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The Asymmetry of State Sovereign Immunity

Richard Henry Seamon

THE ASYMMETRY OF STATE SOVEREIGN IMMUNITY

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Abstract: This Article discusses whether a State has sovereign immunity from claims for just compensation. The Article concludes that the States are indeed immune from just-compensation suits brought against them in federal court; States are not necessarily immune, however, from just-compensation suits brought against them in their own courts of general jurisdiction. Thus, the States' immunity in federal court is not symmetrical to the States' immunity in their own courts. This asymmetry, the Article explains, is the result of the Due Process Clause of the Fourteenth Amendment. The Due Process Clause obligates a State to provide a means of paying just compensation every time the State takes private property for public use. A State may be able to meet this obligation by establishing a non-judicial compensation system. If a State fails to establish an adequate non-judicial compensation system, however, the State's remedial obligation under the Due Process Clause falls upon the State's courts. This resolution respects both a State's constitutional right to avoid private lawsuits and an individual's constitutional right to just compensation.

The principles of sovereign immunity and just compensation are on a collision course. The principle of sovereign immunity bars you from suing an unconsenting State for money.[1] The principle of just compensation requires the State to pay you money if it takes your property for public use.[2] The question is: Can you sue the State for

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1. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 745–49 (1999). A State can consent to suits against it, thereby waiving its sovereign immunity, and some States have done so for claims seeking just compensation. *See id.* at 755 (stating that "sovereign immunity bars suits only in the absence of consent"). As discussed *infra* notes 249–59 and accompanying text (Part V.A), however, in many States the waiver of sovereign immunity from just-compensation claims is unclear or incomplete. *See, e.g.*, DANIEL R. MANDELKER ET AL., FEDERAL LAND USE LAW § 4A.02[5][d] (1998) (observing that "in many states the availability of a compensation remedy in land use cases is not clear"). The issue discussed in this Article is therefore one that can arise in many States. Moreover, the analysis proposed in this Article has implications outside the context of just-compensation claims against unconsenting States. *See infra* notes 260–394 and accompanying text (Parts V.B through V.D).

2. The Fifth Amendment to the U.S. Constitution says in relevant part, "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This

money if it takes your property for public use without paying you? Surprisingly, and contrary to the belief of many commentators, the United States Supreme Court has never answered that question.[3]

Two principles of symmetry suggest that you cannot sue an unconsenting State for just compensation. First, the Court's case law establishes a symmetry between the States' immunity from lawsuits brought in *federal* court and their immunity from lawsuits brought in *their own* courts.[4] Because the Court's case law also strongly suggests that States are immune from just-compensation suits brought in federal court,[5] this symmetry suggests that they are likewise immune from such suits in their own courts. In addition, the Court's case law suggests that the immunity of the *States* is symmetrical to the immunity of the *United States*, and that the United States would be immune from just-compensation claims (had it not waived its immunity from such claims in the Tucker Act[6]).[7] The symmetry between the States' sovereign immunity and that of the United States is thus a second symmetry suggesting that States are immune from just-compensation suits. Significantly, both of these symmetries—(1) between the States' immunity in federal court and their immunity in their own courts and (2) between the States' immunity and that of the United States—underlay the Court's recent decision in *Alden v. Maine*,[8] which held that States are immune in their own courts, as well as in federal court, from private actions based on Article I statutes.[9] The Court could plausibly rely on the same symmetries to hold that States are immune from just-compensation claims in both their own courts and federal court.

This Article argues for a partly contrary conclusion: Unconsenting States *may* sometimes be sued for just compensation in their own courts, though not in federal court. That conclusion rests on the thesis that the

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prohibition against certain takings of property without just compensation applies to the States under the Fourteenth Amendment. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 383–84 & n.5 (1994).

3. *See infra* note 19 (citing commentary reading Supreme Court precedent to hold that Just Compensation Clause overrides sovereign immunity).

4. *See infra* notes 112–14 and accompanying text (Part III.B).

5. *See infra* notes 73–91 and accompanying text (Part II.B and II.C).

6. *See* 28 U.S.C. §§ 1346(a), 1491 (1998).

7. *See infra* notes 115–39 and accompanying text (Part III.C).

8. 527 U.S. 706 (1999).

9. *See id.* at 712 (describing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), as making clear that "Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts," and holding in the case before it that "the powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts").

States' immunity in federal court and their immunity in their own courts are *not* symmetrical.[10] The States' federal-court and state-court immunities are not symmetrical because of the Due Process Clause of the Fourteenth Amendment.[11] The procedural component of the Due Process Clause imposes on the States remedial obligations that sometimes require the involvement of the States' own courts.[12] In particular, the Due Process Clause requires that, when a State takes private property for public use, the State must have a "reasonable, certain and adequate" procedure for paying just compensation.[13] A State may be able to meet this remedial obligation without involving its courts. For example, a State may be able to create a procedure under which property owners seek just compensation from the State's executive or legislative branch. If a State does not provide an adequate, alternative compensation procedure, however, the Due Process Clause would require the State to let itself be sued for just compensation in its own courts of general jurisdiction.[14] In short, the Due Process Clause could subject an unconsenting State in its own courts to suits from which it would be immune in federal court.

This asymmetry reflects the differing roles of the state and federal courts with respect to a State's due process obligations. When due process obligates a State to provide a remedy, the State's courts can enable the State to meet that obligation by providing the remedy. The federal courts cannot serve that function for the States. Although a federal court can often remedy a State's violation of the Due Process Clause, in doing so the federal court is not discharging the State's obligation to provide a remedy through its own tribunals. Thus, even if a federal-court remedy is available for a State's violation of the Due Process Clause, that does not excuse the State's failure to make its own remedy available. By the same token, the Due Process Clause can require that a remedy be available in state court, even though that remedy would not be available in federal court because of sovereign immunity. In sum, because the federal courts play a different role from that of a State's own courts in meeting the State's due process obligations, the States'

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10. *See infra* notes 241–48 and accompanying text (Part IV.D).

11. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

12. *See infra* notes 260–328 and accompanying text (Part V.B).

13. *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985); *see also supra* note 181 and accompanying text.

14. *See infra* notes 178–248 and accompanying text (Part IV).

sovereign immunity in federal court and in their own courts can be asymmetrical.

Although the analysis offered here concerns just-compensation claims brought against unconsenting States under the Due Process Clause of the Fourteenth Amendment, the analysis has broader implications. Those implications flow from this Article's thesis that it is the procedural component of the Due Process Clause in combination with the Just Compensation Clause—and not, as some commentators have assumed, the Just Compensation Clause alone—that overrides sovereign immunity in some circumstances. The implications of this Article's thesis are threefold.

First, a State has remedial obligations under the Due Process Clause not only when it takes private property for public use but also when it causes other deprivations of people's life, liberty, or property. Those remedial obligations sometimes entail awards of retroactive monetary relief from the state treasury, such as for the State's erroneous collection of taxes. Thus, the Due Process Clause can create asymmetries between a State's immunity in its own courts and its immunity in federal court besides the asymmetry related to just-compensation claims.

Second, the federal government has its own remedial obligations under the Due Process Clause of the Fifth Amendment. Under the analysis proposed here, for example, the federal government has an obligation, notwithstanding its sovereign immunity, to provide a procedure to pay just compensation when it takes private property for public use. Thus, Congress could not repeal the existing Tucker Act remedy for governmental takings unless an adequate alternative remedy were available.

Finally, the analysis proposed here clarifies two aspects of Congress's power to enforce the Due Process Clause against the States under Section 5 of the Fourteenth Amendment.[15] First, it clarifies Congress's power to enforce the remedial obligations imposed on States by the doctrine of procedural due process. The analysis shows, specifically, that Congress cannot necessarily enforce those remedial obligations by regulating state conduct that gives rise to those remedial obligations but that does not itself violate the Fourteenth Amendment. This is why the Court struck down a federal statute in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank.*[16] The statute at issue there

15. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article [i.e., this Amendment].").

16. 527 U.S. 627 (1999).

regulated the States' infringement of patents, conduct that could give rise to remedial obligations under the Due Process Clause but that did not "by itself violate the Constitution."[17] Second, Congress's power to enforce the Due Process Clause of the Fourteenth Amendment does not depend on whether or not remedies are available in federal court for the States' violations of the Fourteenth Amendment. As this Article shows, the availability of federal-court remedies does not excuse a State's failure to meet its own remedial obligations under the procedural component of the Due Process Clause. Nor can the availability of federal-court remedies undo state conduct that violates the substantive components of the Due Process Clause.

This Article proceeds in five parts. Part I shows that, contrary to the view of many commentators, it is an open question whether the just-compensation principle overrides the principle of state sovereign immunity. Part II shows that, although that question is open, Supreme Court precedent virtually compels the conclusion that States are indeed immune from just-compensation suits brought in federal court. Part III discusses precedent suggesting that States are likewise immune from just-compensation suits brought in their own courts. Part IV argues that, despite the precedent discussed in Part III, the Due Process Clause sometimes subjects unconsenting States to just-compensation suits in their own courts. Finally, Part V discusses the implications of Part IV's due-process analysis.[18]

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17. *Id.* at 643.

18. I am aware of only one other commentator who has suggested that the Due Process Clause overrides state sovereign immunity from just-compensation claims, and she did so only in passing and based on the assumption, rejected in *Alden v. Maine*, 527 U.S. 706, 754 (1999), that the States' immunity in their own courts is a common-law, rather than a constitutional, doctrine. *See* Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 TEX. L. REV. 685, 763 (1989) (stating that "[a] due process violation . . . occurs if plaintiffs are precluded from litigating whether a given state activity constitutes a taking"); *id.* at 763–64 (referring to "common-law doctrine of sovereign immunity" applicable in state courts). Other commentators have discussed, in varying levels of detail, the broader issue of the relationship between sovereign immunity and the Due Process Clause. *See, e.g.*, Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1151 n.22, 1171–74 (1984) (arguing primarily that Supremacy Clause requires state courts to adjudicate federal claims without regard to sovereign immunity, but observing that due process may impose similar requirement); Ellen D. Katz, *State Judges, State Officers, and Federal Commands After* Seminole Tribe *and* Printz, 1998 WIS. L. REV. 1465, 1493 (asserting that, given restrictions on federal-court jurisdiction on claims against States, principles of due process may create a special obligation on part of state courts to adjudicate federal claims against the State); *see generally* Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the* Alden *Trilogy*, 109 Yale L.J. 1927 (2000) [hereinafter Vázquez, Alden *Trilogy*] (discussing Court's federalism decisions from October 1998 Term); Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 B.Y.U. L.

I. THE UNITED STATES SUPREME COURT HAS NOT DECIDED WHETHER SOVEREIGN IMMUNITY BARS CLAIMS AGAINST UNCONSENTING STATES FOR JUST COMPENSATION

You would think that the U.S. Supreme Court would have decided by now whether a State can be sued for just compensation without its consent. Indeed, many commentators think that the Court did decide that issue in *First English Evangelical Lutheran Church v. County of Los Angeles*.[19] I respectfully submit that those commentators are mistaken.[20]

REV. 731, 733 n.8, 789 n 189 (stating that "due process ultimately requires state if not federal jurisdiction" and that "a state court is under special obligation to try a federal claim . . . as much [as] a matter of due process . . . as a matter of supremacy"); Michael Wells, *Suing States for Money: Constitutional Remedies After* Alden *and* Florida Prepaid, 31 RUTGERS L.J. 771, 772–83 (2000) [hereinafter Wells, *Suing States*] (discussing Supreme Court case law implying that "as a matter of due process, state courts must be open for certain constitutional claims"); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1777–1807 (1991) (discussing limits on constitutional remedies, including those imposed by immunity doctrines); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L J. 1, 72–104 (1998) [hereinafter Jackson, *The Supreme Court*] (proposing common-law version of sovereign immunity that would permit effective remedies for state misconduct); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1766–1804 (1997) [hereinafter Vázquez, *What Is*] (proposing an interpretation of precedent that would obligate state courts to hear most constitutional claims against state officers); Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 125 (1996) (stating without elaboration that, under *Reich v. Collins*, 513 U.S. 106 (1994), "state courts must provide adequate relief when state officials deprive persons of their property in violation of federal law," despite sovereign immunity). In addition, at least one commentator has argued, mostly for normative reasons, that the Just Compensation Clause of its own force overrides sovereign immunity. *See* Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277 (1988). As far as I can tell, no commentary has explored in detail the specific question whether the Due Process Clause overrides state sovereign immunity from just-compensation claims or the broader question of what implications an affirmative answer to that question would have for state sovereign immunity. *Cf. infra* note 19 (citing commentary assuming that the Court has resolved this issue). This Article attempts to examine those questions in detail. It also, to a more limited extent, addresses the "complicated" relationship between the sovereign immunity of the States and that of the United States. *See* Melvyn R. Durchslag, *Accommodation by Declaration*, 33 LOY. L.A. L. REV. 1375, 1379 (2000) (describing this issue as "complicated").

19. 482 U.S. 304 (1987). *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL COURT SYSTEM 379 & n.32 (4th ed. 1996) [hereinafter HART & WECHSLER] (citing *First English* and *Reich* as holding that Constitution "requires courts to provide" remedies for takings, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding"); Scott P. Glauberman, *Citizen Suits Against States: The Exclusive Jurisdiction Dilemma*, 45 J. COPYRIGHT SOC'Y U.S.A. 63, 96 n.194 (1997) (citing *First English* for proposition that "the state cannot assert sovereign immunity in state court against a takings claim"); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144, 205 (1996) (asserting that *First English* makes clear that federal courts can award just

As a plurality of the Court recently recognized, *First English* does not resolve whether "the sovereign immunity rationale retains its vitality" for claims seeking just compensation under the Fourteenth Amendment.[21]

A. The Holdings of First English

In *First English*, the Court decided two things. First, the Court held that, when a land-use regulation has "taken" private property, it is not enough for a state court to invalidate the regulation prospectively.[22] The Constitution also entitles the landowner to just compensation for the

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compensation "without regard to the 'consent' of Congress"); Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After* Seminole Tribe*: The Eleventh Amendment and Other Immunity Doctrines*, 55 WASH. & LEE L. REV. 849, 871–72 (1998) (citing *First English* for proposition that Just Compensation Clause "carves out an exception to otherwise applicable rules of sovereign immunity"); Katz, *supra* note 18, at 1485 & n.89 (citing *First English* as holding that state courts must adjudicate just-compensation claims against the State and that "state courts may not permit claims of state sovereign immunity to block" awards of just compensation); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 981 & n.351 (2000) (citing *First English* for proposition that "the Takings Clause has been held to incorporate a self-executing waiver of state and federal sovereign immunity against claims for monetary compensation"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37, 57 (1995) (stating that "after *First English*, no state court is free to reject a compensation award where a taking is found"); Vázquez, *What Is*, *supra* note 18, at 1709–10 & n.121 (citing *First English* for proposition that "the state courts [may not] interpose their own law of sovereign immunity to bar [just-compensation] claims"); *see also* Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 724 n.126 (2000) [hereinafter Jackson, *Seductions*] (citing *First English* for proposition that "notwithstanding sovereign immunity, the Constitution 'dictates' a remedy for takings of property"); Jackson, *The Supreme Court*, *supra* note 18, at 115 & n.454 (stating that *First English* "strongly suggests" that States lack sovereign immunity from just-compensation claims in federal court).

20. *See* Boise Cascade Corp. v. Or. State Bd. of Forestry, 991 P.2d 563, 568 (Or. Ct. App. 1999) (observing that *First English* "did not squarely present" this issue and admitting that Oregon Court of Appeals' resolution of the issue in that case "is not beyond dispute"), *cert. denied*, 121 S. Ct. 1363 (2001); Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 137–38 (1999) (observing that Supreme Court "has never held that the [Just Compensation] Clause abrogates either federal or state sovereign immunity").

21. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 714 (1999) (Kennedy, J., joined by Rehnquist, C.J., and Stevens & Thomas, J.J.), discussed *infra* notes 43–51 and accompanying text (Part I.C).

22. *See First English*, 482 U.S. at 319 (holding that "[i]nvalidation" of ordinance that caused a regulatory taking, "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause").

period during which the regulation was in effect and caused a taking.[23] This holding recognized so-called "temporary regulatory takings."[24] Second, the Court held that, when a temporary regulatory taking occurs, the Just Compensation Clause, of its own force, gives rise to a monetary cause of action in "inverse condemnation" that is enforceable in state court.[25] As the Court put it, the Just Compensation Clause is "self-executing."[26] Thus, the plaintiff in *First English* could sue for just compensation in state court even though there was no state statute or state case law recognizing a cause of action for temporary regulatory takings.[27] It was "not necessary" for state law to create the cause of action, because it was created by the United States Constitution.[28]

Neither of the holdings in *First English* concerned sovereign immunity. The first holding resolved a remedial question: What remedy does the Constitution require for a temporary regulatory taking?[29] That question can arise whether or not the governmental defendant has sovereign immunity. Indeed, *First English* illustrates the point, as the defendants in that case were units of local government, which the Court has long held do not share the State's immunity.[30] The second holding recognized that a cause of action in inverse condemnation arises directly

23. *See id.* at 321 ("We . . . hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

24. *See id.* at 313 ("We now turn to the question whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings.").

25. *See id.* at 315–16.

26. *Id.* at 315 (quoting United States v. Clarke, 445 U.S. 253, 257 (1980)); *see also* Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 5 n.6 (1984) (noting that, when federal government takes possession of private property without bringing a condemnation proceeding, property owner's right to bring inverse-condemnation suit "derives from the self-executing character of the constitutional provision with respect to condemnation") (internal quotation marks omitted).

27. The state court in *First English* had dismissed the claim for a regulatory taking on the ground that California law did not create a cause of action to support the claim. *See First English*, 482 U.S. at 308–09; *see also* Agins v. Tiburon, 598 P.2d 25, 28–31 (Cal. 1979) (holding, apparently as a matter of state law, that property owner had no cause of action in inverse condemnation for unduly burdensome land-use restriction), *aff'd on other grounds*, 447 U.S. 255 (1980).

28. *First English*, 482 U.S. at 315 (quoting Jacobs v. United States, 290 U.S. 13, 16 (1933)).

29. *See id.* at 311, 313 (describing this as a "remedial question").

30. *See id.* at 308 (stating that complaint named county and county flood control district as defendants); *see also* Bd. of Trs. v. Garrett, 531 U.S. 356, ___, 121 S. Ct. 955, 965 (2001) ("[T]he Eleventh Amendment does not extend its immunity to units of local government."); Alden v. Maine, 527 U.S. 706, 756 (1999) (treating as well-settled the principle that cities, counties, and other units of local government are not entitled to sovereign immunity, and implying that this principle applies to actions brought in state court as well as in federal court).

from the Constitution when a temporary regulatory taking occurs.[31] The question whether the plaintiff has a cause of action, however, differs from the question whether the defendant has sovereign immunity. The failure to distinguish between these two questions is what seems to have led to the mistaken view among some commentators that *First English* decided the immunity issue.

Nonetheless, the Court has repeatedly distinguished the issue whether the plaintiff has stated a cause of action from the issue whether the defendant has sovereign immunity from that cause of action. Perhaps the most famous case differentiating the issues is *Larson v. Domestic & Foreign Commerce Corp.*[32] In *Larson*, the Court held that sovereign immunity barred a tort suit against a federal officer.[33] The Court rejected the plaintiff's contention that the officer's commission of a tort precluded the defense of sovereign immunity.[34] That contention, the Court explained, "confuses the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action."[35] *Larson* is only one of many cases in which the Court has said that the issue whether the plaintiff has stated a cause of action and the issue whether the defendant has sovereign immunity from that cause of action are "analytically distinct."[36] *First English* established that a temporary regulatory taking

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31. *See First English*, 482 U.S. at 315 ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation.") (internal quotation marks and citations omitted).

32. 337 U.S. 682 (1949).

33. *Id.* at 703.

34. *Id.* at 691–93.

35. *Id.* at 692–93.

36. United States v. Mitchell, 463 U.S. 206, 218 (1983) (observing that, although Tucker Act waived federal government's sovereign immunity, an "analytically distinct" issue was whether statutes and regulations on which plaintiff relied created right to compensation); *see also* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 483–84 (1994) (stating that lower court erroneously "conflate[d]" the "analytically distinct" issues of whether sovereign immunity had been waived and whether cause of action for compensation existed); Will v. Mich. Dep't of State Police, 491 U.S. 58, 63–64 (1989) (treating as separate questions whether 42 U.S.C. § 1983 overrode States' federal-court immunity and whether Section 1983 created cause of action against States); Loeffler v. Frank, 486 U.S. 549, 559–60 (1988) (determining that Congress intended to limit the availability of a cause of action against a federal agency without limiting scope of statute waiving that agency's sovereign immunity); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 112 (1984) (relying on *Larson* to criticize dissent for confusing issue of whether suit was barred by sovereign immunity with issue of whether defendants' conduct violated plaintiffs' rights); *cf.* United States v. Stanley, 483 U.S. 669, 684 (1987) (characterizing question of whether Constitution supplies cause of action against federal official as "logically distinct" from question whether the official has official immunity); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397–98 (1971) (recognizing difference between issue of whether Constitution created cause of action against

gives rise to a cause of action for monetary relief, but *First English* did not address whether States are immune from that cause of action.[37]

B. Sovereign Immunity in First English

The Court in *First English* did mention sovereign immunity. The Court did so, however, only to paraphrase an argument by the U.S. Solicitor General as amicus curiae.[38] The relevant passage is in footnote nine of the opinion and, including the Court's response, is as follows:

> The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." Brief for United States as *Amicus Curiae* 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.[39]

This passage makes clear that the Solicitor General was not directly arguing that sovereign immunity barred just-compensation claims.

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officials and issue of whether they were immune from that cause of action under doctrine of official immunity).

37. Professor Fallon has pointed out to me that the distinction between the existence of a monetary cause of action and the existence of sovereign immunity is pretty thin in the context of the Fifth Amendment, where the only defendant against which a cause of action for just compensation originally could have run was the United States, a defendant otherwise capable of asserting sovereign immunity. *See* E-mail from Richard H. Fallon, Professor of Law, Harvard Law School, to Richard H. Seamon, Assistant Professor of Law, Univ. of S.C. (Jan. 11, 2001) (on file with author). I agree with that observation but would add that the Court in *First English* did not seem to rely on the original understanding of the Fifth Amendment in concluding that it creates a monetary cause of action. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (asserting that, under "original understanding" of Just Compensation Clause, compensation was not required "when government regulations limited the ways in which property could be used"). This circumstance, coupled with the fact that the defendants in *First English* were units of local government that could not claim sovereign immunity, convinces me that the Court in *First English* did not intend to address sovereign immunity. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 308 (1987).

38. *See First English*, 482 U.S. at 316 n.9.

39. *Id.* (internal citations omitted).

Instead, he was arguing that, in light of the prohibitory wording of the Just Compensation Clause and general principles of sovereign immunity, the Clause should be interpreted only to prospectively nullify government action that has caused an uncompensated taking of private property for public use, and not to create a cause of action for retroactive monetary relief.[40] Thus, the Solicitor General's argument was that the Just Compensation Clause functioned as a limit on governmental power rather than as the source of a monetary cause of action. Accordingly, the Court did not mention sovereign immunity in response to the Solicitor General's argument. Rather, the Court reiterated the point made elsewhere in its opinion that the Clause itself creates a private cause of action for a monetary remedy but does not otherwise "limit the governmental interference with property rights."[41] As Professor Brauneis has accordingly observed, footnote nine of *First English* hints—but it only hints, without firmly deciding—that the just-compensation principle overrides the sovereign-immunity principle.[42]

C. *Sovereign Immunity in* Del Monte Dunes

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[43] a plurality of the Court again hinted that the just compensation requirement may override sovereign immunity. At the same time, the plurality confirmed that the issue is open.

In *Del Monte Dunes*, the Court held that the plaintiff had a right to a jury trial in a federal-court action asserting an inverse-condemnation claim against a city under 42 U.S.C. § 1983.[44] To justify that conclusion, the majority had to explain why a right to a jury trial exists in an inverse-condemnation action under Section 1983 even though there is no right to a jury trial when the government brings an action to condemn property.[45]

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40. *See id.*; *see also* Brief for the United States as Amicus Curiae Supporting Appellee at 16–17, *First English* (No. 85-1199) (discussing sovereign immunity to support interpreting Just Compensation Clause as not creating "self-effectuating damage remedy").

41. *First English*, 482 U.S. at 315.

42. *See* Brauneis, *supra* note 20, at 138 (stating that "the reference to sovereign immunity in *First English* that some have taken to be an oblique hint about abrogation may be explicable on other grounds").

43. 526 U.S. 687 (1999).

44. *Id.* at 720–21.

45. *See id.* at 711–18. *But see* Grant, *supra* note 19, at 146, 149 (arguing that the Court's precedent holding that there is no right to jury trial in condemnation proceeding is "manifestly wrong" and that the same right applies in inverse condemnation).

A plurality of the Court (the majority minus Justice Scalia) offered as one difference between inverse-condemnation actions and direct-condemnation actions that, in inverse-condemnation actions, the government often disputes that any "taking" has occurred for which it is liable, whereas in direct-condemnation actions the government virtually never disputes its liability for a taking.[46] The dissent replied that this "absence-of-liability" rationale had not actually been used in the cases denying the right to a jury in direct-condemnation actions.[47] Instead, the dissent observed, courts in those cases often relied on a sovereign-immunity rationale; they reasoned that the government's power to claim total immunity from suits for just compensation included the lesser power to allow such suits without providing a jury.[48] In responding to the dissent, the plurality cited footnote nine of *First English*:

> Even if the sovereign immunity rationale retains its vitality in cases where th[e] [Fourteenth] Amendment is applicable, *cf.* First English, 482 U.S. at 316 n.9, it is neither limited to nor coextensive with takings claims. Rather, it would apply to all constitutional suits against the Federal Government or the States, but not to constitutional suits such as this one against municipalities like the city of Monterey.[49]

The plurality seems to be saying that the old, "sovereign immunity" rationale does not provide a workable standard for determining when a right to a jury trial exists. Of greater importance for our purposes, the plurality suggests doubt about whether sovereign immunity protects States from just-compensation claims based on the Fourteenth Amendment.[50] At the same time, the plurality clearly believed the issue

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46. *See id.* at 712 (plurality opinion) (finding "[m]ost important" difference between direct-condemnation proceeding and property owner's action to redress uncompensated taking under § 1983 to be that, "when the government initiates condemnation proceedings, it concedes the landowner's right to receive just compensation . . . . Liability simply is not an issue"). Justice Scalia did not join this part of the plurality opinion because he believed that "all § 1983 actions must be treated alike insofar as the Seventh Amendment right to jury trial is concerned." *Id.* at 723 (Scalia, J., concurring in part and concurring in the judgment). He therefore did not think that it was appropriate to focus on the particular features of inverse-condemnation actions brought under Section 1983 to determine whether there was a right to jury trial in those actions.

47. *Id.* at 742 (Souter, J., dissenting).

48. *Id*

49. *Id.* at 714 (plurality opinion).

50. This expression of doubt will be all the more intriguing to those who like to count votes on the Court because the doubt is voiced by Justice Kennedy, often a swing vote on issues of federalism. *See* Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV 1601, 1652 (2000). In *Del Monte Dunes*, Kennedy speaks for himself and three other Justices (Chief

to be open—a belief that it made clear when it asserted something to be so "*[e]ven if* . . . sovereign immunity . . . retains its vitality."[51]

D. Immunity vs. Just Compensation: A Conflict Not Yet Resolved

First English did not decide whether the just-compensation principle overrides the sovereign-immunity principle, and the plurality opinion in *Del Monte Dunes* confirms that the issue is unresolved.[52] In misreading *First English* as resolving the issue, commentators have ignored the difference between the issue whether a cause of action exists and the issue whether a particular defendant has sovereign immunity from that cause of action. The next Part of this Article demonstrates that, although the issue is indeed open, the Court's case law strongly suggests that the Just Compensation Clause does *not* override the States' immunity in federal court. The more difficult question of whether unconsenting States can be sued for just compensation in their own courts is addressed in

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Justice Rehnquist and Justices Stevens and Thomas), two of whom (the Chief Justice and Justice Thomas) are usually considered "solid" votes in favor of immunity. *See generally* Ann Althouse, *The* Alden *Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 637–38 (2000) (discussing voting patterns of individual Justices on cases involving federalism). If these Justices doubt the vitality of sovereign immunity as applied to claims for just compensation, there is serious doubt indeed whether a majority of the Court would sustain sovereign immunity in the face of a just-compensation claim.

51. *Del Monte Dunes*, 526 U.S. at 714 (plurality opinion) (emphasis added). In a personal communication with the author, Professor Fallon characterized this passage from the plurality opinion in *Del Monte Dunes* as dictum. *See* Fallon E-mail, *supra* note 37. I am not entirely convinced of this characterization. In my view, the passage may be more accurately characterized as an expression of doubt made in the course of describing the rationale for the plurality's conclusion. *Cf.* Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). Although the plurality's expression of doubt about sovereign immunity's vitality in the face of the Fourteenth Amendment is fairly offhand, it seems significant that the remark is made in response to a remark from Justices who are usually hostile to sovereign immunity. This circumstance, in my view, prevents treating that expression of doubt as utterly casual.

52. Besides the suggestion of the plurality in *Del Monte Dunes*, the only other decision of the Court suggesting a position on the issue is *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). That case involved a private action against an interstate compact in which the plaintiffs alleged, among other things, a taking of their property without just compensation. *Id.* at 394. The question before the Court was whether the interstate compact was "entitled to the immunity that the Eleventh Amendment provides to the compacting States themselves." *Id.* at 393. It might be inferred from the Court's decision that, if the compact *did* have sovereign immunity, the just-compensation claim would be barred by that immunity. That inference, of course, is contrary to the plurality's suggestion in *Del Monte* that the Fourteenth Amendment overrides sovereign immunity. *Lake Country* is no more than suggestive, however, because the Court held that the compact did not have sovereign immunity from the just-compensation claim asserted there. *See id.* at 400–02.

Parts III and IV.

II. ALTHOUGH THE ISSUE IS OPEN, THE COURT'S CASE LAW VIRTUALLY COMPELS THE CONCLUSION THAT UNCONSENTING STATES ARE IMMUNE FROM JUST-COMPENSATION SUITS BROUGHT IN FEDERAL COURT

As shown in Part I, the Court has never squarely decided whether States are immune from private actions for just compensation. As explained in this Part and as the lower federal courts have held, however, the Court's decisions virtually compel the conclusion that States are immune from just-compensation actions when those actions are filed in federal court.[53]

Admittedly, the Court's decisions stop short of producing an airtight conclusion, precisely because none involves a suit for just compensation directly against the State. As discussed below in Section A, the absence of such cases reflects that it took some time for the Court to decide that the Just Compensation Clause even applied to the States (via the Fourteenth Amendment). By the time the Court did so, the Court had also decided that neither a State nor its officials can be sued in federal court by a private plaintiff seeking money from the state treasury, even for a violation of the Fourteenth Amendment.

Although none of these decisions involved a federal-court action brought directly against a State for just compensation, the inescapable implication of those decisions is that such actions are barred by sovereign immunity. As discussed below in Section B, the Court has uniformly held that federal courts cannot entertain suits directly against a State or suits against state officers that seek money from the state treasury. None of these holdings suggest any exception for suits seeking just compensation.

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53. *See* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 94 F.3d 996, 1005 (5th Cir. 1996) (holding that sovereign immunity barred takings claim asserted against state entity and state officers in federal-court action), *rev'd on other grounds sub nom.* Phillips v. Wash. Legal Found., 524 U.S. 156 (1998); McMurtray v. Holladay, 11 F.3d 499, 504–05 (5th Cir. 1993) (same); Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616, 618–20 (9th Cir. 1992) (holding that sovereign immunity barred inverse-condemnation action in federal court against two states and commission formed to administer interstate compact); Garrett v. Illinois, 612 F.2d 1038, 1039–40 (7th Cir. 1980) (holding that sovereign immunity barred just-compensation claim brought against state in federal court).

A. The Court Has Never Squarely Addressed Whether Federal Courts Can Hear Suits for Just Compensation from the States

The Court has not had much chance to decide whether States are immune from private suits for just compensation. In 1833, the Court held that the Just Compensation Clause of the Fifth Amendment did not apply of its own force to the States; instead, the Clause applied only to the federal government.[54] In 1877, the Court rejected the argument that the Just Compensation Clause applied to the States by virtue of its incorporation into the Due Process Clause of the Fourteenth Amendment.[55] It was only in 1897 that the Court reversed its position on incorporation.[56] In 1897, the Court held that the Just Compensation Clause *was* incorporated into the Due Process Clause of the Fourteenth Amendment.[57] Before 1897, though, a suit against a State alleging a violation of the Just Compensation Clause failed to state a cause of action and was thus defective quite apart from any immunity problem.[58]

By the time that the Court decided in 1897 that the Just Compensation Clause applies to the States, the Court had developed an "officer suit" doctrine that enabled takings claimants to get remedies against individual

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54. *See* Barron v. The Mayor of Baltimore, 32 U.S. 243, 247–51 (1833).

55. *See* Davidson v. New Orleans, 96 U.S. 97, 105 (1877) ("If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment, with the one we are construing, was left out.").

56. *See* Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 235–41 (1897).

57. *Id.* at 241 ("[A] judgment of a state court . . . whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is . . . wanting in the due process of law required by the Fourteenth Amendment . . . ."). The Court in *Chicago, Burlington & Quincy Railroad* did not expressly rely on an incorporation theory. *See* Dolan v. City of Tigard, 512 U.S. 374, 383–84 & n.5, 405–07 (1994) (Stevens, J., dissenting) (arguing that *Chicago, Burlington & Quincy Railroad* is better understood as resting on doctrine of substantive due process); *see also* RICHARD C. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS 24–29, 215 (1981) (noting that case did not rest on incorporation theory). Nonetheless, the Court has consistently understood its decision in that case as resting on an incorporation theory. *See Dolan*, 512 U.S. at 384 n.5; *see also, e.g.*, Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2457 (2001).

58. *See Davidson*, 96 U.S. at 105 (stating that State's taking of private property for public use would not violate Due Process Clause); *Barron*, 32 U.S. at 251 (holding that Court lacked jurisdiction to review state-court decision rejecting taking claim against city because claim did not state a violation of Fifth Amendment). *But cf.* Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 626–32 (1999) (discussing early cases in which Court applied "general constitutional principles" in diversity cases involving power of state and local governments to take and condemn property).

officers and thereby avoid sovereign immunity.[59] A famous case illustrating the officer-suit doctrine is *United States v. Lee*,[60] which was decided in 1882 in favor of the descendants of Robert E. Lee. In *Lee*, the Court upheld the eviction of federal officers from Arlington Cemetery because the land used for the cemetery had been taken from Lee without just compensation.[61] In 1897, the Court relied on *Lee* to award similar injunctive relief against state officers who had occupied the plaintiff's land without paying just compensation.[62] At about the same time, the Court upheld an award of personal damages against an official who had caused an uncompensated taking.[63] Thus, by 1897, a property owner whose property had been taken by a State without just compensation could sue the responsible state officials for an injunction preventing their continued "taking" of the property and for damages out of their own pockets.[64] Because such an "officer suit" was not considered to be a suit against the sovereign, it was not barred by sovereign immunity.

Given the remedies available in an officer suit, a takings claimant would have been crazy to sue a State directly for just compensation in federal court. By 1897, the Court had repeatedly stated that a person could not sue a State directly (as distinguished from suing its officers) without the State's consent.[65] The Court had so held even for claims

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59. *See generally* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 160–68 (1998) [hereinafter Seamon, *Separation of Powers*] (discussing officer suits).

60. 106 U.S. 196 (1882).

61. *Id.* at 223.

62. *See* Tindal v. Wesley, 167 U.S. 204, 212–23 (1897) (relying primarily on *Lee* to hold that sovereign immunity did not bar ejectment action against state officers who took plaintiff's land without just compensation).

63. Belknap v. Schild, 161 U.S. 10, 21–23 (1896); *cf.* Hopkins v. Clemson Agric. Coll., 221 U.S. 636, 647–48 (1911) (upholding award of damages against public college that was considered to be analogous to an individual official).

64. *See supra* notes 60–63 (citing cases); *see also* Scranton v. Wheeler, 179 U.S. 141, 151–53 (1900) (holding that sovereign immunity did not bar ejectment claim against federal officer in which claimant alleged a taking without just compensation).

65. *See, e.g.*, United States v. Texas, 143 U.S. 621, 644 (1892) (stating that "the judicial power of the United States does not extend to suits of *individuals* against States"); Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 451 (1883) ("It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent . . . ."); Railroad Co. v. Tennessee, 101 U.S. 337, 339 (1879) ("The principle is elementary that a State cannot be sued in its own courts without its consent."); Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . . ."); *cf* Curran v. Arkansas, 56 U.S. (15 How.) 304 (1853) (holding that individuals could sue State for money in its own courts with State's consent).

alleging violations of the Fourteenth Amendment. In the 1890 case of *North Carolina v. Temple*,[66] for example, the Court held that sovereign immunity barred a federal-court action against a State alleging that the State had violated the Fourteenth Amendment by failing to make payments on state bonds.[67] Moreover, *Temple* was only one of many cases in which sovereign immunity defeated constitutional claims against States that had reneged on their bond obligations.[68] This case law, combined with the availability of relief against state officers, goes far to explain why the Court never had a case that required it squarely to decide whether the Just Compensation Clause overrode the States' sovereign immunity.[69]

Nonetheless, the officer suit had a major shortcoming. You could sue an officer for damages out of the officer's own pocket and for an injunction preventing the officer from violating federal law. You could not sue an officer, however, to get money from the state treasury.[70] That was one type of relief as to which the Court would not indulge the fiction that the suit was against the officer, rather than against the State. As the Court said,

> No suit . . . can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; *or to pay out its money* in his possession on the State's obligations,

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66. 134 U.S. 22 (1890)

67. *Id.* at 25, 30 (holding that Eleventh Amendment barred federal-court action against State alleging violations of Contract Clause and Fourteenth Amendment).

68. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 16 (1890) (holding that sovereign immunity barred federal-court action by a citizen against his own State alleging that State's failure to pay interest on its bonds violated Contract Clause of U.S. Constitution). Many of these suits rested on the Impairment of Contracts Clause, U.S. CONST. art. I, § 10, cl. 1. *See, e.g.*, *Hans*, 134 U.S. at 13. The suits were uniformly rejected to the extent that the relief sought would "expend itself on the public treasury." Land v. Dollar, 330 U.S. 731, 738 (1947); *see also* Seamon, *Separation of Powers*, *supra* note 59, at 168–74.

69. In addition, it appears that just compensation became increasingly available in the state courts during the 19th century. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 149–51 (1998) (discussing nineteenth-century case law recognizing right to just compensation as natural right); Brauneis, *supra* note 20, at 85 n.114 (discussing gradual adoption of state constitutional provisions guaranteeing just compensation); J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 70–71 (1931) (discussing evolution of just-compensation concept in United States as judicial development based on theory of natural rights).

70. *See, e.g.*, Louisiana v. Jumel, 107 U.S. 711, 727–28 (1883). The Court in *Jumel* and other cases after the Civil War repudiated its earlier "party of record" rule, under which sovereign immunity never barred suits against government officers. *See generally* Seamon, *Separation of Powers*, *supra* note 59, at 162–63, 169–73 (discussing party-of-record rule).

> or to execute a contract, or to do any affirmative act which affects the State's political or property rights.[71]

Officer suits for that sort of relief were deemed to be "really" suits against the sovereign itself.[72]

This limitation on officer suits clearly would have prevented someone from getting an injunction requiring an officer to pay just compensation from the state treasury. Perhaps because this was so clear, there appear to be no reported decisions by the United States Supreme Court in which a plaintiff sought that sort of relief.

B. *The Court's Sovereign Immunity Decisions Strongly Suggest that Federal Courts Cannot Hear Suits for Just Compensation from the States*

Although none of the Court's cases involved federal-court suits seeking just compensation from the government treasury, there are cases in which plaintiffs alleging violations of the Just Compensation Clause sought remedies different from those traditionally available in officer suits (i.e., damages out of the officer's pocket and injunctions prohibiting the officer from continuing to take the plaintiff's property). The Court's rejection of nontraditional remedies in these cases demonstrates that sovereign immunity would have barred the use of an officer suit to get just compensation from a State.

One such case, *Belknap v. Schild*,[73] involved a patent-infringement claim against federal officers. The plaintiff held a patent for an improvement to caisson gates.[74] He sued the officers who had been using a supposedly infringing caisson gate at a federal navy yard.[75] The Court

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71. Hopkins v. Clemson Agric. Coll., 221 U.S. 636, 642 (1911) (emphasis added).

72. *See, e.g.*, Int'l Postal Supply Co. v. Bruce, 194 U.S. 601, 605 (1904) (patent-infringement action to enjoin official's use of infringing government property "really was against the United States"); *see also* Ford Motor Co. v. Ind. Dep't of Treasury, 323 U.S. 459, 464 (1945) ("And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.").

73. 161 U.S. 10 (1896).

74. *Id.* at 11. A caisson is a watertight chamber used for underwater construction and repair of, e.g., ships. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 160 (10th ed. 1993) ("caisson," definition 2(a)).

75. *See Belknap*, 161 U.S. at 23 (observing that, according to government's pleading, the allegedly infringing caisson gate "was made and used by the United States in a dry dock at a navy yard, and the defendants only operated and used it as officers, servants, and employe's [sic] of the United States").

recognized that the officers' conduct violated the Just Compensation Clause, remarking that "the United States have no more right than any private person to use a patented invention without license of the patentee or making compensation to him."[76] Because of that violation, the Court held that the plaintiff was entitled to damages from the officers' own pockets.[77] The Court also held, however, that the plaintiff was not entitled to an injunction preventing federal officers from continuing to use the navy-yard caisson gate that allegedly infringed his patent.[78] That injunctive relief was barred, the Court explained, because it sought to control government-owned property.[79] The Court's explanation made it clear that sovereign immunity would likewise bar an injunction tapping the government treasury: "[N]o injunction can be issued against officers of a State, to restrain or control the use of property already in the possession of the State, or *money in its treasury* when the suit is commenced."[80] This reference to the inaccessibility of "money in [the] treasury" shows that, just as the plaintiff in *Belknap* could not enjoin use of the infringing caisson gate, he could not have gotten compensation from the U.S. Treasury.[81]

The Court reached a similar conclusion in a case involving a State. In *Hopkins v. Clemson Agricultural College*,[82] the plaintiff claimed that a state college had taken his land without just compensation by building a dike that caused his land to flood.[83] The Court held that the plaintiff was entitled to an award of damages that could be executed against property that the College owned in its own right, separate and apart from the State.[84] The Court appeared to assume, however, that the award of damages could not be executed against state-owned property or funds.[85]

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76. *Id.* at 16.

77. *Id.* at 23 (holding that defendant officials could be "held liable to the patentee for their own infringement of his patent"); *see also id.* at 18 ("[O]fficers or agents, although acting under order of the United States, are . . . personally liable to be sued for their own infringement of a patent.").

78. *Id.* at 23 (holding that lower court "erred in awarding an injunction against the defendants").

79. *Id.* at 18–25.

80. *Id.* at 18 (emphasis added).

81. *Id.*; *see also* Int'l Postal Supply Co. v. Bruce, 194 U.S. 601, 605 (1904) (relying on *Belknap* to reject claim for injunctive relief in patent-infringement case against federal government).

82. 221 U.S. 636 (1911).

83. *Id.* at 638–40.

84. *Id.* at 648.

85. *See id.* (observing, in response to defendant's argument that State held title to land underlying the college, that money judgment could be satisfied out of land that college itself owned in fee simple and out of its various sources of income).

Moreover, the Court held that the plaintiff was not entitled to an injunction requiring the College to destroy the dike.[86] That relief was not warranted because the title to the dike, as well as the title to the land on which the dike was located, might be held by the State, not the College:

> The state, therefore, may be a necessary party to any proceeding which seeks to affect the land itself, or to remove any structure thereon which has become a part of the land. If so, and unless it consents to be sued, the court cannot decree the removal of the embankment which forms a part of the State's property.[87]

The Court in *Hopkins*, as in *Belknap*, said that a court could not compel an officer to "*pay out [the State's] money* . . . or to do any affirmative act which affects the State's political or property rights."[88] Thus, the decision in *Hopkins*, like that in *Belknap*, makes clear that sovereign immunity would have barred an award of just compensation from the sovereign's treasury.

C. *The Bottom Line: Hints but No Holdings that Permit Federal Courts To Require States To Pay Just Compensation*

Belknap and *Hopkins* date from about the turn of the century but are still good law. Throughout the twentieth century, the Court has held that sovereign immunity bars federal suits seeking money from the state treasury, including for violations of federal law.[89] Except for footnote 9 of *First English*, a majority of the Court has never suggested that an unconsenting State can be sued for just compensation in federal court.

Nonetheless, a plurality of the Court in *Del Monte Dunes* doubted whether "the sovereign immunity rationale retains its vitality in cases where th[e] [Fourteenth] Amendment is applicable."[90] This could be read as a hint that the sovereign-immunity principle does *not* apply when a

86. *Id.* at 648–49.

87. *Id.* at 649.

88. *Id.* at 642 (emphasis added).

89. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 665–78 (1974) (holding that relief in federal-court officer suit that would require payment of retroactive monetary relief from state treasury was barred by sovereign immunity); Ford Motor Co. v. Ind. Dep't of Treasury, 323 U.S. 459, 462–70 (1945) (holding that sovereign immunity barred federal-court action against state agency and officials for refund of taxes allegedly collected in violation of Commerce Clause and Fourteenth Amendment); *see also* Dugan v. Rank, 372 U.S. 609, 620 (1963) (stating that suit is considered to be one against the sovereign if the judgment sought would expend itself on the public treasury).

90. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 714 (1999) (plurality opinion) (citing, with a "*cf.*" signal, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987), discussed at text accompanying notes 19–42, *supra*).

claim is based on the Just Compensation Clause or some other provision made applicable to the States under the Fourteenth Amendment. To carry through on this hint while remaining faithful to the precedent discussed in this Part, the Court would need to conclude that a private action for just compensation against an unconsenting State has to be brought somewhere other than in a federal court, such as in the State's own courts. That is precisely the result for which this Article contends.[91] To reach that result, however, the Court would also have to grapple with case law discussed in the next Part, which suggests that the States' immunity in their own courts is symmetrical to their immunity in federal court and to the immunity of the federal government.

III. SYMMETRY SUGGESTS THAT STATES ARE ALSO IMMUNE FROM JUST-COMPENSATION SUITS BROUGHT IN THEIR OWN COURTS

The thesis of this Article is that unconsenting States can sometimes be sued in their own courts for just compensation.[92] Nonetheless, there is Supreme Court case law supporting a contrary conclusion, and that case law is discussed in this Part. The case law includes a case discussed above in Part II, *Hopkins v. Clemson Agricultural College*.[93] *Hopkins* could be read as directly supporting state sovereign immunity from just-compensation claims in state courts.[94] Other case law supplies indirect support by establishing two dimensions of symmetry in the law of sovereign immunity. The first symmetry is between the States' sovereign immunity in *federal* court and the States' sovereign immunity in *their own* courts.[95] The second symmetry is between the sovereign immunity of the *States* and the sovereign immunity of the *federal government*.[96] These two dimensions of symmetry are not only deeply rooted in the Court's precedent; they were reaffirmed by the Court in *Alden v. Maine*.[97] Nonetheless, the case law discussed in this Part does not foreclose this Article's thesis that the Fourteenth Amendment sometimes overrides the States' sovereign immunity from just-compensation claims.

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91. *See infra* notes 178–248 and accompanying text (Part IV).

92. *See infra* notes 178–248 and accompanying text (Part IV).

93. 221 U.S. 636 (1911).

94. *See infra* notes 98–11 and accompanying text (Part III.A).

95. *See infra* notes 112–14 and accompanying text (Part III.B).

96. *See infra* notes 115–39 and accompanying text (Part III.C).

97. 527 U.S. 706 (1999), discussed *infra* notes 140–77 and accompanying text (Part III.D).

A. Hopkins v. Clemson Agricultural College

Hopkins was discussed above in Part II to show that States have sovereign immunity in federal courts even from claims based on the Just Compensation Clause (as incorporated into the Fourteenth Amendment).[98] Now this Article discusses *Hopkins*' suggestion that this immunity from just-compensation claims extends even to a State's own courts.

Dr. Hopkins filed his lawsuit against the Clemson Agricultural College in a South Carolina state court, alleging that a dike built by the College had taken his property (by flooding it) without just compensation.[99] The case came to the U.S. Supreme Court after the South Carolina Supreme Court relied on sovereign immunity to affirm the dismissal of Hopkins' lawsuit.[100] The U.S. Supreme Court held that Hopkins was entitled to recover damages payable out of the College's own property.[101] The Court appeared to agree with the College, however, that an award of damages could not be executed against state funds or state-owned property.[102] In addition, the Court held that Hopkins was not entitled to an injunction requiring the College to tear down the dike that had caused Hopkins' land to flood, because that dike sat on state-owned land.[103] The decision in *Hopkins* thus strongly suggests that, when a state agent takes private property for public use without just compensation, the State has sovereign immunity in its own courts from relief that would be paid out of the state treasury or that would affect state-owned property.[104]

Indeed, the only reason that Dr. Hopkins was able to get damages from the College was because the Court concluded that the College did not

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98. *See supra* notes 82–88 and accompanying text (discussing Hopkins v. Clemson Agric. Coll., 221 U.S 636 (1911)).

99. *Hopkins*, 221 U.S. at 637–41.

100. *Id* at 636.

101. *Id.* at 644–48.

102. *See id.* at 648 (observing that, even if the land on which college was located was "not subject to levy and sale" because the State held title to it, the college itself held some land in fee simple and had various sources of income to satisfy the money judgment against it).

103. *Id.* at 648–49; *see also* text accompanying note 87, *supra* (quoting relevant passage of Court's opinion).

104. *See generally* Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L.J. 319, 347–48, 381, 383 (Spring 1998) [hereinafter Seamon, *Sovereign Immunity*] (explaining that *Hopkins* supports recognition that Constitution protects States' immunity from private actions for retroactive monetary relief in their own courts).

share the State's immunity.[105] The Court treated the College the same as an individual officer or a unit of local government, neither of which, the Court had previously held, possessed sovereign immunity from personal damages for tortious conduct.[106] Dr. Hopkins might not have been so lucky today. In recent years, the lower federal courts have consistently held that state universities are "arms of the State" that share the State's sovereign immunity.[107]

I believe that *Hopkins* can be read narrowly, for reasons that I will now explain, and that it *should* be read narrowly, for reasons discussed in Part IV.[108] *Hopkins* can be read as a case in which the State had immunity in its own courts only because that immunity did not prevent the plaintiff from getting adequate relief in those courts for the taking of his property. Under the Court's decision, Dr. Hopkins could recover damages from the College, in periodic state-court suits, as long as the dike continued to take his land, because the College did not share the State's sovereign immunity.[109] Furthermore, the Court suggested that Dr. Hopkins would not be forced to bring periodic suits against the College indefinitely. Rather, the forces of nature would take care of the problem. The dike that had caused the flooding of Hopkins' land had already washed away once, and the Court observed that Hopkins might be able to have the College enjoined from "further acts looking to the maintenance or reconstruction of the d[i]ke."[110] Such injunctive relief against a future taking, coupled with compensation from the College for the prior taking, arguably provided adequate relief in state court.[111] For these reasons, *Hopkins* can be read as a case in which sovereign immunity did not prevent an adequate state remedy for a governmental taking of property.

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105. *See Hopkins*, 221 U.S. at 642–46 (framing the question as "whether a public corporation can avail itself of the State's immunity from suit" and holding that, although college was an agent of the State, it did not share State's immunity in action alleging unconstitutional and tortious conduct).

106. *See id.* at 643–44 (relying on suits against public officials to reject College's claim that it had sovereign immunity); *id.* at 645 (citing Lincoln County v. Luning, 133 U.S. 529, 530–31 (1890) (holding that County did not share State's sovereign immunity)).

107. *See* Richard H. Seamon, *Damages for Unconstitutional Affirmative Action: An Analysis of the Monetary Claims in* Hopwood v. Texas, 71 TEMPLE L. REV. 839, 859–61 (1998) (discussing cases holding that state colleges and universities were entitled to sovereign immunity).

108. *See infra* notes 178–248 and accompanying text (Part IV).

109. *See Hopkins*, 221 U.S. at 639–40, 648.

110. *Id.* at 649.

111. *Cf.* Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 591 n.6 (1995) (stating in dicta that, despite general rule that 42 U.S.C. § 1983 does not authorize declaratory or injunctive relief against illegal state taxes if state law provides adequate remedy, declaratory relief might be available if necessary to spare taxpayer from having to bring multiple suits).

So read, *Hopkins* would not support a State's use of sovereign immunity to bar an adequate remedy for a taking.

B. *Symmetry Between the States' Immunity in Federal Court and Their Immunity in Their Own Courts*

As discussed in Part II, Supreme Court case law virtually compels the conclusion that States cannot be sued for just compensation in federal court. (They cannot be sued directly, nor can their officers be sued for an injunction requiring the payment of just compensation from the state treasury.[112]) Other case law indicates that the State's immunity in *federal* court is symmetrical to their immunity in *their own* courts.[113] Together, these two lines of cases forcefully suggest that unconsenting States cannot be sued for just compensation in their own courts.

The case law indicating that the State's federal-court immunity and their state-court immunity are symmetrical dates back to the early 19th century. The Court has consistently relied on the States' immunity in federal court to determine the scope of their immunity in their own courts, and vice-versa. As discussed below in Section D, the Court did so again in its recent decision in *Alden v. Maine*.[114]

C. *Symmetry Between the Sovereign Immunity of States and the Sovereign Immunity of the United States*

The Court has not only treated the States' immunity in federal court as being symmetrical to the States' immunity in their own courts. In addition, the Court has often treated the States' sovereign immunity as symmetrical to the United States' sovereign immunity.[115] Because of this

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112. *See supra* notes 53–91 and accompanying text (Part II).

113. I have discussed this case law in an earlier Article and will not repeat the discussion here. For a discussion of earlier case law, see Seamon, *Sovereign Immunity*, *supra* note 104, at 375–88.

114. 527 U.S. 706, 745–46 (1999), discussed *infra* notes 140–177 and accompanying text.

115. *See, e.g.*, Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 686 n.21 (1982) (Stevens, J., joined by Burger, C.J., and Marshall and Blackmun, JJ.) (citing with apparent approval precedent treating state sovereign immunity similarly to federal sovereign immunity); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 53 (1944) ("The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government."); Philadelphia Co. v. Stimson, 223 U.S. 605, 620 (1912) (stating that principle permitting state officers to be sued for injunctive relief against violation of federal law is "equally applicable" to federal officers); Tindal v. Wesley, 167 U.S. 204, 213 (1897) (stating that, in analyzing whether suit against state officer was barred by sovereign immunity, "the question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States"); Cunningham v. Macon & Brunswick

apparent symmetry between state and federal sovereign immunity, an analysis of whether the States are immune from just-compensation claims must consider the United States' immunity from such claims.

The Court's early case law suggests that the United States is immune from just-compensation claims except to the extent that it has waived that immunity in legislation such as the Tucker Act.[116] As Professor Brauneis has noted, the "classic cases" supporting that suggestion are *Schillinger v. United States*[117] and *Lynch v. United States*.[118] Professor Brauneis adds that those cases are "somewhat dated."[119] Indeed, in light of later decisions of the Court, *Schillinger* and *Lynch* do not foreclose this Article's thesis that the Due Process Clause sometimes overrides sovereign immunity.[120]

In *Schillinger*, the Court held that the plaintiff could not sue the United States under the Tucker Act for infringing on the plaintiff's patented method of laying concrete pavement.[121] The plaintiff alleged that, by infringing on his patent, the government had taken his property for public use without just compensation.[122] The Court determined that this infringement claim did not fall into any of the categories of claims as to which the Tucker Act waived the federal government's sovereign immunity; it was therefore barred by sovereign immunity.[123] That

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R.R., 109 U.S. 446, 451 (1883) ("It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution."); *see also* Seamon, *Separation of Powers*, *supra* note 59, at 173–74 (citing and discussing cases in which "the Court did not distinguish the sovereign immunity of the states from that of the United States"). *But cf., e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 478 (1793) (opinion of Jay, C.J.) (stating that federal courts' reliance on executive branch for enforcement of its judgments "place[s] the case of a state, and the case of the United States, in very different points of view" when it comes to sovereign immunity).

116. *See* 28 U.S.C. §§ 1346(a), 1491 (1998).

117. 155 U.S. 163 (1894).

118. 292 U.S. 571 (1934); *see also* Brauneis, *supra* note 20, at 138 n.343 (citing *Lynch*, 292 U.S. at 579–82, and *Schillinger*, 155 U.S. at 168). *But cf.* Kenneth N. Klee et al., *State Defiance of Bankruptcy Law*, 52 VAND. L. REV. 1527, 1576–77 (1999) (asserting that "[c]ourts have held that the United States may not assert its sovereign immunity as a defense to a Takings Clause claim"); Michael P. Kenny, *Sovereign Immunity and the Rule of Law: Aspiring to a Highest-Ranked View of the Eleventh Amendment*, 1 GEO. MASON INDEP. L. REV. 1, 14 (1992) (similar assertion).

119. Brauneis, *supra* note 20, at 138 n.343.

120. *See infra* notes 126–127, 134, 138 and accompanying text.

121. *Schillinger*, 155 U.S. at 166–72.

122. *See id.* at 168.

123. *Id.* at 167–72.

determination rested primarily on the Court's view that the alleged violation of the Just Compensation Clause did not, in and of itself, state a "claim[] founded upon the constitution" within the meaning of the Tucker Act.[124] At this time, the Court did not construe the Just Compensation Clause as creating a cause of action except when the circumstances of the taking implied a promise by the government to pay just compensation.[125] The Court in later cases concluded that the Clause itself creates a cause of action, without regard to whether the government impliedly promised to pay for the property that it had taken.[126] Thus, the predicate for the Court's sovereign-immunity ruling in *Schillinger* is no longer valid.[127] Even so, the portion of *Schillinger* that has been superceded by later case law concerned the existence of a cause of action, not the existence of sovereign immunity. Because these are two

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124. *Id.* at 167 (observing that, under then-recent amendment, Court of Claims could hear "[a]ll claims founded upon the constitution"); *id.* at 168 (rejecting plaintiff's argument that official's tortious appropriation of private property for public use "creates a claim founded upon the constitution").

125. *See* ROBERT MELTZ ET AL., THE TAKINGS ISSUE 40 n.20 (1999) (noting that "[e]arly decisions hung the [Court of Claims'] jurisdiction on the 'implied contract with the United States' phrase in the Tucker Act," but later cases "shifted to the statute's 'claim . . . founded . . . under the Constitution' phrase"); Brauneis, *supra* note 20, at 137 n.342 (discussing Court's transition from the view that Court of Claims' jurisdiction over just-compensation claim rested on "implied contract" to modern view that such claims arise directly under the Constitution); *Developments in the Law: Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 876 (1957) ("Before 1927 the Supreme Court . . . took the view that a 'taking' action could be maintained [under the Tucker Act] only if a promise to make compensation could be attributed to the Government.").

126. *See, e.g.*, Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 12 (1990) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the [Claims Court] to hear and determine.") (adding bracketed text and quoting United States v. Causby, 328 U.S. 256, 267 (1946)). In *United States v. Dickinson*, 331 U.S. 745, 748 (1947), the Court said:

> But whether the theory of these suits be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment . . . .

See also Jacobs v. United States, 290 U.S. 13, 16 (1933) (holding that lower court erred in considering just-compensation claim to be based on implied contract, and stating: "A promise to pay was not necessary . . . . The suits were thus founded upon the Constitution."); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923) (stating that property owner's right to recover just compensation from United States "does not depend on contract" and that "[a] promise to pay is not necessary"); *see also* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (observing that "it has been established at least since *Jacobs* . . . that claims for just compensation are grounded in the Constitution itself").

127. *See Developments in the Law*, *supra* note 125, at 876 (commenting that Court decisions rejecting takings claims that could not be supported on implied-contract rationale seemed to rest on Court's assumption that Just Compensation Clause itself did not create cause of action).

distinct issues (as discussed above),[128] *Schillinger* still constitutes precedent suggesting that the federal government would be immune from just-compensation suits in the absence of its consent.[129] .

In *Lynch*, the Court held that a federal statute violated substantive due process by repudiating the government's obligation to honor contracts of war insurance.[130] The statute was a wartime, cost-saving measure; it purported to repeal earlier statutes that gave low-cost death and disability insurance to people who fought in World War I.[131] The Court determined that the repeal of those statutes would breach the government's contracts with the insured veterans and thereby unconstitutionally deprive them of a property right.[132] In addition to holding the repealer statute unconstitutional, the Court held that the statute did not withdraw the federal government's consent to suits to recover money under the insurance contracts that the statute sought to repeal.[133] In other words, the Court construed the statute to prevent the United States from using sovereign immunity to defeat a constitutional challenge to its contract repudiation. This result, if anything, implies that the federal government cannot use its sovereign immunity to prevent an adequate remedy for its unlawful deprivation of property, including its

128. *See supra* notes 32–37 and accompanying text.

129. Other cases, like *Schillinger*, suggest that the United States is immune from just-compensation claims based on a rationale the continued validity of which is dubious. *See, e.g.*, United States v. N. Am. Transp. & Trading Co., 253 U.S. 330, 335–36 (1920); Tempel v. United States, 248 U.S. 121, 130–31 (1918); Russell v. United States, 182 U.S. 516, 535 (1901); *see also* United States v. Sioux Nation, 448 U.S. 371, 414 (1980) (arguably suggesting that Congress must "waive[] the Government's sovereign immunity" for "courts to resolve a taking claim on the merits").

130. *See* Lynch v. United States, 292 U.S. 571, 580 (1934) (holding that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States" that arose under wartime insurance policies issued by the government).

131. *See id.* at 574–79 (describing statutes that created wartime insurance program).

132. *Id.* at 576 (holding that insurance policies "are contracts of the United States"); *id.* at 579 (observing that repeal of statutes creating those policies would, "if valid, abrogat[e]" those contracts and "relieve[] the United States from all liability on the contracts without making compensation to the beneficiaries"); *id.* (holding that insurance contracts were protected by Just Compensation Clause; that, in absence of power to annul them, "the due process clause prohibits the United States from annulling them"; and that no such power had been identified).

133. *See id.* at 575 (government argued that lower courts lacked jurisdiction over the suit "because the consent of the United States to be sued had been withdrawn" by same statute that purported to repeal prior statutes creating wartime insurance); *id.* at 586 (rejecting government's argument, stating: "[I]t does not appear that Congress wished to deny the [judicial] remedy if the repeal of the contractual right was held void under the Fifth Amendment.").

takings of private property for public use without just compensation.[134]

The *Lynch* Court did say in dicta that Congress could have withdrawn consent to suit on the insurance contracts as long as it did not repudiate its obligation to honor the contracts.[135] In light of the holding in *Lynch*, this dicta should be read to mean only that the government could fulfill its contractual obligations "without the interposition of" the courts.[136] It should not be read to mean that the United States need not provide a way of honoring those obligations or its obligation to pay just compensation when it takes private property for public use.[137] As the Court recently said, the government can violate the Constitution "either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought."[138] In light of that principle, the *Lynch* dicta suggests only that the Constitution does not require that compensation procedures take the form of judicial procedures.[139]

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134. *See* Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 134–36 (1974) (citing *Lynch* to support interpreting a federal statute not to preclude suit for just compensation under Tucker Act); Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (citing *Lynch*, among other cases, for proposition that, "while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of [federal] courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation") (footnote omitted), *cert. denied*, 335 U.S. 887 (1948).

135. *See Lynch*, 292 U.S. at 581 ("Although consent to sue was thus given when the [war insurance] policy issued, Congress retained power to withdraw the consent at any time.").

136. *Id.* at 582 ("So long as the contractual obligation is recognized, Congress may direct its fulfillment without the interposition of either a court or an administrative tribunal."); *cf.* Beers v. Arkansas, 61 U.S. (20 How.) 527, 528–30 (1857) (rejecting constitutional challenge to state statute creating additional requirements for suing State in state court on its bond obligations and suggesting that even repeal of state statute permitting such suits would not imply that State repudiated the contract obligations upon which such suits were based).

137. Such a reading of the *Lynch* dicta would be at odds with not only the holding in *Lynch* but also the Court's later decision in *De La Rama Steam Ship Co. v. United States*, 344 U.S. 386 (1953). In *De La Rama*, the Court refused to construe a federal statute to take away a federal district court's jurisdiction to hear a claim against the United States based on a government insurance policy. *De La Rama* 344 U.S. at 387–91. The Court cited *Lynch* and observed that the effect of such a construction would be to prevent the plaintiff from enforcing the government's contractual obligations. *Id.* at 382, 388–90; *see also* Graham v. Goodcell, 282 U.S. 409, 431 (1931) (stating in dicta that Congress could not withdraw consent to suits against itself, and preclude suits against its officers, to prevent paying tax refunds, if it lacked power to enact legislation eliminating the right to the refunds).

138. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 717 (1999).

139. *See infra* notes 182–195 and accompanying text (arguing that States may be able to use nonjudicial procedures to meet their obligation under Due Process Clause to provide procedure for payment of just compensation).

D. Alden v. Maine

The two dimensions of symmetry that have been discussed—(1) between the States' immunity in federal court and their immunity in their own courts; and (2) between the States' immunity and that of the United States—underlay *Alden v. Maine*.[140] *Alden* therefore reinforces an argument that (1) if States are immune from just-compensation claims in federal court and (2) if the United States would be immune from just-compensation claims in the absence of the Tucker Act, then States should be immune from just-compensation claims in their own courts.[141] Like the other case law discussed in this Part of the Article, *Alden* does not compel the conclusion that States are invariably immune from just-compensation suits brought in their own courts.

In *Alden*, the Court addressed an issue that arose in the wake of the Court's decision three years earlier in *Seminole Tribe v. Florida*.[142] In *Seminole Tribe*, the Court held that Congress cannot use its Article I powers to authorize private actions for retroactive monetary relief to be brought against unconsenting States in *federal* court.[143] This naturally led to the question whether Congress could use Article I to subject unconsenting States to such suits in *their own* courts.[144] Addressing this question so soon after *Seminole Tribe*, the Court seems to have regarded

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140. 527 U.S. 706 (1999). In the interest of full disclosure, I note that I wrote an amicus brief in *Alden* on behalf of a group of state and local organizations. *See* Brief of the National Conference of State Legislatures [et al.], *Alden v. Maine* (No. 98-436). The Court adopted one of the arguments in that amicus brief. *Compare id.* at 15 (arguing that Court's anti-commandeering precedent prevents Congress from "using the Commerce Clause . . . to turn the State against itself" by "pitting the executive branch of Maine against its judicial branch") *with Alden*, 527 U.S. at 749 ("A power to press a State's own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will . . . .").

141. For reasons discussed above, decisions of the United States Supreme Court virtually compel the conclusion that unconsenting States are immune from just-compensation claims in federal court. *See supra* notes 53–91 and accompanying text (Part II). In contrast, it is unclear from the Court's case law whether the United States would be immune from just-compensation claims in federal court in the absence of the waiver of immunity in the Tucker Act. *See supra* notes 116–39 and accompanying text (arguing that older Court decisions suggesting that federal government is immune from just-compensation claims do not resolve the issue); *see also infra* notes 329–43 and accompanying text (arguing that, in the absence of Tucker Act, Due Process Clause of Fifth Amendment would require United States to provide adequate procedures for paying just compensation).

142. 517 U.S. 44 (1996).

143. *Id.* at 72–73.

144. *Alden*, 527 U.S. at 741 ("Whether Congress has authority under Article I to abrogate a State's immunity from suit in its own courts is . . . a question of first impression.").

it as a question of symmetry: for private causes of action authorized by federal statutes enacted under Article I, is a State's immunity in its own courts symmetrical to its immunity in federal court?[145] That the issue was one of symmetry was reinforced by the facts of *Alden*. The plaintiffs in that case initially sued the State of Maine in federal court to recover overtime wages under the federal Fair Labor Standards Act.[146] After that federal-court suit was dismissed based on *Seminole Tribe*, the plaintiffs brought an identical suit against Maine in Maine's own courts.[147] The Court held in *Alden* that this state-court action was likewise barred by sovereign immunity.[148]

The majority opinion in *Alden* consisted of four parts. Part I demonstrated that the States' sovereign immunity derives, not from the Eleventh Amendment, but from the original Constitution.[149] Part II demonstrated that Congress could not override this immunity using its Article I powers.[150] Part III discussed limits on the States' immunity, including the States' ability to waive their immunity.[151] Part IV rejected the plaintiffs' argument that Maine had waived its immunity from the claims in that case.[152] In discussing the nature of the States' immunity in their own courts (in Part I) and Congress's power to abrogate that immunity (in Part II), the Court repeatedly linked the States' immunity in federal court to their immunity in their own courts and also linked the States' immunity to that of the federal government.

Specifically, the Court determined in Part I that the original

145. *See* Jackson, *Seductions*, *supra* note 19, at 698 (asserting that, "[h]aving decided . . . in *Seminole Tribe* that the Eleventh Amendment barred the states from being sued in federal courts without their consent on Article I causes of action, coherence arguments for the same rule in state courts apparently were very attractive to the Court [in *Alden*]").

146. *See* 29 U.S.C. §§ 201–19 (1998) (codifying Fair Labor Standards Act); Mills v. Maine, 118 F.3d 37, 41 (1st Cir. 1997) (upholding dismissal of federal-court action involving same claims as addressed in *Alden*).

147. *Alden*, 527 U.S. at 712.

148. *Id.* at 712, 754.

149. *Id.* at 713 (concluding that state sovereign immunity "neither derives from, nor is limited by, the terms of the Eleventh Amendment" but is instead "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments").

150. *Id.* at 730 (stating that state sovereign immunity "is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution" and is therefore applicable to Congress's exercise of legislative powers).

151. *Id.* at 755 (stating that "certain limits are implicit in the constitutional principle of sovereign immunity," one of which is that "sovereign immunity bars suits only in the absence of consent").

152. *Id.* at 757–58 (concluding that Maine "has not consented to suit").

Constitution "preserve[d] the States' *traditional* immunity from private suits."[153] By "traditional" immunity, the Court meant the States' immunity in their own courts, which, of course, predated the Constitution.[154] The Court reasoned that the immunity that States had enjoyed in their own courts was preserved in the federal courts for which the Constitution provided.[155] This "preservation" rationale implies that, under the original Constitution, States would enjoy the same immunity in the newly authorized federal courts as they had had in their own courts—i.e., that the States' immunities in the two fora would be symmetrical.[156]

The Court began Part II of its opinion by asserting that state sovereign immunity restricts not only the powers of the federal judiciary but also those of Congress.[157] In support of this assertion, the Court cited decisions, including *Seminole Tribe*, holding that Congress cannot use Article I to abrogate state sovereign immunity in *federal* court.[158] In the Court's view, "[t]he logic of the decisions . . . does not turn on the forum in which the suits were prosecuted but extends to state-court suits as well."[159] The Court also cited decisions in which it "described the States' immunity . . . without reference to whether the suit was prosecuted in state or federal court."[160] These decisions "suggest[ed]" that States enjoy in their own courts an immunity "analogous" to that enjoyed in federal court.[161] The Court reasoned that, because Congress cannot use Article I

153. *Id.* at 724 (emphasis added).

154. *See id.* at 715–16 ("Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified."). The court further stated that:

> The handful of state statutory and constitutional provisions authorizing suits or petitions of right against States [in their own courts] only confirms the prevalence of the traditional understanding that a State could not be sued [in its own courts] in the absence of an express waiver, for if the understanding were otherwise, the provisions would have been unnecessary.

Id. at 724; *see also id.* at 742 (stating that sovereign immunity of States from suits in their own courts "was long established and unquestioned" when ratification of Constitution was being debated).

155. *Id.* at 724 (inferring from circumstances of Eleventh Amendment's adoption that "the country as a whole—which had adopted the Constitution just five years earlier—had not understood the document to strip the States of their immunity from private suits").

156. *See id.* at 742 (reasoning that the logic of argument by supporters of Constitution that it would not subject unconsenting States to suits in federal court "applies with even greater force in the context of a suit prosecuted against a sovereign in its own courts").

157. *Id.* at 730–31.

158. *Id.* at 733 (citing, among other cases, Seminole Tribe v. Florida, 517 U.S. 44 (1996)).

159. *Id.*

160. *Id.* at 745.

161. *Id.* at 748.

to abrogate the States' federal-court immunity, it cannot use Article I to abrogate their state-court immunity, either.[162]

After discussing its case law on the States' federal-court immunity and finding that case law supported "analogous" state-court immunity, the *Alden* Court in Part II of its opinion considered "whether a congressional power to subject nonconsenting States to private suits in their own courts is consistent with the structure of the Constitution."[163] The Court found that the constitutional structure accords States a dignity that is offended by private suits "regardless of the forum."[164] Ultimately, the Court could not believe that Congress could "require state courts to entertain federal suits which . . . could not be heard in federal courts."[165]

In addition to linking the States' state-court immunity to their federal-court immunity, the Court in *Alden* linked the States' sovereign immunity to that of the United States. Part I of the opinion discussed the founding generation's "universal" acceptance of the English doctrine "that a sovereign could not be sued without its consent" without suggesting that this doctrine differed depending on whether the "sovereign" was a State or the federal government.[166] Part II even more explicitly linked the States' immunity to that of the United States:

> It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege.[167]

Elsewhere in its opinion, moreover, the *Alden* Court quoted precedent in which it had equated the sovereign immunity of States to that of the

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162. *See, e.g., id.* at 735 (finding in history of Eleventh Amendment the suggestion that "the States' sovereign immunity was understood to extend beyond state-law causes of action"); *see also* Dan Braveman, *Enforcement of Federal Rights Against States:* Alden *and Federalism Non-sense*, 49 AM. U. L. REV. 611, 646 (2000) (remarking that *Alden* "appears to adopt a rather curious 'symmetrical' view of federalism" under which "state courts cannot be required to hear FLSA claims against the states because federal courts cannot be required to do so").

163. *Alden*, 527 U.S. at 748.

164. *Id.* at 749.

165 *Id.* at 754; *see also id.* at 752 (observing that it would be "anomal[ous]" for "the National Government [to] wield greater power in the state courts than in its own judicial instrumentalities").

166. *Id.* at 715; *see also id.* at 716–17 (quoting Alexander Hamilton's statement in Federalist No. 81 that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*").

167. *Id* at 749–50; *see also id.* at 735 ("[S]urely the dissent does not believe that sovereign immunity poses no bar to a state-law suit against the United States in federal court.").

federal government.[168]

Thus, if the Court were to conclude that States are immune from just-compensation suits brought in federal court (as argued in Part II of this Article)[169] and that the United States would likewise be immune from such suits (as some early case law suggests),[170] *Alden* would in two ways support the further conclusion that States are likewise immune from such suits in their own courts. First, *Alden* indicates that the States' immunity in their own courts is coextensive with their immunity in federal court.[171] Second, *Alden* indicates that the States' immunity corresponds to that of the United States.

Nonetheless, *Alden* does not foreclose the thesis of this Article, which is that the Due Process Clause of the Fourteenth Amendment can subject unconsenting States to suits for just compensation in their own courts. As mentioned, Part I of the *Alden* opinion traces the States' sovereign immunity to the *original* Constitution; it thus does not prevent the conclusion that the Fourteenth Amendment altered that immunity.[172] Similarly, Part II of the *Alden* opinion discussed only Congress's power under Article I to override the States' sovereign immunity; it does not address whether Congress would have such power under Section 5 of the

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168. *Id.* at 745–46:

> It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.

(quoting Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 451 (1883)); *id.* at 750 ("The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government.") (quoting Great N. Life Ins. Co. v. Read, 322 U.S. 47, 53 (1944)).

169. *See supra* notes 53–91 and accompanying text (discussing case law strongly suggesting that States are immune from just-compensation suits brought in federal court).

170. *See supra* notes 116–39 and accompanying text (discussing case law suggesting that United States is immune from just-compensation suits).

171. The Court in *Alden* determined that in some ways suits against the States in their own courts are more threatening to sovereignty interests than are suits against the States in federal court. *Alden*, 527 U.S. at 749. This determination would support an argument that the States' immunity from just-compensation claims in their own courts follows *a fortiori* from their federal-court immunity from such claims. That argument, however, would be hard to reconcile with case law indicating that States bear the initial responsibility for providing just compensation when they take private property for public use. *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985),

172. *See supra* notes 149 and 153–156 and accompanying text; *see also Alden*, 527 U.S. at 726–27 (referring to the "original understanding of the States' constitutional immunity from suit" by the "founding generation"); *id.* at 730 (saying that state sovereign immunity "inheres in the system of federalism established by the Constitution").

Fourteenth Amendment.[173] Most importantly, the issue before the Court in *Alden* concerned a State's immunity from a private action based on an Article I statute, and the Court's holding was expressly limited to that situation.[174]

The Court in *Alden* did mention the Fourteenth Amendment in Part III of its opinion, where it discussed limits on state sovereign immunity. The Court explained that "[t]he States have consented . . . to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments."[175] The only amendment that the Court cited was the Fourteenth Amendment, of which the Court said:

> We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.[176]

It may be significant that the Court referred in this passage only to Congress's power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment. Perhaps this implies that the Fourteenth Amendment does not abrogate that immunity of its own force.[177] If the

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173. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article [i.e., this Amendment]."); *see also Alden*, 527 U.S. at 730 (stating at outset of Part II of the opinion: "In this case we must determine whether Congress has the power, under Article I, to subject nonconsenting States to private suits in their own courts."); *id.* at 741 (stating at outset of Part II.B of its opinion: "Whether Congress has authority under Article I to abrogate a State's immunity from suit in its own courts is, then, a question of first impression.").

174. *See Alden*, 527 U.S. at 712 ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); *id.* at 754 ("In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.").

175. *Id.* at 755.

176. *Id.* at 756.

177. *See* Boise Cascade Corp. v. Or. State Bd. of Forestry, 991 P.2d 563, 567 (Or. Ct. App. 1999) (stating that *Alden*'s "emphasis on positive acts of Congress under section five" might suggest that Fourteenth Amendment does not, of its own force, subject unconsenting States to just-compensation claims in their own courts). Compare the description of the Fourteenth Amendment in the passage of *Alden* quoted in the text with the description of the Fourteenth Amendment in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453–54 (1976). In *Bitzer*, the Court described the substantive provisions, as well as the enforcement provision, of the Fourteenth Amendment as "contemplat[ing] limitations on [the States'] authority." *Id.* at 453. The *Bitzer* Court said that the Fourteenth Amendment's substantive provisions, in particular, "[i]mpressed . . . duties" on the States "with respect to their treatment of private individuals." *Id.*; *see also id.* at 456 (observing that, quite apart from Congress's power to

Court were to so hold, it would reject the thesis of this Article, which is that the Fourteenth Amendment does indeed, of its own force, sometimes abrogate state sovereign immunity.

In any event, like the other precedent discussed in this Part of this Article, *Alden* supports but does not compel the conclusion that States are immune from just-compensation suits in their own courts. It is therefore hoped that this Part has shown that the Court's precedent leaves room for the argument advanced in the next Part of this Article.

IV. THE DUE PROCESS CLAUSE CREATES REMEDIAL OBLIGATIONS THAT SOMETIMES REQUIRE STATES TO SUFFER JUST-COMPENSATION SUITS IN THEIR OWN COURTS

The Due Process Clause of the Fourteenth Amendment puts remedial obligations on the States.[178] Those obligations arise whenever a State deprives a person of life, liberty, or property.[179] One such deprivation occurs when a State takes private property for public use.[180] The Court has said that the State's remedial obligation for this sort of deprivation is to have made, at the time of its taking of the property, "reasonable, certain and adequate provision for obtaining compensation."[181] This Part

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enforce substantive provisions of Fourteenth Amendment, those provisions "themselves embody significant limitations on state authority"); *see also* Seminole Tribe v. Florida, 517 U.S. 44, 65–66 (1996) ("[T]he 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."). The *Bitzer* Court characterized Congress's enforcement power as almost ancillary to the substantive provisions: "Standing behind the imperatives [of the substantive provisions] is Congress' power to 'enforce' them 'by appropriate legislation.'" *Id.* at 453. In light of this description, it would seem incongruous to conclude that Section 5 gives Congress the awesome power to abrogate state sovereign immunity even though the substantive provisions themselves do not; this conclusion would seem to result in the enforcement tail wagging the substantive dog.

178. This Part of the Article analyzes the nature of those obligations for claims seeking just compensation. The implications of that analysis for other due process claims are discussed *infra* notes 260–328 and accompanying text (Part V.B).

179. *See* U.S. CONST. amend. XIV, § 1 ("Nor shall any State deprive any person of life, liberty, or property, without due process of law.").

180. Hudson v. Palmer, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring) ("The Due Process and Takings Clauses of the Fifth and Fourteenth Amendments stand directly in opposition to state action intended to deprive people of their legally protected property interests. . . . When adequate remedies are provided and followed, no uncompensated taking or deprivation of property without due process can result.").

181. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 252 (1905); Sweet v.

argues that a State may well be able to meet this obligation in many cases without allowing itself to be sued in its own courts; in such cases, the State can retain its immunity from suits for just compensation in those courts. If a State fails to create an adequate, alternative way to pay just compensation, however, the Due Process Clause requires the State's courts of general jurisdiction to be open to just-compensation suits against it. Under these circumstances, the Due Process Clause overrides state sovereign immunity.

A. A State May Be Able To Provide "Reasonable, Certain and Adequate Provision" for Just Compensation Without Involving Its Courts

We should take the Court at its word when it says that a State can meet its due process obligation by creating a just-compensation scheme that is "reasonable, certain, and adequate."[182] As the Court has often said, due process is "flexible."[183] The States, in particular, have wide discretion in devising procedures for providing due process.[184] That discretion is part of the broader discretion that the people of every State have to structure their state government however they like, within the limits of the U.S. Constitution.[185] This latitude includes the State procedures by which

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Rechel, 159 U.S. 380, 403 (1895); *see also* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11 (1990) (applying same standard to asserted takings by federal government); Dames & Moore v. Regan, 453 U.S. 654, 689 (1981) (same); United States v. Sioux Nation, 448 U.S. 371, 422 (1980) (same); Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 124–25 (1974) (same); Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923) (same); W. Union Tel. Co. v. Pa. R.R., 195 U.S. 540, 568 (1904) (same); Cherokee Nation v. S. Kan. Ry., 135 U.S 641, 659 (1890) (same).

182. *See supra* note 181 (citing cases that state "reasonable, certain, and adequate" standard).

183. *E.g.*, Zinermon v. Burch, 494 U.S. 113, 127 (1990) ("Due process, as this Court often has said, is a flexible concept that varies with the particular situation."); Gilbert v. Homar, 520 U.S. 924, 930 (1997) (describing due process as "flexible").

184. *See, e.g., Gilbert*, 520 U.S. at 930 (observing that State has broad discretion in providing due process in connection with disciplining its employees).

185. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 752 (1999) ("A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts."); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government . . . a State defines itself as a sovereign."); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); *see also* Johnson v. Fankell, 520 U.S. 911, 919 (1997) (referring to States' authority "to establish the structure and jurisdiction of their own courts"); *cf.* Regents of Univ. of Minn. v. Raygor, 620 N.W.2d 680, 685–87 (Minn. 2001) (holding that State's sovereign immunity prevented 28 U.S.C. § 1367(d) from tolling statute of limitations for state-court suit against State based on state law), *cert. granted*, 121 S. Ct. 2214 (2001); Bush v. Paragon Property, Inc., 997 P.2d 882, 884–88 (Or. Ct.

property owners can get just compensation when their property is taken for public use.[186] All that the Fourteenth Amendment demands is that the State's compensation procedure be: (1) reasonable—i.e., that it not entail undue delay, expense, or effort;[187] (2) certain—i.e., that there be no doubt about its existence or its potential to lead to an award of just compensation;[188] and (3) adequate—i.e., that it actually and reliably result in an award of just compensation when the State has taken private property for public use.[189]

If a State has a nonjudicial compensation scheme that meets these criteria, the Due Process Clause should not be construed categorically to compel the State to let itself be sued for compensation in its own courts.[190] For example, a State could create a claims commission in its

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App. 2000) (holding that Congress lacked power to require state courts to provide interlocutory appellate review of orders denying arbitration when state law did not permit such review).

186. *See e.g.*, *Madisonville Traction*, 196 U.S. at 252 ("Speaking generally, it is for the State, primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken."); Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 236 (1897) ("The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation."); *see also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 660 (1981) (Brennan, J., dissenting) (stating that "the Constitution does not embody any specific procedure or form of remedy that the States must adopt" in meeting their obligations under Just Compensation Clause). Justice Brennan's dissent in *San Diego Gas* was later adopted by a majority of the Court to the extent that it argued in favor of government liability for temporary regulatory takings. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315, 316 n.9, 318 (1987) (discussing and citing with approval Justice Brennan's *San Diego Gas* dissent); *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 866–67 (1987) (Stevens, J., dissenting) (observing that Court in *First English* endorsed Justice Brennan's proposal in *San Diego Gas* dissent that government owes just compensation for temporary regulatory takings); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018 (1992) (describing with approval Justice Brennan's observation in *San Diego Gas* dissent that, from property owner's perspective, government's prohibition of all beneficial use of land was tantamount to physical appropriation).

187. *See, e.g.*, Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 677 (1923) (holding that Just Compensation Clause is satisfied by "prompt" ascertainment and payment of compensation).

188. *Cf.* Wallace v. Hines, 253 U.S. 66, 68 (1920) (holding that federal court would not withhold equitable relief based on speculative state remedy).

189. *Cf.* Crane v. Hahlo, 258 U.S. 142, 147–48 (1922) (holding that due process was not violated by statute that restricted judicial review of administrative determination of damages caused to property owner by city's improvement of adjoining street).

190. *See* Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 298 (1990) ("[I]t seems hard to contend that a scheme providing a single, but entirely fair, administrative determination necessarily denies due process."). The Due Process Clause may well require that judicial review be available for claims that a State's non-judicial compensation scheme fails to meet the criteria of (1) reasonableness, (2) certainty, and (3) adequacy. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93

executive branch to handle just-compensation claims.[191] A State could even authorize its legislature to rule on claims for just compensation and

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COLUM. L. REV. 309, 334 (1993) [hereinafter Fallon, *Confusions*] (observing that judicial review is usually available for claim that an administrative scheme violates Due Process Clause). In addition, it is arguable that the Supremacy Clause or Article III, or the two in combination, require that some federal court be able to review a claim that a state has failed to provide just compensation for a taking of private property for public use. *See* Seamon, *Sovereign Immunity*, *supra* note 104, at 393 n.363 (suggesting that Supremacy Clause may require that United States Supreme Court be able to review state adjudications of federal claims); *see also* Meltzer, *supra*, at 298–99 (arguing that Article III is more appropriate basis for constitutional right to judicial review); *cf., e.g.*, Crowell v. Benson, 285 U.S. 22, 46, 60 (1932) (suggesting that judicial review of administrative determinations affecting life, liberty, or property can sometimes be required by Due Process Clause or Article III); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920) (stating that, when property owner claims that rates that state entity allows it to charge are confiscatory, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the [rate] order is void because in conflict with the due process clause"); Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine*: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1305 (2000) (appearing to argue that due process generally requires judicial forum); Martin Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 915 & n.61 (1982) (arguing that due process requires an "independent" court to review constitutional claims); *see generally* Woolhandler and Collins, *supra* note 58, at 628–40 (discussing early eminent domain and rate cases in which Court found constitutional right, including due-process right, to judicial review).

191. *See, e.g.*, Austin v. Ark. State Highway Comm'n, 895 S.W.2d 941, 942–44 (Ark. 1995) (holding that sovereign immunity barred just-compensation claim, but property owner could file claim with state Claims Commission); *see also* ARK. CODE. ANN. §§ 19-10-201 to -210 (Repl. 1994) (authorizing certain claims against State to be heard by executive-branch commission, subject to review by Arkansas legislature); *cf. Crane*, 258 U.S. at 145–47 (rejecting due process challenge to state procedure under which damages to plaintiff's property were assessed by municipal officials, subject to state-court review only on issues of jurisdiction or fraud and willful misconduct by officials); Comm'rs of Road Improvement v. St. Louis S.W. Ry., 257 U.S. 547, 555 (1922) (stating that "due process of law does not necessarily require judicial machinery to fix values in condemnation"); Bauman v. Ross, 167 U.S. 548, 593 (1897) (upholding land-acquisition scheme under which value of land was determined by commissioners, subject to judicial review); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 694–95 (1897) (holding that due process did not require jury to assess damages but was instead satisfied by procedure that permitted award to be determined by commissioners, subject to judicial review); Shoemaker v. United States, 147 U.S. 282, 285 (1893) (same); United States v. Jones, 109 U.S. 513, 519 (1883) (upholding federal statute authorizing state courts to hear condemnation actions brought by federal officials and remarking that determination of just compensation "may be prosecuted before commissioners or special boards or the courts . . . . All that is required is that it shall be conducted in some fair and just manner . . . ."); Kohl v. United States, 91 U.S. 367, 378–79 (1875) ("The proceeding by the States, in the exercise of their right of eminent domain, is often had before commissioners of assessment or special boards appointed for that purpose."). *But cf.* Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893) (describing amount of just compensation as "judicial" question); *but see also* United States v. Cors, 337 U.S. 325, 330–36 (1949) (independently reviewing whether just compensation resulted from application of administrative regulations prescribing compensation for property confiscated for wartime use).

to award compensation by private bills.[192] Today, it may seem doubtful that a non-judicial compensation scheme—particularly a private-bill scheme—could meet the due process criteria of reasonableness, certainty, and adequacy. Problems with non-judicial procedures for adjudicating claims against the government have led in modern times to the prevalence of judicial procedures.[193] Historically, however, compensation claims against the government were handled by the legislative branch, and to a lesser extent by the executive branch, long before they were assigned to the courts.[194] Given this history and the flexibility of due process, it would be untenable to conclude that the Due Process Clause categorically compels judicial resolution of just-compensation claims.[195]

B. *If a State Does Not Provide an Adequate, Alternative Way To Pay Just Compensation, the State Can Be Sued for Just Compensation in Its Own Courts of General Jurisdiction*

Section A argued that States can meet their due process obligation by creating non-judicial schemes of providing just compensation for private property that the State has taken for public use. The question remains: What does the Due Process Clause require if a State does not create an adequate non-judicial compensation scheme and retains its immunity from just-compensation suits in its own courts?

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192. *Cf.* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 644 n.9 (1999) (noting availability of remedy by private bill from legislature in evaluating state remedies for State's patent infringement).

193. *See* WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY, PART II 8–11 (1978) (describing problems with congressional consideration of claims against the United States during the first half of the 19th century); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 156–57 (1986) (discussing similar issue).

194. *See* Seamon, *Separation of Powers*, *supra* note 59, at 175–78 & n.97 (discussing history of federal claims); Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985) (same); *see also* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 903–62 (1997) (discussing history of legislative and executive handling of claims against government).

195. *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 326 (1985) ("The flexibility in approach in our due process cases is intended in part to allow room for other forms of dispute resolution [i.e., besides courtroom litigation]."); *see also, e.g.*, Burnham v. Superior Court of California, 495 U.S. 604, 619 (1990) (noting that history is relevant to due-process analysis); Ingraham v. Wright, 430 U.S. 651, 672–76 (1977) (same); *Crane*, 258 U.S. at 147 (same, with specific reference to just-compensation proceedings); Hurtado v. California, 110 U.S. 516, 528–29 (1884) (indicating that historical practice is relevant to due-process analysis).

In considering that question, it is worth keeping in mind that a person whose property has been taken for public use can often get some judicial relief without suing the state directly. Specifically, the property owner can sue the responsible state officials for money damages out of their own pockets and an injunction to prevent them from continuing to take the property without just compensation.[196] These remedies probably are available in both federal court and the State's own courts.[197] If these remedies are available in state court and they combine to produce just compensation in a particular case, the property owner in that case cannot complain that the State has failed to provide an adequate remedy.[198]

Often, however, an officer suit will not produce just compensation. An award of damages for any temporary taking will frequently be barred by

196. *See supra* notes 59–72 and accompanying text (describing remedies historically available for uncompensated takings in officer suits) Today, the property owner could seek money damages from the responsible state officials under 42 U.S.C. § 1983. *Cf., e.g.*, City of Monterey v. Del Monte Dunes, 526 U.S. 687, 694 (1999) (stating that federal-court suit seeking monetary award against municipality for alleged regulatory taking was brought under Section § 1983). Injunctive relief against the official would also be available under Section 1983, as well as under the doctrine of Ex parte *Young*, 209 U.S. 123, 149–68 (1908). *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("Congress plainly authorized the federal courts to issue injunctions in § 1983 actions . . . ."); *See also Ex parte* Young, 209 U.S. at 151–52 (citing United States v. Lee, 106 U.S. 196 (1882). In *Lee*, the taking of property without just compensation was alleged to support the principle authorizing an officer suit for equitable relief despite state sovereign immunity. *See supra* notes 60–61 and accompanying text (discussing *Lee*) Although the Court applies "ripeness" rules that would generally prevent a federal-court suit against a state official alleging an uncompensated taking, those rules would not apply if, as posited in the text, the State failed to provide an adequate process for obtaining compensation in its own courts. *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (holding that, before suing in federal court, takings claimant must exhaust state remedies for obtaining just compensation as long as state provides "an adequate process for obtaining compensation"); *see generally* Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 HASTINGS CONST. L.Q. 1, 5–17 (1999) (describing Court's "ripeness" rules for takings claims in federal court).

197. The Court has held that state courts and federal courts have concurrent jurisdiction over Section 1983 suits. *See* Felder v. Casey, 487 U.S. 131, 141 (1988). But the Court has "never held that state courts *must* entertain § 1983 suits." Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 591 n.4 (1995) (emphasis added). Even so, "[v]irtually every State has expressly or by implication opened its courts to § 1983 actions, and there are no state court systems that refuse to hear § 1983 cases." Howlett v. Rose, 496 U.S. 356, 378 n.20 (1990).

198. *Cf.* Parratt v. Taylor, 451 U.S. 527, 543–44 (1981) (rejecting plaintiff's argument that tort remedy against state was inadequate because it did not allow suit against offending officer, because remedy "fully compensated" plaintiff for his loss); Bob Jones Univ. v. Simon, 416 U.S. 725, 746–48 (1974) (finding it unnecessary to decide whether Tax Injunction Act would violate due process as applied in some situations, because plaintiff in that case had adequate relief).

official immunity,[199] and sometimes even injunctive relief could be barred.[200] When that is true and the State has not created an adequate nonjudicial scheme for awarding just compensation, the State will have failed to make "reasonable, certain and adequate provision for obtaining compensation."[201]

Under these circumstances, the victim of a taking should be able to sue the State directly for just compensation in a state court of general jurisdiction.[202] In such a suit, the plaintiff would have a cause of action under the Just Compensation Clause, as applicable to States under the Fourteenth Amendment.[203] The plaintiff might have to prove that an officer suit in state court would not yield just compensation and that the

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199. *See* 9 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY, § 81.05(d), at 514–15 (2d ed. 1994) (discussing difficulties of overcoming official immunity in just-compensation suits based on Section 1983).

200. See THOMAS, *supra* note 199, §81.05(c)(2), at 510–11 (discussing difficulties of obtaining injunctive relief in takings suits); *see also supra* notes 73–88 and accompanying text (discussing Court's refusal to uphold injunctive relief in *Hopkins* and *Belknap* because of its interference with government property); *cf.* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281–88 (1997) (holding that federal-court officer suit for injunctive and declaratory relief by Native American Tribe was barred by sovereign immunity because it was equivalent to a quiet title action to which State had not consented); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 n.11 (1949) (noting that injunctive relief in officer suit would be barred "if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property"); Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 560–75 (E.D. Mich. 2001) (holding that sovereign immunity barred Ex parte *Young* relief against state officials who administered Medicaid program).

201. *See supra* note 181 (citing cases articulating the "reasonable, certain, and adequate" standard).

202. *Cf.* United States v. Lee, 106 U.S. 196, 218 (1882) (describing claim based on Just Compensation Clause as being "of that character which it is intended the courts shall enforce"); Jackson, *The Supreme Court*, *supra* note 18, at 117 (arguing from Court's precedent that "a remedy for unlawful government conduct," including takings of private property for public use, should be provided "if there [is] a jurisdictional basis for doing so"). A state court is said to have "general jurisdiction" when it has power under state law "to hear a wide range of cases, civil or criminal, that arise within its geographic area." BLACKS LAW DICTIONARY 856 (7th ed. 1999). All States have such courts. *See* P. BARNES, CONGRESSIONAL QUARTERLY'S DESK REFERENCE ON THE AMERICAN COURTS 173 (2000) ("All states have at least one court of general jurisdiction . . . ."); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, STATE COURT ORGANIZATION: 1998 15–17 (2000) (Table 3). Although sovereign immunity ordinarily could be said to restrict a state court's jurisdiction, that restriction would have to be ignored when the assertion of sovereign immunity would violate a State's obligations under the Fourteenth Amendment. *Cf.* Testa v. Katt, 330 U.S. 386, 394 (1947) (holding that state court of otherwise competent jurisdiction was obligated to hear federal claim, despite state policy of not enforcing penal laws of foreign jurisdiction).

203. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315–16 (1987); *see also supra* notes 19–42 and 49 and accompanying text (discussing *First English*).

State did not provide any adequate, nonjudicial procedure for the plaintiff to get it.[204] If those conditions are proven, the State should not be allowed to assert sovereign immunity as a defense. That is because, if a state court honored that defense, the state court would cause the State to deny "reasonable, certain, and adequate provision" for payment of just compensation.[205] Because that result would violate the Fourteenth Amendment, the state court would have to reject the State's sovereign immunity defense.[206]

Some commentary has suggested that it is the Supremacy Clause,[207] rather than the Due Process Clause of the Fourteenth Amendment, that requires state courts to entertain federal claims against their own States despite sovereign immunity.[208] In light of *Alden*, however, the Supremacy Clause cannot serve as a *deus ex machina*[209] that compels state courts to choose the just-compensation principle over the sovereign immunity principle on the theory that sovereign immunity is merely a creature of state law that is preempted by the federal just-compensation principle. *Alden* establishes that a State's immunity in its own courts

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204 *Cf.* Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 586–92 (1995) (holding that declaratory and injunctive relief for unconstitutional state taxes was not available in state court under 42 U.S.C. § 1983 if state law provided adequate remedy); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 50 (1990) (stating in dicta that States can impose reasonable restrictions on state-court remedies for unconstitutional state taxes).

205. *See supra* note 181 (citing cases articulating the "reasonable, certain, and adequate" standard).

206. *Cf.* Reich v. Collins, 513 U.S. 106, 109 (1994) ("[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment.") (quoting Carpenter v. Shaw, 280 U.S. 363, 369 (1930)).

207. U.S. CONST. art. VI, cl. 2, states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

208. *See, e.g.*, Grant, *supra* note 19, at 199–200 (contending that, because "the sovereign Constitution stands supreme," Just Compensation Clause "abrogates" federal sovereign immunity); Katz, *supra* note 18, at 1492–93 (arguing that Supremacy Clause obligates state courts to hear federal claims against States because of "[t]he absence of a broad constitutionally based state immunity" in state court); Gordon & Gross, *supra* note 18, at 1171–74 (similarly relying on Supremacy Clause to argue that state courts must hear federal claims against the State and state officers, notwithstanding sovereign immunity). *But see* Alden v. Maine, 527 U.S. 706, 730 (1999) (holding that States do have immunity in their own courts that is derived from U.S. Constitution).

209. A "*deus ex machina*" is "a person or thing . . . that appears or is introduced suddenly and unexpectedly and provides a contrived solution to an apparently insoluble difficulty." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 316 (19th ed. 1993) ("*deus ex machina*," definition 2).

derives from the U.S. Constitution, as does the just-compensation principle.[210] Thus, the Supremacy Clause does not cause one principle to trump the other.

A state court must choose the just-compensation principle over the sovereign-immunity principle not because of the Supremacy Clause, but because sovereign immunity is "a part of the Constitution, of equal authority with every other, but *no greater*."[211] Sovereign immunity and the Fourteenth Amendment each get their due "authority" if the Fourteenth Amendment is construed as generally permitting a State to meet its remedial obligations under that Amendment in ways other than letting itself be sued directly for money. This is why it is appropriate, in particular, to interpret the Fourteenth Amendment to permit a State to provide just compensation through non-judicial procedures (as well as through officer suits).[212] That interpretation preserves the essence of sovereign immunity, which, at its core, protects the sovereign from being called upon by a *court* to honor its monetary obligations. Sovereign immunity cannot eliminate those obligations, however, when those obligations, like sovereign immunity itself, arise from the Constitution. To avoid giving sovereign immunity higher "authority" than the Fourteenth Amendment obligation to pay just compensation, the immunity must yield when the State has not met that obligation in ways that do not implicate sovereign immunity.[213] A contrary conclusion would pervert the federal system established by the Constitution.[214] A central purpose of the federal system is to protect individual liberty through the diffusion of power to the States.[215] Thus, state sovereignty is

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210. *See, e.g.*, *Alden*, 527 U.S. at 730 (saying that state sovereign immunity "inheres in the system of federalism established by the Constitution"); *id.* at 754 ("In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."); *see also supra* notes 140–77 and accompanying text (discussing *Alden*).

211. Poindexter v. Greenhow, 114 U.S. 270, 286 (1885) (emphasis added).

212. *See supra* notes 179–95 (arguing that States can meet their obligation to provide procedures for paying just compensation without letting themselves be sued in their own courts).

213. *See* Fallon, *Confusions*, *supra* note 190, at 338 ("[T]he Constitution in general and the Due Process Clause in particular do sometimes require individually effective remediation for constitutional violations. In such cases, competing doctrines, including sovereign and official immunity, must give way.") (footnotes omitted).

214. *Cf.* Jackson, *The Supreme Court*, *supra* note 18, at 114–16 (arguing that state sovereign immunity should be understood to create a preference against monetary remedies against the States, which would be overcome "where the supremacy of constitutional law" requires).

215. *See Alden*, 527 U.S. at 758 (attributing to Framers of Constitution "the unique insight that freedom is enhanced by the creation of two governments, not one"); Printz v. United States, 521 U.S. 898, 921 (1997) ("This separation of the two spheres is one of the Constitution's structural

protected from federal incursion to preserve individual rights, not vice versa.[216]

One could argue that this conclusion gives more "authority" to the Fourteenth Amendment than to the States' constitutionally based immunity. To the contrary, the conclusion reflects that sovereign immunity gives the States only the privilege of not being called upon by courts, at the instance of private plaintiffs, to honor their obligations. Sovereign immunity is a protective device that can be used against private lawsuits, not a destructive device that can be used to eliminate the constitutional rights of individuals.

C. *Case Law Supports the Conclusion that an Unconsenting State Can Be Sued in Its Own Courts of General Jurisdiction if It Fails To Make an Adequate, Alternate Provision for Just Compensation*

The most direct support for the analysis advanced in Section B comes from Supreme Court cases on state taxation. The Court has held that the Due Process Clause does not require a State to let a taxpayer challenge a state tax before it is collected. Instead, the State may compel the taxpayer to pay the tax first and challenge it later.[217] When the State exerts that compulsion, however, the Court has said that the procedural component

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protections of liberty."); New York v. United States, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals.").

216. If a state court, contrary to the analysis described in the text, erroneously accepted the State's sovereign-immunity defense, the property owner would be entitled, after pursuing appeals through the state-court system, to appellate review by the United States Supreme Court. *See* 28 U.S.C. § 1257(a) (authorizing United States Supreme Court to review final judgments rendered by "the highest court of a State in which a decision could be had" where "any title, right, privilege, or immunity is specially set up or claimed under the Constitution"); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 26–31 (1990) (holding that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts"); *see also* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 310–13 (1987) (holding that Court could review state-court decision denying compensation for temporary regulatory taking).

217. *See, e.g.*, Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 587 (1995) ("As long as state law provides a clear and certain remedy, the States may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford post-deprivation relief (e.g., a refund)...") (internal quotation marks and citations omitted); Reich v. Collins, 513 U.S. 106, 110–11 (1994) (stating that Due Process Clause gives State "the flexibility to maintain an exclusively predeprivation remedial scheme" for wrongfully collected taxes, as well as "an exclusively postdeprivation regime"); *McKesson*, 496 U.S. at 37 ("[I]t is well established that a State need not provide predeprivation process for the exaction of taxes."); *id.* at 51 (holding that, when State compels taxpayer to pay taxes before challenging them, State's post-deprivation procedure must provide "a clear and certain remedy") (internal quotation marks omitted).

of the Due Process Clause obligates the State to provide a "clear and certain remedy" for any erroneous tax collection.[218] The Court has also said that this remedy must, in some cases, take the form of a refund of the erroneously collected taxes.[219] Thus, the procedural due process requirements for erroneously collected taxes parallel those for governmental takings of private property for public use: The State does not have to provide a procedure for challenging the government's deprivation of taxes or property (or its taking of private property for a public use) before the deprivation (or taking) occurs. The State does, however, have to provide a post-deprivation procedure that is "clear and certain" and that can result in an award of money from the state treasury.[220] Ordinarily, States provide a post-deprivation remedy by letting themselves be sued for tax refunds in their own courts.[221]

Admittedly, the Court's tax decisions would have to be extended to support the conclusion that, in the absence of an adequate alternative, an unconsenting State can be sued for just compensation in its own courts. For one thing, the Court has not yet extended this case law outside the tax context.[222] For another thing, even limited to the tax context, the

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218. Newsweek, Inc. v. Fla. Dep't of Revenue, 522 U.S. 442, 445 (1998); *Nat'l Private Truck Council*, 515 U.S. at 587; *Reich*, 513 U.S. at 106; *McKesson*, 496 U.S. at 40; Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U.S. 280, 285 (1912).

219. *See Newsweek*, 522 U.S. at 444–45 (holding that taxpayer was entitled to refund in light of state statutory provisions that appeared to authorize that remedy); *Nat'l Private Truck Council*, 515 U.S. at 587–92 (holding that, where state law provided for refund required by due process, state court could refuse to award declaratory and injunctive relief under 42 U.S.C. § 1983); *Reich*, 513 U.S. at 111–14 (taxpayer was entitled to refund in state court given statutory provisions authorizing that relief, despite later state court's interpretation of those provisions as not authorizing refunds); *McKesson*, 496 U.S. at 39 (observing that, if state tax were beyond State's power to impose, or imposed on an entity immune from taxation, "[t]he State would have had no choice but to 'undo' the unlawful deprivation by refunding the tax").

220. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1825–26 (1991) (recognizing parallel between constitutionally required remedies for wrongfully collected taxes and governmental takings of private property for public use). Despite the parallel described in the text, the Due Process Clause protects all "property," whereas the Just Compensation Clause protects only "*private* property." The latter term excludes money that does not take the form of specific funds, see Eastern Enterprises v. Apfel, 524 U.S. 498, 540, 544 (1998) (five Justices concluding that Just Compensation Clause does not apply to law that imposes financial liability), and it also excludes interests in government entitlements, i.e., "new property." *Cf.* Robert Brauneis, Eastern Enterprises, Phillips, *Money, and the Limited Role of the Just Compensation Clause in Protecting Property "In Its Larger and Juster Meaning,"* 51 ALA. L. REV. 937, 938 (2000) (arguing that Just Compensation Clause protects "ordinary objects").

221. *See Reich*, 513 U.S. at 112 ("States ordinarily prefer that taxpayers pursue only postdeprivation remedies—i.e., that taxpayers 'pay first, litigate later.'") (emphasis omitted).

222. *See* Fallon & Meltzer, *supra* note 18, at 1825–26 (observing that Court has not applied its decisions requiring refunds in tax cases to other contexts); *see also The Supreme Court, 1989 Term:*

Court's tax cases need not be read to mean that the Fourteenth Amendment overrides state sovereign immunity. In all of the cases in which the Court has cited the "clear and certain remedy" principle to sustain tax-refund suits against States brought in state court, the State has waived its immunity by allowing itself be sued for a refund in its own courts.[223] Thus, the cases may mean only that the Due Process Clause "requires a State to provide the remedy it has *promised*."[224] The Court has never construed the Due Process Clause to require state courts to refund taxes paid to a State that has not waived its immunity from such suits.[225] Likewise, the Court has never held that a state court can award just compensation from the treasury of an unconsenting State.[226]

The extension of the tax cases urged here accords with case law holding or suggesting that sometimes a State can satisfy its due process obligations by letting its officers, rather than the State itself, be sued in

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Leading Cases, 104 HARV. L. REV. 129, 197 (1990) (remarking that *McKesson* "may not be generalizable").

223. *See McKesson*, 496 U.S at 49 n.34 (noting that Florida "concede[d] that the State waived any sovereign immunity"); *see also* Seamon, *Sovereign Immunity*, *supra* note 104, at 399 n.394 (citing *McKesson* and later cases).

224. Alden v. Maine, 527 U.S. 706, 740 (1999) (emphasis added); *accord* Hudson v. Palmer, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring) ("The due process requirement means that government must provide to the inmate the remedies it *promised* would be available.") (emphasis added); *see also* Richards v. Jefferson County, 517 U.S. 793, 804 (1996) ("Whether acting through its judiciary or through its legislature, a State may not deprive a person of all *existing* remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.") (emphasis added) (quoting Brinkerhoff-Farris Trust & Sav. Co. v. Hill, 281 U.S. 673, 682 (1930)); *cf.* FALLON, *supra* note 19, 1999 SUPPLEMENT, at 135 (questioning whether *Alden* "suggests that the state could plead sovereign immunity in its own courts if no state remedy appeared to be available and the doors of the federal courts were similarly closed").

225. Compare *Reich v. Collins*, in which the Court held that, once a taxpayer had paid taxes relying on existing state law that appeared clearly to authorize refund actions against the State, a State could not decide that no such remedy existed and that the taxpayer should have challenged the taxes before they were collected. *Reich*, 513 U.S. at 110–14. The Court considered this an unconstitutional "bait and switch" tactic. *Id.* at 111; *see also Brinkerhoff-Farris Trust*, 281 U.S. at 674–82 (holding that due process was violated by state-court decision that had the effect of preventing taxpayer from raising federal challenge to tax). As Professor Wells has observed, the State in *Reich* did not raise sovereign immunity as a defense to the refund action. *See* Michael Wells, *Suing States*, *supra* note 18, at 779; *see generally* Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919, 928–29 (2000) [hereinafter Woolhandler, *Old Property*] (demonstrating that, with possible exception of *Reich*, the Court has required states to provide remedies against themselves in their own courts only "where the state had substituted remedies against itself" for remedies against its officers).

226. *See supra* notes 53–91 and accompanying text (demonstrating, in Part II of this Article, that the Court has never decided whether sovereign immunity bars just-compensation claim against an unconsenting State).

state court.[227] As discussed above, officer suits could indeed yield just compensation in some cases.[228] In those cases, the victim of a taking may not be constitutionally entitled to sue the State directly. In many cases, however, officer suits would not produce just compensation. Official immunity could prevent damage awards against officers for any taking that has already occurred,[229] and, in any event, many officers would be judgment proof.[230] Moreover, injunctive relief against continued takings would not always be available.[231] Officer suits therefore would not always satisfy the Due Process Clause requirement that a State provide a "reasonable, certain, and adequate" procedure for paying just compensation every time it takes private property for public use. In cases in which the Court has held that post-deprivation officer suits satisfied due process, the plaintiff failed to show that this remedy was inadequate.[232]

Moreover, the cases in which the Court has found that officer suits satisfy due process differ in two important ways from cases involving claims for just compensation. First, the nature of the government action that caused the deprivation in these cases differed from governmental takings of private property for public use. Specifically, they involved "random and unauthorized" deprivations by state officials.[233] In contrast, a taking of private property triggers a right to just compensation only

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227. *See* Zinermon v. Burch, 494 U.S. 113, 128 (1990) ("In some circumstances . . . the Court has held that . . . a common-law tort remedy for erroneous deprivation, satisfies due process.").

228. *See supra* notes 196–98 and accompanying text.

229. *See supra* note 199 and accompanying text (discussing official immunity as limit on monetary relief in actions based on uncompensated taking).

230. *See* Owen v. City of Independence, 445 U.S. 622, 652 n.36 (1980); *cf.* Scott v. Donald, 165 U.S. 107, 109 (1897) (plaintiffs alleging that defendants "were wholly irresponsible financially, and unable to respond in damages" in successfully seeking federal court injunction against state officer's enforcement of unconstitutional tax laws).

231. *See supra* note 200 and accompanying text (discussing limits on injunctive relief in officer suits based on uncompensated taking).

232. *See* Hudson v. Palmer, 468 U.S. 517, 535–36 (1984) (holding that due process was satisfied by existence of state tort remedy against officer who had destroyed plaintiff's property); Ingraham v. Wright, 430 U.S. 651, 674–82 (1977) (holding that due process was satisfied by availability of state tort remedy for improper corporal punishment of public school student); *see also* N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 314–16 (1908) (holding that plaintiff was not entitled to notice and hearing before health officials shut down facility suspected of harboring unwholesome food, while observing that plaintiff would be able to sue state officials afterwards).

233. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982) (distinguishing cases involving random and unauthorized deprivations by state officials from case before it, in which deprivation occurred under "established state procedure").

when it is authorized by state law.[234] It is arguably fairer to require the State itself to pony up for a deprivation that it authorizes than for a deprivation that it does not authorize.[235] That is especially true when the state-authorized deprivation consists of a taking of private property for public use. That type of deprivation, by its nature, benefits the public.[236] With that sort of deprivation, it is fair to make the public treasury pay the bill.[237] More fundamentally, a violation of the Just Compensation Clause differs from all other constitutional violations in that the Just Compensation Clause "dictates" a monetary remedy for every governmental taking of private property for public use.[238] Furthermore, the Clause seems to contemplate that this compensation will come from the public funds of government entities that authorize the taking, and not from its officers' personal funds.[239] Besides governmental takings of

234. *See, e.g.*, United States v. N. Am. Transp. & Trading Co., 253 U.S. 330, 333 (1920) ("In order that the Government shall be liable [for just compensation] it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.").

235. *Cf., e.g.*, Bd. of County Comm'rs v. Brown, 520 U.S. 397, 403–04 (1997) (municipal liability under Section 1983 cannot be based on respondeat superior but instead generally requires proof of custom or policy). *But cf.* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 282–96 (1913) (holding that action under color of state law could violate Fourteenth Amendment even if it violated state law). Under *Home Telephone*, the fact that a state official's conduct violates state law cannot matter in determining whether a violation of the Fourteenth Amendment has occurred, but I believe that this fact can play a role in determining the remedy required for that violation. This Article traces the States' remedial obligation to the procedural component of the Due Process Clause of the Fourteenth Amendment and identifies the main goal of that Clause as ensuring accuracy. If one accepts that approach, then it seems sensible in crafting the remedy to consider whether the violation is the result of the conduct of a rogue official or more systemic.

236. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239–41 (1984).

237. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee [of just compensation] . . . was designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); *see also* United States v. Dickinson, 331 U.S. 745, 748 (1947) (relying on principle that Just Compensation Clause "expresses a principle of fairness" to reject government's argument that taking claim was barred by statute of limitations).

238. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987).

239. *See, e.g.*, United States v. Security Indus. Bank, 459 U.S. 70, 77 (1982) (stating that Just Compensation Clause requires government to use eminent domain power to take private property for public use "so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public") (quoting Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935)); *Armstrong*, 364 U.S. at 49 (stating that "public as a whole" is meant to bear burden—i.e., of paying compensation—when government takes private property for public use); United States v. Gettysburg Elec. Ry. 160 U.S. 668, 680 (1896) (reasoning that potential for government's abuse of its taking power is diminished by fact that just compensation for taking "must be raised by taxation"); THE COMPLETE BILL OF RIGHTS § 11.3 1.1, at 377 (Neil H. Cogan ed. 1997) (quoting

private property for public use, no other deprivation subject to the Due Process Clause is also subject to a constitutional provision that demands governmental compensation for every such deprivation.[240]

D. Due Process Can Create an Asymmetry Between a State's Immunity from Suits Brought in Its Own Courts and Its Immunity from Suits Brought in Federal Court

This Part of the Article has argued that an unconsenting State can be sued for just compensation in its own courts of general jurisdiction if it fails to implement an adequate, alternative way of paying just compensation for property that it has taken for public use. That argument, if accepted, creates an asymmetry between the States' immunity in their own courts and their immunity in federal court. It would subject States to suits in their own courts that, under the analysis advanced in Part II, could not be brought in federal court.[241]

Blackstone's statement that, when government takes property involuntarily, the legislature must provide "full indemnification" to property owner); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 54 (1964) (quoting 17th century view of Grotius that "just satisfaction" for land taken by eminent domain should be paid "out of the common stock"); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 566–67, 572–88 (1972) (discussing historical basis for requirement of compensation from government for its taking of private property for public use).

240. This does not mean that the Just Compensation Clause creates the only substantive right for which the Due Process Clause requires a monetary remedy. As discussed *supra* notes 217–21 and accompanying text, and *infra* notes 300–314 and accompanying text, the Due Process Clause has been construed to mandate a monetary remedy in at least one other context—namely, as a remedy for state taxes collected in violation of federal law. The Clause may very well dictate monetary remedies in other contexts, too, but the identification of those contexts is complicated by the absence of explicit guidance in the text of the Constitution.

241. *See supra* notes 53–91 and accompanying text (arguing in Part II that sovereign immunity bars just-compensation suits brought against States in federal court); *cf. Reich*, 513 U.S. at 110 (noting that, while Constitution bars state courts from denying recovery of state taxes collected in violation of federal law, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding," the States' Eleventh Amendment in federal court "does generally bar tax refund claims from being brought in that forum") (dicta). Quite apart from the restriction on suits seeking monetary relief that is imposed by the doctrine of sovereign immunity, an additional restriction is imposed by the provisions in many states constitutions that, like the U.S. Constitution, prohibit payments from the treasury except by legislative appropriation. *See* James M. Hirschhorn, *Where the Money Is: Remedies To Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1837–38 n.120 (1984) (stating that most state constitutions forbid disbursements from state treasury except by appropriation statute); *cf.* U.S. CONST. art. I., § 9, cl. 7 (Appropriations Clause). Under the analysis proposed here, these state constitutional provisions could not prevent a state court of general jurisdiction from awarding just compensation against the State, in the absence of an adequate, alternative compensation procedure, for the same reason that the State's sovereign immunity could not prevent such an award. A state court's reliance on these state constitutional provisions to deny just compensation would violate the Fourteenth Amendment. *See* Fallon &

This asymmetry is justified by the differing roles of the state courts and federal courts when it comes to the States' obligations under the Due Process Clause of the Fourteenth Amendment. The Due Process Clause obligates the sovereign that takes private property for public use to make "reasonable, certain and adequate provision" for awarding just compensation to the property owner.[242] The "taking" sovereign can use its own courts to meet this obligation. The obligation cannot be met, however, by the courts of another sovereign.[243] Thus, state courts have a primary role in ensuring their State's compliance with the Just Compensation Clause, which is part of the broader role in safeguarding constitutional rights contemplated for those courts by the Framers of the Constitution.[244]

Of course, a federal court can often provide effective remedies for a State's violation of the Due Process Clause of the Fourteenth Amendment, despite the sovereign immunity that States enjoy from suits brought in federal court.[245] Specifically, remedies against the state officials who are responsible for the violation may be available in federal court under 42 U.S.C. § 1983, which permits money judgments payable out of the officials' own pockets, or under the doctrine of Ex parte *Young*, which permits injunctive relief against the officials.[246] This Article should not be read to endorse any restriction on those federal-court remedies.[247] Rather, its point is that the availability of federal-court remedies does not excuse a State's failure to provide its own remedies—either in its courts or by some other means—to the extent required by the

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Meltzer, *supra* note 18, at 1786 ("[T]he Supreme Court has sometimes compelled state courts to provide constitutional remedies despite a lack of state law authority for them to do so.").

242. *See supra* note 181 (citing case law establishing requirement of "reasonable, certain, and adequate provision" for payment of just compensation); *see also infra* notes 260–325 (explaining that this requirement stems from doctrine of procedural due process).

243. *Cf.* District of Columbia v. Carter, 409 U.S. 418, 424 (1973) ("actions of the Federal Government and its officials are beyond the purview of the [Fourteenth] Amendment").

244. Because Article III of the Constitution gave Congress discretion whether or not to create the lower federal courts, state courts were bound to have major responsibility for protecting individual constitutional rights. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (stating that, under original Constitution, state courts were supposed to be "the primary guarantors of constitutional rights").

245. *See supra* notes 53–91 and accompanying text (Part II).

246. *Ex parte* Young, 209 U.S. 123 (1908).

247. Nor should it be read to cast doubt on the U.S. Supreme Court's exercise of appellate jurisdiction over decisions in state-court cases in which just compensation is sought from a State. *See supra* note 216.

Due Process Clause of the Fourteenth Amendment.[248]

V. IMPLICATIONS OF DUE PROCESS CONSTRAINTS ON STATE SOVEREIGN IMMUNITY

Part IV concluded that the Due Process Clause of the Fourteenth Amendment can override the States' immunity from just-compensation suits brought in their own courts. This Part discusses the implications of that conclusion and of the analysis underlying it. As explained in Section A, the conclusion is directly relevant, because many States have not clearly waived their immunity from all just-compensation claims. In addition, as discussed in Section B, the analysis is relevant in analyzing the States' ability to use sovereign immunity to avoid other obligations under the Due Process Clause of the Fourteenth Amendment. As Section C explains, because the proposed analysis rests on the Due Process Clause, it applies to the federal government as well as to the States. Finally, Section D discusses the implications of the analysis proposed

248. This Part of the Article has argued that the States' immunity in their own courts is overridden in some circumstances by their obligation under the procedural component of the Due Process Clause to establish procedures for meeting their substantive obligation to pay just compensation. It is the Article's reliance on procedural due process, in combination with the substantive obligation imposed by the Just Compensation Clause, that results in the asymmetry between the State's immunity in their own courts and their immunity in federal court. This asymmetry would not arise if—as many commentators believe the Court concluded in *First English*, see *supra* note 19 (citing commentary)—the Just Compensation Clause, standing alone, were interpreted to override state sovereign immunity. In that event, sovereign immunity presumably would not bar a suit against a State for just compensation regardless whether the suit were brought in federal court or in state court. (A just-compensation suit in federal court could, however, be barred by the Court's "ripeness" rules. *See* note 196 *supra* (discussing Court's ripeness rules).) This Article's reliance on the Due Process Clause of the Fourteenth Amendment, rather than on the Just Compensation Clause standing alone, is consistent with the expression of doubt by a plurality of the Court in *Del Monte Dunes* whether sovereign immunity "retains its vitality in cases where th[e] [Fourteenth] Amendment is applicable." City of Monterey v. Del Monte Dunes, 526 U.S. 687, 714 (1999) (plurality opinion). This doubt suggests that sovereign immunity could be overridden to protect other substantive obligations applicable to the States under the Fourteenth Amendment. This Article's analysis is also consistent with the case law of the Court that, this Article has argued in Part II, virtually compels the conclusion that the Just Compensation Clause does not, of its own force, override the States' sovereign immunity from actions brought in federal court. *See supra* notes 53–91 and accompanying text (Part II). By proposing an analysis that is consistent with my understanding of precedent, I do not mean to imply that an alternative analysis would be illogical. As Professor Meltzer remarked in a personal communication with me, "the Court might take the view that (a) the express grant of a compensatory remedy for a takings should be viewed as incompatible with sovereign immunity, while (b) whatever remedies may be implied as appropriate under the Due Process Clause are subordinate to sovereign immunity." E-Mail from Daniel J. Meltzer, Professor of Law, Harvard Law School, to Richard H. Seamon, Assistant Professor of Law, Univ. of S.C. (Mar. 5, 2001) (on file with author). I agree with this observation, while believing that such a ruling would be difficult to reconcile with the case law discussed in this Article.

here for Congress's power to enforce the Fourteenth Amendment.

A. State Waivers of Immunity from Just-Compensation Claims

This Article addresses whether an unconsenting State can be sued for just compensation. That issue does not matter in States that have enacted legislation waiving the State's immunity from all just-compensation suits in their courts.[249] There are three other categories of States in which the issue does matter: (1) States in which it is unclear whether, as a matter of state law, the State has waived immunity from all just-compensation

249. At least two States, New York and Utah, expressly waive their immunity from just-compensation claims. *See* N.Y. CT. CL. ACT § 9(2) (McKinney 2001) (empowering court of claims to hear monetary claims "against the state for the appropriation of any real or personal property or interest therein"); UTAH CODE ANN. § 63-30-10.5(1) (1997) (providing that "immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation"). Other States have statutes that expressly authorize inverse-condemnation claims against the State under at least some circumstances. For example, MASS. GEN. LAWS ANN. ch. 79, § 10 (West 2001) authorizes an inverse-condemnation action

> when the real estate of any person has been taken for the public use or has been damaged by the construction, maintenance, operation, alteration, repair or discontinuance of a public improvement or has been entered for a public purpose, but such taking, entry or damage was not effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law, or when the personal property of any person has been damaged, seized, destroyed or used for a public purpose.

See also N.M. STAT. ANN. §§ 42A-1-2(H) & 42A-1-29 (Michie 1994) (authorizing inverse-condemnation actions against any "person," including a governmental entity, that is authorized to exercise eminent domain); N.C. GEN. STAT. §§ 40A-3 & 40A-51 (1999) (authorizing inverse-condemnation actions against certain entities with eminent domain power); PA. CONS. STAT. ANN. tit. 26, §§ 1-502(e), 1-511 to 1-518 (West 1997) (authorizing condemnee whose land has been taken without institution of eminent domain proceeding to file petition triggering assessment of just compensation by "viewers," subject to judicial review). Still other States have statutes that waive their sovereign immunity in more general terms. *See, e.g.*, CAL. GOV'T CODE § 945 (West 2001) ("A public entity may sue and be sued."); 705 ILL. COMP. STAT. 505/8 (1999) (authorizing claims against State to be asserted in court of claims); MICH. COMP. LAWS 600.6419 (2000) (same); OHIO REV. CODE ANN. § 2743.02(A)(1) (Anderson 2000) (same); *see also* NEV. REV. STAT. ANN. § 41.031 (Michie 1999) (broadly waiving State's sovereign immunity from private actions in its own courts). Even in States with statutes that, specifically or in general terms, waive sovereign immunity from just-compensation claims, state courts may construe the statutes in a way that may preserve sovereign immunity from certain just-compensation claims. *See, e.g., In re* Condemnation of 2719, 21, 11 E. Berkshire St., 343 A.2d 67, 69 (Pa. Commw. Ct. 1975) (holding that Pennsylvania statute authorizing inverse-condemnation actions does not apply because plaintiffs failed to allege government defendant was lawfully exercising power of eminent domain); *see also, e.g.*, Reynolds v. State, 471 N.E.2d 776, 778 (Ohio 1984) (stating that Ohio Court of Claims Act does not waive sovereign immunity from claims based on State executives' exercise of discretionary authority).

suits brought in its courts;[250] (2) States in which it is clear that the State has retained its immunity from at least some just-compensation claims brought against it in state court;[251] and (3) States in which it has been the state courts, rather than the legislatures, that have decided to abrogate state-court immunity from just-compensation claims.[252] It is obvious

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250. *See* MANDELKER, *supra* note 1, § 4A.02[5][d] ("[I]n many states the availability of a compensation remedy in land use cases is not clear."); *see also, e.g.*, New Port Largo, Inc. v. Monroe County, 985 F.2d 1488, 1493 n.12 (11th Cir. 1993) (noting uncertainty in Florida case law about whether courts recognize cause of action in inverse condemnation for temporary takings), *cert. denied*, 510 U.S. 964 (1993); Austin v. City and County of Honolulu, 840 F.2d 678, 681 (9th Cir. 1987) (observing that there was no Hawaii case law either establishing or rejecting existence of inverse condemnation cause of action); *see generally* Edelman v. Jordan, 415 U.S. 651, 673 (1974) ("In deciding whether a State has waived its [sovereign immunity], 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).

251. *See* Austin v. Ark. State Highway Comm'n, 895 S.W.2d 941, 942–44 (Ark. 1995), *cited supra* note 191; Hise v. State, 968 S.W.2d 852, 853–55 (Tenn. Ct. App. 1997) (holding that inverse condemnation claim against State was barred by sovereign immunity), *appeal denied* (Apr. 6, 1998).

252. *See, e.g.*, Barber v. State, 703 So. 2d 314, 317–22 (Ala. 1997) (reversing summary judgment for State in case asserting inverse-condemnation claim; noting that such claims are not barred by state constitutional provision establishing sovereign immunity); City of Kenai v. Burnett, 860 P.2d 1233, 1238–39 (Alaska 1993) (apparently identifying state constitution's just-compensation provision as source for causes of action in inverse condemnation); Bd. of Comm'rs v. Adler, 194 P. 621, 622–24 (Colo. 1920) (holding that state constitution's just-compensation provision overrode state's sovereign immunity); Textron, Inc. v. Wood, 355 A.2d 307, 311–13 (Conn. 1974) (holding that sovereign immunity did not bar suits seeking declaration that State owed plaintiff just compensation and stating in dicta that damages would also be available); State *ex rel.* Smith v. 0.24148, 0.23831 & 0.12277 Acres of Land, 171 A.2d 228, 231 (Del. 1961) (holding that state constitution's just-compensation provision was self-executing waiver of state's sovereign immunity from just-compensation claims); Columbia County v. Doolittle, 512 S.E.2d 236, 237 (Ga. 1999) (interpreting state constitution's just-compensation provision as waiving sovereign immunity); Deisher v. Kan. Dep't of Transp., 958 P.2d 656, 662–63 (Kan. 1998) (discussing development of inverse condemnation in Kansas); Dep't of Highways v. Corey, 247 S.W.2d 389, 389–91 (Ky. 1952) (holding that sovereign immunity did not bar claim against state agency based on state constitution's just-compensation provisions); Foss v. Me. Turnpike Auth., 309 A.2d 339, 343–45 (Me. 1973) (holding that state sovereign immunity did not bar claim for just compensation against state agency); Dep't of Natural Res. v. Welsh, 521 A.2d 313, 315–19 (Md. 1986) (holding that sovereign immunity did not bar quiet title action against state agency alleging unlawful taking of private property); State *ex rel.* Peterson v. Bentley, 12 N.W.2d 347, 357 (Minn. 1943) (holding that sovereign immunity did not bar just-compensation claim for taking of land outside of State, and stating in dicta that sovereign immunity would not bar just-compensation claim for taking of land inside State), *overruled in part on other grounds sub nom.* State by Peterson v. Anderson, 19 N.W.2d 70 (Minn. 1945); Williams v. Walley, 295 So. 2d 286, 288 (Miss. 1974) (holding that sovereign immunity did not protect governmental entity from just-compensation claim in light of self-executing nature of state constitutional guarantee of just compensation); McGrew v. Granite Bituminous Paving Co., 155 S.W. 411, 415 (Mo. 1912) (holding that state constitution's just-compensation provision was "self-enforcing" and therefore party whose property had been taken could resort to any common-law remedy that would provide adequate relief for violation of provision; not addressing sovereign immunity); Alexander v. State, 381 P.2d 780, 781–82 (Mont. 1963) (rejecting sovereign-immunity

why the issue is relevant in the first two categories of States. This section explains why the issue is relevant to the third category.

State-court decisions holding that the State has waived its state-court immunity from just-compensation suits cannot necessarily be regarded as settling the issue, for two reasons. First, some of these decisions rest on the same mistake that many commentators have made; they fail to distinguish the issue of whether the Just Compensation Clause creates a monetary cause of action from the issue of whether that Clause overrides sovereign immunity.[253] Even if that mistake were not obvious before (in

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defense to taking claim and holding that state constitutional guarantee of just compensation was self-executing); Nine Mile Irrigation Dist. v. State, 225 N.W. 679, 681–83 (Neb. 1929) (holding that sovereign immunity did not bar just compensation claim against State based on state constitution's guarantee of just compensation); Sibson v. State, 282 A.2d 664, 665 (N.H. 1971) (holding that sovereign immunity did not bar claim for just compensation); DeBruhl v. State Highway & Pub. Works Comm'n, 102 S.E.2d 229, 238 (N.C. 1958) (quoting with approval case from another jurisdiction rejecting sovereign-immunity defense against payment of interest as component of just compensation); Minch v. City of Fargo, 297 N.W.2d 785, 789 (N.D. 1980) (construing state constitution's just-compensation provision to create cause of action in inverse condemnation); Williams v. State, 998 P.2d 1245, 1248–52 (Okla. Civ. App. 2000) (describing inverse-condemnation action in Oklahoma as predominantly judicial creation); Boise Cascade Corp. v. Or. State Bd. of Forestry, 991 P.2d 563, 566–69 (Or. Ct. App. 1999) (holding that Due Process Clause of Fourteenth Amendment required state courts to entertain just-compensation claim against Oregon); Harris v. Town of Lincoln, 668 A.2d 321, 326–28 (R.I. 1995) (discussing case law holding that state and federal constitutions' just-compensation provisions create cause of action in inverse condemnation); Horry County v. Ins. Reserve Fund, 544 S.E.2d 637, 640 (S.C. Ct. App. 2001) (stating that inverse-condemnation claim arises from constitution); Hurley v. State, 143 N.W.2d 722, 728–29 (S.D. 1966) (construing state constitution's just-compensation provision to create inverse-condemnation remedy supplementing statutory remedies); Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 595–99 (Tex. 2001) (distinguishing breach-of-contract claim against State, which is governed by statute, from just-compensation claim against State, which is governed by case law construing state constitution's just-compensation provision); Timms v. State, 428 A.2d 1125, 1126 (Vt. 1981) (citing case law establishing that state constitution's just compensation clause overrides sovereign immunity); Wyo. State Highway Dep't v. Napolitano, 578 P.2d 1342, 1347–51 (Wyo. 1978) (appearing to treat inverse-condemnation claim as arising from self-executing nature of state constitution's just-compensation provision), *appeal dismissed*, 439 U.S. 948 (1978); *cf.* Waid v. Dep't of Transp., 996 P.2d 18, 24–25 (Wyo. 2000) (suggesting that *Napolitano* may have been superseded by later statutes).

253. *See, e.g.*, Dep't of Agric. & Consumer Servs. v. Mid-Fla. Growers, Inc., 521 So. 2d 101, 103 n.2 (Fla. 1988) (holding that because of self-executing nature of state constitution's just-compensation provision, no statutory authority was necessary for inverse-condemnation claim against State); Fielder v. Rice Constr. Co., 522 S.E.2d 13, 15 (Ga. Ct. App. 1999) (reasoning that sovereign immunity does not bar inverse-condemnation claims because inverse condemnation is form of eminent domain; citing state constitution's just-compensation provision), *cert. denied*, No. S99C1722, 1999 Ga. LEXIS 1020 (Ga. Nov. 19, 1999); Renninger v. State, 213 P.2d 911, 916 (Idaho 1950) (holding that Idaho Constitution both created cause of action in inverse condemnation and waived sovereign immunity); *Alexander*, 381 P.2d at 781 (rejecting sovereign immunity defense in light of self-executing nature of Montana Constitution's just-compensation provision); Hurley v. State, 143 N.W.2d 722, 729 (S.D. 1966) (reasoning that no consent to sue State was necessary given

light of decisions such as *Larson*),[254] it is obvious now, in light of the recent plurality opinion in *Del Monte Dunes*, and it provides a strong justification for state courts to revisit the issue.[255] Second, some state-court decisions holding that the State has waived its immunity appear to rest on the belief that a State's immunity in its own courts exists solely as a matter of state law.[256] Under this view, the "waiver" of state immunity is not the result of any voluntary choice by the State but is instead the result of preemption. This preemption analysis is incorrect after *Alden v. Maine*, which makes clear that a state's immunity in its own courts is protected by the U.S. Constitution.[257] With this error corrected, a state court might still conclude that the State had waived its immunity as a matter of state law. Even so, the incorrectness of the preemption analysis

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self-executing nature of state constitution's just-compensation provision); Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980) (holding that state constitution's just-compensation provision both waived sovereign immunity and created cause of action for just compensation); Smith v. Fenimore, 171 A.2d 228, 231 (Vt. 1961) (holding that state constitution's just-compensation provision was self-executing waiver of sovereign immunity that allowed common-law action for money); Wisconsin Retired Teachers Ass'n v. Employee Trust Funds Bd., 558 N.W.2d 83, 94–95 (Wis. 1997) (holding that just-compensation provision of Wisconsin Constitution was self-executing and therefore waived state's sovereign immunity); *see also* James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After* Seminole Tribe, 46 U.C.L.A. L. REV. 161, 207 n.168 (1998) [hereinafter Pfander, *Intermediate Solution*] ("In takings cases, states often view just-compensation provisions in state constitutions as self-executing, thereby overcoming the doctrine of sovereign immunity.").

254. *See supra* notes 32–35 and accompanying text (discussing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)).

255. *See supra* notes 43–51 and accompanying text (discussing City of Monterey v. Del Monte Dunes, 526 U.S. 687, 714 (1999)).

256. In New Jersey, for example, the courts appear to treat sovereign immunity as a creation of state law. *See* Willis v. Dep't of Conservation & Econ. Dev., 264 A.3d 34, 35–38 (N.J. 1970). The New Jersey Supreme Court recently concluded that state law cannot constrain suits in inverse condemnation under *First English*. *See* Greenway Dev. Co. v. Borough of Paramus, 750 A.2d 764, 769–71 (N.J. 2000) (holding that suits in inverse condemnation were not subject to requirements of state tort claims statute). Other states have come to a similar conclusion. *See e.g.*, Jacoby v. Arkansas, 962 S.W.2d 773, 775–78 (Ark. 1998) (holding that federal statute authorizing private actions in state court overrode State's sovereign immunity under Arkansas Constitution), *vacated*, 527 U.S. 1031 (1999); *Foss*, 309 A.2d at 343–44 (holding that, while state legislature can authorize state agency to commit trespass or create nuisance, that power is subject to just compensation guarantee of federal constitution); Alper v. Clark County, 571 P.2d 810, 811–13 (Nev. 1977) (holding that, because inverse-condemnation claim vindicated federal constitutional rights, claim was not subject to state statutory restrictions on suits against counties).

257. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 730 (1999) (saying that state sovereign immunity "inheres in the system of federalism established by the Constitution"); *see also supra* notes 207–210 (discussing *Alden*'s elimination of preemption rationale for concluding that just-compensation principle overrides sovereign-immunity principle).

warrants reconsideration of the issue.[258]

In short, the issue addressed in this Article has direct relevance even though many States have mitigated the harshness of sovereign immunity by waiving their immunity to some extent.[259] In many States, the waiver is incomplete or unclear (or both). Moreover, although this Article proposes an analysis specifically for evaluating just-compensation claims against states, the analysis also has implications for other claims, as discussed in the sections that follow.

B. *State Remedial Obligations Under the Due Process Clause for Deprivations Other than Takings of Private Property for Public Use*

The analysis proposed in Part IV would sometimes subject States to just-compensation suits brought in their own courts, even though they would be immune if those suits were brought in federal court. The States' exposure to just-compensation suits, however, is not necessarily the most significant feature of the proposed analysis. The proposed analysis extends beyond claims based on the Just Compensation Clause, because it does not rest solely on the Just Compensation Clause.[260] Rather, it rests on the interaction of that Clause and the procedural component of the Due Process Clause. This Article proposes that the remedial requirements of procedural due process can expose an unconsenting State to suits in its own courts that would be barred by sovereign immunity in federal court. That proposition includes, but is not necessarily limited to, suits for just compensation, as this section explains.

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258. *Cf.* GA. CONST. art. 1, § 2, ¶ IX(f) (providing that waiver of sovereign immunity prescribed in that provision should not be "construed as a waiver of any immunity provided . . . by the United States Constitution").

259. *See* Pfander, *Intermediate Solution*, *supra* note 253, at 207 n.168 (counting twenty-one States that permit just-compensation claims in state tribunals). The availability of judicial relief in most States for at least some just-compensation claims arguably supports the thesis of this Article that the Due Process Clause requires such relief. *Cf.* Cooper v. Oklahoma, 517 U.S. 348, 356, 360–62 (1996) (examining modern precedent in analyzing due-process challenge to state rule of criminal procedure).

260. *Cf.* Beermann, *supra* note 18, at 315 (arguing that "[s]overeign and official immunities must be overruled by the takings clause"); *supra* note 19 (citing commentary asserting, in light of *First English*, that Just Compensation Clause, standing alone, overrides sovereign immunity).

1. The Error-Remediation Element of Procedural Due Process

At the heart of this Article is the Court's repeated statement that both the States and the federal government must make a "reasonable, certain and adequate provision" for paying just compensation.[261] That statement prescribes more than a substantive obligation to pay; it also demands the existence of an adequate procedure for honoring that substantive obligation.[262] The Court has never identified the legal source of this procedural requirement. In my view, it stems from the procedural component of the Due Process Clause—i.e., from the doctrine of procedural due process.[263]

Procedural due process requires States to use adequate procedures when they deprive people of life, liberty, or property.[264] This is not just procedure for procedure's sake.[265] Rather, a key purpose of the procedures is to ensure that these deprivations are accurate[266]—i.e., that

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261. *E.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985); *see also supra* notes 181–205 and accompanying text (discussing requirement that States make "reasonable, certain, and adequate" provisions for paying just compensation).

262. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 717 (1999) (stating that government can violate Constitution "by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought").

263. The Court has construed the Due Process Clause of the Fourteenth Amendment to do three things.

> First, [it] incorporates many of the specific protections defined in the Bill of Rights. . . . Second, [it] contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. . . . [Third, it provides] a guarantee of fair procedure.

Zinermon v. Burch, 494 U.S. 113, 125 (1990) (internal quotations omitted). The third aspect is elaborated in the doctrine of procedural due process. *See id.*

264. *See* U.S. CONST. amend. XIV, § 1. The doctrine of procedural due process applies mainly to government actions that directly cause "[a] relatively small number of persons" to be "exceptionally affected, in each case upon individual grounds." Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915) (distinguishing case before it from Londoner v. City of Denver, 210 U.S. 373 (1908)); *see generally* BERNARD SCHWARTZ, ADMINISTRATIVE LAW §§ 5.6–5.8, at 232–37 (3d ed. 1991) (discussing *Londoner/Bi-Metallic* distinction).

265. *See, e.g.*, Richards v. Jefferson County, 517 U.S. 793, 803 (1996) ("the guarantee of due process is not a mere form").

266. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 332 (1993) ("the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error") (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 13 (1979)); Carey v. Piphus, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property."); Mathews v. Eldridge, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process . . . .").

they comport with both federal and state law.[267] This accuracy goal serves the systemic purpose of preserving the rule of law and the more particularized purpose of protecting the substantive rights of individuals in their life, liberty, and property.[268]

To achieve accuracy, procedures must not only avoid errors but also provide a way to remedy the errors that inevitably occur.[269] When an error is detected before it causes a deprivation of life, liberty, or property, the usual remedy is to prevent the deprivation from occurring, such as by an injunction.[270] When the error is detected after it has caused a deprivation, some other remedy—including, in some situations, an award of compensatory damages—may be required to fulfill the accuracy goal of the Due Process Clause.[271] In short, the doctrine of procedural due process contemplates that procedures will serve two functions: error-

267. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985) (holding that procedural due process entitled municipal employee to pre-termination procedures to ensure that termination was based on accurate facts and was otherwise appropriate); Goss v. Lopez, 419 U.S. 565, 581 (1975) (holding that Due Process Clause entitled public school student to "rudimentary" procedures before being suspended from school to prevent suspensions based on "unfair or mistaken findings of misconduct"); Daniel S. Feder, Note, *From* Parratt *to* Zinermon*: Authorization, Adequacy, and Immunity In a Systemic Analysis of State Procedure*, 11 CARDOZO L. REV. 831, 844–45 (1990) (identifying accuracy as main goal of procedural due process, including accuracy in the "faithful implementation of state substantive laws").

268. *Cf.* Fallon, *Confusions*, *supra* note 190, at 311 ("The ultimate commitment of the law of due process remedies—analogous to that of procedural due process—is to create schemes and incentives adequate to keep government, overall and on average, tolerably within the bounds of law."); *id.* at 338 (stating that "the Constitution in general and the Due Process Clause in particular do sometimes require individually effective remediation for constitutional violations").

269. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 126 (1990) (stating that inquiry under doctrine of procedural due process "would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law").

270. *See* Gen. Oil Co. v. Crain, 209 U.S. 211, 221–28 (1908) (holding that Court had jurisdiction to review state supreme court decision dismissing, on sovereign immunity grounds, suit against state officer challenging constitutionality of state tax law); Seamon, *Sovereign Immunity*, *supra* note 104, at 344–45, 381–83, 397–98 (discussing *Crain* and ultimately proposing that it be understood as a decision resting on Due Process Clause); *see also* Porter v. Investors Syndicate, 286 U.S. 461, 469–71 (1932) (holding that, to avoid due-process concerns, state statute should be construed to let state courts enjoin state administrative order revoking plaintiff's permit to do business in State).

271. *See, e.g.*, McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39 (1990) (holding that, when State chooses to remit taxpayers to post-collection relief from erroneous taxation, due process requires state to "provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a clear and certain remedy for any erroneous or unlawful tax collection") (internal quotation marks, citation, and footnote omitted); *cf.* Booth v. Churner, 121 S. Ct. 1819, 1823–24 (2001) ("[D]epending on where one looks, 'remedy' can mean either specific relief obtainable at the end of a process of seeking redress, or the process itself.").

avoidance and error-remediation.[272]

As between error-avoidance and error-remediation, the error-avoidance function is probably better known, perhaps because it was emphasized in the well-known decision *Mathews v. Eldridge*.[273] In *Mathews*, the Court said that its precedent considered three factors in evaluating the adequacy of a procedure that deprived someone of life, liberty, or property:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[274]

In describing the second factor, the Court seemed primarily concerned with minimizing the risk of error—i.e., in error-avoidance. Given that concern, the three-factor inquiry as a whole seems to stress enhanced error-avoidance as the relevant goal of additional procedural safeguards (while also making clear that, even if additional procedural safeguards would minimize errors, they may not be constitutionally required in light of the relevant individual and governmental interests).

One of the best-known cases addressing the error-remediation (as distinguished from the error-avoidance) function of procedural due process is *Parratt v. Taylor*.[275] In *Parratt*, the Court held that the requirements of procedural due process were satisfied by a state tort remedy for a prison official's allegedly negligent loss of a prisoner's property (a hobby kit).[276] That holding emphasized not only a tort action's potential for determining whether the deprivation was erroneous

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272. Professor Fallon has argued that the post-deprivation remedial demands of the Due Process Clause should be considered distinct from the pre-deprivation procedures traditionally associated with "procedural due process." *See* Fallon, *Confusions*, *supra* note 190, at 329–40. Without disagreeing with that argument, this Article discusses the remedial demands of the Due Process Clause as an aspect of procedural due process, in keeping with the Court's current approach. *See, e.g.*, *Zinermon*, 494 U.S. at 126 (stating that inquiry under doctrine of procedural due process "would examine . . . any remedies for erroneous deprivations"); Parratt v. Taylor, 451 U.S. 527, 537 (1981) ("[W]e must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of *procedural due process.*") (emphasis added).

273. 424 U.S. 319 (1976); *see also supra* note 266 (citing precedent that describes accuracy goal of procedural due process in terms of minimizing error).

274. *Matthews*, 424 U.S. at 335.

275. 451 U.S. 527 (1981).

276. *Id.* at 536–44.

but also its potential for remedying an erroneous deprivation.[277] In later cases, the Court confirmed that procedural due-process analysis examines not only the "procedural safeguards" against erroneous deprivations but also "any remedies for erroneous deprivations provided by statute or tort law."[278]

This Article relies principally on the error-remediation element of procedural due process. Of course, procedural due process requires a State to have an adequate process for accurately identifying instances in which it has taken private property for public use (this is an important requirement, considering how hard it can be accurately to identify regulatory takings). It is the error-remediation element of procedural due process, however, that sometimes overrides sovereign immunity by requiring state courts to award just compensation payable from the state treasury if there is no adequate, alternative compensation scheme. In short, a State meets its procedural due process obligations only when, having identified an instance in which private property has been taken for public use, it also provides the remedy—i.e., payment of just compensation—that is necessary to prevent that taking from being unconstitutional (and hence erroneous).

Because of this Article's reliance on the error-remediation element of the doctrine of procedural due process, I must address commentary that denies the validity of that element. In particular, Professors Wells and Eaton have argued that the Court was wrong, and departed from precedent, when in *Parratt* and later cases it construed the doctrine of procedural due process sometimes to require States to provide post-

277. *See id.* at 543–44 (observing that post-deprivation tort action provided a "means by which [the plaintiff] can receive redress for the deprivation" and be "fully compensated . . . for the property loss").

278. *Zinermon*, 494 U.S. at 126; *see id.* at 125 ("the existence of state remedies *is* relevant" to procedural due-process analysis) (emphasis in original); *id.* at 129 (stating that, in *Mathews*, "it was clear that the State, by making available a tort remedy that could adequately redress the loss, had given the prisoner the process he was due"); *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643 (1999) (citing *Parratt* for proposition that State can satisfy procedural due process requirement by providing post-deprivation remedy); Albright v. Oliver, 510 U.S. 266, 285 (1994) (Kennedy, J., concurring) (recognizing that "*Parratt* rule" stems from procedural due process and would be satisfied in that case by availability of post-deprivation state tort suit for malicious prosecution); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985) (relying on *Parratt* to hold that violation of Just Compensation Clause was not complete until state denied just compensation); Hudson v. Palmer, 468 U.S. 517, 533 (1984) (relying on *Parratt* to "hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available"); *Logan*, 455 U.S. at 435–37 (holding that State violated procedural due process in that case; distinguishing *Parratt*, while clearly treating it as valid procedural due process precedent).

deprivation remedies for erroneous deprivations; in their view, any requirement of a post-deprivation remedy must stem, if anywhere, from the doctrine of substantive due process.[279] If they are right, the analysis proposed in this Article may be wrong, because the doctrine of substantive due process would be an odd basis for overriding a State's sovereign immunity from just-compensation claims. When a court concludes that government action violates substantive due process, that conclusion ordinarily requires invalidation of the action.[280] In contrast, when a court concludes that government action constitutes a taking of private property for public use, that conclusion does not invalidate the government action; it means only that the government must pay for the property that has been taken.[281] Thus, the doctrine of substantive due process and the doctrine of just compensation work somewhat at cross-purposes.[282]

In any event, I respectfully disagree with Professors Wells' and Eaton's view that *Parratt* and its progeny erroneously depart from procedural due process precedent.[283] Precedent amply supports the Court's conclusion in *Parratt* and later cases that procedural due process can require a state to provide post-deprivation remedies for erroneous deprivations.[284] Support for the Court's procedural due-process analysis

279. *See* Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 212–22 (1984).

280. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("[T]he due process clause contains a substantive component that *bars* certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.") (internal quotation marks and citation omitted) (emphasis added).

281. *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314–15 (1987) (stating that Just Compensation Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power," and that Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation*").

282. *See Williamson County*, 473 U.S. at 197 (stating that remedy for successful substantive due process challenge to government regulation "is not 'just compensation,' but invalidation of the regulation and if authorized and appropriate, actual damages"); *see also* John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1048 (2000) (arguing that compensable taking cannot be caused by government conduct that constitutes "any type of illegality," including constitutional violations). *But cf.* Richard H. Seamon, *An Analysis of Jurisdictional Issues Arising From* Eastern Enterprises v. Apfel, 51 ALA. L. REV. 1239, 1256–58 (2000) (arguing that unconstitutional government conduct can cause a taking).

283. *See also* Feder, *supra* note 267, at 840 (observing that "courts and commentators consistently refuse to accept the Supreme Court's own characterization" of its decision in *Parratt* as resting on procedural due process but defending Court's characterization).

284. *See* Parratt v. Taylor, 451 U.S. 527, 543–44 (1981); *see also supra* note 278 (citing later cases in which Court described "*Parratt* rule" as making existence of state post-deprivation remedies relevant to procedural due-process analysis).

comes from: (1) *Ingraham v. Wright*,[285] in which the Court held that procedural due process was satisfied by the availability of a state tort remedy against public school teachers who wrongfully imposed corporal punishment on their students;[286] (2) a line of cases the most famous of which is *North American Cold Storage Co. v. City of Chicago*,[287] in which the Court rejected procedural due process challenges to government deprivations that justifiably, in light of some exigency, occurred without meaningful pre-deprivation procedures but afforded post-deprivation remedies;[288] and (3) the line of cases exemplified by *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*,[289] in which the Court construed the doctrine of procedural due process to require States to provide either a pre-deprivation or post-deprivation remedy for erroneously collected taxes.[290]

Professors Wells and Eaton find *Ingraham* and the *North American Cold Storage* line of cases inapposite because they involved government deprivations that under some circumstances would be justified.[291] For example, *Ingraham* involved corporal punishment of public school students, which "may help maintain order in the classroom";[292] *North American Cold Storage* involved the government's summary quarantining of food that officials suspected (perhaps erroneously) was unwholesome.[293] Both cases thus presumed that the challenged government conduct could be justified under certain circumstances—i.e., if the beaten child was misbehaving and the confiscated food was unwholesome. *Parratt*, in contrast, involved the allegedly negligent loss of the plaintiff's property by a government official, conduct that, the plaintiff claimed, could never be justified.[294]

But just as the government can (according to the Court) properly beat a child who is believed to have misbehaved and confiscate food that is

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285 430 U S. 651 (1977).

286. *Id.* at 682.

287. 211 U.S. 306 (1908).

288. *Id.* at 314–19.

289. 496 U.S. 18 (1990).

290. *Id.* at 31–51; *see also supra* notes 217–26 and accompanying text (discussing *McKesson* line of cases) and *infra* notes 295–97 (same).

291. Wells & Eaton, *supra* note 279, at 219–21.

292. Wells & Eaton, *supra* note 279, at 219.

293. Wells & Eaton, *supra* note 279, at 220 & n.85.

294. Wells & Eaton, *supra* note 279, at 220–21; *see also* Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 625–26 (1997) (describing *Parratt* as "a failure").

believed to be contaminated, it can properly destroy a prisoner's property if, for example, the property is believed to be contraband. Those beliefs may turn out to be erroneous, and for that reason, the Court in cases involving these actions, including *Parratt*, construed procedural due process to require post-deprivation remedies. *Parratt* is not distinguishable from *Ingraham* and *North American Cold Storage*, however, merely because a prison official's destruction of a prisoner's property would violate substantive due process if motivated by sheer malice. So too, the malicious beating of a school student who was not believed to be misbehaving, and the malicious destruction of food that was not believed to be contaminated, would violate substantive due process. All this means is that, depending on the justification (or lack thereof) for governmental deprivation of liberty or property, the victim of the deprivation may be able to assert a substantive due process claim or only a procedural due process claim. But the issue of justification does not distinguish *Ingraham* and *North American Cold Storage* from *Parratt*.

Professor Wells finds the *McKesson* line of cases inapposite because, in light of the federal Tax Injunction Act,[295] those cases concern a state-court remedy that "may be the only recourse for unconstitutionally collected taxes."[296] The problem with this basis for distinguishing the Court's reliance on procedural due process in the *McKesson* line of cases from its reliance on procedural due process in *Parratt* and its progeny is that the Court itself in the *McKesson* line of cases did not rely on the unavailability of federal-court remedies in concluding that due process mandated a state-court remedy for erroneous taxes. More fundamentally, as argued above, the availability of a federal-court remedy does not excuse a State's failure to provide its own remedies to the extent required by the Due Process Clause.[297]

In sum, the Court has held that procedural due process requires

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295. 28 U.S.C. § 1341 (1994) ("The [federal] district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.").

296. Michael Wells, *Suing States*, *supra* note 18, at 778 ("The constitutionally-implied [*sic*] remedy issue arises in the tax context and not elsewhere because other remedies, including § 1983 suits, are typically available for other constitutional violations, while a state court [tax] refund action, implied directly from the Due Process Clause, may be the only recourse for unconstitutionally collected taxes."); *see also id.* at 793 ("But an equally essential premise for the state court cause of action recognized in *Reich* [a decision following *McKesson*] is that Congress may validly bar taxpayer access to the federal courts, as it has by the tax injunction act."); *id.* at 800 (describing principle established in *Reich* to be that "states must provide effective remedies for constitutional violations when federal remedies are not available").

297. *See supra* notes 241–48 and accompanying text.

procedures that not only avoid but also remedy erroneous deprivations of life, liberty or property. This Article contends that the remedial element of procedural due process underlies a State's obligation to create a procedural scheme for awarding just compensation when it takes private property for public use. If a State does not create an adequate alternative to just-compensation suits against itself in its own courts, it cannot rely on sovereign immunity to defeat those suits.

2. *The Interaction of the Remedial Element of Procedural Due Process and the Just Compensation Clause*

Although procedural due process requires error-remediation, it does not require a remedy for every error, nor does it require the same type of remedy for every type of error.[298] This Article has focused on deprivations that consist of governmental takings of private property for public use. Such a deprivation is erroneous only when it occurs without the payment of just compensation. Once that error (the failure to pay just compensation) is identified, the nature and invariability of the remedy—the payment of just compensation for every such taking—is dictated by the text of the Just Compensation Clause.[299] Thus, it is procedural due process that requires some remedy, but it is the Just Compensation Clause that specifies what the remedy must be in every instance.

The Court has held that the procedural component of the Due Process Clause also requires a compensatory remedy—but does not invariably do so—for the erroneous collection of taxes.[300] The collection of taxes implicates procedural due process because it deprives taxpayers of their property (namely, their money).[301] Procedural due process accordingly requires the State to have adequate procedures to ensure that the taxes are collected accurately—i.e., consistently with state and federal law. This

298. *See, e.g.*, Martinez v. California, 444 U.S. 277, 284 n.9 (1980) ("It must be remembered that even if a state decision does deprive an individual of life or property, and even if that decision is erroneous, it does not necessarily follow that the decision violated that individual's right to due process.").

299. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 (1987) ("in the event of a taking, the compensation remedy is required by the Constitution"); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658 n.24 (1981) (Brennan, J., dissenting) ("[T]his is not a case involving implication of a damages remedy—the words of the Just Compensation Clause are express.").

300. *See supra* notes 217–32 and accompanying text (arguing that Court's tax cases support conclusion that Due Process Clause can override States' sovereign immunity from just-compensation claims).

301. *See* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31–51 (1990).

requirement includes the need for procedures that prospectively prevent or retroactively remedy erroneous collections. As to the timing of those procedures, "the States may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford post deprivation relief (e.g., a refund)."[302] When a State chooses to provide post-deprivation relief, instead of pre-deprivation relief, for erroneous taxes, a refund is not invariably required. For example, if a state tax violates the Commerce Clause by discriminating between out-of-state taxpayers and their in-state competitors, the State might be able to satisfy the Due Process Clause by retroactively increasing the taxes of the in-state competitors.[303] In contrast, procedural due process would require a refund of state taxes that were erroneously collected from people who were exempt from the taxes under a federal statute.[304] Thus, the remedial requirements imposed by the doctrine of procedural due process, like other requirements imposed by that doctrine, depend partly on the nature of the individual harm caused by an erroneous deprivation.[305]

For this reason, the Due Process Clause might sometimes require a State to refund taxes that had been collected in violation of state, rather than federal, law.[306] The nature of a taxpayer's harm does not vary depending on whether the State has erroneously collected taxes from him in violation of (say) a state-law exemption or a federal-law exemption. Of course, there may be considerations besides individual harm that would justify construing the Due Process Clause to require differing remedies for federal-law and state-law violations, including the role of those remedies in ensuring the supremacy of federal law.[307] The point is

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302. Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 587 (1995).

303. *See McKesson*, 496 U.S. at 39–40.

304. *See* Ward v. Bd. of County Comm'rs, 253 U.S. 17, 22–25 (1920); *see also McKesson*, 496 U.S. at 39 (citing *Ward* as example of situation in which State "would have had no choice" but to refund taxes).

305. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 759–61 (1982) (holding that burden of proof required in proceeding to terminate parental rights depended partly on nature of individual interest affected by erroneous termination).

306. *Cf.* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 83–84, 133 (1997) (arguing that early Supreme Court case law suggests that "remedies for some state law violations may be constitutionally required").

307. *See McKesson*, 496 U.S. at 105 (stating that due process "requires a clear and certain remedy for taxes collected in violation of *federal* law") (emphasis added); *cf.* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 114 (1984) (stating that Court's development of Ex parte *Young* doctrine had reflected "accommodat[ion]" between "the need to promote the supremacy of federal law" and "the constitutional immunity of the States," and holding that doctrine does not authorize federal-court relief for violations of state law); Jackson, *The Supreme Court*, *supra* note 18, at 52–61 (arguing that federal courts should be more willing to grant relief for States' violations of federal law than for their violations of state law); Woolhandler, *Old Property*, *supra* note 225, at 937

that, if a state court decided that a state tax had been collected from a taxpayer in violation of state law, but denied a refund as barred by sovereign immunity, the taxpayer could plausibly argue that the state court's decision violated the doctrine of procedural due process, and the argument would pose a question about the remedial requirements of that doctrine.[308]

The Court's tax cases show that the remedial requirement of procedural due process can override state sovereign immunity, but the cases should not be read to mean that the remedial requirement always does. Although the doctrine of procedural due process requires States to create a system for avoiding and remedying erroneous deprivations of life, liberty, and property—the doctrine does not require the system to detect all errors,[309] to remedy all errors detected,[310] or to make the post-deprivation remedy required for an erroneous deprivation a judicial award of money from the sovereign's treasury.[311] That is because the

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("[S]upremacy concerns suggest that injunctive relief must be available to ensure state compliance with valid federal statutory law, quite apart from whether due process of its own force requires such remedies.").

308. *See* Cent. of Ga. Ry. v. Wright, 207 U.S. 127, 136–42 (1907) (holding that Due Process Clause was violated by state laws that authorized state taxes to be assessed against taxpayer without giving taxpayer a chance to challenge official's valuation of taxable property).

309. *See, e.g.*, Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 320 (1985) (due process "does not require that the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error") (internal quotation marks omitted).

310. *See, e.g.*, Martinez v. California, 444 U.S. 277, 284 n.9 (1980) ("It must be remembered that even if a state decision does deprive an individual of life or property, and even if that decision is erroneous, it does not necessarily follow that the decision violated that individual's right to due process."); Mackey v. Montrym, 443 U.S. 1, 11 (1979) (holding that due process did not require hearing before suspension of drivers' license, while recognizing that post-suspension detection of error would not yield a complete remedy); Bd. of Curators v. Horowitz, 435 U.S. 78, 92 & n.8 (1978) (indicating that state medical school's decision did not violate due process even if it violated school's own rules); Ingraham v. Wright, 430 U.S. 651, 694 (1977) (White, J., dissenting) (observing that, under majority's holding, public school student who suffered corporal punishment on basis of mistaken facts would have no remedy as long as officials acted reasonably); Fallon, *Confusions*, *supra* note 190, at 311:

> The dictum of *Marbury v. Madison* notwithstanding, there is no right to an individually effective remedy for every constitutional violation. The ultimate commitment of the law of due process remedies—analogous to that of procedural due process—is to create schemes and incentives adequate to keep government, overall and on average, tolerably within the bounds of law.

311. *See* Gilbert v. Homar, 520 U.S. 924, 929–36 (1997) (holding that State did not violate doctrine of procedural due process by suspending plaintiff without pay, even though this entailed loss of income during period of suspension); *see also* Hague v. Comm. for Indus. Org., 307 U.S. 496, 529 (1939) ("There are many rights and immunities secured by the Constitution . . . which are not capable of money valuation . . . ."); Walter E. Dellinger, *Of Rights and Remedies: The*

doctrine's demand for error-avoidance and error-remediation vary depending on the individual and governmental interests at stake.[312] For example, the Due Process Clause may demand greater accuracy for permanent deprivations of property than for temporary ones.[313] Furthermore, the invariability with which a remedy is required for an erroneous deprivation may depend not only on the nature of the individual harm caused by an erroneous deprivation but also on other factors, such as whether or not the error is one of federal law; if an error is one of federal law, whether it is a statutory error or a constitutional one; and, if the error is constitutional, what type of constitutional right is affected.[314]

An illustrative case is *Ingraham v. Wright*,[315] in which the Court held that due process does not require procedural safeguards before a public school official beats a student.[316] (Corporal punishment implicates procedural due process because it interferes with the student's liberty interest in being free from physical restraint and pain.)[317] The *Ingraham* Court held that due process was satisfied by the availability of a post-punishment state tort suit against the responsible officials.[318] Obviously, these tort suits would not detect every erroneous beating. Moreover, as the dissent observed, tort suits would not ensure a remedy for every

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Constitution as a Sword, 85 HARV. L. REV. 1532, 1544 (1972) (asserting that, contrary to implication in *Bivens*, 403 U.S. at 395, the federal courts' "exercise of remedial power to create a damage action directly from the Constitution [was] virtually unprecedented"); John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 279 (2000) ("The strictures in the Constitution were not conceived as predicates for money damages.").

312. See, for example, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), where the Court described precedent on procedural due process to require consideration of:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

313. *See, e.g.*, *Gilbert*, 520 U.S. at 932 (stating that procedural due-process analysis considers finality of deprivation); *Mathews*, 424 U.S. at 340 (determining that individual interest at stake in that case was in uninterrupted flow of benefits, rather than in absolute amount of benefits, because, if termination found erroneous, benefits would be awarded retroactively).

314. *Cf.* Jeffries, *supra* note 311, at 280 (arguing that "the [official] liability rule for money damages should vary with the constitutional violation at issue").

315. 430 U.S. 651 (1977).

316. *Id.* at 683.

317. *See id.* at 673–74.

318. *Id.* at 683 (concluding that due process was satisfied by state's "preservation of common-law constraints and remedies").

beating that was found, in those suits, to have been erroneous.[319]

As with erroneous tax collections, the need for a compensatory remedy for an erroneous liberty deprivation may depend on whether the error is one of state law or federal law.[320] For example, compensation may not be constitutionally required for the beating of a student that was erroneous because it violated a state statute.[321] In contrast, compensation may be required if the beating violated substantive due process because of its arbitrariness.[322] The differing results would reflect that the remedial demands of the Due Process Clause can be influenced by the Supremacy Clause.[323]

In short, the remedial element of procedural due process produces some hard cases, but cases involving governmental takings of private property for public use are not among them. It is difficult to explain, for example, the case law indicating that compensation from the State is often required for erroneous taxation but seldom for erroneous liberty deprivations.[324] In contrast, there is an explanation for the nature and invariability of the remedy required for governmental takings of private property for public use: Although the Due Process Clause requires a remedy for that sort of deprivation, the nature and invariability of that remedy (just compensation for every such taking) is prescribed by the Just Compensation Clause. The Constitution does not prescribe the

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319. *Id.* at 693–94 & n.11 (White, J., dissenting).

320. *See supra* notes 306–08 and accompanying text.

321. *Cf.* Paul v. Davis, 424 U.S. 693, 701 (1976) (stating that Fourteenth Amendment should not be interpreted as a "font of tort law").

322. *Cf.* County of Sacramento v. Lewis, 523 U.S. 833, 848–51 (1998) (explaining that doctrine of substantive due process does not invariably create constitutional liability for official conduct that would constitute a tort).

323. The Supremacy Clause can likewise influence whether a State's remedial procedures must include judicial review. *See supra* note 190 (observing that, even if Due Process Clause would not, standing alone, require state to involve its courts in adjudicating just-compensation claims, Supremacy Clause may mandate judicial review in some circumstances).

324. *See* Fallon & Meltzer, *supra* note 18, at 1825–28 (discussing possible reasons for differences between Court's decisions in tax cases and its decisions in other due process cases and finding none of them satisfactory). It is likewise difficult for this author to understand the Court's conclusion that a government official's negligence can never constitute a "depriv[ation]" within the meaning of the Due Process Clause. *See* Davidson v. Cannon, 474 U.S. 344, 348 (1986) ("[T]he protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials"); *see also* Daniels v. Williams, 474 U.S. 327, 329–36 (1986) (holding that Due Process Clause is not implicated by a state official's negligent destruction of property because such conduct does not "deprive" a person of the property, within the meaning of the Due Process Clause). In my view, if the negligence is caused by inadequate procedures (for example, the procedures for training or supervising the negligent official), the Court should recognize a deprivation.

remedies required for other erroneous deprivations of life, liberty, or property. In the absence of textual guidance, difficult questions arise.[325]

3. *Summary: The Just Compensation Clause Plus Procedural Due Process Can Override Sovereign Immunity*

This section has not essayed a grand theory of due process remedies or even suggested that such a theory is appropriate.[326] Rather, it has discussed the implications of Part IV's reliance on the doctrine of procedural due process, plus the Just Compensation Clause, as the legal bases for overriding state sovereign immunity from just-compensation claims. The discussion has emphasized that procedural due process obligates States to have procedures designed not only to avoid but to remedy erroneous deprivations of life, liberty, or property. There is no single answer to the question of what remedy the Due Process Clause

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325. Although the Just Compensation Clause has been interpreted to require compensation for every taking of private property for public use, this interpretation does not necessarily give the right to just compensation privileged status among constitutional rights. This becomes clear when one considers that injunctive relief is not available to prevent the government from taking private property for public use. *See* Seamon, *Separation of Powers*, *supra* note 59, at 210–11. In contrast, injunctive relief is often available to protect other constitutional rights, such as those secured by the Fourth Amendment. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 36 (2000) (upholding preliminary injunction against drug checkpoint program found to violate Fourth Amendment). By the same token, the government could not force someone to submit to an unreasonable search and seizure by tendering just compensation. *Cf.* Brauneis, *supra* note 20, at 61 (observing that 19th century case law invalidated laws that authorized uncompensated takings, treating them similarly to warrants issued without probable cause, in violation of Fourth Amendment); Dellinger, *supra* note 311, at 1562–63 (arguing that protection of Fourth Amendment would be weakened if exclusionary rule were abolished in favor of requiring government compensation for Fourth Amendment violations). In this respect, as Professor Brauneis has observed, just-compensation rights are "uniquely weak"; they provide only liability-rule protection instead of the stronger property-rule protection provided by other constitutional rights. *See* E-Mail from Robert Brauneis, Associate Professor of Law, The George Washington University Law School, to Richard H. Seamon, Assistant Professor of Law, Univ. of S.C. (Jan. 24, 2001) (on file with author); *see also* Brauneis, *supra* note 20, at 113 (observing that, in contrast to governmental takings, which trigger Just Compensation Clause's provision for monetary relief, violations of other constitutional provisions that flatly and unqualifiedly limit government power "should arguably be seen as more serious than the mere failure to pay compensation for what could be forcibly taken so long as it was paid for"); Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal v. Mahon, 106 YALE L.J. 613, 672 n.268 (1996) (discussing distinction between a "liability rule" and "property rule" in context of takings jurisprudence); Jackson, *The Supreme Court*, *supra* note 18, at 93 (observing that, because monetary awards for government's violation of certain rights could be perceived as "depreciat[ing] the value of those rights," injunctive relief is preferable for such violations).

326. *Cf.* Jeffries, *supra* note 311, at 259 (arguing that it is not appropriate to determine the availability of money damages from state officials under 42 U.S.C. § 1983 without considering the nature of the constitutional violation for which the damages are sought).

requires for a State's erroneous deprivation of life, liberty, or property.[327] The Court's decisions make clear, however, that for some deprivations—including, but not limited to, those involving takings of private property for public use—the Clause requires compensation. This Article argues that, when that is the remedy required by the Fourteenth Amendment, and when it is sought in a state court of otherwise competent jurisdiction, a state court cannot deny the remedy because of sovereign immunity if the State has created no adequate alternative for providing just compensation. This is true even though that judicial remedy would be barred by the State's sovereign immunity if it were sought in a federal court. Thus, the Due Process Clause creates asymmetries between a State's immunity in its own courts and its immunity in federal court.[328]

C. *The United States' Obligations Under the Due Process Clause of the Fifth Amendment*

Just as the analysis offered here is not limited to claims for just compensation, it is not limited to claims against the States. The United States has remedial obligations under the Due Process Clause of the Fifth Amendment.[329] Under that Clause, when the federal government takes private property for public use, it, like the States, must have made "reasonable, certain, and adequate provision for obtaining compensation."[330] Currently, the federal government meets this obligation by authorizing just compensation suits to be brought against it

327. *Cf.* Hart, *supra* note 244, at 1366–67 (discussing breadth of congressional discretion to prescribe remedies consistent with Constitution).

328. I thus join Professor Jackson, and part company with Professor Vázquez, in believing that a State cannot always satisfy the Fourteenth Amendment by letting its officers be sued. *See* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 979 n.91 (2000) (stating that she is "not yet persuaded by the argument that the Due Process Clause of the 14th Amendment could always be satisfied with relief against officers"); *cf.* Vázquez, *What Is*, *supra* note 18, at 1770 (proposing reinterpretation of *McKesson* "as establishing that individuals injured by a state's violation of mandatory federal obligations have a right to damages not from the state itself, but from state officials"); Vázquez, Alden *Trilogy*, *supra* note 18, at 1947–48 (asserting that Court's due process precedent "could be reconciled, and other doctrinal conundrums solved, if *McKesson* were interpreted as holding that the remedy required by the Due Process Clause is a remedy against state officials rather than the state itself").

329. U.S. CONST. amend. V.

330. *See supra* note 181 (citing cases articulating the "reasonable, certain, and adequate" standard, many of which involved asserted takings by federal government).

under the Tucker Act.[331] As discussed above, some early decisions of the Court—including *Schillinger* and *Lynch*—have been read to suggest that, in the absence of the Tucker Act, the United States would have sovereign immunity from just-compensation suits.[332] As also discussed above, however, the *Schillinger* line of cases has been undermined by later precedent, and *Lynch* is better read as prohibiting, rather than authorizing, the United States to use sovereign immunity to prevent payment of just compensation. Under the analysis proposed here, the Due Process Clause would bar Congress from repealing the Tucker Act unless there were an adequate, alternative procedure by which the federal government would pay just compensation for private property that it took for public use.

The Court hinted as much in *Russian Volunteer Fleet v. United States*.[333] In that case, a federal agency appropriated two shipbuilding contracts, as well as the completed ships, from a Russian corporation.[334] The federal statute authorizing the appropriation also authorized people whose property had been appropriated to sue the United States for just compensation.[335] The Court rejected the government's argument that the provision authorizing these suits did not permit suits to be brought by companies incorporated in a country the government of which was not recognized by the United States.[336] The Court determined that the government's interpretation, "to say the least, would raise a grave question as to the constitutional validity of the act."[337] That determination implies that the Constitution requires the United States to have an adequate scheme for paying just compensation when it takes private property for public use.[338]

The same implication arises from the Court's decisions on the

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331. 28 U.S.C. §§ 1346(a), 1491 (1994); *see also* Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 149 (1974) (holding that availability of Tucker Act remedy for taking alleged in that case ensured that "procedural due process is satisfied"). Claims for just compensation of $10,000 or less may be brought in either the Court of Claims or the federal district courts, under the "Little Tucker Act." *See* 28 U.S.C. § 1346(a)(2).

332. *See supra* notes 115–139 and accompanying text (Part III.C).

333. 282 U.S. 481 (1931).

334. *Id.* at 486–87 (explaining that contracts were appropriated by United States Shipping Board Emergency Fleet Corp. under federal statute and executive order).

335. *Id.* at 489–90 (describing relevant provisions of Act of June 15, 1917, ch. 29, 40 Stat. 183).

336. *Id.* at 492.

337. *Id., quoted in Developments in the Law, supra* note 125 at 878 n.338.

338. *See also* Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 134 (1974) (stating that there would "clearly [be] grave doubts" about constitutionality of federal statute at issue in that case if statute were construed to withdraw Tucker Act remedy for governmental taking of plaintiffs' property).

authority of federal district courts to address just-compensation claims against the federal government. The Court has held that the district courts cannot exercise federal-question jurisdiction over just-compensation claims that can be asserted in the United States Court of Federal Claims under the Tucker Act.[339] The Court has also indicated, however, that a district court can exercise federal-question jurisdiction over a just-compensation claim if Congress has withdrawn the Tucker Act remedy for that claim.[340] The Court has never suggested that the federal government's sovereign immunity bars the district courts from hearing just-compensation claims that cannot be asserted under the Tucker Act.[341] To the contrary, the Court's decisions suggest that the federal district courts act as a backstop for the Court of Claims by resolving just-compensation claims that do not fall within the latter's jurisdiction under the Tucker Act.[342]

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339. *See, e.g.*, Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11–17 (1990); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 94 n.39 (1978); Malone v. Bowdoin, 369 U.S. 646, 647–48 & n.8 (1962). *But cf.* Kidalov & Seamon, *supra* note 196, at 43–50 (discussing some inconsistencies in relevant precedent).

340. *See* E. Enters., Inc. v. Apfel, 524 U.S. 498, 520–22 (1998) (plurality opinion) (holding that takings claim was properly addressed by federal district court because Tucker Act remedy had presumptively been withdrawn for plaintiff's claim); *Reg'l Rail Reorg. Act Cases*, 419 U.S. at 124–25, 138 (holding that takings claim was ripe given uncertainty about availability of Tucker Act remedy)

341. Much is unclear about the sovereign immunity of the United States, including whether it, like state sovereign immunity, is of constitutional stature. *See* FALLON, *supra* note 19, at 1001–02. Quite apart from the United States' sovereign immunity, another potential restriction on judicial awards of money payable from the U.S. Treasury stems from the Appropriations Clause, which prohibits payments from the Treasury except "in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7; *see also supra* note 241 (discussing state constitutional provisions requiring that payments from state treasury occur only pursuant to appropriation statute). Under current federal law, however, that constitutional restraint on payments from the federal treasury is more theoretical than real, as a practical matter. Many money judgments entered by the federal courts can be paid out of the U.S. Treasury under the Judgment Fund Act, 31 U.S.C. § 1304 (1994). The Act appears to authorize the federal district courts to enter awards of just compensation against the United States. *See id.* § 1304(a)(3)(A) (authorizing appropriation of "necessary amounts" for payment of judgments entered under 28 U.S.C. § 2414); 28 U.S.C. § 2414 (authorizing payment of "final judgments rendered by a district court . . . against the United States"); Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 95 (1992) (opinion of Rehnquist, C.J., for the Court). A separate federal statute authorizes the U.S. Court of Claims to enter money judgments against the United States. *See* 28 U.S.C. § 2517. *See generally* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424–34 (1990) (discussing relationship between Appropriations Clause and statutory authorization for disbursements from treasury under, among other statutes, the Judgment Fund Act).

342. *See* Kidalov & Seamon, *supra* note 196, at 43–44 (discussing power of federal district courts to decide whether Tucker Act remedy is available for alleged takings by federal government). For the reasons discussed in analyzing just-compensation claims against the States, an adequate remedy for just-compensation claims against the United States cannot always be furnished through an officer

In short, just as the state courts enable the States to provide due process, so too do the United States Court of Federal Claims and the United States District Courts enable the federal government to provide due process. And, just as the Due Process Clause would prevent state courts from honoring a defense of sovereign immunity when doing so would deny just compensation, so would the Clause prevent the federal courts from doing so.[343]

D. Congress's Power Under Section 5 of the Fourteenth Amendment

Section 5 of the Fourteenth Amendment empowers Congress to

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suit. *See supra* notes 199–201 and accompanying text. In a suit against a federal officer, a court usually could enjoin the officer from continuing to take the plaintiff's property, as *United States v. Lee*, 106 U.S. 196 (1882), shows. *See supra* notes 60–62 and accompanying text. *But cf.* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 n.11 (1949) (noting that injunctive relief in suit against federal officer would be barred "if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property"). Moreover, the court could award damages against the officer for the temporary taking, as the *Belknap* case shows. Belknap v. Schild, 161 U.S. 10 (1896); *see also supra* notes 73–81 and accompanying text. The problem is that the damages often would either be barred by official immunity or unrecoverable as a practical matter.

343. As discussed in Part III.C above, *supra* notes 115–39 and accompanying text, there is early Court case law suggesting that the United States would be immune from just-compensation claims in the absence of a statutory waiver such as the Tucker Act. It is possible that, contrary to the conclusion for which this Section of the Article contends, the Court could rely on that early case law to hold that the United States is immune from just-compensation claims while also concluding that the Fourteenth Amendment overrides the States' sovereign immunity from such claims. This differing treatment of the United States and the States could be defended on at least three grounds: (1) that the Fifth Amendment, unlike the Fourteenth Amendment, was not meant to alter the sovereign immunity that existed under the original Constitution, *see* Seminole Tribe v. Florida, 517 U.S. 44, 65–66 (1996) (stating that Congress's power under Section 5 of Fourteenth Amendment to abrogate state sovereign immunity rested on the rationale 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"); (2) that the separation-of-powers doctrine puts a limit on federal courts' power to enter money judgments against members of the federal political branches, *cf.* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 477 (1793) (opinion of Jay, C.J.) (stating that federal courts' reliance on executive branch for enforcement of its judgments "place[s] the case of a State, and the case of the United States, in very different points of view" when it came to sovereign immunity); or (3) that the Framers intended in the original Constitution to distinguish the suability of the States from the suability of the United States, *see* James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1370–73 (1998) (discussing historical basis for differential treatment of federal and state sovereign immunity). I thank Professors Joshua Schwartz and Robert Brauneis for the insight that the United States' immunity from just-compensation claims could, consistently with case law, be found to differ from that of the States. *See* Posting of Environmental Policy Project, (Dec. 17, 1999) (forwarding comments of Joshua I. Schwartz, Professor of Law, The George Washington Univ. Law School, and Robert Brauneis, Associate Professor of Law, The George Washington Univ. Law School) (copy on file with author).

"enforce" the Due Process Clause by "appropriate legislation."[344] Congress's Section 5 power has been addressed in several recent decisions of the Court.[345] This Part does not attempt a comprehensive analysis of those decisions. Instead, this Part describes two ways in which the due-process analysis proposed in this Article sheds light on Congress's Section 5 power. First, the proposed analysis clarifies that the States' obligation to remedy erroneous deprivations of life, liberty, or property stems from the procedural component of the Due Process Clause.[346] Congress can use Section 5 enforce those remedial obligations, but it is not necessarily "appropriate" for Congress to do so by regulating the state conduct that merely gives rise to those obligations.[347] Second, the proposed analysis clarifies that federal courts cannot help the States meet their remedial obligations under the Due Process Clause.[348] Accordingly, Congress's power to enforce the States' remedial obligations under Due Process Clause of the Fourteenth Amendment is not diminished by the availability of federal-court remedies.[349]

Because the procedural component of the Due Process Clause puts remedial obligations on the States, Congress can use Section 5 to "enforce" those remedial obligations by "appropriate" legislation.[350] To be "appropriate," however, the legislation must be tailored to remedying or preventing the States' failure to meet their remedial obligations.[351] A federal law may not satisfy this "tailoring" requirement if, instead of

344. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

345. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, ___, 121 S. Ct. 955, 963–68 (2001); United States v. Morrison, 529 U.S. 598, 619–27 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80–91 (2000); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672–75 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636–48 (1999); City of Boerne v. Flores, 521 U.S. 507, 516–35 (1997).

346. *See supra* notes 178–248, 260–325 and accompanying text (discussing States' remedial obligations under the doctrine of procedural due process).

347 *See supra* Part IV.D.

348. *See infra* notes 392–94 and accompanying text.

349. *See infra* note 393 and accompanying text.

350. *See* U.S. CONST. amend. XIV, § 5; *see also* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (stating that "[t]he 'provisions of this article,' to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment," and holding that Congress had power under Section 5 to enforce Free Exercise Clause, which had been held to be incorporated into Due Process Clause).

351. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999) (stating that, "for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct").

regulating state remedial procedures, the law regulates state conduct that could give rise to remedial obligations. The "appropriate" way for Congress to remedy or prevent defective state remedial procedures would ordinarily be to regulate the remedial procedures themselves.[352]

This appears to be why the Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[353] concluded that the federal statute challenged there exceeded Congress's power under Section 5.[354] *Florida Prepaid* concerned the federal Patent and Plant Variety Protection Remedy Clarification Act ("Patent Remedy Act," or "Act"). The Act made States civilly liable for infringing patents.[355] The Court in *Florida Prepaid* observed that a State's infringement of a patent could cause a deprivation of property, if the infringement was intentional.[356] Thus, the Patent Remedy Act targeted State conduct that could give rise to state remedial obligations under the doctrine of procedural due process. The Court added, however, that, "[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law."[357] Thus, a State's intentional infringement of patents violates procedural due process "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent."[358] Nonetheless, Congress "barely considered the availability of state remedies for patent infringement" when it was drafting the Patent Remedy Act.[359] As a result, the statute that Congress enacted was not limited to "cases involving arguable constitutional

352. The qualification in the text ("ordinarily") reflects that Congress can use Section 5 to enact "reasonably prophylactic legislation" in response to "[d]ifficult and intractable" violations of the Fourteenth Amendment. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88, 91 (2000).

353. 527 U.S. 627 (1999).

354. *Id.* at 646–47.

355. 35 U.S.C. §§ 271(h), 296(a) (1994); *see also Fla. Prepaid*, 527 U.S. at 631–32 (describing Patent Remedy Act).

356. *Fla. Prepaid*, 527 U.S. at 641–42 (holding that patents "are surely included within the 'property' of which no person may be deprived by a State without due process of law" and Court knew of "no reason why Congress might not legislate against their deprivation without due process under § 5 of the Fourteenth Amendment"); *id.* at 645 (observing that, although negligent official conduct "does not 'deprive' [a] person of property within the meaning of the Due Process Clause . . . . [a]ctions predicated on direct patent infringement [under federal statute] . . . do not require any showing of intent to infringe").

357. *Id.* at 642–43 (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)) (bracketed text and ellipsis added by Court in *Florida Prepaid*).

358. *Id.* at 643.

359. *Id.*

violations"[360] and hence did not fall within Section 5. In short, the Patent Remedy Act was not "appropriate" legislation for enforcing the procedural Due Process Clause because it was aimed at state conduct that could give rise to remedial obligations under the Clause—i.e., at the States' infringement of patents—rather than at state conduct that violated those remedial obligations—i.e., at the States' failure adequately to avoid or remedy their intentional patent infringements.[361]

I respectfully disagree with commentators who have criticized *Florida Prepaid* for failing to analyze the Patent Remedy Act as a law that enforced substantive due process.[362] It is true that the plaintiff in *Florida*

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360. *Id.* at 646.

361. A similar defect led the Court in United States v. Morrison, 529 U.S. 598, (2000), to hold that a federal statute exceeded Section 5. *Morrison* concerned the federal Violence Against Women Act ("VAWA"), 42 U.S.C. § 13981. The VAWA authorized a private civil action against people who committed gender-motivated crimes of violence. *Morrison*, 529 U.S. at 605–07 (describing the VAWA). The federal government defended the VAWA as a way of enforcing the rights of the victims of such crimes to the equal protection of state laws that proscribed gender-motivated, violent crimes. *See id.* at 619. The Court recognized that, when Congress enacted the VAWA, Congress had ample evidence of "pervasive bias in various state justice systems against victims of gender-motivated violence." *Id.* The problem was that the VAWA did not target this systemic bias. Instead, the VAWA targeted the underlying (private) conduct that gave rise to the States' obligation to provide the protection of their laws on an equal basis. *Id.* at 626 (observing that the VAWA "is not aimed at proscribing discrimination by [state] officials" involved, for example, "in investigating or prosecuting" gender-motivated crimes but at individuals who committed those crimes). A State's duty under the Equal Protection Clause to afford the protections of its laws on an equal basis, like its remedial obligations under the Due Process Clause of the Fourteenth Amendment, is procedural in nature; it concerns the way substantive laws are enforced. *Florida Prepaid* suggests that Congress ordinarily cannot use Section 5 to regulate state conduct that could give rise to remedial obligations, but that does not in and of itself violate the Fourteenth Amendment; similarly, *Morrison* indicates that Congress cannot use Section 5 to regulate private conduct that could give rise to equal-protection obligations, but that does not in and of itself violate the Fourteenth Amendment. Thus, there is a plausible rationale for the Section 5 holding in *Morrison*, and it is a rationale that is consistent with the holding of *Florida Prepaid*. Whether the holding in *Morrison* reflects too narrow a conception of Section 5 power (as Professor Caminker has persuasively argued) is a different matter. *See* Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351, 1353 (2000) (arguing that "[n]either text, precedent, nor federalism values guiding constitutional interpretation persuasively support limiting Congress's Section 5 powers" in the way in which the Court did in *Florida Prepaid*); *see also* Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1643 & n.59 (2000) (arguing that Congress may be able to use Section 5 to ban possession of weapons in public schools on the theory that state's inaction in the face of the problem constitutes discrimination or causes a deprivation of life or liberty without due process); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 477 (2000) (contending that Court has treated Congress's power under Section 5 with unusual "suspicion and hostility").

362. *See* Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1061 (2000) (criticizing opinion in *Florida Prepaid* for its failure "even to advert to the question" whether state's patent infringement should be analyzed under doctrine of

Prepaid was not complaining about the procedure by which the State infringed its patent;[363] the plaintiff wanted a remedy for that infringement. Yet, as previously discussed, a State's obligation to remedy an erroneous deprivation of property, including a State's intentional infringement of a patent, stems from the procedural component of the Due Process Clause.[364] Thus, a plaintiff's desire for a remedy for a State's deprivation of his or her property interest does not automatically identify the plaintiff's claim as one grounded in substantive due process.

Likewise, a plaintiff's claim that a deprivation of property was erroneous does not automatically make that claim a substantive due process claim. To plead a substantive due process claim, the plaintiff must allege that the deprivation was not merely erroneous, but so flawed that it was "arbitrary in the constitutional sense."[365] The plaintiff in *Florida Prepaid* did not allege constitutional arbitrariness.[366] The plaintiff did assert that the State's infringement of its patent violated the federal law against patent infringement.[367] That assertion was probably correct; even after *Florida Prepaid*, States probably still have to obey the federal patent laws.[368] Even so, a State's infringement of a patent

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substantive due process); Michael Wells, *"Available State Remedies" and the Fourteenth Amendment: Comments on* Fla. Prepaid v. Coll. Sav. Bank, 33 LOY. L.A. L. REV. 1665, 1667, 1669–76 (2000) [hereinafter Wells, *Available State Remedies*] (arguing that "[a] procedural due process reading of *Florida Prepaid*'s adequate state remedies prong presents formidable analytical difficulties" and that, read as a decision about substantive due process, *Florida Prepaid* conflicts with *Home Telephone*).

363. *See* Wells, *Available State Remedies*, *supra* note 362, at 1675 (asserting that "the nature of the underlying claim in *Florida Prepaid* seems to be substantive rather than procedural").

364. *See supra* notes 261–97 and accompanying text.

365. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) ("[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense.") (internal quotation marks omitted); Fallon, *Confusions*, *supra* note 190, at 310 ("In its commonest form, substantive due process doctrine reflects the simple but far-reaching principle . . . that government cannot be arbitrary.") (footnotes omitted).

366. The plaintiff in *Florida Prepaid* contended that the State's infringement was "willful." *Fla. Prepaid*, 527 U.S. at 632–33. It is doubtful that even most "willful" infringements would violate substantive due process, given the Court's repeated insistence that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Lewis*, 523 U.S. at 846 (internal quotation marks omitted).

367. *Fla. Prepaid*, 527 U.S. at 631 ("College Savings claims that, in the course of administering its tuition prepayment program, Florida Prepaid directly and indirectly infringed College Savings' patent. College Savings brought an infringement action under 35 U.S.C. § 271(a) . . . .").

368. The Court in *Florida Prepaid* concluded "that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment." *Id.* at 647. This conclusion does not resolve whether, to the extent that the Act imposes only a substantive obligation on States not to infringe patents, it can be justified under the Patent Clause, U.S. CONST. art. I, § 8, cl. 8. In *Alden*, the Court clearly

ordinarily would violate substantive due process (as distinguished from violating the federal patent laws) only if the infringement were "arbitrary in the constitutional sense"—i.e., "egregious."[369] And the fact that a State's conduct violates the federal patent laws does not make the conduct "arbitrary" for purposes of substantive due process (or otherwise unconstitutional).[370] Congress cannot use Section 5 to alter the Court's definition of "arbitrary" for purposes of substantive due process any more than Congress can use Section 5 to alter the meaning of the Free Exercise Clause.[371]

The analysis is the same if one treats the plaintiff's claim in *Florida Prepaid* as alleging that, by infringing the plaintiff's patent, the State was taking private property for a public use.[372] A State's taking of private property for public use does not violate the Just Compensation Clause, as applicable to States under the Fourteenth Amendment.[373] Instead, a violation of the Just Compensation Clause occurs only if the State fails to pay just compensation for the taking.[374] Thus, the assertion of a taking

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believed that States continue to have an obligation to pay the wages prescribed in the FLSA, even though they cannot be sued under that statute for retroactive monetary relief. *See* Alden v. Maine, 527 U.S. 706, 754–60 (1999) (discussing alternative ways of enforcing federal laws against the States and observing that Maine "has not questioned Congress's power to prescribe substantive rules of federal law to which it must comply"). By parity of reasoning, States would also still have to obey the federal patent laws.

369. *Lewis*, 523 U.S. at 846.

370. *See Fla. Prepaid*, 527 U.S. at 643 ("[A] State's infringement of a patent . . does not by itself violate the Constitution.").

371. *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (stating that "Congress does not enforce a constitutional right by changing what the right is" and holding that, as applied to States, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* (1996), exceeded Congress's enforcement power under Section 5, because Act "appears to attempt a substantive change in constitutional protections.").

372. In fact, the plaintiff in *Florida Prepaid* did argue that the Patent Remedy Act fell within Congress's power under Section 5 because it was "appropriate" for enforcing the States' obligations under the Just Compensation Clause. *See Fla. Prepaid*, 527 U.S. at 641–42. The Court declined to consider that argument, finding no evidence that, in enacting the Patent Remedy Act, Congress intended to rely on the Just Compensation Clause. *See id.* at 642 n.7; *see also* Kidalov & Seamon, *supra* note 196, at 73–75 (discussing significance of Court's refusal to address the just-compensation defense of the statute).

373. *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (stating that Just Compensation Clause "does not prohibit the taking of private property").

374. *See, e.g.*, Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 734 (1997) (stating that "only takings without 'just compensation' infringe" the Just Compensation Clause). A person whose patent had been taken for public use by the State could sue the State in state court alleging a claim in inverse condemnation under *First English*. *See supra* notes 19–52 and accompanying text (discussing *First English*). The claim would not be barred by the federal statute that gives federal

does not establish a violation of a State's substantive obligation under the Fourteenth Amendment to pay just compensation. Of course, a State violates the procedural component of the Due Process Clause if it fails to provide adequate procedures for paying just compensation.[375] But violations of neither the substantive obligation to pay just compensation nor the procedural obligation to have a scheme for doing so are targeted by a federal statute that creates civil liability for *all* state infringements of patents, even those for which the State provides just compensation. Such a statute would not target state violations of the substantive obligation to pay just compensation, because state takings of private property for public use do not violate that component unless they go uncompensated.[376] And the statute would not target state violations of

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district courts exclusive jurisdiction of cases "arising under any Act of Congress relating to patents," 28 U.S.C. § 1338, because the case would arise under the Constitution, not under the patent laws. *See* Jacobs Wind Elec. Co. v. Fla. Dep't of Transp., 919 F.2d 726, 728 (Fed. Cir. 1990) (determining that patent owner could assert taking claim against State in state court, notwithstanding federal court's exclusive jurisdiction over patent infringement claims); Jacobs Wind Elec. Co. v. Dep't of Transp., 626 So.2d 1333 (Fla. 1993) (same); Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 S. CAL. L. REV. 1161, 1163 n.5 (2000) (same).

375. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 717 (1999) (stating that government violates the Constitution "either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought"). In Part IV, I argue that a State can establish adequate procedures for payment of just compensation without waiving immunity in its own courts, but, if (and only if) it fails to do so, its use of sovereign immunity to prevent the recovery of just compensation would violate the procedural component of the Due Process Clause of the Fourteenth Amendment. In my view, this argument accords with the Court's precedent, both old and new. I therefore respectfully disagree with Professor Vázquez's view that the Court's decision in Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999), can be read to mean "that a state's insistence on sovereign immunity is *never* a violation of the Fourteenth Amendment." Professor Vázquez stated,

> [T]he Court in *College Savings Bank*[, 527 U.S. at 675,] indicated that the statute involved in that case was a prophylactic measure because it was a prohibition of States' sovereign-immunity claims, which are not in themselves a violation of the Fourteenth Amendment. This suggests that a state's insistence on sovereign immunity is *never* a violation of the Fourteenth Amendment....

Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 898 (2000) [hereinafter Vázquez, *Schizophrenia*] (internal quotation marks and footnote omitted; emphasis added). *College Savings* indicates only that a State's reliance on sovereign immunity does not *necessarily* violate the Fourteenth Amendment, a principle that is fully consistent with the analysis in this Article. *See Coll. Sav. Bank*, 527 U.S. at 675 (remarking that State's assertion of sovereign-immunity defenses to patent-infringement claims "are not in themselves violations of the Fourteenth Amendment").

376. Professors Heald and Wells assert that most patent infringements by the States are caused by officials who lack the power to exercise eminent domain. *See* Heald & Wells, *supra* note 19, at 870–71, 888. They appear to believe that the infringement of a patent by a state official who lacks eminent-domain power would violate the Fourteenth Amendment if the infringement constituted a taking of property for which just compensation was due. *Id.* at 888 (contrasting such an infringement

the procedural component of the Due Process Clause, because it would operate without regard to whether the state had an adequate procedure for paying just compensation for its takings.[377]

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to a State's "proper" exercise of authority to take private property for public use). Based on that belief, they find a close "fit" between a federal statute abrogating state sovereign immunity from patent-infringement claims and the prevention or remediation of violations of the Fourteenth Amendment. *See id.* If I understand their argument correctly, I respectfully disagree. It is true that a state official's infringement of a patent could immediately give rise to a cause of action in inverse condemnation, if the infringement constituted a taking of private property for public use. *See id.* at 888. A cause of action in inverse condemnation is not the same, however, as a cause of action for a violation of the Just Compensation Clause. *See* Kidalov & Seamon, *supra* note 196, at 51–52. A cause of action in inverse condemnation arises as soon as a taking occurs, whereas a cause of action for a violation of the Just Compensation Clause does not arise until the State fails to pay just compensation for the taking. *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985) (recognizing that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation"). Thus, a state official's infringement of a patent does not violate the Constitution just because it causes a taking of private property for public use. This conclusion is not altered by the official's lack of eminent-domain power. As long as the official's act of infringement fell within the general scope of his or her authority—i.e., as long as it was not ultra vires—the official's conduct could cause a taking for which just compensation was due. *See* Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1362–63 (Fed. Cir. 1998). If the official's infringement *was* ultra vires, it could *not* constitute a taking for which just compensation is due. *See id.* If the infringement was "arbitrary in the constitutional sense," *Lewis*, 523 U.S. at 846 (internal quotes omitted), it could violate substantive due process, and be actionable on that basis. As discussed in the text, however, the official's conduct would not be constitutionally arbitrary merely because it violated federal patent laws.

377. Because *Florida Prepaid* addressed Congress's power to enforce the States' procedural due process obligations, I respectfully disagree with commentary suggesting that *Florida Prepaid* conflicts with *Home Telephone*, which was a substantive due process case. *See* David L. Shapiro, *The 1999 Trilogy: What is Good Federalism?*, 31 RUTGERS L.J. 753, 757 (2000). In *Home Telephone*, a phone company claimed that telephone rates set by a city violated the Fourteenth Amendment because they were so low as to be confiscatory. Home Tel. & Tel Co. v. City of Los Angeles, 227 U.S. 278, 281 (1913). This claim asserted a violation of substantive due process, not procedural due process. *See, e.g.*, Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 255 (1984) (identifying substantive due process as doctrine underlying Court's decisions reviewing reasonableness of utility rates). The Court concluded in *Home Telephone* that the company had adequately alleged a substantive due process violation, even if the challenged rates violated state law and could have been set aside on that basis. *Home Tel.*, 227 U.S. at 282–95. This conclusion reflects that a violation of substantive due process can occur before state remedies for the violation have been exhausted. That principle does not conflict with *Florida Prepaid*. *Florida Prepaid* reflects that, unlike a State's violation of substantive due process, a State's violation of procedural due process sometimes does not occur until after adequate state remedies have been exhausted. *See Fla. Prepaid*, 527 U.S. at 642–43 (relying on cases involving "procedural due process claims"); *see also* Zinermon v. Burch, 494 U.S. 113, 125–26 (1990) (explaining that violation of substantive due process "is complete when the wrongful action is taken," whereas violation of procedural due process "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process.") If a plaintiff can plead a violation of substantive due process, the plaintiff can seek a

This explanation of *Florida Prepaid* as a decision about Congress's power to enforce the procedural component of the Due Process Clause should show that the decision does not necessarily "undo" the Court's decision in *Alden v. Maine*.[378] In *Alden*, state employees sued the State of Maine in a state court in Maine for backpay under the federal Fair Labor Standards Act (FLSA), a statute enacted under Congress's Article I, Commerce Clause power.[379] The Court in *Alden* held that the suit was barred by the State's immunity in its own courts and that Congress could not use its Article I powers to abrogate that immunity.[380] Professor Vázquez has argued that these holdings may be insignificant if a state employee's right to the wages prescribed by the FLSA constitutes a "property" interest protected by the doctrine of procedural due process.[381] The premise of this argument is that the States' use of sovereign immunity to defeat a state-court action for backpay under the FLSA would violate the Due Process Clause.[382]

It is not necessarily true, however, that a State would violate the Due Process Clause by using sovereign immunity to bar a state-court action against it for backpay under the FLSA. To begin with, a State's violation of the FLSA is no more tantamount to a violation of *substantive* due process than is a State's violation of the federal patent laws. Neither sort of violation is necessarily "arbitrary" as the Court has defined that term

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remedy for that violation in a federal-court lawsuit—under 42 U.S.C. § 1983, for example—even if an adequate state remedy was available for the violation and even if, as this Article has argued, the existence of an adequate state remedy would be required by the doctrine of procedural due process. As discussed in the text, however, the plaintiff in *Florida Prepaid* did not allege a substantive due process violation.

378. 527 U.S. 706 (1999), discussed *supra* notes 140–77 and accompanying text; *see* Vázquez, Alden *Trilogy*, *supra* note 18, at 1928 (asserting that *Florida Prepaid* "may contain the seed of *Alden*'s substantial undoing").

379. *Alden*, 527 U.S. at 711 (describing background of lawsuit); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537–56 (1985) (analyzing FLSA as exercise of Congress's power under Commerce Clause).

380. *Alden*, 527 U.S. at 754.

381. Vázquez, Alden *Trilogy*, *supra* note 18, at 1974–80 (arguing that comparison of *Alden* and *Florida Prepaid* leads to conclusion "either that, under the holding of *Florida Prepaid*, the *Alden* plaintiffs would have been entitled under the Due Process Clause to the relief that the Court in *Alden* denied them, or that the Court now rejects its 'new property' jurisprudence").

382. Vázquez, Alden *Trilogy*, *supra* note 18, at 1974 (asserting that, if the right to wages under FLSA constituted property, plaintiffs in *Alden* "would have been entitled under the Due Process Clause to the relief the Court in *Alden* denied them"). The plaintiffs in *Alden* sought back pay for approximately a four-year period. *See* Joint Appendix at 50–51, *Alden* (No. 98-436) (unpublished decision of state trial court in *Alden* case, stating that plaintiffs "are seeking damages for the period of December 21, 1989 to February 6, 1994").

for purposes of substantive due process.[383] It is true that, if the right of a state employee to the wages prescribed by the FLSA is, like a patent, a property interest, a State's intentional violation of the FLSA would constitute a deprivation of property.[384] The State would therefore have a procedural due process obligation to establish a system for ensuring that its payment of wages complied with the FLSA. That system would have to ensure accurate payment of wages and a way to remedy erroneous payments.

The question remains what remedy the State would have to provide when its system detected a post-payment error. That question is one of procedural due process, for reasons already discussed. Procedural due process might generally require retroactive compensation from the State for FLSA violations; the Court's tax cases arguably support that requirement.[385] If the Due Process Clause did require retroactive compensation from the State for FLSA violations, then *Alden* would indeed lose much significance.

It is far from clear, however, that the Due Process Clause would require retroactive compensation from the State for violations of the FLSA.[386] One could plausibly argue that prospective correction of the

383. *See supra* text accompanying notes 365–71, *supra* (explaining why State's violation of patent laws does not violate substantive due process).

384. An employee's right to the wages prescribed by the FLSA appears to be "property" as the Court has usually defined the term for purposes of the Due Process Clause. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (stating that property interest exists for due process purposes if "existing rules or understandings that stem from" sources of law independent of the Constitution support "legitimate claims of entitlement" to a monetary benefit). In a companion case to *Florida Prepaid*, however, the Court appeared to adopt a narrower definition of "property" in holding that the Lanham Act, 15 U.S.C. § 1125(a), did not give the plaintiff a "property" interest in being free from a state entity's making a false statement about a product that the State marketed in competition with the plaintiff's product. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673–75 (1999). To reconcile *College Savings* with precedent, the result in that case is best understood to reflect that, when a State makes false claims about its own product, any resulting competitive injury is too indirect to cause the owner of a competing product to suffer a "deprivation" within the meaning of the Due Process Clause. *Id.* at 675. *Cf.* Martinez v. California, 444 U.S. 277, 285 (1980) (State's decision to parole person who murdered plaintiffs' decedent did not "deprive" decedent of life because murder was "too remote a consequence"). Admittedly, this was not the reason the Court gave for its decision in *College Savings*.

385. *See supra* notes 217–26 and 300–14 (discussing Court's tax cases); *see also* Brief for Petitioners at 29–31, *Alden* (No. 98-436) (arguing that Court's tax cases supported conclusion that plaintiffs were entitled to retroactive relief for State's FLSA violations as a matter of due process).

386. Even if the Due Process Clause does require retroactive compensation from the State for violations of the FLSA, the Clause does not necessarily require the State to make that remedy available in its courts. Instead, the State may be able to satisfy the Due Process Clause by creating an adequate nonjudicial scheme for awarding that compensation.

error that led to the violations, such as through injunctive relief, would satisfy the Due Process Clause.[387] Alternatively, one could argue that due process requires retroactive compensation only for egregious violations and, even then, only compensation payable by the officials responsible for the violations. These arguments would emphasize the difference between a State's erroneous collection of a tax—which deprives people of money (or other property) that they already have received—and a State's failure to pay the prescribed wage—which deprives people of money that they have not yet received.[388] In addition to this difference between the individual interest at stake in the two settings, there may be other differences that justify interpreting the Due Process Clause to mandate different remedies for erroneous taxation and erroneous payment of wages. For example, perhaps States have greater incentives to avoid erroneous wage payments than they do to avoid erroneous tax collections.[389] The point is that, although the procedural Due Process Clause may require States to remedy its violations of the FLSA, the Clause does not necessarily require that remedy to take the form of a state-court award of retroactive monetary relief payable out of the state treasury, which is the only type of remedy that implicates the sovereign immunity recognized in *Alden*.[390] The broader point is that,

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387. *But cf.* Jackson, *The Supreme Court*, *supra* note 18, at 113 (arguing that Court's precedent barring federal courts from awarding retroactive monetary relief against States for federal statutory violations might be justified if state courts were available to grant that relief).

388. *Cf.* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 10–11 (1979) ("[T]here is a human difference between losing what one has and not getting what one wants.") (quoting Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1296 (1975)); *Cf. also* Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, ___, 121 S. Ct. 1446, 1451 (2001) (distinguishing, for due-process purposes, between someone who is "presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation," on the one hand, from someone with a claim for payment under a contract); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282–83 (1986) (opinion of Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, JJ.) ("Denial of a future employment opportunity is not as intrusive as loss of an existing job."); *see generally* Thomas W. Merrill, *supra* note 19, at 967 nn.298–99 (citing studies suggesting that people find loss of existing object or interest more painful than failure to acquire an equivalent object or interest, and proposing definition of "property" for due process purposes that reflects that difference).

389. This is, of course, speculative. People, and especially businesses, can vote with their feet by leaving or avoiding States with defective tax systems, an ability that may create a disincentive to erroneous taxation. Similarly, States might be deterred from violating the FLSA because they compete for employees with both private employers and other public sector employers. *Cf.* Fallon & Meltzer, *supra* note 18, at 1828 (arguing that threat of refunds "are surely useful, and indeed may be necessary, to keep state officials within the bounds of law").

390. Professor Vázquez believes that the Court may have decided *Alden* without considering the implications of its decision in that case for its decision the same day in *Florida Prepaid*, and that the "most important[]" cause of this oversight was that "the litigants in *Alden* failed to invoke the due process principle." Vázquez, Alden *Trilogy*, *supra* note 18, at 1929–30. In fairness to the plaintiffs in

although due process can override the States' immunity in their own courts, it will not always do so; the occurrence of an override depends on, among other things, whether such an override is necessary to achieve the accuracy demanded by the doctrine of procedural due process.[391]

Finally, the due-process analysis proposed in this Article clarifies that Congress's use of Section 5 to remedy or prevent violations of the Fourteenth Amendment does not depend on the availability of federal-court remedies for those violations.[392] As discussed above, the federal courts cannot help a State meet its remedial obligations under the procedural component of the Due Process Clause.[393] The presence of federal-court remedies is therefore irrelevant to Congress's power to ensure that the States themselves meet their remedial obligations, just as the absence of federal-court remedies is irrelevant to whether the Due Process Clause requires the States themselves to provide those remedies. Furthermore, when a State violates, not its remedial obligations, but its substantive obligations under the Due Process Clause—for example, by violating substantive due process restrictions on arbitrary state conduct

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Alden, however, it should be noted that they *did* make a due process argument. *See* Brief for Petitioners at 29–32, *Alden* (No. 98-436) (relying on Court's decisions about States' constitutional obligation to refund illegally collected taxes to argue that "[s]tate action taking a person's money or other property in violation of governing federal constraints and denying that person all state court redress for that loss is, most assuredly, a plain affront to due process").

391. *See supra* note 268 and accompanying text (stating that procedural due process serves systemic goal of enforcing rule of law and goal of protecting individual's interest in life, liberty, and property).

392. *But cf.* Vázquez, *Schizophrenia*, *supra* note 375, at 893. Professor Vázquez believes that the Court's recent decisions on Section 5 "appear to hold that an abrogation is valid under Section 5 . . . only if a withdrawal of Eleventh Amendment immunity is 'genuinely necessary' to assure compliance by the states with their federal obligations." *Id.*; *see also id.* at 895 (stating that Court's recent Section 5 decisions "suggest that, at a minimum, Congress must consider the adequacy of . . . alternative means before it resorts to means barred by the Eleventh Amendment"). Professor Vázquez bases this reading primarily on the Court's statement in *College Savings Bank* that Congress may use Section 5 to abrogate state sovereign immunity where "genuinely necessary" to prevent States from violating the Fourteenth Amendment. *See id.* at 861 & n.11 (quoting Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999)). Professor Vázquez then juxtaposes this statement with Justice Scalia's statement in another case that federal-court remedies already supply "the necessary judicial means to assure [state] compliance" with the Constitution. *See id.* at 859–60 & n.2 (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 33 (1989) (Scalia, J., concurring in part and dissenting in part)). Based on these statements, he suggests that the Court could conclude that Congress never has the power under Section 5 to abrogate state sovereign immunity, because that step is not genuinely necessary in light of existing federal-court remedies. *See id.* at 893 ("If the Court adhered to the supremacy strain [evinced in recent Section 5 decisions], abrogation would never be appropriate . . . ."). Contrary to that conclusion, the existence of federal-court remedies does not diminish Congress's Section 5 power, for reasons discussed in the text.

393. *See supra* notes 241–44 and accompanying text.

and on state conduct that unduly burdens fundamental liberties—that substantive violation occurs whether or not there is a remedy in federal court (or, for that matter, whether or not there is a remedy in state court) for the violation.[394] The existence of judicial remedies for a State's violations of its substantive obligations under the Fourteenth Amendment does not excuse those violations, and it therefore cannot dilute Congress's power to remedy or prevent them under Section 5.

VI. CONCLUSION

The state courts and the federal courts are not fungible. Each can enable its respective sovereign to meet the remedial obligations of the Due Process Clause. By the same token, neither the state courts nor the federal courts can discharge the remedial obligations of the other sovereign. Thus, when a State fails to meet its remedial obligations, it can subject itself, in its own courts and without its consent, to suits that would be barred from federal court by sovereign immunity. One such situation arises when the State violates its obligation under the Due Process Clause to create a "reasonable, certain, and adequate" procedure to pay just compensation for private property that the State has taken for public use.

394. *See* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 282–95 (1913) (holding that existence of state-court remedies for alleged violation of Fourteenth Amendment did not defeat claim); *see also* Pac. Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196, 204–05 (1924) (holding that plaintiff asserted present injury by claiming that state agency's rate order was confiscatory and therefore violated Due Process Clause of Fourteenth Amendment).