

California Law Review

VOL. 69

MARCH 1981

NO. 2

Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations

Louis E. Wolcher†

The Constitution of the United States contains numerous restrictions on how the states can exercise their governmental powers against individuals.¹ When the states ratified that document and its amendments, they accepted those restrictions as binding under the supremacy clause.² If a state, through its agents,³ exceeds or threatens to exceed its

† Assistant Professor of Law, Rutgers School of Law, Camden. B.A. 1969, Stanford University; J.D. 1973, Harvard University.

1. See, e.g., U.S. CONST. art. I, § 10 (*inter alia*, no bill of attainder or ex post facto law, and no law impairing the obligation of contracts); *id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); *id.* amend. XV, § 1 (no denial of the right to vote on account of race); *id.* amend. XIX, § 1 (no denial of the right to vote on account of sex); *id.* amend. XXIV, § 1 (no denial of the right to vote for failure to pay a poll tax); *id.* amend. XXVI, § 1 (no denial of the right to vote to those eighteen years of age or older).

2. 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.

U.S. CONST. art. VI, cl. 2.

3. A "state," like any nonhuman entity whose existence and powers are recognized by law, can "act" only through its human representatives. Thus, a state does not physically pass a law; its human legislators do. Nor does a state physically deny someone life, liberty, or property without due process of law—only state judges, state prosecutors, state policemen, state administrators, etc., can do that. There is therefore no constitutional injury caused by a state that is not in the first instance caused by a person acting on behalf of the state. The warrantless search of a home by a

powers and inflicts injury on an individual whose rights are protected by the Constitution, it would seem elementary that the state is duty-bound to right the wrong. But how is that duty to be enforced should the state evade or deny it?

At one time the Supreme Court seemed to embrace the notion that the duty to remedy at least some unconstitutional acts rested on state officers as a moral obligation unenforceable in a court of law.⁴ The passage of time, and the Civil War, seem to have displaced this notion with one more hospitable to the injured party.⁵ It now seems fundamental that explicitly or implicitly, the constitutional concept of "due process of law" requires an opportunity to assert one's substantive constitutional rights in some judicial forum, state or federal.⁶

Nevertheless, it should come as no surprise that an individual's federal rights against the states, both statutory and constitutional, are sometimes broader in scope than his right of access to a lower federal

state policeman, illegal under state law, and the acts of a majority of state legislators passing an unconstitutional statute can be categorized as state or private action only with reference to the attending legal consequences. *See* *Snowden v. Hughes*, 321 U.S. 1, 15-17 (1944) (Frankfurter, J., concurring).

Where the consequence of constitutional wrongdoing is to create a federal court remedy against the officer in question for threatened or actual harm, the Court has said that all of his actions taken as an officer, even though in blatant violation of state law, constitute "state action." *See* *Monroe v. Pape*, 365 U.S. 167, 183 (1961); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 288-89 (1913).

Sometimes this generous view of state action has led to the backlash of a narrow definition of substantive constitutional rights. *See* *Paul v. Davis*, 424 U.S. 693, 699-712 (1976) (simple defamation by police official, though perhaps state action, does not deny plaintiff liberty or property within meaning of fourteenth amendment). But where the consequence is to create monetary liability in federal court against the treasury of a unit of local government, the Court's decisions have in effect created two classes of state action: those actions of officers for which the unit pays, and those for which it does not. *Compare* *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (municipalities strictly liable in damages under § 1983 for harm caused by unconstitutional "official policy") with *Monell v. Department of Social Serv.*, 436 U.S. 658, 691-94 (1978) (municipalities not liable at all under § 1983 for damages caused by officials not acting pursuant to "official policy").

It therefore appears that all types of constitutional violations by states are not created equal—a concept that is explored more fully later in the context of constitutionally based claims against state treasuries in state courts. *See* text accompanying notes 551-73 *infra*.

4. In *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107-10 (1860), and *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615-16 (1842), the Court expressed the view that the apparently absolute duty of a state under art. IV, § 2, cl. 2 of the Constitution to honor other states' proper requests for the extradition of fugitives was not legally enforceable.

5. *See* *Monell v. Department of Social Serv.*, 436 U.S. 658, 676 (1978) (this theory "has not survived"); *Ex parte Virginia*, 100 U.S. 339, 346-48 (1879).

6. U.S. CONST. amend. V & amend. XIV, § 1; *see, e.g.*, *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 286 (1912) (Holmes, J.); *Poindexter v. Greenhow*, 114 U.S. 270, 302-03 (1885) ("to take away all remedy for the enforcement of a right is to take away the right itself. But that is not within the power of the State").

court. If the legislative history of article III of the Constitution⁷ and the experience of the nation before 1875⁸ were not enough to establish this basic proposition, modern decisions of the Supreme Court clearly do. The Court has recently held, for example, that a defendant in a state criminal action who has received a full and fair hearing on his claim that evidence should not be admitted because it was seized in violation of his fourth amendment rights, may not obtain subsequent collateral review of that claim in a federal district court habeas corpus proceeding.⁹ Likewise, two recent Court decisions held that a welfare recipient's claim that the state has denied him benefits in violation of federal

7. Article III, § 1 of the Constitution provides, in part: "The judicial Power of the United States, shall be vested in one Supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish."

It is generally accepted by scholars of the Constitutional Convention that this language was a compromise between those who wanted a mandatory and strong federal judiciary and those who wanted no lower federal courts at all, relying instead on state courts to enforce federal law and the Supreme Court to review and harmonize their decisions. See, e.g., P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 11-12 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*]; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 53 (1923). The Supreme Court has accepted this view of history, and has explained its consequences as follows:

The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts to hear and decide cases within the judicial power of the United States . . . Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III.

Palmore v. United States, 411 U.S. 389, 400-01 (1973); see *City of Greenwood v. Peacock*, 384 U.S. 808, 833 (1966). The view that Congress has a duty to create lower federal courts and to invest them with the entire federal judicial power set forth in art. III, § 2, first expressed by Justice Story in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 327-39 (1816), "did not survive later cases." *Palmore v. United States*, 411 U.S. at 401 n.9. But see J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, 240-47 (1971) (arguing for such a duty from the imperative nature of the word "ordain" in the final version of art. III, in contrast to the weaker language used in prior draft).

It is apparent that the framers of art. III at least had in mind the possibility if not the probability that some federal rights would be adjudicated in tribunals other than federal courts.

8. Except for the short-lived "Law of the Midnight Judges," 2 Stat. 89 (1801), *repealed*, Act of 1802, 2 Stat. 132, federal trial courts had no general federal question jurisdiction until 1875. Act of 1875, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (1976)). In most cases during the early years of the republic, litigants with federal claims and defenses were therefore relegated to state court for their vindication, with access ultimately to the Supreme Court should they lose. See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 24-30 (1927); Warren, *supra* note 7, at 62.

9. *Stone v. Powell*, 428 U.S. 465, 494 (1976). In the absence of extraordinary circumstances, a state court defendant in the position of the respondents in *Stone* could not have obtained a federal court injunction against the use of the illegally seized evidence in advance of his state court prosecution. See *Perez v. Ledesma*, 401 U.S. 82, 84-85 (1971). Likewise, federal court remedies other than habeas corpus would be unavailable while he was in jail. *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973). Finally, after he was released from jail, a federal court damage remedy against the offending state officers probably would be precluded by the doctrine of collateral estoppel or be ineffective as a practical matter. See *Allen v. McCurry*, 101 S. Ct. 411 (1980). See also text accompanying notes 130-51 *infra*.

statutes or regulations could be brought only in state court, except in the unlikely event he could establish the \$10,000 amount in controversy required for access to a federal district court under 28 U.S.C. section 1331 before it was amended in December, 1980.¹⁰ In both examples the claimants have theoretical access to the Supreme Court on appellate review of adverse state court decisions, but it is plain that for the great bulk of similarly situated litigants the state supreme court is the end of the line.¹¹ Such claimants depend, as a practical matter, entirely on state judges for the vindication of their federal rights.

This Article explores the problem of vindicating federal constitutional rights in state courts. Considering especially federal civil rights legislation, the lower federal courts would seem to have a very broad jurisdiction in most such cases.¹² And, in fact, federal courts exercising the power given to them by Congress have vastly altered and reshaped state institutions to conform them to the mandates of the Constitution and to remedy past constitutional wrongs.¹³ Their role in enforcing the

10. Compare *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-23 (1979), with *Maine v. Thiboutot*, 100 S. Ct. 2502, 2506 n.6 (1980). However, if the welfare claimant could state a colorable constitutional claim arising out of the same transaction, he could obtain federal court jurisdiction over the constitutional claim under 28 U.S.C. § 1343(3) (1976) without regard to amount in controversy, and then over his statutory claim on a pendent jurisdiction theory. *Hagans v. Lavine*, 415 U.S. 528, 536 (1974). Congress has recently responded more sympathetically to plaintiffs raising federal questions, eliminating the amount in controversy requirement of 28 U.S.C. § 1331(a) (1976). Pub. L. No. 96-486, § 2, 49 U.S.L.W. 196 (Jan. 13, 1981).

11. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* 29 (1975), reprinted in 67 F.R.D. 195, 217 (1976) ("the percentage of cases accorded review [in the Supreme Court has] dipped below the minimum necessary for effective monitoring of the nation's courts on issues of federal statutory and constitutional law"); see *Duncantell v. Texas*, 439 U.S. 1032, 1033 (1978) (Brennan, J., dissenting from denial of certiorari) (Supreme Court ought to review fourth amendment claim arising in state court criminal conviction because "this Court may well be the only federal forum with jurisdiction to review . . . [that] claim").

12. 42 U.S.C. § 1983 (Supp. III 1979) (originally enacted as Civil Rights Act of 1871, 17 Stat. 13) provides, in part:

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

Federal district courts have jurisdiction to enforce constitutional claims asserted under § 1983 without regard for the amount in controversy. 28 U.S.C. § 1343(3) (1976). And as the Court expansively held in *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543-44 n.7 (1972): "Despite the different wording of the substantive and jurisdictional provisions, when the § 1983 claim alleges constitutional violations, § 1343(3) provides jurisdiction and both sections are construed identically." Claims under § 1983 alleging the denial under color of state law of federal statutory rights, by contrast, do not fall within the § 1343(3) jurisdiction of federal courts, and until recently the claimant had to meet the \$10,000 jurisdictional minimum of 28 U.S.C. § 1331 (1976) to gain access to a federal forum. See note 10 *supra*.

13. Ever since the Court in *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) ordered the desegregation of public schools "with all deliberate speed," federal courts have enforced constitu-

Constitution against recalcitrant state governments has been and continues to be primary.¹⁴ Never far out of the picture, however, and sometimes very much in it, are a plethora of rules—constitutional, statutory, and judge-made—which restrict federal court jurisdiction to give remedies necessary or appropriate to the vindication of constitutional rights against the states. Even putting aside those door-closing rules developed by federal courts to assure that there is a real case or controversy before them,¹⁵ many claimants whose constitutional rights have

tional mandates to the states in a variety of contexts by structural remedies having an enormous impact on how state government is run and how public resources are allocated. The cases are discussed, and the federal courts' role analyzed and applauded, in such excellent pieces as O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); and Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980). Others have expressed reservations about the propriety of federal court intrusion into matters traditionally left to the legislative process. E.g., Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Jennings, *The Chancellor's Foot Begins to Kick: Judicial Remedies in Public Law Cases and the Need for Procedural Reforms*, 83 DICK. L. REV. 217 (1979); Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978).

14. Most authorities seem to agree that the prime movers in the federal civil rights explosion that has occurred in this country since the mid-1950's have been, and ought to be, federal courts. See note 13 *supra*; Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 SW. L.J. 411, 418 (1967). The Supreme Court gave legitimacy to this view in its construction of the basic civil rights statute, 42 U.S.C. § 1983 (1976), in *Mitchum v. Foster*, 407 U.S. 225, 242 (1972):

Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be legislative, executive or judicial." *Ex parte Virginia*, 100 U.S. [339,] 346.

But see *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976) ("we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States"); note 17 *infra*.

Too little scholarly attention has been paid to those instances in recent history when state courts have assumed the primary role in institutional litigation, acting under authority of state or federal constitutions to remedy violations that federal courts were unable or unwilling to address. Compare *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) with *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (constitutional challenges to systems of financing public school education by local property taxes); and *Rizzo v. Goode*, 423 U.S. 362 (1976) with *Tabor v. Moore*, 81 Wash. 2d 613, 503 P.2d 736 (1972) (broad-based challenges to the constitutionality of local government police practices). See generally note 32 *infra*.

15. Art. III of the Constitution requires a "case" or "controversy" of a judicial nature as a precondition to the exercise of federal judicial power, while no such federal constitutional restraint burdens state courts (although state law may impose similar or identical restrictions). *Doremus v. Board of Educ.*, 342 U.S. 429, 434 (1952). Federal courts have developed numerous doctrines such as standing, ripeness, and mootness which are required by or draw their inspiration from art. III, and which serve to shut off federal court review of assertedly unconstitutional governmental action. See *Tileston v. Ullman*, 318 U.S. 44 (1943); L. TRIBE, *AMERICAN CONSTITU-*

been violated by the states and who are entitled to a remedy get none from the federal courts because Congress has forbidden it,¹⁶ or because federal judge-made rules of self-restraint foreclose it.¹⁷ In such cases the statutes and doctrines in question presuppose the existence of an adequate remedy in state court, and where this premise collapses, federal courts may then act in a backup capacity to vindicate constitutional rights.¹⁸

TIONAL LAW ch. 3 (1978). As important as these rules are to civil rights litigants seeking a federal court remedy, when they are held applicable in a given case the ousted litigant is not denied a constitutionally required remedy even if a state court later also refuses to hear his claim. This is because the process of analysis leading to the conclusion that a litigant has no standing to assert a given claim, or that his case is not yet factually ready for judicial determination (ripeness), or, indeed, is no longer a real controversy (mootness), a fortiori shows he has no constitutional rights of access to a court at this time. See generally Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

By contrast, the other federal court door-closing doctrines discussed in the text start from the premise that the plaintiff has a real controversy and a right to a remedy, but that for one reason or another a federal court ought not give relief, either now or ever.

16. E.g., Jolmson Act of 1937, 48 Stat. 775 (codified at 28 U.S.C. § 1342 (1976)) (forbidding federal court injunctions against state administrative orders fixing rates for public utilities, except under certain circumstances); Tax Injunction Act of 1937, 50 Stat. 738 (codified at 28 U.S.C. § 1341 (1976)) (forbidding federal court injunction against the assessment, levy, or collection of any state tax, except under certain circumstances).

17. Beginning with *Douglas v. City of Jeannette*, 319 U.S. 157, 163-65 (1943), the Court has developed a doctrine that has been called variously the Douglas doctrine, the doctrine of equitable restraint, and the *Younger* abstention doctrine, after the decision in *Younger v. Harris*, 401 U.S. 37 (1971). The doctrine is essentially that a federal court may not interfere by injunction or declaratory relief with certain state court criminal and civil proceedings in which constitutional claims or defenses are being or may be asserted, indeed may not even reach the merits of those constitutional issues independently of the state court. Its only conditions are that the state court proceeding be in "good faith" and afford the federal plaintiff a reasonable opportunity to litigate his federal claims. The literature on this phenomenon, most of it hostile to the breadth of the Court's decisions, is large. See, e.g., Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 27 (1976); Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977); Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEX. L. REV. 1324 (1972); Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978).

Professor Redish's concerns with the doctrine are typical of those expressed by many writers: "[A] central purpose of the *Younger* doctrine is to avoid implying that state judges will not protect constitutional rights as vigorously or as competently as their federal counterparts. . . . [But] harsh reality may justify doubts about the competence of state courts in enforcing federal rights." Redish, *supra*, at 479-80, 483.

18. Both the Tax Injunction Act and the Johnson Act, 28 U.S.C. §§ 1341, 1342 (1976), preclude federal court relief only if a "plain, speedy and efficient remedy may be had in the courts of such state." For an instance of federal court intervention because state court remedies were found inadequate under the statutory test, see *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 302-03 (1952) (the Tax Injunction Act).

The doctrine of *Younger v. Harris* likewise requires the existence of an adequate opportunity for the federal plaintiff to raise his constitutional claims in state court. Without it, the federal court is free to exercise its residual jurisdiction, reach the merits, and award appropriate relief. See *Moore v. Sims*, 442 U.S. 415, 430 (1979) ("in sum, the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims"); Trainor v.

However, one restraint on federal judicial power which admits no such backup role for federal courts is the eleventh amendment.¹⁹ As will be seen, the eleventh amendment is both more and less than what it seems to be. But when according to its curious rules the amendment applies, it absolutely forbids a federal court from awarding relief against a state, either directly or indirectly, notwithstanding the plaintiff's claim that the state violated his clearly established constitutional rights. Although the relief precluded by the eleventh amendment can be either equitable or legal, there are alternative routes to the same end for those seeking an injunctive remedy against the state.²⁰ However, there are none which are truly adequate for many of those seeking monetary compensation for injuries inflicted on them in the past by unconstitutional state action.²¹

There are federal courts of limited jurisdiction and state courts of general jurisdiction in every state. Things would be very easy if one could say with confidence that the victim of unconstitutional state action could enter one or another of these tribunals, apply for an appropriate remedy against the state or one of its officers, and, after a full and fair hearing, walk away with constitutionally adequate compensation and redress. Even though such a claimant might fail to prove a case for relief on the merits, at least he would lose with the knowledge that he has had due process rendered to him. Unfortunately, things are not that simple.

This Article will consider how the eleventh amendment has been confused with sovereign immunity, the doctrine that no state can be sued in its own courts without its consent, regardless of the nature of the claim.²² It will be shown that, despite the unravelling of that confu-

Hernandez, 431 U.S. 434, 446 (1977) ("the pendency of the state-court action called for restraint by the federal court and for the dismissal of appellees' complaint unless extraordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal . . . claim").

19. The eleventh amendment was declared to have been ratified as part of the Constitution in 1798. See 7 ANNALS OF CONG. 483 (1798). The eleventh amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

20. See text accompanying notes 81-100 *infra*.

21. An injunction against state officials responsible for administering an unconstitutional state policy or program is not barred by the eleventh amendment and garners the plaintiff all the prospective relief to which he is constitutionally entitled. *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974); *Ex parte Young*, 209 U.S. 123 (1908); see text accompanying notes 78-98 *infra*. But for the plaintiff who was wronged in the past by state action, compensation in damages is the only viable remedy. And a damages remedy against the individual state officer perpetrating the wrong, although not precluded by the eleventh amendment, often is unavailable as a matter of law or as a practical matter does not result in actual relief. See text accompanying notes 124-51 *infra*. But see text accompanying notes 152-90 *infra*.

22. See, e.g., *Palmer v. Ohio*, 248 U.S. 32, 34 (1918) ("the right of individuals to sue a State,

sion, the state of eleventh amendment doctrine is such that at least most compensatory claims against states by individuals are precluded in the lower federal courts.

Moreover, state law sovereign immunity doctrines bedevil the litigant who seeks redress in state courts for unconstitutional official conduct. The plea of sovereign immunity, when it is accepted, is a legal barrier to any court's inquiry into the merits of the claim. From the plaintiff's perspective, basic justice is not done, because the court must dismiss the case no matter how deserving his claim.²³ Were the claim based on the common or statutory law of the state in question, one might be tempted to agree with Justice Holmes that "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."²⁴ But where the claim is created by the federal Consti-

in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State"). *Accord*, *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529-30 (1857). As will be seen, the holdings of these cases and others discussing sovereign immunity in state courts are a great deal less expansive than their dicta, and their dicta have not withstood the test of time and the Court's recent holdings in the area. *See* text accompanying notes 287-325 *infra*.

23. Professor Prosser has explained that an immunity, such as sovereign immunity, "avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 131, at 970 (4th ed. 1971). In federal courts the eleventh amendment defense is jurisdictional, and hence its disposition in favor of the state precedes and precludes any consideration of the merits of the plaintiff's case. *E.g.*, *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); *Ford Motor Co. v. Department of Treas.*, 323 U.S. 459, 467 (1945).

24. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (action against territory of the United States, based on local law, barred by sovereign immunity). The doctrine of common law sovereign immunity in nonconstitutional cases is today almost nowhere credited as worthy of respect in a government of laws, and commentators have been nearly universal in calling for its partial or complete abolition. *See, e.g.*, 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 29.3, at 1611-12 (1956); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* ch. 6 (1965); W. PROSSER, *supra* note 23, § 131, at 971; Davis, *Sovereign Immunity Must Go*, 22 AD. L. REV. 383 (1970); Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1363-64 (1954). Certainly no enlightened student of the subject today adheres to the traditional English saw that "the king can do no wrong," partly because "the maxim is pointless where there is no king," Maguire, *State Liability for Tort*, 30 HARV. L. REV. 20, 20 (1916), and partly because it has been shown that the statement originally meant the king was not *entitled* to do wrong, not that he was incapable of it. *See, e.g.*, Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3-4 (1963).

In fact, modern students of the subject seem to agree that government, like private enterprises, ought to bear the cost of injuries stemming from its activities, that government is in an excellent position to spread this cost equitably by taxation of the beneficiaries of its activities, and that the risk of loss, like most others, can be insured against. These facts have led almost all the states to judicial or legislative abrogation of sovereign immunity in tort cases, either in whole or in part. *See* 3 K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 25.00-1, at 555 (1976) ("altogether, 34 states have enacted statutes which at least to some extent involve unconditional waivers"); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25, at 203 (1980 Supp.) ("only two states

tution, Holmes' logic does not hold: The law set forth in that document was made by the people of the United States, not by the state in question.²⁵

That a higher lawmaking authority than the state demands an adequate remedy has been the motivating factor in most of the Supreme Court's decisions construing the eleventh amendment in cases of claimed injury to constitutional rights. The Court has built an elaborate structure of fiction and artifice to permit federal courts to give remedies in many, if not most, cases. It has also opened the treasuries of local governments to some kinds of constitutional claims, and has created a role for Congress in enforcing the fourteenth amendment against the states themselves that holds some promise of a fully adequate system of remedies in the future. But for the time being, the person whose constitutional rights have been injured by the state, and for whom money damages is the only viable remedy, is left in an analytic void. Such a plaintiff has only an inadequate remedy against state officers personally, not a federal court remedy against the state treasury. Moreover, such a plaintiff is confronted with dicta saying that he has no claim against the state itself in state court either.²⁶

At this critical juncture, then, where money damages are the appropriate form of relief for unconstitutional state action, a shortfall occurs between the promise of the Constitution and the remedial powers of federal courts. At this point too, should the injured party seek redress against the state in state court, where the eleventh amendment is inapplicable,²⁷ doctrines of sovereign immunity will be advanced, in all

adhere to the traditional common law immunity from torts in the exercise of governmental functions: Maryland and South Dakota. Only two lack anything better than conditional waiver statutes: Georgia and Mississippi").

The implication of these waivers of sovereign immunity in common law tort cases to the right to a damages remedy against the state for constitutional torts is explored at text accompanying notes 216-25, 546-51 *infra*.

25. U.S. CONST. preamble ("We the People of the United States . . . do ordain and establish this Constitution"); see Willis, *The Doctrine of Sovereignty Under the United States Constitution*, 15 VA. L. REV. 437, 453 (1929). Holmes' theory has been rightly limited to situations where there is a unitary sovereign, and so long as federal legislative or constitutional authority limits that of the states it is without logical support. Jaffe, *supra* note 24, at 4; cf. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 518 (2d ed. 1898) ("[the king] can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his court is, we may say, an accident").

26. See, e.g., *Palmer v. Ohio*, 248 U.S. 32, 34 (1918) ("The right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States"); *Hopkins v. Clemson Agric. College*, 221 U.S. 636, 642 (1911) ("with the exception named in the Constitution, every State has absolute immunity from suit. Without its consent it cannot be sued in any court, by any person, for any cause of action whatever"); *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883) (neither a state nor the United States can be sued "in any court in the country without their consent"). But see text accompanying notes 326-57 *infra*.

27. *Maine v. Thiboutot*, 100 S. Ct. 2502, 2506 n.7 (1980).

likelihood, to bar his relief. He will surely be tempted to rejoin with the comforting dicta of Chief Justice Marshall:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.²⁸

But to what extent, if at all, is the state judge required to agree and grant the compensatory remedy sought? Is there an implied immunity of states from suits on constitutional claims in their own courts, analogous to the implied immunity of the United States?²⁹ Or does the supremacy clause obligate the state judge to cast aside state constitutional, common law, or statutory doctrines of sovereign immunity at the behest of a private litigant claiming a federal constitutional entitlement to a remedy which federal courts cannot give because of the eleventh amendment?³⁰

The thesis of this Article is that there is such a duty upon the state courts, at least in some cases and for some types of constitutional claims, and that the duty can be enforced by the mandate of the Supreme Court. The author contends that state courts have both the right and the obligation under the supremacy clause to impose constitutionally appropriate remedies against their own governments, even if these remedies are not explicitly required by the Constitution. The Article thus posits a role for state courts in the development of constitutional remedies analogous to that announced for federal courts in *Bivens v. Six Unknown Named Agents*.³¹ There is every reason to believe that there are state judges at all levels who are faithful to their duty to safeguard federal rights, especially as many of them have increasingly demonstrated a willingness to extend the protections of their

28. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). He might also invoke Abraham Lincoln's observation, made in his first annual message, Dec. 3, 1861, that "[i]t is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." VII COMPLETE WORKS OF ABRAHAM LINCOLN 42 (Nicolay & Hay ed. 1905).

29. See text accompanying notes 241-54 *infra*.

30. See U.S. CONST. art. VI, cl. 2 ("the Judges in every State shall be bound . . . [by the Federal Constitution], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). See also *General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908).

31. 403 U.S. 388, 397 (1971). That decision held that federal courts have the power to imply a cause of action for damages directly from the Constitution against federal law enforcement officers guilty of violating the plaintiff's fourth amendment rights, even though the remedy is not strictly indispensable to the vindication of constitutional rights. See generally Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3, 24 n.125 (1975).

own state constitutions to individuals oppressed by state power but left without federal constitutional recourse.³² Yet even without this expectation, which has been challenged by some,³³ in this matter state courts

32. The fourteenth amendment establishes a minimum level of protection for the individual from state government. It does not require uniformity throughout the nation above that minimum, however. Thus, state courts are free to give their citizens more protection as a matter of state law than the federal constitution requires, so long as in doing so the federal constitutional rights of others are not denied. *See, e.g.*, *Pruneyard Shopping Center v. Robins*, 100 S. Ct. 2035, 2040 (1980); *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

There is mounting evidence that many state courts are increasingly assuming a more active role in the process of constitutional decisionmaking than was their wont during the activist Warren Court years. The state court trend towards rejecting the example of Supreme Court decisions that narrowly interpret fourteenth amendment rights by expansively interpreting state constitutional guarantees against the oppressive exercise of state power, has been noted and applauded by individual Justices of the Supreme Court and by commentators. *See, e.g.*, *Pruneyard Shopping Center v. Robins*, 100 S. Ct. at 2046 (Marshall, J., concurring); *Michigan v. Mosley*, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Daughtrey, *State Court Activism and Other Symptoms of the New Federalism*, 45 TENN. L. REV. 731 (1978); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973). Indeed, this extraordinary power of state judges in effect to "reverse" Supreme Court decisions which they find too niggardly in protecting individual rights, and their expressed willingness to do just that, has found its way into popular literature. *See* Lewin, *Avoiding the Supreme Court*, N.Y. Times, Oct. 17, 1976, § 6 (Magazine), at 31. It has even been the object of not-too-subtle appeals by dissenting Justices of the Supreme Court. *See, e.g.*, *Kentucky v. Whorton*, 441 U.S. 786, 791 n.2 (1979) (Stewart, J., dissenting).

33. Unlike federal judges, state judges are without constitutionally protected lifetime tenure and salary. Many are elected, and serve relatively short terms. They are perceived by many as dependent on the state political process or whims of the electorate, and thus less disposed than federal judges to intrude vigorously into state government in the service of federal constitutional rights. *See, e.g.*, Chafee, *Safeguarding Fundamental Human Rights: The Tasks of States and Nation*, 27 GEO. WASH. L. REV. 519, 522-23 (1959); Cluevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1358-59 (1970) ("there is an inherent potential for bias when a state judge or administrator reviews actions of other state officials"); Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 683 n.14 (1979); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 VA. L. REV. 250, 263-64 (1974); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1128 (1977).

Many critics of state court competence or willingness to enforce federal rights admit they lack empirical data either to support or rebut their position. *See id.* at 1116. *But see* Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1216, 1205 n.57 (1978) (offering statistics that show a lower success rate for the government as appellant in state supreme courts than in federal courts). Some grudgingly acknowledge the activist disposition of many state courts to enforce state constitutional guarantees, but minimize its significance as evidence of a willingness to enforce federal rights with a vigor equal to that of federal judges. *See* Koury, *Section 1983 and Civil Comity: Two for the Federalism Seesaw*, 25 LOY. L. REV. 659, 687-93 (1979); McCormack, *supra*, at 264 n.72; Neuborne, *supra*, at 1116 n.45 & 1121 n.59. Finally, those who concede the competence of some state supreme courts denigrate, albeit without evidence, that of state trial judges. *Id.*; Rosenfeld, *The Place of State Courts in the Era of Younger v. Harris*, 59 B.U. L. REV. 597, 648-55 (1979). *But see* *Kewin v. Board of Educ.*, 65 Mich. App. 472, 482-83, 237 N.W.2d 514, 519-20 (1976) (state trial judge affirmed in implying a cause of action for damages directly from the fourteenth amendment against a local government); *Strauss v. State*, 131 N.J. Super. 571, 575-78, 330 A.2d 646, 648-50 (Super. Ct. Law Div. 1974) (state trial judge implies fourteenth amendment cause of action for damages against the state); *In re Roy*, 90 Misc.

remain the only hope for litigants barred from effective redress in federal court by the eleventh amendment. It was part of the constitutional plan that state trial courts of general jurisdiction be the ultimate line of defense against unconstitutional government in cases where the vulnerable battlements of the federal courts' limited jurisdiction had been breached.³⁴

It has seldom been necessary to invoke this principle. However, as Professor Hart observed in a related context, if the state courts were to fail in their role and duty when the time came, "then we really would be sunk."³⁵

Part I of this Article details the current structure and limitation of remedies in federal courts for unconstitutional state action, with principle focus on the eleventh amendment and on officer immunity doctrines, and the obstacles they place in the way of those seeking redress in a federal forum. Part II briefly defines the problems confronting persons seeking damages for constitutional violations against states in their own courts. Part III considers the duty of state courts, imposed by the supremacy clause, to assume jurisdiction over suits against states based on the Constitution, despite sovereign immunity doctrines cast in jurisdictional terms. Part IV establishes that constitutional damages claims in state courts are not precluded by "substantive" sovereign immunity. Finally, Part V analyzes the circumstances under which a state judge must or may in fact grant the requested remedy against the state, and suggests what the contours of that remedy ought to be.

I

FEDERAL COURT REMEDIES AGAINST UNCONSTITUTIONAL STATE ACTION: A SUIT THAT ALMOST FITS

A. Congress' Role in Enforcing Constitutional Rights Against the States

Lower federal courts are creatures of statute and can only have such subject matter jurisdiction as Congress gives them.³⁶ In a sense, therefore, the amenability of states to suit in federal courts has always

2d 35, 39-40, 393 N.Y.S.2d 515, 518-19 (Fam. Ct. 1977) (state trial judge of limited jurisdiction awards relief arguably beyond his jurisdiction because of perceived command of the Constitution).

34. See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401-02 (1953); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1117-18 (1969); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 46-48 (1975). But see Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 522 (1974).

35. Hart, *supra* note 34, at 1401.

36. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850); note 7 *supra*.

been in the first instance a question of congressional intent and power. But it took the Court 178 years, until its 1976 decision in *Fitzpatrick v. Bitzer*,³⁷ to decide conclusively that in at least some cases Congress has the power unilaterally to remove the eleventh amendment immunity of states from suits in federal courts.³⁸ In *Fitzpatrick* the Court upheld the power of Congress to authorize private suits for money damages in federal courts against unconsenting states guilty of employment discrimination in violation of the fourteenth amendment.³⁹ The Court reasoned that not only did Congress have the express constitutional authority to enforce the amendment,⁴⁰ but "it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority."⁴¹ Two

37. 427 U.S. 445, 456 (1976).

38. The Court had earlier held certain commerce clause enactments applicable to a state-run railroad on the theory that "the State, although acting in its sovereign capacity in operating this . . . [r]ailroad, necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.'" *California v. Taylor*, 353 U.S. 553, 568 (1957) (Railway Labor Act) (quoting *United States v. California*, 297 U.S. 175, 184 (1936) (Safety Appliance Act)). But neither case dealt with the eleventh amendment immunity of states from suits by private individuals. In *California v. Taylor* the state had intervened in a federal court suit by private persons and thus had waived its immunity. *California v. Taylor*, 353 U.S. at 556, 568 n.16; see *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). And in *United States v. California* the issue was not involved since a suit against a state by the United States is not covered by the eleventh amendment. *E.g.*, *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

The Supreme Court cases prior to *Fitzpatrick* that did consider the eleventh amendment issue in terms of Congress' power always ultimately inquired into whether the state had waived its immunity or constructively consented to suit by its words, actions, or inaction, looking to the language or nature of the congressional enactment in question to decide if and how consent was required. See *Edelman v. Jordan*, 415 U.S. 651, 671-74 (1974) (no waiver by mere participation in federal welfare programs); *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 282-85 (1973) (no congressional intent to invite waiver by the state of its immunity from suit by state employees for overtime pay under the Fair Labor Standards Act); *Parden v. Terminal Ry.*, 377 U.S. 184, 192 (1964) (consent to suit under Federal Employers' Liability Act implied from state's operation of railroad in interstate commerce); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276-82 (1959) (waiver of immunity found in state's entering into interstate compact approved by Congress). See generally Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 688 (1976) (these cases exhibit a "schizophrenic approach" in their confusion of the two separate issues of congressional power to abrogate and state waiver of the eleventh amendment immunity).

39. The statute in question was the Equal Employment Opportunity Act of 1972, 86 Stat. 103, which amended Title VII of the Civil Rights Act of 1964, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979)), to make state and local government employers liable for damages to employees whom they had subjected to employment discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1976). The Court found that "in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment." 427 U.S. at 453 n.9.

40. U.S. CONST. amend. XIV, § 5.

41. 427 U.S. at 456. The Court did not rely on the arguable theory that the fourteenth amendment (as well as the other post-Civil War amendments) implicitly repealed or modified the eleventh amendment as a matter simply of federal judicial power. Some have suggested or argued

years later the Court in *Hutto v. Finney*⁴² used the same reasoning to approve an award of attorney's fees payable from the state treasury in a successful action against state officers to correct unconstitutional conditions in the Arkansas state prison system. The Court said that the federal statute authorizing such awards to the prevailing parties in civil rights actions⁴³ was passed to enforce the fourteenth amendment, and that Congress "undoubtedly intended" to expose the states to liability for fees.⁴⁴ This being so, it followed axiomatically from *Fitzpatrick* that the statute had validly set aside the states' eleventh amendment immunity.⁴⁵

The Court's *Fitzpatrick* and *Hutto* holdings came close to re-embracing a theory of the eleventh amendment first espoused in 1821 by Chief Justice Marshall in *Cohens v. Virginia*,⁴⁶ a theory which subsequent cases had seemed to thoroughly discredit.⁴⁷ Marshall contended that a federal court with a case before it in which Congress had conferred jurisdiction because it arises under the Constitution or laws of the United States, can and should exercise that jurisdiction regardless of the identity of the defendant.⁴⁸ His analytic approach—that the lan-

this might be the case on the basis of the intent of the framers of the fourteenth amendment to limit the sovereignty of the states and enhance the role of all branches of the federal government in protecting individual rights. See, e.g., Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 75 (1972); Freed, *Suits to Remedy Discrimination in Government Employment—The Immunity Problem*, 5 COLUM. HUM. RTS. L. REV. 383, 414-18 (1973). But see Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 171 (1977). The Court has never addressed this question squarely, although its fourteenth amendment decisions implicitly reject the notion. See, e.g., *Alabama v. Pugh*, 438 U.S. 781 (1978); *Ford Motor Co. v. Department of Treas.*, 323 U.S. 459, 463-64 (1945).

This theory is, of course, inapplicable to the contract clause. U.S. CONST. art. I, § 10, cl. 1. Although expressly a restraint on state power like the fourteenth amendment, the contract clause was part of the original Constitution and hence preceded the adoption of the eleventh amendment.

42. 437 U.S. 678 (1978).

43. Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1976)).

44. 437 U.S. at 693-94. The Court's analysis concerned the propriety of an award entered by the court of appeals to compensate the plaintiffs for fees incurred in successfully defending the district court's decree on appeal. Another portion of the opinion upheld a like award entered by the district court to compensate the plaintiffs for fees incurred at the trial level. However, that award predated the effective date of the Civil Rights Attorneys' Fees Awards Act, and hence was analyzed under a different standard. *Id.* at 689-93; see note 102 *infra*.

45. 437 U.S. at 693 ("as this Court made clear in *Fitzpatrick*, . . . Congress has plenary power to set aside the States' [eleventh amendment] immunity from retroactive relief in order to enforce the Fourteenth Amendment").

46. 19 U.S. (6 Wheat.) 264, 382-83 (1821).

47. E.g., *United States v. Texas*, 143 U.S. 621, 644 (1892) (dicta); *Hans v. Louisiana*, 134 U.S. 1, 19-20 (1890); see D. CURRIE, *FEDERAL COURTS CASES AND MATERIALS* 564 (2d ed. 1975).

48. 19 U.S. (6 Wheat.) at 383. On the facts of *Cohens* the Court exercised the jurisdiction conferred on it by § 25 of the Judiciary Act of 1789, 1 Stat. 73, 85, to review a state court judgment of conviction in a criminal case by a writ of error. The state of Virginia was a nonconsenting

guage of the eleventh amendment modifies some of the nine categories of jurisdiction conferred by article III, but not the category granting "arising under" jurisdiction—has long since fallen by the wayside.⁴⁹ But keeping in mind that lower federal courts can get their jurisdiction only from Congress,⁵⁰ the results in *Cohens*, *Fitzpatrick*, and *Hutto* are strikingly similar. The *Cohens* Court construed the power given to it by Congress to review the decisions of state courts in cases in which the state was a party and where its courts had assertedly denied federal statutory or constitutional rights. The *Fitzpatrick* and *Hutto* Courts dealt with analogous powers given by Congress to lower federal courts to award relief directly against the states in cases founded upon the states' denials of federal statutory and constitutional rights. The difference between *Cohens* and the two more recent cases lies in the clarity with which Congress had expressed its intent to remove the barrier of the eleventh amendment. Section 25 of the Judiciary Act of 1789⁵¹ simply gave the Supreme Court jurisdiction over certain federal question cases arising in state courts, without identifying the parties against whom that jurisdiction might be invoked. So, too, article III extends the potential federal judicial power to all cases arising under the Constitution and laws of the United States. But when Congress gave the federal district courts their general federal question jurisdiction, it neglected to name the states as potential defendants.⁵² Thus, when Marshall said in *Cohens* that "a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case,"⁵³ he proposed stripping the states of

defendant in error. The basis of the writ, and of the Court's jurisdiction under § 25, was the state court's denial of a federal statutory defense. 19 U.S. (6 Wheat.) at 375-76, 415-30.

49. See note 47 *supra*. This is not to say that some commentators have not tried to resuscitate Marshall's view. See, e.g., R. BERGER, CONGRESS V. THE SUPREME COURT 328 (1969); C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 93-94 (1972).

50. *Cohens* involved the appellate jurisdiction of the Supreme Court, which appears to be self-executing by the language of art. III, § 2, cl. 2. However, subject to possible limitations not relevant here, see *Guam v. Olsen*, 431 U.S. 195, 204 (1977), the Supreme Court's appellate jurisdiction is subject to much the same control by Congress under the exceptions clause, art. III, § 2, cl. 2, as is the jurisdiction of lower federal courts under art. III, § 1. Compare *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1869), with *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850). The Supreme Court's original jurisdiction (including actions against states coming within one or more of the categories of art. III, § 2) is self-executing and presumably not subject to contraction by Congress, however. *Ex parte Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 96 (1861); see *South Carolina v. Katzenbach*, 383 U.S. 301, 357 n.1 (1966) (Black, J., dissenting). It is partly for this reason that a constitutional amendment was necessary to ensure the demise of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which the Court proclaimed its original jurisdiction in a debt-collection action brought against a state by a citizen of another state.

51. Ch. 20, § 25, 1 Stat. 85 (1789).

52. 28 U.S.C. § 1331 (a) (1976) (as amended by Pub. L. No. 96-486, § 2, 49 U.S.L.W. 196 (Jan. 13, 1981)) simply states, in relevant part: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

53. 19 U.S. (6 Wheat.) at 383.

their eleventh amendment immunity without the explicit sanction of Congress.⁵⁴

By contrast, the Court had before it in *Fitzpatrick* a congressional enactment that expressly named states as among those answerable as defendants in federal court damages actions for their unlawful employment discrimination.⁵⁵ And in *Hutto*, although the statute was silent, its legislative history contained explicit statements of congressional intent to expose states to liability for attorneys' fees in civil rights actions against their officers.⁵⁶ In both cases, therefore, the Court could bypass the eleventh amendment on the direct authority of Congress, not just on the basis of its own views about the desirability of federal courts enforcing the fourteenth amendment.⁵⁷

The reasoning of *Fitzpatrick* and *Hutto* is in line with the consensus of modern scholarship that the historical purpose and function of the eleventh amendment was to undo the holding of *Chisholm v. Georgia*.⁵⁸ In that case the Court upheld its jurisdiction to award damages

54. The generality of Marshall's language suggests that he meant his theory to apply in all federal courts, not just the Supreme Court. See *Hans v. Louisiana*, 134 U.S. 1, 19-20 (1890). But the collapse of his theory as a means of avoiding the eleventh amendment in lower federal courts has not meant that the Supreme Court's authority to review state court decisions where the state is an appellee or respondent is likewise in danger. Although the Supreme Court, like any other federal court, is bound by the eleventh amendment, the *Cohens* decision also held that a writ of error from the Supreme Court to a state court in such a case is not a proceeding "commenced or prosecuted" against the state and hence is not within the terms of the amendment. 19 U.S. (6 Wheat.) at 408-10. This portion of the *Cohens* opinion has survived and flourished. See text accompanying notes 533-35 *infra*.

55. The 1972 amendments to Title VII of the Civil Rights Act of 1964 expressly included states among those answerable as defendants in federal court suits for damages. *Fitzpatrick v. Bitzer*, 427 U.S. at 449 n.2.

56. The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), merely authorizes a fee award in favor of the prevailing party in actions under certain civil rights statutes, including § 1983. No mention is made in the statute of state liability. The Court nevertheless found the requisite clear congressional intent to render states liable in explicit statements of purpose in both the House and Senate reports accompanying the measure, and in Congress' rejection of attempts to amend the act so as to immunize state and local governments. 437 U.S. at 694.

57. Last Term the Court found, on the basis of somewhat sketchier evidence of legislative intent, congressional authority for a fee award under § 1988 to be paid by the state in an action in federal court where the plaintiff had prevailed solely on the basis of a federal statutory welfare claim. *Maher v. Gagne*, 100 S. Ct. 2570, 2575-77 (1980). However, the Court found it unnecessary to decide whether Congress could constitutionally strip the states of their eleventh amendment protection in federal court suits based solely on art. I legislation, because the plaintiffs had also alleged in their complaint a substantial fourteenth amendment claim. Even though the constitutional claim was not decided, the Court held, it was sufficient to support Congress' authorization of a fee award in the case as a measure appropriate to the enforcement of the fourteenth amendment. *Id.* at 2576-77. The legislative history of § 1988 contained statements addressing the question of pendent claims that supported the Court's result, but it was not as strong as the legislative history relied on in *Hutto*. *Id.* at 2576 n.15.

58. 2 U.S. (2 Dall.) 419 (1793). As Professor Currie has observed: "everyone seems to agree that the eleventh amendment was a direct and immediate response to *Chisholm*." D. CURRIE, *supra* note 47, at 561. See generally Mathis, *The Eleventh Amendment: Adoption and Interpreta-*

against the State of Georgia in an original proceeding on its docket brought by a South Carolina creditor to collect a debt incurred by the state during the Revolutionary War. In rejecting Georgia's claim of sovereign immunity, the Justices had little to guide them but the language of article III, section 2, which they held meant what it said when it extended the federal judicial power to controversies "between a State and Citizens of another State."⁵⁹ As Professors Tribe and Nowak⁶⁰ have shown, the eleventh amendment was adopted to check this tendency of federal courts to construe article III and generalized jurisdictional grants as sufficient in themselves to authorize federal courts to invade the states' preconstitutional sovereign immunity⁶¹ in suits by

tion, 2 GA. L. REV. 207 (1968). *Chisholm* was clearly "reversed" by the amendment, and the Court faithfully applied it retroactively to dismiss all cases on its docket against a state by a private party from another state or a foreign country, even though brought before the amendment was adopted. See *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798).

59. U.S. CONST. art. III, § 2. For a good analysis of the various opinions of the Justices in *Chisholm*, rendered seriatim after the fashion of the times, see C. JACOBS, *supra* note 49, at 51-55. In essence, the Justices in the majority reasoned that since nothing in the Constitution modified the express language of art. III, the Court's original jurisdiction in cases "in which a State shall be a Party" was entitled to be read for all it was worth. For an interesting study of the facts, background, and aftermath of the *Chisholm* case, see Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. AM. HIST. 19 (1967).

60. Tribe, *supra* note 38, at 693; Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1441-42 (1975). Professor Field contends that art. III, as modified by the eleventh amendment, does not codify a constitutional doctrine of sovereign immunity in federal courts, but rather restores the Framers' conception of the common law doctrine of sovereign immunity. She agrees with Tribe and Nowak that Congress is free to modify that doctrine, but she also thinks that federal courts have the power to modify it when required by other portions of the Constitution. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 538, 543-45 (1978); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suits Upon the States*, 126 U. PA. L. REV. 1203, 1261-65 (1978). In her view "[t]he cases the [eleventh] amendment enumerates would be outside the judicial power only in the sense that the judicial power language of article III does not compel that they be heard." 126 U. PA. L. REV. at 543. This thought misses the point that art. III does not require that any cases be heard in lower federal courts because it takes congressional authorization for a lower federal court to get any of its art. III jurisdiction. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850).

61. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.

THE FEDERALIST NO. 81, at 416 (A. Hamilton) (Everyman's Library ed. 1911) (emphasis in original).

It is generally accepted now that Congress intended and commanded in § 34 of the Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (as amended now codified in 28 U.S.C. § 1652 (1976)), that federal courts apply all the laws, statutory and common, of the states in those cases "where they apply," including chiefly diversity cases. *Erie R.R. v. Tompkins*, 304 U.S. 64, 71-80 (1938); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 86-88

private citizens.⁶² In short, the states sought protection of their fiscal integrity⁶³ against the federal judiciary, whose very right to exist was hotly contested during the Constitutional Convention and the ratification debates.⁶⁴ The amendment and its legislative history say nothing of Congress' power to expose states to suit in federal courts. The legitimacy of that power is bottomed on the fact that the states have at least some influence on the political processes of Congress—an influence that is totally absent in the chambers of federal judges.⁶⁵

(1923). It is curious that the Court in *Chisholm*, a species of diversity case, disposed of Georgia's common law sovereign immunity without even a reference to § 34.

62. Notwithstanding its apparently limited language, the eleventh amendment, or art. III as altered by it, has been construed to prohibit suits against a state by its own citizens as well as those by noncitizens. *Hans v. Louisiana*, 134 U.S. 1, 15-16 (1890). Certain other litigants not mentioned in the amendment are likewise precluded by it from suing a state in federal court, ostensibly on the theory that "[b]ehind the words of the constitutional provisions are postulates which limit and control." *Mouaco v. Mississippi*, 292 U.S. 313, 322 (1934) (foreign government barred); see *Smith v. Reeves*, 178 U.S. 436, 446-49 (1900) (federally chartered corporation barred); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883) (suit by state as the nominal assignee of claims belonging to noncitizens of defendant state barred).

On the other hand, the Court has had little difficulty construing the amendment narrowly so as to permit genuine suits by states against states in its original jurisdiction. *Kansas v. Colorado*, 206 U.S. 46, 83 (1907). And suits by the United States against a state are not barred. *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

63. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821), Chief Justice Marshall observed:

It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction [in *Chisholm*]. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures . . . Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors.

Accord, R. BERGER, *supra* note 49, at 325; 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 96-99 (rev. ed. 1935).

Of course, genuine concern for the fiscal integrity of the states would embrace more than just protection against creditors' suits. Nonetheless, the Court has permitted substantial inroads on that integrity by its decisions permitting federal court suits against state officers for prospective relief, which often requires the states to make substantial outlays of money. See text accompanying notes 81-94 *infra*.

64. Many of the framers of the original Constitution initially rejected the idea of having lower federal courts at all. See note 7 *supra*. During the ratification process, some seized upon ostensible federal court jurisdiction under art. III in suits against states as a reason for voting against the new Constitution. See PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 309 (P. Ford ed. 1888). And Hamilton felt compelled to assuage this concern by denying that the jurisdiction existed except in cases where the state gave its consent. *THE FEDERALIST* NO. 81 (A. Hamilton). Other supporters of the Constitution, however, embraced the jurisdiction as worthwhile if not necessary. See the comments of Wilson in the Pennsylvania ratifying convention, printed in 2 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 491 (1836) ("When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing").

65. See Tribe, *supra* note 38, at 695 & n.71; Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L.

As far as Congress' power is concerned, at least under the fourteenth amendment,⁶⁶ there the matter currently lies. If Congress makes *clear*, either expressly in the statute or in its legislative history, its intent to subject the states to liability in federal courts, then those courts can and will entertain "private suits against States or state officials which

REV. 543, 559-60 (1954). The argument is that the states, through their representation in Congress, can have a much greater impact on congressional actions affecting federalism issues than they can on the decisions of federal judges, whose lifetime tenure and salary protections insulate them from the political process. While this theory in modern times may exaggerate the extent of the states' actual political power in Congress, *see* Tribe, *Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065, 1071 (1977), it remains essentially sound in its appraisal of the *relative* strength of the states' influence in Congress as opposed to their influence in federal courts.

66. To date, the Court's decisions suggesting an equivalent power under other portions of the Constitution have gone off on a theory of waiver or constructive consent by the state. *See* *Parden v. Terminal Ry.*, 377 U.S. 184, 192 (1964) (commerce clause); *Petty v. Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275, 276-82 (1959) (interstate compact clause). *See also* note 38 *supra*. Nonetheless, there is certainly enough in the pre-*Fitzpatrick* cases to support Congress' power under other portions of the Constitution unilaterally to abrogate the states' immunity on a surrender of sovereignty theory. For instance, in *Parden* the Court said:

By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity.

377 U.S. at 192.

The continued soundness of this dicta is, however, questionable in view of the subsequent decision of the Court in *National League of Cities v. Usery*, 426 U.S. 833, 840-52 (1976). In that case the Court found Congress' 1974 amendments to the Fair Labor Standards Act to be beyond Congress' commerce clause power to the extent they purported to regulate the wage structure of state employees engaged in "traditional governmental functions." A fortiori, such an attempted regulation could not remove the states' eleventh amendment immunity. However, since the decision in *National League of Cities*, some courts of appeal have upheld, under the war powers clause of art. I, the power of Congress to regulate and unilaterally to abrogate the states' eleventh amendment immunity even in the traditional field of government employment. *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070 (5th Cir. 1979); *Jennings v. Illinois Office of Educ.*, 589 F.2d 935, 937-38 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979) (both cases dealing with the Veteran's Reemployment Rights Act, 38 U.S.C. §§ 2021-2024 (1976 & Supp. II 1978, Supp. III 1979)). The Ninth Circuit recently reached a similar conclusion with regard to Congress' power under the copyright clause, art. I, § 8, in *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (1979). Quite apart from their soundness under *National League of Cities*, these decisions are vulnerable to at least two additional arguments. First, like the contract clause, Congress' art. I powers antedate the eleventh amendment and might therefore be seen as having been impliedly limited by it. *See* note 41 *supra*. Second, unlike the fourteenth amendment (or even the contract clause), Congress' art. I powers do not "by their own terms embody limitations on state authority." *Fitzpatrick v. Bitzer*, 427 U.S. at 456. *But cf.* *Maine v. Thiboutot*, 100 S. Ct. 2502, 2506 n.7 (1980) (upholding Congress' power to authorize an award of attorneys' fees against a state in a state court action to enforce welfare rights given to plaintiffs by commerce clause enactments).

In any event, the Court last term took pains to underscore that the tenth amendment state sovereignty issues articulated in *National League of Cities* have no bearing at all on Congress' power to enforce the fourteenth amendment. *New York Gas Light Club, Inc. v. Carey*, 100 S. Ct. 2024, 2032 (1980); *cf.* *City of Rome v. United States*, 446 U.S. 156, 180 (1980) (fifteenth amendment).

are constitutionally impermissible in other contexts."⁶⁷ But where the Court can find no such evidence of unmistakable purpose, it cannot rely on congressional power as a means of avoiding the eleventh amendment.⁶⁸ This requirement that Congress clearly express its intent to remove the bar of the eleventh amendment serves the dual purpose of focusing its attention on the federalism consequences of a given piece of legislation, and of notifying the proponents of states' rights that their interests are at risk and that now is the time to bring to bear on Congress whatever political influence they have. By the same token, the clear expression requirement is a safeguard against the federal judiciary becoming too innovative and expansive in exposing the states to suit, as the Supreme Court arguably was in *Chisholm* and *Cohens*.

Apart from the specialized statutes at issue in *Fitzpatrick* and *Hutto*, Congress has not yet passed legislation expressly removing the eleventh amendment immunity of the states in the general run of cases based on the Constitution. The principal federal statutory weapon in the arsenal of those claiming that state action has denied them constitutional rights is section 1983 of the Civil Rights Act of 1871. On its face however, that statute creates liability only for "persons" who act under color of state law.⁶⁹ Nevertheless, shortly after the Court decided in 1978 that the class of defendants potentially liable in federal courts under section 1983 included municipalities as well as individuals,⁷⁰ Justice Brennan observed that, in light of *Fitzpatrick* and *Hutto*, it was "surely at least an open question whether § 1983 properly construed does not make the States liable for relief of all kinds, notwithstanding the Eleventh Amendment."⁷¹

The Court resolved that open question adversely to state liability in its 1979 decision, *Quern v. Jordan*.⁷² Section 1983 does not expressly provide that states may be sued, the Court observed, and so the statutory route taken in *Fitzpatrick* to bypass the eleventh amendment be-

67. *Fitzpatrick v. Bitzer*, 427 U.S. at 456.

68. *Quern v. Jordan*, 440 U.S. 332, 343-45 (1979). But see *Maher v. Gagne*, 100 S. Ct. 2570, 2575-77 (1980) (discussed at note 57 *supra*).

69. See note 12 *supra*.

70. *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978); see text accompanying notes 159-63 *infra*.

71. *Hutto v. Finney*, 437 U.S. 678, 703 (1978) (Brennan, J., concurring).

72. 440 U.S. 332 (1979). The Court had reached the same result in another decision rendered after *Fitzpatrick* and *Hutto*, *Alabama v. Pugh*, 438 U.S. 781 (1978). *Pugh*, however, was a brief per curiam opinion which did not squarely address the question of congressional intent to abrogate the states' eleventh amendment immunity. The Court in *Quern* decided to reevaluate the soundness of its holding in *Edelman* that the respondents were barred by the eleventh amendment from seeking monetary relief against the state, with particular reference to its intervening decisions in *Fitzpatrick* and *Hutto*. The Court characterized its conclusion that Congress had not removed the states' eleventh amendment immunity in enacting § 1983 as a holding, not dicta, as Justice Brennan charged in his special concurrence. 440 U.S. at 341-42 n.12.

cause of clear congressional intent was foreclosed.⁷³ Nor does the legislative history surrounding the measure contain unmistakable evidence of congressional intent to make states suable, as the Court relied upon in *Hutto*.⁷⁴ A holding that states may be sued in section 1983 actions would have effectively eliminated the eleventh amendment as a defense in all cases based on the Constitution,⁷⁵ and the resulting potential for federal court interference with the states' fiscal independence would have been substantial. The Court therefore concluded that it could not read the statute to encompass states as parties defendant without a "clearer showing of congressional purpose to abrogate [the]

73. *Id.* at 340. Approximately two months before the passage of § 1983, Congress enacted the "Dictionary Act," which stated, in part, that "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. And in *Monell v. Department of Social Serv.*, 436 U.S. 658, 689 n.53 (1978), the Court relied on this statute in support of its conclusion that § 1983's "persons" included municipalities. Justice Brennan argued in his opinion concurring in the Court's judgment in *Quern*, that the 1871 Congress understood the phrase "bodies politic and corporate" to include states. 440 U.S. at 356-57. Without directly challenging him on this point, the majority refused to read the Dictionary Act as a textual abrogation of the states' eleventh amendment immunity. It noted that that Act "was intended to provide a 'few general rules of construction,'" *id.* at 341 n.11, (quoting CONG. GLOBE, 41st Cong., 3d Sess. 1472 (1871) (remarks of Rep. Poland)), and presumably, therefore, did not receive the sort of focused attention on state suability one would expect when Congress is about to expose states to treasury liability in federal courts. Moreover, the Court observed, § 1983 was modeled after § 2 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, passed more than five years before the Dictionary Act. 440 U.S. at 341 n.11. The Court did not make clear its view of the significance of this fact, but it presumably meant that when Congress in § 1983 adopted the language of an earlier statute which likewise did not expressly make states answerable as defendants, it also adopted the earlier statute's ambiguous congressional intent. This conclusion is, or course, logical only if, as the Court said, the intervening Dictionary Act itself contains no unmistakable indicia of congressional intent to make states liable under statutes passed thereafter.

Nor did the Court find in the *Monell* decision any authority to read expansively to include states in the word "persons" in § 1983. Unlike states, municipalities and other units of local government are not protected by the eleventh amendment. Therefore, liberal judicial construction of congressional enactments to include municipalities as defendants is not interdicted by the same federalism concerns that are applicable to states, 440 U.S. at 338.

74. *Id.* at 343 (§ 1983 "passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting [it]").

75. The *Quern* decision came in a later stage of the same litigation which had been before the Court in *Edelman v. Jordan*, 415 U.S. 651 (1974). The *Edelman* decision is discussed in text accompanying notes 108-23 *infra*. It began as a suit under § 1983 to enforce constitutional claims and pendent federal statutory welfare claims. The plaintiffs' constitutional claims had not been decided, but had been subordinated to their federal statutory claims under the rule of *Hagans v. Lavine*, 415 U.S. 528, 536 (1974). See *Edelman v. Jordan*, 415 U.S. 651, 653 n.1 (1974). The *Hagans* decision requires federal district courts to dispose of the plaintiffs' pendent statutory claims, if possible, in advance of, and without unnecessarily reaching, their constitutional claims. Therefore, a construction of § 1983 which held states liable in constitutional cases might also have opened them to added potential liability under pendent statutory claims, whether or not the constitutional claims were decided. Cf. *Maier v. Gagne*, 100 S. Ct. 2570, 2576 (1980), discussed at note 57 *supra*.

Eleventh Amendment immunity."⁷⁶

Although Justice Brennan and others took issue with the Court's reading of the legislative history of section 1983,⁷⁷ the *Quern* decision is essentially sound. Where the anticipated result of a holding that states are liable under a particular statute in federal court suits by private individuals is a relatively small overall financial impact, perhaps the Court can be more aggressive in its search for congressional intent.⁷⁸ But this cannot be said about state liability under section 1983. The Court was properly reluctant to discern in the sparse threads of legislative history unearthed by Justice Brennan a congressional mandate to federal courts to enforce the fourteenth amendment directly against state treasuries.⁷⁹ Only a demonstrably clear statement by Congress would legitimize the Court in authorizing such a far-reaching intrusion by the federal courts or distinguish its approach from the freewheeling one espoused in *Chisholm v. Georgia* and *Cohens v. Virginia*.

Whether the Court was right or wrong in its reading of congressional intent, however, as a result of the *Quern* decision the typical plaintiff who seeks a constitutional remedy in federal court cannot now rely on the marvelous convenience of congressional abrogation of the state's eleventh amendment immunity.⁸⁰ He must, instead, fall back on equitable principles and legal fictions that allow some federal court

76. 440 U.S. at 343.

77. *Id.* at 354-65 (Brennan, J., concurring in the judgment); Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L.J. 293, 332-34 (1980); Note, *State Monetary Accountability for Civil Rights Violations: Reconciling the Eleventh and Fourteenth Amendments*, 43 ALBANY L. REV. 708, 723-24 (1979); Note, *Quern v. Jordan, A Misdirected Bar to Section 1983 Suits Against States*, 67 CALIF. L. REV. 407 (1979).

78. See *Hutto v. Finney*, 437 U.S. 678, 697 n.27 (1978).

79. Justice Brennan quoted extensively from the remarks of individual Congressmen and Senators in congressional debates to show that the fourteenth amendment and § 1983 were meant to correct the denial of constitutional rights by the states. 440 U.S. at 354-65. But the majority is correct when it says that no one in these debates focused on the precise question whether state treasuries would be liable for retroactive damages in federal court actions, or on whether the bar of the eleventh amendment would be removed by the passage of § 1983. 440 U.S. at 343. Moreover, even if the Court were inclined to read charitably the comments of individual legislators made in the heat of debate, it would be receiving a message on congressional intent that was far less coherent and persuasive than the House and Senate reports relied on in *Hutto*. Finally, there is something to be said for the notion, hinted at in both *Quern* and *Hutto*, that the Court ought to require a "formal indication of Congress' intent to abrogate the States' Eleventh Amendment immunity," when considering a statute, like § 1983, which could place "enormous fiscal burdens on the States." *Quern v. Jordan*, 440 U.S. at 344-45 n.16 (quoting *Hutto v. Finney*, 437 U.S. at 697 n.27).

80. The holding in *Quern* means that a successful plaintiff in a § 1983 suit against a state officer, whether for damages or injunctive relief, can recover attorneys' fees against the state under § 1988 as interpreted in *Hutto*, even though the state cannot be made a party-defendant. Although seemingly anomalous, this result can be supported on the theory that Congress meant to provide for attorneys' fees which were easily collectible from the state treasury as an incentive for suits against state officers in federal courts to enforce constitutional norms, but that it was unwilling to take the more drastic step of exposing states to plenary liability on the merits. But see Note,

remedies for unconstitutional acts by state officials. And he must attempt to negotiate his way through judicial avoidance doctrines painstakingly fashioned by the Court in the course of nearly 200 years of federal court jurisdiction. It is to those doctrines, and the gaps they leave, that we now turn.

B. Federal Court Remedies Against States and State Officers

1. Enjoining Unconstitutional Action: The Doctrine of Ex parte Young

Suppose a claimant wishes to stop a state official from carrying out threatened conduct that would infringe his constitutional rights. Whether or not that threatened conduct would be independently tortious or illegal under state law,⁸¹ a federal court is not precluded by the

Civil Rights—State's Eleventh Amendment Immunity Under 42 U.S.C. § 1983, 10 CUM. L. REV. 223, 234 (1979).

An unsuccessful effort partially to abrogate the eleventh amendment immunity was made during the 96th Congress in the form of a Senate bill entitled the Civil Rights Improvement Act of 1979, S. 1983, 96th Cong., 1st Sess., 125 CONG. REC. S15994 (daily ed. Nov. 6, 1979). Among other things, the bill would have amended section 1983 to include states and their subdivisions as "persons" subject to suits in federal courts. Damages against states would have been available in four situations: first, where the unconstitutional conduct was authorized by state law, policy or practice, or was committed by an elected or appointed policymaker; second, where the unconstitutional conduct was at the direction of or with the encouragement of a "supervisory officer"; third, where a supervisory officer failed to take reasonable steps to prevent the recurrence of unconstitutional conduct of which he was aware or should have been aware; and fourth, where the plaintiff was unable to identify the specific state officers who wronged him. *Id.* §§ 2(c)(1)(A)-(D). The measure has been criticized for stopping short of providing for state damage liability for all § 1983 violations by officers. See Association of the Bar of the City of New York, Committee on Civil Rights, Imposing Liability upon Governments for Civil Rights Violations and Imposing Limits upon *Younger v. Harris*: Pending Legislation to Amend 42 U.S.C. § 1983, at 8-9 (1978).

81. Prior to the decision in *Ex parte Young*, 209 U.S. 123 (1908), the plaintiff had to show that the officer's threatened conduct would constitute an unlawful or tortious act under general law if engaged in by someone not possessing the mantle of state authority. *E.g.*, *In re Ayers*, 123 U.S. 443, 500 (1887) ("The vital principle in all such cases [allowing relief] is that the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable"). Where this was not convenient or possible, the eleventh amendment was held to preclude federal jurisdiction, even though the suit was nominally against the officer and even though a palpable injury to the plaintiff's constitutional rights was the result. *E.g.*, *Fitts v. McGhee*, 172 U.S. 516, 529-30 (1899); *In re Ayers*, 123 U.S. at 500; *Louisiana v. Jumel*, 107 U.S. 711, 726-27 (1882).

The *Young* decision discarded this approach, holding that the threatened enforcement of an unconstitutional statute was an illegal act enjoined by a federal court without regard for its intrinsic illegality under general tort law. 209 U.S. at 159. Since the decision in *Young*, the Court has routinely upheld federal jurisdiction to enjoin unconstitutional acts without inquiry into whether the acts would be tortious but for the officer's possession of state authority. See, *e.g.*, *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 300-01 (1952) (defendant officer threatened "to act . . . by proceeding against appellant for the collection of [unconstitutional] ad valorem taxes"); *cf.* *Edelman v. Jordan*, 415 U.S. 651, 664 (1974) (approving federal injunction preventing state welfare officials "from failing to process applications within the time limits established by the federal regulations").

While the *Young* decision opened the doors of the federal courts to a much larger class of

eleventh amendment from granting the requested relief so long as the complaint names the official, rather than the state, as the defendant.⁸² Suppose the claimant is more ambitious. On behalf of himself or an entire class of persons, such as all blacks in a state, or prisoners, or welfare recipients, he wants to put a stop to a particular way the state has been governing, or to bring its programs in line with what he thinks the Constitution or federal law commands. Again the eleventh amendment is no barrier. If the suit is brought against the state officers or local governments responsible for administering the program, the federal court has jurisdiction, for example, to desegregate schools,⁸³ reorganize legislative apportionment,⁸⁴ reform prison systems,⁸⁵ and engage in a myriad of other forms of system-wide constitutional tinkering with state government.

The eleventh amendment is no barrier in these cases even though it expressly extends to "any suit in . . . equity."⁸⁶ Likewise, the plaintiff's state of citizenship is irrelevant to his right to relief, as is the nature of his claim, even though the eleventh amendment has been construed to extend to suits to enforce federal rights brought by any person, whether or not a citizen of another state.⁸⁷ This is because, quite simply and illogically, a suit for such "prospective"⁸⁸ relief

claimants than was permitted under the earlier tort model, it did so at the expense of logic. The idea that an officer is responsible for his torts just as ordinary citizens are, and that his defense of authority must be rejected if bottomed in an unconstitutional statute, is at least consistent with the notion that the suit is actually against him, not the state. The same cannot be said about his acts which are illegal only because they are taken on behalf of the state.

82. Even though the requested equitable relief as a practical matter will affect the state little less than if it had been sued by name, the complaint must name the appropriate officer and never the state. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978); Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 435 (1962) ("Even when the substance of sovereign immunity is gone, the form usually remains"). Federal courts may also entertain suits against municipalities and other local government units by name, since only states are protected by the eleventh amendment. *Monell v. Department of Social Serv.*, 436 U.S. 658, 690-91 (1978); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

83. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

84. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962).

85. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978).

86. U.S. CONST. amend. XI.

87. *Hans v. Louisiana*, 134 U.S. 1, 12-18 (1890) (contract clause claim by citizen of state); *North Carolina v. Temple*, 134 U.S. 22, 30 (1890) (contract clause and fourteenth amendment claims by citizen of state); *see note 62 supra*. But *see Edelman v. Jordan*, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting) (expressing the view that the eleventh amendment "bars only federal court suits against States by citizens of other States"). The amendment has also been read to preclude suits in admiralty, even though it mentions only suits at law and in equity. *Ex parte New York*, 256 U.S. 490, 497 (1921).

88. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). The Court used the term "prospective" in contradistinction to "retroactive." The latter type of relief, it held, is barred by the eleventh amendment. The former type most clearly includes relief which seeks to undo an unconstitutional state of affairs existing at the time the decree is entered, as well as that which seeks to restructure state institutions for the future. *Id.* at 667-68; *see Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977).

against a state *officer* is not a "suit . . . commenced or prosecuted against one of the United States" within the meaning of the eleventh amendment.⁸⁹ Instead, in the words of Justice Peckham, speaking for the Court in *Ex parte Young*, "[i]t is simply an illegal act upon the part of the state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional."⁹⁰ In the *Young* decision, the Court upheld the jurisdiction of a federal circuit court to enjoin the attorney general of Minnesota from instituting any proceeding to enforce an unconstitutional state statute reducing the rates charged by railroads operating in the state. The fiction adopted by the Court permitted it to sidestep the eleventh amendment because that fiction supposed the suit to be against Mr. Young, not against the State of Minnesota. But clearly the effect of the judgment on the ability of Minnesota to enforce its statute was the same as if the state had been sued by name. Indeed, later cases established that the same kind of federal court jurisdiction was available to compel state officers to engage in affirmative acts that required the expenditure, not of the named officer's money, but of funds from the state treasury.⁹¹ Moreover, although maintaining the fiscal integrity and independence of the states from federal judicial interference was the primary historical reason for the adoption of the eleventh amendment, the amendment has been held to be inapplicable even where immense costs are entailed in complying with prospective federal relief.⁹² To be sure,

It also includes complaints that by terms require the payment of money, but only to the extent that money is due for events occurring after the date of the decree, as opposed to the date the complaint was filed. See *Vargas v. Trainor*, 508 F.2d 485, 491 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975) ("the entry of a court order or judgment requiring that payments be made divides the past from the prospective for Eleventh Amendment purposes"); *accord*, *Kimble v. Solomon*, 599 F.2d 599, 605 (4th Cir. 1979), *cert. denied*, 444 U.S. 950 (1980). For a discussion of what is retroactive relief, see text accompanying notes 108-23 *infra*.

89. The fourteenth amendment and other provisions of the Constitution guaranteeing civil rights against the states are triggered only by the actions of states, not those of purely private wrongdoers. See, e.g., *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978); *Civil Rights Cases*, 109 U.S. 3, 11 (1883). Nevertheless, an officer of the state acting under color of its authority can commit a constitutional violation on its behalf even though his acts may be unauthorized by the state or even in violation of state law. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 183-84 (1961); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287-88 (1913). It is one of the great anomalies of constitutional law that an officer's acts can be, for example, simultaneously those of the state for the purposes of proving a fourteenth amendment violation, but not those of the state for the purpose of assessing the impact of the eleventh amendment.

90. 209 U.S. 123, 159 (1908).

91. E.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (state welfare officials enjoined from denying welfare benefits to otherwise qualified aliens).

92. See note 63 *supra*. Justice Rehnquist, speaking for the Court in *Edelman v. Jordan*, 415 U.S. 651, 668 (1974), characterized the costs necessary to comply with prospective injunctive decrees as ancillary to the federal courts' equitable jurisdiction. Sometimes these costs can be de minimis. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 346-49 (1979). Nevertheless, despite the innocuous label, it is clear that sometimes ancillary costs can be very large indeed. See, e.g., *Milliken v.*

the anticipated effect of certain federal court remedies on the ability of the states to function in the federal system may mean the plaintiff will lose on the merits or will get less than he requested.⁹³ But at least there is usually no automatic jurisdictional barrier to a federal court's reaching a conclusion about what the Constitution requires.⁹⁴

As the Court stated in *Edelman v. Jordan*, "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature Such an ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in *Ex parte Young*."⁹⁵

Yet why is it permissible for federal courts to have even this prospective impact on state government functions? A contrary interpretation of the eleventh amendment might not in theory have meant any less protection for constitutional rights. Those seeking injunctive remedies against unconstitutional state action could have gone to state courts, where the eleventh amendment does not apply.⁹⁶ State judges are bound by the supremacy clause to give relief required by the Constitution, including relief of the type sought in *Ex parte Young*, and the Supreme Court can review their decisions to insure that that duty is fulfilled.⁹⁷ To the extent the doctrine of *Ex parte Young* simply provides the plaintiff with an equally competent alternative federal forum, it cannot be said that it is technically "indispensable to the establishment of constitutional government and the rule of law," as Professor

Bradley, 433 U.S. 267, 289 (1977) (school desegregation decree upheld "notwithstanding a direct and substantial impact on the state treasury," estimated at \$6 million by Justice Powell, dissenting, *id.* at 293); *Wyatt v. Aderholt*, 503 F.2d 1305, 1317 (5th Cir. 1974) (overruling an eleventh amendment defense in the face of the contention "that the prescribed remedy will entail the expenditure annually of a sum equal to sixty percent of the state budget excluding school financing, and a capital improvements outlay of \$75,000,000").

93. *E.g.*, *Rizzo v. Goode*, 423 U.S. 362, 377-80 (1976) (alternative holding) ("principles of federalism" preclude broad injunction aimed at reforming allegedly unconstitutional city police practices); *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (alternative holding) (injunction which would involve federal court in "an ongoing audit of state criminal proceedings" held to be inappropriate for federalism reasons); see *Eisenberg & Yazell*, *supra* note 13, at 507 ("[c]ourts should pause before ordering costly relief, should do so only to the extent necessary to remedy violations").

94. *But see* notes 16-17 *supra*.

95. 415 U.S. at 667-68.

96. *Maine v. Thiboutot*, 100 S. Ct. 2502, 2506 n.7 (1980).

97. *See, e.g.*, *Ward v. Love County*, 253 U.S. 17, 22-23 (1920) (state courts bound to give constitutionally required relief); *General Oil Co. v. Crain*, 209 U.S. 211, 226-27 (1908) (holding that the doctrine of *Ex parte Young* is constitutionally required in state courts and that the Supreme Court can review state court decisions refusing to apply it); *cf. Monroe v. Pape*, 365 U.S. 167, 237-39 (1961) (Frankfurter, J., dissenting, considers illegal intrusion by police officers to be appropriate for state court litigation under civil rights statute).

Wright has claimed.⁹⁸

The fact is, however, that the doctrine does more than provide an alternative forum. It gives plaintiffs access to a uniform body of federal constitutional law administered by federal judges considered, at least by Congress, to be more sympathetic than state judges to the vindication of federal constitutional rights against the states.⁹⁹ Uninhibited by the push and pull of local politics, federal judges are permitted by the principle of *Ex parte Young* to give constitutionally required prospective remedies without regard for how they may be received by the electorate or by state executive and legislative officials. The result is thought to be greater protection of constitutional rights. The cost, of course, is unfaithfulness to the apparent spirit of the eleventh amendment. Despite that amendment the federal courts have thus staked out for themselves a vast territory of power and influence over the practices of the states. Their ability to afford prospective relief to parties whose constitutional rights have been endangered has a great potential impact on how states behave toward other citizens similarly situated, even if the suit is not a class action.¹⁰⁰ Accordingly, if widespread adherence by the states to constitutional norms is a justification for evading the eleventh amendment, as the Court in *Ex parte Young* apparently thought, then the suit seeking prospective relief presents the best case for evasion.

2. *Compensating Victims of Unconstitutional Action: The Doctrine of Edelman v. Jordan*

Once a federal court has obtained jurisdiction over a suit against a state officer seeking injunctive relief from unconstitutional conduct, it ought to have the ability to enforce any ensuing decree.¹⁰¹ Thus, the Court held in *Hutto v. Finney* that a state officer's disobedience of a lawful federal court decree is enforceable by, among other things, an order for attorneys' fees to compensate the plaintiff for his efforts in

98. C. WRIGHT, FEDERAL COURTS § 48, at 209-10 (3d ed. 1976).

99. See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoted at note 14 *supra*).

100. On the facts of *Ex parte Young*, for example, it seems unlikely that the state would have attempted to enforce against others a statute that had been ruled unconstitutional on its face by a federal court in the context of a particular plaintiff's suit. Indeed, the recognition of this practical fact is one of the reasons often given in support of the doctrine that federal courts ought to abstain from deciding the constitutionality of state statutes where the federal plaintiff is already involved in another proceeding pending in state court which raises that issue. The state court may give a narrowing construction to the statute that would save it when applied to this plaintiff or others. See, e.g., *Moore v. Sims*, 442 U.S. 415, 429-30 (1979).

101. The ability to make good the commands of an injunction is one of the criteria a court may use in deciding what shape to give it or whether to issue it at all. But once this decision has been made, "federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." *Hutto v. Finney*, 437 U.S. 678, 690 (1978).

obtaining compliance by the recalcitrant defendant.¹⁰² The Court observed that a civil contempt fine, aimed in part at compensating the plaintiff, would also be an appropriate exercise of a federal court's jurisdiction.¹⁰³ This is true even though the money for such an award is paid out of the state's treasury, not out of the pocket of the individual officer nominally sued as the defendant.¹⁰⁴ Although comforting to some plaintiffs, these forms of compensation are necessarily limited. They exist as adjuncts to an otherwise appropriate injunctive decree, and come to life only if the decree is disobeyed. Even then, they offer at best the promise of monetary relief for injuries occurring after the federal decree is entered.

For injuries to constitutional rights suffered before such a decree, or for injuries of a nonrecurring nature for which equitable relief is inappropriate or inadequate, compensation in damages is the only available remedy. Suppose, for example, the plaintiff was arrested without probable cause and abused by the police;¹⁰⁵ or the obligation of his contract with the state was impaired and he has suffered damages

102. *Id.* at 689-93. *Hutto* was an action for injunctive relief in federal court under § 1983, brought by inmates of the Arkansas penal system against members of the state's Department of Correction in their official capacities. The suit sought relief from prison conditions which the district court found to be cruel and unusual punishment in violation of the eighth and fourteenth amendments. When the state failed adequately to comply with a series of relatively mild remedial orders, the district court issued a stiff mandatory injunction and an award of attorneys' fees premised on a finding that the state officials had been guilty of bad faith in their noncompliance with the earlier orders. The Supreme Court affirmed this award, holding that the power to enjoin necessarily carried with it the power to enforce by all appropriate means:

If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail. The less intrusive power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief.

In this case, the award of attorneys' fees for bad faith served the same purpose as a remedial fine imposed for civil contempt. It vindicated the District Court's authority over a recalcitrant litigant.

Id. at 691. The Court also held that the compensatory purpose and effect of the award did not render it improper under the eleventh amendment, inasmuch as it also had a remedial purpose and effect. *Id.* at 691 & n.17.

The second part of the Court's opinion, sustaining the propriety of the court of appeal's fee award in the same case under the Attorneys' Fees Awards Act of 1976, is discussed at note 44 *supra*.

103. 437 U.S. at 690-92. Analytically, the Court first established the propriety of a civil contempt fine, and then of a fee award for bad faith as a lesser sanction necessarily included in the former. The Court did say, however, that federalism concerns "may counsel moderation in determining the size of the award or in giving the State time to adjust its budget before paying the full amount." *Id.* at 692 n.18.

104. *Id.* at 692 & n.19; cf. *Gates v. Collier*, 616 F.2d 1268, 1270-71 (5th Cir. 1980) (upholding a district court order to the state auditor and treasurer directing the payment from the state treasury of an attorneys' fee award entered pursuant to the 1976 Attorneys' Fees Awards Act).

105. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961).

as a result;¹⁰⁶ or he has paid an unconstitutional tax under protest and now wants his money back.¹⁰⁷ Only compensation in damages will make the plaintiff whole.

Yet in such cases, as Justice Rehnquist wrote for the Court in *Edelman v. Jordan*, "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."¹⁰⁸ Although the *Edelman* decision dealt in terms with a lower court order that state officers pay welfare benefits due to the plaintiffs as a matter of federal statutory law, the rule it identified equally prohibits compensation for constitutional rights denied by the state.¹⁰⁹ Nor will the plaintiff gain by naming only state officers as defendants. Although Chief Justice Marshall in an early case tried to confine the operation of the eleventh amendment "to those suits in which a state is a party on the record,"¹¹⁰ even he later conceded that the amendment could not be so easily side-stepped.¹¹¹ Instead, it seems clear now that a suit against a state officer in his official capacity, seeking compensation for past wrongs, will be considered a suit against the state for purposes of the eleventh amendment where "[t]he funds to satisfy the award [sought] . . . must inevitably come from the general revenues of the State."¹¹² Finally, the

106. See, e.g., *Louisiana v. Jumel*, 107 U.S. 711 (1882).

107. See, e.g., *Ford Motor Co. v. Department of Treas.*, 323 U.S. 459 (1945).

108. 415 U.S. 651, 663 (1974).

109. E.g., *Ford Motor Co. v. Department of Treas.*, 323 U.S. 459, 464 (1945) (suit for refund of taxes collected in violation of commerce clause and fourteenth amendment).

110. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824). The Court upheld the jurisdiction of a federal circuit court to order state officers to pay to the plaintiff \$100,000 held in the state treasury. The money had been seized to collect a tax from the plaintiff in violation both of the Constitution and a prior injunction entered by the court restraining the defendants from collecting the tax. Although Marshall's solution to the eleventh amendment problem is no longer viable, the result is supportable under modern doctrine since the order restoring the money can be seen as necessary and ancillary to the lower court's jurisdiction to grant the original injunction. See text accompanying notes 101-04 *supra*.

111. *The Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 123-24 (1828) (federal court action against governor to recover the value of slaves allegedly converted by state officers is barred by the eleventh amendment because he was sued "not by his name, but by his style of office, and the claim made upon him is entirely in his official character"); see *In re Ayers*, 123 U.S. 443, 487-88 (1887) (Marshall's test is inapplicable when the state officers named as defendants "have not a real, but merely a nominal interest in the controversy").

112. *Edelman v. Jordan*, 415 U.S. 651, 665 (1974). As discussed at text accompanying notes 124-51 *infra*, state officers are personally liable under § 1983 for their denial under color of state law of federal statutory and constitutional rights, subject to applicable immunity defenses. Yet in *Edelman* the Court concluded, without analysis, that the monetary relief sought by the plaintiffs "will obviously not be paid out of the pocket" of the state officer sued. 415 U.S. at 664. It may have meant that the officer so obviously had a good faith immunity to liability that the plaintiffs could not have intended to sue him personally. This solution, however, would be inconsistent with the rule that the defendant officer has the burden of pleading, and possibly proving, his own good faith. *Goinez v. Toledo*, 100 S. Ct. 1920, 1923-24 (1980). A better solution to the question whether monetary relief will inevitably be paid by the state rather than the officer would focus on

plaintiff will gain nothing in such a case by labelling his theory of recovery "equitable restitution," thereby attempting to bring the case within the fiction of *Ex parte Young*.¹¹³ So long as it is clear from the pleadings and evidence that the plaintiff seeks damages from the state treasury for an injury which happened before suit was filed, the federal court is without constitutional power to award relief, unless Congress has expressly authorized it to do so, or unless the state has expressly waived its eleventh amendment immunity.¹¹⁴

Why are suits seeking compensation for constitutional wrongs inflicted by the state in the past treated inhospitably by federal courts, while suits seeking to prevent identical future wrongs or correct present ones are welcomed? Professor Tribe has said that the fictional injunctive suit against an officer for future payments is not a vital encroachment on state sovereign immunity, because it preserves the states'

what the plaintiff alleges or admits in response to the defendant's motion to dismiss on eleventh amendment grounds. Cf. *Rothstein v. Wyman*, 467 F.2d 226, 236 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), *quoted in* *Edelman v. Jordan*, 415 U.S. at 665 (plaintiffs "expressly contemplate" that the relief sought will be paid out of state funds). In short, the plaintiffs ought to have the option to try recovery against the individual state officer. And this is true even though the state has agreed to indemnify him for his losses. See Tribe, *supra* note 38, at 686 n.25 ("a state should not be able to turn a purely intramural arrangement with its officers into an extension of sovereign immunity").

113. 209 U.S. 123 (1908). In *Edelman*, the court of appeals had sought to justify an award of retroactive welfare benefits as equitable restitution ancillary to the district court's decree enjoining the payment of future benefits in accordance with federal law. 415 U.S. at 665. The Supreme Court found the label unpersuasive, reasoning that "it is in practical effect indistinguishable in many aspects from an award of damages against the State." *Id.* at 668. The Court considered it irrelevant that an equitable award is "capable of being tailored in such a way as to minimize disruptions of the state program," in ways that a judgment at law is not. *Id.* at 665. The litmus test for what is barred by the eleventh amendment is the nature of the injury compensated, not the form of compensation. If an award "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," it is retroactive and hence unavailable in a federal court. *Id.* at 668.

114. After a period of confusion generated by some of the Court's earlier decisions, see note 38 *supra*, the Court in *Edelman* at last established a clear standard for assessing a state's consent to be sued in federal court. That standard is very rigorous:

Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find 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."

415 U.S. at 673, (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). The Court found the state's mere participation in joint federal-state welfare programs insufficient in itself to establish consent under this standard. *Id.* at 673-77. The Court's earlier decisions perhaps leave open the possibility that a state's "consent" to suit in federal court will be more easily found when the cause of action relates to what the Court concludes is "proprietary" activity by the state in a field of activity regulated by Congress. Compare *Parden v. Terminal Ry.*, 377 U.S. 184, 186 (1964) (consent to suit under the FELA implied from state's mere operation of a railroad in interstate commerce) with *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973) (*Parden's* implied consent approach limited to proprietary activities).

immunity in federal courts in the "core area of damage suits."¹¹⁵ Yet if the states' ability to control their own destinies free of federal interference is the important criterion of eleventh amendment immunity, the result probably ought to have come out the other way.¹¹⁶ Alternatively, if the important criterion is simply the raw fiscal impact on the states of one form of relief as opposed to the other, one would be hard pressed to say with confidence that prospective constitutional remedies do not cost the states at least as much in dollars as would a carefully drawn regime of state liability for constitutional torts.¹¹⁷

What is more, the distinction between prospective remedies, which federal courts may give, and retroactive relief, which they may not give, does not in itself predict whether the state must eventually pay damages for its past violations of constitutional rights. The *Edelman* test at best tells the plaintiff he has no right to seek damages from the state in federal court—it says nothing about his right to file an action seeking the same relief in a state court. The Court acknowledged this much in *Edelman's* sequel—*Quern v. Jordan*.¹¹⁸ One issue in *Quern* was whether it was proper for a federal court in a class action seeking prospective welfare relief against state officers to order a notice to be sent to all class members advising them of the procedures available to them in state courts and agencies for the collection from the state of wrongfully withheld past benefits.¹¹⁹ The Court upheld the notice as a proper exercise of the lower federal court's jurisdiction to give relief ancillary to prospective remedies.¹²⁰ Critical to the Court's conclusion was the fact that the form of notice did not prejudge the merits. Instead, it simply advised of available procedures, "[a]nd whether or not the class member will receive retroactive benefits rests entirely with the State, its

115. Tribe, *supra* note 38, at 687.

116. For an analysis of the tremendous impact federal injunctive remedies have had on the operation of state government, see authorities cited in note 13 *supra*. Cf. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703-05 (1949) (principle of sovereign immunity may be archaic as applied to damage suits, but injunctive and specific relief pose a greater threat to the effective operation of government).

117. See *Hutto v. Finney*, 437 U.S. 678, 690 n.15 (1978) ("'Ancillary' costs may be very large indeed."); *Edelman v. Jordan*, 415 U.S. 651, 682 (1974) (Douglas, J., dissenting) ("Whether the decree is prospective only or requires payments for the weeks or months wrongfully skipped over by the state officials, the nature of the impact on the state treasury is precisely the same."); note 92 *supra*.

118. 440 U.S. 332 (1979); *accord*, *Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Assoc.*, 49 U.S.L.W. 3641 (U.S. Mar. 2, 1981) (per curiam).

119. *Id.* at 346-49. After the remand in *Edelman*, the district court ordered the defendant to send notice to all class members advising them that they were "entitled" to recover past benefits in a state administrative proceeding. *Jordan v. Trainor*, 405 F. Supp. 802, 808-10 (N.D. Ill. 1975). The court of appeals held this form of notice violated the eleventh amendment, and modified it as indicated in text. *Jordan v. Trainor*, 563 F.2d 873, 875-78 (7th Cir. 1977).

120. 440 U.S. at 349. The Court also noted that the cost of giving notice was de minimis. *Id.* at 347 n.19.

agencies, courts, and legislature, not with the federal court."¹²¹ Putting aside for the moment whether the state may be obligated to give relief in its own courts or agencies,¹²² the *Quern* holding makes clear that the prospective/retroactive distinction has less to do with financial impact than with choice of forum.

Indeed, apart from the accidents of history,¹²³ the reason for the different treatment of claims for prospective and retroactive relief is perhaps best understood as necessary to give the eleventh amendment any meaning at all. Were it not for some such distinction, the federal courts could act in constitutional cases as though the eleventh amendment did not exist. Without express congressional authority of the kind insisted upon in the *Fitzpatrick-Hutto-Quern* line of cases, such a result might be seen as a dangerous arrogation of power by federal courts. In a sense, therefore, the *Edelman* distinction legitimizes the federal courts' activism in avoiding the eleventh amendment where it is most critical to constitutional liberties as a whole (securing compliance by states with the Constitution now and in the future) by sacrificing federal jurisdiction to give relief against the state to the claimant seeking only a particularized remedy for past wrongs.

This is not to say that the injured party has no federal court damage remedy at all. As shown in the next two sections of this Article, under section 1983 he can assert a damages claim against the offending state officer personally, and, where applicable, against local governments such as cities and counties. But as we shall see, this avenue of

121. *Id.* at 348.

122. Once the plaintiffs have filed an action in state court seeking wrongfully withheld welfare benefits from the state treasury, it is clear in principle that the state court must give relief if the Constitution or valid federal law requires it. *See generally* text accompanying notes 287-325 *infra*. The *Quern* Court's stated disapproval of the district court's order is not inconsistent with this principle, since whether or not valid federal law requires relief is a matter entirely for the state court to decide once it is determined that the eleventh amendment deprives the district court of jurisdiction. 440 U.S. at 348. To be sure, one of the Court's footnotes contains language intimating that whether or not the plaintiffs get payment in the last analysis is up to the Illinois legislature. *Id.* at 348-49 n.20. However, the Court cannot have meant by this that it would be without power to review the correctness of a state court decision refusing to give relief, or indeed that the state court would not have a duty to consider whether valid federal law required it to give a judgment for the plaintiffs. *See* *Central Mach. Co. v. Arizona State Tax Comm'n*, 100 S. Ct. 2592 (1980) (by implication) (reversing state court decision refusing to give a tax refund against the state where plaintiff's claim was founded on the Constitution); *General Oil Co. v. Crain*, 209 U.S. 211, 226-27 (1908). Of course, whether federal statutes and regulations in fact require the state to pay past benefits, and, if so, whether such a mandate is constitutional, are separate questions. *See* text accompanying notes 312-16 *infra*.

123. The question [of sovereign immunity] is to be answered, as it has over the centuries for the most part been answered, in terms of our legal tradition. This tradition does not always give us the answer. But it does tell us that the sensitive areas . . . are those involving the enforcement of contracts, treasury liability for tort, and the adjudication of interests in property which has come unsullied by tort into the bosom of the government. Jaffe, *supra* note 24, at 29.

supposed redress leaves many claimants without any actual compensation for their injuries.

3. *Damages Actions Against State Officers Personally*

It has long been a tradition in this country that state and federal officers are answerable personally in damages for their torts, even those committed under the mantle of statutory authority. Although the claim of statutory authority can be and usually is asserted as a defense, it will not preclude liability if the officer was acting beyond his authority or if the statute itself is unconstitutional.¹²⁴ As Professor Jaffe has said, this tradition, originating in England, "was the result of a deliberate effort to protect the citizen from governmental misuse of authority."¹²⁵ But although the officer thus sued is subject to the rule of law, just like private individuals, it is not necessarily the same law. Sometimes he can be charged with illegal conduct that has no counterpart in private life, such as a state bureaucrat's refusal to pay welfare benefits owing to the plaintiff-recipients as a matter of federal statutory or constitutional law.¹²⁶ Even though the defendant's acts are illegal only because they are taken on behalf of the state, neither the eleventh amendment nor common law sovereign immunity is a defense to his personal liability.¹²⁷ On the other hand, he may be immunized from actual liability for conduct which, if committed by a private person, would not justify a defense—for instance, a battery committed in the course of an illegal arrest made on the basis of a good faith mistake.¹²⁸

Building on this tradition of officials' liability, Congress in 1871 passed what is now section 1983.¹²⁹ This statute makes state officers personally liable for their acts, taken under color of state law, that deprive or cause the deprivation of federal statutory or constitutional rights. Compensation of victims of unconstitutional state action is one of the chief goals of section 1983, both on its face and as a matter of legislative intent, and the section seems to admit of no exceptions to

124. See, e.g., *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280 (1912) (state officer held liable for a refund of a tax he collected pursuant to an unconstitutional state statute); *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (Sergeant-at-Arms of the House of Representatives held liable for false imprisonment in executing a warrant of arrest pursuant to a congressional order, where the order arose out of an investigation beyond the constitutional powers of the House).

125. L. JAFFE, *supra* note 24, at 237.

126. See note 112 *supra*.

127. See *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

128. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967); W. PROSSER, *supra* note 23, § 17, at 100 ("A private citizen, . . . unlike an officer, is privileged to arrest only when a crime has in fact been committed, and must take the risk that it has not.").

129. See note 12 *supra*.

liability.¹³⁰ Nevertheless, the person seeking damages against a state officer who, on behalf of the state, has violated the plaintiff's constitutional rights will encounter a series of obstacles to actual recovery. These may be legal or practical, but in the end they often mean that compensation is not given.

The legal obstacles consist of the immunity doctrines the Supreme Court has developed to shield state officers from liability even in the face of the strong "societal interest in compensating the innocent victims of governmental misconduct."¹³¹ These immunities, when pleaded and proved, foreclose any award, partly because they are considered part of the common law heritage impliedly adopted by Congress as a modifier to section 1983 liability and partly because "overriding considerations of public policy . . . demanded that the official be given a measure of protection from personal liability."¹³²

The most potent of these defenses is the doctrine of absolute immunity. Under that doctrine, it has developed that even the most egregious, knowing, and malicious acts of certain state officers, producing perhaps incalculable harm to constitutional rights, nonetheless can create no officer liability as a matter of law.¹³³ Absolute immunity has been extended by the Supreme Court to state and regional legislators,¹³⁴ state judges,¹³⁵ and state prosecutors.¹³⁶ Absolute immunity shows signs of creeping into other areas as well.¹³⁷ It differs from a state's eleventh amendment immunity from suit in federal court only in

130. See, e.g., *Owen v. City of Independence*, 100 S. Ct. 1398, 1407-08 (1980); *Monell v. Department of Social Serv.*, 436 U.S. 658, 683-87 (1978).

131. *Owen v. City of Independence*, 445 U.S. 622, 652-53 (1980).

132. [N]otwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law *and* was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine."

Id. at 637 (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)) (emphasis added).

133. See, e.g., *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978) (state judge is absolutely immune from liability for issuing an *ex parte* order without notice which resulted in the sterilization of a fifteen-year-old retarded girl).

134. *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402-06 (1979); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

135. *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967).

136. *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976).

137. See, e.g., *Gorinan Towers, Inc. v. Bogoslavsky*, 49 U.S.L.W. 2081 (8th Cir. July 22, 1980) (absolute immunity similar to that of state legislators extends to city's board of directors); *Turner v. Raynes*, 611 F.2d 92, 95-97 (5th Cir. 1980) (absolute immunity for judges extends to all their "judicial" acts, not simply those within the judges' jurisdiction); cf. *Butz v. Economou*, 438 U.S. 478, 513-17 (1978) (federal hearing examiner is sufficiently like a judge to warrant absolute immunity; federal agency officials presenting a case to a hearing examiner are sufficiently like prosecutors to warrant absolute immunity). See generally *Oakes, The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 940-44 (1979).

one particular: A plaintiff asserting a constitutionally based damage claim against one of these officers for conduct within the scope of his official duties has a dubious privilege of filing a complaint which is technically within a federal court's jurisdiction. However, that complaint will be dismissed without regard for the constitutional merits as soon as the defendant's status is pleaded and proved.¹³⁸

A different form of officer immunity from actual liability under section 1983 is the "qualified" or "good faith" immunity. This defense is available to state officers at all levels—from the governor down to the policeman on the beat—who are not in the class of absolutely immune defendants noted above.¹³⁹ The good faith immunity is less preclusive than its absolute counterpart. The defendant has the burden of pleading¹⁴⁰ and probably proving¹⁴¹ both that he committed the offending acts in the subjective belief they were lawful, and that that belief was objectively reasonable under the circumstances.¹⁴² He therefore runs some risk of actual liability, unlike those protected by an absolute immunity.

In its cases the Court has identified three basic policy rationales to support its doctrines of officer immunity: (1) the idea that it is unjust to impose personal liability on a public servant who is required by law to exercise discretion, especially if he acts in good faith; (2) the fear that the threat of such liability would make him timid in the exercise of his duties, to the detriment of the public interest; and (3) the worry that such potential liability might deter people from entering into government service.¹⁴³ In government activities where these three concerns are thought most compelling, such as the enactment of statutes by legislators and the trial of lawsuits by judges, the officers in question are

138. See, e.g., *Stump v. Sparkman*, 435 U.S. 349, 354-56 (1978).

139. See, e.g., *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials and officers); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (superintendent of state hospital); *Wood v. Strickland*, 420 U.S. 308 (1975) (members of local school board); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (governor and other executive officers of state); *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (municipal police officers).

140. *Gomez v. Toledo*, 100 S. Ct. 1920, 1923-24 (1980).

141. *Gilker v. Baker*, 576 F.2d 245 (9th Cir. 1978) (burden of proof); *McCray v. Burrell*, 516 F.2d 357, 370 (4th Cir. 1975) (en banc), *cert. dismissed*, 426 U.S. 471 (1976) (burden of proof).

142. [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

143. *Wood v. Strickland*, 420 U.S. 308, 319-320 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). See generally *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1197-1204 (1977).

given an absolute immunity. In other contexts the lesser protection afforded by the good faith immunity will do. Nevertheless, both forms of immunity are rooted in concerns extrinsic to the general goal of section 1983, which is to enforce the Constitution.¹⁴⁴ In addition, both have the same effect when proven: The plaintiff is left with a theoretical remedy against the officer which, for reasons having nothing to do with how much the plaintiff has been hurt, has come up empty as a matter of law.

The lucky plaintiff who manages to sidestep these officer immunities must then face numerous and formidable practical obstacles to obtaining compensation for his injuries. Thus, the plaintiff may have trouble even identifying the wrongdoer, though it is clear that the wrongdoer must be an officer of the state.¹⁴⁵ Furthermore, once the defendant is identified, it may be difficult to convince a jury to render a truly adequate verdict against him: He may be sympathetically perceived as a figure of authority who was just doing his job.¹⁴⁶ Finally, even if the plaintiff obtains a judgment, he will likely encounter difficulty in collecting it.¹⁴⁷

There are those who will leap all of these hurdles and actually collect adequate personal judgments against state officers who abused their constitutional rights. Yet most commentators agree that these are the lucky few, and that the large majority of claimants go away empty-handed.¹⁴⁸ Moreover, it has been suggested that without the threat of

144. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.) (absolute immunity of certain federal officers upheld because "[i]n this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation").

145. See, e.g., *Howell v. Cataldi*, 464 F.2d 272, 282-84 (3d Cir. 1972) (plaintiff, beaten by several policemen, suffers directed verdict for failure to prove the specific identities of his assailants). Moreover, only those officers who ordered or participated in the unconstitutional conduct are responsible in damages, so the plaintiff will not likely be able to collect from the identifiable supervisors of the unidentified individuals who wronged him. See, e.g., *Johnson v. Glick*, 481 F.2d 1028, 1033-34 (2d Cir.), cert. denied, 414 U.S. 1033 (1973); cf. *Dunlop v. Munroe*, 11 U.S. (7 Cranch.) 242, 269 (1812) (normal principles of respondeat superior inapplicable to supervisors in public office). See also *Rizzo v. Goode*, 423 U.S. 362, 375 (1976).

146. Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1347 (1976). This problem, as well as all the others discussed in text, are also encountered in the analogous context of suits for damages against federal officers brought directly under the Constitution. See Note, "Damages or Nothing"—*The Efficacy of the Bivens-Type Remedy*, 64 CORNELL L. REV. 667, 702-03 (1979); text accompanying notes 422-30 *infra*.

147. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977) ("Officials often lack the means to satisfy judgments rendered against them"); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections* (pt. 1), 60 VA. L. REV. 1, 29 (1974); cf. S. REP. NO. 588, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 2789, 2790 ("Of course, Federal agents are usually judgment proof so . . . [a suit for damages against them for their constitutional violations] is a rather hollow remedy").

148. Professor Jaffe has said that "it is perhaps a realistic statement of the law that liability of

broader actual liability, the section 1983 remedy provides at best minimal deterrence against unconstitutional action by officer-defendants, and therefore the Court may have painted the immunity doctrines with too broad a brush.¹⁴⁹ Even were this assessment of the general picture erroneous, however, there is no question but that a large number of people whose constitutional rights have been violated have no effective remedy against state officers. For these people, only state or local government liability will provide actual compensation. The courts, which played the major role in creating this predicament by their evolution of the officer immunity doctrines, ought to recognize the interdependence of officer and governmental liabilities in evaluating the legitimacy of these plaintiffs' claims on the public fisc.¹⁵⁰ As it happens, the Supreme Court did just that last Term in *Owen v. City of Independence*,¹⁵¹ a case where the eleventh amendment was not a bar to the creation of strict governmental liability in federal court for certain constitutional wrongs. The *Owen* decision provides a partial solution to the conundrum of who must pay for the harm caused by unconstitutional state action.

4. Damages Against Local Governments

Counties, municipalities, school boards, and other units of local government are not entitled to the protection of the eleventh amendment, even though the actions of their agents are considered those of the state for the purposes of the fourteenth amendment and other constitutional restraints on state action.¹⁵² Consequently, these entities and

an officer for damages for his 'illegal' acts is not the rule but the exception." Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 221 (1963). This belief is generally shared. See, e.g., Bermann, *supra* note 147; Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526, 528, 540 (1977); Kates & Kouba, *Liability of Public Entities under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 136-37 (1972); McCormack, *supra* note 147, at 29.

149. E.g., Freed, *supra* note 148, at 528, 540; Oakes, *supra* note 137, at 940-44.

150. As Professor Davis has said, "[p]roblems about governmental tort liability can no longer be adequately considered without taking into account officers' tort liability. The two subjects are interdependent." 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.18, at 213 (Supp. 1980). See also Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 244 (1979). Congress has recognized this interdependence as it applies to remedies for unconstitutional actions by federal officers, see S. REP. NO. 588, *supra* note 147, at 2790, and has provided for a remedy against the United States for certain such actions. See 28 U.S.C. § 2680(h) (1976).

151. 445 U.S. 622 (1980).

152. Compare *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (eleventh amendment inapplicable), with *Ward v. Love County*, 253 U.S. 17, 24 (1920) (fourteenth amendment "binds the county as an agency of the State"). Federal courts have occasionally expressed the view that the eleventh amendment defense is available to some sub-state political entities, such as state universities and colleges. See, e.g., *Hander v. San Jacinto Junior College*, 519 F.2d 273, 279-80 (5th Cir. 1975); *George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund*, 493 F.2d 177, 180 (1st Cir. 1974). As the Court said in the *Mount Healthy* case, the availa-

their officers have always been subject to suit in federal courts under circumstances where the same type of action against states or state officers would have been barred by the eleventh amendment.¹⁵³ Early cases assumed without analysis that federal courts had jurisdiction because a suit to redress or prevent a constitutional violation by a unit of local government arose under the Constitution within the meaning of the statute giving federal courts their general federal question jurisdiction, 28 U.S.C. § 1331.¹⁵⁴ However, when the victim of an unconstitutional arrest and search by the Chicago police sued the City of Chicago in a federal district court to recover damages under section 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), the Court held in its 1961 decision, *Monroe v. Pape*,¹⁵⁵ that municipalities were not "persons" subject to liability under that statute. The Court relied principally on the congressional rejection, in 1871, of the so-called Sherman Amendment to section 1983 to support its conclusion that Congress did not intend to make local governments answerable.¹⁵⁶ That proposed amendment would have made municipalities liable for damages done to the persons or property of their inhabitants by private individuals "riotously and tumultuously assembled."¹⁵⁷ Following through on the implications of *Monroe*, the Court held in three later cases that local governments could not be sued under section 1983 whatever the form of relief sought or theory of liability advanced.¹⁵⁸

bility of the defense to these units "depends, at least in part, upon the nature of the entity created by state law." 429 U.S. at 280. And the dispositive factor in this analysis seems to be whether any resulting judgment will be paid out of the state treasury. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1980). However, "the Court has consistently refused to construe the [eleventh] amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" *Id.* at 401. See also *Mount Healthy*, 429 U.S. at 280-81 ("a local school board such as petitioner is more like a county or city than it is like an arm of the State").

153. Compare *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (barring suit for injunctive relief against state by name) with *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913) (by implication) (suit for injunctive relief against city permitted).

154. See, e.g., *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 279-80 (1913) (jurisdiction premised on the suit "arising under" the Constitution within the meaning of § 1331's predecessor). Section 1983 was not "discovered" as a vehicle to enforce the Constitution against the states and their political subdivisions until relatively late in the nation's history. See HART & WECHSLER, *supra* note 7, at 950 & n.3. The Court's early decisions approving lower federal court injunctions against unconstitutional state action rested on the unspoken premise that the cases arose directly under the relevant provisions of the Constitution. See *Bell v. Hood*, 327 U.S. 678, 684 (1946).

155. 365 U.S. 167 (1961).

156. *Id.* at 191.

157. CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871).

158. *Aldinger v. Howard*, 427 U.S. 1, 6-19 (1976) (action against county under state law cannot be joined by pendent jurisdiction to a § 1983 action against county officials); *City of Kenosha v. Bruno*, 412 U.S. 507, 511-13 (1973) (municipality is not liable for equitable relief under § 1983); *Moor v. County of Alameda*, 411 U.S. 693, 698-710 (1973) (county is not liable for damages under § 1983 even though it has no immunity under state law).

Nevertheless, some of the Court's later decisions seemed embarrassingly inconsistent with *Monroe*,¹⁵⁹ and most federal courts of appeal managed to avoid it by reverting to the theory of the early cases and sustaining suits against local governments on causes of action drawn directly from the Constitution.¹⁶⁰ In 1978, the Court in *Monell v. Department of Social Services*¹⁶¹ undertook a thorough reevaluation of *Monroe* and the legislative history surrounding passage of the 1871 Civil Rights Act. The Court concluded that as a general matter Congress did intend municipalities and other units of local government to be covered by the generic word "persons" in section 1983.¹⁶² Congress'

159. See *Monell v. Department of Social Serv.*, 436 U.S. 658, 663 nn.5 & 6 (1978) (citing cases decided on the merits where the "principal defendant was a school board," and § 1983 was the basis of the plaintiffs' claims).

160. These decisions relied on the theory of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), which held that under certain circumstances a substantive cause of action for damages could be implied directly from the Constitution and enforced by federal district courts pursuant to their general federal question jurisdiction under 28 U.S.C. § 1331(a) (1976). See generally text accompanying notes 359-434 *infra*. Although the Supreme Court never has decided whether the *Bivens* case extends this far, numerous lower federal court decisions, prior to the *Monell* case, upheld jurisdiction under this theory against units of local government. See, e.g., *Lister v. Commissioners Court*, 566 F.2d 490, 492-93 (5th Cir. 1978) (injunctive relief against county governing body); *Delluins v. Powell*, 566 F.2d 216, 222-23 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1979) (damages against District of Columbia); *Gentile v. Wallen*, 562 F.2d 193, 196-97 (2d Cir. 1977) (damages and injunctive relief against school board); *Richmond Elks Hall Ass'n v. Richmond Dev. Agency*, 561 F.2d 1327, 1330-34 (9th Cir. 1977) (damages against municipal agency); *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975) (damages against county). Other cases are collected and analyzed in Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 928-29 nn.40-46 (1976). But see *Koska v. Hogg*, 560 F.2d 37, 42-45 (1st Cir. 1977) (no cause of action for damages against municipality "at least [where] there has been no municipal involvement in the wrongdoing"); *Smetanka v. Borough of Ambridge*, 378 F. Supp. 1366, 1378 (W.D. Pa. 1974) (no cause of action against municipality). The pre-*Monell* commentary was generally favorable to the implication of a constitutional cause of action against local governments. See, e.g., Bodensteiner, *Federal Court Jurisdiction of Suits Against "Non-Persons" for Deprivation of Constitutional Rights*, 8 VAL. U.L. REV. 215 (1974); Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U.L. REV. 770 (1975); Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HAST. CON. L.Q. 531 (1977). For developments in this area since the Court's *Monell* decision, see note 190 *infra*.

161. 436 U.S. 658 (1978).

162. *Id.* at 683-90. The Court relied on several lines of evidence. First, it pointed to statements in debate, by both supporters and opponents of the measure, that § 1983 was to have a very broad impact in protecting federal rights against unconstitutional state action, including the provision of a remedy for unconstitutional takings of property by municipalities without just compensation. *Id.* at 683-87. Second, it noted that "municipal corporations were routinely sued in the federal courts and this fact was well known to Members of Congress." *Id.* at 688. And third, it pointed out that the "Dictionary Act," 16 Stat. 431 (1871), passed only months before § 1983, provided that "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate," and that the phrase "bodies politic and corporate" was understood by Congress in 1871 to include municipalities. 436 U.S. at 688-89.

Nevertheless, the Court carefully qualified its decision by stating that "[o]ur holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes." *Id.* at 690 n.54; see *Vercher v. Harrisburg Housing Auth.*, 454 F.

rejection of the Sherman Amendment, the Court said, meant only that Congress disapproved of the sort of far-reaching vicarious liability that the amendment would have imposed, and not that the Legislature meant to exclude local governments from liability in all cases.¹⁶³

However, fleshing out the contours of section 1983 liability for public entities was another matter. The *Monell* case itself was a class action by female employees for injunctive relief and back pay against the City of New York and two of its agencies. The basis of the complaint was an assertedly unconstitutional official policy forcing pregnant employees to take unpaid leaves of absence before medical necessity required them. Moreover, that this policy was indeed official policy of the City of New York was not disputed.¹⁶⁴ Under the circumstances, therefore, there was little doubt that the city had "subject[ed], or cause[d] to be subjected" these plaintiffs to a deprivation of their constitutional rights within the meaning of section 1983. The kind of municipal liability Congress rejected in the Sherman Amendment—for the acts of mobs of private citizens—was a far cry from this case. Instead, the *Monell* facts showed a conscious decision on the part of highly placed and responsible officers of the city to chart an unconstitutional course. If it was fair to subject the city to suit under section 1983 in any case, this was it.¹⁶⁵

But what of the city's actual liability, as opposed to its suability,

Supp. 423, 425 (M.D. Pa. 1978) (local housing authority liable after *Monell*); *Gill v. Monroe County Dep't of Social Serv.*, 79 F.R.D. 316, 336 (W.D.N.Y. 1978) (county liable after *Monell*). See generally note 152 *supra*. This caveat presaged the Court's later conclusion, in *Quern v. Jordan*, 440 U.S. 332 (1979), that § 1983's "persons" does not include states. See text accompanying notes 72-80 *supra*.

163. 436 U.S. at 669-83. Thus, municipal liability for lawlessness by private individuals would have, in effect, thrust on cities an obligation to keep the peace. The Court said that the opponents of the Sherman Amendment thought Congress did not have the constitutional power to impose this obligation under the "reigning constitutional theory of . . . [the] day." *Id.* at 676; see note 4 *supra*. By contrast, the Court said, "the inference is strong that Congressmen in 1871 would have drawn . . . [the] distinction" between this species of remote vicarious liability and liability where the city had "defaulted in a state imposed duty to keep the peace" or was in some other way itself at fault in the deprivation of a constitutional right. 436 U.S. at 681 n.40.

164. *Id.* at 661 n.2.

165. Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

Id. at 690-91 (footnotes omitted).

under section 1983? The Court was less than generous on this score. First, it said that "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under section 1983 on a *respondeat superior* theory."¹⁶⁶ The Court based this conclusion on the language of section 1983 and Congress' rejection of the Sherman Amendment, both of which gave rise to what the Court questionably termed a "quite strong" inference that Congress did not intend to impose vicarious liability of any variety on municipalities.¹⁶⁷ Thus, *Monell* probably did nothing to ameliorate the predicament of plaintiffs in the position of those in *Monroe v. Pape*, who were the victims of police misconduct that violated the Constitution but that was also palpably illegal under state and municipal law.¹⁶⁸ What is more, even though the particular claimants in *Monell* were concededly the victims of unconstitutional official policy, the Court said that the question of the city's *actual* liability was not before it. Accordingly, it expressed no view on "the question whether [municipal] bodies should be afforded some form of official immunity."¹⁶⁹

In *Owen v. City of Independence*¹⁷⁰ the Court settled this question adversely to the claim of immunity, holding that a city is strictly liable in damages for its unconstitutional official policies, even though they were adopted in good faith reliance on then existing constitutional law.

166. *Id.* at 691.

167. *Id.* at 692-93 n.57. The Court found that the words "subject or cause to be subjected" in § 1983 were implicitly hostile to any kind of vicarious liability, and that Congress' rejection of the Sherman Amendment evidenced a similar intent. Yet in doing so it seems to have fallen into the same erroneous analysis embraced in *Monroe v. Pape*. That Congress rejected one form of far-reaching liability does not logically mean that it rejected a more limited one. Nor would municipal liability for the constitutional torts of the municipality's own agents "have raised all the constitutional problems associated with the obligation to keep the peace." *Id.* at 693; see note 163 *supra*. Rather, it would be sensible to consider the municipality liable when it has chosen to employ officers to "keep the peace," but in the course of doing so those officers have violated constitutional rights.

Although the scholarly reaction to the "official policy" portion of the *Monell* decision has been generally favorable, most commentators have criticized the Court's refusal to hold local governments vicariously liable under § 1983. See, e.g., Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409, 412-13 (1978); Note, *Monell v. Department of Social Services: One Step Forward and a Half Step Back for Municipal Liability Under Section 1983*, 7 HOF. L. REV. 893, 921-22 (1979); Comment, *Municipal Liability Under Section 1983 for Civil Rights Violations after Monell*, 64 IOWA L. REV. 1032, 1047-51 (1979). Others have questioned the ability of the courts to make principled distinctions between "official policy" and other forms of government action. See Comment, *Respondeat Superior Liability of Municipalities for Constitutional Torts After Monell: New Remedies to Pursue?*, 44 MO. L. REV. 514, 528 (1979). But see Schnapper, *supra* note 150. See also note 3 *supra*.

168. 365 U.S. at 172. In *Monell* the Court said that "[n]o useful purpose would be served by an attempt at this late date to determine whether *Monroe* was correct on its facts." 436 U.S. at 701 n.66.

169. 436 U.S. at 701.

170. 445 U.S. 622 (1980).

The plaintiff in *Owen* was a police chief who had been fired without a hearing by the city manager acting on authority of a resolution passed by the city council. He sued the city as well as the city manager and individual members of the city council in federal court under section 1983, claiming that his discharge without a hearing violated his rights to substantive and procedural due process under the fourteenth amendment.¹⁷¹ In this the Court agreed with him, holding that he had been denied a "liberty" interest without due process of law when the city had not given him an opportunity to clear his name in a hearing, as he had requested.¹⁷² Likewise, the Court found, although not without dispute from the dissent, that the plaintiff's unconstitutional discharge had been made pursuant to official policy within the meaning of *Monell*.¹⁷³ However, the court of appeals had held that even though the city was suable, it was entitled to a good faith immunity from the plaintiff's claims because the constitutional right to a name-clearing hearing under the circumstances had not been clearly established in the case law until after the plaintiff's discharge.¹⁷⁴ The city, said the court of appeals, "should not be charged with predicting the future course of constitutional law."¹⁷⁵ Although this argument is not without superfi-

171. *Id.* at 630.

172. In connection with the plaintiff's discharge, the city, "through the unanimous resolution of the City Council," allegedly released to the public false statements charging him with misappropriations of drugs and other items from the police property room. *Id.* at 633 n.13. Under the circumstances, the Court said, its decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), required the city to afford the plaintiff notice and an opportunity to be heard in defense of his good name.

173. 445 U.S. at 633 & n.13. Justice Powell took issue with the Court's conclusion that the plaintiff had been denied a "liberty" interest by an official policy of the city. In a dissenting opinion, joined by Chief Justice Burger and Justices Stewart and Rehnquist, he contended that: (1) Under *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), the plaintiff was not entitled to a name-clearing hearing unless the city made a public statement seriously damaging his standing in the community; (2) no such statement was made by the city in firing the plaintiff since the allegedly defamatory reports "were never released"; and (3) although one councilman made a speech criticizing the plaintiff, "the city cannot be held liable for . . . [his] statements on a theory of *respondeat superior* . . . [and] the statements of a single councilman scarcely rise to the level of municipal policy." 445 U.S. at 662-63 & n.5.

The majority, however, agreed with the court of appeals that the plaintiff's firing and the stigma attached to his name were "caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy." *Id.* at 633 (quoting *Owen v. City of Independence*, 589 F.2d 335, 337 (8th Cir. 1978)). Since as a matter of law there was no constitutional violation unless the stigma came from or was caused by the city, the Court's finding of the latter also *ipso facto* proved that the stigma was inflicted by the official policy of the city within the meaning of *Monell*. Thus the usually separate questions, was there a violation and is the city suable, coalesced on the particular facts of *Owen*.

174. As the court of appeals said, "[t]he Supreme Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), crystallized the rule establishing the right to a name-clearing hearing . . . two months after the discharge in the instant case." *Owen v. City of Independence*, 589 F.2d 335, 338 (8th Cir. 1978).

175. 589 F.2d at 338.

cial appeal, the Court rejected it for what it thought were deeper reasons of public policy.

In holding that no municipal immunity whatsoever was warranted, the Court relied heavily on both the principle of compensating victims of unconstitutional acts and on the inadequacies of the section 1983 remedy against state and local officers individually.¹⁷⁶ The Court also pointed out that constitutional goals were served by strict liability for constitutional violations because of its deterrent effect on government decisionmakers.¹⁷⁷ On the other hand, the Court found no basis, either in history or in policy, for immunizing local governments. Unlike individual officers, the Court held, governments need no immunity to protect them from the uniquely human consequences of personal liability that motivated the Court's absolute and qualified immunity decisions.¹⁷⁸ On the contrary, local governments are in an excellent position to spread the costs of this liability among those who benefit from government activities, the taxpayers.¹⁷⁹ The extent to which con-

176. A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated.

445 U.S. at 651 (footnote omitted).

177. Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.

Id. at 651-52 (footnotes omitted).

178. See text accompanying note 143 *supra*. It is not unjust to make the city pay, said the Court, because "[e]lemental notions of fairness dictate that one who causes a loss should bear the loss." 445 U.S. at 654. Furthermore, the Court predicted that the threat of government liability will have, at most, a marginal effect on the individual official's willingness to exercise discretion. *Id.* at 655-56. Indeed, as a matter of constitutional policy, the possibility of municipal liability *ought* to inform that discretion. *Id.* at 656. Finally, said the Court, municipal liability obviously has no bearing on the willingness of citizens to participate in government, since there is no threat that they personally will be held strictly liable for unconstitutional policies. *Id.* at 654 n.38.

179. *Id.* at 654-55. The Court thus subscribed to the view of many state courts and commentators that government immunity doctrines are much broader than necessary, and that government liability for wrongs caused by its activities is the most appropriate policy solution to the problem of who should bear the loss. See note 24 *supra*. The Court's acceptance of this theory as it relates to harms caused by unconstitutional official policy, however, is in stark contrast to its rejection of the same theory as applied to harms inflicted by officers acting beyond the ambit of

stitutional policy goals predominated in the *Owen* Court's thinking is apparent in its rejection of two approaches to municipal immunity under section 1983 that were based on the common law as it existed in 1871. The first sought to distinguish between a city's governmental and proprietary functions—immunity for the former, liability like that of a private corporation for the latter. The second sought to immunize discretionary acts, while providing liability for ministerial ones.¹⁸⁰ The Court gave reasons why these historical forms of immunity should not be incorporated into section 1983.¹⁸¹ But it never quite succeeded in showing that Congress could not have intended to incorporate them, since Congress was presumably aware of their existence when section 1983 was passed.¹⁸² This latter approach to the incorporation of historical immunities into section 1983 had seemed to be crucial in the Court's earlier official immunity decisions.¹⁸³ The *Owen* decision makes clear, however, that it is not enough that a particular form of immunity existed in 1871. To be adopted as a qualifier to liability under the otherwise absolute language of section 1983, that immunity must advance goals which the Court feels are sufficiently weighty to overcome both the plaintiff's and society's interests in compensation

such policy. *Monell v. Department of Social Serv.*, 436 U.S. 658, 693-94 (1978). It should be noted that Justice Brennan authored the majority opinions in both cases.

180. See 2 F. HARPER & F. JAMES, *supra* note 24, § 29.6; W. PROSSER, *supra* note 23, § 131, at 977-84.

181. The Court said that the "governmental-proprietary" distinction was a "quagmire" which had led to "artificial and elusive distinctions." 445 U.S. at 644 n.26; see F. HARPER & F. JAMES, *supra* note 24, § 29.6, at 1621 ("No satisfactory test has been devised for distinguishing governmental from proprietary functions"). Moreover, cities were always subject to liability at common law, even for governmental activities, when the state removed their immunity. Because the Court in *Monell* had held that Congress intended to expose cities to liability under § 1983, the enactment of that statute was the equivalent of "the sovereign's enactment of a statute making [them] amenable to suit." 445 U.S. at 647. Any further immunity from actual liability, therefore, had to be supported by considerations of policy, not just historical precedent.

The Court also said that the common law immunity for discretionary functions likewise had no relevance to a city's § 1983 liability. It explained:

That common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

Id. at 649.

182. 445 U.S. at 676-79 (Powell, J., dissenting). Justice Powell also noted that "the current law[s] in 44 States and the District of Columbia . . . provide municipal immunity at least analogous to a 'good faith' defense against liability for constitutional torts," and that "[o]nly five States impose the kind of blanket liability constructed by the Court today." *Id.* at 680-83.

183. *Id.* at 666 (Powell, J., dissenting) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)) (§ 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them").

for, and deterrence of, constitutional violations.¹⁸⁴

This is powerful medicine. In holding as it did, the Court expressly recognized and implicitly rejected any concerns about the fiscal integrity of local governments.¹⁸⁵ All of this was done in the service of compensating victims of unconstitutional acts—of providing a viable, actual remedy where the rule of law was thought to require one. In short, the Court was not content with a remedy which, for a large class of plaintiffs, bears no fruit.¹⁸⁶ Instead, it cultivated one with the realistic promise of actual relief from the public fisc of local governments: A plaintiff has no recourse when a judgment against a state officer is returned unexecuted for lack of assets, but a local government that refuses to pay can be compelled to levy and collect taxes.¹⁸⁷

Nevertheless, the Court's holding in *Owen* fills only some of the gaps in the section 1983 remedy. It leaves untouched the Court's decision in *Monell* that local governments are immune from damages under section 1983 for unconstitutional acts perpetrated by their officers without the sanction of official policy or custom.¹⁸⁸ Likewise undisturbed by *Owen* is the holding of *Quern v. Jordan* that section 1983 gives no federal court remedy against the state itself, even in cases of

184. Hence the Court's use of the conjunctive in describing when it will incorporate an immunity into § 1983: "Where the immunity claimed by the defendant was well-established at common law at the time § 1983 was enacted, *and* where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity." 445 U.S. at 638 (emphasis added).

185. *Id.* at 654-57; see *Monell v. Department of Social Serv.*, 436 U.S. 658, 664-65 n.9 (1978) ("Mr. Justice Douglas, the author of *Monroe*, has suggested that the municipal exclusion might more properly rest on a theory that Congress sought to prevent the financial ruin that civil rights liability might impose on municipalities However, this view has never been shared by the Court, . . . and the debates do not support this position"). But see *Owen*, 445 U.S. at 672 (Powell, J., dissenting) ("several legislators expressed trepidation that the . . . strict liability approach [of the proposed Sherman Amendment to § 1983] could bankrupt local governments").

186. But cf. *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 124 (1874) (federal court may not levy execution against municipality's taxable property because "[t]he want of a remedy and the inability to obtain the fruits of a remedy are quite distinct").

187. The Court in numerous cases has held that mandamus to local officers requiring them to levy and collect taxes is an appropriate remedy for a federal court seeking to enforce an unsatisfied judgment against a local government. See *Labette County Comm'rs v. United States ex rel. Moulton*, 112 U.S. 217, 221 (1884); *United States ex rel. Riggs v. Board of Supervisors*, 73 U.S. (6 Wall.) 166, 198 (1868); *United States ex rel. Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 554-55 (1867). The court has also said that the propriety of this remedy is in no way lessened by the "diminished resources of the City." *City of Galena v. United States ex rel. Amy*, 72 U.S. (5 Wall.) 705, 710 (1867).

However, the Court has refused to authorize an injunction to levy taxes to this end, because it regarded mandamus to be an adequate remedy at law. *Walkley v. City of Muscatine*, 73 U.S. (6 Wall.) 481, 483-84 (1868). And for the same reason it held in *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 124-25 (1874) that a federal court could not use its equitable powers to levy execution directly against a municipality's taxable property.

188. 436 U.S. 658, 691-94 (1978).

unconstitutional official policy.¹⁸⁹ For victims of unconstitutional conduct by state and local officers in these situations, a state court remedy is the only realistic hope, or at least the best hope, for recovery.¹⁹⁰

II

STATE COURT REMEDIES AGAINST THE STATES FOR UNCONSTITUTIONAL ACTIONS: THE PROBLEM DEFINED

The individual left without an effective compensatory remedy under section 1983 against state officials or local governments has nowhere to turn for relief except the state. But with the limited exceptions already noted, Congress has not made state treasuries liable for the

189. 440 U.S. 332, 338-45 (1979). Nor is it likely that a claimant can evade the holding of *Quern* by suing a state under § 1983 in state court. See, e.g., *Edgar v. Washington*, 92 Wash. 2d 217, 595 P.2d 534 (1979), cert. denied, 444 U.S. 1077 (1980); cf. *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973) ("We find nothing . . . to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them"). This is not to say that a state cannot be liable in state court on other theories, but only that Congress did not include it in the class of persons suable under § 1983.

190. Although a constitutionally implied cause of action for damages against states in federal courts is precluded by the eleventh amendment, in theory such an implied respondeat superior cause of action against local governments in federal courts is possible even after *Monell*. See Blum, *supra* note 167, at 418. All lower federal courts that have considered this question have refused to imply such a remedy, however. See *Dean v. Gladney*, 621 F.2d 1331, 1335-37 (5th Cir. 1980); *Gordon v. City of Warren*, 579 F.2d 386, 391-92 (6th Cir. 1978); *Molina v. Richardson*, 578 F.2d 846, 851-53 (9th Cir.), cert. denied, 439 U.S. 1048 (1978); *Kedra v. City of Philadelphia*, 454 F. Supp. 652, 676-79 (E.D. Pa. 1978). See generally *The Supreme Court 1977 Term*, 92 HARV. L. REV. 57, 321 (1978). To the extent these federal court decisions rest on Congress' rejection of the Sherman Amendment as evidencing an implied intent to foreclose a constitutionally implied form of vicarious liability against local governments, they probably do not survive the Court's decision last Term in *Carlson v. Green*, 100 S. Ct. 1468 (1980). Compare *Kosta v. Hogg*, 560 F.2d 37, 42-44 (1st Cir. 1977), with text accompanying notes 478-86 *infra*. To the extent they rest on the idea that implied constitutional remedies are available only in fields where "Congress [has] not entered" they appear also to have been outdated by the *Carlson* decision. Compare *Molina v. Richardson*, 578 F.2d 846, 851 (9th Cir. 1978), with text accompanying notes 385-421 *infra*. Likewise, those cases, like *Molina*, which have refused to imply a constitutional cause of action for vicarious liability against local governments because the § 1983 remedy against officers is adequate, are inconsistent with the facts and with the premises of both the *Carlson* and *Owen* decisions. Compare *Molina*, 578 F.2d at 853, with text accompanying notes 468-77 *infra*.

Nevertheless, these federal court cases may be supportable on federalism grounds alone. See *Molina*, 578 F.2d at 852 ("if the federal courts inject themselves too rapidly into disputes between local governments and individual citizens, the states and their political subdivisions will likely be inhibited from seeking creative, efficacious resolutions to such disputes"). See generally text accompanying notes 72-79 *supra*. But while it may be inappropriate for this reason for a federal court to subject local governments to treasury liability for constitutional torts, identical action by the state's own courts obviously does not raise the same concerns. This is not to say that constitutionally implied vicarious liability for local governments in state courts does not raise other concerns, such as the financial viability of those governments. See text accompanying notes 568-71 *infra*. Rather, it seems clear that if such a constitutionally implied remedy is appropriate somewhere, it is at the very least appropriate in state courts.

consequences of unconstitutional state action. Therefore, the claimant, to be successful, must be able to spin out from the Constitution itself a right to effective redress against the state. Since lower federal courts are precluded by the eleventh amendment from even hearing this argument, the claimant must convince a state court of general jurisdiction, and later, possibly, the Supreme Court on review, of the correctness of several related, but analytically distinct, basic propositions: (1) To the extent the doctrine of sovereign immunity is cast in procedural terms as a barrier to the state court's jurisdiction to consider the propriety of any and all claims against the state, the doctrine cannot, because of the supremacy clause, survive the plaintiff's claim of a right to a hearing on *whether* the Constitution demands a state remedy; (2) there is no implied doctrine of substantive state sovereign immunity in the Constitution, or if there is one as to claims based on state law, it is not adequate to preclude state liability in its own courts for some or all violations by the state of an individual's federal constitutional rights; and (3) an implied constitutional cause of action for damages against the state in its own courts is either appropriate or necessary to vindicate the plaintiff's constitutional rights. Only if all three propositions are correct will it follow as a syllogism under the supremacy clause that the state court should award the requested relief "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹⁹¹ The next three sections will treat these propositions and their consequences.

III

JURISDICTIONAL SOVEREIGN IMMUNITY AND ITS SUBORDINATION TO THE SUPREMACY CLAUSE

It is now established that a state's sovereign immunity and its eleventh amendment immunity are two different things. This has not always been so. In several of the Court's early decisions reviewing suits against states in state courts, it seemed to analyze the immunity question in terms of the eleventh amendment.¹⁹² However, in its 1978 decision, *Nevada v. Hall*,¹⁹³ the Court held that the eleventh amendment was no barrier to suit by California citizens against the State of Nevada

191. U.S. CONST. art. VI, cl. 2. The duty of state courts to give relief required by the Constitution in cases within their jurisdiction is well established. *See, e.g.,* *Robb v. Connally*, 111 U.S. 624, 637 (1884). The draftsmen of the supremacy clause plainly intended it to bind state judges to the national government, notwithstanding their oaths to support and follow state constitutions in conflict with valid federal authority. *See* J. GOEBEL, *supra* note 7, at 215, 224. Indeed, the state courts' competence and duty to decide federal questions, which in effect convert them into federal courts *pro hac vice*, were facts relied on by those who opposed the provision for a federal judiciary in the original Constitution. *See generally* HART & WECHSLER, *supra* note 7, at 1, 9-12.

192. *See, e.g.,* *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642-43 (1911); *Poindexter v. Greenhow*, 114 U.S. 270, 296-97 (1885).

193. 440 U.S. 410 (1979).

in a California state court.¹⁹⁴ The Court reviewed its prior cases dealing with the eleventh amendment and the relevant debates surrounding the adoption of the Constitution and concluded that they concerned only "questions of federal court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts."¹⁹⁵ And last Term, in *Maine v. Thiboutot*,¹⁹⁶ the Court was asked to affirm that the eleventh amendment prohibited Congress from setting aside the states' immunity from suit in their own courts on a purely statutory cause of action. The Court concluded, however, that "[n]o Eleventh Amendment question is present, of course, where an action is brought in a state court since the amendment, by its terms, restrains only '[t]he Judicial power of the United States.'"¹⁹⁷

The Court's decisions separating the threads of the eleventh amendment from those of state sovereign immunity comport fully with the history and purpose of the amendment. As has been seen, the impetus for the eleventh amendment was the fear that federal courts, tribunals of a new and different sovereign, would bring states to the bar of justice in a hostile setting.¹⁹⁸ There is no historical evidence that the framers of that amendment feared the exposure of states to liability in their own courts.¹⁹⁹ To the contrary, when the argument was made in

194. The plaintiffs sued to recover damages for injuries suffered in an automobile accident in California caused by the negligence of an employee of the University of Nevada, an agency of the state. *Id.* at 411-12. The portion of the *Hall* decision rejecting Nevada's claim of immunity from actual liability, as opposed to its immunity from suit, is explored in text accompanying notes 240-73 *infra*.

195. 440 U.S. at 420-21.

196. 100 S. Ct. 2502 (1980).

197. *Id.* at 2506 n.7. The *Thiboutot* case held that § 1983 permitted suit in a state court for prospective relief to remedy a state's denial of welfare benefits owing to the plaintiffs as a matter of federal statutory law, and that 42 U.S.C. § 1988 (1976) permitted an award of attorneys' fees in such a case to be paid out of the state treasury. The case is explored further in text accompanying notes 287-325 *infra*.

198. See *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring) ("Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this," that is, in a suit effectively against a state in federal court for monetary liability); cf. *Edelman v. Jordan*, 415 U.S. 651, 677 n.19 (1974) ("Whether Illinois permits such a suit to be brought against the State in its own courts is not determinative of whether Illinois has relinquished its Eleventh Amendment immunity from suit in the federal courts"). But see D. CURRIE, *supra* note 47, at 573 ("do you really believe the storm over *Chisholm v. Georgia* was over so trivial a matter as the choice of forum?").

199. Indeed, in *Nevada v. Hall* the Court was not even able to find evidence that the Framers feared the much more daunting potential of a state being sued in another state's courts. 440 U.S. at 420-21. It should be noted, however, that the House of Representatives rejected a proposed alteration to the final draft of the eleventh amendment which would have denied federal court jurisdiction only "[w]here such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect." 4 ANNALS OF CONG. 476 (1794). At best, how-

Hollingsworth v. Virginia that the eleventh amendment ought not be applied retroactively to cases on the Supreme Court's docket that had been instituted before its ratification, Attorney General Lee replied, on behalf of the defendant states: "A law, however, cannot be denominated retrospective, or *ex post facto*, which merely changes the remedy, but does not affect the right: In all the states, in some form or other, a remedy is furnished for the fair claims of individuals against the respective governments."²⁰⁰

Nevertheless, constitutionally implied damage remedies have been primarily, although not exclusively, the creations of federal courts. In *Bivens v. Six Unknown Named Agents*,²⁰¹ the Court established the substantive power of the federal judiciary to create remedies appropriate to the enforcement of constitutional rights without any prior approval or guidance from Congress. However, that substantive power came into being only because Congress has given jurisdiction to federal courts over cases arising under the Constitution.²⁰² Now that the amount in controversy requirement for federal question jurisdiction has been repealed,²⁰³ a plaintiff almost always can invoke federal court jurisdiction and seek a constitutionally implied damage remedy, although he may not, of course, ultimately prevail on the merits.²⁰⁴ The one exception is when he seeks such a remedy against a state, for then

ever, this implies that Congress wished the reversal of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), to be absolute. In other words, federal courts would be without jurisdiction whatever the supremacy clause duties of state courts were. This reading is supported by the Senate's rejection of two other proposals to soften the impact of the eleventh amendment on federal court jurisdiction over states as defendants—one which preserved federal jurisdiction in cases arising under treaties, and another which foreclosed such jurisdiction only on claims arising before the ratification of the amendment. 4 ANNALS OF CONG. 30 (1794). Moreover, the Court has never accorded weight to Congress' rejection of these proposals in construing the eleventh amendment. In fact, it found in *Hans v. Louisiana*, 134 U.S. 1 (1890), that the amendment impliedly barred a suit in federal court against a state by one of its own citizens, even though resolutions expressly prohibiting claims against states by "any person or persons, whether citizen or citizens" had been introduced in both the House and the Senate the day after *Chisholm* was decided, but then tabled. Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 226-27 (1968).

200. 3 U.S. (3 Dall.) 378, 381 (1798).

201. 403 U.S. 388 (1971).

202. 28 U.S.C. § 1331 (1976); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 405 (1971) (Harlan, J., concurring in the judgment).

203. Until December 1, 1980, federal question jurisdiction lay only if the "matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1976). Now, by Pub. L. No. 96-486, § 2, 49 U.S.L.W. 196 (Jan. 13, 1981), Congress has entirely removed the amount in controversy requirement of § 1331(a).

204. See, e.g., *Bell v. Hood*, 71 F. Supp. 813 (C.D. Cal. 1947) (affirming dismissal on the merits of a constitutionally based cause of action against federal officers, on remand from the Supreme Court's decision in *Bell v. Hood*, 327 U.S. 678 (1946), that the court had jurisdiction to decide this question); cf. *City of Kenosha v. Bruno*, 412 U.S. 507, 514 (1973) (by implication) (federal district court has jurisdiction under § 1331 to decide whether to imply from the fourteenth amendment a cause of action for injunctive relief against a municipality).

the eleventh amendment denies federal courts jurisdiction no matter how appropriate the remedy might be.²⁰⁵ Such a plaintiff must therefore apply to a state court, where the eleventh amendment does not operate. But the rub is that state courts derive their basic jurisdiction from state law, not from Congress or the Constitution,²⁰⁶ and state sovereign immunity law may seem to preclude the plaintiff's damages claim against the state.

It has been settled at least since the Court's 1876 decision in *Clafin v. Houseman*²⁰⁷ that federal statutory claims which Congress has not expressly placed within the exclusive jurisdiction of federal courts are capable of being litigated in state courts. That is to say, state courts at the very least may choose to exercise jurisdiction over such claims if "by their own constitution they are competent to take it."²⁰⁸ The same principle would seem applicable to claims based upon the federal Constitution itself. In New Jersey, for example, state law precludes an award of monetary relief against the state "except in actions founded upon the Constitution."²⁰⁹ In *Strauss v. State*,²¹⁰ a New Jersey trial judge used the jurisdiction thus granted him to imply a cause of action for damages against the state directly from the fourteenth amendment, on the authority of the *Bivens* decision. Several other state courts have similarly made use of their general state law jurisdiction to imply remedies from the Constitution against government units for their violations of federal constitutional rights.²¹¹

205. In *Hans v. Louisiana*, 134 U.S. 1, 18 (1890), for example, the Court held that a federal circuit court had no jurisdiction even to consider the plaintiff's claim against the state for its alleged breach of the contract clause in refusing to pay interest due on its bonds. There was no diversity, as the plaintiff was a citizen of the state he sued; hence, federal jurisdiction in the case had to rest, if at all, on the ground that the plaintiff's claim arose under the Constitution. That it probably did not under modern theories of "arising under" jurisdiction, see *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), is beside the point. The *Hans* Court assumed the case arose under the contract clause and decided squarely that even on this assumption the eleventh amendment precluded consideration of the case altogether.

206. See, e.g., *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring).

207. 93 U.S. 130 (1876) (state court may entertain jurisdiction over suits by assignee in bankruptcy arising under federal bankruptcy statutes); see *THE FEDERALIST* No. 82, at 421 (A. Hamilton) (Everyman's Library ed. 1911) ("state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited").

208. *Clafin v. Houseman*, 93 U.S. 130, 136 (1876).

209. N.J. REV. STAT. § 52:4A-1 (1980-81).

210. 131 N.J. Super. 571, 330 A.2d 646 (Super. Ct. Law Div. 1974). The plaintiff in *Strauss* alleged he had been wrongfully convicted in state court of a narcotics offense as a result of a conspiracy between the state (through its prosecutors) and one of its undercover police agents to suppress exculpatory evidence which the plaintiff had a constitutional right to receive. *Id.* at 572-73, 330 A.2d at 647.

211. See, e.g., *Kewin v. Board of Educ.*, 65 Mich. App. 472, 482-83, 237 N.W.2d 514, 519-20 (1976) (against municipality for damages; no good faith immunity granted); *T & M Homes, Inc. v. Township of Mansfield*, 162 N.J. Super. 497, 504-06, 513-18, 393 A.2d 613, 617, 621-24 (Super. Ct. Law Div. 1978) (against municipality for damages and injunctive relief; good faith immunity

It is clear on the basis of principle and precedent that once a state court has jurisdiction over a federal claim, the supremacy clause requires it to hear that claim fairly in accordance with what valid federal law mandates.²¹² It is also clear that state law must give way to the extent it interferes with or impedes the state judge's overriding federal duty.²¹³ Thus, at the very least state law doctrines of sovereign immunity not cast in jurisdictional terms cannot stand in the way of a state judge's duty to decide *whether* the Federal Constitution calls for an implied remedy against the state. For example, in many states sovereign immunity exists, if at all, as a common law doctrine.²¹⁴ The courts in these states possess general jurisdiction over all claims for relief, but many have demed themselves the substantive power to hear some or all claims against their governments.²¹⁵ Their basic state law jurisdiction does not in terms exclude suits against states. Therefore they must exercise that jurisdiction and give the plaintiff his remedy *if* the Constitution requires it as a matter of substantive law. In those states where the courts have altered the common law to permit ordinary tort claims against the state, there is the additional compulsion that a refusal to entertain existing jurisdiction over constitutionally based claims against the state would be an unconstitutional discrimination against federal rights.²¹⁶

granted "except as to taking claims"); *Papadopoulos v. Oregon State Bd. of Higher Educ.*, 14 Or. App. 130, 178, 511 P.2d 854, 876 (1973) (against state for damages); *cf. Tabor v. Moore*, 81 Wash. 2d 613, 615-16, 503 P.2d 736, 737-38 (1972) (against state officers for injunctive relief). *But see Figueroa v. State*, 604 P.2d 1198, 1205-06 (Haw. 1979) (no implied cause of action against state).

212. Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them . . .

Robb v. Connolly, 111 U.S. 624, 637 (1884); *accord, Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-39 (1969); *see note 191 supra*.

213. *See, e.g., Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 362-64 (1952) (state court in FELA action must permit jury to determine factual issue of fraud even though state law entrusts it to judge); *Truax v. Corrigan*, 257 U.S. 312, 330 (1921) (due process requires state courts to give injunction against picketing in a labor dispute even though state law precludes it).

214. *See, e.g., Perkins v. State*, 252 Ind. 549, 557-58, 251 N.E.2d 30, 34-35 (1969) (judicially abrogating state's common law sovereign immunity from liability in tort for injuries stemming from the exercise of proprietary functions); *Danrille v. Associated Indem. Corp.*, 323 So. 2d 441, 442 (La. 1975) (judicially abrogating state's common law sovereign immunity in automobile tort cases); *accord, Jones v. State Highway Comm'n*, 557 S.W.2d 225, 227-28 (Mo. 1977); *Hicks v. State*, 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975); *Mayle v. Pennsylvania Dep't of Highways*, 479 Pa. 384, 402-03, 388 A.2d 709, 718-19 (1978).

215. *See, e.g., Boyce v. Lancaster County Natural Gas Auth.*, 266 S.C. 398, 223 S.E.2d 769 (1976); *Oroz v. Board of Connty Comm'rs*, 575 P.2d 1155, 1158 (Wyo. 1978).

216. The most fertile source of Supreme Court decisions construing the duty of state courts to assume their ordinary jurisdiction to enforce federal law in a nondiscriminatory fashion has been the Federal Employers Liability Act, which gives the plaintiff the option of suing in state or federal court. However, Congress gave access to state courts only to the extent they were competent under state law, and did not purport to force them to assume jurisdiction in all circumstances. As

In contrast to common law sovereign immunity doctrines, state statutory or state constitutional law may expressly deny jurisdiction to state courts to entertain suits against the state.²¹⁷ In such states the plaintiff has a problem: With the doors of the lower federal courts closed to him by the eleventh amendment, and lacking a basis in state law for state court jurisdiction, how is he ever to obtain a hearing on the merits of his claim to a constitutionally implied remedy? The solution to this problem depends on the extent to which state law withdraws state court jurisdiction.

Suppose first that state law gives jurisdiction to its courts to enforce some damage remedies against the state (*e.g.*, tort claims arising out of state officers' negligence in operating motor vehicles), but purports to deny jurisdiction in all other cases, including those based on the Constitution. The Court's holding in *Testa v. Katt*²¹⁸ suggests that a state court would be obligated, under the supremacy clause, to exercise jurisdiction over a plaintiff's constitutionally based cause of action against the state. At issue in *Testa* was whether a state court had a duty to hear a claim based upon the Emergency Price Control Act²¹⁹ for treble damages against a vendor who sold goods at a price in excess of the federally prescribed ceiling. Congress provided in the Act that the buyer of such goods could sue the seller "in any court of competent jurisdiction."²²⁰ Nevertheless, the Rhode Island Supreme Court held

Justice Holmes said, writing for the Court in *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387-88 (1929):

It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty [to hear an FELA action]. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse.

Thus, the Court in *Douglas* said a New York court could decline jurisdiction over an FELA action brought by a Connecticut plaintiff against a Connecticut railroad for an accident occurring in Connecticut, based upon a state statute giving the court discretion to close the doors of state courts to all actions, no matter what the source of the claim, having such an attenuated relationship to New York. Similarly, in *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950), the Court permitted a state court to apply its nondiscriminatory doctrine of *forum non conveniens* to decline jurisdiction over an FELA action. And in *Herb v. Pitcairn*, 324 U.S. 117, 120-21 (1945) it implicitly recognized that neutral rules of state court venue were adequate to preclude suit on an FELA action in one state court so long as another court within the state was available to the plaintiff.

However, if a state gives its courts jurisdiction over ordinary tort claims arising under state law, the Court has held that they are obligated to hear analogous claims arising under federal law, even though this might produce inconvenience or confusion or otherwise offend state policy. *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1, 55-59 (1912); *accord*, *McNett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 233-34 (1934) ("While Congress has not attempted to compel states to provide courts for the enforcement of the [FELA] . . . the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law A state may not discriminate against rights arising under federal laws").

217. See, *e.g.*, *General Oil Co. v. Crain*, 209 U.S. 211, 216 (1908).

218. 330 U.S. 386 (1947).

219. 56 Stat. 23 (1942), as amended by 58 Stat. 632 (1944).

220. 58 Stat. 632, 640 (1944).

that such an action could not be maintained in the state courts because the federal cause of action was "penal . . . in the international sense" and therefore not enforceable in the courts of another sovereign when in conflict with the latter's public policy.²²¹ The Supreme Court disagreed. It found immaterial the claim that the federal statute, penal or otherwise, offended what the Rhode Island courts thought was state policy, "[f]or the policy of the federal act is the prevailing policy in every state" under the supremacy clause.²²² Likewise, it did not matter that state law had not in terms given state courts jurisdiction over the federal claim:

It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. . . . Thus the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action. Under these circumstances the State courts are not free to refuse enforcement of petitioner's claim.²²³

Under the supremacy clause, the Constitution is no less a policy applicable in all states than is valid federal statutory law. If state law gives state courts jurisdiction over some claims against the state, the nondiscrimination principle expressed in *Testa v. Katt* requires a like exercise of jurisdiction over constitutionally-based claims. Nor should it matter that state law tort claims are not necessarily exact analogues of federal constitutional claims.²²⁴ The *Testa* case holds that jurisdiction over the same general *type* of claim under state law (here, suits against states for damages caused by their agents) is the litmus test of the state court's duty to assume jurisdiction over a federal claim.²²⁵

A more difficult question arises where state law denies jurisdiction to state courts over any and all causes of action for damages against the state. Professor Hart has shown that *Congress'* power to control lower federal court jurisdiction does not include the power simultaneously to deny the jurisdiction of state courts to give constitutionally required

221. 330 U.S. at 388 (quoting *Testa v. Katt*, 71 R.I. 472, 474-75, 47 A.2d 312, 313 (1946)).

222. 330 U.S. at 393.

223. *Id.* at 394; see note 216 *supra*.

224. For instance, state law may permit suits for damages against the state for injuries caused by the negligence of its agents, but deny jurisdiction over intentional tort claims. Or it might permit suit for some but not all kinds of intentional torts by its agents. *Cf.* 28 U.S.C. § 2680 (1976) (federal jurisdiction over suits concerning acts of federal officials).

225. In *Testa* the Court said that claims for double damages for an employer's failure to pay overtime wages under the Fair Labor Standards Act, over which Rhode Island courts had in the past assumed jurisdiction, were the same type of claim as treble damage actions under the Emergency Price Control Act. 330 U.S. at 394. See also *Martinez v. California*, 100 S. Ct. 553, 558 n.7 (1980). Likewise, the Court held in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-39 (1969) that a state court had to grant injunctive relief appropriate to the enforcement of a federal civil rights statute "if that court is empowered to grant injunctive relief generally."

remedies.²²⁶ But if a remedy against the state is called for by the Constitution, and federal courts cannot give it because of the eleventh amendment, may *state legislatures* constitutionally deny jurisdiction to their courts?

The answer must be no if the basic assumption is true that constitutional government requires that some court, state or federal, always be available to test the legitimacy of a plaintiff's claim that he is entitled by the Constitution to a given remedy. And this assumption appears time and time again in the Court's decisions.²²⁷ Moreover, one need not come to grips with the ultimate case—the refusal of a state to create any courts at all²²⁸—to conclude that once the state has created courts of general jurisdiction it may not deny them pieces of that jurisdiction if the effect is to foreclose the plaintiff from any forum in which to plead his constitutional claim.²²⁹ It is clear that this basic principle

226. Hart, *supra* note 34, at 1401-02; see *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) (Congress may "not so exercise that power [to control state and federal court jurisdiction] so as to deprive any person of life, liberty or property without due process of law or to take private property without just compensation"); *Coan v. State*, 11 Cal. 3d 286, 290-92, 520 P.2d 1003, 1006-07, 113 Cal. Rptr. 187, 190-91 (1974).

227. See, e.g., *Guam v. Olsen*, 431 U.S. 195, 204 (1977); *Johnson v. Robison*, 415 U.S. 361, 366 (1974); *Truax v. Corrigan*, 257 U.S. 312, 334 (1921). For instance, the Court has held there is a constitutional right to judicial review of state administrative or legislative action, such as ratemaking, and that review must be such as to afford a meaningful opportunity to litigate constitutional defenses. In *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 337 (1920), Justice Brandeis, for the Court, found constitutionally deficient a method of judicial review of state agency ratemaking which required the plaintiff to incur the risk of sizeable contempt fines.

Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates.

Accord, *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 348-50 (1913); *Ex parte Young*, 209 U.S. 123, 145-48 (1908). These cases make it clear that the due process clause mandates judicial process at some point, even though the state may retain considerable flexibility in determining when this process is afforded. Hart, *supra* note 34, at 1372: "a necessary postulate of constitutional government [is] that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained."

228. [W]hether the states are under a constitutional obligation to provide courts of competent jurisdiction for the enforcement of federal rights of action, if no such courts otherwise exist, and, if so, how the obligation can be made effective, remains uncertain. The uncertainty illustrates again the great fact of political science that ultimate questions often do not have to be faced in successful collaborative living.

Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 507-08 (1954).

229. This was the Court's holding in *Kenney v. Supreme Lodge of the World*, 252 U.S. 411 (1920). In that case an Illinois statute precluded its courts from hearing actions founded upon wrongful deaths which had occurred in other states. Based on this statute the Illinois Supreme Court held that state courts in Illinois had no jurisdiction to enforce a judgment rendered by an Alabama court for a death caused there. Justice Holmes, writing for the Court, responded:

[N]o doubt there is truth in the proposition that the Constitution does not require the State to furnish a court. But it also is true that there are limits to the power of exclusion and to the power to consider the nature of the cause of action before the foreign judgment based upon it is given effect.

....

applies no less to suits in which the state pleads sovereign immunity from the Court's decision in *General Oil Co. v. Crain*.²³⁰

The plaintiff in *Crain*, a Tennessee corporation, sought an injunction in a Tennessee state court against a state officer to prevent the collection of an inspection tax which was assertedly unconstitutional under the commerce clause and the fourteenth amendment. The Tennessee Supreme Court, relying on a state statute, held that the suit was essentially against the state and was thus precluded by the doctrine of sovereign immunity. Although the Supreme Court affirmed the judgment on the merits, it first had to contend with the argument that it lacked jurisdiction on writ of error because the state court decision rested on the adequate, independent state ground of sovereign immunity. The question narrowed to this: If the state's immunity from suit in its own courts was of constitutional magnitude, even in a case where the plaintiff asserted a constitutional claim, then the sovereign immunity statute would be a valid state law precluding Supreme Court inquiry into the merits.²³¹ But the Court rejected this proposition:

Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation.²³²

The Court had that very day decided, in *Ex parte Young*,²³³ that a person in the plaintiff's position did have a federal court remedy in an injunctive action to restrain a state officer from violating the Constitution. Since the eleventh amendment was no barrier to the plaintiff in a federal court action, therefore, the holding in *Crain* was not strictly necessary to give him a forum. Nevertheless, the Court assumed the plaintiff had no other remedy, and voiced its very definite conclusion

[T]he fact that here the original cause of action could not have been maintained in Illinois is not an answer to a suit upon the judgment But this being true, it is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent.

Id. at 414-15; *accord*, *People v. Western Union Tel. Co.*, 70 Colo. 90, 198 P. 146 (1921); *see* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1117 (1969).

230. 209 U.S. 211 (1908).

231. *See* *Michel v. Louisiana*, 350 U.S. 91 (1955).

232. 209 U.S. at 226.

233. 209 U.S. 123 (1908); *see* text accompanying notes 81-100 *supra*.

that the doctrine of sovereign immunity, if cast as a jurisdictional barrier in state courts of otherwise general jurisdiction, must give way to claims of constitutional magnitude.²³⁴ By the same token, state courts of general jurisdiction in every state must, under the supremacy clause, disregard any state law or constitutional provision which stands in the way of their considering whether to imply a federal constitutional cause of action against the state. And this includes state provisions purporting to limit state court jurisdiction no less than those touching upon substance.

IV

SUBSTANTIVE SOVEREIGN IMMUNITY AS A BAR TO CONSTITUTIONAL ACTIONS IN STATE COURTS

As the previous section shows, neither the eleventh amendment nor state laws denying state courts jurisdiction can stand in the way of the duty of a state court possessing otherwise general jurisdiction to decide whether the Constitution calls for a damage remedy against the state treasury. This necessarily means that a state may be sued in state court for the purpose at least of making the inquiry into what the Constitution demands or permits. Granting this, however, the question remains whether there is some implicit constitutional doctrine of substantive sovereign immunity which would automatically shield states from actual liability on all constitutionally-based claims in state courts. Chief Justice Hughes gave voice to the possibility of such a

234. The Court did not retreat from this position in *Georgia R.R. & Banking Co. v. Musgrove*, 335 U.S. 900 (1949), which dismissed for lack of a federal question an appeal from a decision of the Georgia Supreme Court upholding the sovereign immunity defense in a contract clause case. *But see* HART & WECHSLER, *supra* note 7, at 935. The plaintiff in *Musgrove* claimed a perpetual exemption from certain kinds of state taxation granted by its charter from the state. It sued the state revenue commissioner in state court for declaratory relief and an injunction against the threatened assessment of ad valorem taxes which it claimed unconstitutionally impaired the obligation of its contract with the state. *Musgrove v. Georgia R.R. & Banking Co.*, 204 Ga. 139, 140, 40 S.E.2d 26, 27 (1948). Although the Georgia Supreme Court upheld the defense of sovereign immunity, it carefully declined to express an opinion on "what remedy, if any, the plaintiff might have if any of its money or property should be seized or levied upon for such taxes. . . ." *Id.* at 159, 249 S.E.2d at 38. Since there is no constitutional right to an injunction against state taxes, *see* *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912), the Supreme Court's conclusion that the *Musgrove* appeal presented no federal issue was clearly warranted. As the Court held in the *O'Connor* case, the state may constitutionally remit the plaintiff to the remedy of a suit for a refund after the tax is collected. The Supreme Court's later decision upholding federal court jurisdiction to issue an injunction by the same plaintiff and on the same facts as in *Musgrove* was premised on a finding that the state's alternative remedies, although arguably minimally adequate under the Constitution, were not "plain, speedy and efficient" within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341. *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 302-03 (1952). Unlike the plaintiff in *Crain*, who the Court assumed had no other remedy open to him, the plaintiff in *Musgrove* thus ultimately got a forum to present its constitutional claims, notwithstanding the Court's dismissal of its appeal from the denial of a particular state court remedy.

theory when he stated for the Court in *Monaco v. Mississippi* that "[b]ehind the words of constitutional provisions are postulates which limit and control There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'"²³⁵

The *Monaco* decision held that the eleventh amendment barred suit by a foreign government against a state in the Supreme Court's original jurisdiction, despite the fact that on its face the eleventh amendment does not apply to such a plaintiff. The Principality of Monaco claimed interest and principal due on bonds which it held and which had been issued by the State of Mississippi. To the extent that claim was predicated on the defendant's liability under Mississippi contract law, no doubt Chief Justice Hughes' dictum is true. A state's sovereign immunity from suit or liability in any court, state or federal, is of constitutional status where the underlying claim is based on state law, because the legitimacy of that claim is defined by reference to *all* state law, including sovereign immunity.²³⁶ Whether that law is wise or unwise²³⁷ is, under the system of federalism envisaged by the Constitution, for state legislatures and courts to determine. Indeed, this was the basic premise of the Court's decision in *Erie Railroad v. Tompkins*²³⁸ that as a general rule a federal court in a diversity action is bound to follow state law regardless of its disagreement with that law on policy grounds.

On the other hand, to the extent the underlying claim in *Monaco* was based on the notion that the state could not constitutionally refuse to pay the sums due on the bonds,²³⁹ the Court's holding denied plaintiff access only to a federal forum. It did not preclude the plaintiff from seeking recovery in some other forum, such as the courts of Mississippi or another state.²⁴⁰

In short, nothing in the *Monaco* decision speaks to the narrow question whether there is a constitutionally implied doctrine of sovereign immunity in state courts on some or all constitutional claims. Nevertheless, the fact remains that the *Chisholm v. Georgia*²⁴¹ opinion

235. 292 U.S. 313, 322-23 (1934) (quoting THE FEDERALIST NO. 81 (A. Hamilton)).

236. See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

237. See note 24 *supra*.

238. 304 U.S. 64 (1938).

239. 292 U.S. at 315-16 (argument of counsel for plaintiff).

240. Compare *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (upholding Congress' power to withdraw federal courts' jurisdiction to issue injunctions in labor disputes) with *Truax v. Corrigan*, 257 U.S. 312, 328-29 (1921) (holding unconstitutional state legislation similarly withdrawing state court jurisdiction).

241. 2 U.S. (2 Dall.) 419 (1793).

did stir up a great storm on the general question of state suability, and that the ratification debates on the original Constitution expressed a similar concern.²⁴² There is little doubt that the framers were used to a system, under the Articles of Confederation, in which each state was totally sovereign and, borrowing the English tradition, could not be sued in its own courts without its consent. But by the same token, they were also aware that the new government contemplated delegations of and restraints on their powers that were previously unknown, and that some measure of surrender of sovereign immunity might exist in the "plan of the convention."²⁴³ The eleventh amendment settled that that immunity in the federal courts had not been surrendered. On the other hand, because the states had been used to treating one another as independent sovereigns under the Articles of Confederation, the Court in *Nevada v. Hall*²⁴⁴ rightly concluded that the Constitution gave them no immunity in another state's courts beyond that which the forum state chose to give them as a matter of comity.

But might there not be a residuum of state sovereign immunity in the states' own courts, even on constitutional claims, that is impliedly created or preserved by the original Constitution? At least a partially negative answer to this question is possible solely as a matter of logic. It would be a non sequitur to say that the Constitution implicitly preserved the states' preexisting common law sovereign immunity in cases based on the Constitution itself. That is because the states' preconstitutional immunity from suit in their own courts was cast with reference to their roles as unitary sovereigns unencumbered by externally imposed constraints. Therefore, that states were immune from suit in their own courts before the adoption of the Constitution conforms to the basic notion discussed above,²⁴⁵ derived from the English practice, that a unitary sovereign has plenary power to define the scope of private rights created by its own law. This fact reveals nothing about what new obligations the states and their courts assumed upon ratifying a written federal constitution imposing express restraints on their powers to abridge private rights. Indeed, the framers' decision to bind state officers, and in particular state judges, with an oath to support the Constitution and valid federal law, even when in conflict with state law,²⁴⁶ shows that extensive new obligations were part and parcel of the new form of government.

242. See text accompanying notes 58-64 *supra*.

243. THE FEDERALIST No. 81, at 416 (A. Hamilton) (Everyman's Library ed. 1911), *quoted at* note 61 *supra*.

244. 440 U.S. 410 (1979). The *Hall* case is discussed further at text accompanying notes 257-86 *infra*.

245. See text accompanying notes 235-38 *supra*.

246. U.S. CONST. art. VI.

However, this is only a partial answer, for the Constitution might be read as impliedly creating a new immunity for states from suits in their own courts on constitutional claims. Support for this reading might be drawn from the sovereign immunity of the United States itself. Nothing in the Constitution gives the United States immunity from suit, yet the Constitution has been construed to imply such an immunity in state and federal courts, even on constitutional claims.²⁴⁷ Yet surely the federal government is bound by the Constitution no less than the states.²⁴⁸ And since there is an implied immunity for the former, perhaps there is also one for the latter.

To begin with, it must be recognized that a definitive answer to this problem cannot be found in the legislative history of the original Constitution or of the eleventh amendment. At best, that history reflects a concern with state suability in federal courts, as the Court recognized in *Nevada v. Hall*.²⁴⁹ In addition, the analogy to the implied sovereign immunity of the federal government provides little assistance for at least two reasons. First, the Constitution expressly reserves to Congress the exclusive authority to make appropriations, while state legislatures are given no comparable discretion in the text of the Constitution.²⁵⁰ Thus, in the area of damages remedies, the federal government's immunity from suit without legislative consent is grounded upon explicit constitutional text, while the states can point to no such protection. Second, the immunity of the United States conforms, albeit imperfectly, to the pragmatic explanation for the traditional immunity of the king in England, that he is differentiated from "every petty lord of every petty manor" only by the "accident" that "there happens to be in this world no court above his court."²⁵¹ In other words, although the United States as an entity is subject to the rule of law, no court has power to open its treasury, without its consent, to enforce that rule. By contrast, state courts can be compelled to entertain suits against their own states by the Supreme Court, and ultimately by the power of the

247. "It is now well settled—though for a century the rule was stated only in dicta—that the United States may not be sued without its consent." C. WRIGHT, *supra* note 98, § 22, at 82 (footnote omitted); see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment) ("However desirable a direct remedy against the [federal] Government might be as a substitute for individual officer liability, the sovereign still remains immune to suit"). The United States, through Congress, has waived its immunity for a substantial number of statutory, common law, and constitutional claims. C. WRIGHT, *supra* note 98, at 84-86; see note 476 *infra*.

248. See *Butz v. Economou*, 438 U.S. 478, 501 (1978); note 433 *infra*.

249. 440 U.S. at 420-21; see note 265 *infra*.

250. Art. I, § 9, cl. 7 of the Constitution vests "exclusive responsibility for appropriations in Congress, and . . . no execution may issue directed to the Secretary of the Treasury until such appropriation has been made." *Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962) (footnotes omitted). See also note 476 *infra*.

251. 1 F. POLLOCK & F. MAITLAND, *supra* note 25, at 518.

federal executive in enforcing the Court's mandates.²⁵²

Thus, at bottom, there can be no clear and definitive historical answer to the question whether the states have an implied immunity from suit in their own courts on constitutional claims. The answer can only come from an analysis of policy and the structure of the Constitution. And as a policy argument, sovereign immunity has never been persuasive, even in nonconstitutional cases.²⁵³ Further, to the extent the doctrine embraces the states' fiscal integrity as a concern, that concern can be adequately answered, as it is below, by choice of form and remedial flexibility.²⁵⁴

It is certainly plausible that the "plan of the convention" contemplated state responsibility in damages whenever the state oversteps express constitutional restraints on its own powers set up for the benefit of private citizens. Or, to put it more narrowly, perhaps a state must be liable in its own courts on constitutional claims when no other meaningful remedy is available.²⁵⁵ Nevertheless, many of the Court's early decisions reviewing state court actions against states on constitutional claims appear at first glance to foreclose this line of analysis. For instance, in *Palmer v. Ohio* the Court said that "[t]he right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State."²⁵⁶ To what degree does or should this recitation of the boilerplate of sovereign immunity continue to control the disposition of constitutional claims against states in state courts, or indeed, even explain the Court's few decisions on this subject, including *Palmer*? This question is the focus of the next four sections.

A. Suits Against a State in Another State's Courts: The Implications of Nevada v. Hall

*Nevada v. Hall*²⁵⁷ concerned an ordinary negligence claim for damages brought in a California state court by California residents who had been injured in an automobile accident in California. What made the case interesting was that the injuries had been inflicted by an employee of the University of Nevada, a Nevada state agency, driving in California on the official business of his employer.²⁵⁸ Named as defendants were the estate of the driver, who had been killed in the crash,

252. See text accompanying notes 532-39 *infra*.

253. See note 24 *supra* & text accompanying notes 546-51 *infra*.

254. See text accompanying notes 436-573 *infra*.

255. Cf. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 (1798) (argument of counsel for defendants), quoted at text accompanying note 200 *supra*.

256. 248 U.S. 32, 34 (1918); see text accompanying notes 328-31 *infra*.

257. 440 U.S. 410 (1979).

258. *Id.* at 411.

the University, and the State of Nevada. The California courts rejected Nevada's plea of sovereign immunity and upheld a jury verdict against all three defendants for a total of more than a million dollars.²⁵⁹

Had the plaintiffs in *Hall* sued in a lower federal court, they would have been barred from obtaining jurisdiction over the state by the eleventh amendment. Although Nevada has consented to suit in such a tort case in its own courts, it is well established that such partial consent does not confer jurisdiction on a federal court.²⁶⁰ Since the plaintiffs sought damages for their past injuries, the doctrine of *Edelman v. Jordan* is squarely on point and would have required dismissal on jurisdictional grounds.²⁶¹

But the Supreme Court in *Hall* rejected the *Edelman* approach. It affirmed the California state courts' exercise of jurisdiction and judgment, even though in excess of the \$25,000 ceiling on recovery which Nevada law imposed in its statute waiving sovereign immunity in tort suits in its own courts.²⁶² The Court concluded that nothing in the eleventh amendment, article III, or any other part of the Constitution required California courts to honor the sovereign immunity of a sister state, at least where the immunity defense conflicted with California's legitimate interest in compensating its citizens for injuries inflicted on them in California.²⁶³

To begin with, article III and the eleventh amendment by their very terms address only the federal judicial power. The Court conceded that much language in the legislative history of the Constitution and the Court's own prior decisions seemed to paint the doctrine of sovereign immunity with a broad brush.²⁶⁴ But this material in the

259. The trial court initially quashed service of process on Nevada in response to the state's motion based on sovereign immunity. This was reversed by a unanimous decision of the California Supreme Court. *Hall v. University of Nevada*, 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 355 (1972), *cert. denied*, 414 U.S. 820 (1973). On remand for trial Nevada sought unsuccessfully to limit its liability, and the jury entered a verdict of \$1,150,000. 440 U.S. at 412-13. This verdict was affirmed by the California Court of Appeal. *Hall v. University of Nevada*, 74 Cal. App. 3d 280, 141 Cal. Rptr. 439 (1st Dist. 1977). The California Supreme Court declined to review, and the state successfully petitioned for certiorari to the United States Supreme Court. *See* 440 U.S. at 413-14.

260. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 465-66 (1945); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 172 (1909); *Smith v. Reeves*, 178 U.S. 436, 441 (1900).

261. 415 U.S. 651 (1974); *see* text accompanying notes 101-23 *supra*. The suit would have been dismissed for the additional reason that Congress has not given federal district courts diversity jurisdiction over suits by citizens of one state against another state. *See* 28 U.S.C. § 1332 (1976). *But see* Stewart, *The State as an Unwilling Defendant: Reflections on Nevada v. Hall*, 59 NEB. L. REV. 246, 273 (1980) (suggesting that Nevada could have removed Hall's suit to a federal district court in California).

262. 440 U.S. at 412-13 n.2.

263. *Id.* at 424.

264. *Id.* at 420 & n.20 (citing *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934); *Hans v.*

final analysis concerned only the question of a state's suability in federal courts.²⁶⁵ The immunity of one state from suit in another state's courts, the Court said, had not even been discussed by the framers of the Constitution. What is more, the closest analogy to interstate sovereign immunity is and has always been the immunity of one nation from suit in another nation's courts, not the eleventh amendment immunity from suits against the state in federal courts.²⁶⁶ Under the doctrine of foreign government immunity, as first adopted in this country by Chief Justice Marshall, one sovereign is free to give or withhold immunity to another independent sovereign as a matter solely of comity, determined by its own law.²⁶⁷ Likewise, the Court said, one state may or may not grant immunity to another state, solely as a matter of its own law, and without compulsion either way by the Constitution.²⁶⁸

Nor did the full faith and credit clause²⁶⁹ require California courts to apply Nevada law, either Nevada's law asserting the state's immunity from suit except in its own courts or its more limited law restricting the amount of damages recoverable against the state. The Court said that "the Full Faith and Credit Clause does not require a State to apply

Louisiana, 134 U.S. 1, 18 (1890)). The Court cited these cases as examples, thus impliedly calling into question similar dicta contained in its other decisions.

265. 420 U.S. at 420-21 ("all of these cases, and all of the relevant debate, concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts").

266. *Id.* at 416-18.

267. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); see Angell, *Sovereign Immunity—The Modern Trend*, 35 YALE L.J. 150, 159 (1925) (one sovereign's immunity in the courts of another sovereign "is clearly a matter not of right but of privilege decreed by comity"); 28 U.S.C. §§ 1602-1611 (1976).

268. The Court admitted that had Nevada's immunity defense been asserted in the early nineteenth century, prevailing notions of comity would probably have persuaded California to honor it. 404 U.S. at 417; see *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Ct. C.P. Pa. 1781) (sustaining Virginia's plea of sovereign immunity in a debt collection case commenced by attachment of Virginia's property situated in Pennsylvania). See also *Paulus v. South Dakota*, 58 N.D. 643, 647-49, 227 N.W. 52, 54-55 (1929). However, the Court held that California was free to alter its views on comity to comport with changing ideas about the wisdom of the sovereign immunity doctrine generally. 440 U.S. at 417-18 & n.13. The Court was wise to view this matter as nonconstitutional. Since the immunity of a truly sovereign nation in another nation's courts is solely a matter of the latter's comity, and since prior to the adoption of the Constitution the States inter se enjoyed the status of more or less independent sovereigns, *Hall* can be seen as holding that the silence of the Constitution implies that principles of comity, rather than the Constitution, dictate the immunity of one state in the courts of another. Thus, unlike cases of federal court jurisdiction over unconsenting states, where waiver of a preexisting immunity must be found in the Constitution or elsewhere, the Court in *Hall* needed to find no waiver since it was merely reaffirming the status quo ante. Cf. THE FEDERALIST NO. 81, (A. Hamilton), quoted at note 58 *supra* (sovereign immunity of the states before the Constitution was like that of foreign states). But see 440 U.S. 431 (Blackmun, J., dissenting) ("The only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention").

269. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State").

another State's law in violation of its own legitimate public policy."²⁷⁰ That California's public policy was legitimate followed, according to the Court, from its substantial interest in protecting those injured on its highways by the negligence of residents and nonresidents alike, regardless of their status or identity.²⁷¹

Finally, the Court held that nothing implicit in the Constitution requires the states to "respect the sovereignty of one another."²⁷² Quite the contrary, such an enforced respect would intrude upon the forum state's own sovereign right to decide, as a matter of its own public policy, how to adjust the competing claims of injured plaintiffs and defendant sovereign states.²⁷³

The limits on the Court's decision in *Hall* are not clear. It did imply, in a footnote, that there might be circumstances where the full faith and credit clause would require the courts of one state to honor the sovereign immunity of another state.²⁷⁴ And the footnote hints vaguely that in such circumstances the forum state might be precluded from applying its own laws simply because the defendant is another state, even though the result would not have been forbidden had the defendant been an individual.²⁷⁵ The Court suggested that the essen-

270. 440 U.S. at 422.

271. *Id.* at 424. The Court also observed that "[i]n further implementation of that policy, California has unequivocally waived its own immunity from liability for the torts committed by its own agents and authorized full recovery even against the sovereign." *Id.* It did not say, however, whether such further implementation was a constitutional prerequisite to California's power to assert jurisdiction. See *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 189, 197 & n.46 (1979) (suggesting that it is). If the student Note is correct, then in a mirror image of the fact pattern in the *Hall* case, Nevada could not award more than \$25,000 to one of its citizens injured by an employee of California driving in Nevada.

272. 440 U.S. at 425. But cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (holding that Oklahoma may not exercise jurisdiction over a New York seller of a defective automobile which caused injury in Oklahoma, in part because "[t]he sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister states—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment").

273. 440 U.S. at 426-27. The question of how a plaintiff like Hall is to obtain enforcement of a judgment against a nonconsenting state is explored at note 554 *infra*.

274. California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result.

440 U.S. at 424 n.24. This footnote comes at the end of the section of the Court's opinion dealing with the full faith and credit clause question of whether the California courts had to apply Nevada's sovereign immunity statute. It does not appear to modify the Court's earlier conclusion that a state's sovereign immunity is, outside the context of that clause, nonconstitutional except in actions before federal courts.

275. This was Justice Blackmun's reading of the footnote, as expressed in his dissenting opinion. 440 U.S. at 431. As Justice Brennan has said, in suits between private litigants involving multistate transactions, "constitutional limitations on the choice of law are by no means settled." *Shaffer v. Heitner*, 433 U.S. 186, 225 (1977) (concurring in part and dissenting in part). Compare

tial criterion might be whether the forum state's exercise of jurisdiction would "interfere with . . . [the defendant state's] capacity to fulfill its own sovereign responsibilities."²⁷⁶ And this in turn would seem to depend either on the financial impact of the suit on the defendant state's treasury or on the intrinsic nature of the state's liability-producing conduct. Nevertheless, the Court in *Hall* permitted California to exercise jurisdiction without regard for how large the resulting judgment might be, and without inquiry into whether or not the negligent state employee was performing official business which was integral to the operation of the University or indeed to that of Nevada state government itself.²⁷⁷ Perhaps, as the Court's footnote suggests by inference, these facts are not pertinent simply because the number of fact situations similar to those of *Hall* is likely to be relatively small and hence so too is the potential for large-scale disruption of state finances.²⁷⁸

In any event, the importance of the *Hall* decision for present purposes is its recognition that a state's substantive protection from treasury liability is nonconstitutional in some cases. Indeed, a remarkable feature of the case is that the Court reached the conclusion it did even though the plaintiffs' underlying claims were nonconstitutional. It

Pacific Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939), with *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). Whatever those limitations are, however, the Court's footnote in *Hall* intimates that there is an added dimension when a state is the defendant.

276. 440 U.S. at 224 n.24.

277. See also *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 404 N.E.2d 726, 427 N.Y.S.2d 604 (1980). In that case the New York Court of Appeals ruled that New York courts could entertain a breach of contract action brought by a New York corporation against a state university which was acknowledged to be an agency of the state of Texas. Texas had limited its consent to suit in such cases to its own courts. Citing *Hall*, however, the court of appeals said that "New York is . . . under no compulsion to observe Texas' limitation on venue of suit against its agencies as a matter of Federal law," though it also observed that "[t]he defendant here does not attempt to distinguish this case so as to bring it outside the rule of *Hall*." *Id.* at 579 & n.2, 404 N.E.2d at 729 & n.2, 427 N.Y.S.2d at 607 & n.2. The court then went on to conclude that it would not honor Texas' immunity defense as a matter of comity, because of New York's substantial interest in providing a convenient forum for "redress of injuries arising out of transactions spawned here" (the defendant had placed orders by telephone and in person at the plaintiff's New York offices). *Id.* at 581, 404 N.E.2d at 730, 427 N.Y.S.2d at 608. The court of appeals reached these conclusions even though the plaintiff claimed in excess of \$462,000 in damages, and the underlying transaction involved "in essence a loan transaction" whereby the University had effectively borrowed \$12.5 million, presumably for public purposes. *Id.* at 577-78, 404 N.E.2d at 728, 427 N.Y.S.2d at 606.

278. See *The Supreme Court, 1978 Term*, *supra* note 271, at 198; Note, *Nevada v. Hall: Sovereign Immunity, Federalism and Compromising Relations Between Sister States*, 1980 UTAH L. REV. 395, 405. Nevertheless, the Court's willingness to permit one state to impose treasury liability on another state solely for the negligent conduct of the latter's employees contrasts sharply with its refusal to impose respondeat superior liability on municipalities under § 1983. See text accompanying notes 166-68 *supra*. It also departs from the old common law tradition that neither the king nor municipalities were responsible in tort on a theory of respondeat superior. See *Featler v. The Queen*, 6 B. & S. 257, 295-96, 122 Eng. Rep. 1191, 1205 (Q.B. 1865); *Russell v. Men of Devon*, 2 T.R. 667, 673, 100 Eng. Rep. 359, 362 (K.B. 1788).

would seem that the same result would follow a fortiori were the plaintiffs claiming damages in a California state court for a violation by Nevada of their federal constitutional rights—for example, a suit to redress an unconstitutional arrest or search in California perpetrated by Nevada undercover agents.²⁷⁹

But what of sovereign immunity in a state's own courts? When a suit is based on a state's own common or statutory law, the *Hall* Court suggested, the right to govern necessarily includes the right to deny, control, or condition suits against the sovereign.²⁸⁰ However, where the suit is based on another state's lawmaking authority and arises in the other state's courts, as the Court noted, "[s]uch a claim necessarily implicates the power and authority of a second sovereign," and hence is not automatically interdicted by the defendant state's law of sovereign immunity.²⁸¹

279. The interest of California in securing redress for its citizens in such a case would surely be at the very least as substantial as its interest in *Hall*. See 440 U.S. at 424. Moreover, California may have "further implement[ed]" its interest, *id.*, by waiving sovereign immunity in its own courts for like actions committed by its own police officers. See *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 527 P.2d 865, 117 Cal. Rptr. 241 (1974). See also *State v. Greene*, 285 Or. 337, 352 n.10, 591 P.2d 1362, 1369 n.10 (1979) (Linde, J., concurring) ("An officer's act which violates 42 U.S.C. § 1983 is a governmental tort in Oregon, at least unless the act is expressly authorized by a law or regulation").

Indeed, the *Hall* decision raises a host of additional possibilities for those seeking redress for a state's constitutional violations. It may be safely assumed that all states have at least some assets located beyond their borders in other states: if not tangible property, such as bank accounts, then the tax obligations of nonresidents. See 440 U.S. at 429 (Blackmun, J., dissenting). Suppose a state within its own borders were to deny a constitutional right, or its agents were to inflict a constitutional tort, on one of its own citizens or on a citizen of another state. The *Hall* decision opens the possibility to both victims of initiating a quasi in rem action for damages in the courts of one of these other states where some of the offending state's assets can be located and seized or garnished. See *Harris v. Balk*, 198 U.S. 215 (1905). The noncitizen, of course, would have the stronger case under *Hall* should the forum state happen to be his own. Although this species of jurisdiction was severely cut back by the Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977), arguably such a tactic might succeed as to both claimants for at least two reasons: (1) *Shaffer* dealt only with the defendant's due process right and did not purport to decide how those rights might be limited where the plaintiff's constitutional rights were at stake; and (2) if the offending state made no provision for a damages remedy in its own courts, and the federal courts were unavailable by virtue of the eleventh amendment, an in rem action would be the plaintiff's only available remedy. The *Shaffer* Court expressly refused to decide "whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." *Id.* at 211 n.37; cf. *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977) (suggesting yes, by implication).

280. 440 U.S. at 415-16 (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793) (Jay, C.J.)). The Court also quoted Justice Holmes' famous dictum in *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907), quoted at text accompanying note 24 *supra*.

281. 440 U.S. at 416. But see Martin, *The New Interpretation of Sovereign Immunity for the States*, 16 CAL. W.L. REV. 39, 57 (1980) (criticizing *Hall* on the basis of "history and past rulings of the Supreme Court"). Professor Martin fails to take account of the fact that before the adoption of the Constitution the doctrine of sovereign immunity was but another law in the total spectrum of laws applicable within each state acting as a unitary sovereign. See note 268 *supra*. After the establishment of the new Union, however, the states and the federal government related to one

A claim founded upon a federal statute also "implicates the power and authority of a second sovereign"—the United States.²⁸² So too, in a sense, does a claim based directly on the Constitution, which was made by the people of the United States.²⁸³ In neither case may the state unilaterally change the rules and restraints imposed on it by federal law. Suits against a state in its own courts based upon federal statutes or the Constitution might therefore be viewed as beyond the state's power to deny or control in the same sense that Nevada could not control the content or consequences of California law in the *Hall* case. To be sure, the Court stated in *Hans v. Louisiana*, a suit in federal court to recover interest due on state bonds where the plaintiff asserted that a state statute repudiating the debt was in violation of the contract clause, that "[t]he state courts have no power to entertain suits . . . against a state without its consent. Then how does the [federal] Circuit Court, having only concurrent jurisdiction, acquire any such power?"²⁸⁴ But in *Hall* the Court disapproved this very dictum as one of many which concerned only the question of the states' eleventh amendment immunity in federal tribunals, and which therefore by implication must be seen as going further than necessary to decide the case.²⁸⁵

The Court in *Hall* clearly displayed a mode of thinking about the state immunity issue that contrasted sharply with its approach to the same issue in the context of federal court jurisdiction. In substance, the Court saw a state's sovereign immunity as but another part of that state's nonconstitutional general law when interposed as a defense to private damage claims in another state's courts. Whether this liberal attitude would carry over to claims against a state founded upon federal law in the state's own courts was one of the principal issues considered in a case decided last Term, *Maine v. Thiboutot*.²⁸⁶

another in ways defined by a written Constitution binding on all—ways which were unknown at common law. Thus, both choice of forum and choice of laws could in theory produce results in the new federal system (such as a state court judgment against another state enforceable everywhere in the United States under the full faith and credit clause) which were impossible under the Articles of Confederation. But because eighteenth and nineteenth century notions of in personam jurisdiction required a defendant's physical presence as a condition of a state's power to adjudicate, see *Pennoy v. Neff*, 95 U.S. 714 (1878), the framers obviously could not have contemplated a case such as *Hall*. Their lack of concern, as well as their silence, on the question of interstate sovereign immunity is at best a neutral factor to consider when, after *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the constitutionality of "long-arm" jurisdiction was settled and a *Hall*-type fact situation became possible.

282. See *Owen v. City of Independence*, 445 U.S. 622, 647-48 (1980). See generally text accompanying notes 36-80 *supra*.

283. See note 25 and accompanying text *supra*.

284. 134 U.S. 1, 18 (1890).

285. 440 U.S. at 420 n.20.

286. 100 S. Ct. 2502 (1980).

B. Suits Against a State in Its Own Courts on Federal Claims: The Implications of Maine v. Thiboutot

The Court's decision in *Maine v. Thiboutot* dealt with the question not posed in *Hall*: the status of a state's substantive immunity from suit on a federal cause of action in its own courts. The plaintiff in *Thiboutot* filed suit in a state trial court on behalf of himself and a class of those similarly situated, naming as defendants the State of Maine and its Commissioner of Human Resources.²⁸⁷ He claimed that the state had wrongfully—but not unconstitutionally—denied him and others in the class welfare benefits to which they were entitled under the federal Social Security Act.²⁸⁸ Originally his complaint was based on a provision of Maine law authorizing judicial review of state administrative action, but eventually he amended it to add a claim under section 1983.²⁸⁹ The trial court found in his favor on the merits. It ordered the state to abide by federal law in the future and granted Thiboutot himself retroactive benefits, but denied retroactive benefits to the unnamed members of the class and denied the plaintiff attorneys' fees claimed under 42 U.S.C. section 1988.²⁹⁰

The plaintiff appealed to the Supreme Judicial Court of Maine. Before the case was heard, however, that court decided *Drake v. Smith*,²⁹¹ which reaffirmed that "the sovereign immunity of the State of Maine extends to actions which purport to assert a liability against the State other than liability in tort."²⁹² This seemed to preclude the trial court's retroactive award to Thiboutot individually. Moreover, a federal court could not have granted such an award, because of the principle established in *Edelman v. Jordan*.²⁹³ Although this award would thus have presented a nice question, the state chose not to appeal it.²⁹⁴ On the other hand, the Maine court did decide, in light of *Drake*, that the state's sovereign immunity precluded retroactive relief to the unnamed members of the class.²⁹⁵ However, this decision did not foreclose those class members from individually pursuing their claims

287. *Id.* at 2503.

288. In particular, he alleged that the state's method of computing AFDC benefits to three of his children improperly refused to make allowance for money spent on five other children who were not entitled to benefits but whom he was legally obligated to support. He contended that the state's refusal violated the Social Security Act, specifically 42 U.S.C. § 602(a)(7) (1976). 100 S. Ct. at 2503.

289. *Thiboutot v. State*, 405 A.2d 230, 232 (Me. 1979), *aff'd*, 100 S. Ct. 2502 (1980).

290. 100 S. Ct. at 2503.

291. 390 A.2d 541 (Me. 1978).

292. *Id.* at 543 n.3.

293. 415 U.S. 651 (1974); see text accompanying notes 108-23 *supra*.

294. 405 A.2d at 234.

295. *Id.*

against the state,²⁹⁶ nor did the plaintiff seek review of this question in the United States Supreme Court.²⁹⁷

With these two issues lurking in the background, the Maine court went on to decide two other important questions of liability adversely to the state's claim of sovereign immunity, and these latter questions did find their way to the Supreme Court. First, it said that a section 1983 action could be brought in a state court to redress state violations solely of federal statutory rights.²⁹⁸ Second, it held that a successful litigant in such a case has a right, upon the proper showing, to obtain attorneys' fees under section 1988, payable from the state's treasury.²⁹⁹ Significantly, the court came to this conclusion notwithstanding the fact that state law did not give Maine courts the authority to include attorneys' fees as costs awardable to the successful party in this type of suit.³⁰⁰ The Maine Supreme Judicial Court's decision, although of limited impact on the state treasury,³⁰¹ is thus a prime example of a state court casting aside its local sovereign immunity law to render monetary relief against its own government on the basis of a perceived duty arising from federal law.

And this is exactly how the United States Supreme Court saw the question in upholding the Maine court's judgment on petition for certiorari by the defendant state. The Court first agreed that section 1983 provides the means to redress deprivations of purely statutory federal rights,³⁰² although three of the Justices vigorously dissented on this

296. *Id.* (state law construed to permit retroactive award of benefits "only to those who have been 'claimants' actually pursuing their rights under the regulations").

297. Only the state sought review in the Supreme Court.

298. 405 A.2d at 235. Although the Maine court cited *Quern v. Jordan*, 440 U.S. 332 (1979), and *Alabama v. Pugh*, 438 U.S. 781 (1978), *see* 405 A.2d at 236, it did not strictly apply the holdings of those cases that a state could not be sued by name under § 1983, perhaps because the state did not appeal the judgment against it. Another explanation might be that the state was properly named as a defendant in the case under state law. *See* 405 A.2d at 232, (citing *ME. R. Civ. P. 80B*). In any case, the question was not raised in the state's petition for certiorari to the Supreme Court, *see* 48 U.S.L.W. 3460 (Jan. 22, 1980), and therefore the Court had no occasion to decide whether § 1983's "persons" includes states in state courts but not in federal courts. *See* *Edgar v. State*, 92 Wash. 2d 217, 595 P.2d 534 (1979), *cert. denied*, 444 U.S. 1077 (1980) (holding it does not); note 189 *supra*.

299. 405 A.2d at 239-40. An award of attorneys' fees to the prevailing party is a matter of the trial court's discretion under § 1988 ("the court, in its discretion, may allow . . ."). 42 U.S.C. § 1988 (1976). Accordingly, the Maine Supreme Judicial Court remanded the case to the trial court for final disposition. 405 A.2d at 240.

300. *Id.* at 238; *see* 100 S. Ct. at 2503 (the Maine Supreme Judicial Court "concluded that respondents had no entitlement to attorneys' fees under state law").

301. 405 A.2d at 239.

302. 100 S. Ct. at 2504-05. The Court noted that on its face § 1983 permits suits to redress state violations of rights secured by the "Constitution and laws." *Id.* at 2504 (emphasis in original). The plaintiff needed § 1983 to present his statutory claim because "the Social Security Act itself does not create a private cause of action." *Edelman v. Jordan*, 415 U.S. 651, 674 (1974). Nevertheless, the Court had only just decided, in *Chapman v. Houston Welfare Rights Organiza-*

point. Moreover, because section 1988 applies in "any action . . . to enforce . . . [section] 1983,"³⁰³ the Court concluded that even a partially successful plaintiff was entitled to make a case for attorneys' fees awardable against the state treasury.³⁰⁴

So far, the Court treated the question of attorneys' fees against the state no differently than it had treated a similar issue on the same statutory authority in *Hutto v. Finney*.³⁰⁵ But the *Hutto* decision had only settled Congress' power to authorize federal courts to grant such an award against a state in a case presenting a constitutional claim. The Court thus had to decide whether the principle of *Hutto* extended to suits in state courts on federal statutory claims.

On the matter of whether state courts may or must administer sections 1983 and 1988 in the same way federal courts do, the Court carefully differentiated the two sections. Without deciding whether a state court *must* assume jurisdiction over a section 1983 action, the Court found that Congress had at least permitted it to do so.³⁰⁶ It then reviewed the legislative history of the Attorney's Fees Awards Act of 1976, and found that Congress had acknowledged the concurrent jurisdiction of state courts in section 1983 actions, and had meant the fees provision of section 1988 to apply there no less than in federal courts.³⁰⁷ This being so, the Court held that the supremacy clause imposed a constitutional obligation on state courts to apply section 1988 against their own states' treasuries in section 1983 cases over which

tion, 441 U.S. 600, 615-20 (1979), that the Social Security Act was not a statute that secured "equal rights" or "civil rights" within the meaning of § 1983's jurisdictional counterpart, 28 U.S.C. § 1343 (1976). Notwithstanding *Chapman*, the *Thiboutot* Court held that the word "laws" in § 1983 encompassed all the laws passed by Congress, not just those bearing on civil rights. 100 S. Ct. at 2505. The Court relied chiefly on what it called the "plain language of § 1983" and its view that "Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended." *Id.* at 2505-06.

Justice Powell authored a vigorous dissent, joined by Chief Justice Burger and Justice Rehnquist. He contended, as he had in *Chapman*, that since § 1983 and § 1343(3) were originally enacted as part of the same statute, the 1871 Civil Rights Act, "each section was intended to have precisely the same scope." 100 S. Ct. at 2510. And that scope, he said, ought to be limited to constitutional rights and to those statutory rights created by Congress to enforce civil rights. *Id.* at 2510. The Court's holding, he thought, "creates a major new intrusion into state sovereignty under our federal system," because it permits a disgruntled plaintiff to bring a § 1983 action against state officers whenever any federal statute contemplating state participation is arguably transgressed, whether or not Congress intended that statute to give rise to a private cause of action. *Id.* at 2519.

303. 42 U.S.C. § 1988 (1976).

304. 100 S. Ct. at 2506-07. The dissent did not take issue with this part of the Court's holding.

305. 437 U.S. 678, 693 (1978); see text accompanying notes 42-45 *supra*.

306. 100 S. Ct. at 2503 n.1 (citing *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980)).

307. 100 S. Ct. at 2506-07 (quoting 122 CONG. REC. 35122 (1976) (remarks of Rep. Drinan)). The Supreme Judicial Court of Maine had reached the same conclusion, although it noted that "it seems extraordinary that Congress would enact a statute affecting the authority of the states to control costs in their own courts without stating explicitly its intention to do so." 405 A.2d at 239.

they had actually assumed jurisdiction.³⁰⁸ The Court thought this conclusion was particularly compelling in view of the fact that in section 1983 actions based solely on the denial of federal statutory rights, the plaintiff, at that time, had no access to federal court unless his claim exceeded \$10,000.³⁰⁹ Were state courts not obligated to apply section 1988 in cases where the claims fell below this monetary threshold,³¹⁰ then these plaintiffs, who had been "forced to go to state courts [would], . . . contrary to congressional intent, . . . still face financial disincentives to asserting their claimed deprivations of federal rights."³¹¹

It is, however, only valid federal statutory law that states are obligated by the supremacy clause to apply in cases before them.³¹² The *Hutto* decision upheld section 1988 in a constitutional case, based on Congress' power to enforce the fourteenth amendment.³¹³ The underlying claim in *Thiboutot*, although asserted through the vehicle of section 1983, sought to enforce statutory rights created by Congress under its article I powers.³¹⁴ These powers on their face, unlike the fourteenth amendment, do not impose restraints on state action. Moreover, the eleventh amendment was ratified after the original Constitution, and hence may have impliedly restricted Congress' powers under article I. How, then, could Congress constitutionally permit a private party to obtain monetary relief against a state in such a case pursuant to section 1988, when the federal claim sued upon was nonconstitutional?

The Court might have said that Congress' power to strip the states of their eleventh amendment and other immunities in state *and* federal

308. 100 S. Ct. at 2507. See generally Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 340-61 (1976).

309. *Id.* at 2507 n.12. Now the amount in controversy requirement has been entirely removed. See note 203 *supra*.

310. At that time it could be expected that most individual welfare recipients would fall in this category, since their claims would rarely exceed \$10,000, and they could not escape this dilemma by filing a class action and aggregating their claims. See *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 394 U.S. 332 (1969). Now, however, with the elimination of the jurisdictional amount provision of § 1331(a), see note 203 *supra*, § 1983 plaintiffs should be able to proceed in federal court even when they cannot individually assert large monetary claims.

311. 100 S. Ct. at 2507 n.12.

312. See HART & WECHSLER, *supra* note 7, at 9-10; J. GOEBEL, *supra* note 7, at 131, 215, 224. But see *Wasservogel v. Meyerowitz*, 300 N.Y. 125, 133-34, 89 N.E.2d 712, 716-17 (1949) (alternative holding that state court has no power to invalidate federal administrative order on constitutional grounds and is bound by supremacy clause to enforce it).

313. 437 U.S. at 693-94.

314. No matter how broad the [§ 1983] cause of action may be, the breadth of its coverage does not alter its procedural character. Even if . . . § 1983 provides a cause of action for all federal statutory claims, it remains true that one cannot go into court and claim a "violation of § 1983"—for § 1983 by itself does not protect anyone against anything. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979).

courts does not depend on which of its powers it exercises.³¹⁵ It did not, however, do so in *Thiboutot*, nor did it confront this troublesome issue in a similar case last Term that had been brought in a federal court, *Maher v. Gagne*.³¹⁶ Instead, the Court concluded, in a footnote, that the eleventh amendment was a restraint on federal judicial power that had no bearing on state court actions.³¹⁷ This, however, is only half the problem. If there is an implied constitutional doctrine giving states sovereign immunity from monetary liability in their own courts, one would have expected the Court to analyze whether Congress could constitutionally remove that immunity by enacting legislation under article I or any other portion of the Constitution. That it did not do so implies either that no such immunity doctrine exists, or that it is so clearly subject to congressional modification as not to warrant discussion.³¹⁸ In either case, the Court treated the states' sovereign immunity in their own courts as manifestly less significant in the face of federal rights than their eleventh amendment immunity from suit on the same rights in federal courts.³¹⁹

The *Thiboutot* Court, without disagreement on this point from the dissent, thus recognized implicitly what Justice Marshall contended in

315. See Tribe, *supra* note 38, at 693-95.

316. 100 S. Ct. 2570 (1980). The plaintiff in *Maher* brought suit in a federal district court against a state welfare officer, claiming that his administration of the state's AFDC program violated both the Social Security Act and the Constitution. Though the constitutional claim was never adjudicated, it was sufficiently substantial to support pendent jurisdiction over the statutory claim. *Id.* at 2573. After the case was settled, and a consent decree entered, the plaintiff sought and obtained an attorneys' fee award under § 1988. The Supreme Court upheld this award, agreeing that the plaintiff was a "prevailing party" within the meaning of § 1988. *Id.* at 2575. Against the defendant's contention that the fee award violated the eleventh amendment, the Court held that the *Hutto* decision adequately supported the result. Even though the plaintiff's constitutional claim had never been heard, the Court reasoned, Congress had power under § 5 of the fourteenth amendment to remove the barrier of the eleventh amendment on an incentive theory—Congress could reasonably have concluded that the fee award was necessary as an incentive to plaintiffs to join colorable constitutional claims against the states to their statutory ones. *Id.* at 2575-77. It therefore carefully concluded that "[i]n this case, there is no need to reach the question whether a federal court could award attorney's fees against a State based on a statutory, non-civil rights claim." *Id.* at 2575.

317. 100 S. Ct. at 2506 n.7, *quoted at* text accompanying note 197 *supra*.

318. Likewise, the Court in *Maher* recognized there might be a problem with Congress' power under art. I to remove the states' eleventh amendment immunity in federal courts, *see* note 301 *supra*, but perfunctorily distinguished *Thiboutot* solely on the ground that "that case involved an award of fees by a state court." 100 S. Ct. at 2575 n.12.

319. It is true that the Court in *Thiboutot* also noted that the *Hutto* decision "concluded alternatively that the Eleventh Amendment did not bar attorney's fee awards in federal courts because the fee awards are part of costs, which 'have traditionally been awarded without regard for the State's Eleventh Amendment immunity.'" 100 S. Ct. at 2506 n.7 (quoting *Hutto v. Finney*, 437 U.S. at 695). However, this rule was clearly not traditional in Maine's courts, for as the Court earlier noted, the plaintiffs "had no entitlement to attorney's fees under state law." 100 S. Ct. at 2503. Nor did they have any rights at all under state law, for costs or otherwise, against the state. *See* text accompanying note 291 *supra*.

his concurring opinion in *Employees v. Department of Public Health and Welfare*.³²⁰ There Justice Marshall advanced the novel idea that there is a class of federal rights against the states which Congress can validly create by statute, but which it may not be able to entrust to federal courts for adjudication.³²¹ In other words, the tenth amendment, as expounded in *National League of Cities v. Usery*,³²² may not be the only restraint on Congress' article I powers when directed at the vital interests of the states. Such legislation must not only pass the hurdle of substantive validity set down by *National League of Cities*, but also may have to be left to state courts to enforce. To be sure, state courts are bound to act fairly in such cases, in accordance with the supreme command of federal law. However, state courts are more closely attuned to state concerns and to the political processes of their states. Moreover, their procedures are creations of state law, and hence the states have a tactical advantage in their own courts that they lack in federal courts. In short, choice of forum may indeed make a constitutional difference to the question of sovereign immunity, at least in terms of assessing Congress' powers. Similarly, in *Hall* the Court determined whether or not to recognize sovereign immunity as a bar partly by assessing the impact of one state's sovereign immunity on the lawmaking and law-enforcing competence of another state.

Nevertheless, it may be a mistake to make too much of the *Thiboutot* decision. After all, the Court did not decide whether state courts had to assume section 1983 jurisdiction, although its discussion

320. 411 U.S. 279, 287 (1973).

321. The question in the *Employees* case was whether Congress had removed the states' eleventh amendment immunity from suits by private individuals in federal courts when it had amended the Fair Labor Standards Act to cover the wages and hours of certain state employees. The majority held that it had not. *Id.* at 285. Three years later the Court decided, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that these amendments, and others directed at the states, exceeded Congress' art. I powers.

However, in *Employees*, Justice Marshall saw the question of Congress' substantive powers under art. I as distinct from that of its procedural power to authorize suits in federal courts. He reasoned:

Congress has the power to lift the State's common-law immunity from suit insofar as that immunity conflicts with the regulatory authority conferred upon it by the Commerce Clause. Congress has done so with respect to these state employees in its 1966 amendments to the FLSA; by those amendments, Congress created in these employees a federal right to recover from the State compensation owing under the Act. While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights.

411 U.S. at 297-98 (citing *Testa v. Katt*, 330 U.S. 386 (1947); *General Oil Co. v. Crain*, 209 U.S. 211 (1908)). Although *National League of Cities* disproved Justice Marshall's judgment on the particular question of Congress' substantive power to make the FLSA applicable to the states, the *Thiboutot* case shows that his general sense of the separateness of that question from the immunity issue remains sound.

322. 426 U.S. 833 (1976); see note 66 *supra*.

of the hapless plaintiff with \$10,000 or less in controversy strongly implies that they must.³²³ Even an affirmative answer to this question would not expose states to significant direct liability, however, inasmuch as *Quern v. Jordan*³²⁴ construed section 1983's term "persons" to exclude states, and hence treasury liability for attorneys' fees is the states' only immediate risk in *Thiboutot*-type actions.

However, if the fact that the plaintiff has no alternative forum to choose means that the state must be liable for attorneys' fees in an action to enforce federal statutory rights, then perhaps the state must also be liable for damages in actions brought to enforce federal substantive rights, both constitutional and statutory, that can only be brought in state court. Moreover, the Court's solicitude in *Thiboutot* for the federal welfare claimant with nowhere to turn for relief but a state court might easily extend to the plaintiff who has no practical mode of redress in federal court for violations by the state of his federal constitutional, rather than statutory, rights. In both cases the state has violated federal rights. In both cases state courts are the claimant's only hope for redress.

To be sure, Congress has not created a damages remedy against state treasuries in state courts for violations of constitutional rights. And this may mean that it is improper for state courts to imply a particular remedy directly from the Constitution. That decision in turn may be guided by the special status and role of states in the federal system, as those factors are affected by the form of constitutional damage remedy being sought. But the reasoning on sovereignty issues espoused in both the *Hall* and *Thiboutot* decisions strongly points to the conclusion that there is no doctrine of substantive state immunity analogous to the eleventh amendment in state court actions based on the Constitution. In other words, although the eleventh amendment requires federal courts blindly and automatically to dismiss actions seeking damages from the state for constitutional violations, the same result does not follow, and may not even be permitted, in the state courts.³²⁵

323. 100 S. Ct. at 2507 n.12; see *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980); text accompanying notes 218-33 *supra*. Of course, now that the jurisdictional amount has been eliminated as a requirement of federal question jurisdiction, see note 203 *supra*, the Court's discussion of the plaintiff with a small monetary claim is no longer pertinent except as a suggestion that plaintiffs barred from federal court by a different disability (such as the eleventh amendment) might make a similar appeal for state adjudication.

324. 440 U.S. 332 (1979); see text accompanying notes 72-80 & 298 *supra*.

325. Cf. *Thiboutot v. State*, 405 A.2d 230, 237 (Me. 1979) (upholding state's immunity from retroactive liability to unnamed members of the class, "at least where there is no allegation or evidence that the underpayments were made in bad faith for a racially discriminatory or other constitutionally impermissible purpose"), *aff'd*, 100 S. Ct. 2502 (1980).

C. Integrating Hall and Thiboutot with the Early Cases

In four decisions the Supreme Court has upheld claims of sovereign immunity in state court actions where constitutional rights seemed to be at stake, and has written approvingly of state sovereign immunity as though it did not matter what was the source of the plaintiffs' claims.³²⁶ Notwithstanding these cases, the *Hall* and *Thiboutot* decisions might very well be taken as the measure of existing law and as an indication of a trend to override sovereign immunity in like cases in the future, without regard for what has gone before them.³²⁷ But whatever may be said about the inconsistent dicta in these cases, on close inspection it becomes apparent that every one of them avoids actually deciding whether a state court may validly refuse to give relief against the state when the consequence is to deny redress for violated constitutional rights. These cases show how subtle can be the interplay between sovereign immunity and constitutional rights, and how dangerous it is to take the Court's pronouncements in this area at face value.

Palmer v. Ohio,³²⁸ for instance, was a suit against the State of Ohio in an Ohio state court to recover damages to the plaintiffs' land from flooding caused by a state-maintained dam. The Ohio courts dismissed the action on the ground that the state had not consented to suit. The main contention of the plaintiffs in the Supreme Court was that Ohio really had consented to suit, and that the Ohio courts' decision to the contrary "somehow deprives them of their property without due process of law."³²⁹ The Court rightly found this a "question of local state law," over which it had no jurisdiction.³³⁰ But before throwing the plaintiffs out of court, the Supreme Court was careful to reach the merits of their further claim that their property had been taken without just compensation in violation of the fifth amendment. This claim truly was based on the Constitution, but instead of disposing of it on the easy ground that the state had not consented to suit, the Court found it to be "palpably groundless" on the merits because the fifth amendment, by

326. These cases do not include the Court's unenlightening *per curiam* decision in *Georgia R.R. & Banking Co. v. Musgrove*, 335 U.S. 900 (1949). The *Musgrove* case is discussed and explained at note 234 *supra*.

327. *Cf.* O. HOLMES, *THE COMMON LAW* 36 (1881):

The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

328. 248 U.S. 32 (1918).

329. *Id.* at 33.

330. *Id.* at 34; *cf.* text accompanying notes 236-38 *supra* (state sovereign immunity is of constitutional stature when the underlying claim is based on state law).

its own force, does not apply to the states.³³¹

The Court sustained the immunity of a state from suit in state court in another just compensation case, this time correctly pleaded by the plaintiff under the fourteenth amendment, in *Hopkins v. Clemson Agricultural College*.³³² Although the Court uttered broad dicta about the sovereign immunity of the state, as it had done in *Palmer*,³³³ it did not reach the ultimate question of whether that immunity would prevail in a state court action for compensation under the Constitution where the state alone was responsible for the taking. Instead, the Court found that the state court had erred in extending whatever immunity the state had to the only defendant actually named in the complaint, a state college.³³⁴ Thus, the Court held the plaintiff had a viable, indeed constitutionally mandated, damage remedy against the state's agency. Thereafter, it was free and perhaps compelled to accord immunity to the state in line with state law, for the adequacy of this other remedy meant that the state's sovereign immunity did not conflict with the plaintiff's federal constitutional rights.³³⁵

331. 248 U.S. at 34. The plaintiffs evidently made the pleading error of asserting that the fifth amendment, rather than the fourteenth amendment, required the state to pay just compensation. The Bill of Rights, including the just compensation clause of the fifth amendment, by its own terms applies only to the federal government. The Court in *Palmer* cited two decisions so holding, *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) and *Brown v. New Jersey*, 175 U.S. 172, 174 (1899), in support of its conclusion that the plaintiffs' fifth amendment claim was baseless. 248 U.S. at 34. However, had the plaintiffs relied on the fourteenth amendment, they would have stated a viable claim for relief. Even before the *Palmer* case, the fourteenth amendment was interpreted to call for the same just compensation from state and local governments that is required of the federal government by the fifth amendment. See, e.g., *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 236-37 (1867).

332. 221 U.S. 636 (1911).

333. Compare *id.* at 642, quoted at note 26 *supra*, with *Palmer v. Ohio*, 248 U.S. at 34, quoted at text accompanying note 256 *supra*.

334. The college had built a dike to protect its lands from the overflow of a river, with the result that the plaintiff's lands were flooded. The project had been authorized by the state, and the state held title to the land on which the college sat. 221 U.S. at 637. The plaintiff sued the college in state court for damages and for an injunction to remove the dike, but his complaint was dismissed for failure to join an indispensable party, the state. *Id.* at 640. On appeal, the state supreme court affirmed, over the plaintiff's contention that his property had been taken by the state in violation of the fourteenth amendment. *Id.* at 641. The Supreme Court found that the college, acting on behalf of the state, had violated the plaintiff's constitutional rights and was liable to pay damages; nor could it avail itself of whatever immunity from suit the state had. *Id.* at 645-48. However, the prayer for an injunction was properly denied, the Court said, because the state, on whose lands the dike lay, was an indispensable party which could not be joined because of its immunity from suit. *Id.* at 648-49.

335. The Court's holding merely limited the plaintiff to the constitutionally acceptable remedy of damages from the college for an unconstitutional taking. This is all the just compensation component of the fourteenth amendment requires. See *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 236-37 (1867). See also *Agins v. City of Tiburon*, 100 S. Ct. 2138, 2141-43 (1980). See generally *Atchinson, T. & S. F. Ry. v. O'Connor*, 223 U.S. 280, 285 (1912) (Holmes, J.):

It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he

Nor was sovereign immunity actually at war with constitutional rights in *Beers v. Arkansas*,³³⁶ another of the Court's decisions reviewing actions against states in state courts. The plaintiff in *Beers* sued the State of Arkansas in one of its courts to obtain a judgment for interest due on state bonds. A state law, passed after the bonds had been issued, required their surrender to the court as a precondition of maintaining an action against the state in state court. Because the plaintiff could not or would not do so, his action was dismissed for lack of jurisdiction. In the Supreme Court he maintained that the state's law impaired the obligation of his contract with the state, in violation of the contract clause. The Court assumed that the Arkansas legislature could have denied the state's consent to be sued altogether, and reasoned from that supposed principle that surely it had the lesser power to "prescribe new conditions upon which the suits might still be allowed to proceed."³³⁷ It is not necessary to accept the Court's major premise, which would have denied the plaintiff any remedy for his contract with the state, in order to agree with its minor premise and holding that the contract clause was not violated when the state made it difficult, although not impossible, to collect on the bonds. After all, due process in suits against the government, state or federal, is a flexible concept indeed.³³⁸

The limits on the *Beers* decision become clearer in light of another of the Supreme Court's major decisions upholding a state's sovereign immunity in its own courts in an action seemingly based on the Constitution, *Railroad Co. v. Tennessee*.³³⁹ In that case, Tennessee had established a state-owned bank, and had agreed to indemnify its creditors for the bank's debts in excess of its stated capital. Later the state legis-

cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

Since the Constitution did not call for a remedy against the state, the state's immunity from suit became solely a matter of state law which the Court was obligated to respect. See text accompanying notes 236-38 *supra*.

336. 61 U.S. (20 How.) 527 (1857).

337. *Id.* at 530.

338. See, e.g., *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141 (1920). See also *United States v. Kubrick*, 444 U.S. 111 (1979). In the *Rock Island* case the Court, per Holmes, J., held that a taxpayer's suit for a refund was barred by its failure to follow precisely the procedure specified by statute, which included an administrative appeal which under the circumstances was probably an "idle act." 254 U.S. at 142. It is, of course, a familiar principle that when the government's vital interests are at stake it may substantially cut back on the right of access to judicial review, so long as it provides some constitutionally adequate avenue of redress to those who contest the legality of government programs. See, e.g., *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("There is no constitutional requirement that that test [of the legality of a federal administrative regulation] be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process"); *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 341-43 (1937).

339. 101 U.S. 337 (1879).

lature consented to suit against the state in state court to implement this promise. However, "[n]o power was given the courts to enforce their judgments, and the money could be got only through an appropriation by the legislature."³⁴⁰ The plaintiff had advanced the bank credit after this second enactment. When the state thereafter repealed its consent to suit and sued the creditors in state court to wind up the affairs of the bank, the plaintiff cross-claimed to enforce the state's statutory agreement to indemnify creditors. The state courts dismissed the plaintiff's claim on the basis of sovereign immunity. On writ of error in the Supreme Court the plaintiff asserted that the statute repealing the state's consent to suit was an impairment of the creditors' contract with the state, in violation of the contract clause. Although the Court stated that "[t]he principle is elementary that a State cannot be sued in its own courts without its consent,"³⁴¹ the Court in fact held that the allegedly offensive statute was not a contract clause violation, because it repealed the state's consent to a remedy that was meaningless.³⁴² On its face the consent statute gave the courts no power to enforce their judgments; the state in short had assumed merely a moral obligation to indemnify the bank's creditors.³⁴³ Dishonoring this obligation did not violate the plaintiff's contract clause rights, said the Court, because "[t]he Constitution preserves only such remedies as are required to *enforce* a contract."³⁴⁴

In none of the four cases discussed above did the Supreme Court uphold a state's sovereign immunity in its own courts where the result would have been to deny the plaintiff any other remedy for an established constitutional right. By contrast, in two decisions of roughly the same vintage the Court did address the state court immunity question on the assumption that the plaintiff would be left totally without any remedy for his constitutional rights. And in both cases the Court held that state sovereign immunity doctrines had to bow to the plaintiff's claims, if proven.

The first of those cases was *Poindexter v. Greenhow*.³⁴⁵ Poindexter

340. *Id.* at 338.

341. *Id.* at 339.

342. "Adjudication is of no value as a remedy unless enforcement follows." *Id.*

343. The Court noted that under the scheme established by Tennessee, the state "is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the State to rely on for their fulfillment." *Id.* at 340.

344. *Id.* (emphasis in original). The Court emphasized the limits of its holding when it said: Neither do we find it necessary to determine what would be a complete judicial remedy against a State, nor whether, if such a remedy had been given, the obligation of a contract entered into by the State when it was in existence would be impaired by taking it away. What we do decide is that no such remedy was given in this case.

Id. at 340-41.

345. 114 U.S. 270 (1884).

held coupons on bonds issued by the State of Virginia pursuant to a state statute, enacted in 1871, that made them receivable after maturity for all taxes due the state. In 1882 Virginia's General Assembly passed a law forbidding state tax collectors from honoring the coupons. One of those tax collectors, Greenhow, accordingly refused to accept Poindexter's tender of the coupons in payment of state taxes, and summarily seized a desk from Poindexter's office to satisfy the state's claim. Poindexter then filed suit in a Virginia court against Greenhow to recover possession of the desk, but was denied relief on the ground that the 1882 law was valid, and had validly withdrawn the plaintiff's normal remedy of suit against the tax collector to recover property seized pursuant to an allegedly unconstitutional law.³⁴⁶

The Supreme Court, on writ of error, had no difficulty deciding on the merits that the plaintiff's contract clause rights had been violated by the 1882 law and Greenhow's subsequent enforcement of the law on behalf of the state.³⁴⁷ Nor did it have any difficulty concluding that Greenhow was no more than a "wrong-doer" who seized the desk without valid authority and therefore "must personally answer" to the plaintiff.³⁴⁸ This much of the case was unremarkable and followed the pattern of the Court's earlier decision in *United States v. Lee*,³⁴⁹ construing the powers of federal courts in analogous suits against officers of the United States. However, the Court had to face the additional and related question of whether state law could validly terminate the plaintiff's normal right to sue the tax collector in state court.

On this issue, the Court assumed that "this wrong is without remedy by any law of Virginia."³⁵⁰ Nevertheless, the Court held, the state could not constitutionally leave the plaintiff without any remedy at all for his contract clause rights.³⁵¹ This being so, the Court thought it obvious that a federal court with jurisdiction could disregard state law and award relief against Greenhow.³⁵² The problem was that this plaintiff could not invoke the jurisdiction of a federal trial court, since he and Greenhow were both citizens of Virginia, and in any case his claim was valued at only thirty dollars.³⁵³ Thus, the plaintiff was left

346. *Id.* at 273-74.

347. *Id.* at 278-80.

348. *Id.* at 288; see note 81 *supra*.

349. 106 U.S. 196 (1882).

350. 114 U.S. at 302.

351. The Court said that the state's argument,

if permitted, will have the effect of denying to him all redress for a deprivation of a right secured to him by the Constitution. To take away all remedy for the enforcement of a right is to take away the right itself. But that is not within the power of the State.

Id. at 303.

352. *Id.* at 286-88, 303.

353. *Id.* at 273. Both the general federal question and diversity jurisdiction of lower federal

without any other remedy. Given this background, the Court held that "the Constitution itself, the fundamental and supreme law for Virginia,"³⁵⁴ required the Virginia state court to ignore its own laws and give a remedy which, on the facts of the case, was clearly adequate.³⁵⁵

The Court returned to this theme sixteen years later, in *General Oil Co. v. Crain*.³⁵⁶ In that decision, discussed above,³⁵⁷ the Court said, although it did not hold, that a plaintiff without access to a federal court was entitled to a hearing in state court on his constitutional claims, and that the state court could not validly rely on sovereign immunity as a means of circumventing those claims. It is true that both *Poindexter* and *Crain* involved suits against state officers. But as the Court's decision in *Thiboutot* demonstrates, the principle of jurisdiction and relief in state courts as a matter of necessity also applies where the defendant is the state itself.

D. A Synthesis of the Court's Decisions on the Sovereign Immunity Defense in State Courts

The decision in *Maine v. Thiboutot* reaffirms the basic principle of constitutional law that a state court with jurisdiction over a case is obligated by the supremacy clause to decide it in accordance with the command of the Constitution and valid federal statutory law. And it will be remembered from Part III of this Article that a state court of general jurisdiction always has jurisdiction to decide whether federal law in fact calls for a particular remedy, even one against the state.³⁵⁸

But when is a plaintiff with a constitutional claim actually entitled to monetary redress from the state? Clearly, the elimination of sovereign immunity as an automatic barrier to suit in state courts is only a

courts at that time depended on the existence of at least \$500 in controversy. Act of March 3, 1875, § 2, ch. 137, 18 Stat. 470, 471 (federal question jurisdiction); Act of Sept. 24, 1789, § 11, ch. 20, 1 Stat. 73, 78 (diversity jurisdiction). Although the Court did not mention this fact, it clearly was aware of it when it decided the *Poindexter* case. See *White v. Greenhow*, 114 U.S. 307, 308 (1884). Although federal court jurisdiction on the facts of *Poindexter* was theoretically available then and would be available today under the Civil Rights Act of 1871, ch. 221, 17 Stat. 13 (now codified as 42 U.S.C. § 1983 (Supp. III 1979) and 28 U.S.C. § 1343(3) (1976)), the constitutionality of that Act was very much in doubt in 1884. See *Civil Rights Cases*, 109 U.S. 3 (1883) (holding unconstitutional certain provisions of the Civil Rights Act of 1875, ch. 114, 18 Stat. 335). See generally Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

354. 114 U.S. at 306.

355. The plaintiff sought merely the return of his desk, and alleged that the defendant was still in possession of it. *Id.* at 273-74. A judgment in the plaintiff's favor therefore gained him all that he asked without regard for whether the defendant had the wherewithal to pay a money judgment. See text accompanying note 147 *supra*.

356. 209 U.S. 211 (1908).

357. See text accompanying notes 230-34 *supra*.

358. See text accompanying notes 192-234 *supra*.

first step. For the state actually to be liable in damages there must be found in the Constitution a right to such relief. Decisions such as *Palmer v. Ohio*, *Hopkins v. Clemson Agricultural College*, *Beers v. Arkansas*, and *Railroad Co. v. Tennessee* show vividly that a state's sovereign immunity will be applied to bar recovery even in state court where the plaintiff cannot show both that his constitutional rights were violated and that a remedy against the state is necessary to redress the violation.

On the other hand, the Court's decisions in *Thiboutot* and *Nevada v. Hall* establish that the circumstance that suit has been brought in a state court, rather than in a federal court, will strongly influence how the defense of sovereign immunity is received. Moreover, these cases, together with the decisions in *Crain* and *Poindexter v. Greenhow*, all point to the conclusion that sovereign immunity in state courts is at best a matter of the defendant state's own law, not a protection guaranteed by the Constitution, where the plaintiff's claim is founded upon the state's violation of federal rights. Indeed, the *Thiboutot* case makes explicit, albeit in a limited context, what the Court in *General Oil Co. v. Crain* merely implied: that the state courts' supremacy clause duty obligates them to set aside their own state's sovereign immunity, even in suits naming the state as defendant, when federal law explicitly contemplates state court application. Finally, when *Thiboutot* and *Hall* are read in light of *Crain* and *Poindexter*, a more ambitious conclusion seems to be justified: When a plaintiff has proven on the merits a state violation of his federal constitutional rights, and he has no other forum or remedy to redress the wrong, a state court of general jurisdiction has a constitutional obligation to grant relief against the state.

Having taken these cases to their logical conclusion, however, it now becomes necessary to refine the inquiry further still. Whether a particular plaintiff whose constitutional rights have been violated has a constitutionally inspired damages remedy against the state in state court depends on more than just the nature of his rights and the magnitude of his injury. It also depends on whether it is legitimate for state courts to imply remedies directly from the Constitution, and on the special position and role of states in our federal system of government. This is the subject of the next section.

V

IMPLYING A CONSTITUTIONAL CAUSE OF ACTION FOR
DAMAGES AGAINST STATES IN STATE COURTS*A. The Theoretical Framework: Federal Court
Damages Remedies Against Federal Officers**1. The Bivens Case*

In *Bivens v. Six Unknown Named Agents*³⁵⁹ the Supreme Court expressly held for the first time that the Constitution alone is the source of an appropriate but not strictly necessary damages remedy in federal court.³⁶⁰ The defendants were federal narcotics agents who conducted an arrest and search in violation of the plaintiff's fourth amendment rights. Congress had not provided a statutory cause of action in such circumstances, against either the United States or the officers.³⁶¹ The plaintiff nonetheless sued the officers in federal court, claiming that his right to a damages remedy should be implied directly from the Constitution.

Because the search and seizure had been sprung upon the plaintiff without advance warning, he had had no opportunity to secure an injunction. Further, there was no criminal prosecution pending against him in which the illegally seized evidence might have been excluded. Therefore, it was apparent to all the Justices that, in the words of Justice Harlan, "[f]or people in *Bivens*' shoes, it is damages or nothing."³⁶² Above all else, this total want of a viable alternative remedy motivated the Court's conclusion that the plaintiff had stated a claim under the fourth amendment.

This attitude is clearest in the Court's treatment of the defense argument that the plaintiff's remedy ought to have been under the relevant state's tort law of trespass and invasion of privacy. Only eight

359. 403 U.S. 388 (1971).

360. *Id.* at 397. The Court had earlier decided, in *Bell v. Hood*, 327 U.S. 678 (1946), that a federal district court has jurisdiction under 28 U.S.C. § 1331 (1976) over such a claim for damages against federal officers for their violations of fourth amendment rights. However, the Court reserved judgment on the question whether, on the merits, such a claim is in fact available by implication directly from the Constitution. 327 U.S. at 684-85.

361. 403 U.S. at 396. But compare Act of June 25, 1948 ch. 645, § 2236, 62 Stat. 803 (1948) (codified at 18 U.S.C. § 2236 (1976)) (making it a misdemeanor for a federal officer to participate in an illegal search), with *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (implying a private right of action for damages from § 14(a) of the Securities Exchange Act of 1934), and *W. Prosser, supra* note 23, at § 36.

362. 403 U.S. at 410 (Harlan, J., concurring in the judgment). Since *Bivens* was decided, the class of those for whom damages is the only practicable remedy for fourth amendment violations has grown. See, e.g., *United States v. Havens*, 100 S. Ct. 1912 (1980) (illegally seized evidence can be used to impeach a defendant's testimony); *United States v. Williams*, 622 F.2d 830, 840-48 (5th Cir. 1980) (en banc) (illegally seized evidence is admissible if police acted in good faith).

years before *Bivens* the Court had held, in *Wheeldin v. Wheeler*,³⁶³ that federal law did not create a cause of action in damages against a federal officer guilty of exceeding his statutory authority. It was not that the officer was subject to no law. Rather, the *Wheeldin* Court said, "[w]hen it comes to suits for damages for abuse of power, federal officials are usually governed by local law Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty . . . or immunity from suit."³⁶⁴ In *Bivens*, however, the Court pointedly refused to import this plausible remedial model from cases based on mere statutory violations to those presenting constitutional claims.³⁶⁵ Its refusal to do so rested chiefly on the perceived inadequacy of state tort law to give a complete remedy in cases such as *Bivens*'. Such remedial inadequacy might be tolerable where Congress creates statutory rights and obligations, because Congress can always evidence its desire to have federal common law govern, or can correct by subsequent legislation any deficiencies appearing in the remedial scheme.³⁶⁶

However, neither Congress nor the states unilaterally created constitutional rights and obligations. Moreover, the vindication of constitutional interests has traditionally been a judicial function.³⁶⁷ Thus, in

363. 373 U.S. 647 (1963).

364. *Id.* at 652.

365. 403 U.S. at 396-97 ("Nor are we asked in this case to impose liability upon a congressional employee for actions contrary to no constitutional prohibition, but merely said to be in excess of the authority delegated to him by Congress," citing *Wheeldin*); cf. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-92 (1949) (sovereign immunity in suits against federal officers depends in part on whether the officers allegedly acted beyond their statutory or constitutional authority (no immunity) or merely erroneously or tortiously (immunity)).

366. The *Wheeldin* approach can therefore be seen as but one application of the general principle that Congress' enactments are interstitial. That is, federal statutes are set against the broad backdrop of state law, which is comprehensive unless displaced by Congress. When Congress creates private rights or sets limits on federal officers, but is silent on a point of detail or enforcement, its enactments often are interpreted in harmony with the remedial, procedural, and even substantive law created by and generally applicable within the states. See, e.g., *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29 (1956); *Cope v. Anderson*, 331 U.S. 461, 463-64 (1947). But consider the complex phenomenon known as federal common law, generated by federal courts to protect or further federal interests outside the context of individual constitutional rights. E.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). See generally Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

367. 403 U.S. at 396; *Bell v. Hood*, 327 U.S. 678, 684 (1946). The Court further explained this point in *Davis v. Passman*, 442 U.S. 228, 241 (1979):

Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner

The Constitution, on the other hand, does not "partake of the prolixity of a legal code. *McCulloch v. Maryland*, [17 U.S.] 4 Wheat. 316, 407 (1819). It speaks instead with a majestic simplicity. One of "its important objects," *ibid.*, is the designation of rights. And in "its great outlines," *ibid.*, the judiciary is clearly discernible as the primary means through which these rights may be enforced

See generally Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 403 (1958).

Bivens the Court felt that judicial "free-wheeling" had more legitimacy than it did in *Wheeladin*.³⁶⁸ The Court observed that state laws dealing with trespass and invasion of privacy are typically designed to obtain relief from private wrongdoers. At best, those laws do not adequately take into account the special potential for harm that is present when government officers intrude on individual freedoms; at worst, they may be "inconsistent [with] or even hostile" to fourth amendment rights.³⁶⁹

Because the action was against federal officers in *Bivens*, the Court recognized that it would ultimately be heard in federal court.³⁷⁰ The Court did not decide as it did, then, simply to ensure that the plaintiff in *Bivens* would be able to choose a federal forum in the absence of diversity. Rather, the Court expressed a judgment about the relative inferiority of state tort and property law to vindicate constitutional rights by compensatory damages. *Bivens* responds to the inadequacy of existing common law by implying a cause of action for damages directly from the Constitution.

The idea that the Constitution itself requires certain judicial remedies is not wholly novel. The Constitution, for example, expressly preserves the remedy of habeas corpus.³⁷¹ Likewise, the guarantee of due process in both the fifth and fourteenth amendments has long been construed to require some opportunity to present one's defenses to a judge before the government may take one's life, liberty, or property, or, if the government's need is great enough in the case of liberty or property deprivations, afterwards.³⁷² Moreover, in many cases decided long before *Bivens* the Court had routinely sustained federal court injunctions against state and federal officers whose threatened

368. In *Wheeladin* the Court had supported its refusal to create a federal common law damages remedy for abuse of process by a congressional investigator, partly on the ground "that we are not in the free-wheeling days antedating *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)." 373 U.S. at 651.

369. 403 U.S. at 394.

370. The defendants admitted "that it is the policy of the Department of Justice to remove all such suits from the state to the federal courts for decision," pursuant to 28 U.S.C. § 1442(a) (1976). 403 U.S. at 391 & n.4; see *Tennessee v. Davis*, 100 U.S. 257 (1880). Thus, even had the plaintiff's basic cause of action been governed by state law, a federal court would ultimately have determined the meaning and scope of that law as well as the federal statutory and constitutional issues arising in the case by way of defense and replication.

371. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"); see *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942) (validity of a suspension of the writ open to judicial review).

372. See, e.g., *Guain v. Olsen*, 431 U.S. 195, 204 (1977) ("a construction [of a federal statute] that denied Guam litigants access to Art. III courts for appellate review of [art. I] local-court decisions might present constitutional questions," and hence is avoided); *Yakus v. United States*, 321 U.S. 414, 444 (1944); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). Compare *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), with *North Ga. Finishing, Inc. v. Di-chem, Inc.*, 419 U.S. 601 (1975).

conduct would violate the Constitution.³⁷³ Not only did the Court's language in many of these cases suggest that the plaintiffs' right to relief came directly from the Constitution,³⁷⁴ but many of them lacked a basis for diversity jurisdiction, where state law would apply, and so the Court's power to decide can be explained only on the assumption that the plaintiffs' claims arose under the Constitution.³⁷⁵ And when, in *White v. Greenhow*,³⁷⁶ a citizen of Virginia sued a Virginia state tax collector in federal court to recover for the latter's summary seizure of the plaintiff's property in violation of the contract clause, the Court held that the Constitution itself gave the plaintiff a right to damages.

What makes *Bivens* unique was the Court's willingness to establish new remedies beyond those which are strictly required by the Constitution. It was this willingness more than anything else that called forth from the dissenting Justices the charge that the majority was engaging in judicial legislation.³⁷⁷ The Court seemed to recognize that some state laws might conceivably take into account the proper constitutional criteria and afford the plaintiff an adequate remedy.³⁷⁸ Even where state law falls short of what is constitutionally required, moreover, the Court might have embraced a remedial system that brought deficient state law up to par on an ad hoc basis.³⁷⁹ Instead, it rejected the defendants' proposed test of necessity in favor of one of appropriateness.³⁸⁰ It thereby cast aside state law in favor of a more synpa-

373. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (federal officers); *Ex parte Young*, 209 U.S. 123 (1908) (state officer). Justice Black summarized the cases accurately when he said that "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th amendment forbids the state to do." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnotes omitted). And as Justice Harlan observed in his concurring opinion in *Bivens*: "[T]he presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization." 403 U.S. at 404.

374. See, e.g., *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

375. In the absence of diversity, federal district and circuit courts would have had jurisdiction only if the plaintiffs' well-pleaded complaints correctly alleged claims arising under federal law or the Constitution within the meaning of 28 U.S.C. § 1331 (1976). See HART & WECHSLER, *supra* note 7, at 935 ("In *Young* . . . and many other similar cases, diversity of citizenship was lacking. This makes it plain, does it not, that the operative law creating the cause of action was federal?").

376. 114 U.S. 307 (1885).

377. 403 U.S. at 411-12 (Burger, C.J., dissenting); *id.* at 427-28 (Black, J., dissenting); *id.* at 430 (Blackmun, J., dissenting).

378. *Id.* at 395.

379. Compare *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952), with *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211 (1916).

380. [W]e cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. . . . The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

thetic body of federal judge-made law, but at the same time it made clear that the federal remedy thus generated was not written in stone. As Professor Monaghan has observed, the *Bivens* opinion was a species of constitutionally inspired federal common law.³⁸¹ In writing it the Court opened a dialogue between the courts and Congress on the development of appropriate constitutional remedies.³⁸²

There were, however, two important limitations placed by the *Bivens* Court on the judiciary's role in the dialogue. First, the Court said, there might be "special factors counselling hesitation in the absence of affirmative action by Congress"³⁸³ that would foreclose the judicial implication of a constitutionally appropriate remedy in some cases. Second, a plaintiff such as *Bivens* might be legislatively "remitted to another remedy, equally effective in the view of Congress,"³⁸⁴ and if so, the constitutionally implied remedy would no longer be available. On the facts of *Bivens* neither limitation applied, and so the plaintiff got his damages remedy. How these limitations might operate in other contexts was left for future cases to decide.

2. *The Theory of Bivens Expanded: Davis v. Passman and Carlson v. Green*

After nearly a decade of relative silence on the question, the Supreme Court has written an opinion in each of the last two Terms dealing with the fundamentals of the constitutionally implied cause of action for damages against federal officers. These two opinions, *Davis v. Passman*³⁸⁵ and *Carlson v. Green*,³⁸⁶ have dramatically broadened the scope of the *Bivens*-type remedy and provide important insight into the factors which predict the appropriateness of that remedy in other contexts.

Davis was a suit in federal district court brought by a former employee of a United States Congressman. The plaintiff sought damages in the form of back pay, alleging that the defendant had fired her solely because of her sex in violation of the equal protection component of the

403 U.S. at 397.

381. Monaghan, *supra* note 31, at 2-3, 23-24.

382. *Id.* at 29. This had the important effect of carving out for the judiciary a special activist role in protecting individual constitutional rights, a role which grew in inverse proportion to the inactivity in the field of society's other lawmaking institutions.

Monaghan's thesis has been subject to recent criticism. See Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978). Schrock and Welsh apparently would limit *Bivens* to constitutionally required remedies for particular plaintiffs who have no other effective remedy available to them. *Id.* at 1136.

383. 403 U.S. at 396.

384. *Id.* at 397.

385. 442 U.S. 228 (1979).

386. 446 U.S. 14 (1980).

fifth amendment.³⁸⁷ The *Carlson* case was also an action in federal district court, brought by the representative of a deceased federal prisoner against federal prison officials. The plaintiff claimed compensatory and punitive damages for her son's death, which she asserted was the result of the defendants' culpable acts and omissions, including their failure to give him proper medical care. This conduct, she alleged, violated her son's due process, equal protection, and eighth amendment rights.³⁸⁸ In both cases the plaintiffs invoked the federal courts' general federal question jurisdiction under 28 U.S.C. Section 1331(a), and claimed damages directly under the relevant constitutional provisions violated by the defendants.

That the lower courts in both cases had jurisdiction to consider these claims was, of course, well settled.³⁸⁹ On the merits, however, there were a variety of troublesome issues. As a matter of logical progression, perhaps the first was whether the *Bivens* precedent was limited to fourth amendment rights, as at least one lower federal court had held.³⁹⁰ Most other lower federal courts that considered the question had not so limited the *Bivens* opinion, and had implied damage remedies against federal officers from a variety of other provisions of the Constitution.³⁹¹ The Supreme Court sided with the latter view in *Davis*. However, it did not reason incrementally from *Bivens*, analogizing fourth amendment to fifth amendment rights on the basis of criteria like the relative importance of the two rights or the relative need for a damage remedy to deter violations of each.³⁹² Instead it read *Bivens* as marking out for courts a special role and responsibility in protecting all

387. 442 U.S. at 230-31.

388. 446 U.S. at 16-17 & n.1.

389. See *Davis v. Passman*, 442 U.S. at 236 (citing *Bell v. Hood*, 327 U.S. 678 (1946)); note 360 *supra*. In both *Davis* and *Carlson* the plaintiffs made clear that they claimed relief only under the Constitution within the meaning of 28 U.S.C. § 1331(a) (1976). Their allegations were therefore "inaterial." *Bell v. Hood*, 327 U.S. at 682. Likewise, their claims were not "insubstantial or frivolous," *id.* at 682-83, as the Supreme Court had not before decided whether the theory of the *Bivens* case applied to constitutional rights other than those generated by the fourth amendment. It followed that the district courts had jurisdiction, for "where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for [these] two possible exceptions . . . must entertain the suit." *Id.* at 681-82.

390. *Davidson v. Kane*, 337 F. Supp. 922, 924 (E.D. Va. 1972); accord, *Gabaldon v. United Farm Workers Organizing Comm.*, 35 Cal. App. 3d 757, 762 n.4, 111 Cal. Rptr. 203, 206 n.4 (5th Dist. 1973) (dicta), cert. denied, 416 U.S. 957 (1974).

391. E.g., *Green v. Carlson*, 581 F.2d 669 (7th Cir. 1978), *aff'd*, 446 U.S. 14 (1980) (eighth amendment); *Paton v. La Prade*, 524 F.2d 862, 869-74 (3d Cir. 1975) (first amendment); *United States ex rel. Moore v. Koelzer*, 457 F.2d 892, 893 (3d Cir. 1972) (fifth amendment); see *Wounded Knee Legal Defense/Offense Comm. v. FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974) (sixth amendment).

392. The Court has engaged in something like this amendment-by-amendment analysis in construing the power of a federal district court on habeas corpus to inquire into the constitutionality of a state prisoner's conviction. Compare *Rose v. Mitchell*, 443 U.S. 545 (1979), with *Stone v. Powell*, 428 U.S. 465 (1976).

individual rights secured by the Constitution.³⁹³ And this meant, by and large, the Constitution as a whole, not just particular portions of it:

At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," . . . we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.³⁹⁴

The generality of this reasoning is unmistakable. It was equally unmistakable in the *Carlson* decision.³⁹⁵ The Court will presume that all justiciable constitutional rights give rise to a private damages remedy, subject to the condition that a given right is not committed in the text of the Constitution to the sole discretion of Congress or the President. Of course, justiciability is a precondition to invoking the federal judicial power no matter what the source of the claim is.³⁹⁶ In all likelihood, therefore, the Court was merely making the point that some portions of the Constitution may not confer rights which anyone has standing to assert.³⁹⁷ Moreover, the other condition mentioned—the textual commitment of an issue to a coordinate branch of government—seems only to confirm the otherwise general rule that federal courts will not hear political questions, even in the context of a *Bivens*-type action.³⁹⁸ Alternatively, this condition can just as easily be analyzed as a "special factor counselling hesitation" within the meaning of the *Bivens* limiting factors, and hence not in itself of independent significance.³⁹⁹

Perhaps recognizing that there was substantial overlap in the factors mentioned in *Davis*, the Court in *Carlson* streamlined the *Bivens* analysis further still. There the Court said that once "victims of a constitutional violation" plead a cause of action drawn directly from the Constitution, they have "a right to recover damages against the [offend-

393. 442 U.S. at 241, *quoted at* note 367 *supra*.

394. 442 U.S. at 242 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

395. 446 U.S. at 18 ("*Bivens* established that the victims of a *constitutional violation* by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right") (emphasis added).

396. *See* note 15 *supra*.

397. *See, e.g.*, *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (the guarantee clause, art. IV, § 4, is not a source of judicially enforceable private rights); note 4 *supra*.

398. *Compare* *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), *with* *Baker v. Carr*, 369 U.S. 186, 217 (1962).

399. Indeed, the *Davis* Court itself seemed to treat the "textual commitment" and "special factor" issues as identical. *See* 442 U.S. at 235 n.11, 246.

ing] official in federal court despite the absence of any statute conferring such a right."⁴⁰⁰ The only restraints articulated in *Carlson* on a federal court's power to grant relief are the two situations mentioned expressly in *Bivens*,⁴⁰¹ i.e., special factors counselling hesitation and legislative provision for an equally effective alternative remedy. The *Carlson* Court thus made it patently clear, if the *Davis* decision had not, that the constitutionally inspired damage remedy is the rule rather than the exception—a point that was not lost on either the concurring or the dissenting Justices.⁴⁰²

But how much force do the two limiting factors have? In both *Davis* and *Carlson* the Court overcame persuasive arguments based on the *Bivens* limiting factors to find that the plaintiffs had stated valid constitutional claims. And in doing so, the Court demonstrated the enormous tenacity and potential of the *Bivens* theory.

The *Davis* Court was not hard pressed to conclude, as an initial matter, that "a damages remedy is surely appropriate in this case,"⁴⁰³ since the plaintiff's injury would go completely unredressed without a constitutionally implied cause of action. However, under the first limiting factor, the Court candidly recognized that "a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counselling hesitation."⁴⁰⁴ But this was not the end of matters. The Court was unwilling to let the mere exalted status of the defendant in the federal system in and of itself bar otherwise appropriate relief. Instead, the Court let the cause of action stand and left for another day the question of whether

400. 446 U.S. at 18.

401. *Id.* at 18-19.

402. Justice Powell concurred in the Court's judgment, but disagreed with the generality of the majority opinion authored by Justice Brennan. In his concurring opinion, joined by Justice Stewart, Justice Powell urged that federal courts be given more discretion than the majority allowed, stating that "[t]oday we are told that a court must entertain a *Bivens* suit unless the action is 'defeated' in one of two specified ways." 446 U.S. at 26 (Powell, J., concurring). Chief Justice Burger and Justice Rehnquist each filed dissenting opinions which also took issue with the apparent limitlessness of the Court's reasoning. *Id.* at 30-31 (Burger, C.J., dissenting); *id.* at 35 (Rehnquist, J., dissenting). Curiously, although all four of these Justices had also dissented in *Davis*, they did not contest with equal vigor the similarly broad language of Justice Brennan's majority opinion in that case. See text accompanying note 394 *supra*; *Davis v. Passman*, 442 U.S. at 252-53 (Powell, J., dissenting).

403. 442 U.S. at 245. The Court said that "[r]elief in damages would be judicially manageable, for the case presents a focused remedial issue without difficult questions of valuation or causation." *Id.* Even where valuation and causation issues are "difficult," however, it is hard to see how a federal court would be justified in declining to imply a damages remedy. Many cases arising under statutes present such issues. Moreover, even difficult damages issues certainly can be no more difficult than some of the nettlesome remedial questions confronting federal courts in suits seeking structural remedies against unconstitutional state and federal action. See text accompanying notes 81-96 *supra*.

404. 442 U.S. at 246.

the defendant had any immunity from actual liability under the speech or debate clause of the Constitution.⁴⁰⁵ Likewise the Court was just as loathe as it was in *Bivens* to foreclose the plaintiff from access to any remedy simply because the recognition of her right to sue might deluge federal courts with frivolous claims by others.⁴⁰⁶

Under the second *Bivens* limiting factor, the *Davis* Court could not find any "explicit congressional declaration" that people such as the plaintiff may not avail themselves of a constitutionally implied damage remedy.⁴⁰⁷ Although Congress had given a statutory cause of action for sex discrimination to certain federal employees, the plaintiff was excluded from this coverage.⁴⁰⁸ The Court was unwilling to read into Congress' omission an intent to disturb "whatever remedies petitioner might otherwise possess."⁴⁰⁹ In light of the Court's analysis of the special role of courts in constitutional cases, no doubt this conclusion was influenced by the fact that a contrary result would mean that Congress

405. *Id.* The speech or debate clause provides that Senators and Representatives, "for any Speech or Debate in either House, . . . shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1. The Court noted that this clause "shields federal legislators with absolute immunity 'not only from the consequences of litigation's results but also from the burden of defending themselves.'" 442 U.S. at 235 n.11 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). Nevertheless, the Court refused to remand the case to the court of appeals to dispose of this question first. The immunity of a federal legislator, like the absolute immunity of certain federal and state judicial and executive officers, comes into being only upon the defendant's allegation and proof of his office, and that his actions were taken within the scope thereof. See note 138 *supra*. The reach of the immunity is thus limited, and when it is exceeded the defendant can be held liable. See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). Logically, therefore, the Court was correct in deciding that the question of the defendant's speech or debate clause immunity is posterior to the question whether the plaintiff has stated a cause of action for damages directly under the Constitution. But see *Davis v. Passanin*, 442 U.S. at 251 (Stewart, J., dissenting) ("If . . . the respondent's alleged conduct was within the immunity of the Speech or Debate Clause, that is the end of this case, regardless of the abstract existence of a cause of action Accordingly, it seems clear to me that the first question to be addressed in this litigation is the Speech or Debate Clause claim").

406. 442 U.S. at 248. The Court expressed skepticism about the deluge argument, noting that § 1983 already provides broad access to federal courts for suits against state officers in analogous cases, that the plaintiff in a *Bivens*-type action must first demonstrate the existence of a constitutional violation, and that Congress can always create alternative remedies to relieve the pressure on federal courts. However, the Court found that the "most fundamental answer" to this argument was that provided by Justice Harlan, concurring in *Bivens*. He said:

Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

403 U.S. at 411.

407. 442 U.S. at 246-47 (quoting *Bivens v. Six Unknown Named Agents*, 403 U.S. at 397). The emphasis on the word "explicit" was supplied by the *Davis* Court.

408. 442 U.S. at 247 n.26. The statutory cause of action is § 717 of Title VII of the Civil Rights Act of 1964, 86 Stat. 111 (1972) (codified at 42 U.S.C. § 2000e-16 (1976)).

409. 442 U.S. at 247.

could strip the plaintiff of any federal remedy at all for her injury. This would run directly counter to *Bivens*' explicit assertion that Congress may eliminate a constitutionally implied remedy only by replacing it with an "equally effective" remedy.⁴¹⁰

The Court's commitment to preserving adequate remedies for constitutional violations is at least as clear in *Carlson*. There the Court held that the fifth and eighth amendments give rise to a private cause of action for compensatory and punitive damages against federal prison officials.⁴¹¹ In doing so, it disposed of the first *Bivens* limiting factor with dispatch: Federal prison officials "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate."⁴¹² As it had done in *Davis*, the Court squarely recognized in *Carlson* that merely exposing the defendants to suit might adversely affect their discharge of public business. However, this impact was not in itself enough to deny the plaintiff a forum, although it might affect the defendants' ultimate liability.⁴¹³

The Court's strong commitment to the implied constitutional cause of action also came through plainly in its treatment of the second *Bivens* limiting factor. In *Carlson*, unlike *Davis* or *Bivens*, Congress had supplied a statutory cause of action for those in the plaintiff's position: a suit against the United States under a 1974 amendment to the Federal Tort Claims Act.⁴¹⁴ In that amendment Congress had spoken

410. 403 U.S. at 397. In none of its cases has the Court come to grips with the difficult question whether, in some circumstances, Congress might be without power to abrogate the *Bivens* remedy. Suppose, for instance, that Congress were to enact an exclusive statutory remedy for injuries to fourth amendment rights that gave the injured party a right to collect only one dollar in liquidated damages. Such a scheme would purport to replace not only the *Bivens* remedy but also state law with a remedy that was inadequate to compensate the plaintiff and that clearly encouraged fourth amendment violations. Although Congress may have expressed its view that the new remedy and *Bivens* were equally effective, it would seem elementary that the Court would review Congress' judgment and reject it when the result is a scheme that falls beneath what is minimally required by the Constitution. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Indeed, this power of review is supported by and may explain the subtle shift in language used in text by the Court in *Carlson* to describe the second *Bivens* limiting factor: The Court said the substitute remedy had to be "viewed as equally effective" but did not say by whom. 446 U.S. at 18-19. But see *id.* at 22 n.10. The same analysis would apply were Congress expressly to abrogate *Bivens* and remit plaintiffs to inadequate state law remedies, while at the same time pronouncing those remedies equally effective in an attempt to put them beyond the Court's power of revision.

411. 446 U.S. at 18-23.

412. *Id.* at 19.

413. *Id.* ("even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz v. Economou*, 438 U.S. 478 (1978), provides adequate protection").

414. In 1974, Congress amended the Federal Tort Claims Act to permit a cause of action for damages against the United States for certain intentional torts committed by federal law enforcement officers. 28 U.S.C. § 2680(h) (1976). Its motives in doing so rested in part on the perceived

at last on the topic of appropriate constitutional remedies; would the Court heed its voice and retire from the dialogue?

The Court would not. First it pointed out legislative history that "made it crystal clear that Congress views [the Federal Tort Claims Act] and *Bivens* as parallel, complementary causes of action."⁴¹⁵ Moreover, only if there is an "explicit congressional declaration," held the Court, will it consider the constitutional cause of action to be preempted by a statutory remedy.⁴¹⁶ The Court reiterated the point that the *Bivens* cause of action does not spring from absolute necessity.⁴¹⁷ Therefore, even if the statutory remedy gives the plaintiff the minimum protection required by the Constitution, the more generous *Bivens* remedy can coexist with it if the Court still considers it an appropriate vehicle to enforce constitutional rights. In the Court's view, the continued propriety of the *Bivens* remedy in the face of the statutory one was demonstrated by several factors: the added deterrence to unconstitutional conduct provided by an officer's exposure to personal liability for compensatory and especially punitive damages,⁴¹⁸ the availability of a jury in a *Bivens* suit but not in an FTCA action,⁴¹⁹ and the fact that a *Bivens* action is governed by a uniform body of federal common law, unlike an FTCA suit, which incorporates the "vagaries" of state law.⁴²⁰ For these reasons, said the Court, "[p]lainly FTCA is not a suf-

failure of the *Bivens* remedy to provide many claimants with actual compensation for injuries to their constitutional rights. S. REP. NO. 588, *supra* note 147, at 2790.

415. 446 U.S. at 20 (quoting S. REP. NO. 588, *supra* note 147, at 2791) ("Furthermore, this provision should be viewed as a *counterpart* to the *Bivens* case and its progeny [sic]"') (emphasis supplied by the Court). H.R. 2659, 96th Cong., 1st Sess., 125 CONG. REC. 1107 (1979), would, among other things, establish an exclusive remedy against the United States for constitutional torts committed by federal agents within the scope of their authority. The bill, which is currently in the Judiciary Subcommittee of the House, provides that the extent of the government's liability is governed by "applicable Federal law," although it precludes liability for pre-judgment interest or for punitive damages. *Id.* § 3. The measure also would deprive the United States of the defense of absolute or qualified immunity, except where the offending officer is a "Member of Congress, a judge, or prosecutor, or a person performing analogous functions." *Id.*

416. 446 U.S. at 19-20.

417. *Id.* at 22 n.10 ("The issue is not whether a *Bivens* cause of action or any one of its particular features is essential. Rather the inquiry is whether Congress has created what it views as an *equally* effective remedial scheme. Otherwise the two can exist side by side") (emphasis in original).

418. *Id.* at 22-23. The Court recognized that the threat of personal financial liability has a greater deterrent effect on officer misconduct than damages paid by the government. Moreover, it noted that "[p]unitive damages . . . are especially appropriate to redress the violation by a government official of a citizen's constitutional rights," but that such damages are not recoverable against the United States. *Id.*; see 28 U.S.C. § 2674 (1976).

419. 446 U.S. at 23; see 28 U.S.C. § 2402 (1976).

420. 446 U.S. at 23; see 28 U.S.C. § 1346(b) (United States liable "in accordance with the law of the place where the act or omission occurred"). Indiana law, for instance, did not permit survivorship actions, and drastically limited the damages recoverable in wrongful death actions. 446 U.S. at 17 n.4. *But see* 28 U.S.C. § 2674 (1976). The Court, by contrast, held in *Carlson* that in a constitutionally implied cause of action "only a uniform federal [common law] rule of survivor-

ficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy."⁴²¹

3. *Relief under Bivens: A Caveat and a Synthesis*

The plaintiff in a *Bivens*-type action against a federal officer may wind up with no actual relief, despite a proven constitutional violation and consequent injury. As in suits for damages against state officers under section 1983, the Court has extended to federal officers absolute and good faith immunity defenses that, if proven, will leave some or many plaintiffs uncompensated.⁴²² This willingness to erect legal barriers to actual compensation for violations of constitutional rights stands in marked contrast to the vigorous concern for protecting those rights that was expressed in *Bivens*, *Carlson*, and *Davis*. Nevertheless, the immunity principle, as expressed by the Court in *Butz v. Economou*,⁴²³ rests on sound practical concerns for the viable operation of government. The Court in *Butz* recognized that a rule of strict liability in *Bivens*-type actions would make federal officers unacceptably timid in performing their duties. Although such a rule would give greater actual protection for constitutional rights, its chilling effect on the competent practice of government would be too great a price to pay.⁴²⁴ Thus, the *Butz* Court established, among other things, a qualified immunity to protect those who needed it most if the business of government was to go on—federal executive officials who honestly and reasonably thought their acts were lawful.⁴²⁵

However, this immunity was carefully crafted as part of the federal common law to be no broader than necessary to foster countervailing interests. The *Butz* opinion, for instance, expressly refused to embrace the traditional doctrine that federal executive officers are absolutely immune for their discretionary acts, principally because the Court considered that a lesser protection would suffice.⁴²⁶ The Court held that the

ship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct." 446 U.S. at 23.

421. See 446 U.S. at 22.

422. *Butz v. Economou*, 438 U.S. 478 (1978); see text accompanying notes 127-44 *supra*. Likewise, the impecuniousness of the individual defendant may in a given case, or even in most cases, leave a deserving plaintiff with an uncollectible judgment. See S. REP. NO. 588, *supra* note 147, at 2790. See generally Note, "Damages or Nothing"—The Efficacy of the *Bivens*-Type Remedy, 64 CORNELL L.Q. 667 (1979).

423. 438 U.S. 478 (1978).

424. *Id.* at 497.

425. *Id.* at 496-508. The Court also thought it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Id.* at 504.

426. In *Barr v. Mateo*, 360 U.S. 564 (1959), federal officials were held absolutely immune from liability for actions which were taken within the scope of their authority and which were

plaintiff's interest in compensation, and society's in deterrence, argue against a blanket protection from liability, even for cabinet-level officers, in cases presenting constitutional violations.⁴²⁷ Likewise, in both *Davis* and *Carlson* the Court held that limited constitutional and common law immunity doctrines were adequate to protect the defendants from expansive liability—a liability which clearly would suit the plaintiffs' interests in compensation but which might not comport with different and overriding policy goals.⁴²⁸ On the other hand, the *Butz* Court gave an absolute immunity to federal administrative officers performing acts analogous to those performed by federal judges and prosecutors.⁴²⁹ But it did so only after assuring itself that the law already provided safeguards against arbitrary action by these officers and that nothing less than absolute immunity would serve the public interest in maintaining a vigorous system of administrative regulation.⁴³⁰ In *Owen v. City of Independence*,⁴³¹ by contrast, the Court refused to give municipalities any immunity whatever in actions for constitutional violations caused by their official policy, precisely because it saw no need for such a doctrine sufficiently great to overcome the plaintiff's right to compensation. Although *Owen* was a suit under section 1983, the Court's approach to the statutory immunity question mirrored its atti-

discretionary in nature. The *Barr* plurality said that one necessary price for the effective operation of government "may be occasional instances of actual injustice which will go unredressed." *Id.* at 576. But *Barr* involved a suit for defamation under general tort law, and the Court in *Butz* held that "*Barr* did not purport to protect an official who has not only committed a wrong under local law, but also violated . . . the Constitution." 438 U.S. at 495. In a case of constitutional magnitude, the Court held, analysis is quite different. First, it said, a determination must be made whether a *Bivens*-type remedy is appropriate. Second, "the court then must address how best to reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department." *Id.* at 503.

427. 438 U.S. at 505-06 ("It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct . . . [and] offer[s] opportunities for unconstitutional action on a massive scale"). Named as defendants in *Butz* were the Secretary and Assistant Secretary of Agriculture, and lower-ranking other officers in that department. Although the plaintiff alleged a *Bivens* claim against the defendants for their initiation and prosecution of proceedings to suspend the registration of his commodities futures trading company, the Supreme Court treated only the immunity question, without reaching the issue whether the plaintiff had stated a viable claim under the Constitution. See *Economou v. Butz*, 466 F. Supp. 1351 (S.D.N.Y. 1979) (holding that the plaintiff had stated a claim under the first amendment), *on remand from* 438 U.S. 478 (1978).

428. *Carlson v. Green*, 446 U.S. at 18-20; *Davis v. Passinan*, 442 U.S. at 246.

429. 438 U.S. at 512-15. The officers in question were an administrative law judge or hearing examiner, and agency attorneys and officials responsible for investigating the plaintiff's company and then recommending and initiating agency proceedings to revoke its registration.

430. *Id.* at 507, 513-17 (only a qualified immunity is available as a general rule, "subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business").

431. 445 U.S. 622 (1980); see text accompanying notes 170-87 *supra*.

tude in *Butz*. Indeed, the *Butz* Court itself noted that the "congressional origins of the [section 1983] cause of action" had in fact had little impact in "determining the level of immunity" appropriate to defendants sued under that statute.⁴³² The federal courts themselves had done that, building upon policies which were applicable equally in section 1983 and *Bivens* actions.⁴³³ The conflict between the compensation and deterrence principles on the one hand, and the immunity principle on the other, has produced a synthesis of values in the Court's decisions considering the contours of the constitutionally implied cause of action.

First, as the Court pointedly observed in *Butz* and then confirmed in *Davis* and *Carlson*, the decision whether to create a constitutional damages remedy is governed solely by the criteria of *Bivens* and its progeny. It is analytically distinct from the rules of federal common law, including the immunity defenses, that are developed later to flesh out that cause of action.⁴³⁴

Second, the mere status of the defendant, even though of constitutional magnitude as in *Davis*, is not enough to preclude the implication of a *Bivens* remedy, although it may effect the rules governing his actual liability. Similarly, the existence of another remedy, including a statutory remedy created by Congress, will not foreclose a *Bivens* cause of action unless Congress has expressly made it exclusive and unless it is "equally effective."

Third, those defenses to liability that are adopted as part of the federal common law must find their source in a genuine public policy sufficiently important to override the acknowledged interest of the plaintiff in compensation and that of the public in deterring unconstitutional conduct.

Finally, the exact contours of these defenses must be strictly tailored to meet the needs of the countervailing policy. It is not enough that the defendant is a high-ranking officer, as in *Davis* and *Butz*, who is charged with difficult public responsibilities. He must perform those responsibilities constitutionally, or at least in the good faith and reasonable belief that he is so acting, or else answer in damages for the harm he causes. Other defendants may receive greater or lesser protection, depending not on who they are, but on what they do and on what pro-

432. 438 U.S. at 501.

433. *Id.* at 501-02. The Court thought that the Constitution does not distinguish between federal and state officers—if either violate constitutional rights they ought to answer. "Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers." *Id.* at 501 (emphasis in original). It followed through on this policy of parity by holding that federal quasi-judicial and prosecutorial officers enjoy the same absolute immunity as do similarly situated state officials. See notes 135-36 *supra*.

434. 438 U.S. at 503; note 426 *supra*.

tection is absolutely necessary to make government work properly.⁴³⁵

B. The Implied Constitutional Remedy of Damages Against States in State Courts: An Analysis

As has been seen, a state court of general jurisdiction always has jurisdiction to consider whether to imply a constitutional cause of action, no matter who the defendant is. And in doing so, it has the power and the duty to disregard state law, including the doctrine of sovereign immunity, to the extent that law stands in the way of giving a remedy which is called for by the Constitution. However, whether the state court should actually grant relief against the state for its constitutional violations depends on the resolution of a series of further issues: the applicability of *Bivens* theory to constitutional provisions restraining state action; the seemliness of a constitutionally implied remedy to be administered in state courts; the appropriateness, under the standards set forth in *Bivens*, of a damages remedy against states in state courts; and the immunities and defenses that might be developed to shape the exact contours of such a remedy. The balance of this section examines these issues.

1. The Applicability of Bivens Theory to Constitutional Provisions Restraining State Action and to States as Defendants

The Supreme Court has never decided whether the theory of the *Bivens* case extends to constitutional provisions restraining state action, including the fourteenth amendment.⁴³⁶ Nevertheless, the Court's decisions in *Davis* and *Carlson* have brought the *Bivens* case very far indeed. Although all three cases deal with the liability of federal officers in federal courts, their reasoning and philosophy is not so easily circumscribed. In particular, the Court in both *Davis* and *Carlson* consciously chose to construe *Bivens* as applicable to all justiciable constitutional rights. In both cases it declined to proceed incrementally, from amendment to amendment on a case-by-case basis. Rather, the Court has embraced the broadest possible rationale to explain the *Bivens* cause of action. The genius of *Bivens* as thus construed is that some viable remedy ought to be available for violations of all constitutional rights and that the judiciary is well situated to fashion

435. Cf. *Dennis v. Sparks*, 101 S. Ct. 183, 188 (1980) (private parties accused of conspiring with state judge to deny constitutional rights are not entitled to judge's absolute immunity in § 1983 action because "the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons").

436. The Court recently granted certiorari to decide this extremely important question, but disposed of the case on other grounds. *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977).

that remedy. And this genius admits of no limitation to rights against the federal government. The victim of unconstitutional government action is in precisely the same position whether the victimizer was a federal or a state officer. His need for compensation and society's need for deterrence of unconstitutional acts are the same in both cases.⁴³⁷

Recognizing this, many state and lower federal courts, even before *Davis* and *Carlson*, used the theory of *Bivens* to imply constitutionally appropriate remedies against local governments who acted contrary to the fourteenth amendment.⁴³⁸ Indeed, the Supreme Court's own cases, prior to *Bivens*, that upheld the power of federal courts to award injunctions and damages against state officers acting unconstitutionally rested ultimately on a test of appropriateness rather than strict necessity.⁴³⁹ The plaintiffs in these cases might have been referred to state courts and state tort law for relief, with Supreme Court review to assure that it was given. Instead the Court gave the broadest possible interpretation to 28 U.S.C. section 1331 and to the concept of state action, with the result that federal courts assumed practical suzerainty over the unconstitutional acts of state officers even though this was not, in theory, strictly necessary to protect the plaintiff's rights.⁴⁴⁰

Given this background and the policies voiced in *Davis* and *Carlson*, it is difficult to see why the basic *Bivens* cause of action does not extend to fourteenth amendment rights and to other justiciable rights against the states created by the Constitution. It may be that in a given case a particular claim against a particular defendant ought not to produce liability. But this goes to the question of what immunities are available as defenses to an otherwise appropriate *Bivens* cause of action, or at best to the existence on the facts of that case of special factors counselling hesitation in the judicial creation of the remedy. It does not undercut the applicability of *Bivens* as a general matter to constitutional provisions restraining state action.

Nor should it matter that Congress has failed to act outside the context of section 1983 and other statutes which do not apply by terms

437. *Butz v. Economou*, 438 U.S. 478, 496-504 (1978); see notes 425, 433 *supra*.

438. The numerous federal decisions doing so prior to the holding in *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978), are discussed at note 160 *supra*. For federal court developments since *Monell*, see note 187 *supra*.

The scholarly commentary, some of which is cited at notes 160, 190 *supra*, has been universal in its perception of the implied constitutional remedy as a creation of the federal courts only. In fact, many state courts prior to *Monell* used the theory of *Bivens* to imply constitutional causes of action against units of local government. See, e.g., cases cited at note 211 *supra*.

439. E.g., *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (injunction); *White v. Greenhow*, 114 U.S. 307 (1884) (damages).

440. *Houne Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 285 (1913) (recognizing that a contrary result "would in substance cause the state courts to become the primary source for applying and enforcing . . . the Fourteenth Amendment").

to states as defendants. To be sure, Congress has express power to enforce the fourteenth amendment, just as it has power to regulate the rights and obligations of federal officers. And, in terms solely of self-interest, Congress may be more willing to enact legislation impeding the operation of state government in the service of constitutional rights than legislation with the same end which shackles federal officers. However, just as *Bivens* held that Congress' unexercised legislative powers do not automatically foreclose a constitutionally implied damage remedy against federal officers, so too the mere existence of Congress' powers under section five of the fourteenth amendment has never been thought sufficient to preempt the power of courts to protect fourteenth amendment rights by appropriate remedies.⁴⁴¹ Were the rule otherwise, much of what the Court has done in the field of constitutional rights against the states would be without legitimacy: The lower federal courts' jurisdiction in many of its most important cases was invoked on the grounds the plaintiffs' claims arose under the Constitution, not under section 1983 or any other congressional enactment.⁴⁴²

This is not to say that Congress' action or inaction is irrelevant. Both are quite pertinent to *Bivens* analysis, but for reasons which have nothing to do with whether the right asserted by the plaintiff arises under the fourteenth amendment rather than, for example the fifth amendment. In short, Congress may have intended a particular statutory remedy to be exclusive; this is a matter, however, for consideration by the courts in determining whether an otherwise appropriate constitutional remedy is precluded because, in the words of the *Bivens* Court, the plaintiff has been "remitted to another remedy, equally effective in the view of Congress."⁴⁴³

Of course, it may be argued that *Bivens* and its progeny are limited to the implication of constitutional remedies against individual state or federal officers and may not be extended to government entities, including states.⁴⁴⁴ This argument would grant the duty of state courts to give constitutionally appropriate remedies against such officers, but

441. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 9, 20, 24 (1949).

442. See text accompanying notes 373-76 *supra*. These cases include some of the most important and far reaching of the Court's constitutional decisions. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *aff'd* 98 F. Supp. 797 (1951).

443. 403 U.S. at 397. See also *Butz v. Economou*, 438 U.S. 478, 503 (1978) ("The presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to [imply a *Bivens* cause of action] But once this analysis is completed, there is no reason to return again to the absence of congressional authorization in resolving the question of immunity").

444. Proponents of this argument would necessarily reject those lower federal and state court decisions that have used *Bivens* to imply constitutional remedies against local governments. See notes 160, 210-11 *supra*.

deny their responsibility to go further. Under this model of *Bivens*, a victim of unconstitutional state action would be treated no differently than a person harmed by private misconduct: both have the right to seek a remedy, but no right to collect compensation unless permitted by the relevant substantive law, including immunities, and by the defendant's financial condition.

This view is flawed, however, because it loses sight of the reason why the *Bivens* Court decided to imply a constitutional remedy in the first place. The Court recognized that there was something uniquely harmful about constitutional violations that was not adequately redressed by existing laws governing private relationships.⁴⁴⁵ And that extra something is the defendant officer's status as an arm of a government that is forbidden by a written constitution from performing certain conduct that private law may inadequately police or even condone. In short, the *Bivens* remedy holds the defendant officer liable as a surrogate for the government. He is liable precisely because the government, through him, has violated constitutional rights. When the surrogate is eliminated and the government, such as a state, is sued directly, on its most basic level *Bivens* analysis yields the same result as when an officer is sued. That is because existing remedial law, in the form of the section 1983 cause of action, is inadequate to answer fully all our constitutional concerns. Accordingly, judicial implication of a remedy is warranted—"appropriate" in the vernacular of *Bivens*—unless there is some good reason not to do so.

That a state rather than an officer is sued may be a "special factor counselling hesitation," just as the defendant's special status as a Congressman in *Davis v. Passman*⁴⁴⁶ differentiated him from other officers of the federal government against whom a *Bivens* remedy has been implied. However, as is discussed below, this assumes that governments and individuals are in the same general order of defendants to whom *Bivens* analysis may profitably be applied. The difference between governments and persons may indicate different rules of substantive liability once the basic decision is made to create a *Bivens* cause of action against both. But in either case there is nothing about states as defendants that would warrant a rule excluding them automatically from the initial stage of *Bivens* analysis, in which the decision whether to imply a remedy from the Constitution is made under established and uniform criteria. Of course, state law may give states immunity from suit, just as it may give its officers immunity, but in both cases state law is subordinated by the supremacy clause to the overriding

445. See text accompanying notes 359-84 *supra*.

446. 442 U.S. 228 (1979); see text accompanying notes 403-05 *supra* and 487-89 *infra*.

command of the federal Constitution.⁴⁴⁷ Indeed, in *Ward v. Love County*,⁴⁴⁸ the Supreme Court applied this command to a suit against a county in state court to recover unconstitutionally collected taxes. The Court held that the Constitution of its own force rendered the county liable, despite the fact that there was "no statutory authority therefor,"⁴⁴⁹ thereby concluding that remedies against flesh and blood defendants are not a plaintiff's only recourse in a claim based directly on the Constitution. It is but a simple logical step from local governments as defendants to states as defendants once the basic proposition is established that state sovereign immunity law is not constitutionally sanctioned, at least in cases raising constitutional claims. And this proposition, it will be recalled, is justified by the policy and logic of the Constitution.⁴⁵⁰

2. *Constitutional Remedies in State Courts*

The *Bivens* opinion contemplated the creation of a uniform body of federal common law to be developed and enforced by federal courts. Yet long before *Bivens* the Court had routinely upheld the exercise by state courts of jurisdiction in damage actions against federal officers for acting in excess of their authority.⁴⁵¹ Since 28 U.S.C. section 1331 does not give federal courts exclusive jurisdiction, even now a state court could entertain a *Bivens*-type action against a federal officer, in the event he chose not to remove.⁴⁵² This result would comport with the Court's decisions in other contexts giving state courts the responsibility of applying and perhaps even formulating federal common law.⁴⁵³ That state courts are bound in such cases to apply federal law does not detract from their competence to decide the merits. Indeed, it reinforces the basic point that state courts of general jurisdiction are bound

447. See text accompanying notes 192-357 *supra*.

448. 253 U.S. 17 (1920). The *Ward* case is discussed further at text accompanying notes 457-60 *infra*.

449. 253 U.S. at 21.

450. See text accompanying notes 192-357 *supra*.

451. See, e.g., *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1866); *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851).

452. See note 370 *supra*. The state court would walk a fine line in such a case, "[f]or just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised." *Bivens*, 403 U.S. at 395 (citations omitted).

453. See, e.g., *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731, 735-36 (1967) (state court with "broad jurisdiction of admiralty cases" generally must exercise that jurisdiction over federal judge-made unseaworthiness claim); *Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962) (state court must apply federal common law in dispute over labor contract brought under § 301 of Labor Management Relations Act, 29 U.S.C. § 185 (1976)); cf. *Maime v. Thiboutot*, 100 S. Ct. 2502, 2507 n.12 (1980) (state court must apply federal law in adjudicating § 1983 action).

by the supremacy clause to enforce federal rights in accordance with the overriding command of federal law.

Furthermore, long before section 1983 became a factor in constitutional adjudication the Supreme Court had held that the Constitution alone requires state courts to give certain constitutionally necessary or appropriate remedies. In *Poindexter v. Greenhow*,⁴⁵⁴ for instance, it held that a Virginia state court had a constitutional duty to give judgment against a state officer for the return of property seized by him in violation of the plaintiff's contract clause rights. And, as noted above, it did so even though state law denied the plaintiff a remedy.⁴⁵⁵ Moreover, the plaintiff in *Poindexter* did not have access to a federal court for his claim.⁴⁵⁶ The Court's decision therefore stands for the proposition that state courts must give remedies which are necessary to vindicate the plaintiff's constitutional rights, in the sense that no other court is open to him.

But even where a plaintiff in state court could have invoked federal court jurisdiction to present his constitutional claims, the Court has held in several cases that the Constitution nonetheless requires the state court to give relief. In *Ward v. Love County*,⁴⁵⁷ for instance, the Court ruled that an Oklahoma court was constitutionally obligated to give the remedy of damages against a county which had collected unconstitutional taxes from the plaintiffs by coercion. It registered a similar holding in *Hopkins v. Clemson Agricultural College*,⁴⁵⁸ a state court action against a state college to recover for the taking of property without just compensation. In both cases the plaintiffs' claims exceeded the amount in controversy then required for access to federal courts under their general federal question jurisdiction,⁴⁵⁹ and the fact that the defendants

454. 114 U.S. 270 (1884).

455. See text accompanying note 350 *supra*.

456. See text accompanying note 353 *supra*.

457. 253 U.S. 17 (1920). The plaintiffs in *Ward* were Indians who had received allotments of land in Oklahoma by a congressional enactment which made their property tax exempt for a period of years. The Court had earlier held that the Indians had a vested property right in this exemption which neither Congress nor the state could impair. *Id.* at 20. Nonetheless, the county had assessed a tax against their lands and had threatened large penalties and foreclosure sales if it was not paid. The Indians paid under protest, then sued in state court for a refund. Though the trial court gave relief, the Oklahoma Supreme Court reversed, holding the plaintiffs' payment had been voluntary. *Id.* at 21. On the facts in the record, however, the Supreme Court found coercion. It then held:

To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.

Id. at 24.

458. 221 U.S. 636 (1911). This case is discussed at text accompanying notes 332-35 *supra*.

459. In *Ward* the plaintiffs claimed "\$7,823.35, aside from interest." 253 U.S. at 20. In *Hop-*

were governmental subunits would not have prevented relief.⁴⁶⁰

Similarly, in *Iowa-Des Moines National Bank v. Bennett*⁴⁶¹ the Court held that when county officers collected a tax in violation of the equal protection clause of the fourteenth amendment, the taxpayers in their state court suits could not be forced to await the collection of a higher tax from others, but were constitutionally entitled to refunds. In *Bennett*, too, the claims against the officers or their county were cognizable in federal court.⁴⁶² All three of these cases thus establish that the Constitution requires state courts of general jurisdiction to give particular remedies to vindicate constitutional rights, even though such a result is not absolutely necessary to give the plaintiff a forum. Viewed in this way, they may be taken as creating for state courts a role and duty analogous to that carved out for federal courts in *Bivens*.

Of course, none of these decisions considered whether state courts might have a constitutional obligation to render damages against the state itself, but only because the plaintiffs had not sued the states, and because the required remedies against the defendants actually named were fully adequate. Moreover, the holdings of these cases that state courts must give certain constitutional remedies is analytically distinct from the question against whom those remedies must run. This latter question is best analyzed, as it is below, under the *Bivens* rubric that some otherwise appropriate implied constitutional remedies are foreclosed because of special factors counselling hesitation.

Nevertheless, it may seem incongruous to entrust to state courts the initial development of a *Bivens*-type cause of action against their own states. It is well known that one of the principle reasons federal courts were given jurisdiction over section 1983 claims was Congress' distrust of the ability and willingness of Reconstruction Era state courts to enforce the post-Civil War amendments to the Constitution.⁴⁶³ Moreover, a *Bivens* remedy for damages against the states, although federal in inspiration and scope, could be enforced only in state courts

kings the plaintiff sought "judgment for \$8,000." 221 U.S. at 637. Until 1958, the amount in controversy required for access to a federal trial court in federal question cases was never more than \$3,000, exclusive of interest and costs. HART & WECHSLER, *supra* note 7, at 847 & n.32.

460. Local governments are not usually entitled to the protections of the eleventh amendment. See note 152 *supra*. Even though local governments were not "persons" within the meaning of § 1983 until the *Monell* decision, since at least 1871 they were nevertheless "routinely sued in . . . federal courts . . . [and] regularly held to answer in damages for a wide range of statutory and constitutional violations." *Owen v. City of Independence*, 445 U.S. 622, 639 (1980). See also *Home Tel. & Tel. v. City of Los Angeles*, 227 U.S. 278 (1913) (suit for injunction against municipality sustained under federal court's general federal question jurisdiction); note 157 *supra*.

461. 284 U.S. 239, 247 (1931).

462. The plaintiffs' claims for refunds clearly exceeded \$3,000. See *Iowa Nat'l Bank v. Stewart*, 214 Iowa 1229, 1232-33, 232 N.W. 445, 448 (1930), *rev'd*, 284 U.S. 239 (1931).

463. See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

since lower federal courts would be barred by the eleventh amendment from taking jurisdiction.

The answers to these seeming incongruities are several. First, the Supreme Court is at the apex of the development by state courts of a *Bivens* remedy. It is not precluded by the eleventh amendment from reviewing state court decisions to ensure that their constitutional duties have been discharged and to harmonize their decisions in accordance with what is appropriate under the Constitution.⁴⁶⁴ Second, the Court has in recent decisions correctly rejected the assumption that all state courts today cannot be trusted to enforce constitutional rights against their own states.⁴⁶⁵ Third, the Court has seen nothing incongruous in the analogous phenomenon of federal courts implying constitutional remedies against federal officers.⁴⁶⁶ Fourth, and most importantly, whatever one's feelings are about state courts, in the matter of a *Bivens* remedy for damages against the states they are the only forum open to the plaintiff. Therefore, there is no alternative but to trust them to enforce the Constitution, unless and until Congress acts to remove the eleventh amendment immunity of states from damage suits in federal courts.⁴⁶⁷

3. *The Propriety of the Remedy from the Standpoint of Compensation and Deterrence*

The twin pillars on which the *Bivens* remedy rests are compensation and deterrence: compensation for the victim of unconstitutional action and the deterrent effect that a damages remedy should have on the willingness of government officers to tread on constitutional rights.

The interest of the victim of constitutional state action in a more than theoretical remedy is self-evident. If he is one of the lucky few who overcomes immunity barriers and secures a judgment against a state officer which he then succeeds in collecting, all is well. But if not,

464. As the Court said in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 246 n.5 (1931), "cases discussing the question of what constitutes a suit against the State within the meaning of the Eleventh Amendment . . . have no bearing upon the power of this Court to protect rights secured by the federal Constitution." The Court's role in this regard is discussed further at text accompanying notes 533-39 *infra*.

465. *Allen v. McCurry*, 101 S. Ct. 411, 419-20 (1980); *see, e.g.*, *Moore v. Sims*, 442 U.S. 415, 430 (1979); *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976); *cf.* note 32 *supra* (evidence of increasing state court activism). *But cf.* *Jackson v. Virginia*, 443 U.S. 307, 320-24 (1979) (expanded federal habeas review necessary to correct occasional state court abuses).

466. The analogy is not perfect, because art. III of the Constitution guarantees federal judges lifetime tenure and salary protection, thereby insulating them from political pressure by the other branches of federal government. The same cannot be said of the typical relationship between state judges and state legislative and executive departments. *See* note 33 *supra*.

467. *See Maine v. Thiboutot*, 100 S. Ct. 2502, 2507 n.12 (1980).

he is left uncompensated for his injuries. An effective damages remedy against the state, by contrast, would leave him whole.

By the same token, requiring states to pay for the harm caused by the unconstitutional acts of their officers would tend to promote society's interest in insuring compliance by state government with constitutional mandates. Although no one individual would be held accountable, the impact of damages on the public fisc would tend to exert pressure on policymakers to organize and supervise governmental activities with closer attention to individuals' constitutional rights. While it is true, as the Court observed in *Carlson v. Green*,⁴⁶⁸ that damages against the government provides less deterrence to official misconduct than damages against officers personally, it is also apparent that the two in tandem provide more deterrence than either alone.

Last Term the Court cited precisely these considerations in support of its conclusion in *Owen v. City of Independence*⁴⁶⁹ that municipalities are strictly liable in damages under section 1983 for the consequences of their unconstitutional policies. The Court's conclusion that cities are not immune from liability was, of course, set against the background of a congressional enactment expressly giving the plaintiff a cause of action. To be sure, as the Court said, the intent of section 1983 is broadly remedial.⁴⁷⁰ That intent, however, had not previously stood in the way of the Court's creation, for policy reasons, of comprehensive immunity doctrines which left many victims of unconstitutional conduct without effective redress against state officials.⁴⁷¹ In *Owen* the Court recognized what its immunity decisions had wrought, and its decision to hold municipalities strictly accountable in damages for their unconstitutional policies was guided chiefly by the counter-vailing policies of the Constitution itself.⁴⁷²

The Court's commitment to viable remedies for constitutional violations is not easily limited. The *Owen* opinion accurately states the policies in favor of an effective damage remedy whether the cause of action is based on section 1983 or on the Constitution itself. And those policies—compensation and deterrence—are the same regardless of the identity of the government sued. The Court's statement in *Owen* that "a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an

468. 446 U.S. 14, 21 (1980).

469. 445 U.S. 622, 650-56 (1980); see text accompanying notes 170-90 *supra*.

470. 445 U.S. at 635-38.

471. See text accompanying notes 131-44 *supra*. See also *Butz v. Economou*, 438 U.S. 478, 501-02 (1978).

472. 445 U.S. at 651, *quoted at* notes 176-77 *supra*.

award of damages from the public treasury"⁴⁷³ applies with equal force to decisionmakers at all levels of government—including those employed by states and indeed even by the United States. To be sure, countervailing considerations⁴⁷⁴ may undercut the vigor of the compensation and deterrence policies, just as under *Bivens* there may be special factors counselling hesitation.⁴⁷⁵ But the point is that interests of constitutional magnitude counsel the general propriety of a damage remedy against governments for their constitutional violations, unless those countervailing considerations or special factors are both present and unavoidable.⁴⁷⁶ By the same token, the perception that treasury liability will deter some types of constitutional violations more effectively than others, or that a given type of liability is likely to unduly burden the operation of government, may very well influence the scope of the constitutional remedy or the immunities available to the government defendant. But these questions arise, and ought to be answered, on a case-by-case basis after the threshold decision is made that *Bivens* theory applies to state court actions against state and local govern-

473. 445 U.S. at 656.

474. *Id.* at 651.

475. 403 U.S. at 396.

476. Although the constitutional policies of compensation and deterrence apply with equal vigor to the United States, a *Bivens*-type remedy against the federal government would be inappropriate for several reasons which have no bearing on the matter of such a remedy against the states in their own courts. First, since the federal courts' subject matter jurisdiction can be limited by Congress, *see note 7 supra*, an implied remedy against the United States would ultimately have to be administered by state courts if Congress did not acquiesce. *See Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869). This would mean adjudication in the courts of an unfriendly sovereign, one of the principle things that both the eleventh amendment and the constitutionally implied doctrine of United States sovereign immunity were intended to avoid. *See United States v. Shaw*, 309 U.S. 495, 500-04 (1940); text accompanying notes 58-65 *supra*. Second, for a large class of litigants the need is not there, since Congress has already granted consent to suit for damages in many constitutional cases. *See* 28 U.S.C. § 2680(h) (1976) (intentional torts by federal law enforcement officers); 28 U.S.C. §§ 1346(a) (1976), 1491 (Supp. II 1978) (just compensation claims). Third, the duty of state courts to award damages against states, and of state governments to pay them, can be enforced by the mandate of the Supreme Court and the power of the federal executive, but no higher authority stands ready to compel the United States to pay. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793) (opinion of Jay, C. J.). *See also Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861). Fourth, art. I, § 9, cl. 7 of the Constitution vests "exclusive responsibility for appropriations in Congress, and . . . no execution may issue directed to the Secretary of the Treasury until such appropriation has been made." *Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962) (footnote omitted). *See also* CONG. GLOBE, 33d Cong., 2d Sess. 113 (1854) (remarks of Sen. Stuart). This would surely preclude any court from implying a remedy against the United States because it is a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department." *Davis v. Passman*, 442 U.S. 228, 242 (1979) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). There is, however, no parallel textual provision of the Constitution protecting the exclusive discretion of state legislatures in appropriations matters. Fifth, the Court has expressed the view that the sovereign immunity of the United States is more important to public policy than that of the states, perhaps because the federal government exists to protect the Union and all the people in it, not just the interests of those in a single state. *Kansas v. United States*, 204 U.S. 331, 342 (1907).

ments.⁴⁷⁷

4. *Has Congress Excluded the Remedy?*

The Court said in *Bivens* that the judicial implication of an otherwise appropriate constitutional remedy might be foreclosed were Congress to decide that plaintiffs must pursue another remedy that it considers equally effective. The decision in *Carlson v. Green* narrowed this limitation when it held that the mere existence of a parallel statutory remedy for a constitutional violation will not displace a judicially implied one unless Congress expressly declares its intention to make the statutory remedy exclusive. As noted above,⁴⁷⁸ the reason for this "clear statement" requirement is plain enough. The Court may perceive the alternative statutory remedy to be inadequate, as it did in *Carlson*. Therefore, the adoption of too easy a test for exclusivity would precipitate a conflict between the Court and Congress on what minimum remedy is required by the Constitution. The Court thought it better to avoid the conflict by letting both remedies coexist, a solution that had the added advantage of supplementing the deserving plaintiff's remedial arsenal.⁴⁷⁹

Given this framework, it is plain that Congress has not preempted the field of remedies against unconstitutional state action. There is nothing in the language or legislative history of Congress' principal statutory remedy in this area, section 1983, that voices the requisite express intent to make it exclusive.⁴⁸⁰

On the contrary, since the enactment of section 1983 the Court has time and time again approved state and federal court jurisdiction in suits to redress unconstitutional state action which were not brought under that statute.⁴⁸¹ Moreover, Congress' silence on the issue of state

477. See *Butz v. Economou*, 438 U.S. 478, 503 (1978), *quoted at* note 443 *supra*. The question of immunities in suits against states is discussed at text accompanying notes 544-73 *infra*.

478. Text accompanying notes 407-10 *supra*.

479. 446 U.S. at 18-23 & n.10.

480. The point was made by Chief Justice Burger, dissenting in *Carlson*:

[T]he test enunciated by the Court . . . would seem to permit a person whose constitutional rights have been violated by a state officer to bring suit under *Bivens* even though Congress in 42 U.S.C. § 1983 has already fashioned an equally effective remedy. After all, there is no "explicit congressional declaration" . . . that § 1983 was meant to preempt a *Bivens* remedy.

Id. at 30 (Burger, C.J., dissenting).

481. See, e.g., cases cited in *Monell v. Department of Social Serv.*, 436 U.S. 658, 663 nn.5, 6 (1978) (federal court jurisdiction); *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952) (federal court jurisdiction); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931) (state court jurisdiction); *Ward v. Love County*, 253 U.S. 17 (1920) (state court jurisdiction). The assumption of exclusivity is also inconsistent with those cases which hold that states may consent to suit in federal courts on constitutional claims even though they are non-persons under § 1983. See, e.g., *Soni v. Board of Trustees*, 513 F.2d 347, 352-53 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); see also *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

liability under section 1983 proves at best only that it did not intend to strip the states of their eleventh amendment immunity in federal courts.⁴⁸² It says nothing that limits the role that state courts should or might play in enforcing the fourteenth amendment. Quite the contrary, since Congress gave state courts concurrent jurisdiction over section 1983 suits, it obviously did not intend to limit or deny the role of state courts in enforcing constitutional rights.⁴⁸³ Nor, properly viewed, did Congress' action foreclose state court discretion or duty to enforce these rights when it rejected the proposed Sherman Amendment to section 1983, which would have made municipalities liable for the consequences of mob violence within their jurisdictions.⁴⁸⁴

482. Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, § 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1.

Quern v. Jordan, 440 U.S. 332, 343 (1979); see text accompanying notes 72-79 *supra*.

483. Since Congress gave state courts concurrent jurisdiction over § 1983 suits, it obviously did not intend to limit or deny the role of state courts in enforcing constitutional rights. See *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

484. See text accompanying note 157 *supra*.

In *Monell v. Department of Social Servs.*, 436 U.S. 658, 691-95 (1978), the Court relied on Congress' rejection of that measure in support of its conclusion that § 1983 does not render local governments vicariously liable for the constitutional torts of their agents. Whatever the merits of this position as a matter of statutory construction, see text accompanying notes 166-68 *supra*, the fact that Congress rejected the amendment should have no bearing on the *Bivens* question of whether Congress has expressly excluded a constitutionally implied remedy in state courts against either the states or their local governments.

To begin with, the *Monell* Court made it clear that it was construing solely the intent of the 1871 Congress, an intent shaped by the "reigning constitutional theory of [the] day." 436 U.S. at 676; see text accompanying note 4 *supra*. That theory—that Congress could not validly impose duties on state officers to implement the Constitution—the Court correctly said "has not survived." 436 U.S. at 676; see text accompanying notes 5, 6 *supra*. More importantly, it did not stop the Court from finding in *Monell*, and then enforcing in *Owen*, that Congress did intend that local governments be held liable for their unconstitutional official policies. 436 U.S. at 679-83; see text accompanying notes 161-87 *supra*. Thus, at the very least nothing in Congress' rejection of the Sherman Amendment is inconsistent with a constitutionally implied state court remedy against states based on the same type of official policies for which local governments would be strictly liable under § 1983. (Note that the reference here is to policies adopted by the state governments themselves, not policies of local governments which are nonetheless state action for fourteenth amendment purposes. There is no need to hold states accountable in damages for the unconstitutional policies of the local governments which they created, since § 1983 provides plaintiffs with a fully adequate remedy against the local governments themselves. See *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 645-49 (1911); text accompanying notes 185-87 *supra*).

Moreover, Congress' rejection of the Sherman Amendment falls far short of the sort of express statement of exclusivity which both the *Davis* and *Carlson* opinions require, even on the question of constitutionally implied vicarious liability either of states or of local governments. Indeed, the debates on the amendment show that some Members of Congress thought it was more acceptable that states be liable in such circumstances rather than municipalities:

Other congressional remedies against states, in the field of discrimination in employment and attorneys' fees in civil rights actions, were not meant to be exclusive and at best serve limited classes of constitutional litigants.⁴⁸⁵ As the Court held in *Davis v. Passman*, plaintiffs not afforded a more specific statutory remedy should be free to avail themselves of appropriate constitutionally implied remedies in the absence of an express statement of congressional intent to the contrary.⁴⁸⁶

5. *Special Factors Counselling Hesitation*

In *Davis v. Passman* the Court held that the mere fact that the defendant was a Congressman, a constituent member of a co-equal branch of government, was not enough in itself to preclude implication by the federal judiciary of a constitutional cause of action against him.⁴⁸⁷ Although it was a factor counselling hesitation, the Court said, whatever protection from liability the Constitution gave the defendant could be provided by creating a precisely tailored defense, not by the more drastic prophylaxis of complete immunity from suit. The Court's approach to the liability of a cabinet officer of the executive branch was the same when it held, in *Butz v. Economou*, that such an officer was entitled only to a qualified immunity in a *Bivens*-type cause of action.⁴⁸⁸

Like Members of Congress and high-ranking executive officers, the states have a lofty status in the constitutional system. The Constitu-

I hold that this duty of protection, if it rests anywhere, rests on the State, and that if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State. Hence, in my judgment, this section would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State.

CONG. GLOBE, 42d Cong., 1st Sess. 791 (1871) (remarks of Rep. Willard). See also *Quern v. Jordan*, 440 U.S. 332, 358 n.15 (1979) (Brennan, J., concurring in the judgment).

In either case, the express statement requirement was meant to forestall a conflict on whether a given substitute remedy is truly effective. Since in many cases the § 1983 remedy against a state officer will afford no relief at all, it clearly is not as effective as a constitutionally implied remedy against the government which employed him, or at least it ought not to be held to preempt such a remedy without clearer evidence of Congress' intent. See text accompanying notes 131-50, 414-21 *supra*.

Of course, it may very well be that vicarious liability on a *Bivens* theory would be inappropriate because of special factors counselling hesitation. See text accompanying notes 565-71 *infra*. Or it might be unseemly for a federal court to imply such a remedy while nonetheless appropriate for a state court to do so. See *Molina v. Richardson*, 578 F.2d 846, 852 (9th Cir.), *cert. denied*, 439 U.S. 1048 (1978); note 190 *supra*. But in either case, a court's decision whether or not to use *Bivens* should be made without regard for the 1871 Congress' rejection of the Sherman Amendment.

485. See text accompanying notes 37-45 *supra*.

486. 442 U.S. at 247.

487. *Id.* at 246.

488. 438 U.S. 478, 504-08 (1978).

tion presupposes their continuing existence as viable political entities, capable both of interacting with the federal government and of supplying their people with basic government services.⁴⁸⁹ It is clear that the judicial implication of a constitutional damage remedy against the states will have a financial impact on them, perhaps affecting their ability to discharge these constitutional functions. The likely financial impact of such a damage remedy is obviously a special factor counselling hesitation. Were the contemplated remedy to be enforced in the federal courts, the eleventh amendment would stand as an insuperable and automatic jurisdictional barrier to its implication. But as has been seen, no such automatic barrier exists in the state courts. State courts cannot refuse to imply such a remedy simply because the states are mentioned in the Constitution and have a role under it. Instead, the reasoning in *Davis* and *Butz* suggests that the decisions to create a damages remedy and to give it a certain shape ought to be guided by the underlying realities and likely consequences of judicial action or inaction. States, in short, may warrant different treatment from individuals for reasons of policy, but are not categorically outside the realm of defendants against whom a constitutional cause of action may run.⁴⁹⁰

To a greater or lesser degree, an implied damages remedy to compensate victims of unconstitutional action will drain money from the treasury of the state, reallocate scarce government resources, and impinge upon the state's decisions about how to structure the delivery of services. Similar impacts on state governments were enough to convince the Court in *National League of Cities v. Usery*⁴⁹¹ to hold unconstitutional Congress' attempt to extend the minimum wage protections of the Fair Labor Standards Act to state employees engaged in "traditional governmental functions." The Court held that Congress' commerce clause power, though plenary in its sphere, could not be exercised so as to undermine the constitutionally protected existence of "States as States."⁴⁹² Yet only four days later the Court decided, in *Fitzpatrick v. Bitzer*,⁴⁹³ that Congress had power under section five of the fourteenth amendment to expose the states to perhaps unlimited liability for the consequences of their unconstitutional action. Both de-

489. See, e.g., *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States"); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869) ("in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized"); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1172-73 (1977).

490. See text accompanying notes 444-48 *supra*.

491. 426 U.S. 833, 851-52 (1976).

492. *Id.* at 845.

493. 427 U.S. 445 (1976).

cisions involved state employment practices. Justice Rehnquist wrote for the Court in *National League of Cities* about the impropriety of the Fair Labor Standards Act in that it "directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress sought to impose."⁴⁹⁴ But he then wrote an opinion for the Court in *Fitzpatrick* upholding Congress' power to prohibit unconstitutional discrimination by the states in promulgating similar terms of employment.⁴⁹⁵

The key to reconciling the two cases does not lie exclusively in the nature of Congress' constitutional powers, for the Court was clear that Congress had "plenary" power in both cases.⁴⁹⁶ It lies, rather, in the difference between individual rights arising from constitutional provisions expressly restraining state power and those arising from congressional statutes enacted under article I, which does not in terms limit state power as against the individual.⁴⁹⁷ The distinction between congressional power and the source of the individual rights being asserted is crucial. It shows that individuals' rights to redress from "States as States" depends less on what Congress does than on the inherent nature of constitutional as compared to purely statutory rights.

But why should the two sorts of rights be treated differently? The *National League of Cities* decision suggests that the two basic considerations offsetting the legitimacy of private rights against the states are the financial integrity of state governments and their autonomy from federal regulation.⁴⁹⁸ Congress' article I powers, and especially its

494. 426 U.S. at 849.

495. 427 U.S. at 456. The plaintiffs in *Fitzpatrick* attacked the state's statutory retirement benefit plan on the ground that it unconstitutionally discriminated against male employees on account of their sex. *Id.* at 448.

496. Compare *National League of Cities*, 426 U.S. at 840, with *Fitzpatrick*, 427 U.S. at 456.

497. The Court thought it critical in *Fitzpatrick* that it was considering legislation passed by Congress "under one section of a constitutional Amendment [the fourteenth] whose other sections by their own terms embody limitations on state authority." 427 U.S. at 456. Subsequent cases have made it clear that the state sovereignty concerns voiced in *National League of Cities* are irrelevant when Congress passes valid specific legislation directed at the states pursuant to section five of the fourteenth amendment. See, e.g., *New York Gaslight Club v. Carey*, 100 S. Ct. 2024, 2032 (1980); *City of Rome v. United States*, 446 U.S. 156, 178-79 (1980). Likewise, the Court has said that in federal court suits under the general terms of § 1983 "[t]he Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Milliken v. Bradley*, 433 U.S. 267, 291 (1977). Indeed, sometimes Congress has power under art. I to enact legislation even though it is directed at integral state government activities. *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring); *Fry v. United States*, 421 U.S. 542 (1975). But whatever the dividing line is between permissible and impermissible congressional regulation of such activities under art. I, it is clear that that line has no bearing on the validity of fourteenth amendment legislation.

498. 426 U.S. at 846-52; see Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1224 (1977).

commerce clause power, have been construed very broadly.⁴⁹⁹ Unless these general powers have limits when exercised specifically against state government activities, then the features and even the survival of state government rest ultimately in the discretion of Congress. And there is nothing in the text or history of article I suggesting that the people ceded to Congress this measure of control over the basic contours of their state governments.⁵⁰⁰

The same cannot be said, however, about the fourteenth amendment and other portions of the Constitution specifically restraining state power. By ratifying these provisions the people and the states did not just grant Congress power to enforce them, they also consciously placed limits on the power of state government to grow in certain directions. Thus, it does not make sense to say that the states retained autonomy from federal regulation in the field of constitutional rights, or even that they retained such autonomy in the absence of congressional action. In either case they have "no 'discretion' to violate the Federal Constitution."⁵⁰¹ In other words, there is no field of regulation that is too local or important to the states to be delimited by the Constitution, even if there are such fields beyond the reach of Congress' general law-making powers. To be sure, federalism concerns may and perhaps should influence the Court's interpretation of the content of constitutional rights.⁵⁰² But once the Constitution has been construed, "its dictates are absolute and imperative."⁵⁰³

The source of the right being enforced also makes a difference to the states' financial integrity. Until a specific piece of article I legislation comes into being, the states cannot know whether their present government structure offends national policy. They must, therefore, commit themselves to that structure blindly and at the risk of potentially destructive liability later.⁵⁰⁴ Moreover, states have no direct control over the terms of congressional legislation affecting their interests. Hence, a congressional enactment may disable them from adopting what seems to them to be the most efficient and equitable system of government.⁵⁰⁵

499. See, e.g., *Fry v. United States*, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations").

500. *National League of Cities*, 426 U.S. at 842-43 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

501. *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).

502. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976).

503. *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).

504. See, e.g., *National League of Cities*, 426 U.S. at 846 ("The State of California . . . estimated that application of the [Fair Labor Standards] Act to its employment practices will necessitate an increase in its budget of between \$8 million and \$16 million").

505. See *United Transp. Union v. Long Island R.R.*, 634 F.2d 19 (2d Cir. 1980).

On the other hand, the states must ratify, and hence adopt as their own, constitutional provisions restraining state action.⁵⁰⁶ Their responsibility is bottomed in the bedrock of constitutional provisions which speak directly to how they practice government. They have had both the duty and, to a greater or lesser degree, the opportunity to conform their practices to what the Constitution requires.⁵⁰⁷ In short, the states have to some extent the ultimate *control* over whether and to what extent their practices violate the Constitution. Of course, the states do not ultimately control the specific content of constitutional provisions. This function rests with the Supreme Court—a department of the federal government. Nevertheless, when the Court gives voice to the meaning of the fourteenth amendment, or the contract clause, it does not in theory act as a legislature.⁵⁰⁸ To be sure, it does not simply construe and apply the intent of the Framers and the ratifying states.⁵⁰⁹ But as Professor Fiss has stated, “[t]he judicial role is limited by the existence of constitutional values, and the function of courts is to give meaning to those values.”⁵¹⁰ In this sense, therefore, the Supreme Court is more closely bound to the will of the ratifying states than is Congress when enacting legislation under article I, or even under section five of the fourteenth amendment.⁵¹¹ Moreover, the Court has developed a variety of doctrines unique to its role—such as mootness, ripeness, and standing—which limit the occasions on which it can speak to the meaning of the Constitution and which therefore limit somewhat its potential for intrusion on the operation of state governments.⁵¹²

The point is that the Court poses less of a threat to the financial independence of the states when it construes and enforces the Constitution than does Congress when it passes a piece of legislation under one of its article I powers. To the extent that a given construction of the Constitution by the Court is unexpected and causes widespread disrup-

506. U.S. CONST. arts. V & VII.

507. This is most clearly true where the relevant rule of constitutional law is announced in advance, and the allegedly unconstitutional acts stem from statutes or other high level pronouncements of official state policy. To the extent that state liability is wholly unforeseeable in a given case perhaps a qualified immunity defense would be appropriate, but the existence of such potential cases should not in itself preclude the implication of a constitutional cause of action, either in those cases or in other cases where a violation could have been avoided. See *Davis v. Passman*, 442 U.S. 228, 246 (1979). See generally text accompanying notes 544-73 *infra*.

508. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) (resolving conflicts between a statute and the Constitution in a “particular case . . . is of the very essence of judicial duty”). *Id.* at 178.

509. See *Colgrove v. Battin*, 413 U.S. 149 (1973); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 4-6 (1955).

510. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11 (1979).

511. See *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).

512. See Brillmayer, *supra* note 15.

tion of state practices,⁵¹³ moreover, it can be argued that the states assumed that risk when they adopted a Constitution in which the institution of judicial review was implicit.⁵¹⁴ Indeed, the Court in *Owen v. City of Independence*⁵¹⁵ found the constitutional policies of compensation and deterrence sufficiently weighty to impose monetary liability on a municipality, even though such liability was unexpected and beyond the state's control, and despite the plausible argument that the city's liability-producing conduct in that case was constitutional when it was performed.⁵¹⁶

The idea that for the above reasons it is acceptable to hold states accountable for violations of constitutional rights, but not for violations of certain federal statutory rights, helps explain and reconcile *National League of Cities* and *Fitzpatrick*. But how does it square with the Court's eleventh amendment decisions holding that federal courts may not award damages against states, even for constitutional violations, in the absence of congressional authorization?⁵¹⁷ The common denominator seems to be the ability of states to control their own destinies, within the confines of the Constitution. Granted, the states can more or less control whether they violate the Constitution. But for the eleventh amendment, however, the adjudication of their actual liability for such violations would be put totally beyond their influence, into the courts of the federal government. Although Congress has power to authorize this result, the states have at least some political influence over that decision. They have no similar voice in the decisions of federal judges in the absence of congressional authorization for suits in federal courts.⁵¹⁸ The Supreme Court's eleventh amendment holdings can thus be seen as relieving the states of the onus of adjudication in an unfriendly forum, without speaking at all to their ultimate responsibility for violations of constitutional rights. Indeed, the Court's decisions, holding that when a state consents to suits in its own courts the consent does not extend to suits in federal courts,⁵¹⁹ reflect the great importance

513. Compare *Brown v. Board of Educ.*, 349 U.S. 294 (1955), with *Plessy v. Ferguson*, 163 U.S. 537 (1896).

514. See generally C. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912).

515. 445 U.S. 622 (1980).

516. See text accompanying notes 174-75 *supra*.

517. See text accompanying notes 108-23 *supra*.

518. See note 65 *supra*.

519. See, e.g., *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 465-66 (1945); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). But cf. *Nevada v. Hall*, 440 U.S. 410 (1979) (sovereign immunity cannot prevent state from being sued in courts of another state). The principle in text has also been applied to suits against the United States—its consent to suit in federal court does not permit suit on the same cause of action in state court. See, e.g., *United States v. Shaw*, 309 U.S. 495 (1940); 28 U.S.C. § 1346 (1976).

to the states of the choice of forum where their liability is to be adjudicated.

These considerations have an important bearing on the propriety of a *Bivens*-type remedy against states in their own courts. When a state is sued in its own court on a constitutionally based cause of action, it has certain built-in safeguards that protect it against the type of disastrous potential liability that motivated the Court's *National League of Cities* and eleventh amendment decisions.

To begin with, the state is being called to task for transgressing rights that it itself helped to create and agreed to protect. It is true that Congress has not reinforced the state's constitutional duties by enacting a statute providing for damage liability. But Congress' inaction is not enough to preempt the state courts' power to fashion constitutional remedies, as the Court held in *Davis* and *Carlson*. Moreover, the state's constitutional duties exist whether or not Congress speaks. The main question is whether it is appropriate for state courts to fashion an implied damage remedy against the state in favor of those left without redress for constitutional violations through other legal remedies. Indeed, from the standpoint both of compensation and deterrence, such a remedy is not only appropriate but necessary to give any substance at all to constitutional guarantees. In this sense, a constitutionally implied remedy against the state is easier to justify than the basic *Bivens* remedy against officers, for in the latter case, had the result been different, the plaintiff at least would have had his state law tort remedies.

Liability in a specific case or type of case may indeed pose financial problems for the state. Nevertheless, those problems are in a sense of its own creation; they do not emanate from a distant and uncontrollable lawmaking body such as Congress. Moreover, although the Supreme Court will be giving content to the substantive rules of constitutional law with which the states must comply, the extent of their actual ultimate liability for violations can depend very much on their own initiative. As Justice Holmes said, "[m]en must turn square corners when they deal with the Government."⁵²⁰ Sometimes this means that the failure to avail oneself of a tightly drawn advance remedy will preclude the assertion of defenses in a subsequent proceeding.⁵²¹ By analogy, if a prospective civil rights plaintiff has an opportunity in advance to forestall assertedly unconstitutional conduct, the state might properly view his failure to seek the remedy as a bar to a subsequent and more drastic damage remedy against the state.⁵²²

520. *Rock Island, A. & L. R.R. v. United States*, 254 U.S. 141, 143 (1920).

521. *See, e.g., Yakus v. United States*, 321 U.S. 414, 444 (1944).

522. *See Agins v. City of Tiburon*, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), *aff'd*, 100 S. Ct. 2138 (1980) (landowner who challenges the constitutionality of a

Likewise, in other contexts the Court has declared the substance of a federal constitutional right, and then proceeded to hold that its remedial detail may differ from state to state.⁵²³ By the same token, once the right to a damages remedy against the state is established in principle, state courts and legislatures nonetheless should retain broad flexibility in implementing the right.⁵²⁴ For example, they may limit the plaintiff's recovery to compensation for proven injuries and exclude punitive damages.⁵²⁵ They may enact a short statute of limitations or very narrow tolling provisions.⁵²⁶ They may deny the plaintiff a jury, remit his case to an administrative claims agency, or tinker with rules of evidence.⁵²⁷ Still, the recognition that state law can be flexible in procedural and remedial detail should not distract attention from the basic premise that some constitutionally adequate remedy must be provided.

A state court forum also removes those objections to state suability which are voiced in the Court's eleventh amendment decisions. The states control the selection and appointment of state judges and the procedures applicable in state courts. When sued there, by definition they cannot complain of a hostile forum. This is not to say that the states are free to set up kangaroo courts in suits based on the Constitution; due process requires the rendition of impartial justice, and the supremacy clause tells state judges that they must give it regardless of what state law may provide to the contrary. Rather, it is clear that the state gains certain tactical advantages, albeit within the bounds of the Constitution, when it is sued in a court of its own creation.⁵²⁸ Indeed,

zoning ordinance may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid," but must instead sue for mandamus or declaratory judgment to forestall the taking).

523. Compare *Duncan v. Louisiana*, 391 U.S. 145 (1968) (fourteenth amendment requires state to provide a jury in criminal felony trials), with *Apodaca v. Oregon*, 406 U.S. 404 (1972) (twelve person criminal jury may be nonunanimous), and *Williams v. Florida*, 399 U.S. 78 (1970) (criminal jury may be comprised of six persons).

524. Just as a federal court has less discretion and flexibility than a state legislature in formulating a constitutionally acceptable legislative reapportionment plan, see *Connor v. Finch*, 431 U.S. 407, 414-15 (1977), so, too, a state court imposing a scheme of damages liability on the state ought to tread carefully in deference to the state legislature's greater ability to devise a workable compensation system. But some system must be forthcoming, and if not from the state legislature, or Congress, then the duty to provide one falls by default on the state courts.

525. Cf. 28 U.S.C. § 2674 (1976) (in action under Federal Tort Claims Act the United States "shall not be liable for interest prior to judgment or for punitive damages").

526. See *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979).

527. Cf. 28 U.S.C. § 2675 (1976) (attempted administrative adjustment of tort claims against the United States is a precondition of suit); *Lynch v. United States*, 292 U.S. 571, 582 (1934) ("So long as the [constitutionally protected] contractual obligation is recognized, Congress may direct its fulfillment without the interposition of either a court or an administrative tribunal"). See also *Vance v. Terrazas*, 444 U.S. 252, 264-67 (1980) (upholding Congress' power to displace rules of evidence in expatriation proceedings developed by courts from the Constitution, so long as Congress' new rules are minimally acceptable in protecting constitutional rights).

528. For instance, the state creates the rules of procedure that govern suits in its courts, and

the very reason why most commentators say federal judges are preferable to state judges for the prospective enforcement of federal rights—*i.e.*, that the former are life-tenured and not as susceptible to political influence as the latter⁵²⁹—tends to undercut the threat to democratic processes posed by a state court order for the expenditure of public funds. State judges can be expected to be more attuned to the impact of their judgments on state government.⁵³⁰ Accordingly, they may be better equipped than federal judges to take steps to soften the blow of compensatory remedies on the state budget.⁵³¹

All of this supports the conclusion that nothing in the Constitution prevents a state court from implying a federal constitutional cause of action for damages against the state. If a state court determines that liability in such a case does not pose a serious threat to the existence of the state, the Supreme Court should be very slow to second-guess it. The presumption should be that the states need no federal protection against the decisions of their own courts in cases based on constitutional provisions they themselves have approved.⁵³²

A more difficult question is whether the Supreme Court should compel reluctant state courts to enforce a *Bivens*-type remedy against the state. On the one hand, the Supreme Court is an organ of the federal government, and it may more readily impose implied remedies in federal courts against federal officials. On the other hand, the Court has always considered itself uninhibited by the eleventh amendment in reviewing state court decisions in constitutional cases, even those involving substantial monetary liability of the state.⁵³³ Chief Justice

therefore has greater control over and familiarity with them than it has with regard to the procedures applicable in other judicial systems.

529. See note 33 *supra*.

530. See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-30 (1959); *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, 346-50 (1951); *Burford v. Sun Oil Co.*, 319 U.S. 315, 325-27 (1943).

531. For instance, a state judge might enter a judgment but stay its enforcement, or order it paid in installments, out of consideration for the condition of the state budget. Although a federal court might conceivably do the same, it is not as close to the processes of state government and therefore may not know when such remedial flexibility is appropriate, or how much is needed. Even when a federal court has the same knowledge of these matters as a state court, however, its orders generate federalism frictions which are absent when a state court speaks to its own government.

532. Indeed, state courts could probably accomplish the same end without any Supreme Court interference by construing parallel prohibitions contained in their own state constitutions. Cf. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 475, 595 P.2d 592, 602, 156 Cal. Rptr. 14, 24 (1979) (implying a cause of action for damages directly from the California Constitution against a "state protected public utility" guilty of employment discrimination against homosexuals). See generally note 32 *supra*.

533. The Court has assumed jurisdiction on appeal or certiorari in numerous cases from state courts where it has been asked to reverse judgments denying state treasury liability. See, e.g., *Central Mach. Co. v. Arizona State Tax Comm'n*, 100 S. Ct. 2592 (1980); *White Mountain Apache*

Marshall sought to justify this posture on the ground that a writ of error to a state court was not a proceeding "commenced or prosecuted" against a state.⁵³⁴ It seems equally supportable as a practical measure which is essential to the uniformity and the effective enforcement of the Constitution.⁵³⁵ In either case the Court clearly has the power to declare that a damages remedy against states in state courts is constitutionally necessary or appropriate, and hence mandatory.⁵³⁶ It should refuse to exercise that power only if it feels incapable of enforcing its mandates or if the financial independence of the states is an interest of such magnitude that it should never be made to yield to the judgments of a court other than one of the states' own creation. This latter proposition the Court rejected when it decided in *Nevada v. Hall*⁵³⁷ that the courts of one state can override the sovereign immunity of a sister state in tort litigation, at least where the forum state's interest in compensating the plaintiff is strong enough and the "exercise of jurisdiction . . . poses no substantial threat to our constitutional system of cooperative federalism." Likewise, enforceability concerns have never deterred the Court from ordering comprehensive structural remedies in fields such as school desegregation.⁵³⁸ Indeed, it has held itself willing in the past

Tribe v. Bracker, 100 S. Ct. 2578 (1980). And in *Chandler v. Dix*, 194 U.S. 590, 592 (1904), an action begun in federal court to remove the cloud of a state's alleged title to land, the Court said:

Of course, a taxpayer denied rights secured to him by the Constitution and laws of the United States, and specially set up by him, could bring the case here by writ of error from the highest courts of the State. But the statute [consenting to suit in state court only] does not warrant the beginning of a suit in the Federal court to set aside the title of the State.

Accord, *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 57 (1944). *See also In re Ayers*, 123 U.S. 443, 494-95 (1887).

534. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 408-10 (1821); *cf. Pennoyer v. Neff*, 95 U.S. 714, 734 (1878) (appeal is not a new suit, but rather a continuation of the old, for purposes of acquiring personal jurisdiction over the appellant); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349-50 (1816) (Supreme Court's jurisdiction on writ of error seen as variety of removal jurisdiction). *But cf. BLACK'S LAW DICTIONARY* 1860 (3d ed. 1933) ("While an appeal operates as a supersedeas, and is in effect a continuation of the original suit, a writ of error is a new suit or proceeding"). Although Chief Justice Marshall in his *Cohens* opinion restricted his observation about the writ of error to cases where "its operation is entirely defensive," 19 U.S. (6 Wheat.) at 409-10, subsequent opinions have given the Court a much broader role on review of state court decisions by the modern devices of appeal and certiorari. *See* note 533 *supra*.

535. *See Smith v. Reeves*, 178 U.S. 436, 445 (1900); *Robb v. Connolly*, 111 U.S. 624, 637 (1884). The Court has often noted the independent, albeit parallel, structure of federal and state court systems, and their mutual immunity from hindrance by the other. *See, e.g., Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970). Yet it has always stressed that this independence is capped at the apex by Supreme Court review for "federal questions raised in either system." *Id.* at 286; *accord, Carter v. Greenhow*, 114 U.S. 317, 322-23 (1885) (contract clause rights against the states are ultimately secured by state courts with Supreme Court review or by federal court jurisdiction).

536. *See Ward v. Love County*, 253 U.S. 17 (1920). *See also Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966); *Mapp v. Ohio*, 367 U.S. 643, 654-56 (1961).

537. 440 U.S. 410, 424 n.24 (1979).

538. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 16-19 (1958).

to issue mandamus to state officers to enforce its own money judgments against states, and has routinely approved that remedy in federal court actions against local governments.⁵³⁹

The plaintiff's interest in compensation, and society's in deterrence of constitutional violations, are compelling policies to be overcome only by persuasive evidence that a judicially implied remedy would unduly interfere with the states' capacity to fulfill their sovereign responsibilities. And in making this judgment, it should be recognized that both the nature of the cause of action and the identity of the forum where liability is adjudicated ameliorate the impact of an implied remedy on the states' fiscal independence.

It should also be kept in mind that the *Bivens* cause of action is by nature flexible. It is not established by the Constitution for all time. Instead, it is essentially an interim measure that can be replaced when and if Congress enacts an equally effective remedy to take its place. By the same token, there is no reason why state legislatures cannot play a dynamic role in the development of constitutional remedies.⁵⁴⁰ To the extent that a state already has provided for adequate government liability for constitutional torts, the initial development of a *Bivens*-type remedy may not be necessary.⁵⁴¹ Likewise, a state statutory remedy enacted after the creation of a *Bivens*-type remedy against the state may displace the latter if adequate and expressly intended to preempt it.⁵⁴² In either case, the Court can demonstrate its sensitivity to the lawmaking competence and independence of the states without sacrificing the principle that some appropriate and adequate remedy for constitutional violations should always be available.⁵⁴³

539. Compare *Virginia v. West Virginia*, 246 U.S. 565, 593-606 (1918), with note 187 *supra*. See generally Powell, *Coercing a State to Pay a Judgment: Virginia v. West Virginia*, 17 MICH. L. REV. 1 (1918). Even if the Court were to hold that it could not order the state to raise money to pay a judgment, this alone should not preclude implication of the remedy. Cf. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 149 n.35 (1974) ("there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States" to pay a judgment for just compensation against the government under the Tucker Act) (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 571 (1962)).

540. See *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (imposing on states "[p]rocedural safeguards . . . to protect the privilege [against self-incrimination] . . . unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored"); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606, 613-14 (1975). But see *Chapman v. California*, 386 U.S. 18, 21 (1967) ("With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights").

541. See, e.g., OR. REV. STAT. § 30.265(1) (1979) (state made liable for officers' acts in violation of 42 U.S.C. § 1983 (Supp. III 1979)).

542. Cf. *Carlson v. Green*, 446 U.S. 14, 19-21 (1980) (FTCA to complement, not preempt, *Bivens*).

543. The Court's legislative reapportionment decisions provide a good analogy. There the

6. *The Immunity Issue: Some Thoughts on the Scope of the Remedy*

Assume that an individual's constitutional rights have been violated by the state. Assume further that his remedies against the state officer responsible for the wrong are unavailing, either because the officer is immune from liability or is without funds to satisfy a judgment. This individual has an interest in compensation, regardless of the precise nature of the constitutional violation. For instance, his property may have been taken and disposed of without payment of compensation or he may have been beaten by a state policeman run amok. In both cases the Constitution has been violated, and in both cases only money damages will make the plaintiff whole. This may be true whenever there is misconduct by an official that rises to the level of a constitutional wrong. The special nature of constitutional rights as opposed to those originating from statutes and the common law, the hospitality of a state court forum as opposed to a federal one, the basic flexibility of the *Bivens*-type remedy—all these factors ameliorate substantially the impact of a damages remedy against the state in its own courts for such wrongs. Nor does it appear that a state needs immunity to protect itself from the specific undesirable consequences of potential liability that prompted the Court's officer immunity decisions.⁵⁴⁴ In this regard, the state is no different from units of local government, which the Court in *Owen v. City of Independence*⁵⁴⁵ held are not entitled to a good faith immunity from section 1983 liability.

For these reasons, a state court possessing a lively regard for constitutional rights would be justified in holding the state strictly liable on the theory of *Bivens* for all constitutional violations by its officers. Indeed, some appear to have done just that;⁵⁴⁶ others have held municipalities liable for constitutional torts under circumstances where the federal courts' power to do so was in doubt.⁵⁴⁷ This approach recog-

Court has said that the primary responsibility for formulating a constitutionally acceptable plan rests with the state legislature, and that a federal court ought to respect the legislative judgment unless the chosen remedy contains specific constitutional defects. But this judicial deference to legislative competence is limited by the basic principle that the courts always have the last say on whether a given system is constitutionally adequate. *See, e.g., White v. Weiser*, 412 U.S. 783, 797 (1973); *Sixty-seventh Minn. State Senate v. Beens*, 406 U.S. 187, 196-97 (1972); *Cf. Scott v. Germano*, 381 U.S. 407, 409 (1965) (district court insists on reapportionment, stays its hand while state acts). And when the state legislature has failed in its duty to produce an acceptable plan, the judiciary has the right and the responsibility to fill in the void with its own. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964).

544. *See* text accompanying notes 143, 178 *supra*.

545. 445 U.S. 622 (1980).

546. *E.g., Stauss v. State*, 131 N.J. Super. 571, 330 A.2d 646 (Super. Ct. Law Div. 1974); *Papadopoulos v. Oregon State Bd. of Higher Educ.*, 14 Or. App. 130, 178, 511 P.2d 854, 876 (1973), *cert. denied*, 417 U.S. 919 (1974).

547. *See* cases cited at note 211 *supra*, most of which were rendered before the Supreme Court's *Monell* decision holding that local governments could be sued under § 1983.

nizes that government liability not only serves the plaintiff's interest in compensation but also has a valuable curative effect on the way the state structures and delivers services at all levels.

These general policies have also led increasingly to state court decisions abolishing the doctrine of state sovereign immunity in analogous nonconstitutional tort cases. Many such decisions endorse the notion that, since state courts originally created the doctrine of sovereign immunity as part of the state's common law, it is within their competence and, indeed, it is their duty to reevaluate that doctrine in light of changing conditions and conceptions of justice.⁵⁴⁸ Notably, these decisions also reject or make light of the argument that the abolition of sovereign immunity in tort cases would bankrupt the state. Instead, they point to the absence of data pointing one way or the other on this issue, the availability of insurance to soften the blow to the public fisc from judgments against the state, the superior equity of having taxpayers assume the costs of government actions taken on their behalf, and the general desirability of compensating victims of wrongful government conduct.⁵⁴⁹ Courts that have taken such a position in tort cases generally can be expected to be sympathetic to similar claims to compensation by victims of constitutional torts by state officers. Indeed, these courts may have a duty to equalize their remedial schemes and grant relief in constitutional cases under the theory of *Testa v. Katt*,⁵⁵⁰ which holds that a state may not refuse to adjudicate a claim based on federal law when it has opened its doors to like claims under state law.⁵⁵¹

However, a more cautious court might legitimately make further distinctions, while at the same time recognizing the force of the plaintiff's claim to compensation and the unique advantages to the state of having its liability determined in courts of its own making. Such a court might accept the general principle that states are answerable on a *Bivens* theory in their own courts, but proceed to shape the cause of

548. See cases cited at note 214 *supra*.

549. In *Mayle v. Pennsylvania Dep't of Highways*, 479 Pa. 384, 388 A.2d 709 (1978), for example, the Pennsylvania Supreme Court judicially abrogated the doctrine of state sovereign immunity in tort actions, holding it "unfair and unsuited to the times." *Id.* at 386, 388 A.2d at 710. It characterized the state's argument that tort liability would provoke a fiscal crisis for the state as "speculation," registering instead its view that "[w]elfare economics analysis suggests that government, if suable in tort, may become more efficient." *Id.* at 394-95, 388 A.2d at 714. See generally note 24 *supra*.

550. 330 U.S. 386 (1947); see text accompanying notes 216-25 *supra*.

551. See *Pitroni v. Mercadante*, 572 F.2d 98, 101 (5th Cir.) (Gibbons, J., concurring), *cert. denied*, 439 U.S. 827 (1978) ("When a state makes the decision to provide in its courts of general jurisdiction for a resolute superior remedy against municipalities, it cannot discriminate in the application of that remedy simply because the conduct complained of is made illegal by federal law").

action with reference to additional policy criteria. Recognizing that public resources are limited, the expected impact on the fisc of a damages remedy in a given class of constitutional cases is one important variable. By the same token, some kinds of constitutional violations are more predictable, and hence avoidable, than others. Since an important concern in this area is the states' ability to control their own destinies, albeit within the confines of the Constitution, treasury liability in such predictable cases would tend to achieve the desirable goal of deterring unconstitutional activity without sacrificing the legitimate concerns of the states. But to the extent that the state has less capacity to predict and prevent liability-producing conduct, this important variable of deterrence is weakened.

Thus, one possible solution to the question of the states' actual liability for constitutional violations, as opposed to their suability, is the establishment of immunities to protect the states' fiscal integrity where it is most threatened, or where the states have the least amount of control over whether a constitutional violation occurs. Indeed, these two variables—predictability and fiscal impact—can be seen to relate to one another in more subtle ways.

Where, for instance, a given type of violation is not easily predicted and corrected in advance but as a class produces a small risk of substantial monetary liability, the interest of the plaintiff in compensation might legitimately take precedence. A good example of this type of constitutional violation was at issue in *Carey v. Piphus*.⁵⁵² There the Court held that a public school's temporary suspension without a hearing of students for smoking marijuana, although a procedural due process violation, gave rise at best to nominal damages in a section 1983 suit against the responsible school officials. The Court held the plaintiffs to a high common law standard of proving actual damages, even though the nature of the constitutional violation made it unlikely that such proof was available.⁵⁵³ When the occasional claimant appears who can prove actual damages in such a case, however, state treasury liability is an appropriate remedy precisely because similar cases are likely to be few and far between. In short, as the long term

552. 435 U.S. 247 (1978).

553. *Id.* at 264. The *Carey* decision has been criticized on the ground that it gives inadequate protection to those constitutional rights that, because of their dignitary nature, are inherently incapable or difficult of precise monetary valuation. See, e.g., Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1285 (1979); Oakes, *supra* note 137, at 940-44; Note, *Carey v. Piphus and Remedying Constitutional Torts*, 21 ARIZ. L. REV. 871 (1979); Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus*, 93 HARV. L. REV. 966 (1980).

Whatever the merit of this position, the *Carey* decision clearly produces a small risk of substantial liability for this class of constitutional violations. Small, too, is the likelihood that state responsibility in damages in these cases will result in fiscal disaster.

risk of exposure of the state to large actual liability decreases, so does the force of the state's argument that the threat of financial disaster should foreclose such liability.⁵⁵⁴

Similarly, a state has little legitimate reason to object to a constitutionally implied remedy in state court in cases where the plaintiffs seek the return of property or the refund of money that the state has unconstitutionally taken from them. For example, when a state takes private property for a public use it is constitutionally obligated to pay the owner just compensation.⁵⁵⁵ Should it refuse to do so, the plaintiff may succeed in getting a viable judicial remedy by suing the officer who took his property.⁵⁵⁶ However, when this remedy fails, for one reason or another, a suit against the state is the plaintiff's only recourse.⁵⁵⁷ A state court should give appropriate relief in such a case because the fiscal integrity of the state is at best minimally affected by the remedy. Although a given judgment may be large, the state has taken the plaintiff's property with full knowledge of its constitutional obligation to

554. *Cf.* *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979), discussed at text accompanying note 278 *supra*. Indeed, the *Hall* case itself suggests, by necessary extrapolation from the result, a situation in which a state court may be forced by the Constitution to disregard its own state's sovereign immunity and grant damages against the public fisc. Such a case would arise if the plaintiffs in *Hall*, unable to collect in California, were to file suit in a Nevada state court to enforce their California judgment. In this case, the full faith and credit clause as well as 28 U.S.C. § 1738 (1976) would seem to entitle the plaintiffs to enforcement, even though the judgment is against state policy in Nevada. *See, e.g.*, *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (Mississippi court must enforce Missouri judgment on a contract between Mississippi citizens which is illegal under Mississippi law); *Huntington v. Attrill*, 146 U.S. 657, 685-86 (1892) (Maryland court must enforce New York judgment which was seen as "penal" in nature by the former). *See generally* *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977) ("The Full Faith and Credit Clause . . . makes the valid in personam judgment of one State enforceable in all other States"). Nor may a state escape its obligation to give full faith and credit "by the simple device of denying jurisdiction in such cases to courts otherwise competent." *Kenney v. Supreme Lodge of the World*, 252 U.S. 411, 415 (1920); *see* note 229 *supra*.

555. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation"). The just compensation requirement is binding on the states through the fourteenth amendment. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236-37 (1897). Although the fifth amendment does not require payment in advance of the taking, it does require at least the opportunity to establish a claim for compensation in a court of law afterwards. *See, e.g.*, *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21-22 (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

556. *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 101 S. Ct. 446 (1980) (recovery of interest on money held by clerk of state court in interpleader action); *Poindexter v. Greenhow*, 114 U.S. 270 (1885) (recovery of desk seized by state officer in violation of plaintiff's contract clause rights); *United States v. Lee*, 106 U.S. 196 (1882) (recovery of land seized by federal officer in violation of plaintiff's fifth amendment rights).

557. *See, e.g.*, *Chandler v. Dix*, 194 U.S. 590, 591-92 (1904) (suit in federal court against state officer to remove unconstitutional cloud on title to land barred by the eleventh amendment); *cf.* *Goldberg v. Daniels*, 231 U.S. 218, 221-22 (1913) (suit against federal official to obtain possession of vessel where the United States is the "owner in possession" is barred by sovereign immunity). The suit against the officer may also fail as a practical matter because he has disposed of the property and is personally without funds to satisfy any resulting judgment.

pay him just compensation. The state is simply being asked to give value for equivalent value taken and retained. Hence the net value of its fisc remains unimpaired.

An analogous situation arises in tax refund suits. It is well established that a state is constitutionally obligated to give the taxpayer a reasonable chance to contest the legality of state taxes in some judicial proceeding.⁵⁵⁸ Should the taxpayer pay a tax under protest without having had a prior opportunity to challenge its legality, a suit for a refund is his only remedy. In *Ford Motor Co. v. Department of Treasury*⁵⁵⁹ the Supreme Court held that a federal court was precluded by the eleventh amendment from hearing such a suit against the state agency responsible for collecting the tax. It follows that the state must provide an adequate remedy in its own courts. Upon failing to do so, however, it should be held accountable in a *Bivens*-type action for damages in state court, because it is only being asked to pay back money which the plaintiff claims it had no right to collect in the first place. The action in substance presents a claim of unjust enrichment against the state that does not threaten the integrity of its general revenues.⁵⁶⁰

Yet even where general revenues are invaded to a substantial degree, there are some cases where the constitutional value of deterrence suggests that an implied remedy against the state is proper. Thus, there is every reason to hold states accountable for constitutional violations which they easily could have avoided, even though the damages in such cases might be very large. Indeed, this threat of strict liability is one of the best ways to deter conduct in which the states clearly have no constitutional right to engage. It is true that state statutes, constitutional provisions, and other embodiments of what the Court in *Monell*

558. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-82 (1930); *Central of Ga. Ry. v. Wright*, 207 U.S. 127, 141-42 (1907). On the other hand, a good illustration of the remedial flexibility of due process is the decision in *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845). There the Court held Congress had withdrawn by statute the traditional right of a private citizen to sue a customs collector for illegally exacted duties on import goods. The Court acknowledged the United States' sovereign immunity from suit; however, the taxpayer was not left in a position of damages or nothing. Instead, the Court held his remedy was to withhold payment of the tax, and, upon seizure of his goods, to sue the collector for possession. It was thus able to avoid the question whether Congress could constitutionally withdraw "all right of action . . . from the party." *Id.* at 250; see *Poindexter v. Greenhow*, 114 U.S. 270, 302-03 (1885) ("To take away all remedy for the enforcement of a right is to take away the right itself. But that is not within the power of the State").

559. 323 U.S. 459, 464 (1945); cf. *Jagnandan v. Giles*, 538 F.2d 1166, 1176 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977) (federal court barred by eleventh amendment from hearing suit against state university for refund of unconstitutional nonresident tuition paid by plaintiffs under protest).

560. Cf. *Ward v. Love County*, 253 U.S. 17, 24 (1920) (county liable in state court action for refund of unconstitutionally collected taxes because "[i]n legal contemplation it received the money for the use and benefit of the claimants and should respond to them accordingly").

v. Department of Social Services called "official policy"⁵⁶¹ carry the germ of potentially large state liability should they be held unconstitutional in a *Bivens*-type action against the state. However, these classic expressions of state action are most within the control of state citizens and their policymakers, at least where the relevant federal constitutional rules are known in advance. The people of a state may be unable to prevent an individual policeman from abusing someone's fourth amendment rights. But they do have a large measure of control over how their laws are made and who makes them. Where the plaintiff's clearly established constitutional rights are abridged by the formal sanction of state law, therefore, the taxpayers and their elected representatives cannot complain that state liability was unforeseeable. And the ability to foresee potential liability gives states the opportunity and duty both to avoid it and to financially plan for it. Good examples of such cases are the official policies condemned in the *Monell* and *Owen* decisions,⁵⁶² had those policies been adopted *after* the Supreme Court announced their unconstitutionality in other cases. That local governments are strictly liable in such circumstances under section 1983 is all the more reason to hold states liable in their own courts to the same extent for analogous unconstitutional policies adopted at the state level of government. Were the rule otherwise, similarly situated victims of unconstitutional policies would be treated differently, even capriciously so.⁵⁶³ Moreover, the states might see a way to avoid the impact of the *Monell* and *Owen* decisions by arrogating powers from local governments to themselves, sometimes to the detriment of rational and efficient systems for the delivery of government services.⁵⁶⁴

561. 436 U.S. 658, 690-91 (1978); see text accompanying notes 164-65 *supra*.

562. See text accompanying notes 164, 173 *supra*.

563. A comprehensive recent study of government organization in the states concluded: "There is little uniformity among and within States as to what level and type of government has responsibility for a particular function or any of its components." IV ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SUBSTATE REGIONALISM AND THE FEDERAL SYSTEM 2 (1974). For example, a hypothetically identical unconstitutional prison regulation or policy might emanate from the state in Connecticut, a county in California, and a municipality in New York. *Id.* Even within a given state there may be little uniformity. Certain police services, for example, may be supplied by a city while others are supplied by the state. *Id.* Similarly, local governments may have extensive responsibility for services which in other parts of the same state are provided by the state government. *Id.* If states are absolutely immune, but local governments absolutely liable for the same kind of unconstitutional conduct, a victim's ability to get compensation will depend fortuitously on the particular state or indeed part of the state in which he happens to have been wronged.

564. The Advisory Commission on Intergovernmental Relations has decried the present ad hoc approach to distributing service responsibilities in state political structures, and has called for an "ideal assignment system" taking into account such factors as economic efficiency, fiscal equity, political accountability and administrative effectiveness. *Id.* at 7; see Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (arguing on political grounds for a greater role for municipal governments in the private and public sectors). The combined effect of strict liability for local

All of this suggests that there may be some types of constitutional violations where state damage liability would be inappropriate because the potential impact on the state treasury is large *and* the degree of predictability and avoidance, and hence the likelihood of deterrence, is small. One example is a state statute which was constitutional when adopted, but has since been held unconstitutional. Retroactive liability in such a case might be very large, while at the same time its threat by definition could have had little beneficial impact on the deliberations of the legislators who voted for the then lawful statute.⁵⁶⁵ It is true that in *Owen* the Court imposed strict liability on a municipality in an analogous case.⁵⁶⁶ However, the different status of state and local governments in the constitutional scheme might arguably justify an immunity for the former but not the latter for their good faith reliance on existing constitutional principles.⁵⁶⁷

Likewise, the states have the least amount of actual control over actions of their officials that are in violation not only of constitutional rights, but also of state law. The state in such a case has by hypothesis instructed its agents to behave in a constitutional fashion, but those instructions have been cast aside at the whim of the officer.⁵⁶⁸ It may be equitable to place the burden of any resulting damages on the state, especially since the state hires and supervises its employees and therefore has at least some measure of control over their activities. How-

governments and absolute immunity for states would exert pressure on state legislators to centralize as a way of avoiding exposure to potential liability. This would not only impede efforts to decentralize government functions for efficiency and other reasons, but might also produce the inefficient reassignment of locally discharged service responsibilities back to the state.

565. Indeed, it might chill efforts to produce creative legislative solutions to difficult problems.

566. 445 U.S. at 635-58. Even when the relevant constitutional restraints are not made plain until later, the Court thought that "[e]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Id.* at 654. It noted further:

[I]t is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Id. at 655.

567. Compare *Owen* with *Quern v. Jordan*, 440 U.S. 332 (1979) (§ 1983 policies permit awards against municipalities, but preclude similar awards against states). On the other hand, anything other than equality of scope between the liabilities of the two types of governments would tend towards the inequities and irrationalities commented on in notes 563-64 *supra*. Offsetting this concern, however, is the fact that full parity can never really be achieved, even if states are liable in state courts to the same extent that local governments are in federal courts under § 1983. This is because one can anticipate that a state would prefer, all things being equal, to stand before the bar of its own courts, even accepting those courts' supremacy clause duty to render impartial justice in federal question cases before them.

568. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961); text accompanying note 168 *supra*. See generally note 3 *supra*.

ever, this is the most likely type of case to produce unforeseeable and large liability, and one where state liability will generate the least amount of added deterrence to future unconstitutional action.⁵⁶⁹ The state has already sought to outlaw the officer's conduct, and by definition the threat of personal liability has not deterred him from engaging in it. Although liability will no doubt prompt the state to adopt more rigorous controls over its officers' activities, it can never achieve a state of full compliance with the Constitution, as there will always be instances of individual lawlessness under color of state authority. Finally, the truly lawless state officer is the one least likely to be protected by a good faith immunity, and hence the victim's section 1983 remedy against him is usually not automatically barred.⁵⁷⁰ For these reasons, state courts might legitimately exercise caution about holding states accountable in damages solely on a respondeat superior theory, at least where state law has not abrogated sovereign immunity in analogous nonconstitutional tort cases.⁵⁷¹

A constitutional cause of action for damages against the states in their own courts provides the best possible environment, from the states' perspective, in which to discharge their constitutional responsibilities. The only realistic objection to the judicial implication of this remedy is its potential impact on state treasuries and hence on the fiscal viability of state governments. However, as detailed above, there are many constitutional claims where the threat of financial disaster is nonexistent or minimal, or has been discarded as makeweight by state courts in nonconstitutional cases. The Supreme Court's decisions counsel against gross judgments about the propriety of an implied constitutional cause of action for damages.⁵⁷² Rather, they support the making of fine distinctions based on whatever policies are at war in a given case. Accordingly, the fact that in some cases treasury liability might be dangerous should not blind courts to the fact that in others it is not. To the extent problems are perceived, they can be handled on a case-by-case basis by creating immunity defenses which take into account the underlying realities, such as the solution proposed above.⁵⁷³

569. It is also one where the Court has held that local governments are immune from liability under § 1983. *Monell v. Department of Social Serv.*, 436 U.S. 658, 691 (1978); *see* text accompanying notes 166-68 *supra*.

570. *But see* *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978) (absolute judicial immunity bars § 1983 action, even for corrupt or malicious conduct). And, as noted previously, the plaintiff may not be able actually to collect a judgment even if he is lucky enough to obtain one. *See* note 147 *supra*.

571. *See* text accompanying notes 216-25, 551 *supra*.

572. *See* text accompanying notes 422-34 *supra*.

573. The solution proposed in the text asks two important questions: (1) Was the type of violation for which damages are sought predictable and avoidable, and hence deterrable by a remedy against the state?, and (2) What is the expected financial impact on the state of such a

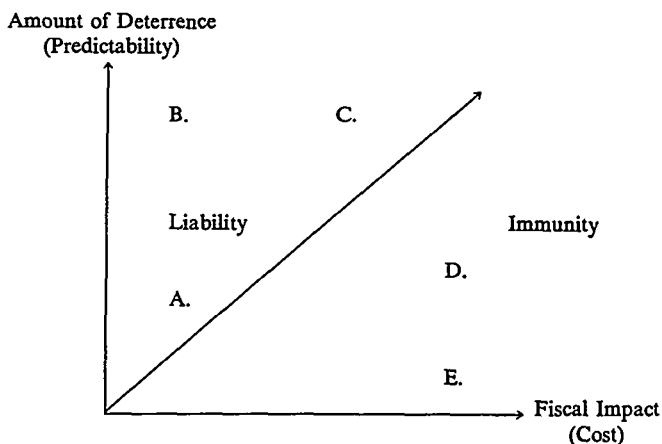
Certainly these problems should not be dismissed by a blanket judgment that state courts have no business at all rendering appropriate constitutional remedies against the states.

CONCLUSION

The idea that there are some wrongs without remedies, whatever its force may be in the field of private law, has no place in regulating the rights of individuals against government in a system with a written constitution like our own. When the Constitution tells a state that it shall not, for instance, deprive persons of life, liberty, or property without due process of law, the consequence ought to be either compliance by the state or a remedial system designed to redress fully and adequately the harm caused by noncompliance.

The Supreme Court's decisions construing the federal judicial

remedy in this general class of case? The proposed solution sees these two variables as directly linked in terms of predicting the appropriateness of a particular kind of constitutional damage remedy: As the deterrent effect of the remedy increases, the less of a concern is its projected financial impact, but by the same token the greater that impact is, the more anticipated deterrence is required to make the remedy appropriate. This concept can be conveniently expressed in graph form as follows:



The points on the graph represent some of the situations discussed in the text:

- A Suits for harm caused by officers' lawless conduct producing, as a class, a relatively small amount of compensable damages. *See, e.g., Carey v. Piphus*, 435 U.S. 247 (1978).
- B Suits for compensation for property taken by the state, and tax refund suits.
- C Suits for harm caused by state statutes and other forms of official policy that were unconstitutional when made.
- D Suits for harm caused by state statutes and other forms of official policy that were constitutional when made, but have since become unconstitutional.
- E Suits based on a respondeat superior theory of liability. *E.g., Monroe v. Pape*, 365 U.S. 167 (1961).

Although placing any given case on one side or the other of the Liability/Immunity line may prove a difficult task, the two variables mentioned ought to help courts at least ask the right questions.

power to give constitutional remedies against the states and their officers have gone far toward achieving these goals. But the Court has thus far not insisted upon damages remedies necessary to compensate all victims of past violations. Legitimate concerns of public policy have caused it to erect barriers to recovery against state officers, in the form of immunity doctrines. By the same token, federalism concerns embodied in the eleventh amendment have led the Court to deny the power of federal courts to give damages against the states themselves. Although the Court took a large step toward establishing a more comprehensive remedial scheme in *Owen v. City of Independence*,⁵⁷⁴ that decision succors only some victims of unconstitutional state action.

For many others, under current doctrine, the federal courts are powerless to give adequate relief. But the state courts are not equally powerless. On the contrary, the supremacy clause tells them they must give these claimants a hearing on their claim to a constitutional remedy against the state. And in that hearing, state judges must cast aside state law, including sovereign immunity, if it is inconsistent with the commands of the Constitution.

For some time federal courts have thought of themselves, under the *Bivens* decision, as specially competent in the vindication of rights drawn directly from the Constitution. Although they are, there is no reason why state courts cannot fulfill a similar role. Indeed, there is every reason for them to do so when a given constitutional remedy is not only appropriate but necessary to give meaning to the constitutional rights of a particular claimant who has no other viable remedy. State law doctrines of sovereign immunity, whatever their legitimacy in the context of common law and statutory claims, cannot and should not stand in the way of the state courts' duty to grant such a remedy in a constitutional case.

A state court forum is ideally suited to this task. The federalism concerns found in the Court's eleventh amendment decisions are almost completely irrelevant where a state is defending against a constitutional claim in a court of its own creation. Moreover, a *Bivens*-type remedy against states in state courts would act as a catalyst, perhaps stimulating state legislatures and Congress to devise legislative solutions which are equally, if not more, effective. Until then, the *Bivens* remedy is sufficiently flexible to guard against untoward extremes on a case-by-case basis.

The one thing that is no longer admissible, if it ever was, is the notion that sovereign immunity bars all claims against the states, of whatever source and wherever litigated. Instead, the nature of the

574. 445 U.S. 622 (1980).

claim and the court where it is heard are both important, if not determinative, criteria, as the Court held in *Nevada v. Hall*⁵⁷⁵ and *Maine v. Thiboutot*.⁵⁷⁶ It is now more appropriate than ever to reaffirm that state courts of general jurisdiction share with federal courts the duty to enforce the Constitution, and to recognize that that duty is strongest of all when constitutional claimants have no other forum in which to vindicate their rights.

575. 440 U.S. 410 (1979).

576. 100 S. Ct. 2502 (1980).