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EFFECTIVE ALTERNATIVES TO CAUSES OF ACTION BARRED BY THE ELEVENTH AMENDMENT

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I. INTRODUCTION

If any line of decisions by the Rehnquist Court has sparked the most ardent disagreement by legal academics, it has been the sovereign immunity decisions. Beginning with *Seminole Tribe of Florida v. Florida*[1] in 1996, the Court has invalidated congressional efforts to hold states liable for private suits seeking monetary damages for violations of federal law not based on the Reconstruction Amendments. Scholars have heavily criticized these decisions as unfaithful to the Constitution, as undermining legitimate national goals without any corresponding benefit, and as creating a doctrinal mess without theoretical coherence.[2] These scholars' criticisms follow the lead of the four dissenting Justices on the Supreme Court who have consistently presented four opposing votes to every Eleventh Amendment holding.

We believe that these criticisms are vastly exaggerated. While the decisions serve as strong symbols of the importance of federalism to the Rehnquist Court, the rulings establish no serious barrier

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1. 517 U.S. 44 (1996).

2. *See, e.g.*, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) ("Sovereign immunity is inconsistent with a central maxim of American government: no one, not even the government, is above the law."); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000) ("The Court has for the last ten years chosen to expand the range of government immunity from suit for wrongdoing, a result compelled neither by history nor logic."); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1012 (2000) ("In ways that the Court fails to acknowledge, its effort fails to promote any coherent conception of states' rights or state autonomy while harming legitimate national objectives.").

to a Congress and President intent on achieving national policy objectives. The Court's Eleventh Amendment cases have the effect of eliminating private suits for retrospective damages as an instrument of federal policy. But Congress still retains a broad arsenal of powers to achieve its ends, and even without new federal legislation, can hold states liable for damages as long as suit is brought by the United States. To be sure, the prohibition against recovering monetary damages against states may leave individual plaintiffs less than fully compensated when harmed by state violations of federal statutory law. This prohibition may also lead to some under-enforcement of constitutional norms. Nonetheless, the important question is whether the Eleventh Amendment prevents the federal government from achieving its policy aims. We conclude that the Constitution still provides Congress a broad arsenal of powers to achieve its ends. With these tools, Congress can act to ensure that states and individuals comply with the Constitution and federal law. Most academics have singularly focused on damages lawsuits as the primary means for the enforcement of federal law, and have understated the much broader and effective powers available to the national political branches.

Part II of this Essay discusses briefly the Eleventh Amendment cases and the academic commentary they have generated. Part III explains what we describe as the "internal" constraints on state sovereign immunity — those created by the Court's Eleventh Amendment doctrine itself — such as the availability of prospective relief, suits against state officers in their private capacities, and suits brought by the United States. Part IV discusses what we describe as "external" limitations on sovereign immunity — those supplied by sources outside of the Eleventh Amendment doctrine — such as the Spending Clause and Congress's foreign affairs powers. Finally, we conclude that the limitations outlined in Parts III and IV are sufficient to ensure that the sovereign immunity doctrine will not become an insuperable barrier to the federal government achieving its national policy objectives.

II. The Eleventh Amendment Debate

The text of the Eleventh Amendment, ratified in response to the Supreme Court's decision in *Chisholm v. Georgia*,[3] 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.[4]

The origins of the Eleventh Amendment are a familiar story, and we do not repeat it here.[5] Academic debate has focused on whether the Amendment's text only prohibits diversity suits between a state and the citizens of a different state,[6] or whether it gives effect to a broader principle of state sovereign immunity.

We do not seek to pass judgment on which side of the debate has things right, or what method of interpretation ought to be used to grasp the Amendment's meaning.[7] Rather, we begin with the Rehnquist Court's reinvigoration of sovereign immunity in *Seminole Tribe*. Overruling *Pennsylvania v. Union Gas Co.*,[8] which had been decided only six years earlier, the five Justice majority held that Congress could not allow private parties to seek monetary damages

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3. 2 U.S. (2 Dall.) 419 (1793).

4. U.S. Const. amend. XI.

5. For the standard historical discussions, see 1 Charles Warren, The Supreme Court in United States History 96–102 (rev. ed. 1932); 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 734–41 (1971).

6. *See, e.g.*, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1894, 2004 (1983) (arguing for a strict construction of the Eleventh Amendment, stating that the Amendment's text only prohibits diversity suits); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1045–54 (1983) (stating that the Eleventh Amendment was "designed merely to require a limiting construction of the state-citizen diversity clause").

7. For recent efforts, see John F. Manning, *The Eleventh Amendment and the Precise Reading of Constitutional Texts*, 113 Yale L.J. 1663, 1733–49 (2004) (arguing that the Eleventh Amendment's "specificity cannon" has a crucial role in applying the Eleventh Amendment); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1653 (2002) (arguing that the Court failed to distinguish between personal and subject matter jurisdiction in interpreting the Eleventh Amendment).

8. 491 U.S. 1 (1989) (plurality opinion).

from states for violations of federal laws enacted pursuant to the Commerce Clause.[9] In response to the dissenters' arguments that the Eleventh Amendment did not apply in federal question cases, Chief Justice Rehnquist concluded that the Framers understood Article III not to grant subject matter jurisdiction to the federal courts over such cases:

> The text dealt in terms only with the problem presented by the decision in *Chisholm*; in light of the fact that the federal courts did not have federal-question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.[10]

The Eleventh Amendment, in other words, only restored the *status quo ante* that had existed before *Chisholm*, and state sovereign immunity was inherent in the constitutional structure in 1789.

The Rehnquist Court then expanded *Seminole Tribe* in various ways. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court narrowly interpreted Congress's remedial powers under Section 5 of the Fourteenth Amendment — which trumps the limits of the Eleventh Amendment[11] — to protect states against private damage suits.[12] Specifically, the Court held that the Reconstruction Amendments do not authorize Congress to create a private damages remedy against states that violate a patent, unless Congress can show a broad pattern of state patent infringement.[13] Soon after *Florida Prepaid*, in *Kimel v. Florida Board of Regents* and *Board of Trustees of the University of Alabama v. Garrett,* the Court invalidated portions of the Discrimination in Employment Act and the Americans with Disabilities Act that provided damages remedies

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9. *Seminole Tribe*, 517 U.S. at 69–70.

10. *Id.*

11. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 671 (1999) ("Congress can abrogate state sovereign immunity only when it legislates to enforce the Fourteenth Amendment."); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (stating that sovereign immunity under the Eleventh Amendment is limited by the enforcement provision of Section 5 of the Fourteenth Amendment).

12. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639–48 (1999).

13. *Id.* at 640.

for injured persons, again reasoning that there was insufficient evidence showing a history or pattern of state violations of the Fourteenth Amendment.[14]

Academic response to these cases has generally been negative and widespread. Daniel Meltzer criticizes Eleventh Amendment doctrine for lack of any real constitutional theory and argues that sovereign immunity cannot meet any cost-benefit test for government policy. State sovereign immunity, in his words, "fails to promote any coherent conception of states' rights or state autonomy while harming legitimate national objectives."[15] Erwin Chemerinsky argues that the Eleventh Amendment cases have placed the Supreme Court above the Constitution. He contends that "sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law" because it allows a judicially-created common law doctrine to "reign supreme over the Constitution and federal law."[16] Vicki Jackson declares that "the Court's Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars."[17] In her view, sovereign immunity is itself unconstitutional and serves only to promote "government nonaccountability" and to place "the fiscal interests of the states over the supremacy of federal law."[18] Even Ernest Young, generally a supporter of the Rehnquist Court's federalism decisions, acknowledges that the Eleventh Amendment cases do not seem successful at a functional level. He concludes that sovereign immunity "is a poor way to protect state prerogatives in a federal system."[19]

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14. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000); Bd. of Trs. v. Garrett, 531 U.S. 356, 360 (2001). In two more recent cases, however, *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) and *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court upheld statutory regimes that overrode state sovereign immunity — the former in the context of sex-based discrimination, the latter involving the right of access to courts — because they either contained sufficient evidence of state discrimination or remedied the violation of a fundamental right.

15. Meltzer, *supra* note 2, at 1011–12.

16. Chemerinsky, *supra* note 2, at 1201, 1211.

17. Jackson, *supra* note 2, at 953.

18. Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 691 (2000).

19. Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 S. CT. REV. 1, 2.

On the other hand, academic supporters of the Court's position find that the cases achieve no real change in the structure of remedies for constitutional violations. John Jeffries, for example, argues that the damages actions against state officers for violations of federal law under 42 U.S.C. § 1983 (section 1983) provide the right framework for constitutional remedies.[20] Henry Monaghan finds that the prospective damages actions provided by *Ex Parte Young* mean that "little has changed" due to the recent Eleventh Amendment cases.[21]

III. Internal Constraints on Sovereign Immunity

We do not believe that the Eleventh Amendment cases have made no mark, but like Jeffries and Monaghan, we also think that the primary focus should be on whether the federal government retains sufficient powers to achieve national policy objectives. The Court has identified a number of exceptions internal to Eleventh Amendment doctrine that still allow federal courts to enforce federal law against states.

First, as the Court has recognized throughout its Eleventh Amendment cases, plaintiffs can seek an injunction for prospective relief against individual state officers for violations of federal law. *Ex Parte Young* held that such suits did not violate the Eleventh Amendment because a state officer is "stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct" when he violates federal law.[22] While the plaintiff in an *Ex Parte Young* proceeding may not receive full compensation for individual harms, lawsuits for injunctive relief provide a powerful means for guaranteeing state compliance with federal constitutional and statutory norms — including payment of state funds for the damages flowing from the violation of a prospective injunction.[23]

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20. John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 49–50 (1998).

21. Henry P. Monaghan, *The Sovereign Immunity "Exception,"* 110 Harv. L. Rev. 102, 103 (1996).

22. 209 U.S. 123, 160 (1908) (holding that a cause of action can be brought against a state by an individual on grounds that the suit asserts liability against a state officer for federal law violations rather than against the state per se).

23. *See* Meltzer, *supra* note 2, at 1017.

Second, the Supreme Court permits suits for retrospective damages against state officers in their private capacities, so long as there is less than a virtual certainty that damages will be paid from the state treasury.[24] While there are complicated issues regarding indemnification and the liability of state treasuries,[25] in many instances plaintiffs can recover money damages from individual representatives of the state.[26]

Third, as Professor Jeffries has emphasized, section 1983 provides a damages remedy against state officials for a broad class of state violations of constitutional rights. Section 1983 holds state officials liable for violations of either the Constitution or other federal law, subject to certain important immunities. Judges and legislators enjoy absolute immunity, while executive branch officials receive a qualified immunity if they believed in good faith that their actions were consistent with federal law. Professor Jeffries endorses this negligence standard because it only provides compensation for unreasonable actions, and thus provides the best level of deterrence for future actions. While section 1983 does not provide comprehensive compensation for actions which *ex ante* appear legal but *ex post* violate federal law, these immunity doctrines are creations of federal common law that Congress can choose to override. If section 1983 provides only incomplete compensation, that is a decision by Congress not to duplicate the full scope of judicially enforceable damages remedies available in suits against non-state defendants for violations of federal law.

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24. *See* Edelman v. Jordan, 415 U.S. 651, 668 (1974) (finding that retrospective damages against state officers in their personal capacities are only disallowed if there is a "virtual certainty" that the damages will be paid from the state treasury and "not from the pockets of individual state officials").

25. *See* Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 464 (2002) (exploring the Rehnquist Court's connections between judicial conservatism and a commitment to federalism as they relate to the interplay between federal law and liability shielding for state and local governments and their subdivisions); Jeffries, *supra* note 20, at 50–51 (examining the interplay between the Eleventh Amendment and section 1983, and highlighting that the Eleventh Amendment is frequently not a bar to actions by individuals against states because most of these actions can be asserted under the broad mandate of section 1983).

26. *See* Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 880 (2000) ("[I]n reality, damage judgments rendered against individual state officers are usually paid by the state.").

Fourth, as the Court recognized in *Alden v. Maine*, sovereign immunity poses no bar to suits for damages against states brought by the United States.[27] Lawsuits commenced by the federal government, according to the Court, "require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."[28] While the United States may automatically sue when its proprietary interests are involved, it can also bring a damages action if authorized to do so by Congress, and it may distribute the recovery to injured parties.[29] A number of such provisions exist in different regulatory schemes, but if Congress concludes that federal rights are being under-enforced, it can simply authorize the executive branch to bring damages actions in all instances of violations of federal law. To the extent that the Executive Branch does not have sufficient resources to carry out such a task, that again is a choice of the national political branches. Congress can appropriate funds to create more Justice Department litigators charged with enforcing federal regulatory statutes, or it can create double or even treble damages to cover increased litigation costs, thereby increasing deterrence.[30] We recognize that reliance on suits brought by the United States centralizes enforcement of federal law in the Executive at the expense of private parties, but we suggest that this also makes the enforcement of federal law more accountable and transparent both to Congress and to the electorate at large.

Fifth, Section 5 of the Fourteenth Amendment (Section 5) continues to provide Congress with the ability to hold states responsible for violations of constitutional rights through damages actions. *City of Boerne v. Flores* established a barrier to Congress's enforcement powers by requiring that prophylactic statutory remedies for constitutional violations be congruent and proportional to a pattern or history of state violations of judicially recognized federal

27. 527 U.S. 706, 755–56 (1999).

28. *Id.* at 756.

29. *Cf.* Kansas v. Colorado, 553 U.S. 1, 9 (2001) (finding that, in a suit between states, "it is the State's prerogative either to deposit the proceeds of any judgment in 'the general coffers of the State' or to use them to 'benefit those who were hurt'").

30. *See* Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1371–72 (2001); *see also* William P. Marshall, *Understanding Alden*, 31 RUTGERS L. REV. 803, 816–17 (2000).

rights.[31] Nonetheless, in *Nev. Dep't of Human Res. v. Hibbs*, the majority held that congressional efforts to enforce against the states a federal right — through damages actions — against gender discrimination overrode state sovereign immunity because sex discrimination by the state was subject to heightened scrutiny.[32] Similarly, *Tennessee v. Lane* upheld damages remedies against a state when the state had deprived the plaintiff of his right of access to the courts — a fundamental right judicially recognized as emanating from the Due Process Clause.[33] These cases demonstrate that *City of Boerne* has not limited the Section 5 power to cases of remedying race discrimination, as some had feared, but instead that Congress still retains significant ability to enact damages remedies for violations of established constitutional rights.[34]

IV. External Limits on Sovereign Immunity

Part III reviewed the variety of methods that Congress may still use to compel states to obey federal policies, either through suits for damages or through other judicial action, without colliding with the Court's Eleventh Amendment case law. This Part discusses powers "external" to the Eleventh Amendment, in that they are independent of the Rehnquist Court's decisions on state sovereign immunity.

First, Congress retains significant authority under the Spending Clause to evade state sovereign immunity. Congress may simply attach compliance with a national policy standard as a condition to the receipt of federal funds. Congress, for example, effectively enacted a national drinking age of twenty-one by explicitly requiring

31. 521 U.S. 507, 520 (1997).

32. 538 U.S. at 728.

33. 541 U.S. at 529.

34. In addition, Fourteenth Amendment remedies are available in the property and due process areas that may not be subject to the *City of Boerne* limitations on the Section 5 power. Under the Takings Clause, for example, states must provide just compensation for seizures of private property; this damages remedy is required by the Constitution itself. *See* First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 316 (1987). In addition, the Court has suggested in cases where property has been taken or a right infringed without meeting the standards of procedural due process, the Due Process Clause may directly require a remedy. *See, e.g.*, Reich v. Collins, 513 U.S. 106, 110–12 (1994); Eric Rakowski, *Harper and its Aftermath*, 1 Fla. Tax Rev. 445, 472 (1993).

all states that received federal highway funds to match the federal standard. In *South Dakota v. Dole*, the Court, speaking through Chief Justice Rehnquist, upheld this use of spending conditions to achieve federal policy, even though the Twenty-First Amendment prohibits Congress from directly enacting legislation establishing a national drinking age.[35] If *Dole* remains good law, and it appears to be, then Congress could simply require states that receive federal funds to waive their sovereign immunity in any lawsuit brought to enforce a constitutional or federal statutory right. In *Florida Prepaid*, for example, Congress could have simply provided that any state receiving federal research funding must subject itself to lawsuits for damages arising from the infringement of a federal patent.[36] Or Congress could attach as a condition to federal funding that states offer their own remedial process for violations of federal rights.[37]

Congress could also use its spending powers more directly by simply reducing or even completely eliminating federal expenditures for states that fail to respect federal policies. If a state refuses to obey federal patents, for example, Congress could respond in the next appropriations cycle by reducing grants to the state's universities. While cutting funding might have the effect of harming the groups that Congress seeks to protect, it would also put tremendous pressure on state officials to change the policies that have violated federal law.

Second, Congress could seek to use its foreign affairs power to override state sovereign immunity. In *Missouri v. Holland*, the Court indicated that federalism limitations on Congress's enumerated powers in Article I, section 8, such as the Commerce Clause, do not apply to the exercise of the treaty power.[38] *Holland* upheld a federal statute enacted to implement a treaty with Canada which protected migratory birds, although it had previously held that an earlier version of the statute enacted solely pursuant to the Commerce Clause had violated the Constitution. While the Court has not revisited the *Holland* issue, scholars have argued that Congress

35. 483 U.S. 203, 211–12 (1987).

36. *See* Meltzer, *supra* note 30, at 1380.

37. *See* Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POL'Y 460, 464–65 (1995).

38. 252 U.S. 416, 433–35 (1920).

may make treaties on almost any subject,[39] and that these international agreements remain outside the limitations of the powers reserved to the states recognized in the Tenth Amendment.[40]

Recent cases have found that the federal government possesses an unenumerated foreign affairs power, one that may be exercised even in the absence of any formal statute, treaty, or executive agreement.[41] Presumably, Congress could exercise this power to force states to waive their sovereign immunity, even though such a tactic could not be employed were an area of purely domestic law at issue.

Third, several non-federal alternatives exist that can provide monetary remedies for violations of federal law. States may have regulatory schemes designed to provide remedies for violations of

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39. A number of works have appeared debating whether *Holland* continues to make sense after the expansion of the Commerce Clause during the New Deal. *See* Carlos Vazquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 741 (2002) (arguing that *Holland* continues to be good law); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 100–01 (2000) (stating that *Holland* must be limited or overruled); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 450–51 (1998) ("My argument is that the federal government should not be able to use the treaty power . . . to create domestic law that could not be created by Congress. To the extent that this conclusion would require overruling Holland, I argue that the justifications for stare decisis are weak . . . ."); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (providing a thoughtful review of *Holland* and its legitimacy). For our purposes, we only wish to explore the possibilities in regard to state sovereign immunity if the current doctrine remains good law. If treaties were originally not subject to the limitations of the Tenth Amendment, then Congress theoretically could enact legislation that overrides state sovereign immunity to implement a treaty. Peter Menell, for example, has argued that Congress could require states to pay monetary damages for violating federal patents, essentially evading *Florida Prepaid*, in order to enforce international agreements on intellectual property. Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1460–64 (2000).

40. United States v. Wang Kun Lue, 134 F.3d 79, 85 (2d. Cir. 1997) (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 191 (1996)) (stating that the Court has repeatedly rejected arguments that treaties cannot deal with matters reserved to the states through constitutional scheme and Tenth Amendment); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 302–303 (1987) ("[The] Tenth Amendment . . . does not limit the power to make treaties or other agreements.").

41. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 386–87 (2000) ("Because the state Act's provisions conflict with Congress's specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted . . . .").

federal law by state officers. While *Alden v. Maine* made clear that states enjoyed sovereign immunity in their own judicial systems, the Court also pointed out that states may waive the privilege in either federal or state court.[42] *Kimel* and *Garrett* observed that even though states cannot be sued under federal employment laws, every state has its own employment discrimination and minimum wage and hour laws.[43] Similarly, every state provides remedies for age and disability discrimination.[44] In the area of intellectual property, plaintiffs who have suffered patent infringements at the hands of a state may be able to sue for inverse condemnation under the state's takings clause.[45]

State common law may also provide additional sources of relief. Plaintiffs whose federal statutory rights are violated could sue under a tort action, such as conversion or misappropriation.[46] Most states have their own tort claims acts in which they have waived sovereign immunity.[47] Additionally, if a state has violated a plaintiff's federal rights in a contract context, state contract law may provide a means of recovery. Most states have waived sovereign immunity when they enter into contracts.[48]

To be sure, these alternatives are imperfect. They may have different elements than a federal remedy would provide, they might not afford the same level of compensation, or they may possess different procedural barriers. These state alternatives also might run

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42. 527 U.S. at 757–58.

43. *Kimel*, 528 U.S. at 91; *Garrett*, 531 U.S. at 374 n.9.

44. *See* Brent W. Landau, *State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws*, 39 HARV. J. ON LEGIS. 169, 189 (2002).

45. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 644 n.9 (1999).

46. *See, e.g.*, Menell, *supra* note 39, at 1417 (suggesting that intellectual property holders may sue state infringers under various common law tort doctrines).

47. *Id.* at 1418.

48. Approximately twenty states have statues waiving sovereign immunity in contract. *See, e.g.*, WYO. STAT. ANN. § 1-39-104 (2003) ("[i]mmunity in actions based on a contract entered into by a governmental entity is waived except to the extent provided by the contract if the contract was within the powers granted to the entity . . . ."). Many other states have judicially waived immunity in contract. *See, e.g.*, State Hwy. Dep't v. Milton Constr., 586 So. 2d 872, 875 (Ala. 1991).

into preemption problems if they conflict with a comprehensive federal regulatory scheme.[49]

Finally, as with Congress's use of its spending power, political checks at the state level may also provide means for achieving national objectives. State officials who refuse to compensate their own citizens for violations of federal rights may come under political pressure to waive sovereign immunity, provide a state remedy, or at least cease the illegal activity.[50] While these measures may not yield the full measure of compensation that would be available in a damages action, we suggest that sufficient transparency and accountability may well exist in state government such that it would often be difficult for elected state officials to continue violating federal law.

V. CONCLUSION

The signature issue of the Rehnquist Court has been its renewed judicial protection for states' rights. Decisions shielding the states from damages actions not based in legislation enforcing the Reconstruction Amendments have received steady academic criticism. Our purpose in this Essay has been to demonstrate that scholarly concern about the Rehnquist Court's Eleventh Amendment jurisprudence is exaggerated. While state sovereign immunity prevents plaintiffs from recovering retrospective damages from states that violate federal law, a number of doctrines internal and external to the Eleventh Amendment provide Congress with substantial means for enforcing federal law and policies.

It is not obvious why the Rehnquist Court would devote substantial resources to developing a line of cases that pose no serious barriers to Congress, while at the same time depriving individuals of full vindication of their constitutional or statutory rights. We believe that one effect of the decisions, conscious or not, is to potentially concentrate greater law enforcement discretion in the hands of the Executive branch. If the United States can successfully override sovereign immunity by itself suing the states, as the Court has concluded, then the applicability of the Eleventh Amendment

49. *See, e.g.*, Menell, *supra* note 39, at 1426–27 (noting that federal law preempts any state statue that undermines or conflicts with the federal patent regime).

50. *See* Landau, *supra* note 44, at 207 (noting that at least fourteen states filed amicus briefs opposing state sovereign immunity in *Garrett*).

hinges first on action by Congress, and then on the decisions of the President and the relevant agencies, rather than the choices of private parties. It remains to be seen whether a new Court will continue following the same path.