ The Court has explained that, when an official administers an unconstitutional state law, he or she is “stripped” of official authority and therefore cannot claim the immunity of the sovereign for which he or she acts.⁶⁵ It bears emphasis, given the focus of this article, that *Ex parte Young* authorizes only prospective relief; it “does not apply where a plaintiff seeks [money] damages from the public treasury.”⁶⁶

Second, Congress may abrogate (i.e., override) eleventh amendment immunity. Congress can do so, however, only in the exercise of certain constitutional grants of power and only when it makes clear its intention to do so in the text of a statute.⁶⁷ Whether a constitutional grant of congressional power encompasses the power to abrogate seems to depend on whether the grant predates or postdates the Eleventh Amendment. The Court held in *Fitzpatrick v. Bitzer* that Congress can abrogate the Eleventh Amendment in the exercise of its power under Section 5 of the Fourteenth Amendment.⁶⁸ More recently, however, the Court held in *Seminole Tribe v. Florida* that Congress cannot abrogate the Eleventh Amendment in the exercise of its power under the Commerce Clause.⁶⁹ To reconcile the latter holding with *Fitzpatrick*, the Court in *Seminole Tribe* explained that the Fourteenth Amendment came after the Eleventh Amendment

for prospective relief by Indian tribe against state officials concerning ownership to certain lands did not fall within exception); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 167-76 (1996) (Souter, J., dissenting) (tracing history of “[t]he doctrine we call *Ex parte Young*”); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (discussing applicability of *Ex parte Young*); Fletcher, *supra* note 7, at 1041 & n.25 (explaining that Eleventh Amendment exception “commonly traced” to *Ex parte Young* “was in fact firmly established” in earlier Court decisions); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 6 (describing *Ex parte Young* as the “most celebrated example” of federal courts’ power to enjoin federal-law violations by state officials).

64. See *Papasan v. Allain*, 478 U.S. 265, 276 (1986) (observing that under *Ex parte Young*, “an unconstitutional state enactment is void and . . . any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity”); *Quern v. Jordan*, 440 U.S. 332, 337 (1979) (stating that under *Ex parte Young* federal courts “may enjoin state officials to conform their future conduct to the requirements of federal law”).

65. See, e.g., *Ex parte Young*, 209 U.S. at 159-60 (reasoning that when state official “comes into conflict with the superior authority of [the] Constitution . . . he is . . . stripped of his official or representative character”); *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885) (holding that defendant who violated plaintiff’s rights was stripped of his authority); see also *Coeur d’Alene Tribe*, 521 U.S. at 272-73 (observing that, under nineteenth-century case law, which focused on whether official had acted tortiously, “a state official who committed a common-law tort was said to have been ‘stripped’ of his official or representative character”).

66. *Hafer v. Melo*, 502 U.S. 21, 30 (1991); see also *Edelman v. Jordan*, 415 U.S. 651, 665-78 (1974) (holding that relief in officer suit that would require payment out of state treasury did not fall within *Ex parte Young* exception).

67. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976) (holding that Title VII abrogated State’s eleventh amendment immunity from actions for employment discrimination).

68. See *id.*; see also U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

69. See *Seminole Tribe v. Florida*, 517 U.S. 44, 54-73 (1996); see also U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause) (giving Congress power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

and was intended to alter the preexisting relationship between the states and the federal government.⁷⁰ That explanation appears to preclude Congress from relying on any of the powers in Article I to abrogate the Eleventh Amendment.⁷¹ Moreover, even when Congress uses an appropriate power, Congress can abrogate the Eleventh Amendment only when it makes its intention to do so "in unmistakable language in the statute itself" that effects the abrogation.⁷²

70. See *Seminole Tribe*, 517 U.S. at 65-66. The Court in *Seminole Tribe* determined that the holding in *Fitzpatrick* did not support Congress's power to abrogate Eleventh Amendment in exercise of Commerce Clause, because

Fitzpatrick was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh 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 Eleventh Amendment.

71. See, e.g., *In re Sacred Heart Hosp.*, 133 F.3d 237, 243 (3d Cir. 1998) (stating, "The *Seminole Tribe* Court held that Congress may not abrogate state sovereign immunity by legislation passed pursuant to its Article I powers."); Meltzer, *supra* note 63, at 2 (characterizing *Seminole Tribe* as holding "Congress lacks constitutional power, when acting under Article I, to directly overcome a state's immunity from suit in federal court"); Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1691 (1997) (describing *Seminole Tribe* as holding that "Eleventh Amendment immunity cannot be abrogated by Congress pursuant to its Article I powers"); cf. Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 102 (1996) (describing *Seminole Tribe* as holding, more narrowly, that "Congress lacks authority under its Article I, Section 8 regulatory powers to abrogate") (emphasis added). But see *Diaz-Gandia v. Depena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996) (holding that, notwithstanding *Seminole Tribe*, Congress had power to abrogate Eleventh Amendment pursuant to War Powers under Article I, section 8 of the Constitution).

72. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985); see also *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (clear statement of congressional intent to abrogate Eleventh Amendment is required "[b]ecause abrogation . . . upsets the fundamental constitutional balance between the Federal Government and the States . . . and because States are unable directly to remedy a judicial misapprehension of that abrogation.") (internal quotations omitted). In *Hutto v. Finney*, the Court suggested that, when exercising its power under Section 5 of the Fourteenth Amendment, Congress did not need to satisfy the "clear statement" rule in order to abrogate eleventh amendment immunity. See *Hutto v. Finney*, 437 U.S. 678, 698 n.31 (1979) (in rejecting argument that 42 U.S.C. § 1988 did not expressly abrogate state's eleventh amendment immunity from attorney's fees, Court said "clear statement" rule applicable to federal statutes enacted under Article I is not "appropriate" for federal statutes enacted under Section 5 of Fourteenth Amendment); see also *Maher v. Gagne*, 448 U.S. 122, 131 & n.14 (1980) (reiterating *Hutto* Court's suggestion with apparent approval). According to Professor Chemerinsky, the suggestion in *Hutto* that the clear statement rule does not apply to statutes enacted under Section 5 finds support in *Missouri v. Jenkins*, 491 U.S. 274 (1989). Erwin Chemerinsky, *Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988-89 Term*, 39 DEPAUL L. REV. 321, 329-30 (1989). With respect, the author disagrees with that reading of *Jenkins*. The Court in *Jenkins* emphasized that the monetary relief awarded against the State in *Hutto* (an award of attorney's fees) did not implicate the Eleventh Amendment at all, because it was ancillary to prospective relief. See *Jenkins*, 491 U.S. at 280 (stating, "The holding of *Hutto*, therefore, was not just that Congress had spoken sufficiently clearly to overcome Eleventh Amendment immunity in enacting § 1988, but rather that the Eleventh Amendment did not apply to an award of attorney's fees ancillary to a grant of prospective relief") By emphasizing that the award did not implicate the Eleventh Amendment at all, the Court in *Jenkins* backed away from its earlier suggestion that the statute under which the award was made abrogated the Eleventh Amendment. Moreover, *Hutto*'s suggestion cannot be squared with the Court's stringent application of the clear statement rule in *Atascadero* to a statute that, the Court recognized, was enacted under

The third restriction on the scope of eleventh amendment immunity is that a state can consent to a federal-court action, or can, in other words, “waive” its immunity.⁷³ The waiver need not be purely altruistic to be effective. Instead, a valid waiver can occur in response to pressure from Congress.⁷⁴ One form of pressure that is clearly permissible stems from Congress’s power under the Spending Clause.⁷⁵ This Clause grants Congress authority to give states money for activities such as administering public benefits programs.⁷⁶ Congress could condition a state’s receipt of federal money for such a program on the state’s consent to sue in federal court for improper administration of the program.⁷⁷ In addition to using financial incentives to obtain a waiver, Congress may be able to use the threat of preemption as a lever for obtaining a state’s waiver of eleventh amendment immunity. Under this approach, Congress would enact a law that

Section 5 of the Fourteenth Amendment. See *Atascadero*, 473 U.S. at 242 & 244-45 n.4; see also *Welch v. Texas Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 472 n.2 (1987) (plurality opinion) (noting that *Atascadero* Court applied clear statement rule to federal statute enacted under Section 5 of Fourteenth Amendment); cf. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7-13 (1989) (holding that clear statement rule was satisfied by Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by Superfund Amendments and Reauthorization Act of 1986); *id.* at 29-30 (Scalia, J., concurring in part and dissenting in part) (agreeing with majority that statute at issue “leaves no fair doubt that States are liable to private persons for money damages”), *overruled in part by Seminole Tribe*, 517 U.S. at 66 (overruling holding in *Union Gas* that Congress could abrogate Eleventh Amendment using Commerce Clause powers).

73. See, e.g., *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (holding that waiver was effected “by the voluntary appearance of the State in intervening as a claimant of the fund in court”); cf. *Seminole Tribe*, 517 U.S. at 65 (distinguishing issue of Congress’s power to abrogate eleventh amendment immunity from “the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity”).

74. Cf. *New York v. United States*, 505 U.S. 144, 167-68 (1992) (establishing that Congress can use financial incentives or threats of federal preemption to encourage states to regulate in accordance with federal prescriptions).

75. U.S. CONST. art. I, § 8, cl. 1 (Spending Clause); see *Beasley v. Alabama State Univ.*, 3 F. Supp. 2d 1304, 1311-16 (M.D. Ala. 1998) (holding that, even after *Seminole Tribe*, Congress may use Spending Clause to encourage states to waive their eleventh amendment immunity as condition of receiving federal funds); see also *Atascadero*, 473 U.S. at 247 (holding that Rehabilitation Act “falls . . . short of manifesting a clear intent to condition participation in the programs funded under the Act on a State’s consent to waive its constitutional immunity”); see generally Kit Kinports, *Implied Waiver After Seminole Tribe*, 82 MINN. L. REV. 793, 807-21 (1998) (discussing continued vitality of notion that States can “impliedly waive” Eleventh Amendment).

76. See, e.g., *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 511 n.10 (1990) (noting that, in 1988, federal government contributed approximately twenty-nine billion dollars to Medicaid program).

77. See *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1249 (M.D. Ala. 1998) (holding that State waived eleventh amendment immunity from monetary claims based on Title VI by accepting federal funds in the face of Congress’s clear intention to authorize suits for violation of Title VI by recipients of funds); see also *Beasley v. Alabama State Univ.*, 3 F. Supp. 2d 1304, 1311-16 (M.D. Ala. 1998) (holding that, even after *Seminole Tribe*, Congress may use Spending Clause to encourage states to waive their eleventh amendment immunity as condition of receiving federal funds); cf. *Magnolia Venture Capital Corp. v. Prudential Sec., Inc.*, 151 F.3d 439, 442-46 (5th Cir. 1998) (holding that state agency lacked authority to waive state’s eleventh amendment immunity from claim asserted in federal bankruptcy proceeding); *New York v. United States*, 505 U.S. 144, 167 (1992) (stating: “Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State’s legislative choices”).

provided for federal regulation of a subject unless a state consented to waive its immunity from federal-court lawsuits related to the state's continued regulation of the subject.⁷⁸ This approach to obtaining a waiver, however, may no longer be valid after *Seminole Tribe*.⁷⁹ In any event, whether Congress uses the Spending Clause or the threat of preemption, Congress must make the waiver condition unmistakably clear on the face of a federal statute.⁸⁰ Otherwise, a state's receipt of funds or continued regulation will not effectively waive its immunity.⁸¹ A

78. *Cf.* *New York v. United States*, 505 U.S. 144, 167 (1992) (stating that, "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation").

79. *Seminole Tribe* held that Congress could not use the Commerce Clause—or, apparently, its other Article I powers—to abrogate the states' eleventh amendment immunity. *Seminole Tribe*, 517 U.S. at 54-73. That holding would have little significance if Congress could condition a State's continued regulation of a field that Congress could regulate under Article I upon the state's waiver of eleventh amendment immunity. As Justice Scalia explained in the case that *Seminole Tribe* overruled:

[T]o acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers—that is, to adopt the very principle [that] . . . [*Seminole Tribe*] rejected.

Pennsylvania v. Union Gas, 491 U.S. 1, 44 (1989) (Scalia, J., concurring in part and dissenting in part); *see Chavez v. Arte Publico Press*, 157 F.3d 282, 286 (5th Cir. 1998) (relying on same passage of Scalia's dissenting opinion to reject argument that State waived its eleventh amendment immunity from private, federal-court actions for copyright infringement and violation of Lanham Act); *Close v. New York*, 125 F.3d 31, 40 (2d Cir. 1997) (relying on Justice Scalia's dissent in *Union Gas* to reject argument that State of New York waived its eleventh amendment immunity from private, federal-court actions under Fair Labor Standards Act, 29 U.S.C. §§ 201-219, an Article I statute); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 362-66 (3d Cir. 1997) (holding that State did not constructively waive eleventh amendment immunity from action under Lanham Act), *petition for cert. granted*, 67 U.S.L.W. 3084 (U.S. Jan. 8, 1999) (No. 98-149); *see also* John T. Cross, *Intellectual Property & the Eleventh Amendment after Seminole Tribe*, 47 DEPAUL L. REV. 519, 533-38 (1998) (arguing that constructive waiver of eleventh amendment immunity is no longer viable theory). *But cf.* *Genentech, Inc. v. Regents of the Univ. of Cal.*, 143 F.3d 1446, 1453-54 (Fed. Cir. 1998) *petition for cert. filed*, 67 U.S.L.W. 3337 (U.S. Nov. 3, 1998) (No. 98-731) (finding University impliedly waived its eleventh amendment immunity from federal-court declaratory judgment action concerning University patent); Kinports, *supra* note 75, at 810 n.77 (citing other post-*Seminole* cases addressing continued vitality of implied-waiver doctrine).

80. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (stating, "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find a waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction") (internal quotation marks omitted; brackets supplied by the Court); *see also Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987) (overruling *Parden v. Terminal Ry.*, 377 U.S. 194 (1964) "to the extent that [it] is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language"); *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 280 n.1 & 282 (1973) (reading *Parden* "in the final analysis" as turning on implied-waiver rationale); *Parden v. Terminal Ry.*, 377 U.S. 184, 192 (1964) (reasoning that, by operating railroad, state impliedly waived eleventh amendment immunity from suit under federal statute by injured railroad employee and the federal statute abrogated eleventh amendment immunity).

81. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (stating, "[t]he mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by

waiver of the Eleventh Amendment, like an abrogation, must be unmistakably clear to be effective.⁸²

B. Official Immunity

The Eleventh Amendment does not bar a federal court jurisdiction when a plaintiff seeks to hold a state official personally liable for money damages—i.e., an individual-capacity suit.⁸³ Many such suits are barred, however, by the doctrine of *official* immunity.⁸⁴ Unlike sovereign immunity, the official immunity doctrine is not rooted in the Constitution.⁸⁵ Rather, official immunity rests on common law doctrines that have been read to restrict statutes and other legal doctrines that would otherwise permit actions for money damages against officials.⁸⁶ Officials can invoke this immunity when sued for discretionary conduct within the scope of their official duties.⁸⁷

the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts.”); *see also* Florida Dep’t of Health & Rehabilitative Servs. v. Florida Nursing Home Ass’n, 450 U.S. 147, 150 (1981) (per curiam) (holding that State did not consent to private action in federal court for recovery of money due under Medicaid program); *Nihiser v. Ohio Envtl. Protection Agency*, 979 F. Supp. 1168, 1169 (S.D. Ohio 1997) (holding that State did not waive its eleventh amendment immunity from federal-court suit under Rehabilitation Act by accepting federal funds). *But see* *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1249 (M.D. Ala. 1998) (holding that State waived eleventh amendment immunity from monetary claims based on Title VI by accepting federal funds in the face of Congress’s clear intention to authorize suits for violation of Title VI by recipients of funds).

82. *See* George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363, 385 (1985) (stating that, under *Atascadero*, “the degree of clarity needed in a federal spending power statute to find a waiver by the state of its eleventh amendment protection is precisely the same as that needed to find intent on the part of Congress to abrogate that protection in the context of the fourteenth amendment”). *But cf.* *Wisconsin Dep’t of Corrections v. Schacht*, 118 S. Ct. 2047, 2054-57 (1998) (Kennedy, J., concurring) (arguing State should be deemed to waive its immunity when it removes action to federal court brought against it in state court).

83. *See* *Papasan v. Allain*, 478 U.S. 265, 278 & n.11 (1985) (noting that Eleventh Amendment does not apply when state official is liable for damages in his individual capacity).

84. HART & WESCHLER, *supra* note 46, at 1155-84; *see* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1119-33 (1981) (discussing official immunity for public officials).

85. *See, e.g.,* *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 403-05 (1979) (basing absolute official immunity of state legislators on interpretation of federal statutes in light of common law). Unlike most officials, whose immunity apparently does not stem from the Constitution, federal legislators enjoy immunity under the Constitution itself. *See* U.S. CONST. art. I, § 6, cl. 1 (Speech or Debate Clause).

86. *See* *Sievert v. Gilley*, 500 U.S. 226, 229-36 (1991) (applying doctrine of qualified immunity in action against federal official for damages caused by official’s constitutional violation); *Tower v. Glover*, 467 U.S. 914, 920 (1984) (stating that courts, in determining whether official has qualified immunity from claim under 42 U.S.C. § 1983, ask whether officials had such immunity when Section 1983 was enacted and also interpret history and purpose of Section 1983); *United States v. Gillock*, 445 U.S. 360, 372 n.10 (1980) (referring to official immunity as creation of federal common law); *see also* HART & WESCHLER, *supra* note 46, at 1167 (discussing nature of qualified immunity).

87. *See* *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993) (stating that official immunity protects discretionary conduct carried out within scope of official duties); *Barr v. Matteo*, 360 U.S.

Some officials enjoy "absolute" official immunity: they cannot be sued for any official conduct, no matter how outrageous and malicious.⁸⁸ The Constitution itself confers such absolute protection on federal legislators for conduct related to their legislative duties.⁸⁹ In addition, the United States Supreme Court has accorded absolute official immunity to state, regional, and local legislators for legislative activities,⁹⁰ and to federal, state, and local judges for judicial activities.⁹¹ The Court has also extended absolute official immunity to the President, as well as to prosecutors and other executive-branch officials for activities connected with the judicial process, such as the filing of criminal information.⁹² The Court has made clear, however, that aside from the President and officials engaged in judicially related activities, executive-branch officials are not entitled to absolute immunity.⁹³

Instead, most executive-branch officials have only "qualified" official immunity.⁹⁴ That is, they are immune from monetary awards only if they did not

564, 574-75 (1959) (plurality opinion) (holding that federal officer absolutely immune from state tort action for discretionary conduct).

88. See, e.g., *Stump v. Sparkman*, 435 U.S. 349, 359-64 (1978) (holding that judge had absolute official immunity from action challenging his order permitting sterilization of fifteen-year-old girl without her knowledge based on *ex parte* petition of her parents).

89. See U.S. CONST. art. I, § 6, cl. 1 (Speech or Debate Clause); *Gravel v. United States*, 408 U.S. 606, 613-27 (1972) (interpreting Speech or Debate Clause); *Kilbourn v. Thompson*, 103 U.S. 168, 201-05 (1880) (same).

90. See *Bogan v. Scott-Harris*, 118 S. Ct. 966, 970-73 (1998) (holding that local legislators have absolute immunity from action under 42 U.S.C. § 1983 for legislative activities); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979) (same for regional legislators); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (same for state legislators).

91. See *Butz v. Economou*, 438 U.S. 478, 512-14 (1978) (holding that federal officials have absolute official immunity for adjudicative functions); *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978) (holding that state judge has absolute immunity for judicial acts); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967) (holding that municipal judge has absolute official immunity for judicial acts); cf. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432-37 (1993) (holding that court reporters are not entitled to absolute immunity); *Forrester v. White*, 484 U.S. 219, 229 (1988) (holding that judges are not absolutely immune when acting in their administrative capacity).

92. See *Kalina v. Fletcher*, 118 S. Ct. 502, 511 (1997) (holding that prosecutor has absolute immunity in performing traditional functions of an advocate); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 (1982) (holding that President had absolute immunity for acts within the "outer perimeter" of his official duties); *Imbler v. Pachtman*, 424 U.S. 409, 417-31 (1976) (holding that prosecutor has absolute immunity from action under Section 1983 for initiating prosecution).

93. See *Hafer v. Melo*, 502 U.S. 21, 29 (1991) (stating, "This Court has refused to extend absolute immunity beyond a very limited class of officials, including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions"); *Butz v. Economou*, 438 U.S. 478, 507 (1978) (holding that federal executive officials exercising discretion are entitled to qualified immunity, unless "absolute immunity is essential for the conduct of the public business"); *Scheur v. Rhodes*, 416 U.S. 232, 247 (1974) (stating in action against state official that "in varying scope, a qualified immunity is available to officers of the executive branch of government"); see also *Mitchell v. Forsyth*, 472 U.S. 511, 520-24 (1985) (holding that Attorney General of United States did not have absolute immunity for actions connected with national defense functions); *Pierson v. Ray*, 386 U.S. 547, 555-58 (1967) (maintaining that local police had only qualified immunity).

94. See, e.g., *Kalina v. Fletcher*, 118 S. Ct. 502, 509-10 (1997) (holding that prosecutor entitled to only qualified immunity for filing certificate of probable cause); *Scheur v. Rhodes*, 416 U.S. 232, 242-49 (1974) (holding that state governor was entitled only to qualified immunity).

violate legal norms that were "clearly established."⁹⁵ Although qualified immunity does not provide absolute protection, it shields the official from most lawsuits. In a passage that the government is fond of quoting on behalf of its officials, the Court has said that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."⁹⁶

Although the doctrine of official immunity does not bear directly on the claims in *Hopwood*, it does help elucidate the nature of those claims. The *Hopwood* plaintiffs did not seek to hold any of the individual defendants personally liable for money damages, having rather sued those defendants solely in their official capacity.⁹⁷ This is presumably because the *Hopwood* plaintiffs determined that personal liability would have been barred by official immunity. Certainly, the legal basis for the Fifth Circuit's decision invalidating the affirmative action program was not "clearly established" at the time of that decision.⁹⁸

Officials in future cases similar to *Hopwood* may not be so lucky, depending on where and when they were involved with affirmative action programs. After *Hopwood*, the Fifth Circuit has clearly established that affirmative action programs like the Law School's violate the Equal Protection Clause.⁹⁹ Officials in that circuit, therefore, cannot claim qualified immunity from personal liability for devising and administering similar programs after the date of the Fifth Circuit's decision. Moreover, *Hopwood* reflects a trend in the lower federal courts to strike down a variety of government affirmative action programs.¹⁰⁰ For at

95. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

96. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

97. See *supra* notes 19-21 and accompanying text for a discussion of claims asserted by the *Hopwood* plaintiffs.

98. See *Hopwood v. Texas*, 84 F.3d 720, 722 (5th Cir. 1996) (Politz, J., joined by six other judges dissenting from denial of rehearing en banc) (asserting that panel opinion "goes out of its way to break ground that the Supreme Court itself has been careful to avoid").

99. See *United States v. Lanier*, 520 U.S. 259, 263 (1997) (observing that, in evaluating qualified immunity defenses, Court has looked to circuit court decisions to determine whether law was "clearly established").

100. See, e.g., *Wessmann v. Gittens*, 160 F.3d 790, 794-809 (1st Cir. 1998) (holding unconstitutional city's race-based admission policy for admission to public school); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 712-15 (9th Cir. 1997) (finding state statute providing for affirmative action in government contracting unconstitutional); *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895, 906-29 (11th Cir. 1997) (finding county's affirmative action program for contracting unconstitutional); *People Who Care v. Rockford Bd. Educ., School Dist. No. 205*, 111 F.3d 528, 534-40 (7th Cir. 1997) (invalidating numerous provisions in consent decree providing for desegregation of public schools); *Alexander v. Estep*, 95 F.3d 312, 315-17 (4th Cir. 1996) (holding that city's affirmative action program for firefighters unconstitutional), *cert. denied*, 117 S. Ct. 1425 (1997); *Middleton v. City of Flint*, 92 F.3d 396, 404-13 (6th Cir. 1996) (striking down city's affirmative action program for police promotions), *cert. denied*, 117 S. Ct. 1552 (1997); *Taxman v. Board of Educ., Piscataway Township*, 91 F.3d 1547, 1556-65 (3d Cir. 1996) (en banc) (holding that school board violated Title VII when it laid off white teacher, instead of equally qualified black teacher with equal seniority, based on race), *cert. granted*, 117 S. Ct. 2506, *cert. dismissed*, 118 S. Ct. 595 (1997); *Podberesky v. Kirwan*, 38 F.3d 147, 152-61 (4th Cir. 1994) (holding that race-conscious scholarship program of public university unconstitutional), *cert. denied*, 514 U.S. 1128 (1995); cf. *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 675-77 (4th Cir. 1996) (en banc) (holding that public university not entitled to summary judgment in Title VII action challenging pay raise for female faculty); see generally *Adarand*

least some period of time, though, an official's exposure to personal liability will depend on where he or she carries out official duties. For example, a law school official in the Fifth Circuit could be held personally liable for conduct that would not support personal liability in a circuit in which the relevant legal principles were not yet "clearly established."¹⁰¹

The geographical patchwork quality of official immunity is but one of two ways in which the doctrine operates erratically. Official immunity distinguishes among officials based, not only upon their geographic location, but, also upon the branch of government with which their activities are connected.¹⁰² Legislators and judges generally have absolute immunity, whereas executive officials usually have only qualified immunity.¹⁰³ While legislators and judges arguably are primarily responsible for adopting affirmative action programs and creating precedent encouraging or mandating the development of such programs, only officials in the executive branch will be held personally liable in damages for performing the jobs the legislature and courts have assigned to them.¹⁰⁴

C. *The Immunity of Cities and Counties*

The United States Supreme Court has exacerbated the irrational pattern of monetary liability for unconstitutional government conduct in another significant way. The Court has consistently held that cities and counties, unlike states, cannot claim eleventh amendment immunity.¹⁰⁵ Cities and counties are, however,

Constructors, Inc. v. Pena, 515 U.S. 200, 213-35 (1995) (finding federal government's affirmative action program for government contracting subject to strict scrutiny).

101. *Compare Alexander*, 95 F.3d at 317-18 (denying qualified immunity for officials' involvement with affirmative action program), and *Auriemma v. Rice*, 910 F.2d 1449, 1454-61 (7th Cir. 1990) (en banc) (same), *cert. denied*, 501 U.S. 1204 (1991), with *Moniz v. City of Ft. Lauderdale*, 145 F.3d 1278, 1282-83 (11th Cir. 1998) (establishing that defendants had qualified immunity from action challenging affirmative action program for promotion of police officers); see also *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61-62 (2d Cir. 1992) (granting qualified immunity); *Wittmer v. Peters*, 904 F. Supp. 845, 853-55 (C.D. Ill. 1995) (same), *aff'd on other grounds*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997); *Baker v. Detroit*, 483 F. Supp. 919 (E.D. Mich. 1979) (same), *aff'd on other grounds*, 704 F.2d 878, *vacated*, 712 F.2d 222 (6th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984).

102. See *Kalina v. Fletcher*, 118 S. Ct. 502, 508 (1997) (explaining that prosecutor had absolute immunity for activities connected with judicial process, but only qualified immunity for activities connected with investigation of crime).

103. See *supra* notes 88-96 and accompanying text for a discussion of which officials receive which type of immunity.

104. *But cf. Ann Woolhandler, Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 397-98, 400-05 (1987) (arguing that traditionally limited immunity accorded to executive-branch officials is justified by higher risk that officials in that branch, as compared to officials in legislative and judicial branches, will directly cause injury).

105. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) (noting that "cities and counties do not enjoy Eleventh Amendment immunity"); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) (stating that "the Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities"); see also *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974) (noting that "while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment"); *Lincoln County v. Luning*, 133

bound to comply with the Fourteenth Amendment, and, a violation of this provision could result in a suit for money damages under 42 U.S.C. § 1983.¹⁰⁶ As a result, a city or county can be held liable in money damages under Section 1983 for the harm caused by any unconstitutional affirmative action program that it has adopted, whereas a state is immune from such liability. Moreover, when a city or county is sued under Section 1983, it cannot claim official immunity.¹⁰⁷ One can reasonably wonder why local government is so disfavored.¹⁰⁸

D. Summary of Immunity Principles Governing Monetary Damages

A person who has been injured by the unconstitutional conduct of a state or local government or its officials may recover money damages in a federal court in three situations: (1) A person may recover money from a state, an arm of the state, or a state official in his or her official capacity only if the state has consented to the lawsuit or Congress has abrogated eleventh amendment immunity from the action; (2) a person can recover money damages from units of local government, including cities and counties, as well as from their officials if sued in their official capacity; and (3) a person can recover money from a state or local official in his or her individual capacity (i.e., out of his or her own pocket), unless (as is usually the case) the official has absolute official immunity or did not violate clearly established law.

III. APPLICATION OF IMMUNITY PRINCIPLES TO MONETARY CLAIMS IN *HOPWOOD*

An analysis of the monetary claims in *Hopwood* under the principles discussed in Part II entails two questions. The first is whether the defendants can claim eleventh amendment immunity. If so, the second question is whether that immunity has been abrogated by any of the constitutional or statutory provisions on which the *Hopwood* plaintiffs base their monetary claims.¹⁰⁹ This Part con-

U.S. 529, 530 (1890) (rejecting county's eleventh amendment argument); Fletcher, *supra* note 7, at 1044 (observing that Eleventh Amendment "has never been extended to subdivisions of the state such as cities, counties, and local school boards"); cf. Moor v. County of Alameda, 411 U.S. 693, 717-21 (1973) (holding that county was "citizen" for purposes of diversity jurisdiction).

106. See Monell v. Department of Soc. Servs., 436 U.S. 658, 690-91 (1978) (holding that local governments may be sued under Section 1983 for constitutional deprivations).

107. See Owen v. City of Independence, 445 U.S. 622, 638 (1980) (holding that a municipality does not have qualified official immunity from Section 1983 action).

108. See Margreth Barrett, Note, *The Denial of Eleventh Amendment Immunity to Political Subdivisions of the States: An Unjustified Strain on Federalism*, 1979 DUKE L.J. 1042, 1069 (1979) (concluding that denial of eleventh amendment immunity to cities and counties "furthers no eleventh amendment goals and is contrary to sound principles of federalism"). But cf. Melvyn R. Durchslag, *Should Political Subdivisions be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577, 581-82 (1994) (arguing that history and considerations of individuals' remedial rights justify differing treatment of state and local governments under Eleventh Amendment); see also DeKalb County Sch. Dist. v. Schrenko, 109 F.3d 680, 687-90 (11th Cir. 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), *cert. denied*, 118 S. Ct. 601 (1997).

109. As discussed in Part II, in addition to Congress's power to abrogate the Eleventh Amend-

cludes that all of the *Hopwood* defendants can claim eleventh amendment immunity and, more significantly, that none of the provisions upon which the plaintiffs rely abrogates this immunity with respect to monetary damages.¹¹⁰

A. Which *Hopwood* Defendants Can Claim Eleventh Amendment Immunity?

The *Hopwood* plaintiffs named the following defendants: the State of Texas; three other governmental entities (the University of Texas Board of Regents, the University of Texas at Austin, and the Law School); and officials of those three entities (the members of the Board, the President of the University, the Dean of the Law School, and the Chairman of the Law School's Admission Committee).¹¹¹ The State plainly can invoke the Eleventh Amendment to resist the monetary claims. Indeed, an unconsenting State cannot be sued in its own name in federal court for any type of relief.¹¹² Whether the other entities sued in *Hopwood*—the Board, the University, and the Law School—can do so depends on whether they are “arms” of the State.¹¹³ Precedent establishes that these enti-

ment, a state can waive its eleventh amendment immunity. See *supra* notes 73-82 and accompanying text for a discussion of congressional abrogation and state waiver. The *Hopwood* plaintiffs, however, did not have a plausible waiver argument. The State of Texas has preserved its sovereign immunity with only limited exceptions not applicable to the *Hopwood* facts. See TEX. CIV. PRAC. & REM. CODE ANN. § 107.002(a)(11) (legislative resolutions waiving sovereign immunity do not waive eleventh amendment immunity); *Missouri Pac. R.R. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970) (maintaining that state retains immunity in absence of legislative waiver); see also TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021, 101.102 (authorizing claims against State under state tort law to be brought in state court). Compare *Edelman v. Jordan*, 415 U.S. 651, 677 n.19 (1974) (rejecting argument that State consented to federal court suit by consenting to similar suits in its own courts), and *Kennecott Copper Corp. v. Tax Comm'n*, 327 U.S. 573, 577-80 (1946) (same), with *Flores v. Norton & Ramsey Lines, Inc.*, 352 F. Supp. 150, 152-54 (W.D. Tex. 1972) (holding that Texas Tort Claims Act waived State's immunity from state tort claim in federal court).

110. It does not matter that the *Hopwood* defendants did not raise an Eleventh Amendment defense on appeal to the Fifth Circuit. See *supra* notes 33-34 and accompanying text for an explanation of how and why defendants dropped their eleventh amendment argument on appeal. The Court has permitted defendants to invoke the Eleventh Amendment at any point in the proceedings, regardless of whether they could have done so sooner. See, e.g., *Alabama v. Pugh*, 438 U.S. 781, 782 n.1 (1978) (noting that defendants did not waive Eleventh Amendment defense by failing to raise it in the lower court); *Edelman*, 415 U.S. at 677-78 (same); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 466-67 (1945) (same). To this extent, the Eleventh Amendment “partakes of the nature of a jurisdictional bar.” *Edelman*, 415 U.S. at 678; cf. *Calderon v. Ashmus*, 118 S. Ct. 1694, 1697 n.2 (1998) (noting that Eleventh Amendment is jurisdictional in the sense that it can be raised at any stage of proceeding but “is not co-extensive with the limitations on judicial power in Article III”); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 266 (1997) (stating that Eleventh Amendment “enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction”).

111. *Hopwood v. Texas*, 78 F.3d 932, 938 n.13 (5th Cir. 1996).

112. See *Seminole Tribe v. Florida*, 517 U.S. 44, 58-59 (1996) (holding that Eleventh Amendment bars suit against State for prospective relief); *Pugh*, 438 U.S. at 781-82 (per curiam) (same); see also *Green v. Mansour*, 474 U.S. 64, 70-74 (1985) (holding that Eleventh Amendment barred declaratory relief against state officials under circumstances of that case); *Cory v. White*, 457 U.S. 85, 91 (1982) (stating in action against state officials that Eleventh Amendment bars federal court injunctive relief directed against State).

113. See *supra* note 55 and accompanying text for a discussion of entities that have been found to be arms of the State.

ties almost certainly do constitute “arms” of the State of Texas.¹¹⁴ Therefore, these entities should be entitled to eleventh amendment immunity. Finally, because officials sued in their official capacity share the sovereign’s immunity,¹¹⁵ the officials sued in *Hopwood* are also protected by the Eleventh Amendment.¹¹⁶

The Court has generally used a fact-intensive approach to determine whether a government entity is an “arm of the State.”¹¹⁷ The Court has made clear, however, that a factor of prime importance is whether a money judgment against the entity must be paid with state funds.¹¹⁸ That focus reflects the Court’s understanding that the Eleventh Amendment was prompted by a desire to protect state treasuries.¹¹⁹ The Court also considers any other factor relevant to the entity’s autonomy from the State.¹²⁰ The Court’s focus on an entity’s autonomy underlies its categorical determination that cities and counties are not arms of the State.¹²¹ The Court has not, however, made a similar categorical de-

114. See *infra* notes 123-32 and accompanying text for a discussion of the other *Hopwood* defendants and their “arms of state” status.

115. See *supra* note 56 and accompanying text for a discussion of the relation between states and entities deemed to be arms of the state.

116. See *Kentucky v. Graham*, 473 U.S. 159, 167 (1995) (stating, “The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment”).

117. See, e.g., *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977) (stating that issue whether defendant was “arm of the State partaking of the State’s Eleventh Amendment immunity” depended on “the nature of the entity created by state law”).

118. See *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (characterizing issue whether judgment against entity would be payable out of state treasury as having “considerable importance” in determining whether entity can invoke Eleventh Amendment); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 45-51 (1994) (examining whether judgment against interstate agency would be payable out of state treasuries); see also *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (referring to “rule” that suit “seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment”); cf. *Highway Comm’n v. Utah Constr. Co.*, 278 U.S. 194, 199 (1929) (holding that state highway commission was not “citizen” for purposes of diversity jurisdiction because it was “*alter ego* of the state with no funds or ability to respond in damages”).

119. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (observing that “[a]doption of the [Eleventh] Amendment responded most immediately to the States’ fears that ‘federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin’” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 151 (1984) (Stevens, J., dissenting))); cf. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996) (stating, “The Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State’s treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties”) (internal quotation marks and citations omitted; brackets in original).

120. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (holding that Board of Police Commissioners of St. Louis, Missouri not arm of State because City was responsible for Board’s financial liabilities and Board was “not subject to the State’s direction or control in any other respect”).

121. See *Doe*, 519 U.S. at 429 n.5 (questioning whether entity “has the same kind of independent status as a county or is instead an arm of the State”); *Mount Healthy Sch. Dist. Bd. Educ.*, 429 U.S. at 280-81 (posing question whether entity “is to be treated as an arm of the State partaking of the State’s Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend”); see also *Moor v. County of Alameda*, 411 U.S. 693, 721 (1973) (examining whether county possessed “a sufficiently independent

termination for state colleges and universities.¹²²

Nonetheless, the lower federal courts have almost unanimously held that state colleges and universities *are* arms of the State.¹²³ Those holdings encompass not only suits naming such colleges and universities as defendants, but also suits naming their governing boards as defendants.¹²⁴ The handful of cases holding to the contrary have involved unusual circumstances, such as the school's history as a private institution or its structural independence from the State.¹²⁵

The Fifth Circuit is among the courts that have consistently found state colleges and universities to be arms of the State.¹²⁶ In particular, the Fifth Cir-

corporate character to dictate that it be treated as a citizen" of State for purposes of diversity jurisdiction).

122. See, e.g., *Doe*, 519 U.S. at 429-30 (rejecting argument that state university could be sued in federal court, notwithstanding Eleventh Amendment, because judgment against university would be paid by federal government under indemnity agreement); *Hopkins v. Clemson Agric. College*, 221 U.S. 636, 645-48 (1911) (holding that state college did not have eleventh amendment immunity). See *infra* note 125 for a discussion of this case.

123. See, e.g., *University of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200, 1204 (1st Cir. 1993) (observing that "the vast majority of state universities ... have been found to be 'arms' of the State for immunity and diversity purposes," even though each university must be examined individually); Lawrence Lee Oldaker & David L. Dagle, *The Eleventh Amendment, Its History and Current Application to Schools and Universities*, 72 ED. LAW. REP. 479, 494 (1992) (stating, "Public institutions are generally understood to be indistinguishable arms of the state and therefore receive [Eleventh Amendment] immunity"); Brief for Petitioners at 13 n.6, *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997) (No. 95-1694) (collecting cases); see also Kevin W. Brown, *Public Institutions of Higher Learning as "Persons" Subject to Suit Under 42 U.S.C. § 1983*, 65 A.L.R. FED. 490, § 4 (1983) (discussing immunity of colleges and universities in Section 1983 cases).

124. See, e.g., *Ronwin v. Shapiro*, 657 F.2d 1071, 1072-74 (9th Cir. 1981) (holding that Eleventh Amendment barred claim against Board of Regents of University of Arizona).

125. See *Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1306-12 (3d Cir. 1987) (holding that Rutgers University did not have eleventh amendment immunity, based in part on its history as private institution); *Hander v. San Jacinto Junior College*, 519 F.2d 273, 278 (5th Cir. 1975) (holding that public junior college did not have eleventh amendment immunity "[u]nder the peculiar Texas statutory and decisional law governing junior college districts"); see also *University of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200, 1205-17 (1st Cir. 1993) (holding that University of Rhode Island was citizen, rather than arm of State, for purposes of diversity jurisdiction).

These lower-court cases are consistent with the only Supreme Court decision that has addressed whether a state institution of higher education can claim eleventh amendment immunity: *Hopkins v. Clemson Agric. College*, 221 U.S. 636 (1911). The Court there held that Clemson was not entitled to Eleventh Amendment protection. *Id.* at 642-48. The basis for that holding is not altogether clear. The Court seemed, however, to rely on Clemson's independence from state control. See *id.* at 646 (noting that relevant state statute "created an entity, a corporation, a juristic person, whose right to hold and use property was coupled with the provision that it might sue and be sued, plead and be impleaded, in its corporate name"). That independence arose from factors that do not characterize most modern state colleges and universities. Specifically, the majority of Clemson's Board of Trustees was not chosen by any state entity or official. *Id.* at 638. Moreover, the Board was incorporated, could enter into contracts, hold property, and sue or be sued in its own name. *Id.* at 638-39.

126. See *Lewis v. Midwestern State Univ.*, 837 F.2d 197, 198 (5th Cir. 1988) (applying three-part test to determine whether public university and its board of regents were arms of State: (1) status of university under state law; (2) degree of state control over university; and (3) whether money judgment against university would interfere with State's fiscal autonomy), *cert. denied*, 488 U.S. 849 (1988); *United Carolina Bank v. Board of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 557-61 (5th Cir. 1982) (applying same test).

cuit has accorded "arm of the State" status to several Texas institutions of higher education.¹²⁷ Moreover, the Fifth Circuit has assumed, and a district court within the Fifth Circuit has held that the University of Texas System is an arm of the State.¹²⁸ There is, therefore, strong support for the conclusion that, in addition to the State of Texas itself, two of the other defendant-entities in *Hopwood*, namely, the Board and the University, can also claim eleventh amendment immunity.

The Law School, too, can probably claim eleventh amendment immunity. Doubt arises only because of the paucity of case law regarding the eleventh amendment status of state law schools. Neither the Supreme Court nor the Fifth Circuit has addressed that issue. A district court within the Fifth Circuit, however, has held that a state law school is an arm of the State.¹²⁹ That holding accords with both appellate and district court decisions in other circuits.¹³⁰ The University of Texas Law School possesses no distinctive characteristics that would compel a different conclusion.¹³¹

127. See *Lewis*, 837 F.2d at 199 (recognizing "arm of State" status for Midwestern State University); *United Carolina Bank*, 665 F.2d at 556-61 (recognizing same for Stephen F. Austin University); *Clay v. Texas Women's Univ.*, 728 F.2d 714 (5th Cir. 1984) (recognizing same for Texas Women's University); *Jagnandan v. Giles*, 538 F.2d 1166, 1174-76 (5th Cir. 1976) (recognizing same for Mississippi State University), *cert. denied*, 432 U.S. 910 (1977); see also *University of Texas at Austin v. Vratil*, 96 F.3d 1337, 1340 (10th Cir. 1996) (holding that University of Texas at Austin was entitled to eleventh amendment immunity from civil discovery); cf. *Gay Student Servs. v. Texas A & M Univ.*, 612 F.2d 160, 164-65 (5th Cir. 1980) (holding that, under *Ex parte Young*, Eleventh Amendment did not bar declaratory and injunctive relief against public university), *cert. denied*, 449 U.S. 1034 (1980). *But cf. Hander v. San Jacinto Junior College*, 519 F.2d 273, 278-80 (5th Cir. 1975) (holding that, in light of "peculiar" statutory and decisional law, public junior college did not have eleventh amendment immunity).

128. See *Texas v. Walker*, 142 F.3d 813, 820 n.10 (5th Cir. 1998) (treating University of Texas as arm of State where parties did not dispute University's status as such); *LaVerne v. University of Texas Sys.*, 611 F. Supp. 66, 68 (S.D. Tex. 1985) (granting motion to dismiss action against State of Texas, University of Texas, Chancellor of University, and other officials sued in official capacity); see also *Chacko v. Texas A & M Univ.*, 960 F. Supp. 1180, 1198 (S.D. Tex. 1997) (holding that Texas A & M entitled to eleventh amendment immunity); *Idoux v. Lamar Univ. Sys.*, 817 F. Supp. 637, 639-40 (E.D. Tex. 1993) (holding that Lamar University entitled to eleventh amendment immunity); *Texas Faculty Ass'n v. University of Texas at Dallas*, No. CA-3-88-2917-AH, 1990 WL 161244, at *2 (N.D. Tex. Sept. 26, 1990) (unpublished decision) (holding that Eleventh Amendment protected University of Texas at Dallas and Board of Regents of University of Texas System), *aff'd in part and rev'd in part on other grounds*, 946 F.2d 379 (5th Cir. 1991).

129. See *Moreno v. Texas S. Univ.*, 573 F. Supp. 73, 73-75 (S.D. Tex. 1983) (finding Thurgood Marshall School of Law and its deans to be arms of State and immune from monetary damages under Eleventh Amendment).

130. See *Partington v. Gedan*, 961 F.2d 852, 865 (9th Cir. 1992) (extending eleventh amendment immunity from monetary suits to federal constitutional claims); *Hall v. Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986) (finding University of Hawaii law school and its Board of Regents to be arms of state and immune from state law claims under Eleventh Amendment); *Chinn v. City Univ. of N.Y.*, 963 F. Supp. 218, 224 (E.D.N.Y. 1997) (maintaining that Eleventh Amendment barred Section 1981 claim against City University of New York's law school); *Long v. Richardson*, 525 F.2d 74, 75-79 (6th Cir. 1975) (holding that Eleventh Amendment barred action against Memphis State University brought by former law students challenging state law school's higher tuition charges for residents).

131. See generally TEX. EDUC. CODE ANN. §§ 65.02(a)(2) (making University of Texas at Austin

The same analysis applicable to the University, the Board, and the Law School also controls the availability of the eleventh amendment defense to the individual *Hopwood* defendants. Because those defendants are officials of arms of the State and are sued for damages in their official capacity they, too, can claim eleventh amendment immunity.¹³²

B. Which Provisions Abrogate Eleventh Amendment Immunity?

Because the *Hopwood* defendants can invoke eleventh amendment immunity, the *Hopwood* plaintiffs may recover relief in the form of money damages only if immunity from that relief has been abrogated by one of the provisions on which the plaintiffs rely. In seeking compensatory and punitive damages, the plaintiffs rely on the Fourteenth Amendment and three federal statutes: 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964.¹³³ In seeking attorneys' fees, the plaintiffs rely on 42 U.S.C. § 1988.¹³⁴ It is clear that neither the Fourteenth Amendment nor the first two statutes, Sections 1981 and 1983, abrogate eleventh amendment immunity from monetary damages.¹³⁵ It is unsettled whether Title VI does so, but this Article concludes that it does not because Title VI does not make sufficiently clear Congress's intention to authorize money damages against the State and its officers.¹³⁶ Finally, although Section 1988 may not abrogate the Eleventh Amendment, it will permit the defendants to recover a portion of their attorneys' fees.¹³⁷

1. The Fourteenth Amendment

The Fourteenth Amendment does not, of its own force, override a state's eleventh amendment immunity from money damages. Thus, for example, a federal court cannot award money damages against a State merely because the State has violated the Equal Protection Clause by denying someone admission to a state school because of his or her race. Instead, the court can rely on the Equal Protection Clause only to enjoin State officials from committing future violations. This limit on the remedial power of the federal courts is odd for at least two reasons. First, although it represents a significant restriction on the enforceability of the Fourteenth Amendment, the Court did not articulate it clearly for more than a century after adoption of the Amendment.¹³⁸ Second, this remedial

part of "University of Texas System" ("System")), 67.02 (putting University of Texas at Austin under management and control of Board of Regents of System) (West 1991).

132. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 662-67 (1974) (holding that Eleventh Amendment barred action against state official for monetary relief payable from state treasury).

133. *Hopwood v. Texas*, 861 F. Supp. 551, 553 (W.D. Tex. 1994)

134. *Hopwood v. Texas*, 999 F. Supp. 872, 911 (W.D. Tex. 1998).

135. See *infra* notes 138-60 and accompanying text for a discussion of the statutes and judicial interpretation.

136. See *infra* notes 161-256 and accompanying text for an analysis of the availability of monetary damages for Title VI violations.

137. See *infra* notes 257-68 and accompanying text for a discussion of Section 1988 and the Court's interpretation permitting recovery of attorney's fees.

138. See *City of Boerne v. Flores*, 521 U.S. 507, 523 (1997) (noting that Fourteenth Amendment

restriction binds the federal courts but not Congress.¹³⁹

Not long after ratification of the Fourteenth Amendment, the Court held that a state cannot be sued directly for a violation of the Fourteenth Amendment, because such a suit is barred by the Eleventh Amendment.¹⁴⁰ In *Ex parte Young*, however, the Court held that a state officer could be sued in equity for a violation of the Fourteenth Amendment (or any other provision of the Constitution), despite the Eleventh Amendment.¹⁴¹ The Court in *Ex parte Young*, however, did not explain what types of relief could be granted in such an officer suit.¹⁴² It simply upheld a federal-court injunction prohibiting a state official from enforcing an unconstitutional state statute.¹⁴³ For years, it was unclear to what extent *Ex parte Young* authorized other sorts of relief, such as money damages payable out of the state treasury.¹⁴⁴

The Court squarely addressed that issue in 1974 in *Edelman v. Jordan*.¹⁴⁵ The *Edelman* Court held that the *Ex parte Young* doctrine does not authorize retroactive monetary relief against a State, even for a violation of the Fourteenth Amendment.¹⁴⁶ The Court said, "A federal court's remedial power, consistent

was adopted in 1868). See *infra* notes 144-47 and accompanying text for a discussion of *Edelman v. Jordan*, 415 U.S. 651 (1974), which the Court described as the first case to fully explore state payment of retroactive monetary relief under the Eleventh Amendment.

139. See *infra* notes 148-50 and accompanying text for a discussion of Congress's power under Fourteenth Amendment to abrogate eleventh amendment immunity.

140. See *North Carolina v. Temple*, 134 U.S. 22, 25, 30 (1890) (holding that Eleventh Amendment barred federal-court action against State alleging violations of Contract Clause and Fourteenth Amendment).

141. *Ex parte Young*, 209 U.S. 123, 149-68 (1908).

142. *Id.*

143. *Id.* In the statement of the case, Justice Peckham related that the State Attorney General was held in contempt for violating a federal order prohibiting him from bringing proceedings to enforce an unconstitutional statute against the plaintiffs. *Id.* at 126-27.

144. See *Edelman*, 415 U.S. at 666-72 (discussing Supreme Court precedents after *Ex parte Young* involving federal-court actions against state officials); *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that denial of welfare benefits based on durational residency requirement violates Constitution); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that Constitution required minority student be admitted to University of Texas School of Law pursuant to mandamus action); see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 516 (1954) (appearing to read *Ex parte Young* as permitting only negative injunctive relief against officials, as distinguished from injunctive relief imposing affirmative obligations); Fletcher, *supra* note 7, at 1119 n.324 (asserting need to distinguish between forms of affirmative relief arose only after affirmative injunctions became available). The Court in *Edelman* maintained that it did not read *Ex parte Young* or subsequent holdings to mean that any form of relief can be awarded against a state officer, no matter how closely it resembles a money judgment payable out of the state treasury, just because the relief is labeled "equitable" in nature. *Edelman*, 415 U.S. at 666.

145. 415 U.S. 651 (1974). The Court described the case as the first opportunity it had "taken to fully explore and treat the Eleventh Amendment aspects" of retroactive monetary relief payable out of the state treasury. *Id.* at 670-71.

146. *Id.* at 677. The plaintiff in *Edelman* claimed that the defendant officials had violated the Equal Protection Clause by delaying the processing of his claim for welfare benefits while processing and allowing the claims of similarly situated applicants. *Id.* at 653 n.1. As a remedy for that violation, the plaintiff sought an injunction requiring the officials to use state funds to pay benefits that, because of delay, had not been paid. *Id.* at 668. The Court noted that the retroactive monetary award sought

with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury."¹⁴⁷

Curiously, Congress does not suffer from a similar remedial constraint. When enacting legislation to enforce the Fourteenth Amendment, Congress has "undoubted power" to abrogate the State's eleventh amendment immunity from retroactive monetary relief.¹⁴⁸ In recently reaffirming that power, the Court in *Seminole Tribe* reasoned that the Fourteenth Amendment was "adopted well after the adoption of the Eleventh Amendment" and "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."¹⁴⁹ That reasoning would seem to support the power of federal courts to award whatever relief against the states is appropriate to enforce the Fourteenth Amendment, including retroactive monetary relief.¹⁵⁰

As it stands, the *Hopwood* plaintiffs cannot rely on the Fourteenth Amendment alone to recover monetary damages in federal court.¹⁵¹ Instead, they must show that they are entitled to such relief under a statute falling within one of the constitutional grants of power that enables Congress to abrogate the Eleventh Amendment, such as Section 5 of the Fourteenth Amendment.¹⁵² If

by plaintiff "will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action." *Id.*

147. *Id.* at 677 (citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Ex parte Young*, 209 U.S. 123 (1908)); see also *Quern v. Jordan*, 440 U.S. 332, 337 (1979) (describing *Edelman* as reaffirming rule that had evolved in Court's "earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment").

148. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989).

149. *Seminole Tribe v. Florida*, 517 U.S. 44, 65-66 (1996).

150. See Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 350-53, 351 n.296 (1995) (arguing that federal courts, as well as Congress, have power to remedy Fourteenth Amendment violations notwithstanding Eleventh Amendment); 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, 1441-42 (1975) (arguing that Congress, rather than federal courts, should exercise power to override eleventh amendment immunity for states' violations of Fourteenth Amendment); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693 (1976) (same).

151. See *Santiago v. New York State Dep't of Correctional Servs.*, 945 F.2d 25, 28-32 (2d Cir. 1991) (holding that Fourteenth Amendment did not, of its own force, create a cause of action for retroactive monetary relief against State in federal court), *cert. denied*, 502 U.S. 1094 (1992); see also *DeKalb Sch. Dist. v. Schrenko*, 109 F.3d 680, 688 (11th Cir. 1997) (stating that "[t]he Supreme Court has found no general abrogation of Eleventh Amendment immunity for claims brought pursuant to the Fourteenth Amendment," but Congress can abrogate that immunity), *cert. denied*, 118 S. Ct. 601 (1997).

152. When the Court in *Ex parte Young* held that injunctive relief was available against a state official for a violation of the Fourteenth Amendment, it did not identify any federal statute that gave the plaintiff a cause of action against the official. The Court thereby implied that the Fourteenth Amendment, standing alone, not only overrode the Eleventh Amendment but also created a private cause of action in federal court for violations of the Fourteenth Amendment. See Meltzer, *supra* note 63, at 38 (noting that *Ex parte Young* "in effect recognized an implied federal cause of action for an injunctive remedy against state officials whose conduct violates the Fourteenth Amendment"); see also

the Fourteenth Amendment did create a private cause of action, a further question would be whether money damages could be awarded on Fourteenth Amendment claims.¹⁵³

2. 42 U.S.C. § 1983

Section 1983 authorizes federal courts to award money damages to anyone who has been deprived “of any rights, privileges or immunities secured by the Constitution and [federal] laws” by any “person” acting under color of state law.¹⁵⁴ The Court in *Edelman* appeared to reject the suggestion that Section 1983 “was intended to create a waiver of a State’s Eleventh Amendment immunity.”¹⁵⁵ In *Quern v. Jordan*, the Court squarely held that Section 1983 indeed did not “override the traditional sovereign immunity of the States” from suits in federal court.¹⁵⁶ *Quern* forecloses relief under Section 1983 in federal-court actions against States, arms of the State, and state officials sued in their official capacity.¹⁵⁷ It is therefore clear that the *Hopwood* plaintiffs cannot recover monetary damages under Section 1983.

Monaghan, *supra* note 71, at 130-31 (noting that *Ex parte Young* “necessarily assumed” implied right of action for equitable relief against State officials); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 70 n.53 (1984) (observing that *Ex parte Young* “marked the emergence of the idea that conduct threatening to violate federal constitutional rights . . . was inherently actionable as a matter of federal law”).

Later decisions seemed to confirm the suggestion in *Ex parte Young* that the Fourteenth Amendment created a private cause of action in federal court, because they upheld prospective relief for federal-court claims that were ostensibly based on the Fourteenth Amendment alone. See, e.g., *Brown v. Board of Educ.*, 349 U.S. 294 (1954) (granting equal access to nonsegregated education under Fourteenth Amendment); *Sweatt v. Painter*, 339 U.S. 629 (1950) (assigning equal protection to legal education under Fourteenth Amendment); see also *Bandes, supra* note 150, at 290, 290 n.2 (1995) (citing *Brown* as case where court enforced constitutional rights without statutory cause of action). Nonetheless, the Court has never squarely addressed whether the Fourteenth Amendment itself creates a federal cause of action. See *Milliken v. Bradley*, 433 U.S. 267, 290 n.23 (1977) (determining that, in light of Court’s holding that monetary relief granted by lower court fell within *Ex parte Young* doctrine, Court did not need to decide whether “the Fourteenth Amendment, *ex proprio vigore*, works a *pro tanto* repeal of the Eleventh Amendment”).

153. Although such damages would be barred by the Eleventh Amendment if sought in federal court, the Eleventh Amendment would not bar them in a state-court action, because the Eleventh Amendment does not bar actions filed in state court. See *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) (noting that Eleventh Amendment question is absent in state court since it retains only “Judicial power of the United States”); *Nevada v. Hall*, 440 U.S. 410, 420-21 (1979) (holding that Eleventh Amendment did not limit State’s judicial powers in its courts in tort action involving sister state’s vehicle). But see Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 3-5 (forthcoming Apr. 1999) (unpublished manuscript on file with *Brandeis Law Review*) (arguing that Tenth Amendment does not immunize states in their own courts from private actions based on federal statutes enacted under Article I).

154. 42 U.S.C. § 1983 (1994).

155. *Edelman v. Jordan*, 415 U.S. 651, 676 (1974).

156. *Quern v. Jordan*, 440 U.S. 332, 341 (1979). The Court in *Quern* determined that Section 1983 did not express a sufficiently clear intention to abrogate the State’s eleventh amendment immunity from suit in federal court. *Id.*

157. See also, *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (holding that neither State nor its officials acting in official capacities are persons covered by Section 1983).

3. 42 U.S.C. § 1981

Section 1981 likewise does not help the *Hopwood* plaintiffs. This statute gives everyone “the same right as is enjoyed by white citizens,” to, “make and enforce contracts” free of state interference.¹⁵⁸ In *Jett v. Dallas Independent School District*, however, the Supreme Court concluded that Section 1983 provides the exclusive federal basis for money damages for violations of Section 1981 by “state governmental units.”¹⁵⁹ Although *Jett* involved an agency of local government, the Court’s reasoning applies equally to actions against state entities and their officials.¹⁶⁰ *Jett* establishes that Section 1981 does not provide an independent cause of action in a case such as *Hopwood*.

4. Title VI

a. *The Unsettled Availability of Monetary Damages for Title VI Violations*

Title VI prohibits racial discrimination by recipients of federal financial assistance.¹⁶¹ It furnishes the most promising basis for the *Hopwood* plaintiffs to recover money damages. The Fifth Circuit held that the *Hopwood* defendants intentionally violated Title VI,¹⁶² and the Supreme Court has made clear that money damages are available for such violations.¹⁶³ The decisions of the Court so indicating, however, did not concern a defendant that was entitled to eleventh amendment immunity. Indeed, the Court has not addressed whether Title VI abrogates eleventh amendment immunity from retroactive monetary relief. Although the lower federal courts have held that Title VI does so,¹⁶⁴ this Article reaches a contrary conclusion.

The Fifth Circuit’s decision in *Hopwood* establishes that the defendants are liable in money damages under Title VI, unless liability is barred by the Eleventh Amendment. The Fifth Circuit held that the Law School’s admission program violated the Equal Protection Clause.¹⁶⁵ That holding is tantamount to a holding that the Law School violated Title VI, in light of Supreme Court decisions making clear that, when a state entity receiving federal financial assistance violates

158. 42 U.S.C. § 1981(a) (1994).

159. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 733 (1989) (citing *Brown v. General Servs. Admin.*, 425 U.S. 820 (1976)).

160. See *Edelman*, 415 U.S. at 667 n.12 (noting that “county action is generally state action for purposes of the Fourteenth Amendment”).

161. 42 U.S.C. § 2000d. See *supra* note 19 for relevant portion of statute.

162. *Hopwood v. Texas*, 78 F.3d 932, 957 (5th Cir. 1996) (holding that defendants “committed intentional discrimination”).

163. See *infra* note 168 and accompanying text for a discussion of the Supreme Court cases indicating monetary damages are available for intentional Title VI violations.

164. See *infra* note 176 for cases holding that Title VI abrogates eleventh amendment immunity from retroactive monetary relief.

165. See *supra* note 28 and accompanying text for a discussion of the equal protection claim and the judicial analysis. The Fifth Circuit addressed only the plaintiffs’ equal protection claim, not their statutory claims, finding the latter to be merely “derivative” of the former. *Hopwood*, 78 F.3d at 938.

the Equal Protection Clause, it has also violated Title VI.¹⁶⁶ The Fifth Circuit in *Hopwood* further held that the defendants “committed intentional discrimination.”¹⁶⁷ In several decisions, the Supreme Court has indicated that Title VI authorizes money damages for intentional violations of Title VI.¹⁶⁸ In none of those decisions, however, was the defendant an entity entitled to eleventh amendment immunity.¹⁶⁹ Consequently, the Court has not addressed whether Title VI abrogates the Eleventh Amendment. Unless Title VI does so, the *Hopwood* plaintiffs cannot recover money damages for violations of that statute.

The issue of whether Title VI abrogates eleventh amendment immunity from money damages has great importance. Title VI is a major anti-discrimination measure, banning racial discrimination by all state entities that receive federal financial assistance. Moreover, if Title VI exposes states to money damages, it does so by virtue of a statute that also governs the remedies

166. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610 (1983) (Powell, J., joined by Burger, C.J., and, in relevant part, by Rehnquist, J.) (noting that Title VI proscribes only those racial classifications that violate Equal Protection Clause); *id.* at 615 (O'Connor, J., concurring) (accepting, on *stare decisis* grounds, holding of majority in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), that “Title VI’s definition of racial discrimination [is] absolutely coextensive with the Constitution’s”); *id.* at 617 (Marshall, J., dissenting) (acknowledging that Court in *Bakke* considered Title VI’s proscription on racial discrimination to be coextensive with Fourteenth Amendment’s, but arguing Title VI also bars conduct that does not constitute intentional discrimination, and therefore would not violate Fourteenth Amendment under *Washington v. Davis*, 426 U.S. 229 (1976)); see also *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (stating that *Bakke* and its progeny make clear “that the reach of Title VI’s protection extends no further than the Fourteenth Amendment”).

167. *Hopwood v. Texas*, 78 F.3d 932, 957 (5th Cir. 1996).

168. See *Franklin v. Gwinnett Pub. Schools*, 503 U.S. 60, 70 (1992) (stating that “a clear majority” of the Court in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), expressed the view that money damages are available for intentional violations of Title VI); *Guardians*, 463 U.S. at 607 n.27 (noting that majority of Court “would not allow compensatory relief” under Title VI “in the absence of proof of discriminatory intent”); see also *Lane v. Pena*, 518 U.S. 187 (1996) (recognizing money damages are available under Title VI).

169. Although the Court has said in three cases that money damages are available for intentional Title VI violations, see *supra* note 168 (citing cases), only in one of those cases, *Guardians*, was the issue squarely presented, and that case did not resolve the Eleventh Amendment issue. In *Guardians*, the defendants were a department of city government and city officials—entities that are not protected by the Eleventh Amendment. For this reason, the Court did not need to resolve the issue of money damages under the Eleventh Amendment. *Id.* at 604 (White, J., joined in part by Rehnquist, J.) (acknowledging that “Eleventh Amendment cases are not dispositive here,” but finding them useful by analogy); *id.* at 633 n.28 (Marshall, J., dissenting) (noting that “Eleventh Amendment considerations have absolutely no relevance to this case because [defendants] are not state but rather municipal entities”); *id.* at 637-38 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting) (stating that “[t]he Eleventh Amendment obviously has no relevance in most Title VI litigation; it certainly is not implicated in this suit against the . . . officials and agencies of the City of New York”).

In *Franklin*, another case against a local government entity that, as such, did not have Eleventh Amendment protection, the Court addressed whether monetary damages were available under Title IX of the Education Amendments of 1972. *Franklin*, 503 U.S. at 62-63 (involving school district and teacher employed by district as defendants).

In *Lane*, the Court held that sovereign immunity barred an award of money damages against the federal government in an action for a violation of Section 504 of the Rehabilitation Act of 1973. *Lane*, 518 U.S. at 192.

available against states for violations of three other major anti-discrimination statutes: Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on a disability in federal programs;¹⁷⁰ Title IX of the Education Amendments of 1972, which prohibits sex discrimination in public education;¹⁷¹ and the Age Discrimination Act of 1975, which prohibits discrimination in federally assisted programs.¹⁷² Under all four of these anti-discrimination statutes, the provision governing remedies against the states is Section 1003 of the (somewhat confusingly named) Rehabilitation Act Amendments of 1986.¹⁷³

Section 1003 clearly expresses Congress's intent to abrogate the states' eleventh amendment immunity.¹⁷⁴ It declares that "[a] State shall not be immune under the Eleventh Amendment ... from suit in Federal court for a violation of" the four enumerated anti-discrimination statutes.¹⁷⁵ At least two federal courts of appeals have concluded that Section 1003 exposes states to money damages for violations of these statutes.¹⁷⁶ In so concluding, these courts use the

170. 29 U.S.C. § 794 (1994).

171. 20 U.S.C. §§ 1681-1688 (1994).

172. 42 U.S.C. §§ 6101-6107 (1994).

173. See Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 (1986), codified at 42 U.S.C. § 2000d-7 (revoking state immunity under Eleventh Amendment for violations of these statutes); see also *Lane v. Pena*, 518 U.S. 187, 198 (1996) (referring to provision as Section 1003 of Rehabilitation Act Amendments of 1986).

174. 42 U.S.C. § 2000d-7(a)(1). See *Lane*, 518 U.S. at 198 (1996) (describing Section 1003 as "unequivocal waiver" of States' eleventh amendment immunity).

175. 42 U.S.C. § 2000d-7(a)(1). Section 1003 abrogates the Eleventh Amendment not only for violations of the four named statutes but also for violations "of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." *Id.*

176. See *Duffy v. Riveland*, 98 F.3d 447, 452 (9th Cir. 1996) (concluding that 42 U.S.C. § 2000d-7(a)(1) abrogates eleventh amendment immunity from claim for monetary relief under Rehabilitation Act); *Lussier v. Dugger*, 904 F.2d 661, 669-70 (11th Cir. 1990) (concluding that 42 U.S.C. § 2000d-7(a)(1) abrogates eleventh amendment immunity from claims for retroactive monetary relief under Rehabilitation Act), *vacated and withdrawn on other grounds sub nom. Duffy and Lussier* appear to be the only decisions by federal courts of appeals specifically addressing the availability of money damages under Section 1003.

In other cases in which the federal courts have addressed Section 1003, either the plaintiff has not sought money damages or the opinion does not specify the remedy sought. See *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998) (holding that 42 U.S.C. § 2000d-7(a) abrogated eleventh amendment immunity from claims for unspecified relief under Title IX); *Doe v. University of Illinois*, 138 F.3d 653, 656-60 (7th Cir. 1998) (holding that 42 U.S.C. § 2000d-7(a)(1) abrogated eleventh amendment immunity from claim for unspecified relief under Title IX), *petition for cert. filed*, 67 U.S.L.W. 3083 (U.S. July 13, 1998) (No. 98-126); *Clark v. California*, 123 F.3d 1267, 1269-70 (9th Cir. 1997) (holding that 42 U.S.C. § 2000d-7(a)(1) abrogated eleventh amendment immunity from claim for injunctive relief under Rehabilitation Act), *cert. denied*, 118 S. Ct. 2340 (1998); *Crawford v. Davis*, 109 F.3d 1281, 1282-83 (8th Cir. 1997) (holding that 42 U.S.C. § 2000d-7(a)(1) abrogated eleventh amendment immunity from claims for unspecified relief under Title IX); *Mrs. C. v. Wheaton*, 916 F.2d 69, 75-76 (2d Cir. 1990) (holding that 42 U.S.C. § 2000d-7 authorized "compensatory education award" without deciding whether monetary award was retroactive or prospective); see also *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1272-74 (M.D. Ala. 1998) (holding that 42 U.S.C. § 2000d-7 abrogated eleventh amendment immunity from suit for declaratory and injunctive relief from violations of Title VI); *Grimes v. Sobol*, 832 F. Supp. 704, 707 (S.D.N.Y. 1993) (holding that state education department not immune from suit seeking declaratory and injunctive relief from Title VI violations), *aff'd on other*

two-part inquiry, suggested in *Seminole Tribe*, that asks (1) whether Congress expressed with sufficient clarity an intention to abrogate the Eleventh Amendment; and (2) if so, whether Congress had the constitutional power to do so.¹⁷⁷ The lower courts have concluded that Congress expressed an unambiguous intention in Section 1003 to abrogate the Eleventh Amendment and that it had the power to do so under Section 5 of the Fourteenth Amendment.¹⁷⁸

These lower court decisions can plausibly be challenged on two grounds insofar as they relate to claims under Title VI. In his certiorari petition for the *Hopwood* defendants, Professor Tribe argued that Congress lacked the constitutional power to abrogate eleventh amendment immunity for violations of Title VI.¹⁷⁹ As discussed in the next subsection, that argument, though plausible, rests on a faulty premise. This Article nevertheless agrees that Congress did not effectively abrogate the state's eleventh amendment immunity from money damages in federal court. As explained in subsection c, that conclusion rests on Supreme Court precedents indicating that Congress did not make sufficiently clear an intention in Section 1003 to expose states to that type of relief.¹⁸⁰

b. *The Hopwood Defendants' Argument Against Title VI Damages Claims*

Professor Tribe's argument was straightforward: Congress enacted Title VI in the exercise of its power under the Spending Clause of Article I.¹⁸¹ *Seminole Tribe* makes clear that Congress cannot use its Article I powers to abrogate the Eleventh Amendment.¹⁸² Therefore, regardless of Congress's intention, Title VI does not authorize federal courts to award retroactive monetary relief against

grounds, 37 F.3d 857 (2d Cir. 1994); *Nihiser v. Ohio Env'tl Protection Agency*, 979 F. Supp. 1168, 1169, 1176 (S.D. Ohio 1997) (holding, in action for unspecified relief, that reasonable accommodation provisions of Rehabilitation Act and Americans with Disabilities Act did not fall within Congress's power under Section 5 of Fourteenth Amendment); *cf. Egerdahl v. Hibbing Community College*, 72 F.3d 615, 617, 619 (8th Cir. 1995) (stating, in case where it was not clear whether money damages were sought, that 42 U.S.C. § 2000d-7 "does abrogate states' Eleventh Amendment immunity from Title VI and Title IX claims").

177. *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996). See, e.g., *Coolbaugh v. Louisiana*, 136 F.3d 430, 433 (1998) (stating that "*Seminole Tribe* established a two-pronged test for determining the validity of Congress's abrogation of state immunity through the exercise of its Section 5 enforcement power"), *cert. denied*, 67 U.S.L.W. 320 (U.S. Oct. 5, 1998) (No. 97-1941).

178. See, e.g., *Crawford*, 109 F.3d at 1282-83 (noting that Congress "unequivocally" intended to abrogate states' eleventh amendment immunity rights, and Section 5 of Fourteenth Amendment grants Congress broad enforcement authority).

179. *Hopwood* cert. petition, *supra* note 22, at 23.

180. See *infra* notes 192-213 for a discussion of Supreme Court cases that establish a remedy-specific clear statement rule. Under the analysis proposed in this Article, unlike that advanced in Professor Tribe's petition for certiorari, Congress could amend Title VI to authorize money damages against the States for violations of it. See *infra* note 255 (discussing Congress's power to enact such amendment under Section 5 of the Fourteenth Amendment).

181. *Hopwood* cert. petition, *supra* note 22, at 23; see U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have Power . . . to . . . provide for . . . the general Welfare of the United States"); see also *South Dakota v. Dole*, 483 U.S. 203, 206-11 (1987) (discussing Congress's power under Spending Clause).

182. *Hopwood* cert. petition, *supra* note 22, at 23; see also *supra* notes 69-71 and accompanying text for a discussion of *Seminole Tribe*.

unconsenting states.¹⁸³ By virtue of the *Ex parte Young* doctrine, the federal courts are solely empowered to award prospective relief against the state officials responsible for violations of Title VI.¹⁸⁴

The problem with Professor Tribe's argument is its premise that Title VI rests solely on the Spending Clause. The premise is plausible, because a majority of the Supreme Court in *Guardians Ass'n v. Civil Service Commission* described Title VI as a Spending Clause statute.¹⁸⁵ *Guardians* was decided, however, before Congress amended Title VI in 1986 by enacting Section 1003.¹⁸⁶ The legislative history of Section 1003 indicates that it was enacted under Section 5 of the Fourteenth Amendment, as well as the Spending Clause.¹⁸⁷ More fundamentally, Congress did not need to express an intention to rely on Section 5 for Title VI to be upheld as an exercise of Section 5.¹⁸⁸ The Fifth Circuit has said that "the Court has been cautious about attributing Congressional intent to act under its authority to enforce the Fourteenth Amendment."¹⁸⁹ This is true when the

183. *Hopwood* cert. petition, *supra* note 22, at 23-24.

184. See *supra* notes 62-66 and accompanying text for a discussion of the *Ex parte Young* doctrine.

185. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598 (1983) (opinion of White, J., joined by Rehnquist, J.) (stating "Title VI is spending-power legislation"); *id.* at 633 (Marshall, J., dissenting) (referring to Justice White's "accurate characterization of Title VI as a contractual spending power provision") (internal quotation marks omitted); *id.* at 638 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.) (describing Title VI as "spending power legislation"); see also *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1398 (11th Cir. 1997) (en banc) (stating that, "[i]n *Guardians* . . . at least six members of the Supreme Court agreed that Title VI was enacted under the Spending Clause"), *cert. granted in part*, (U.S. Sept. 29, 1998) (No. 97-843); *cf.* *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1012 n.14 (5th Cir.) (stating that "[i]n *Guardians*, at least five Justices held that [T]itle VI was enacted pursuant to the Spending Clause"), *cert. denied*, 117 S. Ct. 165 (1996).

186. In a case decided after 1986, the Court found it unnecessary to determine whether Title IX, a statute modeled on Title VI, see *Cannon v. University of Chicago*, 441 U.S. 677, 694-703 (1979), was enacted not only under the Spending Clause but also under Section 5 of the Fourteenth Amendment. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 n.8 (1992).

187. See 132 CONG. REC. S28, 622-23 (1986) (statement of Sen. Cranston reading letter from U.S. Department of Justice stating that Section 1003 rested on both Spending Clause and Section 5 of the Fourteenth Amendment); 131 CONG. REC. S22, 346 (1985) (statement of Sen. Cranston, sponsor of predecessor to bill enacted as 1986 legislation, stating that bill was "clearly authorized" by Section 5 of Fourteenth Amendment and Spending Clause); see also S. REP. NO. 99-388, at 27 (interpreting Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), as permitting "exceptions" to Eleventh Amendment for federal statutes passed under Section 5 of Fourteenth Amendment and Spending Clause).

188. See *EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983) (rejecting argument that "Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection,' for '[t]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise'" (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948))); see also *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998) (determining that absence of evidence that Congress intended to rely on Section 5 in enacting Section 1003 "not fatal" to claim that Section 1003 fell within Section 5); *Abril v. Virginia*, 145 F.3d 182, 186 (4th Cir. 1998) (same); *Doe v. University of Illinois*, 138 F.3d 653, 657-58 (7th Cir. 1998) (same); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) (same).

189. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1012 n.14 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996); *accord Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 398 (5th Cir. 1996), *cert. de-*

Court is interpreting a statute that, it is claimed, was enacted under Section 5 of the Fourteenth Amendment.¹⁹⁰ In *EEOC v. Wyoming*, however, the Court made clear that no such caution is appropriate when, instead of deciding what a statute means, the Court must decide whether Congress had the power to enact it.¹⁹¹ The Fifth Circuit's decisions in *Rowinsky v. Bryan Independent School District* and *Canutillo Independent School District v. Leija* are consistent with this distinction, because each involved a question of statutory interpretation, rather than a question of congressional power.¹⁹² Although Professor Tribe was well within the bounds of advocacy in basing his eleventh amendment argument on the premise that Title VI rests solely on the Spending Clause, that premise should be rejected.

c. An Analysis of the Title VI Damages Claims under the Supreme Court's Clear Statement Cases

This author agrees with Professor Tribe that Title VI does not abrogate eleventh amendment immunity from money damages. That is not because Congress lacked the power to do so, but because Congress did not express its intention to do so with the clarity required by Supreme Court precedent. The lower courts that have held that Title VI *does* expose states to money damages have relied on Congress's clear expression in Section 1003 to abrogate eleventh amendment immunity to some extent.¹⁹³ That approach is not sufficiently discriminating under Supreme Court precedent governing the interpretation of statutes that eliminate sovereign immunity. Those precedents establish what might be called a "remedy-specific" clear statement rule. The rule requires federal statutes that eliminate sovereign immunity to be construed not to authorize money damages if they can plausibly be read to exclude that type of relief. Of particular relevance here is the Court's suggestion that Section 1003 can plausibly be read not to authorize money damages against the states.

The earliest of the Court's decisions applying the remedy-specific clear statement rule construed former Section 106(c) of the Federal Bankruptcy Code.¹⁹⁴ Section 106(c) provided that, "notwithstanding any assertion of sovereign immunity," a "determination" by a court under specified provisions of the Bankruptcy Code would "bind[] governmental units."¹⁹⁵ In *Hoffman v. Connecticut Department of Income Maintenance*, the Court held that Section 106(c)

nied, 117 S. Ct. 2434 (1997).

190. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981).

191. 460 U.S. at 243 n.18 (distinguishing approach in *Pennhurst* as applicable to questions of statutory interpretation and not questions of congressional power).

192. *Rowinsky*, 80 F.3d at 1008 (identifying question as whether Title IX imposed liability on school district for sexual harassment of student by peers); *Leija*, 101 F.3d at 395 (identifying issue as whether Title IX imposed strict liability on school for sexual abuse of student by teacher).

193. See, e.g., *Duffy v. Riveland*, 98 F.3d 447, 452 (9th Cir. 1996).

194. 11 U.S.C. § 106(c) (1988), recodified and amended by Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, tit. I, § 113, 108 Stat. 4107 (current version at 11 U.S.C. § 106(a) (1994)).

195. *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 100-01 (1989) (quoting 11 U.S.C. § 106(c) (1988)).

did not authorize monetary relief against a state in a federal bankruptcy proceeding.¹⁹⁶ The Court determined that the language of Section 106(c) was “more indicative of declaratory and injunctive relief than of monetary recovery,” and therefore did not satisfy the Court’s clear-statement rule.¹⁹⁷

In *United States v. Nordic Village, Inc.*,¹⁹⁸ the Court extended *Hoffman* by holding that former Section 106(c) did not waive the federal government’s sovereign immunity from retroactive monetary relief.¹⁹⁹ Again, the Court relied on the clear-statement rule.²⁰⁰ The Court in *Nordic Village* framed the rule in a way that required a clear expression of congressional intent, not only to eliminate sovereign immunity, but also, and more specifically, to authorize money damages. The Court explained that the existence of a “plausible” interpretation of Section 106(c) under which monetary relief was not authorized sufficed “to establish that a reading imposing monetary liability on the Government is not ‘unambiguous’ and therefore should not be adopted.”²⁰¹ As construed by the Court, Section 106(c) eliminated the federal government’s sovereign-immunity defense only with respect to declaratory and injunctive relief.²⁰²

In *United States Department of Energy v. Ohio*,²⁰³ the Court applied its remedy-specific clear statement rule to a set of federal environmental statutes.²⁰⁴ The State of Ohio had relied on these statutes in seeking civil penalties from the United States Department of Energy for illegal pollution at a federal uranium-processing plant in Ohio.²⁰⁵ The Court held that the statutes waived federal sovereign immunity from prospective, “coercive” relief—such as contempt fines to ensure compliance with court orders—but not from retroactive, “punitive” relief—such as monetary penalties for past violations.²⁰⁶ As in *Nordic Village*, it

196. *Id.* at 101-04 (plurality opinion); *id.* at 105 (O’Connor, J., concurring in the judgment).

197. *Id.* at 101-02.

198. 503 U.S. 30 (1992).

199. *Id.* at 33-39.

200. *See id.* at 33 (“Waivers of the Government’s sovereign immunity, to be effective, must be ‘unequivocally expressed.’” (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990))).

201. *Id.* at 37; *see also* *Dellmuth v. Muth*, 491 U.S. 223, 228-30 (1989) (holding that federal statute did not authorize federal-court suits against States).

202. *See Nordic Village Inc.*, 503 U.S. at 35 (finding that Section 106(c) could reasonably be read to permit “declaratory and injunctive—though not monetary—relief against the Government”) (internal quotation marks omitted); *id.* at 36 (explaining that this reading served the important function of allowing bankruptcy court, despite federal government’s longstanding sovereign-immunity objections, “to determine the amount and dischargeability of an estate’s liability to the Government, such as unpaid federal taxes”). In response to *Hoffman* and *Nordic Village*, Congress amended Section 106(c) explicitly and unequivocally to permit monetary relief. *See supra* note 195 citing legislation amending Section 106(c); *In re Sacred Heart Hosp.*, 133 F.3d 237, 243 n.8 (3d Cir. 1998) (noting that amendment was intended to overrule *Nordic Village*).

203. 503 U.S. 607 (1992).

204. *Id.* at 611-15 (describing facts and procedural history of case).

205. *Id.*

206. *Id.* at 615-19 & n.15 (holding that citizen-suit provisions of Clean Water Act (“CWA”) waived federal sovereign immunity from actions for “coercive” relief, but not from actions for civil penalties for past violations); *id.* at 620-27 (holding same with respect to provisions of CWA governing federal facilities); *id.* at 627-28 (holding same with respect to federal-facilities provision of Resource

was not enough for the Court in *Department of Energy* that the statutes expressed a clear intention to eliminate sovereign immunity; the Court insisted they clearly express the specific intention to expose the sovereign to retroactive monetary relief.²⁰⁷

The most recent case applying the remedy-specific clear statement rule is *Lane v. Peña*.²⁰⁸ James Griffin Lane sought compensatory damages for being discharged from the United States Merchant Marine Academy because of his diabetes, a claimed violation of Section 504(a) of the Rehabilitation Act of 1973.²⁰⁹ The Court held that nothing in the Act waived the federal government's sovereign immunity from money damages for such violations.²¹⁰ Instead, the Court maintained that the Act could be read to waive sovereign immunity only with respect to prospective relief, such as injunctions against continuing violations.²¹¹ As in prior cases, the Court in *Lane* distinguished the issue of whether the Act waived sovereign immunity from the issue of whether it authorized retroactive monetary relief. The Court reasoned that "Congress is free to waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary damages awards."²¹² Accordingly, "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."²¹³ This reasoning also applies when Congress abrogates eleventh amendment immunity, as demonstrated by *Hoffman*.²¹⁴

Lane is important not only for its application of the remedy-specific clear statement rule but also for its discussion of the very same statutory provision that the *Hopwood* plaintiffs rely upon in seeking money damages under Title VI—Section 1003 of the Rehabilitation Act Amendments of 1986. As discussed above, Section 1003 governs remedies against the States for violations of Title VI and other anti-discrimination statutes, including the Rehabilitation Act of

Conservation and Recovery Act of 1976 ("RCRA").

207. *See id.* at 627 (stating, of CWA's federal-facilities provisions: "as against the clear waiver for coercive fines the indication of a waiver as to those that are punitive is less certain. The rule of narrow construction therefore takes the waiver no further than the coercive variety"); *see also id.* at 627-28 (agreeing with lower court that RCRA's federal-facility provision "can reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures") (internal quotation marks omitted).

208. 518 U.S. 187 (1996).

209. *Id.* at 189-90 (describing facts); *see also* Rehabilitation Act of 1973, § 504(a), 87 Stat. 355, codified as 29 U.S.C. § 794(a) (1994) (prohibiting discrimination on basis of disability "under any program or activity conducted by any Executive agency").

210. *Lane v. Peña*, 518 U.S. 187, 191-97 (1996) (analyzing plaintiff's claim that money damages against federal government were authorized by Sections 504(a) or 505(a)(2) of the Act, as construed in light of Section 1003 of the Rehabilitation Act Amendments of 1986).

211. *See id.* at 190, 196 (noting that federal government did not dispute propriety of injunctive relief granted by lower court in that case).

212. *Id.* at 196.

213. *Id.* at 192.

214. *See supra* notes 194-97 for a discussion of *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989).

1973.²¹⁵ To understand *Lane's* relevance to the Title VI claims in *Hopwood*, one must examine the structure and text of Section 1003, Mr. Lane's argument regarding Section 1003, and the *Lane* Court's response to that argument.

Section 1003 consists of two subsections, though only the first—subsection (a)—is relevant here (subsection (b) is merely an effective-date provision).²¹⁶ Subsection (a) is divided into two parts. Subsection (a)(1) provides:

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.²¹⁷

This part of subsection (a) unambiguously expresses Congress's intent to abrogate the states' eleventh amendment immunity for violations of certain anti-discrimination statutes.²¹⁸ Subsection (a)(2) describes the remedies available against a State that violates one of those statutes:

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.²¹⁹

The bifurcation of Section 1003(a) is significant because it emphasizes Congress's separately expressed intention to not only abrogate the States' eleventh amendment immunity from liability but to authorize certain remedies against them.²²⁰

Mr. Lane relied on Section 1003 to argue that two other provisions, both contained in the Rehabilitation Act, waived the federal government's sovereign immunity from money damages for violations of Section 504 of that Act.²²¹ In particular, Lane argued that Section 1003(a)(2) "reveals congressional intent to equalize the remedies available against all defendants."²²² He relied on Section

215. See *supra* notes 174-80 and accompanying text for a discussion of Section 1003 of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1845, codified at 42 U.S.C. § 2000d-7 (1994).

216. See 42 U.S.C. § 2000d-7 (1994).

217. 42 U.S.C. § 2000d-7(a)(1) (1994).

218. See *Lane v. Pena*, 518 U.S. 187, 198 (1996) (stating that, "[b]y enacting § 1003, Congress sought to provide the sort of unequivocal waiver that our precedents demand").

219. 42 U.S.C. § 2000d-7(a)(2) (1994).

220. *Cf. Lane*, 518 U.S. at 197 (accord[ing] significance to Congress's inclusion in Rehabilitation Act of provision that specifically addressed remedies against federal defendants).

221. See *id.* at 197-200 (addressing plaintiff's argument that his reading of Sections 504(a) and 505(a)(2) of the Rehabilitation Act was supported by Section 1003 of the Rehabilitation Act Amendments of 1986).

222. *Id.* at 198.

1003(a)(2)'s authorization of remedies against states "to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State."²²³ In Lane's view, the term "public ... entity" encompassed federal agencies and officials such as those from whom he sought damages, and Section 1003(a)(2) established that money damages were equally available from these "public" entities and "private" entities.²²⁴

The Court rejected this argument. It determined that Section 1003(a)(2) was "open to" interpretations that did not authorize money damages against the federal government.²²⁵ The Court observed that Section 1003(a)(2)'s separate reference to "public" and "private" entities "suggests that there is a distinction to be made in terms of the remedies available against the two classes of defendants."²²⁶ The Court reasoned that the distinction could be that money damages were not available against "public" entities—such as the federal defendants sued in *Lane*—whereas money damages *were* available against "private" entities.²²⁷ Thus, the Court concluded that, assuming the term "public ... entity" referred to the federal defendants, Section 1003(a)(2) was "susceptible of" an interpretation that accorded with the Court's holding that money damages were not available against those entities.²²⁸

The Court suggested that Section 1003(a)(2) likewise plainly failed to authorize money damages against states. The Court offered the following as a plausible interpretation of that provision: "By reference to 'public or private entit[ies],' Congress meant [in Section 1003(a)(2)] only to subject the States to the scope of remedies available against *either* public or private [Section] 504 defendants, whatever the *lesser* (or perhaps the greater) of those remedies might be."²²⁹ The "lesser" remedies meant only those remedies—*not* including money damages—available against "public" entities such as the federal defendants in *Lane*. Thus, the Court determined that Section 1003 could reasonably be construed not to authorize money damages against the States, because such damages were not among the "lesser" remedies available against the federal government.²³⁰ That interpretation would bar an award of money damages against a

223. 42 U.S.C. § 2000d-7(a)(2) (1994).

224. *Lane*, 518 U.S. at 198 (describing Lane's argument as follows: "The 'public entities' to which § 1003 refers, Lane concludes, must include the federal Executive agencies named in § 504(a), and those agencies must be subject to the same remedies under § 504(a), including monetary damages, as are private entities.").

225. *Id.* at 199.

226. *Id.* at 199-200.

227. *Id.*

228. *Id.* at 199.

229. *Id.* (second emphasis added).

230. Section 1003(a)(2)'s authorization of remedies "at law" could be construed to allow money damages, since that is the prototypical remedy available at law. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (describing compensatory damages as "classic form of legal relief"); see also *Feltner v. Columbia Pictures Television, Inc.*, 118 S. Ct. 1279, 1284 (1998) (monetary damages "generally are thought to constitute legal relief"). The reference could also, however, plausibly be construed to refer to nonmonetary, prospective relief, including mandamus, a type of relief that would not be available against private entities. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103

state for violations of Title VI.²³¹

The conclusion that Section 1003 does not authorize money damages is buttressed by the existence of federal statutes that specifically and unambiguously do expose states to money damages. One example is the Copyright Remedy Clarification Act of 1992.²³² That statute not only abrogates eleventh amendment immunity but also, in a separate section, authorizes recovery of "actual damages."²³³ The Copyright Remedy Clarification Act is not the only example of legislation that would satisfy the Court's remedy-specific clear statement rule.²³⁴ The Court has considered these other statutes in determining whether

HARV. L. REV. 687, 696 (1990) (listing "historically legal" forms of relief as "ejectment, replevin, mandamus, prohibition, and habeas corpus"); *see generally* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 192 (1965) (describing writ of prohibition); *id.* at 210-12 (describing history of mandamus); *id.* at 193, 389-90 (discussing habeas corpus). Thus, the reference in Section 1003(a)(2) to remedies "at law" does not undermine the Court's determination in *Lane* that Section 1003(a)(2) can be read as not authorizing money damages against the States.

231. Although *Lane* strongly suggests that Section 1003 does not authorize money damages against the State, the Court is not bound by that suggestion. The Court in *Lane* did not squarely address the question whether Section 1003 authorizes such damages. Moreover, *Lane's* discussion of the "lesser remedies" that Congress may have intended in Section 1003 to authorize against States was not necessary to the Court's rejection of *Lane's* argument. The text *supra* discusses only one of the two interpretations of Section 1003 that the Court in *Lane* found plausible and under which money damages would not be available against a federal executive agency for violations of Section 504(a) of the Rehabilitation Act. The Court determined that another plausible interpretation was that Section 1003's reference to "public" entities referred only to "non-federal public entities receiving federal financial assistance," such as "municipal hospitals" and "local school districts." *Lane*, 518 U.S. at 199. Under this interpretation, Section 1003's reference to "public" entities did not refer to the federal government at all, and Section 1003 was therefore irrelevant to the issue before the Court. Having identified this interpretation as a plausible one, the Court did not need to posit any other plausible interpretations of Section 1003 in order to reject *Lane's* argument under that provision. Although *Lane* does not compel the Court to hold that monetary damages are unavailable under Section 1003, other considerations, discussed in the text *infra*, support such a holding.

232. Pub. L. No. 101-553, § 2(a)(2), 104 Stat. 2749 (1990).

233. As amended, 17 U.S.C. § 511 (1994) provides (emphasis added):

(a) In General.—Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 119, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.

(b) Remedies.—In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State, instrumentality of a State, or officer or employee of a State acting in his or her official capacity. Such remedies include impounding and disposition of infringing articles under section 503, actual damages and profits and statutory damages under section 504, costs and attorney's fees under section 505, and the remedies provided in section 510.

234. *See, e.g.*, Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified in relevant part at 15 U.S.C. § 1125 (1994)) (providing that, in civil action, state entities "shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity") and 15 U.S.C. § 1122(b) (1994) (providing that remedies available against States

Section 1003 was clear enough to expose the states to money damages.²³⁵

While interpreting Section 1003 as a statute that does not authorize money damages would reduce the statute's usefulness, it would not eliminate it. Under such an interpretation, Section 1003 would still authorize prospective relief, such as declaratory and injunctive relief, directly against the states. That relief would otherwise be barred by the Eleventh Amendment.²³⁶ There are distinct advantages to getting prospective relief directly against the State, instead of getting it against state officers under the *Ex parte Young* doctrine. First, it ensures that the court order will bind all of the officials necessary to provide the relief. That is a significant benefit, because it is often difficult to identify (and sue) all of the officials who possess the appropriate authority to provide the relief requested in a lawsuit.²³⁷

A recent example of a case that could have posed difficult remedial problems as an officer suit for prospective relief was *Seminole Tribe*.²³⁸ In that case,

include "actual damages"); 7 U.S.C. § 2570(b) (1994) (providing for recovery of "damages" from States for violations of federal plant variety protection statutes); 17 U.S.C. § 2570(b) (1994) (authorizing recovery of "actual damages" from States for violation of federal provisions protecting computer chips); 25 U.S.C. § 941d(j) (1994) (authorizing cause of action "for money damages" by Native American tribe against State of South Carolina); 35 U.S.C. § 296(b) (1994) (patent provision authorizing suit for "damages" against States); *see also* *Varner v. Illinois State Univ.*, 150 F.3d 706, 718 (7th Cir. 1998) (holding that, as amended in 1991, Title VII expressly abrogated States' eleventh amendment immunity from "compensatory and punitive damages," 42 U.S.C. § 1981a(a)(1) (1994)); *cf.* 20 U.S.C. § 1403(b) (providing that, in action against states for violation of Americans with Disabilities Act, "remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in the suit against any public entity other than a State"); 20 U.S.C. § 7709(e)(3) (1994) (in action against state for violation of federal funding statute, "[t]he court shall grant such relief as the court determines is appropriate"); 42 U.S.C. § 12202 (1994) (providing that, in action against state for violation of Americans with Disabilities Act, "remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State"); *cf.* *Pennsylvania v. Union Gas*, 491 U.S. 1, 7-13 (1980) (holding that certain federal environmental statutes abrogated eleventh amendment immunity from retroactive monetary damages); *id.* at 29-30 (Scalia, J., concurring in part and dissenting in part) (agreeing that statutes abrogated Eleventh Amendment).

235. *See* *Lane v. Pena*, 518 U.S. 187, 194-95, 200 (1996) (comparing provisions before Court that were said to waive federal sovereign immunity to other statutory provisions waiving sovereign immunity); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (same).

236. *See supra* note 112 and accompanying text for a discussion of how the Eleventh Amendment bars all forms of federal court relief directly against State.

237. *See, e.g.*, *Blackmar v. Guerre*, 342 U.S. 512, 514-15 (1952) (rejecting former employee's suit challenging his discharge from Veteran's Administration because no effective relief could be granted as to only defendant properly before court). *See generally* James M. Hirschhorn, *Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1851-74 (1984) (discussing Eleventh Amendment limitations on actions against state executive-branch officials seeking relief that require funding by state legislature); *see also* Clark Byse, *Proposed Reforms in Federal 'Nonstatutory' Judicial Review, Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1493-99 (1962) (describing case law concerning "indispensable parties" in actions against federal officers; concluding that it "causes confusion and wasteful litigation"); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 438-51 (1962) (same).

238. 517 U.S. 44 (1996).

the Seminole Tribe of Indians sued the Governor of Florida, as well as the State, for failure to negotiate on a state-tribal compact governing gambling on a Native American reservation located inside the State.²³⁹ The Court held that the suit against the Governor did not fall within the *Ex parte Young* doctrine, because Congress intended to preclude relief under that doctrine.²⁴⁰ If, contrary to that holding, the suit against the Governor had been permitted and the Tribe had prevailed, a question could have arisen whether the Governor could be required to enter into a compact even if he lacked authority to do so under state law.²⁴¹ Second, obtaining relief directly against the State ensures that, if a court's remedial order is violated, the plaintiff can seek monetary contempt sanctions payable out of the state treasury. Such sanctions might otherwise be barred by sovereign immunity.²⁴² These advantages seem to defeat an argument that Section 1003 cannot plausibly be read to exclude money damages because such a reading would render it useless.²⁴³

More serious arguments against the interpretation of Section 1003 suggested in *Lane* center on the issue of notice. One argument is that Congress lacked notice in 1986 that Section 1003 would have to satisfy the Court's remedy-specific clear statement rule, which developed primarily in cases decided after 1986.²⁴⁴ This argument is undermined to some extent by pre-1986 Supreme Court decisions that rigorously applied the clear statement rule (though perhaps with less rigor than later Court decisions).²⁴⁵ Moreover, whatever the merits of this argument, the Court has implicitly rejected it by applying an increasingly

239. *Id.* at 51.

240. *Id.* at 1132-33.

241. *See id.* at 1133 n.17 (citing case law from Kansas holding that its Governor could not enter into compact without legislative approval); *see also* Monaghan, *supra* note 71, at 119 & n.131 (asserting that federal statute under which Seminole Tribe sued "seemingly rearranges state lawmaking authority by superseding the Florida state law that requires legislative approval of Indian tribe compacts").

242. *See* Hirschhorn, *supra* note 237, at 1861-65 (arguing that Supreme Court case law leaves unclear whether Eleventh Amendment bars civil contempt order requiring State to fund compliance with federal-court order against state officials); *see also* Timothy J. Simeone, *Rule 11 and Federal Sovereign Immunity: Respecting the Explicit Waiver Requirement*, 60 U. CHI. L. REV. 1043, 1052-58 (1993) (arguing that sovereign immunity protects federal government from sanctions under Fed. R. Civ. P. 11); Recent Cases, 108 HARV. L. REV. 965, 970 n.34 (1995) (noting that "[c]ourts have given uncertain and varying indications on the applicability of sovereign immunity in the contempt context"; citing cases).

243. *Cf.* *Lane v. Pena*, 518 U.S. 187, 190, 196 (1996) (observing that government did not contest propriety of injunctive relief); *Department of Energy v. Ohio*, 503 U.S. 607, 619 (1992) (observing that statutes under which plaintiffs sued federal government would "be effective," even if construed not to authorize retroactive monetary relief, because they "concededly authorize coercive sanctions"); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (observing that former Section 106(c), "though not authorizing claims for monetary relief, would nevertheless perform a significant function" by obviating sovereign-immunity objections to declaratory relief); *Hoffman v. Connecticut Income Maintenance Dep't*, 492 U.S. 96, 102 (1989) (explaining that former Section 106(c) "is more indicative of declaratory . . . relief than of monetary recovery" from states).

244. *See* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 780 (1995) (arguing that Court's current, stringent version of clear statement rule originated in 1991).

245. *See* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 254 (1985) (Brennan, J., dissenting) (tracing use of clear-statement rule in Eleventh Amendment context to 1973).

stringent clear statement rule to past enactments.²⁴⁶

A second notice argument could be made in *Hopwood*. If the *Hopwood* defendants made an argument based on the remedy-specific clear statement rule at this point in the case, the plaintiffs could assert unfair surprise. Regardless, there is no rule barring the courts from considering this new argument. The Supreme Court has made clear that an eleventh amendment defense can be raised at any stage of a case.²⁴⁷ Thus, the courts in *Hopwood* can address the new form that the defendants' eleventh amendment argument would take.²⁴⁸

The strongest argument against interpreting Section 1003 to preserve the states' immunity from money damages would challenge the clear-statement rule on which that interpretation rests. Indeed, the rule has generated much critical commentary.²⁴⁹ At the same time, the commentators recognize that the *Hoffman-Nordic Village* approach is firmly established.²⁵⁰ The most cogent criticism of the rule, in this author's view, is that it often defeats congressional intent.²⁵¹ For example, the legislative history of Section 1003 expresses an inten-

246. See *id.* at 257 (criticizing Court's rules for determining whether Congress has abrogated Eleventh Amendment on ground that "[w]hatever rule is decided upon at a given time is then applied retroactively to actions taken by Congress").

247. See, e.g., *Alabama v. Pugh*, 438 U.S. 781, 782 n.1 (1978) (holding that defendants did not waive Eleventh Amendment defense by failing to raise it in lower court); *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974) (same); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 466-67 (1945) (same).

248. Cf. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378-80 (1995) (holding that petitioner in Supreme Court could advance argument in support of constitutional claim despite disavowing that argument in court of appeals).

249. See, e.g., *Chemerinsky*, *supra* note 72, at 332 ("clear statement rule" applicable to purported statutory abrogations of Eleventh Amendment "is unjustified in theory and is applied in an unduly restrictive manner"); *Nagle*, *supra* note 244, at 773 (criticizing clear-statement rule on grounds that "the Constitution does not entrust the judiciary with the responsibility for identifying which policy values merit greatest protection, and interpretive rules that Congress cannot satisfy when drafting a statute conflict with legislative supremacy"); *id.* at 799-800 & nn.132-34 (citing other commentary criticizing Court's treatment of sovereign immunity); see also William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 621-23, 629-45 (1992) (discussing Court's strict application of clear statement rule against congressional abrogation of eleventh amendment immunity); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 958-59 (1992) (suggesting clear statement rule may exclude analysis by court which would lead to result implicit in statute); cf. George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363, 389-94 (1985) (defending clear statement rule in Eleventh Amendment cases).

250. See *Lane v. Pena*, 518 U.S. 187, 212 (1996) (Stevens, J., dissenting) (arguing that clear statement rules "should be discarded"); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 39 (1992) (Stevens, J., dissenting) (arguing that clear statement rules should be "reexamine[d]"); *Chemerinsky*, *supra* note 72, at 332 (stating, "[t]he rejection of state liability in *Dellmuth* and *Hoffman*, despite strong support for federal court jurisdiction in the statutes' text and legislative history, indicate that only a very explicit, truly unmistakable statutory provision warrants state liability in federal court."); *Meltzer*, *supra* note 63, at 29 (concluding that since 1990, "clear statement" rule that Court applies to purported abrogations of Eleventh Amendment has been "enforced with undue strictness").

251. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 248-52 (Brennan, J., dissenting) (arguing majority's application of clear statement rule caused it to ignore congressional intent);

tion to make states liable in money damages.²⁵² Currently, however, the Court's clear-statement precedents preclude reliance on legislative history for evidence of Congress's intention to authorize money damages against a sovereign.²⁵³ This categorical exclusion of that source of evidence is hard to justify.²⁵⁴

In sum, Title VI provides a promising—but, in this author's view, ultimately unavailing—basis for the claims for money damages in *Hopwood*. Prior litigation has established that the *Hopwood* defendants intentionally violated Title VI, and, in the absence of eleventh amendment immunity, money damages would be available for the violation. Furthermore, Section 1003 of the Rehabilitation Act Amendments of 1986 unequivocally expresses an intention to abrogate the states' eleventh amendment immunity from liability for such violations. Under Supreme Court precedent, however, this is not enough to authorize money damages. For that remedy to be available, a statutory abrogation "must extend unambiguously to such monetary claims."²⁵⁵ The Court's opinion in *Lane v. Pena* indicates that Section 1003 does not do so. For money damages to be recoverable under Title VI in cases like *Hopwood*, Congress must (and could) amend the statute specifically and clearly to authorize such damages.²⁵⁶

MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 210 (2d ed. 1990) (discussing how clear statement rule "might be challenged as an improper judicial refusal to enforce ascertainable legislative intent").

252. See S. REP. NO. 99-388, at 28 (1986). The legislative history provides that:

[s]ection 1003 also explicitly provides that in a suit against a State for a violation of any of these statutes, remedies, *including monetary damages*, are available to the same extent as they would be available for such a violation in a suit against any public or private entity other than a State.

Id. (emphasis added).

253. See *Lane*, 518 U.S. at 192 (stating that, "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text") (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1993)); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (stating that evidence of congressional intent to abrogate eleventh amendment immunity "must be both unequivocal and textual").

254. See *Dellmuth*, 491 U.S. at 239 (Brennan, J., dissenting) (stating that, "[a] genuine concern to identify Congress' purpose would lead the Court to consider . . . the statute's legislative history"); *Nagle*, *supra* note 244, at 828-29 (arguing that resort to legislative history may be necessary "to fulfill the obligation to remain faithful to the immunity decision Congress made").

255. *Lane*, 518 U.S. at 192.

256. If Section 1003 were construed to authorize monetary damages against the states for violations of Title VI, it would be necessary to decide whether Section 1003 falls within Congress's power to abrogate the Eleventh Amendment. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) (stating that inquiry into whether Congress has acted within its powers must be undertaken). Section 1003 seems to fall easily within Congress's power under Section 5 of the Fourteenth Amendment, insofar as it authorizes money damages for Title VI violations. In *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997), the Court held that legislation enacted under Section 5 must be "congruent" with and "proportionate" to the Fourteenth Amendment violation Congress intends to prevent or remedy. To the extent that Title VI proscribes only conduct that violates the Equal Protection Clause, see *supra* note 166 and accompanying text, Section 1003's authorization of a remedy for that violation is perfectly "congruent" with the scope of the Clause. Cf. *Varner v. Illinois State Univ.*, 150 F.3d 706, 716-17 (7th Cir. 1998) (holding that Equal Pay Act fell within Section 5, even though proof of violation did not require proof of intentional discrimination); *Humenansky v. Regents of Univ. of Minn.*, 152 F.3d 822, 827-28 (8th Cir. 1998) (holding that Congress lacked power under Section 5 to abrogate states'

5. 42 U.S.C. § 1988

Section 1988 permits courts to award “a reasonable attorney’s fee” to parties who prevail in actions to enforce, among other provisions, Sections 1981, 1983, and Title VI.²⁵⁷ Section 1988 is the only provision under which the *Hopwood* plaintiffs might recover some, albeit limited, monetary relief.

Although an award of attorney’s fees is monetary relief, the Court has retreated from its early suggestion that such an award is authorized because Section 1988 abrogates the eleventh amendment immunity. In *Hutto v. Finney*,²⁵⁸ the Court suggested two reasons for rejecting an eleventh amendment challenge to an award under Section 1988 that had been entered in a federal-court action against a state official. First, Section 1988 was a valid exercise of Congress’s power under Section 5 of the Fourteenth Amendment to abrogate the state’s eleventh amendment immunity from retroactive monetary relief.²⁵⁹ Second, the fee award did not implicate the Eleventh Amendment at all, because it was ancillary to “litigation seeking prospective relief” and thus came within the *Ex parte Young* exception.²⁶⁰ In *Missouri v. Jenkins*,²⁶¹ the Court embraced the second rationale to the near-total exclusion of the first when it again upheld a fee award against a state under Section 1988. The Court in *Jenkins* described *Hutto* as holding that “an award of attorney’s fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment.”²⁶² Significantly, the *Jen-*

eleventh amendment immunity from actions for violations of Age Discrimination in Employment Act); *Nihiser v. Ohio Envtl. Protection Agency*, 979 F. Supp. 1168, 1176 (S.D. Ohio 1997) (holding that accommodation provisions of Rehabilitation Act and Americans with Disabilities Act exceeded Congress’s power under Section 5). Moreover, an award of monetary damages for the violation seems “proportional” to the nature of the harm, because, “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.” *Butz v. Economou*, 438 U.S. 478, 485 (1978) (quoting *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971)) (bracketed text supplied by Court in *Economou*); cf. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992) (determining remedies available for violation of Title VI in light of “traditional presumption” that federal courts can award all appropriate remedies for violation of federal statute that gives rise to cause of action). Interests in “liberty” are expressly protected by the Due Process Clause, rather than the Equal Protection Clause of the Fourteenth Amendment. Yet it seems obvious that the interests protected by Equal Protection Clause are entitled to as much congressional protection as are the liberty interests protected by the Due Process Clause. See *Flores*, 117 S. Ct. at 2163-64 (describing Congress’s power under Section 5 to enforce Due Process Clause of Fourteenth Amendment by relying on case law concerning Congress’s power under Section 5 to enforce Equal Protection Clause).

257. 42 U.S.C. § 1988 (1982).

258. 437 U.S. 678 (1978).

259. See *id.* at 693-94 (finding Congress “undoubtedly intended” in Section 1988 to exercise its power under Section 5 to authorize retroactive relief against states “when their officials are sued in their official capacities”). The Court in *Hutto* relied to a great extent on the legislative history of Section 1988 in determining that Congress intended in that statute to abrogate the Eleventh Amendment. See *id.* at 694 & n.22 (discussing legislative history). In cases after *Hutto*, the Court held that the clear statement rule cannot be satisfied by resort to legislative history. See *supra* note 72 and accompanying text.

260. See *Hutto*, 437 U.S. at 694-95 (rejecting State’s argument that Section 1988 did not express with sufficient clarity an intent to abrogate Eleventh Amendment).

261. 491 U.S. 274 (1989).

262. *Id.* at 279; see also *id.* (describing fee award ancillary to litigation seeking only prospective

kins Court did not repeat its suggestion in *Hutto* that Section 1988 abrogated eleventh amendment immunity. Instead, the Court in *Jenkins* saw "no need ... to determine whether Congress ha[d] spoken sufficiently clearly [in Section 1988] to meet a 'clear statement' requirement" for an abrogation.²⁶³ The Court in *Jenkins* thus moved away from the abrogation rationale, presumably because Section 1988 does not satisfy the stringent version of the clear statement that the Court developed after *Hutto*.²⁶⁴ In so doing, the Court strongly suggested that attorney's fees are recoverable under Section 1988 only because, and only to the extent that, in contrast to money damages, they do not constitute retroactive monetary relief.

Under *Hutto* and *Jenkins*, it is clear that the *Hopwood* plaintiffs can recover some of their attorney's fees. If the appellate courts leave intact the district court's final judgment awarding plaintiffs declaratory and injunctive relief, they will be "prevailing parties" within the meaning of Section 1988.²⁶⁵ The fees they incurred in obtaining that relief will be recoverable to the extent that they are "reasonable."²⁶⁶

It is doubtful, however, that the *Hopwood* plaintiffs will recover the fees that they have incurred in asserting their claims for money damages. For one thing, they should not prevail on those claims, because, as discussed, the claims are barred by the Eleventh Amendment under current precedent.²⁶⁷ If the plaintiffs do prevail on their monetary claims, a court would have to decide whether Section 1988 authorizes an award of fees incidental to the recovery of money damages. The resolution of that issue depends on the continued vitality of the Court's suggestion in *Hutto* that Section 1988 abrogates the states' eleventh

relief as "beyond the reach of the Eleventh Amendment"); *id.* (stating *Hutto* "made clear that the application of § 1988 to the States did not depend on congressional abrogation of the States' immunity"); *id.* at 280 (stating, "The holding of *Hutto*, therefore, was not just that Congress had spoken sufficiently clearly to overcome Eleventh Amendment immunity in enacting § 1988, but *rather* that the Eleventh Amendment did not apply to an award of attorney's fees ancillary to a grant of prospective relief") (emphasis added). The Court's move away from the abrogation rationale in *Missouri v. Jenkins* is perhaps most clearly signaled by its use of the word "rather," instead of "also," in the foregoing passage.

263. *Id.* at 281.

264. *See id.* at 280 (asserting that, because holding in *Hutto* based on inapplicability of Eleventh Amendment to fee award ancillary to prospective relief, "[t]hat holding is unaffected by our subsequent jurisprudence concerning the degree of clarity with which Congress must speak in order to override Eleventh Amendment immunity"). As discussed *supra* note 72, by distancing itself from the abrogation rationale suggested in *Hutto*, the Court in *Jenkins* also cast serious doubt on its suggestion in *Hutto* that the "clear statement" rule is watered down for legislation enacted under Section 5 of the Fourteenth Amendment.

265. *See, e.g.,* *Farrar v. Hobby*, 506 U.S. 103, 109-14 (1992) (discussing meaning of "prevailing party" for purposes of Section 1988).

266. 42 U.S.C. § 1988 (1982); *see also* *Farrar*, 506 U.S. at 114-16 (discussing reasonableness of fee in light of merely technical victory); *City of Burlington v. Dague*, 505 U.S. 557, 562-67 (1992) (holding that "reasonable" fee under Section 1988 does not include enhancement for contingency of recovery); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 92-102 (1991) (finding that "reasonable" fee under Section 1988 does not include fees of expert witnesses).

267. *See supra* notes 109-256 and accompanying text for an analysis of claims for monetary damages in light of Eleventh Amendment.

amendment immunity from retroactive monetary relief. That, in turn, is a matter that the Supreme Court will have to decide.²⁶⁸

IV. THE IRRATIONALITY OF SOVEREIGN AND OFFICIAL IMMUNITY

Hopwood belies the notion that immunity is conservative-friendly,²⁶⁹ because immunity here defeats claims that conservatives would traditionally support, namely, damages for victims of government-sponsored affirmative action.²⁷⁰ Generally, *Hopwood* is not exceptional. In general, the immunity doctrines operate largely without regard to the merits of the individual claims that they defeat. Indeed, it is hard to identify *any* principled basis on which they predictably operate.

First, consider only the immunity principles governing state and local government. Both state and local governments must comply with the Fourteenth Amendment; for purposes of that Amendment, they are both state actors.²⁷¹ In contrast, local governments are not state actors for purposes of the Eleventh Amendment.²⁷² Thus, while a State can invoke the Eleventh Amendment when sued in federal court for money damages caused by its violation of the Fourteenth Amendment, a city or county cannot do so.

Second, consider the interaction of sovereign and official immunity. The Court has often said that the states' sovereign immunity from suits in federal courts is meant to avoid the "indignity" of haling one sovereign into the courts of another.²⁷³ It seems, however, no less of an affront to the states to permit fed-

268. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (stating that "the Court of Appeals should . . . leav[e] to this Court the prerogative of overruling its own decisions").

269. See, e.g., Joseph F. Riga, *State Immunity in Bankruptcy After Seminole Tribe v. Florida*, 28 SETON HALL L. REV. 29, 30 (1997) (stating that "a resilient core of conservative Justices has been carrying on a 'love affair' with the concept of sovereign immunity, and, particularly, state sovereign immunity for many years"); see also Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbra*, 77 B.U. L. REV. 1089, 1097-1106 (1997) (explaining that "conservative" majority of court has issued recent decisions affirming sovereign immunity); Andrew I. Gavil, *Interdisciplinary Aspects of Seminole Tribe v. Florida: State Sovereign Immunity in the Context of Antitrust, Bankruptcy, Civil Rights and Environmental Law*, 23 OHIO N.U. L. REV. 1393, 1399 (1997) (predicting that "conservative wing" of Court may use sovereign immunity to restrict scope of Fourteenth Amendment in future).

270. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., joined by Thomas, J., concurring in the judgment and concurring in part) (arguing government can never discriminate on basis of race and that "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole"); see also June Kronholz, *Politics & Policy: Education Agency Holds Political Hot Potato by Involving Itself in Affirmative-Action Issue*, WALL ST. J., July 30, 1997, at A16 (describing "conservatives' ire" at federal investigation of Texas higher education in wake of *Hopwood*).

271. See *supra* note 106 and accompanying text for an explanation of local government's liability.

272. See *supra* note 105 and accompanying text for an explanation of Eleventh Amendment liability.

273. See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) (plurality opinion) (stating that Eleventh Amendment is designed to protect "dignity and respect afforded a State"); *Seminole Tribe*, 517 U.S. at 58 ("The Eleventh Amendment . . . serve[d] to avoid 'the indignity of subjecting a

eral-court suits against their officials for injunctive relief that will control the delivery of state services and the structure of state government.²⁷⁴ Furthermore, such injunctive relief may be just as offensive to the State as a retroactive monetary award. Yet a federal court cannot enter the latter type of relief, even if it is nominally against a state official. Thus, the "fiction" designed to preserve the state's dignity goes only so far.²⁷⁵ Aside from state dignity, a suit against a state official in his or her personal capacity faces the hurdle of official immunity.²⁷⁶ While this type of immunity is designed to protect those entering public service,²⁷⁷ it reflects little or no concern for the victims of unlawful government conduct.

Finally, consider the federal government's power to change existing immunity law. The Supreme Court has indicated that official immunity is a common-law, not a constitutional, doctrine.²⁷⁸ Consequently, either the federal courts or Congress could modify and perhaps eliminate it. In contrast to official immunity, the State's sovereign immunity is constitutional in nature and relatively "immune" from revision short of amending the Constitution.²⁷⁹ The federal courts cannot award money damages against an unconsenting State, even when that State violates the Fourteenth Amendment. Congress, on the other hand, can authorize money damages in federal court against states when it exercises its power to enforce the Fourteenth Amendment.²⁸⁰ To do so, however, Congress must speak with crystalline clarity, the slightest ambiguity rendering its efforts fruitless.²⁸¹

State to the coercive process of judicial tribunals at the instance of private parties.'" (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993))).

274. *Cf. Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977) (rejecting Eleventh Amendment challenge to court order requiring State to spend money to desegregate schools).

275. *See Coeur d'Alene Tribe*, 261 U.S. at 281 (plurality opinion) (referring to *Ex parte Young* doctrine as "fiction").

276. *See supra* notes 83-104 and accompanying text for a discussion of official immunity.

277. *See, e.g., Bogan v. Scott-Harris*, 118 S. Ct. 966, 972 (1998) (including among rationales for absolute official immunity that "the threat of liability may significantly deter [public] service"); *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (citing distraction from duty as one rationale for qualified official immunity).

278. *See supra* notes 85-86 and accompanying text for a discussion of common-law basis of official immunity.

279. *See, e.g., Welch v. Texas Highways & Public Transp. Dept.*, 483 U.S. 468, 486 (stating that Eleventh Amendment established "a broad constitutional principle of sovereign immunity"); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (stating that Eleventh Amendment preserved "constitutionally mandated balance of power between the States and the Federal Government" (quoting *Garcia v. Metropolitan Transit Auth.*, 469 U.S. 528, 572 (1985))); *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 51 (1944) (stating Eleventh Amendment established the "constitutional right" of states to be free from federal court actions).

280. *See supra* notes 138-54 and accompanying text for a discussion of how Congress, but not courts, can abrogate Eleventh Amendment when enforcing Fourteenth Amendment.

281. *See supra* notes 194-214 and accompanying text for a discussion of the requirement of clear statement for statute to authorize monetary relief against sovereign; *see also Humenansky v. Regents of Univ. of Minn.*, 152 F.3d 822, 824-25 (8th Cir. 1998) (holding that, in express disagreement with other circuits, Congress did not express sufficiently clear intention to abrogate eleventh amendment immunity in Age Discrimination in Employment Act).

This scheme bespeaks a hierarchy of federal judicial solicitude, with the greatest amount accorded to the States, somewhat less accorded to their officials, and the least accorded to private individuals injured by illegal government conduct. The scheme puts the protection of the last group primarily in the hands of Congress and state legislatures—which are dominated by majoritarian interests, including state and local governments—rather than in the federal courts, which were designed to protect individuals against those forces. Moreover, the existing scheme makes the federal courts highly reluctant to believe that Congress has acted to protect individuals at the expense of the States. In light of these features, it would be hard to design a scheme that more effectively insulated itself from change.

One can devise plausible justifications for the distinctions: (i) between state and local governments;²⁸² (ii) between suits against states and suits against their officials;²⁸³ (iii) between prospective and retrospective relief;²⁸⁴ (iv) between the power of federal courts and that of Congress to enforce the Fourteenth Amendment;²⁸⁵ and (v) between Congress's power to enforce the Fourteenth Amendment and its power to enforce other constitutional provisions.²⁸⁶ One can likewise justify the Court's use of clear-statement rules.²⁸⁷ But no one can pretend that the immunity doctrines, as a whole, reflect coherent and just decision making about when the government should pay for injuries caused by its unconstitutional conduct.²⁸⁸

Two scholars, Professors Jeffries and Monaghan, have recently argued that, as a practical matter, the immunity doctrines seldom defeat meaningful relief for

282. See *supra* note 108 (citing commentary on differing treatment of state and local government under Eleventh Amendment).

283. See *supra* notes 62-66 and accompanying text for a discussion of "stripping rationale" for allowing suits against state officers notwithstanding Eleventh Amendment.

284. See *Green v. Mansour*, 474 U.S. 64, 68 (1985) (asserting that, whereas prospective remedies "are necessary to vindicate the federal interest in assuring the supremacy of that law," retrospective remedies serve compensatory or deterrent interests that "are insufficient to overcome the dictates of the Eleventh Amendment").

285. See *supra* note 150 (citing commentary on this issue).

286. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 65-66 (1996) (stating, in contrast to Article I powers, Fourteenth Amendment was adopted after Eleventh Amendment and "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment").

287. See George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363, 389-94 (1985) (defending clear statement rule in Eleventh Amendment cases). *But see* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 621-22, 632-46 (1992) (describing and criticizing "clear statement" rules applied by Court in Eleventh Amendment and other areas).

288. See Daniel J. Cloherty, *Exclusive Jurisdiction and the Eleventh Amendment: Recognizing the Assumption of State Court Availability in the Clear Statement Compromise*, 82 CAL. L. REV. 1287, 1297 (1994) (quoting scholarly descriptions of Eleventh Amendment law as chaotic); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 97 (1989) (observing that most accounts of Eleventh Amendment's expansion describe it "as a wrong, or at least unprincipled, act").

injuries caused by wrongful state conduct.²⁸⁹ This Article does not dispute either scholar's position. It does, however, attempt to establish these two counterpoints. In response to Professor Jeffries' submission, the Article attempts to show that the operation of the immunity doctrines diverts attention from, and renders moot, the normative question of when the government should pay for the damage that it causes. In response to Professor Monaghan's submission, the Article illustrates that the immunity doctrines are so Byzantine that many meritorious claims will be defeated unless they are handled by specialists.

CONCLUSION

It is odd, but perhaps understandable, that affirmative-action scholars have largely ignored the principles of sovereign and official immunity governing the monetary claims in *Hopwood*. It is odd because those principles utterly defeat the claims for money damages and greatly restrict the recovery of attorney's fees. One would think these effects would at least have been noticed. It is nonetheless perhaps understandable, for this reason—the immunity doctrines have grown so complex and divorced from the merits of permitting monetary claims against the government that they receive attention from only a small part of the legal community. It is hoped that this Article's analysis of *Hopwood* under current immunity law will prompt a larger part of the community to consider the need for revision of that law.

289. See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49 (1998) (stating, "The Eleventh Amendment almost never matters"); Monaghan, *supra* note 71, at 103 (referring to "the fundamental reality of state accountability in federal court for violation of federal law"). Professor Jeffries bases his argument in part on the admittedly "normative" conclusion about when the government should pay for the injuries that it has caused. Jeffries, *supra*, at 53; *see id.* at 69 (arguing current law properly creates "a fault-based liability regime"). Professor Monaghan bases his argument on the extent to which sovereign immunity is limited by *Ex parte Young* and the state courts' presumed obligation under the Supremacy Clause to entertain actions for state violations of federal law. See Monaghan, *supra* note 71, at 122, 132; *but cf.* Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts* (unpublished manuscript on file with *Brandeis Law Review*) (arguing that Tenth Amendment bars Congress from using Article I powers to force state courts to hear private, federal actions against their own State).