Notre Dame Law Review

Volume 75 | Issue 3 Article 4

3-1-2000

# Old Property, New Property, and Sovereign Immunity

Ann Woolhandler
*University of Notre Dame*, John.E.Smithburn.1@nd.edu

# OLD PROPERTY, NEW PROPERTY, AND SOVEREIGN IMMUNITY

*Ann Woolhandler**

## INTRODUCTION

The Court last term built on *Seminole Tribe*'s[1] decision that Congress could not abrogate state immunity when acting under the commerce power. *Alden v. Maine*[2] held that sovereign immunity could not be avoided merely by resort to state court. And the two *Florida Prepaid* cases[3] indicated that state violations of federal statutes are not automatically violations of the Fourteenth Amendment that would allow Congress to abrogate sovereign immunity. Rather, a violation of the Fourteenth Amendment would occur—and Congress could abrogate state sovereign immunity for a statutory violations—only when the states had systematically failed to provide adequate remedies[4] for intentional deprivations[5] of traditional property interests.[6]

---

* Professor of Law, Tulane University; Visiting Professor of Law, Harvard University (Fall 1999). My thanks to Michael Collins, Richard Fallon, and Dan Meltzer for comments on earlier drafts.

1 Seminole Tribe v. Florida, 517 U.S. 44 (1996).

2 119 S. Ct. 2240 (1999).

3 College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999).

4 *See Florida Prepaid*, 119 S. Ct. at 2206. The violations as well as the failure to remedy might need to be systemic. *See id.* at 2207 (stating that Congress had not identified a pattern of patent infringement by states).

5 *See id.* at 2209 (noting that Congress did not focus on instances of intentional or reckless infringement on the part of the states).

6 In *Florida Prepaid*, the Court indicated that Congress could in a proper case invoke Section 5 to protect a patent. *See id.* at 2208. In *College Sav. Bank*, the Court indicated that no due process violation was involved in the state's violation and nonremediation of the Lanham Act, because the statutory expectations had not created a property interest that excluded others. *See College Sav. Bank*, 119 S. Ct. at 2224–25. The Court indicated that trademark infringement might involve a property interest. *See id.* at 2224; *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 40 (4th ed. Supp. 1999) (noting that

These decisions have generally evoked reactions of alarm, although some have indicated that the decisions are no big deal.[7] I place myself squarely among the no-big-deal camp. The reason is partly that the tradition of individual rather than state liability, as it has evolved in the Court's decisions, has proved reasonably effective in accommodating the constitutional requirements of governmental accountability on the one hand and sovereign immunity on the other. To restate the obvious, many people view § 1983 actions against state officers as providing an adequate system of remedies, even though they do not entail state liability for damages.[8] Indeed, it would have comported with historical understandings had the Court not recognized congressional power to abrogate state damages immunity under Section 5 of the Fourteenth Amendment, as it did in *Fitzpatrick v. Bitzer*,[9] but rather required Congress to adhere to the individual liability model.[10] In any event, the Court has stuck close to an individual liability model even when it has permitted abrogation of state immunity. It has allowed Congress to substitute state liability for individual liability in cases where there would be a viable claim for individual liability under traditional common law principles, and where damages liability has a strong historical and normative claim to being constitutionally required.[11]

Parts I and II of this Article provide a historical defense of the Court's recent sovereign immunity decisions. They argue respectively that historically the Court did not treat sovereign immunity as a mere forum allocation device, and that the historical record provides strong support for constitutional compulsion of damages remedies for depri-

---

*College Savings Bank* may suggest limits to the extent to which the 14th Amendment protects statutorily-created entitlements as "new property").

7 *See, e.g.*, DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 155–56 (1999).

8 *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 53 (1998) (indicating belief that our constitutional tort regime based on fault reflects wise policy); Daniel J. Meltzer, *The Seminole Decision and Sovereign Immunity*, 1996 SUP. CT. REV. 1, 47 (noting there was something to the *Seminole Tribe* majority's observations that the nation had survived for nearly two centuries without the question of power to abrogate sovereign immunity being presented to the Court).

9 427 U.S. 445 (1976).

10 *See* Meltzer, *supra* note 8, at 21 (stating that the Reconstruction Amendments could not have had the purpose of overruling 11th Amendment sovereign immunity, because the recognition of that immunity was only given in subsequent decisions); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1749 (1997) (questioning the result in *Fitzpatrick*).

11 Congress, however, may also provide for individual liability in other cases where an appropriate claim for relief can be stated against the individual officer. *See* Alden v. Maine, 119 S. Ct. 2240 (1999) (stating that suits may be pursued against individual officers for "wrongful conduct fairly attributable to the officer himself").

vations of old but not new property. Part III then addresses possible objections to the historical arguments for the Court's distinguishing old and new property for entitlement to damages remedies.

## I. FORUM ALLOCATION AND SOVEREIGN IMMUNITY

In *Alden v. Maine*,[12] the Court repudiated the notion that sovereign immunity was a mere forum allocation device that allowed suits against the State under federal law in the State's own courts. The now-rejected forum allocation theory had some support in statements from the Justices and commentators, and in some direct review cases in which the Supreme Court seemed to require unwilling state courts to supply remedies against the state.[13]

But despite appearances to the contrary, precedent probably does not support treating sovereign immunity merely as a forum allocation device. Historically, the remedies that the Court forced states to provide in state courts were similar to those that the federal courts would provide and were subject to comparable sovereign immunity strictures. To the extent the Court appeared to make the states involuntarily liable, the power was a variation on making individual officers liable for traditional common law wrongs. I thus agree with Professor Carlos Vázquez that the Court's decisions requiring adequate remedies in state court are based on the Court's ability to insist on remedies against individual officers.[14] I would emphasize, however, that the ability to insist on such remedies was generally limited to trespass

12 119 S. Ct. 2240 (1999).

13 *See, e.g.*, Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 6–7 (1988) (concluding that the 11th Amendment in federal question cases is primarily a forum allocation device); Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 122 (1996) (stating that the 11th Amendment serves primarily as a forum allocation device); *see also* Vázquez, *supra* note 10, at 1689 (citing possible support for this proposition); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 153 & nn.393–94 (same).

14 *See* Vázquez, *supra* note 10, at 1724, 1771, 1778. Professor Vázquez would locate a constitutional requirement of individual damages liability in the Supremacy Clause, rather than in the Due Process Clause. *See id.* at 1782. His reason for preferring the Supremacy Clause is to avoid the possible problem that a right to damages under the Due Process Clause might lead to individual liability even under statutory schemes where Congress had not created damages liability. *See id.* The Court's recent sovereign immunity decisions, by limiting the "property" that Congress may protect under the Due Process Clause and the circumstances under which Congress may protect it under Section 5, may have obviated the problem of overly expansive damages remedies under the Due Process Clause.

and related cases.[15] First I shall review the remedies that *federal* courts provided to redress government illegality and then compare the remedies that the Supreme Court imposed on state courts in direct review cases.

### *A. Lower Federal Court Remedies Against Officers*

As David Engdahl[16] and David Currie[17] have described, the federal courts provided damages remedies by way of common law actions against individual officers.[18] Individual officers remained liable for their torts under general agency law, even if they were working for a disclosed principal—the state.[19] Negative injunctions were also available against individual officers to prevent imminent trespasses. By contrast, under general private law agency principles, an agent was not individually liable for damages when contracting for a disclosed principal. Thus state officers could not be held personally liable for state nonpayment of debts or be compelled specifically to perform state contracts.

It is helpful to add to the tort/contract distinction that assumpsit actions against individual tax collectors for payments made under protest were accommodated to the tort side of the line.[20] In effect, the assumpsit action was a civilized version of the tort action that could have resulted if the collector seized property to satisfy the allegedly illegal tax. The payment under protest and assumpsit action substituted for the forcible seizure and trespass action.[21]

---

15 That the Court supplied remedies in cases of trespass and not for disappointed expectations lends support to the Court's reliance on the Due Process Clause as a source of a right to an adequate system of remedies for old (but not new) property deprivations. *See infra* text accompanying notes 56–67.

16 *See* David E. Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1, 41–47 (1972).

17 *See, e.g.*, David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 153.

18 This is not to say that these actions were merely a reflection of the private law rather than a law of government remedies. *See* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2554 (1998) (noting that within the forms of action recognized by general law were distinctive proceedings directed against official actions so as to keep government within the bounds of law).

19 Statutory authority for their action would provide no defense to a tort claim if the statute was unconstitutional or if the officer acted beyond statutory authority. *See, e.g.*, Bates v. Clark, 95 U.S. 204, 209 (1877) (holding the captain liable for damages for a seizure taking place outside of statutory jurisdiction).

20 *See* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414 n.87 (1987).

21 *See* Woolhandler, *supra* note 13, at 136–37 (discussing assumpsit as a substitute for trespass action).

The individual liability scheme was consistent with a moderate notion of dual sovereignty: the federal government should direct its regulations directly to the people, not to the states.[22] Among the people whom it could regulate, however (particularly as to negative prohibitions),[23] were the people who were state officials.[24]

Although the tort and assumpsit actions that the federal courts entertained against state officers were often brought in diversity, the federal courts frequently ignored state law that might have impeded such suits.[25] For example, in *Deshler v. Dodge*,[26] the Court allowed a plaintiff to bring a replevin action challenging a state tax, despite the state law's disallowance of replevin actions in tax cases.[27] Rather, the federal courts followed a general common law of remedies against government officers.[28] These diversity damages actions were the predecessors of federal question constitutional tort actions.

---

22 *See, e.g.*, Alden v. Maine, 119 S. Ct. 2240, 2247 (1999); Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 88–89 (noting the fundamental principle that "the federal government is a sovereign coexisting in the same territory with the states," acting directly on citizens); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 437–38 (1995) (discussing desirability of state and federal governments using their own enforcement machinery so as to enhance vitality of states as self-sufficient institutions as well as accountability).

23 *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1860) ("[T]he Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."); *see also* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 46 (suggesting constitutionally-based limits on the federal government's ability to use state governmental decisionmaking structures). *But see* Puerto Rico v. Branstad, 483 U.S. 219 (1987) (overruling *Dennison's* holding that states could not be required to extradite criminals); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (claiming that the Framers thought Congress could use state instrumentalities to govern); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (same).

24 *See, e.g., Ex parte* Virginia, 100 U.S. 339 (1879) (allowing federal prosecution of state judge for racial exclusions from juries).

25 *See generally* Woolhandler, *supra* note 21, at 84–111 (discussing use of diversity to develop federal rights and remedies).

26 57 U.S. (16 How.) 622 (1853).

27 *See* Woolhandler, *supra* note 21, at 108 (discussing *Deshler*). A state statute required an affidavit that the property in question was the plaintiff's and had not been taken "for the payment of any tax . . . assessed against the plaintiff." *Deshler*, 57 U.S. (16 How.) at 633 (Catron, J., dissenting) (quoting the state statute). Although the plaintiff provided such an affidavit, it was only technically true, because the taxpayer-bank whose property had been seized for taxes had assigned the seized property to a diverse non-taxpayer. *See id.* at 623.

28 *See* Woolhandler, *supra* note 21, at 100–11; Michael G. Collins, *Before Lochner: Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. (forthcoming Mar. 2000).

### *B. Remedies Against States on Direct Review*

Turning now to direct review cases under section 25 of the 1789 Judiciary Act, did the Court force unwilling states to entertain actions against themselves or only against their officers as they did in federal courts? If the Supreme Court forced the state courts to entertain actions against the states themselves, that would show that the Eleventh Amendment was a forum allocation device.

In the direct review cases, it sometimes appears that the Supreme Court was forcing the states to entertain damages remedies against themselves. But on closer examination, many such cases are merely examples of the Supreme Court's taking the state courts as it found them—and it found them entertaining causes of action against the states. In these cases the state courts had recognized remedial rights against the state but had decided against state liability based on the merits of a federal issue and not based on a decision that no action would run against the state regardless of the merits.

For example, in *Curran v. Arkansas*,[29] the Supreme Court entertained a suit to require the State to restore the capital stock to a bank that the State by legislation had withdrawn. The Arkansas courts had treated the State as amenable to suit but had denied relief on the merits of the Contracts Clause claim.[30] True, the State was a defendant in a state court action involving essentially a monetary liability, and the Court reversed on the merits of a federal question that was decisive in making the State liable, but that did not mean that the Court was abrogating the State's immunity. Such cases can be justified on a notion of consent—although the State's consent to be sued in its own courts could not be so limited that the Supreme Court could not review federal questions arising within the context of those state court actions. Such review is necessary to allow states to structure their own judicial institutions, while allowing the Supreme Court the final word on issues of federal law.

In cases such as *Curran*, the state courts proceeded as if there were a remedial right against the state for the particular claim. Occasionally, however, the state court did not so much erroneously decide the merits of the underlying substantive federal question, but rather decided that there was no remedial right in its courts for the particular claim.[31] In such cases during the nineteenth and early twentieth centuries, the Court would not force causes of action against the state

29 56 U.S. (15 How.) 304, 309, 315 (1853).

30 *See id.* at 309, 315–16; *see also* Woolhandler, *supra* note 13, at 151 n.384.

31 *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1786 (1991).

itself that the state courts refused to recognize.[32] But it did force the state courts to recognize claims against individual officers. And it did so along the same lines as the common law actions that lower federal courts entertained against state and federal officers in diversity (and later federal question) actions.

For example, in *Poindexter v. Greenhow*,[33] the state legislature had abrogated trespass remedies against tax officers who seized property for payment of taxes when the taxpayer had offered coupons on state-issued bonds that the State had previously promised to accept for taxes.[34] The Court, however, required the State to continue to provide a remedy against the individual officer. This contrasted with the Court's allowing states to abrogate remedies against themselves, even where those remedies existed at the time the state contracted with bondholders.[35] In *Poindexter*, moreover, the Court seemed to indicate that the State might have to make general tort remedies available in the first place. As the Court put it, "No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law."[36] In other cases, the Supreme Court forced states to provide tax refunds from non-sovereign defendants[37]—which again paralleled the tort

32 *See, e.g.*, Railroad Co. v. Tennessee, 101 U.S. 337, 340 (1879) (holding that legislative repeal of a statute providing for a seemingly enforceable judgment against the State was not a Contracts Clause violation, even as to contracts entered while the statute was in force). *See generally* Woolhandler, *supra* note 21, at 117–18 & nn.205–12, 123 & nn.240–44 (discussing the Court's allowing states to repeal remedies against themselves, as well as positive-law based remedies against their officers).

33 114 U.S. 270 (1884). *See generally* Vázquez, *supra* note 10, at 1736 (discussing *Poindexter*, 114 U.S. at 270, as supporting an immunity-from-liability rather than a forum-allocation interpretation of the 11th Amendment).

34 The case could be viewed as merely restoring a state remedy that was effectively part of the State's contract at the time it was entered, and thus as preventing a Contracts Clause violation. *See Poindexter*, 114 U.S. at 303–04. The Court, however, had allowed the State more leeway to repeal remedies providing relief against itself or affirmative relief such as mandamus against its officers. *See* Woolhandler, *supra* note 21, at 117–19.

35 *See, e.g.*, Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857) (stating that the state grant of permission to be sued is voluntary and can be withdrawn); *see also supra* note 32.

36 *Poindexter*, 114 U.S. at 303.

37 *See* Ward v. Board of County Comm'rs, 253 U.S. 17 (1920) (requiring state court to entertain assumpsit action despite state court's holding that payments were voluntary and that there was no statutory action to recover the tax payments); *see also id.* at 24 (suggesting due process required the action for refund of an unlawful tax collected by coercive means); Carpenter v. Shaw, 280 U.S. 363, 369 (1930) (holding that denial by state court of the recovery of taxes exacted by compulsion and in viola-

and assumpsit actions available in federal courts when federal jurisdiction existed.[38]

One might here object that at least in modern tax refund cases, the Court has forced lawsuits against the states themselves in the teeth of state refusals to accord remedial rights against themselves.[39] In *Reich v. Collins*,[40] for example, the Court compelled a monetary remedy against the State in a tax refund case that the state court had declined to provide. The State had done so not because of a mistake as to substantive constitutional law but because of its decision that, as a matter of state law, refunds should not be available for taxes paid under statutes declared unconstitutional only subsequent to payment of the taxes.[41] The Supreme Court indicated that a refund remedy for an illegal tax was constitutionally required. But it does not necessarily follow that the remedy constitutionally required must be against the State itself. The Supreme Court has provided a not altogether satisfying dodge of this issue by explaining *Reich* as a case where the State promised a remedy and was thus bound to deliver.[42] But if no retrospective damages remedy were constitutionally required against the State itself, it may be questioned what difference the State's promise makes.

With a few added steps, however, the Court's requiring a remedy against the State in *Reich* makes sense and reinforces an individual liability model. The Court's ability to force a remedy against the state in cases such as *Reich* derives from the Court's ability to compel a remedy against individual officers, particularly suits against collectors for illegal payments made under protest. In other words, in response to

---

tion of federal Constitution or law contravenes the 14th Amendment); *cf.* Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931) (reversing a state court's denial of a refund remedy where a state official had exacted taxes in violation of state and federal law).

38 *See* Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U.S. 280, 286–87 (1912) (allowing federal court assumpsit action against a state collector).

39 *See, e.g.*, Fallon & Meltzer, *supra* note 31, at 1784 n.283 (indicating that states may not be constitutionally allowed to assert immunity in their own courts in tax refund and takings cases); Meltzer, *supra* note 8, at 57–58 (stating that tax cases provide the strongest support for congressional ability to abrogate sovereign immunity in state court, but that no decision had unambiguously held that states could not invoke sovereign immunity).

40 513 U.S. 106 (1994).

41 *See id.* at 109; *see also* Fallon & Meltzer, *supra* note 31, at 1824–29 (arguing that such concerns might suffice to deny a remedy).

42 *See* Alden v. Maine, 119 S. Ct. 2240, 2259 (1999) (stating that a state cannot withdraw an apparently clear and certain remedy after taxes have been paid in reliance on that remedy).

the State's refusal to provide an adequate remedy for illegal taxes paid under protest, the Court could provide for an action against the individual officer in federal or state court.

Of course, in *Reich*, the remedy the Court ordered ran against the State itself. But when the state, as in *Reich*, has made clear that it wants to be the defendant in such suits, it makes sense for the Court to assume that the state would prefer to make remedies available against itself rather than against the officer.[43] The Court's rationale that liability against the state is justified by its promise of a remedy makes some sense, in that the state, by making itself a defendant in the refund suits, has led the taxpayer not to seek remedies against individual officers.[44] Absent such a substitution by the state of itself as defendant, the taxpayer might have successfully brought an assumpsit action against the officer, or a trespass action if his property was seized.[45]

Similarly in the *Parratt*[46] line of cases, the Court indicated that the State as a matter of due process may be required to provide an adequate system of remedies for some intentional torts by state officers.[47] Again, the Court's implicit power to compel the state to provide remedies in such cases seems derivative of a theory of individual liability of officers. Similarly, the ability to force an action against the officer for deliberate trespassory harms[48] may be the basis for forcing states to provide adequate remedies for takings of property.[49] Tres-

43 *See* Vázquez, *supra* note 10, at 1771–73 (reading *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), as establishing a remedy against the individual officer, although the action can be against the state if the state designates itself as the party); Woolhandler, *supra* note 13, at 152–54 (offering a similar interpretation of the Court's direct review of tax refund cases).

44 If the state proceeded by an enforcement action, the taxpayer could have raised his constitutional claims defensively. The taxpayer, however, does not always have this option, because the state may seize property without his assent.

45 Because the remedy would be constitutionally compelled, the Court's current doctrine would allow Congress to provide a remedy against the state in appropriate circumstances. *See infra* text accompanying notes 70–73.

46 Parratt v. Taylor, 451 U.S. 527 (1981); *see also* Daniels v. Williams, 474 U.S. 327 (1986) (holding that the state did not violate due process in not providing remedy for merely negligent deprivation of property by state officer); Hudson v. Palmer, 468 U.S. 517 (1984) (holding that no § 1983 remedy was available for intentional destruction of inmate's property because state's post-deprivation procedure satisfied due process).

47 *See* Vázquez, *supra* note 10, at 1771 (noting that the *Parratt* line of cases requires post-deprivation remedies against officers).

48 *See, e.g.*, United States v. Lee, 106 U.S. 196 (1882).

49 *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 62–65 (1999) (stating that just compensation provisions limited the competency of the legislature to abolish

pass and ejectment[50] actions against individuals thus underly the Court's seeming requirement[51] that states supply damages remedies against themselves for takings.[52]

In summary, the Supreme Court's case law, driven by the need to accommodate sovereign immunity and government accountability, does not support a view that the Court itself has direct power to make the states liable in their own courts. The Court, however, has held the state liable in circumstances of deliberate invasions of property where a traditional trespass or assumpsit action might have been brought against an individual officer, but where the state had substituted reme-

---

pre-existing damages remedies without providing an adequate alternative, and discussing early common law trespass actions, as well as actions for ejectment and in equity).

50 *See* Woolhandler, *supra* note 20, at 415 n.88 (1987) (citing ejectment actions against individual officials).

51 *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 (1987) ("[I]n the event of a taking, the compensation remedy is required by the Constitution."). As Professor Tribe has pointed out, however, Supreme Court cases treating damages as a constitutionally required remedy for takings involve counties, or cases in which relief against the United States was statutorily authorized. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1738 n.18 (3d ed. 2000). Tribe also notes that the "Court has also ruled that Congress may bar monetary suits against the United States—even where it is alleged that a statute results in the taking of property without just compensation." *See id.* (citations omitted).

52 The federal court cases against federal officers from the 19th century involving real property seem to have primarily been ejectment actions, rather than damages actions. *See supra* note 50. In the context of immovable property, ejectment would generally supply effective relief. Comparable injunctive-type relief would be less effective for other types of deliberate trespass—e.g., illegal taxation, deliberate tort. The use and efficacy of ejectment leads me to some uncertainty about the extent to which a damages remedy was historically required for the loss of use of property prior to a successful ejectment action. Nevertheless, the availability of damages in modern cases for temporary physical occupations seems to fit well within a traditional tort model. *See First English*, 482 U.S. at 318 (citing cases where temporary use was compensated). I am more uncertain that damages should be required for regulatory takings, particularly temporary regulatory takings, as the Court required in *First English*. *See id.* at 317–18 (noting the issue had not been previously resolved). Certainly when the Due Process Clause began to address confiscatory rates by analogy to takings law, the principal relief was injunctive. *See, e.g.*, *Ex parte* Young, 209 U.S. 123 (1908). Regulatory takings, as opposed to physical takings of real property, moreover, may possibly be accommodated to deprivations of new rather than old property, which I argue below do not necessarily require damages remedies. Temporary regulatory takings have in common with many of the new property cases that the government may not have internalized a benefit commensurate with the plaintiff's claimed loss (unlike the temporary occupation of land cases). *See infra* text accompanying notes 115–29. Thus, I tend to think that injunctive remedies might be constitutionally sufficient in temporary regulatory takings cases.

dies against itself. If sovereign immunity is a constitutional constraint, and one limiting both federal judicial and congressional power,[53] then the limitations on the Court's powers to impose liability directly on the states imply similar limitations on Congress's power.[54] By extension, the case law does not support Congress's treating sovereign immunity as a mere forum allocation device.[55]

## II. THE NONEQUATION OF STATUTORY AND CONSTITUTIONAL VIOLATIONS

The Court in the *Florida Prepaid* cases partly blocked another avenue around *Seminole* by indicating that a state violation of a federal statute would not *pro tanto* violate the Fourteenth Amendment's Due Process Clause and become remediable by congressional abrogation of sovereign immunity under Section 5. In cases involving statutory violations rather than fundamental rights,[56] the Court indicated that a due process violation would only occur and Congress could only abrogate sovereign immunity in cases of a systemic state failure to provide remedies for deliberate deprivations of traditional property interests.

There are two prongs to the *Florida Prepaid* cases: first, identifying when due process is violated by failure to provide damages remedies

53 Arguments that we can rely on the political process to preserve federalism boundaries seem increasingly questionable. *See* Daniel J. Meltzer, *State Sovereign: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000) (expressing opinion that the recent sovereign immunity cases may reflect the Court's disappointment in congressional protection of federalism).

54 That the Court imposed only individual liability for constitutional violations suggests that the state should not be liable at the instance of Congress for mere statutory violations. To the extent the Court now allows congressional abrogation of immunity, it is to provide remedies for or prevent court-recognized constitutional (and not mere statutory) violations.

55 Assuming there is a limitation on both Congress's and the courts' making states directly liable, there is not a problem of state discrimination against federal claims under *Testa v. Katt*, 330 U.S. 386 (1947). A state court would not be discriminating against a federal claim, even if the state allows state-law-based suits against the state, because there is no valid federal claim directly against the state at the instance of individual plaintiffs.

56 The standards that the Court applied, however, came from a fundamental rights case. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that legislation under Section 5 may prohibit conduct not itself unconstitutional if the legislation is proportional and congruent to prevention or remediation of constitutional violations). *Boerne*, however, does not directly involve Congress's enhancing remedies for a court-recognized fundamental rights constitutional violation. What is more, the statute at issue in *Boerne*, in attempting to expand remedies for purported free exercise violations, ran up against the Establishment Clause. *See* Meltzer, *supra* note 18, at 2549 (suggesting the statute at issue in *Boerne* involved an establishment of religion).

for state violations of a federal statute; and second, the scope of congressional power once the Court has identified such a violation. I will primarily address the issue of defining a due process violation, where I think the Court seems to get it right.[57]

First, given the Court's decision in *Seminole Tribe* that Congress lacks power to abrogate state sovereign immunity under the Commerce Clause, it follows that the Court would draw a line between ordinary statutory violations and constitutional due process violations in order to make the limitation on congressional powers stick.[58] Similarly, to make a Supremacy Clause violation into a due process violation would provide an end-run around *Seminole Tribe* by allowing Congress to abrogate sovereign immunity by legislating under the Commerce Clause or any other power.[59]

Assuming it makes sense to draw a line between mere statutory violations and due process violations by state actors, the line that the Court drew is plausible. The Court's holding that there is a constitutional violation if there is a systemic failure to remedy deliberate state violations impacting on traditional property interests matches up with the areas where, at least from an historical perspective, there would be a strong claim to a constitutionally required damages remedy.

The history of remedies described in Part I above indicates that the federal courts provided remedies against officers[60] where there was a traditional intentional trespass but did not provide remedies of payment on contracts or, perhaps more generally, for disappointed

57 *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2206 (1999) (indicating that legislation abrogating sovereign immunity must respond to a widespread and persistent deprivation of constitutional rights); *id.* at 2207 (indicating that abrogation must be proportional to supposed remedial and preventive objectives).

58 *See* Vázquez, *supra* note 10, at 1745 (noting that *Seminole* implies that Congress may not merely create property rights by statute and then abrogate immunity under them).

59 *Cf.* Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989) (concluding that supremacy violations are actionable under § 1983 as statutory not constitutional violations); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 612–15 (1979) (concluding that allegations of incompatibility between federal and state statutes did not give rise to a claim of deprivation of a right "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3) (1994)).

60 Reconstruction era congressional statutes themselves were directed to individual officers. *Cf.* Monroe v. Pape, 365 U.S. 167 (1961) (discussing legislative history of what is now 42 U.S.C. § 1983 (1994)). Congress itself did not seem to think it had power to make states directly liable, well into the regulatory era. In *Parden v. Terminal Railway*, 377 U.S. 184 (1964), the Supreme Court held that a congressional statute created damages liability against a State, by reading the language "every common carrier" to include the State if it operated a railroad in interstate commerce.

expectations of profit.[61] Although the remedies that the federal courts traditionally provided against government officers provide some indication of what remedies were constitutionally required, it helps to consider the remedies that the Supreme Court forced on state courts as well. Remedies historically forced on state courts have more certainty of constitutional compulsion behind them because the Supreme Court did not exercise general common law powers that might go beyond constitutional necessity in direct review cases. In addition, it might be possible that the remedial deficiencies of federal courts, particularly in supplying remedies against the states themselves, might be made up for in state courts.[62] For example, the lack of damages actions for breach of state contracts in federal courts might (hypothetically) have been addressed by compelling state courts to entertain contract actions against themselves or their officers.

But, as noted above, the Supreme Court only forced the states to provide remedies in state courts that were similar to those available in federal courts. Actions for deliberate invasions of traditional property interests were available against individual state officers in both state and federal courts, while actions for nonpayment of state contracts and other disappointed expectations were not. It is in the cases of deliberate trespasses, then, that history most strongly supports a claim that due process requires a monetary remedy.

"Deliberate" does not, however, necessarily mean in all contexts a mens rea as to the illegality of government action, even though negligence as to illegality is the standard to overcome individual officers' qualified immunity from damages liability under § 1983. For example, unlawful taxation and eminent domain are among the deliberate acts of state officers for which remedies are probably required without

61 *Cf.* Woolhandler, *supra* note 13, at 123–25 (noting that the Supreme Court allowed states to abrogate positive law as opposed to common law trespass remedies that had been available at the time that the private party had contracted with the state).

62 On the other hand, not forcing remedies on the states might not indicate that such remedies were constitutionally unnecessary so long as the remedies remained available in federal court. *See* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952) (granting an injunction against a tax violating a promise in a corporate charter, after remedies in state court proved inadequate). The jurisdictional restrictions on federal courts apart from sovereign immunity mean that some constitutionally compelled remedies may end up having to be available in state courts. The issue here is what general categories of remedies against officials are constitutionally required.

regard to any official state of mind as to the law.[63] In such cases, unjust enrichment (admittedly of the state and not the officer) seems to supply a strong ground for a compulsory wealth transfer from the state or its officer without any additional state of mind requirements. Similarly, in the tort area covered by *Parratt*, requirements of nonnegligent deprivations may have more reference to common law standards than to federal individual officer immunity standards of unreasonable illegality, although unreasonable illegality may be present in many such deliberate torts.[64]

Even if the Court's definition of when a statutory violation amounts to a due process deprivation is justifiable, one might fairly object that the Court was unduly restrictive of Congress's powers under Section 5.[65] In the patent case, the Court might have reasoned that Congress could provide a remedy against the State if the State's hypothetical failure to provide a system of remedies would pose a due process problem. Instead, the Court required Congress to have evidence of some real and systemic failure. The reason to be so grudging is that the Court sees sovereign immunity as a constitutional value[66]—just as it may have seen Establishment Clause values weighing against free congressional remedial power to expand remedies for free exercise in *Boerne*.[67]

## III. CRITIQUES OF THE HISTORICAL DEFENSE

In the *Florida Prepaid* cases, the Court indicated that the State's persistent violation and failure to remedy patent infringements, because involving traditional "property" protected by the Due Process

63 *See* Woolhandler, *supra* note 13, at 150 (noting absence of good faith immunities in traditional common law actions against collectors as well as most actions for tangible trespass).

64 Given that deliberate torts may involve mala in se, the requirement of a state of mind toward the law may seem unnecessarily burdensome on the plaintiff. *Cf.* John C. Jeffries, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 97 (1984) (noting that constitutional standards themselves have various degrees of fault built in).

65 *See also* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2234 (1999) (Stevens, J., dissenting) (stating that doing business is a form of property and congressional ability to abrogate should depend on whether Congress has a reasonable basis for concluding that abrogation is necessary to prevent violations).

66 *See also* Alden v. Maine, 119 S. Ct. 2240, 2254–55 (1999). Damages liability may pose a threat to sovereignty. *See id.* at 2264; *see also infra* text accompanying notes 115–19.

67 *See* Meltzer, *supra* note 18, at 2549 (suggesting that the statute at issue in *Boerne* involved an establishment of religion).

Clause, would constitute a constitutional violation that Congress could address under Section 5.[68] By contrast the Court treated the statutory cause of action that Congress had created for false advertising as not involving a "property" interest protected by the Due Process Clause.[69] A state's defeating of these statutorily created expectations of compliance with federal law—what might be considered a form of new property—therefore did not constitute a constitutional violation that would allow Congress in an appropriate case to abrogate sovereign immunity from damages.

The positive side of the Court's recent sovereign immunity decisions is that, together with prior case law,[70] they may be read as holding that the Due Process Clause has a substantive requirement of an adequate system of damages remedies for deliberate[71] state deprivations of old property in violation of federal statutes.[72] The recent cases also hold, however, that there is no such requirement for deliberate deprivations of new property—either in state or federal courts.[73] The above discussion contains a historical defense of requiring the states to supply (through themselves or their officers) damages remedies in cases of traditional trespass but not in cases of defeated expectations, thus lending support to the Court's distinction between old and new property.

My reliance on history implies a belief that consistency in precedent over time embodies collective understandings that should inform current decisions on these same constitutional issues: the scope of sovereign immunity and its accommodation to the rule of law. The history also reflects long-term judgments that individual liability for trespass rather than government liability was not only doctrinally sup-

68 *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2206 (1999) (noting that patents had long been considered a species of property).

69 *See College Sav. Bank*, 119 S. Ct. at 2224–25 (indicating that a hallmark of protected property is the right to exclude others and that statutory interest in being free from false advertising was not an interest protected by the 14th Amendment).

70 *See, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311 (1993) (indicating that the *Parratt* line of cases may be read as requiring states to maintain adequate systems of remedies for violations of nonfundamental rights).

71 The Court includes a requirement of deliberateness in the definition of "deprive." *See Florida Prepaid*, 119 S. Ct. at 2209.

72 *See id.* at 2208; *see also* Michael G. Wells, *Suing States for Money: Constitutional Remedies After* Alden *and* Florida Prepaid, 31 RUTGERS L.J. (forthcoming 2000) (stating that *Alden* rests on the implicit premise that state courts must be open for certain constitutional claims as a matter of due process).

73 *See College Sav. Bank*, 119 S. Ct. at 2224.

ported but normatively acceptable[74]—that it worked reasonably well at controlling government and providing damages remedies where the need for them seemed most insistent,[75] without unduly undermining the financial integrity of the states.

Having given a history-of-doctrine defense, however, it is perhaps incumbent upon me to address the possibility that more recent developments—that is, modern history—undermine my position.[76] The new and old property distinction in the sovereign immunity cases might be criticized as inconsistent with a number of developments in due process law and constitutional remedies. First, the cases' narrow definition of "property" protected by the Due Process Clause may seem inconsistent with procedural due process cases that protect new as well as old property. Second, the cases may be inconsistent with modern developments in constitutional remedies in fundamental rights cases that allow compensation for a broader range of injuries than was protected at common law. And third, the cases may be inconsistent with modern expansions of standing to include a wide range of injuries in statutory cases against government, including in administrative law and § 1983 claims alleging violations of federal statutes (as distinguished from the Constitution).

I will address these possible inconsistencies below. On examination of these modern developments, some of the inconsistencies may reveal themselves as more apparent than real. And even where the inconsistencies are real, they may highlight the normative acceptability of requiring the State to provide a system of monetary remedies in cases of old but not new property deprivations. Providing damages for old but not new property deprivations tends to provide a remedy where the claims for corrective justice are stronger. In addition, allowing compensatory damages for new property deprivations may at

74 *See* Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1202 (1987) (stating that argument from precedent should be descriptively accurate and depict the data in a normatively attractive light); *id.* at 1260 (stating that concern for moral and policy values is built into argument from precedent).

75 *See generally* Fallon & Meltzer, *supra* note 31, at 1736 (stating that constitutional remedies must be adequate overall to keep government in check, and additionally, should provide individual remediation).

76 Herein, I address more recent doctrine that might undermine the old and new property distinction in the context of remedies against government. I will not address modern doctrine that might have supported a forum allocation reading of sovereign immunity because I believe that the cases suggesting that states are suable in state courts should properly be seen as deriving from the Court's ability to impose individual liability on officers as discussed above.

least in some cases produce undesirable consequences.[77] Treating old and new property as equivalent for damages remedies may dilute protections for old property. In addition, requiring compensation for new property deprivations may pose a greater threat to state fiscal integrity than compensation for old property deprivations.

### *A. Definitions of Property for Due Process*

#### 1. Due Process Requirements of Damages Remedies

In the *Florida Prepaid* cases, the Court indicated that patent rights were "property" protected by the Due Process Clause, while the cause of action that Congress had created for false advertising was not such "property" protected by the Due Process Clause.[78] The *Florida Prepaid* cases thus seem to define new property (in the form of a statutorily created cause of action or expectation of compliance with the law by the state) as outside of the definition of property for some due process purposes, while old property of course remains within the definition of due process property.[79] This exclusion of new property may seem inconsistent with procedural due process cases where the Court has extended due process protections to certain statutory entitlements. For example, the Court has characterized welfare benefits and government jobs as due process "property" so long as their receipt is hedged with sufficient restrictions on government discretion.[80] At a higher level of generality, the Court sometimes seems to protect as part of "property" a statutory beneficiary's expectations of governmen-

77 John Jeffries has recently reminded us that limitations on damages can have constitutional benefits (such as fostering constitutional development) as well as costs (such as nonremediation of individual harms and lessened deterrence). *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (stating that limiting money damages fosters constitutional development and directs limited societal resources toward future generations rather than past claimants).

78 *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2224–25 (1999) (indicating that a hallmark of protected property is the right to exclude others and that statutory interest in being free from false advertising was not an interest protected by the 14th Amendment).

79 *See id.*

80 *See, e.g.*, Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); *see also* FALLON ET AL., *supra* note 6, at 40. Entitlement theory displaced a grievous loss or importance theory of interests protected by procedural due process. *See* Goldberg v. Kelly, 397 U.S. 254 (1970). To qualify for protection under entitlement theory, objective criteria may have to be strongly connected to receipt of the benefit. This concept of property under entitlement theory could be generalized to include statutory beneficiaries' expectations that state governments will comply with federal statutes, such as the Lanham Act. The statutory standards enforced in ordinary litigation against private parties would provide the requisite limitations on official discretion.

tal compliance with statutory law.[81] The Court thus appears to allow nontraditional property to count as due process property in the procedural due process context. Yet in the *Florida Prepaid* cases, it excludes such property from "property" in the more substantive context of an entitlement to damages from the state for federal statutory violations.[82]

Entitlement theories that allow for procedural due process protection of new property have been subject to a number of criticisms, some of which are discussed below. But even accepting entitlement theories of property for procedural due process as a given, perhaps the real issue is not so much how to define property as to identify when the Due Process Clause requires a damages remedy for a deprivation of various kinds of property—old property, entitlements, and other statutory expectations of governmental compliance with law.[83] Many liberty and property interests that are protected by due process do not provide the basis for a damages remedy against the state.[84] At a semantic level, one might resolve the inconsistency of the different

81 *See, e.g.*, *Goldberg*, 397 U.S. at 254; Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 85 (suggesting due process primarily guarantees compliance with positive law); Cass R. Sunstein, *What's Standing after* Lujan*: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) (arguing that statutes could create property interests in citizens' interests in seeing government enforce the law); *cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (holding that state law that extinguished state employment discrimination claims when the agency failed to hold a factfinding conference within 120 days deprived the claimant of property protected by due process). In addition, we normally think of plaintiffs in lawsuits who are enforcing statutory expectations, and not merely defendants who may be subject to forced transfers of wealth, as having procedural due process protections. *See id.* at 429 (stating that Due Process Clause protects civil litigants, both plaintiffs and defendants). *But cf.* Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948) (Portal to Portal Case) (upholding congressional enactment that overturned Court interpretation of Fair Labor Standards Act providing overtime for certain transportation time).

82 *See* Fallon, *supra* note 70, at 342–43 (stating that *Parratt* involved substantive due process, although noting that claims of substantive arbitrariness can be transformed into complaints about procedure); *see also* Mark R. Brown, *De-Federalizing Common Law Torts: Empathy for* Parratt, Hudson *and* Daniels, 28 B.C. L. REV. 813, 856 (1987) (indicating that judicial requirement of a remedy may enlarge the property interest granted by the government).

83 *Cf.* Fallon, *supra* note 70, at 319–20 (stating that a set of categories based on fundamentality of interests could not capture what the Supreme Court does in substantive due process; rather, the results are based on precedent and moral intuitions the Court believes are widely shared); *id* at 357 (stating that in our constitutional tradition, remedies will vary with the right at issue and the context in which it is asserted).

84 *See generally id.* at 329 (discussing variations in remedies required for due process violations).

definitions of property by recognizing that entitlements and expectations created by statutes as well as traditional property may all be "property," but that due process is satisfied by a different system of remedies based on the different types of property at issue.[85]

As noted above, the issue is best characterized as one of substantive due process—when does due process require a damages remedy or at least an adequate system of damages remedies. It would not be odd if due process required retrospective damages remedies for a more limited type of property than the full range of property for which due process may require injunctive relief or a system of nonjudicial hearings.[86] A greater imperative for injunctions over damages informs our whole system of remedies against government.[87] In addition, supremacy concerns suggest that injunctive remedies must be available to ensure state compliance with valid federal statutory law, quite apart from whether due process of its own force requires such remedies.[88]

### 2. Justifications for Due Process's Differing Remedial Requirements for Old and New Property Deprivations

#### a. Corrective Justice and Old Property

Granting that due process does not require the same remedies for all types of property, the issue arises as to why old property should be more deserving of a damages remedy than new. The differential remedies may reflect stronger claims for corrective justice in cases of old than new property.[89] Corrective justice aims to take away the

85 *See supra* note 81.

86 *See* Fallon, *supra* note 70, at 348 (indicating that *Parratt v. Taylor*, 451 U.S. 527 (1981), as a form of abstention, does not apply to requests for prospective relief); *id* at 370 (stating that remedies directed to confining or stopping ongoing wrongdoing are the most basic constitutionally).

87 *See* Fallon & Meltzer, *supra* note 31, at 1789–90 (noting stronger claim to individual remediation in cases of continuing coercion as distinguished, for example, from governmental violations of the Contracts Clause). *But cf.* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that plaintiff could seek damages but lacked standing to seek injunction for police choke-hold practice).

88 *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269 (1997) (noting need to make sovereign immunity meaningful, while at the same time preventing violations of federal law). *See generally* Vázquez, *supra* note 10, at 1782 (emphasizing Supremacy Clause as source of remedial rights against state officers).

89 General theories of constitutional remedies have indicated that remedies must be adequate overall to keep government in check, and additionally, should provide individual remediation. *See* Fallon & Meltzer, *supra* note 31, at 1736. The requirement of individual remediation, however, is a more easily compromised principle

wrongful gain of the wrongdoer and restore it to the victim.[90] Both causation of injury to the plaintiff and wrongdoing on the part of the defendant are required to justify the wealth transfer.[91]

Professor Jeffries has argued that our system of remedies against government, consisting of sovereign immunity combined with individual officer liability qualified by good faith immunity, results in damages being awarded largely in conformity with a model of corrective justice.[92] Jeffries's focus has been on defendants' fault as a predicate for corrective justice.[93] For fundamental rights constitutional violations that do not involve wrongful motivation, the system of individual officer immunities supplies the element of fault by holding individual defendants liable only where they have acted unreasonably as to the legality of their conduct.[94]

In the context of mere property deprivations—that is, non-fundamental rights due process violations—the Court has indicated that it is only "deliberate" deprivations that will count as due process violations if the state does not provide adequate remedies. Thus the Court has required an element of defendant fault as an element of the constitu-

---

than the first. *See id.* The individual remediation principle seems to derive from an implicit theory of corrective justice.

90 *See generally* Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 189 (1981).

91 *See* Jeffries, *supra* note 64, at 94 (stating that under corrective justice theory, injury and wrongdoing are necessary for a duty to rectify); *see also* Posner, *supra* note 90, at 190 (same); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987) (same).

92 *See* Jeffries, *supra* note 64, at 100. Jeffries's claims that our liability system works reasonably well may not be a claim that the Constitution requires sovereign immunity. *See* Meltzer, *supra* note 53. Jeffries's defense of the results under current law, however, at a minimum indicates that he finds them compatible with the rule of law and remedial aspirations that inhere in the Constitution.

93 Corrective justice need not serve instrumental ends. *See* Jeffries, *supra* note 64, at 88. Instrumental theories, however, are not necessarily inconsistent with corrective justice. *See* Posner, *supra* note 90, at 198 (treating defendant's failure to take reasonable precautions as unjust gain); *cf.* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, (1936) (discussing various ways to define the defendant's benefit that will change the line between restitution and the more inclusive category of reliance). Jeffries addresses instrumental reasons that a fault-based government liability scheme makes sense. *See* Jeffries, *supra* note 8, at 72–74. He argues that strict governmental liability that requires government to internalize all accident costs may deter socially desirable conduct and may undesirably lower governmental activity levels. *See id.* at 74. More recently, Jeffries has argued that restricting damages liability may encourage constitutional development and direct resources toward future generations. *See* Jeffries, *supra* note 77, at 90.

94 *See* Jeffries, *supra* note 64, at 98.

tional violation.[95] A state deprivation of both old and new property might be equally "deliberate," however that is defined;[96] therefore, it may be difficult to distinguish many cases of old and new property based on the degree of defendant fault.[97]

The distinction between new and old property, however, is one addressed to the nature of the plaintiff's loss and not to the degree of the defendant's fault. Plaintiff loss, moreover, as well as defendant fault are elements of a claim to corrective justice. And it may be possible that the nature of the plaintiff's loss of traditional property calls out more for restoration than does a loss of new property.[98]

First, there is a longer tradition of protection of old property. The history of constitutional remedies discussed above suggests that greater claims to a remedy inhere in tortious deprivations of old property than in wrongful deprivations of new property. The historical willingness to impose individual liability on government officers for trespassory harms even in the absence of individual fault in cases of illegal taxation and other trespassory harms is some measure of the perceived strength of plaintiff's claim to individual compensation in cases of tortious deprivations of old property. This compares with the historical absence of compelled remedies for payment on contracts or other denials of statutorily-created expectations.[99]

To argue that history supports stronger claims to compensation for deprivations of old property than new perhaps just reiterates the historical arguments above, and may amount to no more than an argument that old property is older than new property. But the histori-

95 *See* Jeffries, *supra* note 8, at 55 (noting that the Court has required that deprivations of life, liberty, or property subject to due process must be deliberate).

96 *See* Jeffries, *supra* note 64, at 94. What is wrongful is not necessarily defined in Artistotle's corrective justice theory, other than to point to acts in some sense deliberate; *see also* Posner, *supra* note 90, at 190 (noting that Aristotle associated fault with deliberate, not merely voluntary, acts).

97 Perhaps one could argue that more "fault" is involved in depriving someone of old rather than new property—that is, in causing a loss that disturbs the status quo more. This seems, however, to duplicate the argument that the differing nature of plaintiff's loss justifies a distinction between old and new property.

98 *Cf.* Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451, 460 (1987) (arguing that whether the plaintiff has suffered a loss which ought to be rectified is analytically distinct from the question of whether the injurer has done something justifying his being held liable).

99 *See* Woolhandler, *supra* note 13, at 122–24 (discussing the Court's Contracts Clause jurisprudence, in which trespass actions against officials, as distinguished from positive law remedies against the state or its officials, were not subject to state legislative repeal or judicial abrogation).

cal traditions manifest a notion that the status quo[100] (again, as partly defined by historical traditions and law, as well as common sense and "shared moral intuitions"[101]) rather than expectations have been changed.[102] The fact that tort rather than contract is generally the focus of corrective-justice literature[103] may reflect the greater sense of a loss to the victim when traditional interests in property (and bodily integrity)[104] as opposed to contractual or other expectations have been trenched upon.

b. Old Property, New Property, and Private Power

Critiques of entitlement theory in the context of procedural due process offer additional insights into why it may be normatively attractive to give greater protections to old rather than new property. The argument is not merely one that old property is more worthy, but also that there may be dangers in equating old and new property. In addition to arguing that protection of statutory entitlements under procedural due process is insufficiently grounded in constitutional text and history,[105] Stephen Williams and others have argued that protection of new property has the potential to dilute protections for old prop-

100 *See* Fuller & Perdue, *supra* note 93, at 56 (noting weaker claims for judicial intervention to protect expectations as distinguished from restitution and reliance interests, in that the "law no longer seeks merely to heal a disturbed status quo").

101 *See* Fallon, *supra* note 70, at 319–20.

102 *See* Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 209 (1991) (noting that although law defines and protects even traditional property interests, we resist at some fundamental level the idea that law literally creates them); Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 10 (1983) (noting difference between state refereeing conditions under which individuals engaged in production and exchange create wealth that the state protects from the state, and having become the owner of wealth, transferring it to others pursuant to conditional grants).

103 *See* Louis Kaplow & Steven Shavell, Fairness Versus Welfare Economics in Normative Analysis of Law Enforcement 30 (Sept. 15, 1999) (unpublished manuscript, on file with author); Fuller & Perdue, *supra* note 93, at 56 (observing that in moving from remedies for restitution and reliance to loss of expectancy, "we pass, to use Aristotle's terms again, from the realm of corrective justice to that of distributive justice").

104 Corrective justice seeks simultaneously to take away defendant's wrongful gain and restore the victim's wrongful loss. *Cf.* Fuller & Perdue, *supra* note 93, at 56 (noting that restitution, involving unjust impoverishment and unjust gain, states a stronger case than does a loss of reliance interest without commensurate promissor gain, and that both restitution and reliance state stronger claims for judicial intervention than does a loss of expectancy interest). Traditional property cases may overall (although not uniformly) present more certain and symmetrical gains and losses than new property cases.

105 *See* Williams, *supra* note 102, at 20.

erty by throwing older property and newer entitlements in the same hopper.[106] Old property, moreover, is worth preserving as a category separate from new property and with undiluted protections, because of its greater potential to provide individuals a base for meaningful independence from government.[107]

Williams thus suggests that due process protection of old property serves as an important structural protection of freedom by enhancing private power, and that this protection might be diluted if more positive-law forms of property are treated as equivalent for due process purposes.[108] The *Florida Prepaid* cases, by requiring systems of damages remedies for old property, have the advantage of reinforcing a baseline of constitutional protection for traditional common law interests as against governmental encroachments.[109] And it may not be too bizarre to suggest that the Court is willing to recognize such a baseline for old property because the Court does not have to apply it to statutorily-created expectations.[110]

It might, however, be argued that Congress's creation of remedial rights against state governments, as in the *Florida Prepaid* cases, enhances private power as against state governments. Thus, one could argue that greater protection of old over new property in the recent sovereign immunity cases does not reinforce private power against government but undermines it. This statutory enhancement of private power, however, remains dependent on the will of Congress. What is more, Congress's enhancement of private power through new property entitlements is at the expense of state power, which itself is

106 *See* Farina, *supra* note 102, at 200; Williams, *supra* note 102, at 13. A concern is that government might by positive law allow for official discretion over even traditional property, in a way that undermines protection for such property. *See* Farina, *supra* note 102, at 200. Admittedly, this is not an obvious problem directly presented in the sovereign immunity cases, because in these cases Congress has attempted by positive law to protect both old and new property. Nevertheless, a regime that distinguishes old and new property may end up providing less malleable protections for old property. *See infra* text accompanying notes 108–14.

107 *See* Farina, *supra* note 102, at 209 (describing Williams's argument); Williams, *supra* note 102, at 13 (critiquing Charles Reich's new property theories on grounds that they must sacrifice the claims of traditional liberty and property that they should serve as counterweights to government).

108 *See* Farina, *supra* note 102, at 209–10; Williams, *supra* note 102, at 13.

109 *See* Farina, *supra* note 102, at 201 (noting the problem of finding intrinsic meaning to life, liberty, and property that is not dependent on positive law).

110 It may also not be too bizarre to suggest that congressional regulation of states under the Commerce Clause may be more acceptable to the Court if states are not liable for damages.

an important counterweight to federal power.[111] By contrast, protections for traditional property interests have more potential to provide private power as a counterweight to all government, in that they imply a judicially enforceable baseline of rights as against both the state and federal government, congressional desires to the contrary notwithstanding.[112]

One might here object that the argument that expanded rights may dilute older rights suggests that we should never expand rights for fear of diluting what we have. I am not, however, against the expansion of rights over time. Indeed, the historical analysis herein relies heavily on a common law method.[113] Nuanced treatment of property that is deserving of damages remedies, however, may actually be more helpful than not in encouraging the development and preservation of new rights over time.[114]

### c. Symmetry Between State Gain and Citizen Loss in Old Property Cases

Behind sovereign immunity is a concern that unlimited damages liability may undermine federalism by threatening the continued existence of the states as viable political entities. I do not undertake herein a full-blown defense of federalism[115] but rather assume federalism has advantages and that those advantages might be at risk if states were subjected to unlimited liability at Congress's instance. It is naïve to claim that damages liability is not a threat to the financial integrity of states,[116] given our judicial system's treatment of perceived deep-pocket defendants.[117] Broad damages liability may be a greater threat

111 *See* Woolhandler & Collins, *supra* note 22, at 436 n.194 (citing various authorities).

112 *Cf.* Vázquez, *supra* note 10, at 1783 (indicating that his Supremacy Clause based rights to damages would not be abrogable by Congress as to constitutional violations and noting the undesirability of making relief against the states depend on a congressional decision).

113 *Cf.* Fallon, *supra* note 74, at 1261 (stating that arguments from precedent allow underlying norms to undergo progressive reinterpretations).

114 *See generally* Jeffries, *supra* note 77; *see also infra* text accompanying notes 137–43.

115 *See* Meltzer, *supra* note 53 (adverting to various arguments for federalism); *see also* Woolhandler & Collins, *supra* note 22, at 437 n.194 (citing various authorities).

116 *See* Fallon & Meltzer, *supra* note 31, at 1795 (stating that it is not always easy for even a well-administered government to absorb the costs of officers' constitutional violations); *cf.* Jeffries, *supra* note 8, at 50 (noting that juries were less likely to play Robin Hood when an individual was a defendant).

117 The judicial system allows ruinous damages liability against corporations, reflecting a willingness to see them go out of existence if the damages they throw off as

to states than to private business,[118] moreover, because of the difficulty government may have in internalizing all the benefits of its activities.[119]

If the Court is going to provide for the possibility of damages liability against states, however, liability for old property claims poses less of a threat to states than liability for new property claims, because in old property cases the state will presumptively be able to absorb the loss. The corrective justice concerns discussed above suggest that in many old property cases, the state will have internalized a benefit commensurate with the loss it has caused the citizen. A typical case of a deliberate loss of old property may involve illegal taxation, involving symmetrical gains and losses. By contrast, in many new property cases[120]—such as liability for false advertising—damages may not as

---

determined by our judicial system are greater than benefits produced for their owners. The practice assumes that our liability system works reasonably well at determining costs and benefits—a proposition coming increasingly under question. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. (forthcoming Apr. 2000) (presenting empirical and anecdotal evidence that sound risk analyses that should show nonliability for negligence and eliminate the possibility of punitive damages instead lead jurors to impose greater sanctions). *See generally* Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998) (concluding that jurors' being asked to map their judgments on an unbounded dollar scale potentially produces arbitrary awards). The Constitution does not suggest similar indifference to the continued existence of the states. While governments that do not overall enhance utility should not continue to exist, trusting this issue to the vagaries of our jury system seems undesirable. Certainly the federal government has always kept a reasonably tight rein on its own exposure to jury-assessed liability.

118 *See* William F. Baxter, *Enterprise Liability, Public and Private*, 42 LAW & CONTEMP. PROBS. 45, 51 (1978) (noting that it was perhaps assumed with respect to government policy decisions that government actors can be relied on to take into account the interests of third parties); Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1186 (1981) (noting that there are some areas where both governmental and officer liability are undesirable, and that for some activities we trust officials to have relatively balanced incentives to act in a socially desirable fashion).

119 *See* PETER SHUCK, SUING GOVERNMENT 60–77 (1983) (discussing lesser ability of government officials than private employees to appropriate the benefits of good performance); Baxter, *supra* note 118, at 51 (discussing differences between government and private entity incentives); Larry Kramer & Alan O. Sykes, *Municipal Liability Under Section 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 278 (noting that with the possible exception of certain independent proprietary entities, municipal agencies are not usually motivated by the desire to maximize profits).

120 Loaning money to the state may present a special case of symmetrical gains and losses that nevertheless do not call for redress. Lenders, however, are aware that they must rely on the full faith and credit of the state, and interest rates reflect the risk.

predictably match gains that the state has been able to internalize.[121] The experience with awarding damages for lost statutory expectations under § 1983 discussed below tends to confirm that, in many instances, government has not internalized a gain commensurate with the damages the plaintiff seeks to recover.[122]

The other side of difficulty in internalizing benefits in cases of new property deprivations, moreover, is that the state and its officials may have fewer incentives to violate the law in the first place, thereby making damages remedies less necessary.[123] For example, a state government may have incentives more closely resembling profit motives (and those incentives may be translated to their officers in the absence of damages remedies) to collect an illegal tax than to withhold federally-mandated welfare benefits under restricted appropriations.[124] Thus concerns for deterring government illegality may be somewhat alleviated in new property cases;[125] individual liability[126] (where available[127]) and injunctive remedies may suffice to keep the

121 As noted above, regulatory takings claims may be in the new property category.

122 *See infra* text accompanying notes 149–56.

123 *See* Fallon & Meltzer, *supra* note 31, at 1736 (stating that our system of constitutional remedies calls for a structure of remedies adequate to keep government within bounds).

124 This would be truer when taxes are collected from out-of-staters than from in-staters. *See id.* at 1827 (noting the lack of political safeguards when taxation involves Commerce Clause violations). One could posit a situation in which government might gain the same amount of money in collecting taxes or withholding welfare. Nevertheless, government as an entity is engaged in trying to enrich itself with tax collection efforts, while in welfare cases the state generally is engaging in a program in which it has already engaged to divest itself of funds. New property cases that do not fall at the extreme of benefits disbursement may be somewhat harder to distinguish from old property cases in terms of government incentives—for example, federal regulations of the employment relationship and wage and hour laws.

125 *See* Kramer & Sykes, *supra* note 119, at 286 (noting that in the public sector it is unclear if greater cost internalization would improve or weaken resource allocation).

126 Incentives for compliance should remain fairly strong where individuals are liable for damages. *See id.* at 289 (noting that vicarious liability of a municipality, whether strict or based on negligence, may reduce employee incentives to avoid the occurrence of the wrong).

127 The fact that even a nonimmune official is in the picture does not mean that relief will be available. To comply with sovereign immunity doctrine, the litigant will need to state a good claim for relief against the individual. *See, e.g.*, Alden v. Maine, 119 S. Ct. 2240, 2267 (1999) (stating that suits may be pursued against individual officers for "wrongful conduct fairly attributable to the officer himself"). Thus in cases where a state officer is engaged in illegal commercial activities on behalf of a state entity, such as alleged false advertising, federal courts might look to whether a similarly situated individual employee of a private entity could plausibly be held liable. *See* Vázquez, *supra* note 10, at 1794 (suggesting broad ability of Congress to make

government reasonably in check without the additional requirement of damages. Even when the state has engaged in activities that enable it to internalize gains from illicit behavior,[128] however, liability for lost expectations enhances the threat of unpredictable (and even unreasonably imposed) ruinous liability.[129]

### *B. Recovery for Loss of Nontraditional Interests in Fundamental Rights Cases*

Looking outside of the procedural due process cases to modern developments in constitutional remedies, other potential grounds emerge for critique of the Court's decisions. It might be argued that defining the Due Process Clause as requiring, in non-fundamental rights cases, monetary remedies only for deprivations of traditional property interests runs counter to the loosening of the hold of the common law in the area of remedies for fundamental rights violations. Indeed, in fundamental rights constitutional litigation, emphasis has shifted from the nature of the plaintiff's injury to the nature of the defendant's wrong as the source of the cause of action. As part of this development, standing in constitutional cases has expanded beyond protection of a limited set of common law interests. Closer examination of these developments, however, may help to confirm a general sense that deprivations of traditional common law interests present stronger claims for compensatory remedies based on corrective justice concerns than deprivations of new property.

---

individual officers liable, but also suggesting liability at least as broad as that for similarly situated officers and directors of private entities). Many regulatory programs, such as wage and hour legislation, however, may involve activities for which it may be difficult to find an individual wrongdoer whom courts are likely to hold liable. *See* Jeffries, *supra* note 8, at 60–67 (discussing cases under § 1983 where the courts deemed an individual remedy unavailable, including cases involving benefits, Medicare and Medicaid reimbursement, and fines for pollution).

128 Areas where incentives approach those of private entities, however, may also involve more personal benefit to an official from violating federal statutory rights. This in turn suggests that individual liability may be available.

129 When engaged in some commercial behavior, the states may have similar incentives to violate the law as private parties, and concomitantly may have internalized a gain that would be available to pay damages judgments. This argument suggests the possible wisdom of the rejected waiver concept of *Parden v. Terminal Railway*, 377 U.S. 184 (1964). *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2234–35 (1999) (Breyer, J., dissenting).

As noted, the Court has largely foreclosed the waiver argument. *See id* at 2226–28. The waiver concept might have proved more attractive to the Court if the commerce power were not so broad. Nevertheless, a line might still be drawn for waiver by resurrecting a governmental/proprietary distinction. For discussion of potential avenues around *Seminole Tribe*, see generally Meltzer, *supra* note 8, at 49–61.

*Ex parte Young*[130] manifested an expansion of injunctive remedies beyond direct trespasses[131]—although notably in injunction cases. The plaintiff's common law injury became less emphasized as an element of the claim in favor of emphasis on the defendant's breach of duty—and a breach of duty that seemed to derive more from the Constitution than from the common law.[132] A plaintiff was still required to show an injury, but plaintiff's injury or standing for injunctive relief in constitutional cases could include economic expectations in another's compliance with the Constitution—often even without showing a common law trespassory harm.

The decreasing importance of stating a loss of a traditional common law interest spilled over to damages in *Monroe v. Pape*.[133] While *Monroe* involved a traditional trespass, like *Young* it emphasized as the source of the right to relief, the defendant's violation of the Constitution rather than the defendant's violation of a traditional common law duty impacting on the plaintiff's traditional common law rights.[134] As an outgrowth of the emphasis on the Constitution as the source of the right to relief, we now have § 1983 actions that, for example, provide damages for a discharge from otherwise at-will employment that violates the First Amendment.

Does the move off of traditional common law interests and the corresponding emphasis on defendant's constitutional violation in § 1983 cases addressing constitutional violations suggest that it is inappropriate to resort to traditional common law interests as a limitation on remedies required under the Due Process Clause for nonfundamental rights violations? Not necessarily. First, fundamental rights violations present a different problem from non-fundamental property deprivations.[135] Fundamentality is a label indicating that the right and duty at issue are important and call for extra judicial scrutiny;

130 209 U.S. 123 (1908).

131 *See, e.g.*, Meltzer, *supra* note 8, at 38 (stating that *Young* addressed conduct probably not tortious under traditional common law understandings); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 651 (1973) (discussing *Young* as a case in which the Court did not require the plaintiff to allege a concrete common law injury).

132 *See* Woolhandler & Collins, *supra* note 22, at 460–61.

133 365 U.S. 167 (1961).

134 *See also* Katz v. United States, 389 U.S. 347, 353 (1967) (holding that the Fourth Amendment protected constitutionally-derived interests in privacy that were not necessarily tied to common law property concepts); Warden v. Hayden, 387 U.S. 294, 303–04 (1967) (allowing seizure of mere evidence, in addition to contraband and instrumentalities of crime in which state had a superior property interest).

135 Use of § 1983 for statutory violations is addressed below. Procedural due process cases are addressed above.

retrospective damages liability supplies additional occasions for such scrutiny. Saying the duty is of special concern may indicate that the extra measure of deterrence provided by retrospective damages remedies is often warranted in such contexts—without regard to whether the plaintiff's loss involves old or new property.[136]

What is more, the expansion of standing beyond common law injuries in the fundamental rights constitutional cases has had more uniformly felicitous results in injunction cases than in damages cases.[137] Indeed, the case law sometimes presents examples of requests for damages that seem strikingly inappropriate from a corrective justice standpoint. For example, a policeman who foregoes *Miranda* warnings could arguably be subject to damages remedies[138] just as could a policeman who used excessive force in making an arrest—even though the latter case (most people would agree) states a stronger claim to a monetary remedy. In *Miranda* violation cases, the victim will generally have received some individual remedy by virtue of the excludability of the *Miranda*-violative statement from the case in chief.[139] Not surprisingly, some circuits have found no damages remedies for *Miranda* violations, manifesting a lack of consensus

136 *See* Jeffries, *supra* note 64, at 91 (questioning the persistent impression that unconstitutionality is a reliable proxy for severity of harm). Cases dealing with arguable constitutional violations that are not in the fundamental rights category encompass a broad potential range of official behavior—behavior that by definition has not been singled out for heightened constitutional scrutiny. To narrow this broad range, some delineation of the circumstances in which governmental wrongs (statutory or common law) cross over to actionable federal constitutional violations becomes necessary. Some of this sorting occurs by enhancing the defendant's wrong: for example, requirements of conscience-shocking behavior, deliberateness, or systemic harms. The nature of the plaintiff's loss supplies an additional sorting device, particularly appropriate for deciding when a failure to provide a system of damages remedies is a constitutional violation.

137 *See id.* at 100 (noting that as originally conceived, most constitutional rights were not standards of compensatory liability).

138 *See* California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999) (recognizing a claim for a *Miranda* violation even if the statements may not have caused the interogee harm at trial, although requiring some coercion in addition to *Miranda* violation); Cooper v. Dupnik, 963 F.2d 1220, 1251 (9th Cir. 1992) (en banc) (rejecting claim of qualified immunity as to *Miranda* claim even though the defendant was never tried, although requiring coercion in addition to bare *Miranda* violation). The victim will have to show emotional distress or some other compensable loss. *See infra* text accompanying notes 144–45.

139 *See Butts*, 195 F.3d at 1044. Admittedly, the State had incentives to violate rights and internalized a law-enforcement benefit of being able to use the *Miranda* violative statement for possible impeachment and other collateral uses. But the nature of the plaintiff's loss from the State's collateral use of truthful statements seems undeserving of damages remedies.

on the propriety of this remedy.[140] Providing the full complement of remedies not only may provide compensation in cases with weak corrective justice claims, but also may stifle constitutional development.[141] John Jeffries has pointed out the unlikelihood that the Court would have imposed *Miranda* requirements in the absence of the Court's then-available option of limiting the retroactive effects of its decision.[142] Add to this a requirement of retrospective damages remedies and the odds against judicial recognition of *Miranda* rights become overwhelming.[143] A widely available damages remedy could possibly negatively influence the continued recognition of *Miranda.*

The Court has mitigated the effects of widened standing by narrowing compensable injuries (that is, standing) in constitutional damages cases. In *Carey v. Piphus,*[144] in which the plaintiffs claimed damages due to a lack of a hearing for a high school suspension, the Court limited damages to proved injury to common law interests.[145] Thus, while standing for injunctive relief under § 1983 may require some particularization of injury, standing for damages requires even further particularization. True, emotional distress and any demonstrable economic harm (not merely a harm to traditional property interests) remain presumptively compensable under *Carey.* Thus, monetary remedies in fundamental rights constitutional cases are available for a larger category of plaintiff injuries than in cases of nonfundamental property violations. Nevertheless, the limitation of damages in § 1983 cases alleging fundamental rights violations may reflect the lessened sense of propriety of damages remedies for the wide range of injuries that may suffice for standing in § 1983 injunctive actions.

Another judicial response to the wide array of injuries that are potentially compensable under 1983 has been the development of individual officer immunities. For John Jeffries, immunities help to sup-

140 *See id.* (Schwarzer, J., dissenting) (citing cases where failure to give *Miranda* warnings did not give rise to a damages action). There are a number of stumbling blocks to a damages remedy. One is that a violation may not occur unless the statement is introduced at trial of the case in chief. Introducing the statement for impeachment will not violate *Miranda. See* Harris v. New York, 401 U.S. 222 (1971). In addition, there is an argument that *Miranda* violations are not true constitutional violations, but rather violations of a subconstitutional prophylactic rule. *See* Connecticut v. Barrett, 479 U.S. 523, 528 (1987).

141 *See generally* Jeffries, *supra* note 77.

142 *See id.* at 98.

143 Jeffries also discusses the arresting example of requiring damages in school desegregation cases. *See id.* at 99–100.

144 435 U.S. 247 (1978).

145 *See id.* at 264–65.

ply an element of defendant fault that is often missing in modern constitutional violations. The old regime of strict liability did not necessarily require fault in the sense of a state of mind about the law, but it did require trespassory invasions of traditional vested property interests. As noted above, this availability of remedies without defendant fault shows the historically-perceived strength of plaintiff's claim to an individual remedy when trespassory harms to traditional interests were at issue. Although modern qualified immunities address defendant fault rather than the nature of plaintiff's loss, it is possible that immunities respond in part not only to the absence of fault in many constitutional violations,[146] but also to the wider range of plaintiff losses that are currently compensable. The range of municipal liability—where immunities are not available—sometimes presents examples of damages being awarded in situations where one might think injunctions would sufficiently answer the need for control of defendants and plaintiff's entitlement to a remedy.[147]

### *C. Recovery for Loss of Expectations of Compliance with Law in Statutory Cases*

It is not merely in fundamental rights constitutional cases that the Court has expanded remedies against government or its officers beyond traditional property interests, but also in the area of statutory violations as well. Thus the Court's distinction between old and new property when federal statutes are violated may seem out of step with the expanded universe of plaintiff injuries that can suffice for standing in nonconstitutional administrative law cases and § 1983 cases involving statutory violations. Once again, however, the results in these cases may suggest that an old/new property distinction is appropriate for the availability of damages remedies. The cases involving statutory damages liability often present claims where corrective justice claims are weak, and where the state had not internalized a monetary gain comparable to plaintiff's claimed loss.

In the area of administrative law, those with standing came to include regulatory beneficiaries, whose injury could include lost expectations from the failure of government to subject a regulated party to additional regulation. Protected expectations could include lost profits (e.g., due to an agency's under-regulation of competitors[148]), and even aesthetic interests. Nevertheless, these expansions have primarily involved cases seeking injunctive relief, and thus provide little if

146 *See generally* Jeffries, *supra* note 8.

147 *See id.* at 58.

148 *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970).

any support for a notion that damages remedies must be available for lost statutory expectations.

Perhaps more relevant then are those cases in which the federal courts have recognized damages remedies against local governmental bodies for violations of federal statutes under § 1983.[149] As is true in § 1983 fundamental rights constitutional claims, hurt feelings and loss of economic expectations may be compensable in § 1983 statutory claims. While individual officer immunities mean that many such cases will not result in damages remedies against individuals, local governments remain vulnerable to such claims for their customs and policies on a strict liability basis.[150]

The Supreme Court has countenanced a number of cases where plaintiffs have sought damages under § 1983 for violations of federal statutes. In *Golden State Transit Corp. v. City of Los Angeles*,[151] for example, the Court held that the city was amenable to damages liability for regulating a labor dispute that was preempted by the NLRA. In *Livadas v. Bradshaw*,[152] the plaintiff sought as a possible remedy damages commensurate with a lost statutory penalty that the plaintiff would have recovered from her former employer had the official pursued an enforcement action that the official mistakenly believed preempted.[153] Another case involved underpayments of welfare,[154] while still another sought recovery for public housing tenants' payment of surcharges for excess utility use that did not comply with federal regulations.[155]

The potential damages liability in these cases does little to inspire a sense that expectations of government compliance with federal statutory law always state a strong claim for monetary relief. In the wel-

149 Because § 1983 kicks in as a possible remedy if a particular federal statute does not provide its own detailed scheme of remedies, it may tend to be used to enforce statutory norms that are directed more to government rather than to more general commercial activities.

150 *But cf.* Jeffries, *supra* note 8, at 58 (noting strategems Court uses to avoid strict liability for local governments); *id.* (noting that custom and policy requirement for municipal liability under § 1983 may approach a fault requirement).

151 493 U.S. 103 (1989).

152 512 U.S. 107 (1994).

153 *Id.* at 114 (noting that plaintiff was seeking damages from the commissioner if her claim against the employer were time-barred due to the commissioner's inaction on the claim due to mistaken view of preemptive effect of federal law on the state law claim for penalties).

154 *See* Maine v. Thiboutot, 448 U.S. 1, 3 (1980).

155 *See* Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 422 & n.4 (1987). The payment of a user fee that was in excess of regulations but not otherwise unfair would seem to resemble a contractual claim.

fare cases, the claims to corrective justice are weak, even if distributive justice may favor awards. And in the preemption cases, the government will not have internalized a gain commensurate with the damages it may be asked to absorb.[156] The cases thus suggest the wisdom of a distinction between old and new property for due process requirements of a damages remedy.

## IV. CONCLUSION

The historical record supports the Court's refusal to treat sovereign immunity as merely a forum allocation device. It also supports the Court's distinguishing old and new property for due process requirements of damages remedies. Requiring a system of damages remedies for deprivations of old but not new property not only provides monetary remedies in cases where corrective justice suggests they are more appropriate, but also may prevent dilution of remedies for old property rights and prevent unpredictable burdens on state treasuries. Experience with damages liability for nontraditional interests, particularly in cases under § 1983 for violation of federal statutes, suggests the wisdom of distinguishing among injuries deserving of damages remedies.

156 Other problems with such liability have been discussed by Professor Jeffries, such as a lack of defendant fault and undesirable effects on government activity levels. *See* Jeffries, *supra* note 8, at 74 (stating that liability may affect government activity levels in undesirable ways). In addition, federal preemption does not seem to suggest that there should be a buffer zone of nonimmunized uncertainty beyond the preempted area. *See* Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1548–49, 1559–62 (1989) (questioning the propriety of damages awards in preemption cases).