

NOTE

A CLASH OF CONSTITUTIONAL COVENANTS: RECONCILING STATE SOVEREIGN IMMUNITY AND JUST COMPENSATION

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When two bedrock constitutional guarantees come in conflict, which one prevails? This Note explores the clash between state sovereign immunity and the right to just compensation in inverse condemnation actions. When a state physically invades private property without providing remuneration, plaintiffs rightly take to federal court, asserting their entitlement to just compensation. Yet, state sovereign immunity shields the state from liability—permitting a work-around of the Fifth Amendment. Recognizing this conflict, the federal circuit courts have devised a clever, albeit faulty, solution. Relying on a law review article and dicta, the circuit courts have held that state sovereign immunity can bar inverse condemnation suits in federal courts so long as the state courts theoretically remain open to adjudicate the claims. Yet, as this Note will demonstrate, such an approach is unmoored from precedent and practicability. A proper solution is called for. This Note will discuss alternate ways out of the clash and will ultimately recommend a novel approach: private officer suits with a relaxed qualified immunity bar. As real-world people continue to face permanent damage to their property at the hands of the state, while being deprived of a constitutional guarantee to just compensation, this Note seeks to solve a timely and pressing dilemma.

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INTRODUCTION: THE CLASH

Two concepts abound in Anglo-American jurisprudence that shape the contours of sovereign power: state sovereign immunity and the right to just compensation. The first recognizes a supreme authority; the other imposes a limitation on authority. Both are deeply entrenched in the common law.¹ Yet, while other seemingly contradictory constitutional provisions leave room for “play in the joints”² between them, ensuring both principles are upheld, in many situations state sovereign immunity and the right to just compensation present a zero-sum game. Either the state must consent (or be forced to consent) to liability, or the person whose property has been taken must forego a constitutionally guaranteed remedy of just compensation.³

This circumstance is limited to when a taking is disputed—that is, when the state acts in such a way that deprives the plaintiff of her property or destroys her property, but that is not a formal exercise of the eminent domain power.⁴ Even though the plaintiff can try to enjoin the

¹ *Alden v. Maine*, 527 U.S. 706, 715 (1999) (“When the Constitution was ratified, it was well established . . . that the Crown could not be sued without consent in its own courts.”); *Sinnickson v. Johnson*, 17 N.J.L. 129, 145 (N.J. 1839) (“[I]t seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of [the eminent domain] power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.”).

² *Locke v. Davey*, 540 U.S. 712, 712 (2004).

³ U.S. Const. amend. V; *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (incorporating the Amendment against the states).

⁴ Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 *Wash. & Lee L. Rev.* 493, 501 (2006).

government to stop the activity, she at least will suffer a temporary taking for which she is entitled to compensation.⁵ And often, the government activity will result in permanent damage. Yet, state sovereign immunity will likely bar any action for damages in federal court, and the plaintiff will be deprived of just compensation.⁶ She will find herself completely without a federal remedy.

An illustration will ground the point. Recently, confronting a history of heavy rainfall that impeded evacuation efforts during severe weather events, the Texas Department of Transportation installed an impenetrable concrete median in the middle of Interstate 10.⁷ The barrier “effectively created a dam” by “barricading all rainfall on the northside” of the Interstate, so as to allow future travelers to use the southernmost lanes for evacuation.⁸ When heavy rainfall occurred again, the State’s plan was successful: a significant quantity of water accumulated against the northernmost side of the dam.⁹ But, then, with nowhere to drain, the water flooded and destroyed private property to the north of the Interstate.¹⁰ When the owners brought suit, acknowledging the public benefit of the dam but asserting their constitutional guarantee to just compensation, the State of Texas raised its hands, claiming sovereign immunity.¹¹ The matter is on appeal, but, under current understandings of state sovereign immunity, whether or not the plaintiffs will be able to recover is far from clear.¹²

This Note will focus on similar plights—claims of a right to just compensation after an “inverse condemnation” by the state.¹³ This Note limits its understanding of “inverse condemnation” to situations where

⁵ First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 306–08 (1987).

⁶ Berger, *supra* note 4, at 502.

⁷ Devillier v. Texas, No. 20-cv-00223, 2021 WL 1200893, at *1 (S.D. Tex. Feb. 22, 2021).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *6. Although the magistrate judge found Texas waived its immunity by removing the suit to federal court, this issue is disputed and will not always arise in a proceeding where a state is more careful.

¹² The U.S. Court of Appeals for the Fifth Circuit’s subsequent denial of rehearing en banc inspired a fascinating dissent by Judge Oldham highlighting many of the dangers discussed in this Note, as well as tangential dangers beyond the scope of this Note. See Devillier v. State, 63 F.4th 416, 426–41 (5th Cir. 2023) (Oldham, J., dissenting from the denial of rehearing en banc).

¹³ See United States v. Clarke, 445 U.S. 253, 255 (1980) (explaining the difference between inverse condemnation and formal eminent domain).

private property is physically harmed or physically invaded. This Note will *not* focus on “regulatory takings,” where a government ordinance so diminishes the value of property that it can be called a “taking.”¹⁴

The Supreme Court has yet to issue a holding on which age-old provision must yield in these cases: state sovereign immunity or the right to just compensation.¹⁵ In fact, the Court has expressly ducked resolving the clash.¹⁶ In the Court’s October 2020 Term, it did hold that states surrendered their sovereign immunity in the “plan of the Convention” when the *federal* eminent domain power is being used against a state.¹⁷ But the Supreme Court has *not* decided whether state sovereign immunity gives way in a case where a private plaintiff brings suit against a state. In addressing this conflict, the federal circuit courts have adopted a Solomonic approach. Relying on a due process analogy¹⁸ and a law review article,¹⁹ these courts have held that state sovereign immunity bars a claim for inverse condemnation in *federal* court, so long as the *state* courts theoretically remain open to adjudicate federal takings claims.²⁰ Yet, for reasons outlined below, this approach is unmoored from reason, history, and Supreme Court precedent. This Note will offer potential ways out of the thicket that are superior to the current approach of the lower federal courts. In so doing, this Note makes a few novel contributions. It is the first to point out the fallibilities with the circuit courts’ approach to just compensation suits against states. It is also the first to examine a range of new potential solutions to a clash that continues to evolve. Finally, it is

¹⁴ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

¹⁵ But see *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (acknowledging the clash between sovereign immunity and just compensation and noting that “the Constitution . . . dictates the remedy for interference with property rights amounting to a taking”); *infra* Section III.A.

¹⁶ The Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), neglected to address an argument presented in an amicus brief that sovereign immunity always trumps the just compensation guarantee. See Amicus Brief of the Board of County Commissioners of the County of La Plata, Colorado in Support of the Respondents State of Rhode Island, et al., *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047), 2001 WL 15620, at *20–21.

¹⁷ *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2263 (2021).

¹⁸ *Reich v. Collins*, 513 U.S. 106 (1994).

¹⁹ Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067 (2001).

²⁰ *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527 (6th Cir. 2004) (citing *Reich*, 513 U.S. at 110); *Jachetta v. United States*, 653 F.3d 898, 909 (9th Cir. 2011); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014); *Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1213 (10th Cir. 2019); *Frein v. Pa. State Police*, 47 F.4th 247, 257 (3d Cir. 2022).

the first to recommend a relaxation of qualified immunity’s “clearly established” bar in order to allow inverse condemnation plaintiffs to recover from public officials.

This Note proceeds as follows. Part I will discuss the histories of state sovereign immunity and just compensation provisions. Part II will discuss the recent approach of the circuit courts in inverse condemnation suits against states and point out why this approach is in error. Part III will offer novel potential answers. Part IV will conclude.

I. BACKGROUND PRINCIPLES

A. State Sovereign Immunity

Any discussion of state sovereign immunity necessarily begins with the 1793 Supreme Court decision *Chisholm v. Georgia*.²¹ There, the State of Georgia was sued by a citizen of another state to recover a wartime debt.²² The Supreme Court rebuffed the State’s claim that it was immune from suit,²³ relying on the literal text of Article III, Section 2, which extends the federal judicial power to “Controversies . . . between a State and Citizens of another State.”²⁴ Justice Iredell dissented, asserting that the Supreme Court’s original jurisdiction had to be construed against background principles of common law; because the English tradition only permitted suits against the sovereign with the king’s consent, states could not be brought into court lest they consented or Congress subjected them to suit.²⁵ The people of the country agreed with Justice Iredell.²⁶ Within five years, the Eleventh Amendment was ratified, which by its terms expressly overrode the result in *Chisholm*.²⁷

Although the textual scope of the Amendment is limited to restricting diversity actions against a non-consenting state in federal court, courts and commentators have argued it encompasses nearly *every* suit

²¹ 2 U.S. (2 Dall.) 419 (1793).

²² *Id.* at 430.

²³ *Id.* at 450–79.

²⁴ U.S. Const. art. III, § 2.

²⁵ *Chisholm*, 2 U.S. (2 Dall.) at 432–37.

²⁶ 1 Charles Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926).

²⁷ The Amendment reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI.

commenced against a state for damages, in federal or state court.²⁸ The Supreme Court took the first step in expanding its scope in 1890 with *Hans v. Louisiana*, which held that states could not be sued by citizens of the same state in federal court.²⁹ Later, in *Alden v. Maine*, the Court understood sovereign immunity to reach still further, holding that sovereign immunity protected states from being sued *in their own courts* without their consent.³⁰ Of course, to extrapolate so far from the literal text of the Eleventh Amendment, the case had to “reconceptualize[] the entire doctrine,”³¹ basing the principle not on positive expressions of law but rather “the structure of the original Constitution itself.”³² In this way, sovereign immunity is thought to be a framework principle of our constitutional system and as such cannot be limited to any precise language in the Eleventh Amendment.³³

There are certain exceptions to state sovereign immunity, however. Notably, the *Ex parte Young* doctrine permits suits against state officers for injunctive relief.³⁴ States may also consent to suit, or waive their claim to sovereign immunity, although questions of what effectuates a waiver can be thorny.³⁵ Congress, acting pursuant to its powers under Section 5 of the Fourteenth Amendment, can abrogate state sovereign immunity for certain claims,³⁶ provided it offers a clear statement of its intent to do so³⁷ and the abrogation is congruent and proportional to the injury sought to be prevented.³⁸ Congress, however, *must* proceed under Section 5 if it wishes to abrogate state sovereign immunity; it cannot rely on its powers under Article I of the Constitution.³⁹

²⁸ See, e.g., Caleb E. Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1566 (2002); William P. Baude & Stephen E. Sachs, The Misunderstood Eleventh Amendment, 169 U. Pa. L. Rev. 609, 612–13 (2021).

²⁹ 134 U.S. 1, 15 (1890).

³⁰ 527 U.S. 706, 754 (1999).

³¹ Berger, *supra* note 4, at 514.

³² *Alden*, 527 U.S. at 728.

³³ Nelson, *supra* note 28, at 1566.

³⁴ 209 U.S. 123, 155–56 (1908).

³⁵ Jonathan R. Siegel, Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment, 52 Duke L.J. 1167, 1171 (2003).

³⁶ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

³⁷ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

³⁸ *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

³⁹ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73, 77 (1996).

Although sovereign immunity has been criticized by judges and scholars alike,⁴⁰ it is deeply embedded within our legal system and jurisprudence.⁴¹ While it serves important goals, such as protecting the public fisc and preserving state resources, in the inverse condemnation context, it has gotten in the way of a principle that shares its storied past: the right to just compensation.

B. Just Compensation

According to the Fifth Amendment of the U.S. Constitution, “private property [shall not] be taken for public use, without just compensation.”⁴² The records of the development and ratification of the Just Compensation Clause are “notoriously sparse.”⁴³ However, the right has deep roots in the Anglo-American tradition, stretching back to Blackstone.⁴⁴ Seemingly with little debate, the Amendment was ratified in 1791.⁴⁵ The provision was incorporated against the states in 1897.⁴⁶ While the Amendment shapes the contours of formal eminent domain procedures, it is also invoked by plaintiffs in inverse condemnation suits to argue some public action was effectively a “taking,” and thus just compensation is due. The Supreme Court has repeatedly recognized a right to just compensation for temporary physical takings.⁴⁷ Much just compensation litigation concerns whether a taking has occurred,⁴⁸ or whether the taking can be considered to be for “public use.”⁴⁹ The Supreme Court has yet to

⁴⁰ See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1427 (1987).

⁴¹ *Alden v. Maine*, 527 U.S. 706, 727 (1999).

⁴² U.S. Const. amend. V.

⁴³ John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 *Nw. U. L. Rev.* 1099, 1132 (2000).

⁴⁴ 1 William Blackstone, *Commentaries* *135.

⁴⁵ D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 *U. Miami L. Rev.* 471, 509 (2004) (indicating that “the Just Compensation Clause was not requested by the state conventions held to ratify the Constitution,” and “the direct historical record of the creation of the Just Compensation Clause is therefore relatively sparse”).

⁴⁶ *See Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (finding that a taking by a state violates Fourteenth Amendment due process rights).

⁴⁷ *See First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14 (1949) (requiring just compensation for a temporary physical occupation); *United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946) (same); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 384 (1945) (same).

⁴⁸ See, e.g., *Horne v. Dep’t of Agric.*, 576 U.S. 350 (2015).

⁴⁹ *Kelo v. City of New London*, 545 U.S. 469, 472 (2005).

confront the clash between state sovereign immunity and the right to just compensation directly, only referencing it tersely in a footnote in a case that was not against a state.⁵⁰ The open question, then, has been taken up by the circuit courts. Their approach to the clash is examined in the next Part.

II. THE LAUDABLE, BUT LACKING, CIRCUIT COURT APPROACH

Confronted with the clash, the circuit courts have devised a clever remedy. However, for reasons articulated below, the remedy is illogical and unworkable. Namely, the remedy rests on inapposite precedent in the due process context while dismissing pertinent precedent in the takings context. Additionally, the remedy is not feasible to administer in practice. Thus we remain on the battle line between state sovereign immunity and the right to just compensation.

The circuit courts have held that while the Fifth Amendment requires states to guarantee a judicial remedy for takings in their *own* courts, it does not speak to requiring *federal* courts to hear takings claims.⁵¹ Thus, although “the Fifth Amendment Takings Clause is a self-executing remedy, notwithstanding sovereign immunity,”⁵² it “does not trump ‘the sovereign immunity States enjoy in *federal* court, under the Eleventh Amendment.’”⁵³ The circuit courts agree that the “constitutionally enforced remedy against the States in state courts can comfortably co-exist with the Eleventh Amendment immunity of the States from similar actions in federal court.”⁵⁴ In essence, then, the circuit courts say: federal courts are closed so long as state courts are open.

This analysis has been based on two sources: *Reich v. Collins*⁵⁵ and a law review article by Professor Richard Seamon.⁵⁶ In *Reich*, the Court held that the Due Process Clause of the Fourteenth Amendment forbade a state from eliminating post-deprivation remedies for the payment of

⁵⁰ *First English*, 482 U.S. at 316 n.9.

⁵¹ *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527 (6th Cir. 2004); *Jachetta v. United States*, 653 F.3d 898, 909 (9th Cir. 2011); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014); *Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1213 (10th Cir. 2019); *Frein v. Pa. State Police*, 47 F.4th 247, 257 (3d Cir. 2022).

⁵² *DLX, Inc.*, 381 F.3d at 527.

⁵³ *Id.* (quoting *Reich v. Collins*, 513 U.S. 106, 110 (1994)).

⁵⁴ *Seven Up Pete Venture*, 523 F.3d at 955.

⁵⁵ 513 U.S. 106 (1994).

⁵⁶ Seamon, *supra* note 19.

unconstitutional taxes after those taxes had already been paid, but before they had been refunded.⁵⁷ Although due process permits a state to choose between a pre-deprivation and a post-deprivation scheme, if a state changes course by revoking an existing *ex post* remedy for individuals who have already paid the disputed taxes, thereby depriving them of any remedy at all, state courts must then be open to hear the claims—“the sovereign immunity States traditionally enjoy in their own courts notwithstanding.”⁵⁸ In a parenthetical, the Court added “that the sovereign immunity States enjoy in federal court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum.”⁵⁹ The Court offers no analysis or explanation for this proposition of bifurcated sovereign immunity. Instead, it simply cites to *Ford Motor Co. v. Department of Treasury*,⁶⁰ which was later overruled in *Lapides v. Board of Regents of the University System of Georgia*.⁶¹

In *Ford Motor Co.*, another tax refund case, the Court analyzed whether the State of Indiana consented to appear as a defendant in such suits.⁶² The analysis focused entirely on construing state law, which the Court found to waive sovereign immunity in state court but not in federal court.⁶³ Specifically, the Court asked whether the state statute purporting to waive sovereign immunity for tax refund claims did so in both federal and state court.⁶⁴ Finding it only waived immunity for claims in state court, the Court turned to asking whether the State Attorney General’s conduct in appearing to defend the suit in federal court effectuated a waiver.⁶⁵ This was a question of state law, and, turning to the Indiana Constitution, the Court concluded the Attorney General lacked the authority to waive immunity.⁶⁶ There was no discussion of due process or whether that Clause compelled states to be liable in their own courts in order to remain immune in federal courts. Thus, the case provides little explanation for the Court’s unembellished comment in *Reich* that due

⁵⁷ 513 U.S. at 111.

⁵⁸ *Id.* at 109–10.

⁵⁹ *Id.* at 110 (emphasis omitted) (citing *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459 (1945), *overruled by* *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002)).

⁶⁰ 323 U.S. 459 (1945).

⁶¹ 535 U.S. at 623.

⁶² 323 U.S. at 462.

⁶³ *Id.* at 464–69.

⁶⁴ *Id.* at 465.

⁶⁵ *Id.* at 466–67.

⁶⁶ *Id.* at 469.

process forbids a state from exacting a “bait and switch” upon taxpayers, notwithstanding sovereign immunity.⁶⁷

Ford Motor Co. was later overruled by *Lapides*.⁶⁸ The Court in *Lapides* held that a state waives its immunity from suit in federal court when it removes the case from state court to federal court.⁶⁹ In so doing, the Court found *Ford*’s holding that a state could “regain[] immunity”⁷⁰ in federal court because of a “showing [of] the attorney general’s lack of statutory authority to waive,”⁷¹ even after the Attorney General litigated and lost the case in federal court, promoted “inconsistency and unfairness.”⁷² To the *Lapides* Court, appearing and litigating in federal court on the one hand, and removing a case to federal court on the other, were not meaningfully distinguishable, and the Court overruled *Ford*’s decision to the contrary.⁷³ It is unclear what grounds *Reich*’s conception of bifurcated sovereign immunity stands on, given *Ford* said nothing about the Due Process Clause compelling a state court remedy for tax refund cases. Instead, the *Ford* Court merely commented on the “advantage of having state courts pass initially upon questions which involve the state’s liability for tax refunds”⁷⁴ because those questions would always turn on interpretation of state law. And *Lapides* said nothing of bifurcated sovereign immunity at all.

Neither *Ford Motor Co.* nor *Lapides* speaks to why the Fourteenth Amendment would abrogate state sovereign immunity in state courts for tax refund cases while leaving sovereign immunity in federal courts intact. Perhaps this is because *Reich* was not a case about sovereign immunity at all. Sovereign immunity was not at issue in the case, given that the State did not raise sovereign immunity as a defense, instead opting to argue that its pre-deprivation remedy satisfied due process.⁷⁵ Instead of sovereign immunity, *Reich* sounds in vested rights and principles of fairness. The Court was preoccupied with the injustice of a state “reconfigur[ing] its scheme, unfairly, in *mid-course*,” thereby removing a

⁶⁷ *Reich v. Collins*, 513 U.S. 106, 111 (1994).

⁶⁸ *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 623 (2002).

⁶⁹ *Id.* at 616.

⁷⁰ *Id.* at 622.

⁷¹ *Id.*

⁷² *Id.* at 623.

⁷³ *Id.*

⁷⁴ *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 470 (1945).

⁷⁵ Michael Wells, *Suing States for Money: Constitutional Remedies After Alden and Florida Prepaid*, 31 Rutgers L.J. 771, 779 (2000).

right to a post-deprivation scheme that had already vested in taxpayers.⁷⁶ Instead of a case about sovereign immunity, then, *Reich* should be more narrowly read to stand for the premise that “due process requires the State to provide the remedy it has promised,”⁷⁷ as the Court itself later characterized it.

Yet, the circuit courts in just compensation suits against states have used *Reich* as a convenient, albeit faulty, analogy. This is in spite of the fact that the Supreme Court has refrained from extending the rationale outside of the tax refund context.⁷⁸ The circuit courts seemingly adopted this analogy after it was put forth by Professor Richard Seamon.⁷⁹ Professor Seamon posits that the Due Process Clause should treat cases for just compensation like cases for tax refunds, but acknowledges the question is open and as such his argument is a bit of an invention.⁸⁰ Like the tax refund cases demand, Professor Seamon argues states must provide “reasonable, certain, and adequate” pre- or post-deprivation procedures for the taking of private property, lest their sovereign immunity be abrogated in their own courts.⁸¹ In other words, the state is free to wiggle within the confines of Due Process to craft a unique pre- or post-deprivation scheme; it can even take the claims out of the judicial branch altogether.⁸²

However, if the state fails to make an alternative deprivation remedy available, the state cannot raise sovereign immunity as a defense in its own courts.⁸³ According to Professor Seamon, claiming sovereign immunity would violate the Fourteenth Amendment, and thus a court would be forced to reject it.⁸⁴ He argues that, because state sovereign immunity and the just compensation principle both derive from the Constitution, both must receive their due.⁸⁵ By permitting a state to take the claims out of its judicial branch, the “essence of sovereign immunity,

⁷⁶ *Reich v. Collins*, 513 U.S. 106, 111 (1994); see also John F. Coverdale, Remedies for Unconstitutional State Taxes, 32 Conn. L. Rev. 73, 74 n.5 (1999) (asserting that the notion that every vested legal right should have a remedy is one of the foundations of American jurisprudence).

⁷⁷ *Alden v. Maine*, 527 U.S. 706, 740 (1999).

⁷⁸ Seamon, *supra* note 19, at 1111.

⁷⁹ *Id.*; see, e.g., *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954 (9th Cir. 2008).

⁸⁰ Seamon, *supra* note 19, at 1111–12.

⁸¹ *Id.* at 1102.

⁸² *Id.* at 1104–05.

⁸³ *Id.* at 1108.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1109.

which, at its core, protects the sovereign from being called upon by a court to honor its monetary obligations,” is respected, while victims of a taking can still receive just compensation.⁸⁶ However, if a state fails to protect its own immunity by providing a non-judicial remedy, its immunity must yield to “the Fourteenth Amendment obligation to pay just compensation.”⁸⁷ Professor Seamon emphasizes that “[s]overeign immunity is a protective device that can be used against private lawsuits, not a destructive device that can be used to eliminate the constitutional rights of individuals.”⁸⁸

The path charted by Professor Seamon and the circuit courts is noble. It recognizes the inherent unfairness and backwardness of leaving inverse condemnation victims without just compensation, a remedy “dictate[d]” by the Constitution itself.⁸⁹ It seeks to ground its middle way in precedent. The problem is, while the approach is attractive to someone who believes these claims should be vindicated, it is altogether unmoored from case law, history, and reason.

First, the *Reich* case was decided prior to the seminal decision in *Alden v. Maine*, which held Congress could not subject states to suits in their own courts.⁹⁰ In *Alden*, the Court emphasized that earlier cases described immunity “in sweeping terms, without reference to whether the suit was prosecuted in state or federal court.”⁹¹ It hearkened back to cases such as *Beers v. Arkansas*, which noted the “established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.”⁹² The *Alden* Court emphasized how subjecting states to suit in their own courts would be contrary to the structure of the Constitution, noting that “a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum.”⁹³ More on point, the *Alden* Court criticized potential asymmetry between immunity in federal and state courts, finding the possibility of “the

⁸⁶ *Id.* (emphasis omitted).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1110.

⁸⁹ *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987).

⁹⁰ *Alden v. Maine*, 527 U.S. 706, 754 (1999).

⁹¹ *Id.* at 745.

⁹² *Id.* (citing *Beers v. Arkansas*, 20 How. 527, 529 (1858)).

⁹³ *Id.* at 749.

National Government . . . wield[ing] greater power in the state courts than in its own judicial instrumentalities” untenable.⁹⁴ In making this argument, the Court cited *Howlett v. Rose*.⁹⁵ *Howlett* held that a state entity could not raise a state law sovereign immunity defense to a § 1983 action when such defense was unavailable in federal court; the Court emphasized the “anomaly” that would result if “a State . . . [were to] be forced to entertain in its own courts suits from which it was immune in federal court.”⁹⁶ The *Alden* Court also discussed the paradoxical implications of giving Congress the power to subject states to suit in state court when it lacked the power to subject states to the same suits in federal court.⁹⁷ Such a holding would “imply that Congress may in some cases act only through instrumentalities of the States,” contravening Chief Justice Marshall’s declaration that “[n]o trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States.”⁹⁸ Any other conclusion was indefensible, given the Court was “aware of no constitutional precept that would admit of a congressional power to require state courts to entertain federal suits which are not within the judicial power of the United States and could not be heard in federal courts.”⁹⁹

All this emphatic language points to one conclusion: symmetry. If a state cannot be haled into federal court for a claim, it cannot be *forced* to open up its *own* courts for the same claim or similar claims. Like myself, the reader might now scratch her head. Why do Professor Seamon and the circuit courts not see that their inverse condemnation conclusions rest on faulty premises?

The answer they have clung to can be traced to a single paragraph in the lengthy *Alden* decision. In it, the Court upheld *Reich*, noting that in the tax refund line of cases “[t]he obligation arises from the Constitution itself; *Reich* does not speak to the power of Congress to subject States to suits in their own courts.”¹⁰⁰ The circuit courts have taken this line and

⁹⁴ *Id.* at 752.

⁹⁵ *Id.*

⁹⁶ *Howlett v. Rose*, 496 U.S. 356, 365 (1990).

⁹⁷ *Alden*, 527 U.S. at 752–53.

⁹⁸ *Id.* at 753 (quoting *M’Culloch v. Maryland*, 4 Wheat. 316, 424 (1819)).

⁹⁹ *Id.* at 754.

¹⁰⁰ *Id.* at 740.

run with it.¹⁰¹ Because *Alden* did not overrule *Reich*, they reason, they can extend what they see as the holding of the latter to the just compensation context: they can force state courts to have their doors open to takings claims while closing the doors of the federal courts to the same claims.¹⁰²

But that broad reading of *Reich* is undermined by the Court's reasoning in *Alden*. Forcing state courts to hear federal claims that federal courts are powerless to hear was *exactly* what the Court in *Alden* was concerned with and sought to mitigate against. Therefore, one *must* read *Reich* narrowly in order to reconcile the two cases. Luckily, the *Alden* Court provided us with that narrow lens; it portrayed *Reich* as merely holding that due process required a state to provide the remedy it initially promised.¹⁰³ Sovereign immunity, again, was not at issue in *Reich*, nor has it been at issue in *any other* tax refund case.¹⁰⁴ The Court has never used the Due Process Clause to find an abrogation of state sovereign immunity, given that every time a tax refund case has arisen, the state has already waived its immunity to such suits in its courts.¹⁰⁵

Of course, the same might be said of the circuit court cases regarding inverse condemnation: in each case, the court has found that the state courts are “open” to condemnation claims (or that the point was not argued), and thus the federal claim is barred by sovereign immunity.¹⁰⁶ But the problem with this approach is that it rests on technicalities, and it is not entirely accurate. Moreover, it requires either significant glossing over or surgical parsing of state law in a way the tax refund cases do not.

For one, the dictate to states from *Reich* was clear: establish a remedial system for tax refund claims, one of which *can* be a waiver of sovereign immunity in state courts, but *need not* be. There was no need for courts to analyze whether sovereign immunity had been waived in state courts because the cases focused on the adequacy of the pre- and post-

¹⁰¹ *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 528 (6th Cir. 2004); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014).

¹⁰² See *Seven Up Pete Venture*, 523 F.3d at 956 (“Nothing in this passage suggests or requires a change in the regime addressed in *Reich*: that the State may be sued in its own courts (but not in federal court) for damages arising from violation of a self-executing constitutional clause.”).

¹⁰³ *Alden*, 527 U.S. at 740.

¹⁰⁴ Seamon, *supra* note 19, at 1112.

¹⁰⁵ *Id.*

¹⁰⁶ *Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1213 (10th Cir. 2019); *Seven Up Pete Venture*, 523 F.3d at 956 n.8; *Hutto*, 773 F.3d at 552; *DLX, Inc.*, 381 F.3d at 527; *Frein v. Pa. State Police*, 47 F.4th 247, 257 (3d Cir. 2022).

deprivation procedures, an entirely separate issue. In the circuit court inverse condemnation cases, however, the courts are doing something entirely different—they are not analyzing the sufficiency under federal law of state remedial procedures for inverse condemnation claims, but rather are telling state courts they must hear certain federal claims that federal courts are powerless to hear.¹⁰⁷ Such a demand cannot be traced to the Due Process Clause and runs directly contrary to the emphatic language in *Alden*. Whereas the states in the tax refund cases were merely being assessed for their state laws' compliance with the Due Process Clause, the circuit courts in the inverse condemnation cases are subjecting states to *federal* law claims in their own courts.

In other words, in the tax refund cases, while the *remedy* is dictated by the Due Process Clause, the contours of the state's pre- and post-deprivation remedies, and the state's liability for those remedies, are dictated by state law. This is why the Court in *Ford* noted with approval “[t]he advantage of having state courts pass initially upon [these] questions.”¹⁰⁸ It makes sense that these claims could be barred in federal court, given that tax refund statutes and procedures are not typically matters of federal law; only the dictate that states *have* (and keep) these procedures is federal in form. But in inverse condemnation actions, the *substance* of the claim is federal in nature, given that the circuit courts are holding not that the state courts have a state law *alternative* to just compensation suits, but that the *federal* claims must be cognizable in state courts.¹⁰⁹

And notwithstanding the circuit courts' inconsistency with *Alden*, a Supreme Court case intervened between the earlier circuit court cases and the later cases that undermines their shared reasoning. In *Knick v. Township of Scott*, the Court overruled an earlier precedent that required a plaintiff to litigate his claim in state court before bringing a takings claim in federal court.¹¹⁰ The Court determined that “the state-litigation requirement rests on a mistaken view of the Fifth Amendment,” and causes “the guarantee of a federal forum [to] ring[] hollow for takings

¹⁰⁷ *DLX, Inc.*, 381 F.3d at 527.

¹⁰⁸ *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 470 (1945).

¹⁰⁹ See *DLX, Inc.*, 381 F.3d at 527–28 (“Therefore, had DLX brought a federal claim with its state claim in state court, the Kentucky courts would have had to hear that federal claim . . . but this court is powerless to hear it.”).

¹¹⁰ 139 S. Ct. 2162, 2167 (2019).

plaintiffs, who are forced to litigate their claims in state court.”¹¹¹ It emphasized that “the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court . . . at that time.”¹¹² This right to compensation at the time of the taking is independent of any “post-taking remedies that may be available to the property owner.”¹¹³ In other words, according to the *Knick* Court, the availability of state court remedies is inapposite to a petitioner’s right to a *federal* forum. The presence of post-deprivation procedures on the state level cannot deprive a claimant from a federal forum. Yet, this is precisely the question a *Reich* analysis asks when it looks at the adequacy of state procedures to determine whether a suit is barred by sovereign immunity in federal court. It is precisely what Professor Seamon has argued for—a federal remedy contingent on the availability of a state remedy. It is unclear how this rationale can survive after *Knick*. Moreover, the *Knick* Court struck down the suggestion that takings claims are similar to due process claims, calling the analogy “strained.”¹¹⁴ Due process looks to the adequacy of pre- and post-deprivation remedies, an inquiry which “is quite different from the taking of property *by the government* through physical invasion.”¹¹⁵

It is true *Knick* had nothing to say about state sovereign immunity, given it was a case against a municipality. When later circuit courts have adopted the *Reich*/Seamon analysis for inverse condemnation claims, they have invoked this distinction to cursorily dismiss arguments based on *Knick*.¹¹⁶ Yet, it is difficult to reconcile the spirit of *Knick* with a bifurcated, forum-based approach to sovereign immunity. Taking *Knick* at its word, the inquiries into federal and state remedies for takings claims are to be completely independent. We cannot force open the door to one because the other happens to be closed.

Moreover, it is unclear how to apply this approach in practice. It is uncertain whether there must merely be a cause of action for federal

¹¹¹ *Id.*

¹¹² *Id.* at 2168.

¹¹³ *Id.* at 2170.

¹¹⁴ *Id.* at 2174.

¹¹⁵ *Id.*

¹¹⁶ See *Skatmore, Inc. v. Whitmer*, 40 F.4th 727, 733–34 (6th Cir. 2022); *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1390 (2021); *Bay Point Props., Inc. v. Miss. Transp. Comm’n*, 937 F.3d 454, 456 (5th Cir. 2019); *Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019).

takings claims in state courts, or if the state must also waive its sovereign immunity for those claims in state court for the courts to be deemed “available.”¹¹⁷ Because federal courts are considered “unavailable” when barred by sovereign immunity to hear the claims, there is an argument to be made that the state would similarly be “unavailable” if sovereign immunity barred the claims in state court. Indeed, this would remain true to the way the circuit courts read *Reich* as issuing an abrogation of state sovereign immunity in state court in certain circumstances.

Yet, the circuit courts have not felt the need to analyze whether state sovereign immunity has actually been waived over federal takings claims in each case, instead cursorily noting statutory causes of action¹¹⁸ or merely emphasizing that state courts are required to hear the claims.¹¹⁹ Some courts have raised their hands altogether, acknowledging that state courts theoretically have to be open but refraining from saying sovereign immunity could actually be abrogated in those courts if they are not open. The U.S. Court of Appeals for the Fourth Circuit, for instance, dismissed a federal takings claim after finding that the state courts had long permitted plaintiffs to sue the state for unconstitutional takings, but noted that it need “not decide the question whether a State can close its doors to a takings claim or the question whether the Eleventh Amendment would ban a takings claim in federal court if the State courts were to refuse to hear such a claim.”¹²⁰ The Ninth Circuit abdicated its gate-keeping role altogether. In *Jachetta v. United States*, the plaintiff argued he had to bring his inverse condemnation action in federal court given that his claim involved Indian lands.¹²¹ Because the Alaska courts had held they lacked jurisdiction over actions in which they “would have to resolve competing interests to Native allotment land,” the plaintiff argued he was without a

¹¹⁷ See *Zito v. N.C. Coastal Res. Comm’n*, 449 F. Supp. 3d 567, 582 (E.D.N.C. 2020), *aff’d*, 8 F.4th 281 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 465 (2021) (“Whether the Commission successfully can invoke sovereign immunity for a federal takings claim in state court is a different question for a different court on a different day.”).

¹¹⁸ See *Frein v. Pa. State Police*, 47 F.4th 247, 257 (3d Cir. 2022) (“Pennsylvania’s Eminent Domain Code opens its state courts to takings claims.”); *Williams*, 928 F.3d at 1213 (noting that the plaintiff’s claim could be brought in state court but merely citing a state statute recognizing constitutional takings and a state just compensation action against a city).

¹¹⁹ See *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527–28 (6th Cir. 2004) (emphasizing that the federal courts were closed to the claim due to sovereign immunity but that state courts were required to hear the federal claim).

¹²⁰ *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014).

¹²¹ 653 F.3d 898, 909 (9th Cir. 2011).

remedy in state court.¹²² Nevertheless, the Ninth Circuit held that the claim was barred in federal court by state sovereign immunity, and thus the plaintiff had to go to state court, while “acknowledg[ing] the possibility” that the state court “may dismiss the action for lack of subject matter jurisdiction.”¹²³ In sum, the circuit courts are claiming that state courts have to be open to hear the claims, but they are doing little to make sure that plaintiffs can actually receive just compensation in those state courts.

And even if the circuit courts *did* perform a robust assessment of the availability of state court remedies, this would force federal courts to carefully analyze various state sovereign immunity doctrines. But the *Reich* analysis in the tax refund cases does not force a federal court to analyze the contours of state sovereign immunity doctrine. Instead, the court looks to whether a state has a procedure in place for tax refund claims. Because the procedures are typically non-judicial in nature, there is no need to parse whether sovereign immunity has been waived for the claim. This is not the case in the inverse condemnation context. Already, we see district courts asking whether the non-waiver of state sovereign immunity over certain takings claims in state courts factors into the just compensation analysis.¹²⁴ If so, federal courts would be forced to analyze complicated state immunity law, as state waivers of sovereign immunity in state courts can be unclear or conditional.

Take Texas, for example. To find a waiver of state sovereign immunity in Texas, a plaintiff must show that the state actors acted intentionally to take or damage property.¹²⁵ Federal judges are then left to wonder whether the state court is “closed” to a claim where there is a dispute as to a state actor’s state of mind. This involves federal judges seeking to interpret state law and leads to inconsistent results across claims. Moreover, the scope of many state waivers of sovereign immunity over takings claims is unclear; it is often disputed whether these waivers apply to both federal and state law claims.¹²⁶ This, of course, leads to more

¹²² *Id.* (quoting *Foster v. State*, 34 P.3d 1288, 1291 (Alaska 2001)).

¹²³ *Id.*

¹²⁴ *Zito v. N.C. Coastal Res. Comm’n*, 449 F. Supp. 3d 567, 582 (E.D.N.C. 2020), *aff’d*, 8 F.4th 281 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 465 (2021) (“Whether the Commission successfully can invoke sovereign immunity for a federal takings claim in state court is a different question for a different court on a different day.”).

¹²⁵ *Dahl v. State*, 92 S.W.3d 856, 862 (Tex. App.—Houston [14th Dist.] 2002).

¹²⁶ See, e.g., *Devillier v. Texas*, No. 20-cv-00223, 2021 WL 1200893, at *6 (S.D. Tex. Feb. 22, 2021).

parsing of state law in a federal forum for a federal claim to determine whether a state is actually open to hear federal and state inverse condemnation claims.

Forum-specific immunity will pose issues in the Tenth, Eleventh, Third, Fifth, and First Circuits in particular.¹²⁷ These circuits have adopted a so-called “middle way” to state sovereign immunity, “making a distinction between immunity from suit and immunity from liability.”¹²⁸ The primary problem arises when a state chooses to remove a case from state court to federal court. Although the Supreme Court in *Lapides* held that removal to federal court constitutes a waiver of immunity from *suit*,¹²⁹ under a “middle way” approach, the state nonetheless retains its immunity from *liability* when it removes to federal court.¹³⁰ Thus, although a state might waive its “forum immunity” via removal, it may still “raise an objection to liability on the basis that Congress did not abrogate its sovereign immunity.”¹³¹

This, of course, will pose an insurmountable barrier for takings plaintiffs. Imagine that, following the guidance of the circuit courts, a plaintiff files her federal inverse condemnation claim against the state in state court. Technically, the state court is “open” to hear the claim (again, whatever that really means in substance). However, the state can simply remove the case to federal court and argue it is immune from liability there. The case will have to be dismissed. Middle-way sovereign immunity is just another example of the difficulties with the approach of the circuit courts.

It is also unclear why *state* courts must be open to hear these claims, while *federal* courts can remain closed. In other words, why are state courts the default for hearing these federal claims? Perhaps there are compelling reasons—for instance, maybe it is less offensive to sovereignty to hail the state into its own courts than to force it into federal courts, or perhaps state courts deserve cognizance over property claims, an area where states traditionally have had expertise. But this is undercut

¹²⁷ See *Trant v. Oklahoma*, 754 F.3d 1158 (10th Cir. 2014); *Stroud v. McIntosh*, 722 F.3d 1294 (11th Cir. 2013); *Lombardo v. Pa. Dep’t of Pub. Welfare*, 540 F.3d 190 (3d Cir. 2008); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236 (5th Cir. 2005); *New Hampshire v. Ramsey*, 366 F.3d 1 (1st Cir. 2004); Jessica Wagner, Note, *Waiver by Removal? An Analysis of State Sovereign Immunity*, 102 Va. L. Rev. 549, 556–59 (2016).

¹²⁸ Wagner, *supra* note 127, at 556.

¹²⁹ *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618 (2002).

¹³⁰ See, e.g., *Trant*, 754 F.3d at 1173.

¹³¹ *Stroud*, 722 F.3d at 1303.

by *Alden*'s insistence that federal control of state courts is potentially more offensive to sovereign immunity than is federal subjugation of states to suit in federal court,¹³² as well as *Knick*'s insistence that the existence of a state court remedy for takings claims is irrelevant to the necessity of a federal remedy.¹³³ And the circuit courts who have adopted the *Reich/Seamon* analysis for inverse condemnation claims have not sought to justify the asymmetry in this way—or really, in any way at all.

III. PATHS OUT OF THE CLASH

Where does this leave us? If the circuit courts' approach of funneling federal inverse condemnation claims into state courts is in error, do states have absolute authority to consent or not consent to these claims? Perhaps this is the answer—to achieve forum-neutral sovereign immunity, we must leave takings plaintiffs completely at the whim of the state.

But this position appears untenable. The Court has repeatedly recognized that providing a landowner a forum to seek just compensation when a taking has occurred is guaranteed by the Constitution.¹³⁴ Most recently, *Knick v. Township of Scott* recognized the federal nature of this guaranteed forum.¹³⁵ Moreover, the right to just compensation is one of just two constitutionally guaranteed remedies.¹³⁶ Property was significantly important to the Framers. James Madison, the primary drafter of the Just Compensation Clause in the Federal Constitution, saw private property as inviolate.¹³⁷ The concept of fair remuneration for any government appropriation of property, at least where that appropriation was physical,¹³⁸ was age old, with its roots stretching back to the natural

¹³² *Alden v. Maine*, 527 U.S. 706, 754 (1999).

¹³³ *Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019).

¹³⁴ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999); *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 (1987); *United States v. Clarke*, 445 U.S. 253, 257 (1980); *Jacobs v. United States*, 290 U.S. 13, 16 (1933); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304–06 (1923); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

¹³⁵ 139 S. Ct. at 2168.

¹³⁶ The other being the right to habeas corpus.

¹³⁷ *Barros*, *supra* note 45, at 511.

¹³⁸ The debate over what the original meaning of a “taking” was, and whether that original meaning encapsulated so-called “regulatory” takings, remains controversial and unsettled. See, e.g., William M. Treanor, Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 *Yale L.J.* 694, 711 (1985); William M. Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 *Colum. L. Rev.* 782, 783 (1995); John F. Hart, Land Use Law in the Early Republic and the

law.¹³⁹ Blackstone, who heavily influenced the Framers, emphasized the necessity of just compensation for any exercise of the eminent domain authority, insisting that the legislature could not act in “an arbitrary manner” in condemning land but rather must give a property owner “a full indemnification and equivalent for the injury thereby sustained.”¹⁴⁰ The early American state courts, even prior to the adoption and incorporation of the Fifth Amendment to the Constitution, granted aggrieved landowners reimbursement upon physical invasions of their property.¹⁴¹ These courts recognized the supra-constitutional nature of the right to a fair payment. In *Tinsman v. Belvidere Delaware Railroad Co.*, for example, the Supreme Court of New Jersey held that a plaintiff whose right to raft lumber along a channel was impeded by a railroad company’s building of an embankment on that channel was entitled to damages, even though the railroad company was acting pursuant to legislative direction.¹⁴² In so doing, the court noted that, even though the New Jersey Constitution had no just compensation provision, the right to just compensation attached, as it “is a principle of natural as well as constitutional law, that private property can be taken for public use, by virtue of the eminent domain, only upon just compensation” and thus “[t]hat the individual is entitled, in justice and equity, to remuneration, has never been denied.”¹⁴³ In short, the right to a fair redress when property has been invaded by the government preexists our Federal Constitution, much like state sovereign immunity itself. We must not leverage one over the other without a particularized rationale.

Two reprisals sound here. First is the claim that sovereign immunity leaves plaintiffs remediless all the time, for all sorts of claims, so inverse condemnation claims should be no different. It is true that to accept the argument presented in this Note, one must accept the premise that property is different for some reason. I believe there is a viable and

Original Meaning of the Takings Clause, 94 Nw. U. L. Rev. 1099, 1135 (2000); Kris W. Kobach, The Origins of Regulatory Takings: Setting the Record Straight, 1996 Utah L. Rev. 1211, 1214; Andrew S. Gold, Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,” 49 Am. U. L. Rev. 181, 182 (1999).

¹³⁹ See Paul J. Otterstedt, A Natural Rights Approach to Regulatory Takings, 7 Tex. Rev. L. & Pol. 25, 44 (2002).

¹⁴⁰ Blackstone, *supra* note 44, at *139.

¹⁴¹ See Callender v. Marsh, 18 Mass. (1 Pick.) 418, 430–31 (1823).

¹⁴² 26 N.J.L. 148, 175 (N.J. 1857).

¹⁴³ *Id.* at 161.

weighty claim to argue this is the case. Again, as discussed above,¹⁴⁴ property was one of the dearest rights to the Framers; Blackstone oft referred to it as an absolute right.¹⁴⁵ Moreover, the right to just compensation is one of only two rights that the Constitution explicitly crafts a remedy for, the other being the right to habeas corpus.¹⁴⁶ Therefore, it differs from other naked rights issued by our Constitution, the provision and rectification of which were left to Congress or the courts to devise. For exercises of the eminent domain power, however, the Founders were clear: individuals have a right to the remedy itself. The vesting of an individual entitlement to a monetary remedy is unique and privileged in our constitutional structure, which calls for a unique and privileged treatment of the remedy.

Second is the claim that a state law remedy is good enough. The approach of the circuit courts, after all, is to split the baby: so long as state courts remain open to hear the claim, sovereign immunity can bar the claim in federal court.¹⁴⁷ The result is to funnel takings claims against a state into state courts, or, at a higher level of generality, to require state courts to be the primary adjudicators of a federal claim. This Note has already discussed the shortcomings of this approach from the perspective of a need for symmetrical sovereign immunity and the language of *Knick*,¹⁴⁸ but there is also a historical issue with such an approach. Prior to the adoption of federal question jurisdiction in 1875, the federal courts interpreted diversity jurisdiction broadly so as to ensure federal claims would be adjudicated in federal fora and maintained their power to have broad discretion in deciding whether state procedures would govern the enforcement of federal rights.¹⁴⁹ During this time, the Supreme Court emphatically recognized the “constitutional right” of diversity plaintiffs to sue in federal court and crafted keenly federal substance and procedure to vindicate federal rights.¹⁵⁰ Once federal courts assumed jurisdiction over non-diversity actions with federal questions, the trend of eschewing

¹⁴⁴ See supra notes 42–44 and accompanying text.

¹⁴⁵ Robert P. Burns, Blackstone’s Theory of the “Absolute” Rights of Property, 54 *Cin. L. Rev.* 67, 67 (1985).

¹⁴⁶ Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler’s The Federal Courts and The Federal System* 849 (4th ed. 1996).

¹⁴⁷ See supra Part II.

¹⁴⁸ See supra Part II.

¹⁴⁹ For a brilliant description of this practice, see Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 *Yale L.J.* 77, 99–100, 102–03 (1997).

¹⁵⁰ See *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118, 121–22 (1868).

state restrictions on certain “constitutionally compelled remedies” continued so as to uphold access to federal fora.¹⁵¹ This included resisting state court attempts to limit certain suits to being brought against the state in name, which would have been prevented by state sovereign immunity; instead, the federal courts permitted plaintiffs to name individual officers as defendants because the underlying suits were constitutionally mandated.¹⁵² These included suits for injunctions and for damages.¹⁵³ In the specific context of the Fifth Amendment, in the early Republic, “federal courts did not shy from entertaining cases raising takings issues,” and the Supreme Court repeatedly rejected arguments that would divest lower federal courts sitting in diversity of the power to hear appeals of eminent domain actions.¹⁵⁴ In this way, then, the approach of the circuit courts only gets the story half-right. Yes, it is true that the Supreme Court once required state courts to provide certain remedies for violations of certain rights—namely, the collection of an unconstitutional tax.¹⁵⁵ But that was only half the story. The federal courts, for their part, ignored the availability of state remedies altogether in permitting certain actions against state officers to lie.¹⁵⁶ Only much later did the Supreme Court link together state and federal remedies to hold that the provision in the former could limit the provision in the latter.¹⁵⁷ In short, then, referencing state court remedies to determine the availability of federal court remedies is an ahistorical approach. The question really must become whether sovereign immunity can bar suits for just compensation against the states in the federal courts alone, without reference to what is permitted in the state courts. This question is what this Note turns to now.

A. Self-Execution and Automatic Abrogation

The most traditional argument in resolving the collision is that the Just Compensation Clause trumps state sovereign immunity due to the “self-

¹⁵¹ Woolhandler, *supra* note 149, at 132.

¹⁵² *Id.* at 134–35.

¹⁵³ *Id.* at 136.

¹⁵⁴ Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 *Notre Dame L. Rev.* 679, 684–86 (2022).

¹⁵⁵ Woolhandler, *supra* note 149, at 137.

¹⁵⁶ *Id.*

¹⁵⁷ See *Burrill v. Locomobile Co.*, 258 U.S. 34, 38–39 (1922); Woolhandler, *supra* note 149, at 140 (“*Burrill* therefore represented a significant curtailment—and without much fanfare—of the federal courts’ traditional ability to supply actions at law differing from those in the state.”).

executing” nature of the Fifth Amendment.¹⁵⁸ This argument can be traced back to a footnote in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.¹⁵⁹ The infamous footnote reads:

The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that “the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.” Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.¹⁶⁰

Courts have been reckoning with this footnote ever since. Many courts have considered it to be dictum, given that the plaintiffs in *First English* sued the county, not the state.¹⁶¹ Moreover, today’s federal circuit courts overwhelmingly have held that the Fifth Amendment does not abrogate sovereign immunity, at least in federal courts.¹⁶² However, some modern state courts do read state takings provisions as automatically abrogating state sovereign immunity.¹⁶³

In the most comprehensive treatment of the argument to date, Professor Eric Berger asserts that the Fifth Amendment is self-executing based on

¹⁵⁸ See generally Berger, *supra* note 4, at 498 (arguing that the Takings Clause abrogates state sovereign immunity).

¹⁵⁹ 482 U.S. 304 (1987).

¹⁶⁰ *Id.* at 316 n.9 (citations omitted).

¹⁶¹ *Id.* at 308; see, e.g., *Cnty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 42 n.6 (E.D.N.Y. 2020), *aff’d*, 59 F.4th 540 (2d Cir. 2023); *Zito v. N.C. Coastal Res. Comm’n*, 449 F. Supp. 3d 567, 577 (E.D.N.C. 2020), *aff’d*, 8 F.4th 281 (4th Cir. 2021); *Abdel-Fakhara v. Vermont*, No. 21-cv-00198, 2022 WL 4079491, at *7 (D. Vt. Sept. 6, 2022).

¹⁶² See *supra* Part II. But see *Allen v. Cooper*, 555 F. Supp. 3d 226, 239–40 (E.D.N.C. 2021), *appeal dismissed*, No. 21-2040, 2022 WL 19226124 (4th Cir. Oct. 14, 2022) (holding state sovereign immunity must fall to just compensation, as, *inter alia*, “the text of the Fifth Amendment supports a finding of automatic abrogation”).

¹⁶³ See, e.g., *Rose v. California*, 123 P.2d 505, 510 (Cal. 1942); *State ex rel. Smith v. 0.24148, 0.23831 & 0.12277 Acres of Land*, 171 A.2d 228, 231 (Del. 1961); *Angelle v. State*, 34 So. 2d 321, 323 (La. 1948); *Schmutte v. State*, 22 N.W.2d 691, 694 (Neb. 1946); *Cereghino v. State ex rel. State Highway Comm’n*, 370 P.2d 694, 696 (Or. 1962); *Chick Springs Water Co. v. State Highway Dep’t*, 157 S.E. 842, 850 (S.C. 1931).

textual, structural, and historical arguments.¹⁶⁴ First, he asserts that the text of the Constitution compels the just compensation covenant to beat out state sovereign immunity, given that the Fifth Amendment very clearly requires just compensation, whereas the Court's Eleventh Amendment jurisprudence is notoriously atextual.¹⁶⁵ He emphasizes that "the *Alden* majority's controversial view of [the] original understanding of the Eleventh Amendment is so at odds with the plain meaning of the text, that the Court's approach, faithfully characterized, simply abandons textualism."¹⁶⁶ Professor Berger thus concludes that "[f]rom a textualist perspective then, it would be very strange for the essentially common law sovereign immunity to prevent damages actions for violations of the Takings Clause."¹⁶⁷

While facially persuasive, the textual argument falls short when one considers the background principles of sovereign immunity the Constitution was drafted against. At the Founding, it was widely understood that sovereign states could not be subject to compulsory process without their consent.¹⁶⁸ Thus, while not codified by the Constitution itself, it is well documented that Article III was not intended to override the longstanding framework of state sovereign immunity.¹⁶⁹ The language of Article III, "extend[ing]" the federal judicial power to "Controversies . . . between a State and Citizens of another State" or "between a State . . . and foreign . . . Citizens or Subjects"¹⁷⁰ is not to the contrary. This is because, for something to count as a "controversy," there had to be adverse parties before the court—in other words, there had to be a defendant that could legitimately be commanded to appear before the court.¹⁷¹ Because states could not be haled in as defendants to court, an

¹⁶⁴ Berger, *supra* note 4, at 500.

¹⁶⁵ *Id.* at 519–20 (citing Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 *Harv. L. Rev.* 1342, 1351–71 (1989)).

¹⁶⁶ *Id.* at 521.

¹⁶⁷ *Id.* at 524.

¹⁶⁸ See Nelson, *supra* note 28, at 1565 ("Traditionally, courts could not command unconsenting states to appear at the behest of an individual. For many members of the Founding generation, Article III did nothing to change this system: if a state did not consent to suit, there would be no 'Case' or 'Controversy' over which the federal government could exercise judicial power.").

¹⁶⁹ *Id.* at 1575; see also *The Federalist* No. 81, at 411 (Alexander Hamilton) (Yale Univ. Press 2009) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." (emphasis omitted)).

¹⁷⁰ U.S. Const. art. III.

¹⁷¹ Nelson, *supra* note 28, at 1587.

adjudication where a state was made an adverse party by an individual could never be considered a case or controversy. That is, “while Article III extended the federal government’s judicial power to various categories of ‘Case’ and ‘Controversies,’ background rules of law kept individuals from making an unconsenting state party to a ‘Case’ or ‘Controversy’ in the first place.”¹⁷² In this way, the preexisting state sovereign immunity the Constitution incorporated functioned as a proto-personal jurisdiction. The Eleventh Amendment was a mere response to *Chisholm* and did nothing to override this framework of existing state sovereign immunity. Instead, the Amendment “creates a second type of sovereign immunity, which sounds in subject matter jurisdiction and which therefore cannot be waived,” while background principles of sovereign immunity continue to cover cases the Eleventh Amendment by its text does not address.¹⁷³

Professor Berger then turns to the structural arguments for automatic abrogation. These arguments sound in functionalism. He argues that “[a]llowing state sovereign immunity to bar recovery in *First English* suits would thus undermine the very principles upon which just compensation rests,” whereas “privileging Fifth Amendment takings over Eleventh Amendment sovereign immunity leaves most of current sovereign immunity doctrine intact.”¹⁷⁴ Further, he points out that, of all constitutionally guaranteed rights, it is only the right to just compensation that can be exclusively remedied via damages; thus, a “sovereign immunity bar . . . eviscerates the property right.”¹⁷⁵ He goes on to overwhelmingly critique a robust doctrine of state sovereign immunity in general.¹⁷⁶ Finally, Professor Berger looks to the historical arguments. He emphasizes the sacredness of property at the Founding and the fact that the Just Compensation Clause is unique in its “specific provision of a monetary remedy” in order to argue that “it seems that takings cases constituted that rare exception where the government . . . could be sued.”¹⁷⁷

The problem is that, while Professor Berger is right that both property and the right to just compensation have long been considered sacred, there is a dearth of historical precedent demonstrating that states were actually

¹⁷² *Id.*

¹⁷³ *Id.* at 1566.

¹⁷⁴ Berger, *supra* note 4, at 528.

¹⁷⁵ *Id.* at 531.

¹⁷⁶ *Id.* at 550.

¹⁷⁷ *Id.* at 571–72.

haled into court to answer in damages for takings.¹⁷⁸ Indeed, state courts around the time of incorporation seemed to understand that states could not be sued for just compensation, and that is why suits against officers were widely permitted.¹⁷⁹ Moreover, Supreme Court precedent suggests that the Fifth Amendment did not automatically abrogate the federal government's immunity and thus the Tucker Act was necessary to effectuate a waiver of immunity.¹⁸⁰ In short, Professor Berger provides negligible historical evidence that these suits were actually permitted to proceed against the state.¹⁸¹ While his policy arguments are compelling, they are irrelevant to determining the proper, formal way out of the clash—and are more suited to a debate over potential congressional abrogation.

B. Plan of the Convention Suits

Another potential path out of the clash between sovereign immunity and the right to just compensation could be to take advantage of the Court's recent foray into the so-called "plan of the Convention" doctrine.¹⁸² In this line of cases, the Supreme Court has held that certain suits cannot be barred by state sovereign immunity, as the states agreed to be liable for such suits in the plan of the Convention; this agreement is reflected by "the structure of the original Constitution itself."¹⁸³ In other words, "[t]he plan of the Convention reflects the 'fundamental postulates implicit in the constitutional design.'"¹⁸⁴ This possibility was first recognized by the Court in *Principality of Monaco v. Mississippi*,¹⁸⁵ which held that states could be sued by other states and by the United States as they had "waived their exemption from judicial power" for these

¹⁷⁸ See Robert F. Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 *Vand. L. Rev.* 57, 72 (1999).

¹⁷⁹ *Id.* at 77; see *infra* Section III.C.

¹⁸⁰ *Schillinger v. United States*, 155 U.S. 163, 168 (1894).

¹⁸¹ Berger, *supra* note 4, at 591 ("Of course, none of this history definitively settles our larger question about the interaction of the Takings Clause and state sovereign immunity.").

¹⁸² 546 U.S. 356, 377 (2006); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2258 (2021); *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2460 (2022).

¹⁸³ *Alden v. Maine*, 527 U.S. 706, 728 (1999).

¹⁸⁴ *PennEast*, 141 S. Ct. at 2259 (quoting *Alden*, 527 U.S. at 729).

¹⁸⁵ 292 U.S. 313, 323–30 (1934).

suits.¹⁸⁶ The Court relied on Federalist No. 81.¹⁸⁷ The exception has been expanded over time. In *Central Virginia Community College v. Katz*,¹⁸⁸ the Court held “that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’”¹⁸⁹ The decision rested primarily on the conclusion that “the jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction.”¹⁹⁰ Because the core of bankruptcy proceedings was *in rem*, the Court reasoned, states also consented to be sued in whatever auxiliary proceedings were necessary to effectuate the jurisdiction of the bankruptcy courts.¹⁹¹ According to the Court, this presumptive consent was reflected in the constitutional structure, given the text’s insistence that there be “uniform Laws on the subject of Bankruptcies,” which was compelled by states passing a variety of legislation and refusing to discharge the debts of noncitizens under the Articles of Confederation.¹⁹² This historical evidence prompted the *Katz* Court to conclude that states waived their sovereign immunity for bankruptcy suits to make sure a national bankruptcy policy could inhere.¹⁹³

Next, in *PennEast Pipeline Co. v. New Jersey*,¹⁹⁴ the Court held that states surrendered a portion of their sovereignty to permit the federal government to effectuate its eminent domain power; by extension, then, condemnation suits by private parties entrusted to carry out the federal eminent domain power could be had against states. Because a waiver of state sovereign immunity was necessary for the federal government to have a full and complete eminent domain power, the Court concluded such a waiver could be found in the plan of the Convention.¹⁹⁵ Most recently, in *Torres v. Texas Department of Public Safety*, the Court held

¹⁸⁶ *Id.* at 328.

¹⁸⁷ *Id.* at 324 (citing The Federalist No. 81, at 411 (Alexander Hamilton) (Yale Univ. Press 2009) (“Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States.”)).

¹⁸⁸ *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377 (2006).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 378.

¹⁹¹ *Id.*

¹⁹² *Id.* at 368–77.

¹⁹³ *Id.* at 379.

¹⁹⁴ 142 S. Ct. 2244 (2021).

¹⁹⁵ *Id.* at 2259.

that states had consented in the plan of the Convention to have their sovereignty yield in the face of national military policy.¹⁹⁶ By extension, states could be sued by private parties under a federal statute that forbade state employers from penalizing veterans for their prior service, given that the statute was a part of the federal government's power to control the policy of the armed forces.¹⁹⁷ The Court reasoned that the Constitution's text "strongly suggests a complete delegation of authority to the Federal Government to provide for the common defense."¹⁹⁸ Over the nation's history, the Court emphasized, Congress has capitalized on this federal military power to take action, sometimes "at the expense of state sovereignty."¹⁹⁹ Explaining its decisions in *Katz* and *PennEast*, the Court seemed to formulate a new test for whether a plan-of-the-convention waiver of sovereign immunity could be found: if the federal power at issue is "complete in itself."²⁰⁰ Such an area is *not* merely an area of law that is *now* "under the exclusive control of the Federal Government" but was *once* subject to the control of a different sovereign, such as a state or a tribe, like interstate commerce.²⁰¹ Rather, it is an area that has always been within the control of the federal government and raises distinctly federal interests. In the words of the *Torres* Court, the relevant powers are those "expressly denied to the States, or operat[ing] for the benefit of the entire Nation, or prov[ing] comparably essential to the survival of the Union—itsself a foundational purpose for drafting the Constitution."²⁰²

Although *PennEast* dealt with the province of eminent domain, it is likely a long shot that the reasoning of the plan-of-the-convention cases could be extended to allow any private party to sue a state for damages in inverse condemnation actions. Despite the arguably shabby reasoning of the cases,²⁰³ the precedents appear to be carving out unique federal

¹⁹⁶ 142 S. Ct. 2455, 2464 (2022).

¹⁹⁷ *Id.* at 2460. The statute at issue was the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 *et seq.* USERRA authorizes private damages suits against states if they refuse to use "reasonable efforts" to accommodate service-related disabilities or find an "equivalent" job where a disability prevents a veteran from resuming his prior job. *Id.* §§ 4313, 4323.

¹⁹⁸ *Torres*, 142 S. Ct. at 2463.

¹⁹⁹ *Id.* at 2464–65.

²⁰⁰ *Id.* at 2466–67 (quoting *PennEast*, 141 S. Ct. at 2663).

²⁰¹ *Id.* (explaining the Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)).

²⁰² *Id.* at 2467.

²⁰³ *PennEast*, 141 S. Ct. at 2267 (Barrett, J., dissenting) ("The Court's proposed escape route from this analysis—that the States relinquished their immunity from private condemnation

spheres of policy of which state sovereign immunity cannot stand in the way. Thus, the plan-of-the-convention line of cases appears similar to federal common law and its areas involving “uniquely federal interests.”²⁰⁴ Suits between a private citizen and a state for inverse condemnation do not fall within a broader federal enclave to carry out comprehensive, nationally important federal goals (no matter how important this Author thinks the suits are).

Thus far, however, plan-of-the-convention suits are the only ones in which the modern Supreme Court has found wholesale waivers of sovereign immunity, and that could be extended to suits for damages against the state. Moreover, the historical evidence points towards an understanding that state sovereign immunity *did* preclude suits for inverse condemnation directly against the state. It appears that direct suits against the state are likely not the answer here.

C. Individual Officer Suits and Just Compensation

An historical approach to inverse condemnation suits would involve naming public officials as defendants, rather than the state itself. State courts leading up to incorporation of the Fifth Amendment often heard inverse condemnation suits by private plaintiffs.²⁰⁵ Although suits directly against the state were not typically permitted, plaintiffs had a variety of other defendants from whom to choose and receive just compensation.²⁰⁶ In the early nineteenth century, plaintiffs would bring these claims under a fitting common law cause of action, such as trespass or trespass on the case.²⁰⁷ The property owner would then need to choose a defendant. Sovereign immunity loomed large for these plaintiffs, given

suits in the plan of the Convention—is a dead end.”); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 380 (2006) (Thomas, J., dissenting) (“[H]istory confirms that the adoption of the Constitution merely established federal power to legislate in the area of bankruptcy law, and did not manifest an additional intention to waive the States’ sovereign immunity against suit.”); *Torres*, 142 S. Ct. at 2481 (Thomas, J., dissenting) (“In the end, the ‘history, practice, precedent, and the structure of the Constitution’ all demonstrate that States did not surrender their sovereign immunity in their own courts when Congress legislates pursuant to one of its war powers.” (citation omitted)).

²⁰⁴ *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–05 (1988).

²⁰⁵ Incorporation occurred in 1897. *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897); see Kurt T. Lash, *Beyond Incorporation*, 18 *J. Contemp. Legal Issues* 447, 448 (2009) (explaining that we should look to the public understandings of incorporated amendments as they stood in 1868).

²⁰⁶ *Brauneis*, *supra* note 178, at 77–78.

²⁰⁷ *Id.* at 62.

that it was understood a state could not be haled into court without its consent.²⁰⁸ The early state courts confronted and addressed the clash between state sovereign immunity and the right to just compensation directly. Because the right to remuneration was seen as sacred, early state courts permitted actions in damages to lie against private corporations performing public works and public officers acting pursuant to statutory command.²⁰⁹ In so doing, state court judges recognized that to give full effect to the right of just compensation, sovereign immunity had to be circumvented, lest the right be merely hortatory. For instance, in *McCord v. High*, Chief Judge Dillon of the Iowa Supreme Court upheld an action for damages against a public officer, the district road supervisor, after the public officer had been directed to build a highway across a stream, causing the flooding of plaintiff's pasture.²¹⁰ He emphasized the need for the public official to be named as defendant, writing that "although the injury done the plaintiff is a direct invasion of his rights of property, and actionable in its nature, he is without remedy, unless it be against the defendant."²¹¹ This led him to conclude that, "[i]n such a case, upon principles of justice, the action should, I think, be held to lie against the public officer."²¹²

Public officials and corporations were held liable via a "justification-stripping" model.²¹³ When a plaintiff decided to bring her common law trespass action against a public official or a corporation for, say, the flooding of her land due to an unfortunately placed dike, the defendant would cite the legislation authorizing him to perform the act as "justification."²¹⁴ "Most attempts at statutory justification in just compensation litigation involved appeals, not to general legislation legalizing acts that would otherwise amount to trespasses or nuisances, but to acts granting authority to particular public officers, authorizing particular public works, or, most importantly, chartering particular corporations."²¹⁵ But if the authorizing legislation did not provide a means for injured landowners to obtain just compensation when a taking

²⁰⁸ See, e.g., 1 James Kent, *Commentaries on American Law* 371 n.(e) (14th ed. 1896) (citing *Mich. State Bank v. Hastings*, 1 Doug. 225 (Mich. 1844)).

²⁰⁹ Brauneis, *supra* note 178, at 78.

²¹⁰ 24 Iowa 336, 348–51 (1868).

²¹¹ *Id.* at 350.

²¹² *Id.*

²¹³ Brauneis, *supra* note 178, at 68.

²¹⁴ *Id.* at 83.

²¹⁵ *Id.* at 83–84.

occurred, the statute would be found unconstitutional and therefore could not serve as a justification for the public official's or corporation's actions.²¹⁶ The public official or corporation would be "stripped" of his legal backing and could be found liable in damages. Justification stripping was a familiar model to early American courts, which looked to a similar English tradition of holding executive branch officials liable in damages for injuries that would have been actionable in tort.²¹⁷ Justification stripping was common to the Framers as a way to enforce other constitutional provisions against public officials.²¹⁸ The model was also invoked when plaintiffs sought to recover possession of property unconstitutionally seized. It was understood that when a public officer seized private property acting under the authority of an unconstitutional statute, he was stripped of his official character and became a private party amenable to suit.²¹⁹

The scheme was particularly useful in getting around sovereign immunities. In a hallmark nineteenth-century takings case, *Callender v. Marsh*, Chief Justice Parker of the Massachusetts Supreme Judicial Court wrote, "[I]f by virtue of any legislative act the land of any citizen should be occupied by the public . . . without any means provided to indemnify the owner of the property . . . he might maintain his action . . . against those who were instrumental in the act."²²⁰ A statute without a means to recover just compensation, he recognized, would be unconstitutional, and therefore could not serve as justification for a defendant's actions; thus the door for the plaintiff to hold the public actor accountable was open.²²¹ The procedural maneuver was necessary because "no action can be maintained against the public for damages," and thus "the only way to secure the party in his constitutional rights would be to declare void the public appropriation."²²² Virtually every early American court agreed with Chief Justice Parker and utilized the justification-stripping model to

²¹⁶ *Id.* at 83.

²¹⁷ *Id.* at 101.

²¹⁸ See Akhil R. Amar, *The Constitution and Criminal Procedure: First Principles* 13–14 (1997) (describing how the Framers assumed search and seizures provisions would be enforced via common law damages actions against government officials); John Jay, *A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 *The Founders' Constitution* 312–13 (Philip B. Kurland & Ralph Lerner eds., 1987) (acknowledging that those whose property the military appropriated would be able to "bring Actions and recover Damages").

²¹⁹ See, e.g., *Poindexter v. Greenhow*, 114 U.S. 270, 282–83 (1885).

²²⁰ 18 Mass. (1 Pick.) 418, 430–31 (1823).

²²¹ *Id.*

²²² *Id.*

hold public officials and chartered corporations liable in damages for certain injuries amounting to takings.²²³ Of course, there were divides over precisely *what* injuries were compensable, but the overall thrust of the cases was to permit a plaintiff to receive just compensation from a defendant carrying out a public activity.²²⁴

The U.S. Supreme Court invoked the model in *Pumpelly v. Green Bay Co.* in holding a public works corporation liable for flooding plaintiff's land; the flooding was caused by defendant's erection of a dam across a river.²²⁵ The corporation asserted the dam was authorized by state legislation as a part of a project to improve the navigation of the river.²²⁶ However, because this statutory authorization "contained no provision for compensation," the Court found that defendants "were not protected" by it.²²⁷ The company was held liable in damages.²²⁸ In *Poindexter v. Greenhow*, the Supreme Court held that a tax collector who had acted pursuant to an unconstitutional statute in seizing personal property from the plaintiff could be liable for an action in detinue.²²⁹ Such an action, the Court held, could not be considered as one against the state itself.²³⁰ The Court emphasized that a defendant cannot barely assert the state authorized him to seize the property and thereby evade liability; rather, the defendant is "bound to establish [the defense]."²³¹ In *Poindexter*, the defendant pointed to a state statute commanding the disputed seizure as justification.²³² The Court rebuffed this attempt, commenting that while the act "is a legislative act of the government of Virginia . . . it is not a law of the State of Virginia. The State had passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done."²³³ Because there was no valid law to justify the defendant's

²²³ Brauneis, *supra* note 178, at 109.

²²⁴ Disputes primarily revolved around whether corporations could be held liable if they were solely acting for the public, rather than private, benefit, as well as whether the injuries were direct or merely consequential. Other disputed distinctions, and their impact on the right to recovery, included negligent versus non-negligent acts, and public and private nuisance liability. Authorities split over the impacts of these distinctions on the extent to which a plaintiff could recover damages. *Id.* at 85–97.

²²⁵ 80 U.S. (13 Wall.) 166, 167 (1871).

²²⁶ *Id.* at 176.

²²⁷ *Id.* at 181–82.

²²⁸ *Id.* at 182.

²²⁹ 114 U.S. 270, 306 (1885).

²³⁰ *Id.* at 297.

²³¹ *Id.* at 288.

²³² *Id.*

²³³ *Id.*

actions, he stood “stripped of his official character . . . [and] without defence.”²³⁴ The effect of this was to return the illegally seized property to the plaintiff.

The point of all of this is to say that early American courts did not suffer from a clash between state sovereign immunity and the right to just compensation of the same magnitude as the clash from which modern courts suffer. This is because plaintiffs always had a ready defendant.²³⁵ There was no need to sacrifice one constitutional provision for the other; both could be given their due. Today, the picture is complicated by the explosion of § 1983 suits and the parallel expansion of qualified immunity doctrine.²³⁶ Public officials in the nineteenth century “enjoyed far narrower immunities than they would under modern law. The general principle in the Anglo-American tradition was that executive officials enjoyed no immunity whatsoever for acts they were not authorized to perform by valid statute.”²³⁷ Thus, the justification-stripping model worked quite well, and plaintiffs who had had their land and homes devastated by legislative provisions were not left holding the (often wet) bag.²³⁸

The purpose of this Note is not to rehearse the shortcomings of modern qualified immunity doctrine, or the expansion of § 1983 suits, on which

²³⁴ *Id.*

²³⁵ Note also that private corporations performing public works for their own profits were often named as defendants in suits for just compensation. See Brauneis, *supra* note 178, at 72, 74–75. Private corporations were generally liable for damages caused. *Id.* at 75. Today, however, many of the functions private corporations used to be chartered to perform—the building of public highways or means of transportation, for instance—are carried out by government agencies.

²³⁶ See *Cole v. Carson*, 935 F.3d 444, 477–78 (5th Cir. 2019) (Ho & Oldham, JJ., dissenting).

²³⁷ Brauneis, *supra* note 178, at 78–79. Some limited forms of immunity began to develop in the nineteenth century. For instance, “quasi-judicial” immunity, which began to emerge in the 1840s, offered officials exercising discretionary powers immunity from negligence. *Id.* at 79–81. But quasi-judicial immunity could not save an official from negligence if the statute he was operating under was deemed unconstitutional, as was the case when it failed to provide means to recover just compensation. *Id.* at 81. Modern immunity doctrine did not begin to emerge until the twentieth century. See David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 *U. Colo. L. Rev.* 1, 52 (1972).

²³⁸ See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 *N.Y.U. L. Rev.* 1862, 1876 (2010) (“Because sovereign immunity barred suits directly against the government, the personal liability of the officer was essential to ensure a test of the legality of government action.”). As Professor Pfander and Mr. Hunt detail, any indemnification of public officers was effectuated by Congress, rather than the courts themselves. *Id.* at 1888.

there is no shortage of academic literature.²³⁹ Rather, it is to show that the explosion of immunities has curtailed one constitutional covenant at the expense of another. This result was not anticipated by the Framers, who assumed courts could rely on justification stripping to enforce constitutional rights. Without arguing for an overhaul of qualified immunity doctrine, which is best left for another day, this Note seeks to work within the current framework to see if some sort of compromise could be reached between the two covenants.

As is well established, public officials sued in their individual capacities are entitled to qualified immunity unless they “violated a federal statutory or constitutional right” and “the unlawfulness of their conduct was ‘clearly established at the time.’”²⁴⁰ “‘Clearly established’ means that, at the time of the [official’s] conduct, the law was ‘sufficiently clear’ that every ‘reasonable official would understand that what he is doing’ is unlawful.”²⁴¹ Typically, qualified immunity analysis rests on whether there was highly similar existing precedent at the time of the offense that “‘squarely governs’ the specific facts at issue,”²⁴² in which case the unlawfulness of the conduct can be considered clearly established. Otherwise, officials are usually granted qualified immunity and cannot be held liable in damages.

In the inverse condemnation context, courts could adopt a presumption that any government action that results in the physical invasion of a plaintiff’s property is a violation of the right to just compensation and is clearly unlawful, thereby curtailing qualified immunity in this context.²⁴³ Physical invasions, even those occurring as a mere *consequence* of the government’s behavior rather than as a direct *fruit* of the government’s behavior, have been considered takings by many American courts over

²³⁹ See, e.g., William P. Baude, *Is Qualified Immunity Unlawful?*, 106 *Calif. L. Rev.* 45, 46 (2018).

²⁴⁰ *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

²⁴¹ *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

²⁴² *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015)).

²⁴³ Such a suit, of course, requires a cause of action. Because this Note advocates for private officer suits, § 1983 is a ready vehicle. The debate rages on, however, as to whether the Fifth Amendment *itself* provides an implied private right of action. See, e.g., *Lawyer v. Hilton Head Pub. Serv. Dist.* No. 1, 220 F.3d 298, 302 n.4 (4th Cir. 2000). While a fascinating issue, the sovereign immunity aspect of takings claims against a state provided ample content for this limited Note, and therefore the cause of action question must be left for future research.

the centuries.²⁴⁴ Courts should not be forced to be in the business of determining whether there is some precise analogue to the case at hand; instead, courts should assume wholesale that no reasonable official could conclude that an action resulting in physical harm to a plaintiff's land without providing a means for remuneration was constitutionally permissible.²⁴⁵ Because of the sanctity of property and the natural law origins of the right to just compensation, any action that results in physical harm to private lands should be considered "particularly egregious" and should lead to a denial of qualified immunity.²⁴⁶ It is true that "[t]his rule . . . when the agent has acted in good faith and without knowledge of the want of legal authority, may seem to operate oppressively, but it is a necessary and very just rule notwithstanding, and full protection of the citizen in his legal rights would be impossible without it."²⁴⁷ To return to a historical approach to this clash, and to vindicate both covenants, it may well be constitutionally compelled to circumvent sovereign immunity in this way.

Of course, suing a public officer in his or her individual capacity means that any damages would technically come from the officer's pockets, rather than the state's.²⁴⁸ There is always the possibility that a public

²⁴⁴ Early courts were divided over this question, but later cases swung firmly towards finding any physical invasion to be a taking. In *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871), the Supreme Court, applying the Wisconsin Constitution in a diversity action, was clear: "[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." See also *Eaton v. Bos., Concord & Montreal R.R.*, 51 N.H. 504, 520 (1872) (referring to the distinction between direct and consequential injuries as "perplexed and encumbered").

²⁴⁵ See, e.g., *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (eschewing use of highly similar factual analogues in qualified immunity context when the behavior is severely unconstitutional on its face); see also *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015). In *Browder*, then-Judge Gorsuch pointed out that "some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Id.* (holding that a police officer who sped through an intersection with his lights flashing while not pursuing official business and killed another motorist was not entitled to qualified immunity).

²⁴⁶ *Taylor*, 141 S. Ct. at 54 ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution.").

²⁴⁷ *Cubit v. O'Dett*, 16 N.W. 679, 680 (Mich. 1883).

²⁴⁸ It is true that this approach may face an additional hurdle: the *Edelman v. Jordan*, 415 U.S. 651 (1974), bar. There, the Court held that, when funds to satisfy a damages award "must inevitably come from the general revenues" of the state, even if state officials are named as the defendants, the Eleventh Amendment bars the action. *Id.* at 665. A full analysis of this issue is beyond the scope of this Note. However, it should be noted that the *Edelman* bar has

official would be judgment-proof or lack deep pockets, thereby leaving a plaintiff without a full remedy. However, state indemnification practices are widespread. Thirty-six states have enacted statutes that indemnify state employees.²⁴⁹ Seven other states do not mandate indemnification but give state agencies discretion on whether to indemnify their employees.²⁵⁰ In sum, then, indemnification of state employees is a real possibility for plaintiffs in eighty-six percent of states. Adopting a loose conception of “clearly established” when takings are at issue would permit plaintiffs real relief, while still respecting state sovereign immunity; indemnification, after all, does not threaten state sovereign immunity to the same extent because it is voluntary and states can always narrow their indemnification practices. However, a loose “clearly established” standard could impose real deterrence upon states to refrain from engaging in uncompensated takings, either because the state knows it must indemnify its officers or because the state knows it would lose employees if it forced them to suffer damages for a statutorily authorized activity.

D. Congressional Abrogation

Finally, of course, we can accept that these suits are barred by both state sovereign immunity and, in many cases, qualified immunity, and that we have no other choice but to rely on Congress to abrogate state sovereign immunity in this context. Congress can abrogate sovereign immunity via its powers under Section 5 of the Fourteenth Amendment, so long as there is “congruence and proportionality between the [constitutional violation] to be prevented or remedied, and the means adopted to that end.”²⁵¹ Congress must “identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.”²⁵² Courts must ask whether there is a pattern of this type of unlawful behavior by the states such that it becomes “a problem of national import.”²⁵³ Without

not always been consistently applied, and the Supreme Court continues to award damages against state officers in many cases. See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 60–68 (1998).

²⁴⁹ Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 *Geo. L.J.* 229, 270 (2020).

²⁵⁰ *Id.* at 271–72.

²⁵¹ *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

²⁵² *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999).

²⁵³ *Id.* at 641.

attempting to parse whether a congressional abrogation would be upheld as constitutional, this Note points out that further research should be conducted to assess the level to which states are committing takings without providing means for recompense. There may be room for congressional action if judicial action fails.

CONCLUSION

An age-old clash has yet to be resolved. Two of the most fundamental attributes of our constitutional system have come to a head, and the federal circuit courts are ill prepared to reconcile the battle. Their approach has been to rely on heuristic reasoning, passing the buck to our state courts in the meantime. But while Solomon was praised for his great remedial wisdom, any praising of the circuit courts in this context is misplaced. Their approach creates a variety of complex difficulties, while running contrary to precedent, history, and reason along the way. To return to a historical resolution of this clash, the federal courts should be lenient in permitting inverse condemnation actions to lie against federal officers. We must find our way out of this thicket. This Note sought to suggest how we do so.