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Federal Sovereign Immunity

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In American Constitutional law, a doctrine known as sovereign immunity bars suits against the federal and state governments in most circumstances.[1] The Supreme Court has had many opportunities to explore the scope of the immunity enjoyed by the States.[2] However, Congress has waived the federal government's immunity across a broad range of substantive law,[3] and the Court, therefore, has had little opportunity to decide when claimants are entitled to recover for deprivations despite the lack of Congressional consent. This paper attempts to confront that question—to discover, if the FTCA, the Tucker Act, and other waivers of sovereign immunity were repealed, in what circumstances and to what extent monetary relief would nevertheless be available against the United States. Of course there will be no hard answers, only what on balance can be inferred from the Court's characterization of various substantive rights, its nineteenth-century jurisprudence, its dicta in more recent cases, and its state immunity decisions. The paper opens with an overview of sovereign immunity, including common justifications and criticisms. Part II discusses whether certain types of claim might overcome an assertion of sovereign immunity. Finally, in Part III we discuss the degree to which suits against officers under *Ex Parte Young*[4] may impact the treasury before sovereign immunity concerns reassert to themselves to make that avenue unavailable.

I. Introductory

The Constitution nowhere refers to sovereign immunity. Rather, it is a doctrine from English law that the Court has assumed was silently imported into American law.

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[1] *See* United States v. Lee, 106 U.S. 196 (1882); Alden v. Maine, 527 U.S. 706 (1999); Hans v. Louisiana, 134 U.S. 1 (1890).
[2] *See, e.g.*, College Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Exp. Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996); *Alden*, 527 U.S. at 706.
[3] *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 1346(b); Tucker Act, 28 U.S.C. §1491.
[4] 209 U.S. 123 (1908).

> [T]he doctrine is derived from the laws and practices of our English ancestors; and . . . is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country. . . . And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.[5]

Sovereign immunity is a rule with many, varied rationales. One is that it is part of the very nature of sovereignty to be immune from unconsented suits.[6] In *Kawananakoa v. Polyblank*,[7] Justice Holmes attempted to go beyond the mere assertions that characterize the Court's recent opinions: "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."[8] That argument can be read either narrowly to establish immunity only in those cases where the substantive legal basis for the claim is created by the sued entity or broadly to mean that the law creator is immune from all suits, whatever the substantive basis. The broader claim does not follow logically, but Holmes is ambiguous about which he advances: "the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power."[9] It is unclear if "rights that exist" refers to the specific rights at issue in the case—these involved a property dispute with the applicable law made by the immune sovereign—or is a broader statement about the absence of supervening rights in general. In any event, today more than ever we have Constitutional rights that stand above Congress and so the broad interpretation cannot be saved on that ground. Moreover, there is a difficulty even with the narrow construction of Holmes's argument. Just

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[5] *Lee*, 106 U.S. at 205-7.
[6] *See Alden* 527 U.S. at 716; *Seminole Tribe*, 517 U.S. at 54.
[7] 205 U.S. 349 (1907).
[8] *Id.* at 353. Despite Holmes's "obsolete theory" language, this argument is reminiscent of those found in historical English materials.
[9] *Id.* at 353-54. For our purposes the quote should be read as if the term "Congress" were omitted. *Kawananakoa* dealt with a territory and Congress stood above the territory as the Constitution stands above Congress.

because a sovereign creates the law does not mean that he should be immune to that law. Certainly he can alter the law so as to avoid liability in the circumstances he prefers, but changing the law for everyone is a very different thing from exempting only the law-maker. It does not follow from the proposition that a law-maker can do the former to the conclusion that he can do the latter.[10]

More recent defenses of sovereign immunity have also focused on the putative harm to its "dignity" that a government suffers when subjected to unconsented suits.[11] Alternatively, commentators have argued that sovereign immunity facilitates the government's responsibility to protect common resources by making individuals bear the costs of losses suffered by governmental action.[12]

Opponents of sovereign immunity object to the notion that a state, unlike every other legal actor, should be exempt from sanction for "the most clearly lawless behavior."[13] They argue that sovereign immunity is inappropriate in a democracy for it "inevitably places a lesser value on administering justice to the individual than on giving government a license to act arbitrarily."[14] Moreover, the arguments from sovereignty and dignity have no place in a polity in which the people are sovereign.

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[10] A similar argument, also with some resonance in the English legal tradition, is that courts are the sovereign's courts, and the judges his judges, and thus the sovereign cannot be sued in his own courts without his consent, *see* 2 DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 166-67, 304 (Samuel E. Thorne ed. and trans., 1968-1977); 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 462 (3d ed. 1922-). This seems to have limited application to a government of divided powers where the judiciary is independent of the legislature and the executive.

[11] *See, e.g.*, *Seminole Tribe*, 517 U.S. at 58; Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 268 (1997).

[12] David A. Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 OHIO ST. L.J. 725 (1988).

[13] Atascadero State Hospital v. Scanlon, 473 U.S. 234, 252 (1985).

[14] *Hess v. Port Authority Trans-Hudson Corp*., 513 U.S. 30, 54 (1994) (Stevens, J., concurring).

Finally, there is a tremendous historical dispute over the precise form, extent, and strength of sovereign immunity in England and America in the late eighteenth century and the degree to which it was incorporated into the Constitution.[15]

II. Individual Claims against the Federal Government

This Part discusses the various claims that may be able to overcome federal sovereign immunity. Assuming the repeal of the various congressional waivers of sovereign immunity, in what circumstances and to what extent will money damages remain available against the United States? Addressing the question of sovereign immunity assumes that the government has violated some protected right. We focus on the Takings Clause, unconstitutional taxation, and violations of contracts. While not an exhaustive list of claims that could potentially overcome sovereign immunity, these are the ones existing Supreme Court decisions have suggested are likely to be the strongest.

a. *The Takings Clause, Just Compensation, and Tax Rebate Claims*

The Takings Clause of the Constitution states that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[16] This clause of the Constitution does not hinder the

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[15] This paper cannot survey the full range of historical arguments and interpretations. There are, however, two views which appear regularly and are reducible to a concise form. *Compare Alden*, 527 U.S. at 713-15 ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. . . . The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. . . . In reciting the prerogatives of the Crown, Blackstone -- whose works constituted the preeminent authority on English law for the founding generation -- underscored the close and necessary relationship understood to exist between sovereignty and immunity from suit."), *with Atascadero*, 473 U.S. at 259 ("The Framers never intended to constitutionalize the doctrine of state sovereign immunity."). These same positions are echoed, often verbatim, throughout the Court's sovereign immunity jurisprudence.

[16] U.S. CONST. amend V. This Briefing Paper uses the term "Takings Clause," but the Takings Clause actually consists of only the statement that private property shall not be taken for public use. The "Just Compensation" clause follows and adds "without just compensation" as a qualifier. For purposes of this Part, the Just Compensation Clause is addressed as a part of the Takings Clause, and addressed as a possible trigger for damages.

government from actively taking property, but rather places a condition on such a taking.[17] While sovereign immunity may protect the government from suit by individuals, some commentators argue that the Takings Clause creates a cause of action able to overcome sovereign immunity.

A very plausible textual reading of the Takings Clause withdraws the immunity of the government in cases where it, either through a physical encroachment or regulatory invasion,[18] takes property from a property owner. Under this view, the Constitution spells out the right to make a claim against the government within the Fifth Amendment rather plainly. Dicta in *United States v. Clarke*[19] appeared to endorse the view that a landowner has the right to bring an action in inverse condemnation resulting from the "self-executing character of the constitutional provision with respect to compensation."[20] *Clarke* and cases in line with its holding demonstrate that the right to bring suit against the government is an inherent part of the Takings Clause. As a result of government action, it appears there is a trigger provision allowing for the suit against the government and, accordingly, lowering the shield of sovereign immunity with respect to takings.

The more difficult question in the area of takings is the extent to which the Takings Clause mandates monetary compensation. In other words, perhaps the Fifth Amendment serves only as a limitation on the power of government action but does not serve as a remedial

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[17] *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985).
[18] There is a large and extensive literature on the meaning of "property" for purposes of the Takings Clause. *See* United States v. General Motors Corp., 323 U.S. 373, 377-78 (describing the tension between common usage and substantive uses). *See generally* Adam Mossof, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003). While such a discussion is beyond the breadth of this Briefing Paper, it is of interest to note that the rights discussed within this Part could be substantially expanded or contracted depending on the definition of property that one uses.
[19] 445 U.S. 253 (1980).
[20] *Id.* at 257. An action for "inverse condemnation" is one brought by a property owner for compensation from a government agency which has taken the owner's property without formal condemnation proceedings. BLACK'S LAW DICTIONARY (8th ed. 2004).

provision. Commentators suggest that the "principles of sovereign immunity and just compensation are on a collision course."[21] While the Supreme Court has never directly addressed the issue of whether the Takings Clause implies its own remedy, there are dicta on the subject in several of its opinions. In the case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[22] the Court addressed the claim of a landowner that a regulatory ordinance barring construction on the landowner's property effectively denied the landowner the use of the property, which might give rise to compensation.[23] The claimant brought an action of inverse condemnation for a temporary regulatory taking and was denied compensation.[24] The case then revolved around the consenting state's system of regulatory takings.

While the Court's holding addressed a number of procedural issues with regard to the denial of compensation,[25] dicta also addressed the issue of compensation with regard to sovereign immunity. The United States Solicitor General confronted the Court with an argument in an amicus brief that the Fifth Amendment does not require that a damage remedy be entered against the government in the case of a "regulatory taking."[26] The Government contended that the Fifth Amendment on its own, absent further congressional action, does not require a damage remedy against the United States.[27] This was an issue not raised by the courts below, but that the Solicitor General's office introduced because of the substantial constitutional uncertainty. The

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[21] Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1067 (2001).
[22] 482 U.S. 304 (1987).
[23] *Id.* at 307-309.
[24] *Id.*
[25] The issues presented to the Court consisted of (1) a determination of whether a previous decision by the California Supreme Court that the Just Compensation Clause did not require compensation as a remedy for regulatory takings was properly presented, and (2) in a case of a regulatory taking, whether the landowner may recover damages before judicial determination of a regulatory taking. *Id.* at 310-11.
[26] Brief for the United States as Amicus Curiae at 12, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (No. 85-1199)..
[27] *Id.* at 18.

Solicitor General stated the question presented as "whether the Constitution itself embodies a monetary remedy for governmental takings of property without just compensation."[28] While conceding that the government does pay compensation in cases both of physical takings and of regulatory takings, the Government contended that there is no right to have the courts mandate payment as compensation for the taking.[29] The text is strictly prohibitory and so on its own cannot authorize a monetary award against the government.[30] Accordingly, as a textual matter, the Fifth Amendment imposes a limitation on the power of the government by requiring just compensation, but does not prescribe a particular remedy for violations.[31]

The argument of the Government, however, rested on more than just textual interpretation—it also examined the issue of sovereign immunity. The Government argued that the Constitution does not surrender the immunity of the United States,[32] and cited cases for the proposition that the Constitution does not withhold sovereignty from the Government.[33] Previous decisions of the Supreme Court lend credence to such an argument by demonstrating that Congress possesses the power to bar suits for monetary relief against the United States government where there is an alleged taking of property without just compensation.[34] Indeed, most cases, Takings Clause violations are brought under the Tucker Act[35] or other statutory provisions explicitly granting a waiver of sovereign immunity that set forth a mechanism for

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[28] *Id.*
[29] *Id.* at 14.
[30] *Id.*
[31] *Id.* The Solicitor General draws a parallel with other clauses in the Constitution, specifically within the Fifth Amendment. Just as "indictment is not a remedy for the government's holding of a person to answer for an infamous crime" and "due process is not a remedy for a deprivation of life, liberty, or property," a similar construction would "conclude that the availability of just compensation, while an essential condition of a constitutional taking, was not prescribed by the Fifth Amendment as the judicial remedy for an unconstitutional one." *Id.* at 15.
[32] *Id.* at 16 (citing THE FEDERALIST No. 81 (Alexander Hamilton)).
[33] *Id.* (citing California v. Arizona, 440 U.S. 59, 61-62, 65 (1979)).
[34] *See* Lynch v. United States, 292 U.S. 571, 579, 580-582 (1934).
[35] 28 U.S.C. §1491.

monetary relief.[36] According to the Government, it is within the power of Congress to waive sovereign immunity in certain cases and set up the compensation mechanism available to claimants, but the Fifth Amendment alone does not create a monetary compensation regime through its own language.

In response to the Government's argument, Chief Justice Rehnquist, writing for the majority, penned the much-discussed footnote nine in *First English*.[37] The footnote is dicta because sovereign immunity does not extend to counties or other local government bodies.[38] Nevertheless, Rehnquist rejected the argument of the Solicitor General that the Fifth Amendment is merely prohibitory in nature and does not create any remedial measures.[39] He explained that precedent clearly indicated that the Constitution creates a remedy where interference with property rises to the level of a taking.[40] The Court found that it is an established principle of Fifth Amendment constitutional interpretation that claims for just compensation are based in the Constitution itself.[41] The Court quoted *Jacobs v. United States*[42] for the following proposition:

> [T]he remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States*.[43]

Accordingly, the Court rejected the argument of the Solicitor General's brief that, in light of sovereign immunity and original understanding the Fifth Amendment contains no mandatory remedial trigger.

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[36] *See, e.g.*, Schillinger v. United States, 155 U.S. 163 (1894); Jacobs v. United States, 290 U.S. 13 (1933) (suit brought under Tucker Act for taking by flooding of property). *See also*, United States v. Clarke 445 U.S. 253 (1980) (involving an interpretation of 25 U.S.C. 357 on condemnation of Indian lands).
[37] *First English*, 482 U.S. at 316 n.9.
[38] *See* Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1977).
[39] *First English*, 482 U.S. at 316 n.9.
[40] *Id.* (*citing* San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 655, n.21 (1981) (Brennan, J., dissenting)). *See also* United States v. Clarke, 445 U.S. 253, 257 (1980); Jacobs v. United States 290 U.S. 13 (1933).
[41] *First English*, 482 U.S. at 315.
[42] 290 U.S. 13 (1933).
[43] *Id.* at 16 (emphasis added by *First English*).

The debate over the rights entailed by the Takings Clause relating to compensation did not end with *First English*. Indeed, the issue is probably as murky now as it was before the decision since most lower courts have acknowledged that the language in footnote nine was merely dicta. The first problem is that the cases cited by the Court to rebut the self-execution argument did not actually address the issue of sovereign immunity.[44] In fact, some older Supreme Court cases seem to indicate the supremacy of sovereign immunity in the context of the Takings Clause and just compensation. In *Lynch,*[45] the Court held that the Just Compensation Clause does not abrogate the sovereign immunity of the federal government.[46] As a result, even in the wake of *First English,* the Courts of Appeal have split on the issue. The Seventh Circuit has stated, "It is true that [*First English*] holds that the Constitution requires a state to waive its sovereign immunity to the extent necessary to allow claims to be filed against it for takings of private property for public use."[47] However, the Fifth Circuit has held, "the Foundation's Fifth Amendment inverse condemnation claim brought directly against the State of Texas is also barred by the Eleventh Amendment."[48]

Moreover, many commentators believe that the Court has retreated from the dicta in *First English*. They argue that in a recent opinion[49] (joined by the only two signers of the First English decision still on the Court) treated question as uncertain.[50] In any event, the Court has repeatedly held that the assertion of a constitutional right is not itself sufficient basis for overriding sovereign immunity—otherwise sovereign immunity would be a dead letter.

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[44] *See Jacobs*, 290 U.S. at 13; Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984); United States v. Causby, 328 U.S. 256 (1946); Seaboard Air Line R. Co. v. United States, 261 U.S. 299 (1923); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).
[45] 292 U.S. at 571.
[46] *See id.* at 579-582.
[47] Lucien v. Johnson, 61 F.3d 573, 575 (7th Cir. 1995).
[48] John G. & Marie Stella Kenedy Memorial Found. v. Mauro, 21 F.3d 667, 674 (5th Cir. 1994).
[49] *See* City of Monterey v. Del Monte Dunes, 526 U.S. 687, 714 (1999).
[50] Our reading of *Del Monte Dunes* is that the comment was less a substantive retreat than a debating point: conceding the issue for the sake argument so as to introduce another, independent criticism of the dissent.

Academic literature continues to suggest that sovereign immunity does exist in the area of Takings Clause compensation claims.[51] Of course this is inconsistent with the proposition in *First English* that the Constitution requires compensation through the remedial provision of the Just Compensation Clause. It is also worth nothing that such an interpretation of the Takings Clause with respect to just compensation will affect the standing of all "property" in relation to claims against the government.[52]

There are extrinsic reasons to believe that this debate might be resolved in favor of Takings Clause claims overcoming sovereign immunity. In the context of the Eleventh Amendment, Congress can abrogate state sovereign immunity using its Fourteenth Amendment powers but not its Commerce Clause powers.[53] This can be read to suggest that due process-type guarantees enjoy a special precedence over sovereign immunity. Moreover, the Takings Clause operates against the states only by way of the Fourteenth Amendment, which strengthens the association. The force of this argument is somewhat weakened, however, by the fact that in *Seminole Tribe*, the Court distinguished the Commerce Clause and the Fourteenth Amendment primarily on the grounds that the former contains language expressly directed toward the States. And, the proposition that the Fourteenth Amendment modifies pre-existing regimes of sovereign immunity has no relevance the Takings Clause in the federal context, for the Fifth Amendment has applied to the federal government since 1791, not by virtue of the Fourteenth Amendment. We should be cautious before assuming that the fact that the Fourteenth Amendment can trump state sovereign immunity extends to federal sovereign immunity.

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[51] *See* Seamon, *supra note* 21, at 1067 (suggesting that the States are immune from just-compensation suits brought in federal court, but not those brought against them in their own courts).

[52] As discussed previously, defining what constitutes property is beyond the scope of this Briefing Paper, but it is important to note that an expansion of that definition with a corresponding right to compensation could broadly abrogate sovereign immunity.

[53] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Another extrinsic consideration: *Kelo v. City of New London*[54] expanded the power of the government under the Takings Clause.[55] The analogous result in the remedy context is expansion of sovereign immunity and disfavor of implied remedies.

The state of ambiguity in the takings area is analogous to the situation in tax rebate actions, another Fifth Amendment claim.[56] In 1990 the Supreme Court ruled that unlawful taxation constitutes a deprivation of property, and the Due Process Clause therefore requires states to provide in their own courts either a pre- or post-deprivation remedy.[57] Four years later the Court reaffirmed this holding and noted that while the Eleventh Amendment bars tax refund claims in federal court, the Due Process Clause requires states to provide a state court remedy, sovereign immunity "notwithstanding."[58] However, more recently the Court has cast doubt on the proposition that the Fourteenth Amendment requires the state to provide a remedy and effectively waive its immunity in this instance. In *Alden v. Maine,* the Court held that states enjoy sovereign immunity in their own courts as well as federal courts.[59] As part of an argument that this holding was consistent with existing precedents, the majority recharacterized *Reich* as standing merely for the proposition that a state may not hold out the promise of a post-

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[54] 125 S.Ct. 2655 (2005).

[55] *Kelo*, specifically, was an expansion of what constituted "public use." The Court determined that even a taking by a private company for development could constitute "public use." *See* i*d.* at 2668.

56 The Tax Injunction Act, 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."), establishes another jurisdictional hurdle to bringing state tax claims in federal court. See Arkansas v. Farm Credit Services, 520 U.S. 821, 825-26 (1997) ("We have interpreted and applied the Tax Injunction Act as a 'jurisdictional rule' and a 'broad jurisdictional barrier.' . . . [D]eclaratory relief is as violative of the Tax Injunction Act as an injunction itself."). Two considerations are relevant to this paper. First, the Tax Injunction Act applies only to state taxes, not federal taxes. Second, the jurisdictional bar posed by the Tax Injunction Act is considered separately from the bar posed by sovereign immunity. *See, e.g.*, FDIC v. New York, 928 F.2d 56 (2nd Cir. 1991); Hechinger Investment Co. v. Hechinger Liquidation Trust (In re Hechinger Investment Co.), 335 F.3d 243 (3rd Cir. 2003); Lynn v. West, 134 F.3d 582 (4th Cir. 1998); Lipscomb v. Columbus Municipal Separate School District, 269 F.3d 494 (5th Cir. 2001); Angel v. Kentucky, 314 F.3d 262 (6th Cir. 2002); Darne v. Wisconsin, 137 F.3d 484 (7th Cir. 1998); May Trucking Co. v. Oregon Department of Transportation, 388 F.3d 1261 (9th Cir. 2004); American Petrofina Co. v. Nance, 859 F.2d 840 (10th Cir. 1988); Osceola v. Florida Department of Revenue, 893 F.2d 1231 (11th Cir. 1990).

[57] *See* McKesson Corp. v. Division of ABT, 496 U.S. 18 (1990).

[58] Reich v. Collins, 513 U.S. 106, 109-10 (1994).

[59] 527 U.S. 706 (1999).

deprivation remedy and then withdraw it after the taxpayer, relying on the prospect of a remedy, has paid his taxes.[60] "In this context, due process requires the State to provide the remedy it has promised."[61]

b. Contracts with the Federal Government and the Contracts Clause

Sovereign immunity plays a significant role in the field of contract enforcement. The Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[62] In the field of contracts, it is particularly difficult to analogize between state and federal sovereign immunity because the substantive constitutional and legislative provisions differ in the context of state and federal governments. This results in far smaller source base for evaluating the role of sovereign immunity in federal contract claims.

The Contract Clause of the Constitution requires that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[63] The Contract Clause, on its terms as well as through interpretation by various courts, applies to states and local governments but not the federal government.[64] Indeed, the Supreme Court has noted that contractual obligations between the nation and an individual are binding to the extent of the sovereign's "conscience" and do not create an independent right of action.[65] This interpretation of the Contract Clause is appropriate given the original purpose of the Clause—to prevent states from discharging contractual obligations through debtor relief laws.[66] Although the Contract Clause applies only to states and local governments, the Supreme Court has read contractual rights into the Fifth Amendment,

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[60] *Id*. at 740.
[61] *Id.*
[62] U.S. CONST. art. I, § 9 cl. 7.
[63] U.S. CONST. art. I, § 10, cl. 1.
[64] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 605 (2d ed. 2002). *See also* Esther C. v. Ambach, 515 N.Y.S. 2d 997, 999 (1987).
[65] Lynch v. United States, 292 U.S. 571, 580–81 (1934).
[66] *See* CHEMERINSKY, *supra* note 54, at 605.

through the Takings and Due Process Clauses.[67] The vested contractual rights may constitute protected "property," which cannot be taken without just compensation.[68] Accordingly, this analysis falls under the previous discussion of property rights.[69] In the state and local government context, the Court has fluctuated between strict standards[70] and more deferential standards[71] regarding the states' ability to modify contractual obligations. Furthermore, within the Contract Clause itself, there is no self-executing remedial provision, unlike what may exist with the Just Compensation provision of the Takings Clause. The options for judicial enforcement include both revocation of the applicable law and monetary compensation for breach of contract.

Currently, the rights of individuals advancing contractual claims against the federal government are largely governed by the Tucker Act.[72] That statute, passed in 1887, waives sovereign immunity in lawsuits arising out of contracts to which the government, or its agencies, are parties.[73] In consenting to suit, the Tucker Act qualifies the jurisdictional grounds on which the cases may be brought. If the plaintiff seeks less than $10,000 in damages, the federal district courts have concurrent jurisdiction with the United States Court of Federal Claims.[74] However, if the damages are greater than $10,000, the Court of Federal Claims has exclusive jurisdiction over the controversy.[75] Where the government waives sovereign immunity under the Tucker

[67] *See id.* at 579–580.
[68] *Id.* at 579.
[69] *See supra* Part II(a).
[70] *See* U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977) (finding that impairment of contractual obligations is constitutional if "reasonable and necessary to support an important public purpose.").
[71] *See* Energy Reserves Group, Inc. v. Kansas Power and Light Co, 459 U.S. 400 (1983) (creating a more deferential three-part test with a threshold inquiry into "substantial impairment" of a contractual relationship).
[72] 28 U.S.C. § 1491.
[73] *See id.*
[74] *Id.*
[75] *Id.*

Act, contractual breaches are treated as if they arose at common law and the government as if it were a private party.[76]

The Tucker Act does not actually create an unlimited right to recover in all cases. The Supreme Court, in *Burr v. FHA*,[77] determined that Congress has the power to create agencies capable of acting as private litigants in contract disputes, but to condition the agency's liability on the use of agency funds and not funds from the general treasury.[78] Accordingly, this form of "limited-liability" qualifies the waiver of immunity enacted by the Tucker Act. If Congress creates such a "sue and be sued" agency, the judgment cannot exceed the amount of money available to the agency. To the extent that it does, sovereign immunity attaches.

Burr's endorsement of Congress's ability to limit liability suggests that in the absence of congressional waiver, there will be no basis for a claim against the federal government: the Contract Clause cannot overcome the bar erected by sovereign immunity. Even the Tucker Act does not create any cause of action against the government. Any such cause of action must be based on the substantive law for which sovereign immunity is waived—in the case of the Tucker Act, contract law.[79] Perhaps an individual seeking compensation from the government, however, could bring a suit under the Takings Clause and demand just compensation under a nouvelle definition of property.[80] In contract cases compensation would also depend on the right vested in the individual claiming a breach of contract. If such a right is vested, that agreement may become binding on future Congresses.[81]

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[76] *See* Mobil Oil v. United States, 530 U.S. 604 (2000).
[77] 309 U.S. 242 (1940).
[78] *See id.*
[79] *See* United States v. Testan, 424 U.S. 392, 397 (1976).
[80] As discussed above, whether or not any compensation could actually arise from such a loss of property is a debatable point, but it would provide an alternate theory for a plaintiff seeking relief.
[81] *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839, 875-76 (1996); Perry v. United States, 294 U.S. 266 (1935). The Court in *Winstar*, however, acknowledges that this power to create binding vested rights is uncertain.

The existence of the Tucker Act and the case law surrounding the Act demonstrate both congressional and judicial acknowledgement of the sovereign immunity of the federal government. Without the waiver of immunity, a plaintiff could not bring a claim against the federal government. Plaintiffs have, however, attempted to bring cases involving contractual rights against the government—most prominent among them claims for Social Security benefits.[82] In *Helvering v. Davis*,[83] the Court determined that Social Security is merely a program of government welfare spending, even though the benefits of the program, like a contract, may seem earned.[84] Years later, in *Flemming v. Nestor*,[85] the Court reiterated many of the same ideas, and rejected the argument that the payment of Social Security taxes generates a property right in the accrued benefits.[86] These cases further demonstrate some unwillingness on the part of the Court to vest contractual rights in individuals through claims against the federal government.

c. Defaults on Debt

An interesting question is whether a suit to enforce payment on government bonds would be able to overcome an assertion of sovereign immunity. The federal government's default on its debt would arguably violate both the Takings and Contracts Clauses and thus give rise to a particularly strong case that sovereign immunity would not apply. However, several considerations caution against such a conclusion. First, recovery for a debt default requires the payment of monies from the treasury to compensate for previous violations. This is the area in

[82] Plaintiffs have advanced both contract and property theories in this regard.
[83] 301 U.S. 619 (1937).
[84] *Id.* at 640.
[85] 363 U.S. 603 (1960).
[86] *Id.* at 1372-73.

which sovereign immunity is at its strongest.[87] Moreover, the fact that the government would have to deal with outraged bondholding voters and economic, market consequences might encourage the Supreme Court to conclude that political safeguards are sufficient to protect bondholders against default. The decision to default and risk the attendant increase in borrowing costs and substantial economic dislocation seems like a judgment about macroeconomic policy properly left to the political branches. Finally, analogy to the late nineteenth-century state bond cases suggests that sovereign immunity applies to actions to recover debt. In rejecting various suits, nominally against state officials, to force state governments to honor their debts, the Court consistently held that the State was, as the party of interest to the contract, the real defendant and thus that sovereign immunity attached.[88] It was taken as given that where the state was the defendant, sovereign immunity would bar suit.[89] The State's obligation not to violate its contracts "is subject to the other constitutional principle, of equal authority, contained in the 11th Amendment, which secures to the State an immunity from suit."[90]

III. *Ex Parte Young*

Despite the sovereign's immunity to suits directly against it, there is a long tradition in Anglo-American law of permitting challenges to official action by suing officers rather than the state.[91] In 1908, the seminal case of *Ex parte Young* allowed suits nominally against state officials, even though relief will in fact run against the state. The Court enjoined a state Attorney

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[87] See the discussion below of the limitation of damages in officer suits to prospective injunctive relief. Nor is the fact that the default is continuing likely to help. See the discussion of *Papasan v. Allain*, 478 U.S. 265, 281 (1986), below.
[88] In re Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); La. v. Jumel, 107 U.S. 711 (1883).
[89] In re Ayres, 123 U.S. at 487.
[90] *Id*. at 503.
[91] *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

General from bringing suit to enforce an unconstitutional state statute after reasoning that such an enactment is void and therefore cannot impart the state's immunity to its official:

> The use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.[92]

Although federal waivers of sovereign immunity result in fewer claims against federal officers, in the absence of those waivers the logic of *Ex parte Young* is as appropriate in the context of federal official action as it is in the context of state official action.[93]

The Supreme Court's rightward drift since the 1970's has produced a string of decisions substantially limiting the scope of *Ex parte Young*. Under the rule of *Edelman v. Jordan*,[94] plaintiffs can no longer receive monetary compensation in suits against state officials for past violations of a legal duty.[95] "When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants."[96] Among other

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[92] 209 U.S. 123, 159-60 (1908). The *Young* doctrine relies on a legal fiction—officials are stripped of state immunity and ostensibly held responsible for their individual conduct, but relief runs against the state. *Ex parte Young* requires that "unconstitutional conduct by a state officer may be 'state action' for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh." Florida Department of State v. Treasure Salvors, 458 U.S. 670, 685 (1982) (plurality opinion).

[93] *See generally* Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 959 (5th ed. 2003).

[94] 415 U.S. 651(1974).

[95] *Id.* at 668.

[96] *Id*. at 663 (quoting Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945)).

things, this prevents the use of *Ex parte Young* to obtain tax refunds.[97] However, *Edelman* does not bar actions for prospective relief—those suits that seek to enjoin state officials' future conduct—even where there will be consequences to the state treasury, so long as,

> The fiscal consequences to state treasuries . . . were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*.[98]

"Ancillary" fiscal consequences can include attorneys' fees and fines imposed to enforce prospective, injunctive relief.[99] Declaratory relief is available or unavailable along the same lines: once the state is in compliance with the law, though it becomes so only during litigation, relief is unavailable under *Ex parte Young*.[100]

Edelman and its progeny severely restrict the relief available under *Ex parte Young*. However, there is still a significant prospect for judicial interference in state finances. While post-collectment challenges to taxation seek retroactive relief and are thus unavailable, pre-collectment challenges remain within the terms of the exception. A 1952 case, *Georgia Railroad & Banking Co. v. Redwine*, held that a suit to enjoin the assessment and collection of taxes fell within the *Young* exception.[101] This is still good law. Suits to enjoin the collection of taxes do not seek compensation for past legal violations, but to prevent officials' taking future illegal actions. The fiscal consequences are merely ancillary to the prospective judgment about the

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[97] *Id.* at 665.
[98] *Id.* at 668.
[99] *See* Hutto v. Finney, 437 U.S. 678, 690 (1978) ("Federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. . . . Many of the court's most effective enforcement weapons involve financial penalties.").
[100] *See* Green v. Mansour, 474 U.S. 64 (1985).
[101] 342 U.S. 299 (1952)

legality of future conduct. Indeed, *Edelman* distinguished (and thus approved) several previous cases that enjoined state officials against discontinuing welfare benefits.[102]

It is unlikely, however, that the Rehnquist Court would, or the Roberts Court will, countenance any imaginable degree of interference in government finances simply on the grounds that it is ancillary to prospective relief. The law here is not entirely clear or consistent but suggests the existence of some limits. In *Papasan v. Allain*, the Court refused to allow plaintiffs to recover for a continuing breach of trust on the grounds that the recovery would in effect be for an accrued monetary liability.[103] This would seem to make officer suits under *Ex parte Young* unavailable as a means to recover for debt defaults. On the other hand, in *Milliken v. Bradley*, the Court approved a remedial scheme that required future payments from the state treasury to rectify past discrimination on the grounds that the *funded programs* operated prospectively to bring about improved conditions.[104] More recently, in *Missouri v. Jenkins*, the Court rejected a remedial plan that required the state to pay for increased teacher salaries and quality education programs in the Kansas City, Missouri school district.[105] While *Jenkins* did not discuss the sovereign immunity context, it reflects the same concerns that have motivated the Court to restrict the reach of *Ex parte Young*.

In the *Young* context these concerns found their furthest expression in *Idaho v. Coeur d'Alene Tribe*.[106] That case held that suits that are the functional equivalent of a quiet title action against a state's interests in its submerged lands implicate "special sovereignty interests" and therefore fall outside the scope of *Ex parte Young*. At least one Court of Appeals has read this opinion as an invitation to find new "special sovereignty interests" that also preclude resort to *Ex*

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[102] 415 U.S. at 667.
[103] 478 U.S. 265, 281 (1986).
[104] 433 U.S. 267 (1977).
[105] 515 U.S. 70 (1995).
[106] 521 U.S. 261 (1997).

parte Young.[107] However, the Supreme Court appeared to turn back from this line of inquiry in a 2002 decision. It announced a "'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"[108] Nowhere did it mention "special sovereignty interests," much less suggest that district courts must ask in each suit under *Ex parte Young* whether the requested relief would implicate them.

What should be clear is that the precise contours of relief available under *Ex parte Young* are not written in stone. They are subject to a malleable balancing act that weighs the Supremacy Clause against the demands of sovereignty and is highly case specific. As Justice Brennan has written,

> The Court makes a valiant effort to set forth the principles that determine whether a particular claim is or is not barred by the Eleventh Amendment. To my mind, the Court's restatement simply underscores the implausibility of the entire venture, for it clearly demonstrates that the Court's Eleventh Amendment jurisprudence consists of little more than a number of ad hoc and unmanageable rules bearing little or no relation to one another or to any coherent framework; indeed, the Court's best efforts to impose order on the cases in this area has produced only the conclusion that "[f]or Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct." This hodgepodge produces no positive benefits to society. Its only effect is to impair or prevent effective enforcement of federal law. It is highly unlikely that, having created a system in which federal law was to be supreme, the Framers of the Constitution or of the Eleventh Amendment nonetheless intended for that law to be unenforceable in the broad class of cases now barred by this Court's precedents. In fact, as I demonstrated last Term in Atascadero, the Framers intended no such thing.[109]

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When attempting to obtain remedies against the government, the doctrine of sovereign immunity bars unconsented suit. There are perhaps a few sorts of claims that might overcome sovereign immunity and allow suit against the state as if it were any other legal entity. This

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[107] ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1191 (10th Cir. 1998).
[108] Verizon Maryland v. Public Service Commission, 535 U.S. 635, 645 (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment)).
[109] *Papasan*, 478 U.S. at 293 (Brennan, J., concurring in part, concurring in the judgment in part, and dissenting in part).

paper has discussed the possibility that takings cases, tax rebate claims, contracts cases, and bond cases might create such exceptions to sovereign immunity. An option more generally available but of more limited utility than suit directly against the state is suit against officers under *Ex parte Young*. Because the state is not the defendant but relief in effect runs against it, the plaintiff is able to get redress and can avoid the bar of sovereign immunity. However, the Supreme Court has allowed sovereign immunity considerations to come in through the back door and limit the remedies available in officer suits. A suit against an officer will be construed as a suit against the state if it seeks remedies other than prospective injunctive relief. In that case, the bar of sovereign immunity will attach. The state bond cases serve as examples of both functions of sovereign immunity. It was understood that suit directly against the state was unavailable so the plaintiffs attempted to sue state officers. The Court nevertheless held that the suit was in effect against the state and decided that sovereign immunity therefore denied jurisdiction.[110]

Ultimately, it is impossible to say precisely which claims overcome sovereign immunity and allow citizens to vindicate their rights in court. Nevertheless, we can make some generalizations: certain claims for prospective relief nominally addressed to officers are the strongest route to obtaining relief, though not in the form of damages. For that, a claim based on the Takings Clause is the least unlikely to defeat the bar posed by sovereign immunity.

[110] The reasoning was slightly different than in contemporary cases. The nineteenth-century cases decided that suit was against the state because the state was the party to the contract, while contemporary doctrine would decide that the suit was against the state because it asked for money damage from the treasury for past violations.

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