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Fee Shifting and Sovereign Immunity After *Seminole Tribe*

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**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Introduction</td>
<td>2</td>
</tr>
<tr>
<td>II.</td>
<td>(Very) Brief Histories</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>C. The States’ “Eleventh Amendment” Sovereign Immunity</td>
<td>11</td>
</tr>
<tr>
<td>III.</td>
<td>The Full Contours of the Problem</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>A. The Practical Context</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>B. The Doctrinal Background</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>C. The Near Misses in Precedent</td>
<td>23</td>
</tr>
<tr>
<td>IV.</td>
<td>Easy Answers Dismissed</td>
<td>26</td>
</tr>
<tr>
<td></td>
<td>A. Personal Capacity Suits</td>
<td>26</td>
</tr>
<tr>
<td></td>
<td>B. “Ancillary Awards”</td>
<td>27</td>
</tr>
<tr>
<td>V.</td>
<td>Some Effort at an Answer</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>A. Who Cares?</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>B. Reexamining “Ancillary Awards”</td>
<td>34</td>
</tr>
<tr>
<td></td>
<td>C. Is Edelman the Problem?</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>D. The Hood and Katz Methodological Twists</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td>E. Summary</td>
<td>45</td>
</tr>
<tr>
<td>VI.</td>
<td>Final Thoughts: Strategic, Practical, and Conceptual...</td>
<td>46</td>
</tr>
</tbody>
</table>

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1. For an article that might be fairly titled "Fee Shifting and Sovereign Immunity Before Seminole Tribe" and provides an excellent treatment of the topic, particularly the Edelman problem discussed below, see Ernest A. Nagata, *Federal Powers and the Eleventh Amendment: Attorneys’ Fees in Private Suits Against the State*, 63 Cal. L. Rev. 1167 (1975).
If private citizens are to be able to assert their civil rights [through acts such as § 1983], and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover [from the state treasury] what it costs them to vindicate these rights in court.2

[A] suit by private parties ... imposing] a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.3

I. INTRODUCTION

There is an obvious tension between the two quotes—one from Congress and one from the Court—that begin this Article on fee-shifting statutes. To start fleshing out a synthesis of that tension, I would like to situate the problem in a practical context. Take the law enacted by Oklahoma barring the recognition of out-of-state adoptions by same-sex couples.4 Several affected couples sued in federal court under 42 U.S.C. § 19835 to invalidate the law, claiming that it violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV.6 In Finstuen v. Crutcher, the district court enjoined enforcement of the law on all three theories.7 But, the Tenth Circuit affirmed on the full

The complaint requested attorney's fees under 42 U.S.C. § 1988, but neither court addressed an award. Complaint at 10, Finstuen, 497 F. Supp. 2d 1295 (No. CIV-04-1152-C). After prevailing in the district court, the plaintiffs did request costs ($270.00), Bill of Costs at 1, id., and the Commissioner of Health of Oklahoma, the nominal defendant in the case, did object, but not on grounds of sovereign immunity. Objections to Assessment of Costs at 1, id. Instead, he contended that because he might prevail on appeal, it was premature to tax him. The issue appears not to have been resolved on remand.

With costs, the amounts in controversy are so low and the custom of taxing them so old, see, e.g., Winchester v. Jackson, 7 U.S. (3 Cranch) 514 (1885) (“Costs will be allowed upon a dismissal of a writ of error . . . .”), that I have not focused on them in this Article. I see little reason, other than the patina of history (which is analyzed more in section V.D), why cost-shifting statutes and court rules cannot be substituted everywhere attorneys' fees are mentioned in this Article other than in section III.A. Costs are probably too minor to cause the types of practical problems identified in that section.
6. Finstuen, 496 F.3d at 1139.
7. Id. at 1186.
faith and credit argument only.\textsuperscript{8} Wondering how this illustrates the problem that I would like to introduce is forgivable.

The merits of \textit{Finstuen} are interesting, but this Article focuses on what, at first glance, seems like a tangential question: Could the \textit{Finstuen} plaintiffs have collected attorneys' fees\textsuperscript{9} from Oklahoma under 42 U.S.C. § 1988?\textsuperscript{10} The importance of that question is developed below. For the moment, take \textit{Finstuen} as but one practical example of a hidden problem in the Court's sovereign immunity jurisprudence.

After the \textit{Finstuen} couples prevailed in the district court on their Fourteenth Amendment claims, this Article assumes that an award of attorneys' fees would have been unproblematic—Congress has the power to abrogate a state's sovereign immunity from damages when it acts pursuant to a post-Eleventh Amendment grant of constitutional power, such as the Fourteenth Amendment. That is the upshot of \textit{Seminole Tribe v. Florida}.\textsuperscript{11} And, if the district court had the power to award damages as a constitutional matter,\textsuperscript{12} then there is little question that an award of attorneys' fees should be permissible as well.\textsuperscript{13} Attorneys' fees are in many ways simply costs incident to the prosecution of any suit, but an action for damages constitutes a specific form of suit in Anglo-American jurisprudence—one that the Constitution

\begin{thebibliography}{9}
\bibitem{8} Id. at 1145.
\bibitem{9} Throughout this Article, I use the term "attorneys' fees" to refer to fees attendant to a suit for injunctive relief brought in the first instance. The subsequent prosecution of a state or its officers for failure to comply with the provisions of an injunction is not considered. Attorneys' fees in such a case are pretty clearly part and parcel of an award of prospective relief. \textit{See} Class v. Norton, 505 F.2d 123, 126-31 (2d Cir. 1974). Also, the inherent power of the courts to award fees as a deterrent to bad faith conduct is almost indisputable and will not be addressed here. \textit{See generally} Joan Chisper, Note, \textit{Attorney's Fees and the Federal Bad Faith Exception}, 29 HASTINGS L.J. 319, 323-30 (1977) (grounding this power in the reception by U.S. courts of the equity powers of the English courts, which could order payment of fees for bad faith conduct even in the absence of statutory authority).
\bibitem{10} The \textit{Finstuen} plaintiffs pleaded a "substantial" Fourteenth Amendment question in addition to their full faith and credit arguments, so \textit{Maher v. Gagne}, 448 U.S. 122, 133 n.16 (1980), would probably control the availability of fees. \textit{See infra} notes 126-28 and accompanying text. \textit{Maher} solves some of the practical problems that I identify later, but offers little insight into the conceptual problem of a § 1983 action that asserts only pre-Eleventh Amendment claims. (As shorthand, I use "pre-Eleventh Amendment claims" to mean claims based on both pre-Eleventh Amendment constitutional provisions and the statutes enacted by Congress under those provisions.)
\bibitem{11} 517 U.S. 44, 48 (1996).
\bibitem{12} Note that damages would not have been available in fact, because § 1983 does not create a damages remedy against states. \textit{See} Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). My point is that Congress could have provided for damages as a constitutional matter and that it has so provided for attorneys' fees by enacting § 1988.
\bibitem{13} \textit{But see infra} note 120 and accompanying text.
\end{thebibliography}
NEBRASKA LAW REVIEW


15. This Article refers to the Fourteenth Amendment and post-Eleventh Amendment constitutional provisions interchangeably for reasons of textual economy. There are, of course, other post-Eleventh Amendment provisions that fall squarely within Seminole Tribe's "the latter controls the former" reasoning and that also include a textual basis for inferring the abrogation of states' immunity—for example, the Thirteenth, the Fifteenth, and the Nineteenth Amendments. All provide, as does the Fourteenth Amendment, that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XIII, XV, XIX. The Fourteenth Amendment, however, is the most frequently litigated basis of post-Eleventh Amendments rights; and, it is the amendment under which Congress most often acts (or attempts to act) to abrogate the states' sovereign immunity. Accordingly, I have limited my discussion to it.

It is interesting to note that those amendments that protect "discrete and insular minorities," United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), for whom access to the legal system is most difficult because of its high cost (among other barriers), see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 86–87 (1980), are the same amendments that do not present the problem identified in this Article. That thought is developed further in section V.A.


17. The Eleventh Amendment reads, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted..."
cases—it already determines whether damages are available. There would be two Constitutions, one that impecunious citizens are incentivized (or, again, depending on circumstances, able) to enforce and one that they are not. As developed in section III.A and Part V, such a line may make sense for damage awards, but *Seminole Tribe* and *Edelman* do not compel the creation of a new dividing line for attorneys' fees, and another judicially created partition of the Constitution may not be desirable.

This Article asks two questions: (1) Is the constitutional availability of attorneys' fees from states limited by the constitutional availability of damages, and (2) what would be the effect of saying “yes”? Those simple and straightforward questions defy an easy answer. In Parts IV–VI of this Article, I attempt to work through several ways of thinking about those problems to arrive at an account of what the Court might do, what I believe it should do, and why struggling with this problem is a valuable exercise.

The conceptual question—which is the central focus of this Article—is interesting in its own right, but it is dwarfed in importance by the practical consequences that will flow from the answer that the Court ultimately gives. If the Court's sovereign immunity jurisprudence before and after *Seminole Tribe* means that attorneys' fees are no longer available to successful § 1983 litigants for claims that do not arise under post-Eleventh Amendment causes of action,\(^\text{18}\) the impact will be breathtaking. Fee-shifting regimes that have played an important part in private parties' enforcement of the Constitution and federal law will be significantly undermined. Awards of attorneys' fees will be barred as a constitutional matter for actions that seek to enforce compliance with many federal laws,\(^\text{19}\) such as those that concern employment,\(^\text{20}\) the environment,\(^\text{21}\) and commerce\(^\text{22}\)—as well as for ac-

\begin{itemize}
  \item against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI.

  The Eleventh Amendment and sovereign immunity will be used interchangeably throughout to refer to state sovereign immunity even though to refer to an Eleventh Amendment immunity is a technical misnomer; the modern Court holds that the Constitution's structure provides the immunity, the Eleventh Amendment simply remedied the error in *Chisholm*. See e.g., Larry W. Yackle, Federal Courts 367 (2d ed. 2003) (quoting *Alden v. Maine*, 527 U.S. 709, 713 (1999)).


  19. The succeeding examples of federal law come from the “incomplete sample” of such laws that Justice Powell identified as newly actionable by the Court's reading of the “and laws” provision of § 1983 in *Maine v. Thiboutot*, 448 U.S. 1, 23, 34–37 (1980) (Powell, J., dissenting). Slightly more esoteric statutes implicated include the Federal Noxious Weed Act and the Wild Free-Roaming Horses and Burros Act. *Id.* at 34–35.

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tions raising supremacy, suspension, full faith and credit, and dormant commerce claims. In fact, the reach of the problem identified in this Article extends into some of the most important areas of federal regulation, because Congress has frequently adopted fee-shifting regimes when it saw fit to construct an extensive regulatory apparatus.

Part II begins with a treatment of both the practical concerns and conceptual context of the problem of fee awards against states by providing brief, and no doubt familiar, histories of the statutes and principles at issue.

II. (VERY) BRIEF HISTORIES

A. 42 U.S.C. § 1983

Congress enacted 42 U.S.C. § 1983 in the Civil Rights Act of 1871, also called the Ku Klux Klan Act of 1871, as part of its “Radical Reconstruction” of the southern states that seceded during the Civil War. Section 1983 was designed to provide a federal remedy to citizens of southern states, particularly newly emancipated African Americans and their white supporters, who were frequent targets of organized intimidation by white supremacist groups such as the Ku Klux Klan. Federal protection was necessary because white supremacist groups were often in cahoots with the executive, legislative, and judicial branches.

23. U.S. Const. art. VI, cl. 2.
26. For a thoughtful treatment of § 1983’s use as a vehicle for Dormant Commerce Clause claims, see generally Stephen K. Schutte, Doctrinal Foundations of Section 1983 and the Resurgent Dormant Commerce Clause, 77 Iowa L. Rev. 1249 (1992). For purposes of this Article, Professor Schutte’s recognition that the seminal case in this area, Dennis v. Higgins, 498 U.S. 439 (1991), allowed for attorneys’ fees is important. Id. at 1252. He used the availability of fee awards as one factor in his prediction that there would be an explosion of Dormant Commerce Clause cases after Dennis. See id.
27. Other litigated grounds for relief arising out of pre-Eleventh Amendment constitutional provisions include the Ex Post Facto and the Privileges and Immunities Clauses. See U.S. Const. art. I, § 9; id. art. IV, § 2.
28. See infra section II.B.
The purpose of the Act, in the Supreme Court's now classic formulation "was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" In many respects, this turned the traditional concern of federalism—that the federal government might become too strong—on its head by recognizing that the federal government had become too weak to protect the guarantees of the Fourteenth Amendment without providing access to impartial courts. The Court has recognized that § 1983 disturbs the ordinary balance of state and federal power by holding, for example, that § 1983 is sufficiently explicit to overcome the presumption, codified in the Anti-Injunction Act, that the federal courts should not act to restrain state judicial proceedings.

It seems clear from above that the original understanding of § 1983 intended for it to help protect civil rights and to enforce the Fourteenth Amendment. Yet, the Act languished until the Bill of Rights was incorporated against the states and the Court concluded that "under color of state law" reaches actions by state officers acting contrary to state law. The rehabilitation of § 1983 was in large measure an accident; the most significant development that enhanced its usefulness was a slight change introduced several years later. During the codification by Congress in 1874, the wording of the statute was changed to read, "Any person who... shall subject... any person... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall... be liable to the party injured." In Maine v. Thiboutot, the Court—over a vigorous dissent written by Justice Powell and joined by Chief Justice Burger and then Justice Rehnquist—read the addition of "and laws" literally: the majority extended to plaintiffs a § 1983 cause of action for the violation of any

31. See Mitchum, 407 U.S. at 240.
32. Id. at 242 (quoting Ex Parte Virginia, 100 U.S. 339, 346 (1880)).
33. See, e.g., Ex Parte Virginia, 100 U.S. at 345 ("[T]hese amendments... were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.... It is these [Reconstruction-era amendments] which Congress is empowered to enforce.... Such enforcement is no invasion of State sovereignty. No law [enacted under them] can be [either]."); cf. Lansford, supra note 29, at 23-42 (describing the changes after enactment of § 1983).
35. See Mitchum, 407 U.S. at 242-43. But cf. Younger v. Harris, 401 U.S. 37, 53-54 (1971) (cobbled together a judicially created abstention doctrine that serves as an exception to the § 1983 exception to the Anti-Injunction Act for certain parallel claims that touch on sensitive areas of state control, such as the enforcement of criminal laws).
federal statute, in addition to the well-established cause of action for violations of the Constitution.\textsuperscript{38}

Many of the § 1983 actions that present the problem identified in this Article arise out of that reading of “and laws” in *Thiboutot*. The “and laws” actions that arise from the violation of a statute enacted pursuant to Congress’ Article I powers, e.g., through the Commerce Clause, present pre-Eleventh Amendment claims for which injunctive relief is available against a state official under *Ex Parte Young*, but for which monetary relief is unavailable as a constitutional matter. Statutes passed pursuant to the Spending Clause,\textsuperscript{39} such as the Religious Land Use and Institutionalized Persons Act,\textsuperscript{40} are also implicated to a lesser extent.\textsuperscript{41} It is worth noting that Congress’s use of the Spending Clause is neither infrequent nor insignificant in scope and subject matter: If Congress were to reenact pursuant to its Spending Clause

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  \item[38.] See *Thiboutot*, 448 U.S. 1, 10–11 (1980) (finding that the inclusion broadened the scope of § 1983, rather than reading the new language in *pari materia* with the codification procedures and the unchanged language in § 1983’s jurisdictional provision); see also Clive B. Jacques & Jack M. Beermann, *Section 1983’s ‘And Laws’ Clause Run Amok: Civil Rights Attorney’s Fees in Cellular Facilities Sitting Disputes*, 81 B.U. L. Rev. 735, 744 (2001) (discussing the “and laws” provision). But see Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n, 453 U.S. 1, 20–21 (1981) (excluding federal statutory schemes that are “sufficiently comprehensive . . . that they] demonstrate congressional intent to preclude the remedy of suits under § 1983” and requiring an “inquiry” into whether a federal statute was the kind that created enforceable ‘rights’ under § 1983 (citing Pennhurst v. Halderman, 465 U.S. 89 (1984))). Important to this analysis, however, is that § 1983 claims, despite contrary language in its corresponding jurisdictional statute, 28 U.S.C. § 1343(3), which was particularly useful before the abolition of the amount in controversy requirement for 28 U.S.C. § 1331 jurisdiction, may be maintained for many constitutional violations, not just those that deprive a citizen of equal protection or that are predicated on the Bill of Rights. See Dennis v. Higgins, 498 U.S. 439, 448–50 (1991) (permitting a Dormant Commerce Clause claim). But see Carter v. Greenhow, 114 U.S. 317, 322 (1885) (declining to permit a Contracts Clause claim through the § 1983 vehicle).


  \item[41.] Spending Clause provisions are affected to a lesser extent because sovereign immunity is considered *waived by the state* rather than *abrogated by Congress* when a state accepts federal money with strings attached. A heightened sensitivity to state sovereignty, however, is present even when a state ostensibly waives its immunity. This alters the default rules of statutory interpretation for any law that could infringe a state’s sovereignty. See *Madison v. Virginia*, 474 F.3d 118, 127–28 (4th Cir. 2006). Accordingly, the statutory clarity required of Congress to provide for fee shifting will be heightened if fee awards impact a state’s sovereign immunity.
\end{itemize}
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power those portions of the Americans with Disabilities Act42 ("ADA") or the Age Discrimination in Employment Act43 ("ADEA") that apply to the states (as a response to Kimel v. Florida44 and Alabama v. Garrett45), ADA and ADEA plaintiffs would also face some of the problem this Article identifies. Section 1983 actions that raise constitutional claims are not immune either. Rights such as those contained in the Dormant Commerce Clause—the violation of which is actionable through § 198346—are pre-Eleventh Amendment claims for which an injunction does not run afoul of a state's sovereign immunity, but for which damages are barred by Seminole Tribe.


After Alyekska Pipeline Service Co. v. Wilderness Society,47 in which the Supreme Court held that it is for Congress to abrogate the default American rule that each party bears its own litigation costs, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976, now codified at 42 U.S.C. § 1988.48 The Senate report accompanying the Act states: "The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in [Alyekska] ... [by] allow[ing] courts to provide the familiar remedy of reasonable counsel's fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866."49 It went on to add:

All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.50

The Court found these expressions of a congressional intent to provide attorneys' fees sufficiently clear to abrogate state sovereign immunity in the pre-Seminole Tribe era.51 That holding is not terribly surprising; the sentiments of Congress were expressed by the Court.

44. 528 U.S. 62, 73-76 (2000).
46. See supra notes 26 and 38 and accompanying text.
50. Id.
51. See infra note 109 and accompanying text.
itself, and the statute seemed to comply with the requirement that Congress act to resolve what had been a narrow question of separation of powers and judicial restraint in *Alyeksa*.52

However, what does qualify as a surprise is that the Court has credited a fairly conclusory assertion by a House Report about the effect of the Eleventh Amendment. The House wrote: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments."53 But, the precise holding of the case in which the Court credited the House's bald assertion was limited to awards of attorneys' fees for Fourteenth Amendment claims, which avoids any inconsistency with *Seminole Tribe*.54 Yet the Court did recognize, that it was Congress's express intent that fees be awarded from the state treasury, teeing up the *Edelman* problem.55

These tantalizing tidbits of legislative history and Supreme Court dicta are the first acknowledgments that I can find of the problem for § 1983 identified in this Article.56 Unfortunately, they are apparently the most elaborate treatment of it as well. Commentators after the enactment of § 1988 have simply stated: "An award of fees payable out of the state treasury is not barred by the Eleventh Amendment."57

In the interest of comprehensiveness, note that fee-shifting statutes exist in other areas of the law, for example, under the Clean Air Act,58 the Ocean Dumping Act,59 and the Endangered Species Act.60

55. *Hutto*, 437 U.S. at 694–95; S. REP. No. 94-1011, at 5–6, reprinted in 1976 U.S.C.C.A.N 5908, 5913 ("In such cases it is intended that the attorney's fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." (citations omitted)).
56. These are the first post-§ 1988 acknowledgements that I can find. Nagata's article, supra note 1, and the circuits after *Edelman* but before *Hutto*, dealt with this problem when there was no congressional effort to abrogate the states' immunity, which § 1988 purport to do.
57. MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 204 (2d ed., 2008); see E. RICHARD LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 25 (1981) ("As established in [§ 1988's] legislative history, as held by the Supreme Court in *Hutto v. Finney*, and as followed by a unanimity of courts of appeals' decisions, fees may be awarded against defendant states, and against their officers in their official capacities ... without any bar being interposed by the Eleventh Amendment." (citation omitted)).
Fee-shifting regimes crop up most often when Congress employs the "private attorneys general" model of regulation.61 These other statutes are of little conceptual moment because the arguments about the effect of Seminole Tribe on fee-shifting in 42 U.S.C. § 1988 apply, as a conceptual matter, with equal or greater force to them as well. I highlight these statutes here only as evidence of the extent of the practical problem—fee-shifting pervades most areas of serious federal regulation.62

C. The States' "Eleventh Amendment" Sovereign Immunity64

The truest, and least useful, observation about state sovereign immunity is that it seems the Framers originally intended for the Constitution to displace no more of the states' sovereignty than was required for the operation of the federal system.63 Accepting the hist-

62. I say with greater force because, as discussed in section V.B, there is at least an argument that because § 1983 was enacted pursuant to Congress's Fourteenth Amendment, Section 5 power, causes of action brought through it acquire a whiff of the Fourteenth Amendment's abrogation power. I ultimately dismiss that transmutation argument as unpersuasive for § 1983 causes of action, so it cannot be made, or at least not plausibly so, with respect to acts that deal with the environment and the like. But cf. Mariana T. Acevedo, The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights, 8 N.Y.U. ENVT'L L.J. 437, 438-39 (2000) (seeing an equivalency between the right to live in a healthy environment and civil, political, and human rights in the European Union); Julie H. Hurwitz & E. Quita Sullivan, Using Civil Rights Laws To Challenge Environmental Racism, 2 J. L. Soc'y 5, 5-8 (2001) (tying environmental rights to civil rights).
64. The issue of a state's sovereign immunity from suit in its own courts, which flows from the state's constitution, is irrelevant to this Article. Alden v. Maine, 527 U.S. 709, 713 (1999), ensures that the same Eleventh Amendment concerns apply in state court mutatis mutandis so long as the plaintiff brings a federal cause of action.
65. Compare THE FEDERALIST No. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent . . . [although there are] circumstances which are necessary to produce an alienation of state sovereignty . . . ."), with Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 479 (1793) (permitting an action in assumpsit to lie against Georgia), over-
torical gloss on the Eleventh Amendment—that as a default rule it bars all actions against a state *qua* state—when are such actions permissible? The most important, and the most durable, exception to the Eleventh Amendment is undoubtedly *Ex Parte Young*. There, the Court permitted suits for injunctive relief to proceed against state officers, without running a foul of the states' immunity from suit, by premising that relief on a fiction of personal liability for ultra vires acts. Such suits are now usually brought through § 1983.

The far less durable—and arguably less important—exception that has developed involves suits for damages. For some period of the
Court's history, the power of the federal government to abrogate a state's immunity from damages awards was seen as a function of the clarity with which Congress spoke in its attempt to regulate the states as states.\textsuperscript{72}

The modern Court has retrenched by tilting towards the default rule, and the potentially broad implications of these two exceptions have not been realized. Injunctive relief is impermissible if alleged on the basis of state law or a state constitution.\textsuperscript{73} Sovereign immunity of the federal kind is now available as a defense against suits brought in state court, but based on federal law, even though the Eleventh Amendment only refers to "[t]he Judicial power of the United


\textsuperscript{73} See Pennhurst v. Halderman, 465 U.S. 89, 105–06 (1984). In some sense, this decision may have had the effect of constricting a state's immunity. It was in Pennhurst that the Court first made the fiction of Young explicit by saying that however fictional the theory might be, it is necessary to ensure the supremacy of federal law. That principle is present in the majority, but is best expressed in Justice Steven's dissent where he writes, "[H]ow else can the principles of individual liberty and right [qualified by the majority to be federal liberty and rights] be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of the wrong, whenever they interpose the shield of the State?" Id. at 164 n.48 (Stevens, J., dissenting) (quoting Poindexter v. Greenhow, 114 U.S. 270, 291 (1884)).
States."\(^74\) As a default rule, any award, or at least any award of damages, that must be paid from the state treasury ("retroactive relief") is prohibited under *Edelman v. Jordan.*\(^75\) Today, *Dellmuth v. Muth*\(^76\) and *Seminole Tribe v. Florida,*\(^77\) when read together, seem to foreclose any effort by Congress to abrogate a state's sovereign immunity, except through the use of (1) extraordinarily clear language that evinces a congressional intent to permit retroactive relief from an officer of the state (2) in a statute that was enacted pursuant to the Section 5 power of the Fourteenth Amendment.

The classic example of the type of case left standing after *Seminole Tribe* is *Fitzpatrick v. Bitzer.*\(^78\) There, the Court upheld the provisions of Title VII of the Civil Rights Act of 1964 that provided for damages to persons discriminated against by a state on the basis of race, color,

75. 415 U.S. 651, 663 (1974). The Court felt that this proscription of retroactive relief was required by the effect of damages awards on a state's treasury, and the interference that such awards would work on the ability of the state to budget for its affairs. *See id.; see also* Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 464 (1945) (prohibiting damage awards against states).
77. 517 U.S. 44, 48 (1996). The post-Eleventh Amendment constitutional provisions, such as the Reconstruction-era amendments, came later, so the Court has been more willing to entertain suits for damages against states under these provisions because they can be understood to abrogate the sovereign immunity that the Eleventh Amendment implicitly reaffirmed as inhering in the Constitution. *See Seminole Tribe v. Florida,* 517 U.S. 44, 48 (1996); Jennifer Cotner, *How the Spending Clause Can Solve the Dilemma of State Sovereign Immunity from Intellectual Property Suits,* 51 DUKE L.J. 713, 716 n.16 (2001).
78. 427 U.S. 445 (1976). Other cases make this point clear. *See Tennessee v. Lane,* 541 U.S. 509, 530–33 (2004) (permitting awards for certain violations of the Americans with Disabilities Act that were enacted under the Section 5 power of the Fourteenth Amendment); Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726–28 (2003) (permitting awards under the Family and Medical Leave Act that are congruent and proportional to redressing sex discrimination). It seems likely that the § 1988 decisions which permitted fees in suits asserting violations of civil rights remain good law. *See Missouri v. Jenkins,* 491 U.S. 274, 278 (1989) (desegregation); *Maher v. Gagne,* 448 U.S. 122, 130–31 (1980) (AFDC with an equal protection claim); *Hutto v. Finney,* 437 U.S. 678, 689 (1978) (Eighth Amendment). But another celebrated case in this area might not survive. In *Quern v. Jordan,* 440 U.S. 332 (1979), the district court granted relief only on the claim that the state violated federal laws through its administration of the Aid to the Aged, Blind, and Disabled program. *See Edelman v. Jordan,* 415 U.S. 651, 653 (1974) (explaining the claims upon which the class, later before the Court in *Quern,* had been granted relief). The Court has, however, now held that Congress lacks the power under the Fourteenth Amendment to redress discrimination against the disabled and the aged through the Americans with Disabilities Act, *see Alabama v. Garrett,* 531 U.S. 356, 370–74 (2001), and the Age Discrimination in Employment Act, *see Kimel v. Florida,* 528 U.S. 62, 72–74 (2000). Unless the Court is unusually solicitous of the blind, it seems that *Quern* presents a case in which attorneys' fees were awarded for a violation of a statute enacted under a pre-Eleventh Amendment congressional power.
religion, sex, or national origin. The classic example of the type of case felled by *Seminole Tribe* is *Pennsylvania v. Union Gas*. There, the Court upheld an award against the state under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which provided for monetary damages against an "owner and operator" of a site which later requires cleanup. The Court explicitly overruled *Union Gas* in *Seminole Tribe* as an unconstitutional attempt to abrogate state sovereign immunity through the use of a pre-Eleventh Amendment congressional power, i.e., the Commerce Clause. The topic of this Article is whether a similar seismic shift is waiting in the wings for fee-shifting statutes.

A quick look upwards at the Tenth Amendment in this short history of sovereign immunity is also in order. It should be noted that the members of the Court who have sought to effectively bar damage awards against states are the same as, or aligned with, those who lost the battle against congressional power to regulate the states qua states under the Tenth Amendment. It could be that awarding states sovereign immunity from suit is a back-door effort to undermine congressional authority to regulate states (other than through the Fourteenth Amendment), because a law that is unenforceable through damages is a much less effective law. The peculiar irony of such a strategy is that regulation of states in their traditional governmental capacities, indeed in their most traditional capacities, such as

85. *See ROBERT N. CLINTON ET AL., FEDERAL COURTS: THEORY AND PRACTICE 1109* (1996) (noting the similarities between these two cases); *George D. Brown, State Sovereign Immunity Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 Geo L.J. 363 (1985). Of course, states can still be compelled to conform to federal law through an injunction, but stripping damages from the arsenal of the federal courts ensures that states enjoy one free bite at the apple of non-compliance.
an employer of fire, police, sanitation, public health, and parks and recreation personnel, is permissible under such an approach—at least insofar as the regulation is congruent and proportional to a violation of the Fourteenth Amendment. Then again, on the traditional reading of § 1983’s purpose—the interposition of the federal government between the states and the people when states violate the Fourteenth Amendment—that answer may get the sovereign immunity balance exactly right. Some rights, such as those contained in the Fourteenth Amendment, are perhaps more fundamental than the concept of state sovereign immunity.86

III. THE FULL CONTOURS OF THE PROBLEM

A. The Practical Context

The “American Rule” for attorneys’ fees—that each party bears its own costs—was first announced in Arcambel v. Wiseman,87 and then expressly applied by Alyeksa Pipeline Service Co. v. Wilderness Society88 to even those actions in which “Congress has opted to rely heavily on private enforcement to implement public policy.”89 The rule works well for many litigation configurations. In fact, this Article will assume that it generally strikes a good balance as a gatekeeper to the courts.90 The rule manages not to incentivize attorneys or plaintiffs to vexatiously multiply suits, because the costs of prosecution will be born by each party. A rational plaintiff, even with the means to pay, will not spend money to prosecute a meritless suit, and a rational attorney will not agree to a contingency fee, which protects the plaintiff from out-of-pocket expenditures, if a suit is meritless.91 Further, the American Rule “avoid[s] stifling legitimate litigation by the threat of the specter of burdensome expenses being imposed on an unsuccessful party,”92 a disincentive that exists under the English Rule of “loser

86. But see infra section V.A (finding this conclusion somewhat problematic).
87. 3 U.S. (3 Dall.) 306, 306 (1796).
89. Id.
91. See Winand Emons, Playing It Safe with Low Conditional Fees Versus Being Insured by High Contingent Fees, 8 AM. L. & ECON. REV. 20, 22–23 (2006). There are, of course, exceptions. When there is an asymmetry in financial resources, a meritless suit can be brought (although it should not be brought under accepted professional standards) to harass a defendant without deep pockets.
92. 20 AM. JUR. 2D Costs § 55 (2008).
This incentive-disincentive balance usually works well, particularly when combined with the contingency-fee device.\textsuperscript{94} The American Rule does not work well for cases in which there is no possibility for damages or any potential recovery is tiny or speculative even if the claim succeeds.\textsuperscript{95} Congress therefore responded to \textit{Alyeska} by enacting a fee-shifting regime for § 1983 and other litigation arising from the "civil rights acts which Congress has passed since 1866"\textsuperscript{96} in recognition of the unique nature of the violations for which relief is most frequently sought through § 1983. Successful § 1983 suits often produce little or no pot from which attorneys' fees can be drawn, either because the suit was for declaratory or injunctive relief, as it must be when brought against the state or its officials in their official capacity, or because it is difficult to value violations of federal law and the Constitution that are not classically tortious.\textsuperscript{97} Unspoken, but certainly true, is the fact that impecunious litigants,\textsuperscript{98} who are the most burdened by the American Rule, are also the § 1983...
litigants who most often find themselves acting as “private attorneys general.” It is the rare state that attempts to systematically deprive its middle and upper classes of civil rights on a routine basis. And groups targeted for discrimination rarely find themselves underrepresented amongst the poor.

Commentators are also in agreement that the American Rule does not work well for § 1983 suits. That literature adds one important consideration to the general theory of market incentives. Congress and the Court have primarily focused on the role that fee-shifting plays in the initiation of suit. Thomas Rowe and others have highlighted the role that fee-shifting plays in the maintenance of an action as well. The clever state, staring down a potentially adverse judgment in the form of an injunction that could force it to change a broadly applicable policy at great expense, would offer the particular plaintiff an easy out by agreeing to cease the alleged violation of federal law, possibly only in the plaintiff's case. The state makes a housing voucher available to this plaintiff, or rehires that blind employee. A plaintiff, and a plaintiff's attorney who thinks that she has no reasonable possibility to recover much in the way of fees, would likely settle such a claim out of understandable self-interest. But other similarly situated individuals exposed to the same unlawful state action would not, of necessity, benefit from such a settlement. The injunction that the plaintiff originally sought would have benefited others similarly situated, and the possibility of obtaining fees incentivizes the plaintiff's attorney to keep the case going—a settlement not only turns the billing clock off, but the Supreme Court has held arrangements are unavailable as a practical matter, because, for example, it is difficult to split one-third of an injunction.

99. See Brand, supra note 95, at 297–300; see also Attorney's Fees, supra note 30 at 1875 (collecting cases in which § 1983 actions were brought by persons dependent on the state for support, such as welfare recipients, prisoners, and applicants for state employment). But see Jacques & Beermann, supra note 38, at 735 (noting that not just the impecunious benefit from such an arrangement, and describing the consequences of market incentives to litigate).

As I discuss in more detail in Part V, there are other rationales for fee awards. Professor Rowe has identified at least six: (1) fairness (“[I]t is only just for the loser to have to pay, . . . ”), (2) “making a litigant financially whole,” (3) deterrence and punishment, (4) the “private attorneys general” model of regulatory enforcement, (5) accounting for the relative advantage that each party holds, and (6) provision of a market incentive for all suits. See Rowe, supra note 90, at 653. Of course, these all overlap to some extent.

100. For example, one oft-consulted treatise says that “[s]election 1988 fees are an integral part of § 1983 remedies.” Schwartz & Urbonya, supra note 57, at 196.

101. See Rowe, supra note 90, at 665.

102. The class-action device and the reality that in many cases it is not possible to favorably resolve one plaintiff's claim without making a change to the general policy, act as natural limits on this type of behavior. There are, however, no doubt plenty of cases in which this concern obtains.
that settlement offers in civil rights cases that require a plaintiff to forego fees are not necessarily unethical, despite the impossible position in which they put the plaintiff’s attorney.103

As a practical matter, the American Rule for § 1983 actions asserting pre-Eleventh Amendment claims has the potential to seriously disrupt a substantial portion of the modern litigation and regulatory landscape—both by reducing the market incentive to bring suit and by reducing plaintiffs’ incentive to act as “private attorneys general” in the conduct and maintenance of the suit.

B. The Doctrinal Background

As discussed above, the Eleventh Amendment has long been understood to bar suits by private actors against states for damages, regardless of the citizenship of the plaintiff.104 When a plaintiff can avoid a state’s Eleventh Amendment immunity, for example, through the Ex Parte Young fiction, it is currently believed that attorneys’ fees are available under the § 1988 fee-shifting regime if the plaintiff “prevails.”105 The statutory scheme envisions that the fee award will be paid from the deep pockets of the state treasury.106 For the § 1988 scheme to survive recent changes in sovereign immunity jurisprudence, however, an award of fees must be both constitutionally and statutorily proper. The Court has structured this inquiry as a two-step test.107 First, the language of the statute must be sufficiently clear to provide for damages.” Second, such an award must be proper under cases like Edelman and Seminole Tribe.

Section 1988 seems to easily meet the first requirement. The Court has said, “When it passed . . . [§ 1988], Congress undoubtedly intended . . . to authorize fee awards.”109 Further, the Court appears

103. See Evans v. Jeff D., 475 U.S. 717, 732 (1986) (“In fact, we believe that a general proscription against a negotiated waiver of attorney’s fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement.”).
104. See supra section II.C.
106. See, e.g., Missouri v. Jenkins, 491 U.S. 274, 279 (1989) (permitting recovery of enhanced attorneys’ fees); Hutto v. Finney, 437 U.S. 678, 695 (1978) (permitting recovery of attorneys’ fees under § 1988); see also Schwartz & Urban, supra note 57, at 204 (“When prospective relief is awarded against state officials under the doctrine of Ex Parte Young, an award of fees [is] payable out of the state treasury . . . .”).
107. See Derfner & Wolf, supra note 61, ¶ 7.04[2].
109. Hutto, 437 U.S. at 694; see Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 74 (1927) (holding that a state’s sovereign immunity does not bar the assessments of costs); Missouri v. Iowa, 48 U.S. (7 How.) 660, (1849) ( awarding costs in a suit between states). An interesting question is whether or not such an inquiry,
not to require that § 1988 explicitly authorize such an award against states, a requirement periodically found for the award of retrospective relief. For purposes of this Article, I assume that § 1988 speaks with sufficient clarity to permit awards of attorneys' fees against the state as a statutory matter.

It is the second prong of the analysis that presents more difficulty. The Court has been quite clear that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment," at least when the claim does not arise under a post-Eleventh Amendment right. Are attorneys' fees, when paid from the state treasury, this type of prohibited liability?

To answer that question, it is helpful to understand where the question fits within the framework of § 1983 jurisprudence. Suit could be brought against an officer of a state or an inferior governmental unit, in her official or personal capacity, for damages or injunctive relief.

which turns on the intent of Congress, has survived. Dellmuth v. Muth, 491 U.S. 223 (1989); see Wolpoff v. Cuomo, 792 F. Supp. 964, 966-67 (S.D.N.Y. 1992) (suggesting that Dellmuth overruled Hutto sub silentio). In Dellmuth, the Court explained that "evidence of congressional intent must be both unequivocal and textual . . . [and] legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment." Dellmuth, 491 U.S. at 230. It could be argued that on an in pari materia reading, the application of § 1988 to § 1983 and other civil rights actions that are designed, at least in theory, to be brought against states, gives sufficient textual clarity to save § 1988. But such an argument runs squarely into the Court's decision that the language of § 1983 itself is insufficiently clear to bring it into operation against a state qua state. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989); Quern v. Jordan, 440 U.S. 332, 338 (1979). Whatever the outcome the Court might reach on the statutory interpretation question, this Article is concerned at bottom with whether Congress, as a constitutional matter, could fix any problems with the statute, should they exist.

10. See Hutto, 437 U.S. at 694–95.


12. The consequences of official capacity suits, as opposed to personal capacity actions, developed over time. The Court has given a clear answer to the question of a judgment's effect: a judgment against an officer in an official capacity suit "imposes liability on the entity he represents" so long as the entity received notice and the opportunity to respond. Brandon v. Holt, 469 U.S. 464, 471–72 (1985). That is, "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). This is probably loose language (even if of no moment) however, because an action actually pleaded against the state itself would likely be barred by the Eleventh Amendment. See Ex Parte Young, 209 U.S. 123, 150 (1908). In a personal capacity suit, recovery is limited to the assets of the officer. See Kentucky v. Graham, 473 U.S. 159, 166 (1985). While this distinction is usually considered in the context of the immunities available to an
To winnow those permutations down, note that personal capacity suits for damages, regardless of any indemnity agreement that may ultimately affect a state's treasury, are irrelevant to this discussion. Although an officer may enjoy some form of immunity by virtue of her office, this type of case differs little from the traditional tort case, because personal capacity suits are not effective against the state, so the Eleventh Amendment does not apply. The case of a personal capacity suit for injunctive relief is a little more difficult. There, the classic tort configuration strains to encompass not just a wrong done by a state actor against an individual, but the special powers that the actor possesses only by virtue of her office. Where there is a connection between the obvious fiction of individual capacity suits for injunctive relief and sovereign immunity, such cases might be problematic. That is, an action would be permissible under Ex Parte Young, but fees might not be permissible under the twin inquiries of Edelman and Seminole Tribe. However, this problem disappears because the Court has held that attorneys' fees are unavailable against the state in any action against the person of the official because of the causation problems that give rise to different standards of immunity for governmental entities and individual officers. Suits against inferior governmental units and their employees, whether individual or official capacity claims are brought, do not implicate the Eleventh Amendment, so the Edelman/Seminole Tribe problem is again moot.

113. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (providing for qualified immunity to state officials when their conduct is objectively reasonable).


115. See, e.g., Hafer v. Melo, 502 U.S. 21, 25 (1991) (upholding an award of damages in a personal capacity suit against a state official for acts taken in an official capacity); Scheuer v. Rhodes, 416 U.S. 232 (1974), abrogated on other grounds by Harlow, 457 U.S. at 800. In fact, in Graham, 473 U.S. at 165–67, the Court made clear that for an award of attorneys' fees to be appropriate against the state, the suit must have been against an officer in her official capacity. That is, while it is provided for if theoretically possible to sue an official in her personal capacity for injunctive relief, which indeed the strictest reading of Ex Parte Young suggests, a prevailing plaintiff could then collect attorneys' fees from the individual officer only.

116. See Ex Parte Young, 209 U.S. at 174 (Harlan, J., dissenting).


118. Retrospective damages are available in such cases because the Eleventh Amendment protects neither individuals nor inferior governmental units. See Monell, 436 U.S. at 690.
The cases in which damages have been properly awarded under § 1983 against the state (or, more properly, a state official) are also unproblematic because, a fortiori, an award of attorneys' fees under § 1983 is proper when the plaintiff could not have prevailed unless the action was of such a type that it was constitutional to permit recovery of damages. A constitutional and statutory basis\textsuperscript{119} for an award of damages—plus the requisite clarity in the language of the attorneys' fees statute needed to abrogate state sovereign immunity—means that such an award is permissible.\textsuperscript{120}

The issue is properly framed in official capacity suits for injunctive relief—like Finstuen. Such suits also happen to be the most common § 1983 configuration. In an official capacity suit seeking an injunction, the relief, under the \textit{Ex Parte Young} fiction, does not run against the state for purposes of sovereign immunity.\textsuperscript{121} Yet, an award of at-

\textsuperscript{119} This is, however, almost entirely a hypothetical case because the Court has held that the most likely vehicle (with a companion fee-shifting statute) through which such an award of damages would take place, § 1983, lacks sufficient textual clarity to abrogate state sovereign immunity. See Quern v. Jordan, 440 U.S. 332, 338 (1979); Alabama v. Pugh, 438 U.S. 781, 781–82 (1978). This is true whether the action is brought in state or in federal court. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that states are not "persons" for the purposes of § 1983, eliminating any claim that § 1983 is sufficiently clear to abrogate sovereign immunity in state, rather than federal court).

\textsuperscript{120} As mentioned in Part I, this Article assumes this position by hypothesis. It need not be true, however. \textit{Cf.} \textit{DERFNER \& WOLF, supra} note 61, ¶ 7.04[2] (stating the inverse that "if the state cannot be held liable on the merits, it also cannot be held liable for attorney fees"). If the rationale for awarding attorneys' fees is punitive, one of the reasons identified by Professor Rowe for fee-shifting, it is possible to conceive of a fee award as more injurious to a state's sovereignty than damages. See Rowe, \textit{supra} note 90, at 653, 660–61 ("Punishment for unjustified or undesirable behavior—sometimes in the transaction giving rise to litigation and sometimes in connection with the bringing or conduct of the litigation itself—finds considerable acceptance as a reason to shift fees in certain situations."). The Court decided in \textit{Ex Parte Young} and \textit{Edelman} that as between damages and injunctive relief, injunctive relief encroaches on a state's sovereignty less. Although I have found no case on point, it is intuitively obvious that if nominal and compensatory damages injure a state's sovereignty, punitive damages do so all the more. \textit{Cf.} Molzof v. United States, 502 U.S. 301, 305–06 (1992) (recognizing that Congress has not waived the United States' sovereign immunity from common-law punitive damages). Note, however, that I am not speaking of fees awarded for bad faith litigation conduct, which are adjutants to a court's power to control litigant behavior, but of fee awards motivated by general punitive goals.

Even if attorneys' fees are not imposed for punitive reasons, the American Rule makes them, as a default matter, an unexpected cost of defending a suit. See \textit{supra} notes 87–99 and accompanying text. But, even though attorneys' fees may not be contained within the \textit{general} concept of damages, the Eleventh Amendment's preeminent concern after \textit{Edelman}—the effect of any part of a remedial measure on the state treasury—applies to fees and damages in like measure. Accordingly, I have treated fees as at least contained within the \textit{Eleventh Amendment}'s conception of damages.

\textsuperscript{121} 209 U.S. 123 (1908).
Attorneys' fees must come from the state because official capacity suits are but another means of styling a suit against the state or its arms.\textsuperscript{122} If \textit{Edelman}\textsuperscript{123} and \textit{Seminole Tribe}\textsuperscript{124} are held to control fee awards as well as damages, fee-shifting regimes would be permissible, as a constitutional matter, only when based on post-Eleventh Amendment constitutional provisions and the federal laws enacted under those provisions.

\section*{C. The Near Misses in Precedent}

No court seems to have decided the problem presented in this Article. In \textit{Maher v. Gagne}, the Supreme Court rejected an argument that would have made the issue moot.\textsuperscript{125} The \textit{Maher} plaintiff sued Connecticut under §1983, asserting claims based on the Social Security Act and various constitutional provisions. After the entry of a consent decree, the plaintiff sought fees under § 1988. Connecticut argued that the plaintiff's § 1983 action was in fact just a simple "and laws" action based on the Social Security Act and that "Congress did not intend to authorize the award of attorney's fees in every type of § 1983 action."\textsuperscript{126} The Court's response was clear: "[N]either the language of § 1988 nor its legislative history provides any basis for importing . . . distinctions . . . among § 1983 actions . . . into the award of attorney's fees by a court . . . ."\textsuperscript{127} As a matter of statutory interpretation, it is clear that plaintiffs who assert pre-Eleventh Amendment causes of action are eligible for attorneys' fees under § 1988.

Connecticut made a second, and for purposes of this Article more relevant, argument as well. Granting the question of § 1988's statutory reach, it urged the Eleventh Amendment as a bar to attorneys' fees in purely statutory, non-civil-rights cases.\textsuperscript{128} The Court refused to reach the issue, saying: "In this case, there is no need to reach the question . . . . [f]or, contrary to petitioner's characterization, respondent did allege violations of her Fourteenth Amendment due process

\textsuperscript{122} See supra note 112 and accompanying text.
\textsuperscript{123} 415 U.S. 651, 674–76 (1974).
\textsuperscript{124} 517 U.S. 44, 60 (1996).
\textsuperscript{126} \textit{Maher}, 448 U.S. at 128.
\textsuperscript{127} \textit{Id.} at 129.
\textsuperscript{128} \textit{Id.} at 130.
and equal protection rights . . . [that were] sufficiently substantial to support federal jurisdiction."\(^{129}\) Instead, the Court held that so long as a "substantial" constitutional claim is pleaded as part of the § 1983 action, the ultimate claim on which the plaintiff prevails, even if it is a non-civil-rights and non-constitutional claim, is irrelevant for Eleventh Amendment purposes.\(^{130}\) The Court reached this conclusion using an argument that I consider in section V.B, reasoning that even though a non-civil-rights claim itself cannot lay claim to the Fourteenth Amendment's power to abrogate a state's immunity, incentives to bring suits that include both a "substantial" constitutional claim and non-constitutional/non-civil-rights claims are a congruent and proportional exercise of Congress's Section 5 power to incentivize the constitutional claim.\(^{131}\)

No case resolves the present issue because the cases to date involve—subject to dicta in *Maher* discussed in section V.B—how to handle claims that arise under the Fourteenth Amendment in one fashion or another (e.g., under a statute like Title VII that is congruent and proportional to a Fourteenth Amendment harm) or under a right enforceable against the states only by incorporation through the Due Process Clause. The Court did, however, come close to addressing the present issue in *Fairmont Creamery Co. v. Minnesota*.\(^{132}\) There, it held that the "United States never pay costs," but that when a state becomes a party to litigation in the Supreme Court, it loses some character of its sovereignty.\(^{133}\) *Fairmont* held that the taxing of costs against a state by the Court did not run afoul of any immunity because the state would not "be regarded as the sovereign here."\(^{134}\) The Court made no mention of attorneys' fees, and, other than those conclusory remarks about a state's loss of sovereignty before the Supreme Court, the bulk of the opinion was devoted to proving the historical practice of the Court in assessing costs against states.\(^{135}\) That historical data is useful in section V.D, but the radically nationalist flavor of the *Fairmont* court's holding seems not to have survived cases staking out a more expansive notion of state sovereignty. It is difficult to im-

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129. *Id.* at 130–31. This is somewhat peculiar as it conflates the jurisdictional basis for suit with the remedies available. It is not clear why the existence of jurisdiction on the basis of Fourteenth Amendment claims should cover the availability of a remedy for a non-Fourteenth Amendment claim after the Fourteenth Amendment claim has been dismissed.

130. *Id.* at 131–32.

131. *Id.* at 132.

132. 275 U.S. 70, 74 (1927).

133. *Id.*

134. *Id.* This shades into the language used in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 347 (1821), to justify the exercise of appellate *jurisdiction* over a state as a party, but its applicability to the *remedies* available against a state as a party to a suit commenced by a private party is unclear.

135. *Id.* at 76–77.
agine the Seminole Tribe or Edelman courts saying: “We think that the rule construed by long practice justifies us in treating the state just as any other litigant.”

Courts after Seminole Tribe have not wrestled with the issue in any serious way. Before Hutto, some circuits considered the Eleventh Amendment issue and a split emerged, with some permitting attorneys’ fees and others barring them under Edelman. After Hutto, the only opinion to hint at the problem was Maher, but it predates Seminole Tribe, and the Court had crutches like Union Gas available as authority had it been necessary to address whether attorneys’ fees implicate the Eleventh Amendment under Edelman.

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136. Id. at 77.

137. See, e.g., Nat’l Home Equity Mortgage Ass’n v. Face, 283 F.3d 220, 224 (4th Cir. 2002) ("Virginia contends first that sovereign immunity precludes an award of attorneys fees against State officers when no violation of the Fourteenth Amendment has been alleged. It argues that, in light of recent Supreme Court jurisprudence, such as Seminole Tribe v. Florida, the authority of district courts to award attorneys fees against State actors should be reexamined. . . . [W]e reject Virginia’s argument." (citation omitted)), vacated, 537 U.S. 802 (2002), reinstated, 322 F.3d 802 (4th Cir. 2003); Jensen v. Clarke, 94 F.3d 1191, 1201 (8th Cir. 1996) (due process and Eighth Amendment); cf. Lawson v. Shelby County, 211 F.3d 331, 334–36 (6th Cir. 2000) (omitting a detailed analysis of Seminole Tribe). Districts in the Second and Fourth Circuits have held that states are not immune from an award of attorneys’ fees. See, e.g., Mainstream Loudoun v. Bd. of Trustees, 2 F. Supp. 2d 783, 789 (E.D. Va. 1998) (First Amendment). There were several cases before Seminole Tribe that directly confronted the issue and permitted recovery of attorneys’ fees. See, e.g., Warnock v. Pecos County, 88 F.3d 341, 343 (5th Cir. 1996) (First Amendment). Some articles have addressed the matter as well. See Cristian M. Stevens, Revolutionary or Aberrational?: The Status of the Supreme Court’s Recent Federalism Cases in the Eighth Circuit, 44 St. Louis U. L.J. 529, 586 (2000) (referring to an Eighth Amendment claim); Ernest A. Young, Book Reviews: Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance, 81 Tex. L. Rev. 1551, 1598 (2003) (relying on an Eighth Amendment case); see generally Cotner, supra note 77, at 713 n.15 (referring to a statute enacted under the Fourteenth Amendment); Vicki C. Jackson, Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence, 35 Geo. Wash. Int’l L. Rev. 521, n.84 (2003) (referring to a claim under the Fourteenth Amendment).


139. 491 U.S. 1, 13 (1989).
IV. EASY ANSWERS DISMISSED

A. Personal Capacity Suits

One trivial answer to the problem presented would squeeze all official capacity suits for injunctive relief into the personal capacity category. That would prevent fees from running against the state, which would also disentangle the fee award from immunity concerns. Although that answer does not resolve the conceptual question, it might be a solution to any practical difficulties encountered by plaintiffs. Yet, the Court has intimated that official capacity suits provide the correct vehicle through which to request injunctive relief. At the very least, for suits in which an official is sued as merely the agent of a state entity—and the entity is given notice and an opportunity to respond—an ambiguous styling will probably result in treatment of the suit as one against the individual in her official capacity. Further, choosing to bring suit in this way may present practical difficulties if the official is judgment-proof or leaves office.

140. See supra notes 112–17 and accompanying text. Nagata, supra note 1, at 1202–06, discusses this possibility as well.

141. See Hutto v. Finney, 437 U.S. 678, 700 (1978) ("Like the Attorney General, Congress recognized that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself. The legislative history makes it clear that in such suits attorney's fee awards should generally be obtained either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." (internal quotation marks omitted)).

142. See Hafer v. Melo, 502 U.S. 21, 24 n* (defining the characteristics of an official capacity suit, but declining to resolve the circuit split on the method of determining in which form a suit is brought in the absence of clear pleadings).

143. It is certainly the plaintiff's prerogative to style a suit for injunctive relief against a state officer in her personal capacity. See Brandon v. Holt, 469 U.S. 464, 468 (1985). Such a choice might prove unwise, however, if, for example, different immunities apply to the officer in her personal capacity that—although unavailable to defeat a request for an injunction—would prevent the award of attorneys' fees. Cf: Procunier v. Navarette, 434 U.S. 555, 561-62 (1978) (discussing the qualified immunities of state actors). Further, it is unclear if any injunction entered by the court would survive the death or replacement of the officer, potentially requiring the plaintiff to re-litigate the claim with each change in officeholder. Additionally, since personal capacity suits limit recovery to the assets of the officer, a judgment-proof officer, not inconceivable given the potential size of attorneys' fees, might undermine the purpose of § 1988 to incentivize suits seeking to enjoin unlawful activity. Finally, it is unclear as a theoretical matter whether an injunction against a state officer in her personal capacity is always enforceable, because many violations of the injunction would necessarily be official acts, and therefore subject to different liability standards.
B. "Ancillary Awards"

Another easy answer is sometimes given. The Supreme Court has called attorneys' fees merely "ancillary" to prospective relief; so, one could argue that fees are not part of a truly retrospective award.144 This argument fails on two counts.145 It is true that the distinction between retrospective and prospective relief formed the basis for the Court's decision in Edelman,146 but it is nothing other than conclusory to use such a distinction in this context even assuming it is still the proper distinction to use.147 The Eleventh Amendment, and the Court's understanding of the sovereign immunity that was restored by

144. See Edelman v. Jordan, 415 U.S. 651, 667-68 (1974) (noting that monetary awards which are "ancillary" to an award of injunctive relief do not run afoul of sovereign immunity); see also Missouri v. Jenkins, 491 U.S. 274, 284 (1989) ("We reaffirm our holding in Hutto v. Finney that the Eleventh Amendment has no application to an award of attorney's fees, ancillary to a grant of prospective relief, against a State."); Kentucky v. Graham, 473 U.S. 159, 169 (1985) (conceiving of attorneys' fees as ancillary within the meaning of Edelman); Maher v. Grange, 448 U.S. 122, 133 (1980) (affirming the circuit court's holding that attorneys' fees are "ancillary" and therefore permissible). Although the Supreme Court ultimately decided these issues in favor of permitting fees as ancillary awards, it is notable that the circuits, after Edelman but before Hutto, often found that an assessment of fees against a state was barred by the Eleventh Amendment. See cases cited supra note 138.

145. See Nagata, supra note 1, at 1199–1202 (discussing some of the problems with this approach). The argument seems most persuasive in the context of awards of attorneys' fees for bad-faith litigation. See Hutto v. Finney, 437 U.S. 678, 691–92 (1978); see also Missouri v. Jenkins, 491 U.S. 274, 282 (1989) (providing for an enhancement of attorneys' fees to compensate plaintiffs for a delay in payment). There, the assignment of fees works as a fine and is reasonably considered part of the Court's equitable powers—like, for example, the imposition of damages for violations of an injunction. See id. ("The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail."). The power to award fees for bad-faith litigation is truly "ancillary" to the Court's powers, equitable or otherwise, as it is tied to the ability control the actions of the parties before it. See Attorney's Fees, supra note 30, at 1891–92; see also supra note 9 and accompanying text. Under § 1988, however, fees are assessed without regard to the good faith of the defendant so there is no such analogy to the fines necessary for a court to ensure compliance with its orders and procedure. Ironically, fees are only assessed against a losing plaintiff (or when the state-defendant "prevails") when the plaintiff has litigated in bad faith (frivolously), the reverse of the case in which such a requirement should be imposed to finesse the Eleventh Amendment problem. See Hughes v. Rowe, 449 U.S. 5, 14 (1980).

146. But see Nagata, supra note 1, at 1182–93 (predicating the Edelman distinction on the difference between affirmative relief, which does not afford states flexibility in conforming their conduct to the mandate of the federal court, and injunctive relief, which simply prohibits one unconstitutional path of state action, but leaves the state's discretion in moving forward intact).

it, takes no notice of a difference between retrospective and prospective remedies per se. This distinction was a convenient heuristic for understanding the difference between damages and equitable relief, which require different treatment because of important principles that overcome the rationales for sovereign immunity (such as the supremacy of federal law). The fact that an abstract distinction may be drawn between retrospective and prospective relief—that is, on a temporal scale attorneys’ fees are not prospective relative to the suit—does not answer the question whether there exists a meaningful difference between the two. For example, the Court would certainly not permit shoehorning an award of retrospective (read: damages) relief into a prospective (read: injunctive) remedy which enjoined the state official to disburse funds to pay for past wrongs. Further, to the extent that this distinction has independent weight,

148. See Edelman, 415 U.S. at 674–76; see also Pennhurst v. Halderman, 465 U.S. 89, 105 (1984) (noting that injunctive relief is crucial to vindicating the supremacy of federal law). Indeed, as Justice Douglas pointed out, this heuristic may not even be useful in distinguishing damage awards from injunctive relief. See Edelman, 415 U.S. at 682 (Douglas, J., dissenting). He points out that whether damages are awarded for past harms or an injunction is issued compelling future payments, there is still a significant impact on the state treasury. See id.; see also Pamela S. Karlan, The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983, 53 STAN. L. REV. 1311, 1312 (2001) (highlighting the irony between the treatment of damage awards for past harms and injunctions issued compelling future payments). All that the distinction between retrospective and prospective relief might do in such a context is give a state a free bite at the apple of violating federal law without consequence, though it may be compelled, consistent with the Eleventh Amendment, to cease such a violation through the expenditures of money later. Cf. Clinton, supra note 85, at 1084; Yackle, supra note 17, at 406–07 (noting that a state which violated federal law in the past is in a superior position to that of one attempting to comply with the law progressively). But see John C. Jeffries, Jr. The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 108–11 (1999) (seeing utility in this approach for purposes of resource allocation).

149. Then-Justice Rehnquist’s justification for this distinction—that retrospective relief might impose a sudden burden on the state treasury while prospective relief would give the state a chance to adequately plan for the expenditure—is difficult to accept. See Edelman, 415 U.S. at 665–66 n.11. What of prospective relief that is granted after the year’s budget has been set, but which requires expenditures in that year for compliance? What of awards of retrospective relief that co-occur with the budgeting process? Is the requirement that a state spend $6 million, albeit prospectively, less intrusive on the state budgeting process than a requirement that the state pay $1 in nominal retrospective damages? Compare Milliken v. Bradley, 433 U.S. 267, 293 (1977) (Powell, J., concurring) (noting the millions required to comply with the injunction approved by the majority), with Arizonans for Official English v. Arizona, 520 U.S. 43, 69 (1997) (barring even nominal damages).

attorneys' fees are not truly prospective or retrospective vis-à-vis the suit because they arise at the same time as suit.\textsuperscript{151}

There is an even more fundamental difficulty with this argument. It is hard to understand what "ancillary" means in this context. If it means that the fees are but a small portion of the relief, that is not always true—attorneys' fees can swamp any award of actual damages for past violations (the quantum of which must be hypothetical because the suit is for injunctive relief).\textsuperscript{152} Also, the size of a demand on the state treasury itself does not determine whether relief is retrospective or prospective in any event.\textsuperscript{153} Further, fees are not ancillary in the sense that they are common or expected. Parties who have litigated in good faith are not ordinarily assessed fees under the American Rule.\textsuperscript{154} Nor are attorneys' fees ancillary in the sense that they must be spent in order for a state to comply with an injunction, even if they should be spent to facilitate suits seeking to redress unlawful activity by states, i.e. they are not necessary auxiliaries.\textsuperscript{155} Finally, to say that fees are ancillary in the sense that they supplement or are subordinate to § 1983 actions is to beg the question.\textsuperscript{156} Although fee awards certainly provide incentives to seek injunctions against unlawful state behavior, it is unclear how such a pragmatic benefit grounded in a rather minor (from a constitutional perspective) public policy concern can override the clear statement that the Eleventh Amendment bars recovery by a private plaintiff from the state treasury. This Article returns to the issue in section V.B. For now, note that one could imagine retrospective relief itself as subordinate to the more expensive and oppressive ongoing relief required by some injunctions. "Ancillary" is a problematic term.

If it is accepted that (1) fee awards run against the state, that is, they are retrospective, retroactive, monetary awards, or damages (depending on the nomenclature) that draw from the state treasury (the \textit{Edelman} question), then (2) they are barred except when such a suit

\begin{footnotesize}
\begin{enumerate}
\item[151.] See supra note 9 and accompanying text.
\item[152.] See Hutto v. Finney, 437 U.S. 678, 708 (1978) (Powell, J., concurring in part and dissenting in part) (noting that fees can be significant in the sense of having an effect on the treasury of a state).
\item[153.] See Arizonans, 520 U.S. at 69. This is so even though the rationale for a bar against retrospective relief rests on the fear that it will disrupt the ability of a state to manage its budgetary affairs. See \textit{Edelman}, 415 U.S. at 666.
\item[154.] See \textit{Alyeksa Pipeline Serv. Co. v. Wilderness Soc'y}, 421 U.S. 240, 247 (1975).
\item[155.] See \textit{MERRIAM-WEBSTER'S DICTIONARY} (11th ed. 2003) (defining ancillary as "auxiliary, supplementary"). By way of comparison, certain injunctions do require significant (and nominal) expenditures for their compliance, both of which have been deemed acceptable as adjuncts to equitable relief. See Quern v. Jordan, 440 U.S. 332, 346-48 (1979) (requiring a \textit{de minimus} expenditure to notify class members of procedures to recoup wrongfully withheld benefits).
\item[156.] See \textit{MERRIAM-WEBSTER'S DICTIONARY} (11th ed. 2003) (defining ancillary as "subordinate, subsidiary.")
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for damages is permissible, usually only under the provisions of the Fourteenth Amendment (the Seminole Tribe holding).

V. SOME EFFORT AT AN ANSWER

There are at least five ways of thinking about a solution to the conceptual problem in this Article. First, Fairmont could have gotten it right. Perhaps, except with respect to damages, if the special character of a state's sovereignty is lost when a state adjudicates a constitutional claim in federal court because both are created, and enforced, "under the authority of the United States," then states should be treated as any ordinary litigant. This result might be correct, but the tenor of this reasoning is incompatible with the modern Court's statements. For example, the Court said in Alden: "The Constitution . . . does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power." In fact, the Alden opinion is hostile to Fairmont not just as a matter of tone, but as a matter of logic as well. Alden held that "States' immunity has been described in sweeping terms, without reference to whether a suit was prosecuted in state or federal court." Even Fairmont implicitly acknowledged that a state enjoys sovereign immunity from costs (and so fee awards) in its own courts. The attitude of Fairmont towards states' sovereignty has long been replaced with a reverence that the modern Court contends states enjoyed at the time of the framing. I deal with the better potential solutions to the conceptual problem in greater detail below.

A. Who Cares?

The best answer to the problem might be a yawning: "Who cares?" It seems clear that the purpose of §§ 1983 and 1988 was to provide a remedy for violations of "civil rights." Certainly any violation of whatever rights are classically thought of as "civil" can be reached by Congress through its Section 5 power, or a plaintiff can assert the right under the Fourteenth Amendment directly. The amendments

159. Id. at 745.
160. Fairmont, 275 U.S. at 74 ("The sovereignty of the government not only protects it against suits directly, but against judgments even for costs, when it fails in prosecutions. But is the state to be regarded as the sovereign here? This court is not a court created by the State of Minnesota." (internal citations and quotation marks omitted)).
161. Alden, 527 U.S. at 715 ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.").
162. See supra note 30-33 and accompanying text.
directed at the discrete and insular minorities of whom the Court and Congress should be most solicitous, along with the statutes enacted under those amendments, are protected under *Seminole Tribe*. The rights flowing from the Reconstruction-era amendments that can be directly asserted through § 1983, and any statutes enforcing those amendments, are exactly the types of actions that *Seminole Tribe* took pains to preserve. The market still incentivizes cases asserting these claims: attorneys' fees are available from the state under § 1988 because damages are, as a constitutional matter, available. Damages (and so fees) are barred only in suits asserting violations of statutes enacted under non-civil-rights provisions, like those in Justice Powell's sardonic selection for his *Thiboutot* dissent. It is anything but clear that Congress ever intended to incentivize those suits.

In its most summary form, this answer synthesizes the tension between the quotations at the beginning of this Article by equating "fundamental laws," for which Congress says it is necessary to have a market incentive, with post-Eleventh Amendment rights. On this reading, Justice Powell got it exactly right when he said in *Thiboutot* that the majority had transformed purely statutory claims into "civil rights" actions under § 1983...

Yet, three objections to such a casual dismissal of the problem give a moment's pause. The first is obvious and has two parts, but it is not fatal. Unlike in *Thiboutot*, in which the Court was interpreting what statutory claims may be brought through § 1983, the fee-shifting issue raises questions about what statutes and what constitutional provisions Congress will ever be able incentivize. The distinction is clear. An expansive reading of *Edelman* and *Seminole Tribe* would (1) forever remove the question of what incentives are proper from democratic control, and (2) bar incentives to the enforcement of not just statutes, but constitutional provisions like the Supremacy Clause. On the first objection, if *Thiboutot* was a mistake, Congress can correct it. Not so with an expansive reading of *Seminole Tribe* and *Edelman*. But that, of course, can only counsel caution, not a contrary result—all cases with a constitutional basis share this feature of anti-democratic effect.

The second objection asks: Why should the Eleventh Amendment be the dividing line between laws that are "fundamental" to the nation?

163. See text and sources cited supra note 15.
164. See supra note 48–55 and accompanying text. If nothing else, even though Congress has not exercised its power to correct *Thiboutot*, § 1988 did predate the broad reading of "and laws" that gives rise to many of the potentially disincentivized suits.
and those that are not? Undoubtedly the Reconstruction-era amendments were crucial to perfecting the Constitution and the Union.\textsuperscript{166} But, does that detract from the fundamental character of pre-Eleventh Amendment constitutional provisions? It is, after all, the pre-Eleventh Amendment Constitution that defines the very operation of the national government. Embedded in that objection, however, also lies the reason that a breezy response is not fatal. As a "fundamental" matter, the Court has concluded that the Eleventh Amendment restored to the Constitution's original provisions a balance of state and federal power that did not contemplate damages for actions by states that violate pre-Eleventh Amendment constitutional provisions.\textsuperscript{166} An intellectually coherent position could consider the vision of federalism inherent in the pre-Eleventh Amendment Constitution, and therefore "fundamental" to the nation, as one that does not contemplate (1) actions for damages against states or (2) a market incentive, paid for by the funds of a state treasury, to bring suits for injunctive relief. As explained in section III.B, the latter is not a strict consequence of the former, but the point here is not that the use of the Eleventh Amendment as a constitutional dividing line requires that fee awards be barred, but rather that such a line is not as irrational as it may seem at first glance.

Next, it might also give some pause that the concept of civil rights when § 1983 was adopted, but before § 1988 was passed, included economic rights.\textsuperscript{168} It is somewhat historically inaccurate to say that the modern fair labor regulation disincentivized by a broad reading of \textit{Seminole Tribe} and \textit{Edelman} is equivalent to the type of economic rights that the framers of § 1983 had in mind—they likely thought of the right to enter the marketplace, to contract freely, etc.\textsuperscript{169} Yet at

\textsuperscript{166} See, e.g., Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association ("The Bicentennial Speech") (May 6, 1987), available at \url{http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm} (last visited Oct. 29, 2008) ("While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws.").

\textsuperscript{167} See supra note 65 and accompanying text.


\textsuperscript{169} As Professor Collins points out, it would be seriously wrong to think of this type of regulation as what the Court had in mind while § 1983 was mothballed during the \textit{Lochner} era. See Collins, supra note 168, at 1494. He contends that even today, "[i]t is at least arguable that § 1983 was not intended to cover" what he says "may loosely be called 'economic' rights under the commerce, contract, takings, supremacy, and interstate privileges and immunities clause . . . . Before the modern revival of § 1983 . . . many such 'economic' rights would have been actionable in federal court under section 1331 only." \textit{Id.} at 1495.
least some of the meatiest regulation for the people most likely to be victims of state inattention—the poor, the disabled, and other politically disadvantaged minorities—might come within some conception of economic "civil rights." This would make a reading of sovereign immunity that de-privileges such actions more worrisome.170

The final objection to the "Who cares?" response digs a little deeper into the first objection and reveals a more troubling conceptual concern; one that I think forecloses simple acquiescence to a new bifurcation of the Constitution. Actions through § 1983 to enforce the supremacy of federal law, which use the cumbersome technique of vindicating the right in the statute that displaces the state law, would lose their market incentive.171 The federal statutes that displace a state cause of action will rarely be of the type enacted under the Section 5 power.172 Further, even if it were possible to directly enforce the Supremacy Clause through a § 1983 action, the Supremacy Clause is a pre-Eleventh Amendment provision. Yet if any provision of the Constitution deserves the greatest ability to disturb the balance of power between the states and the federal government—if any provision deserves the power to abrogate state sovereign immunity—intuitively that provision would seem to be the Supremacy Clause. A response might be given that, from the federal judiciary's perspective, the guarantee of federal law as supreme cannot be such an important right if it is not the type of right ordinarily enforced by courts. Even

170. Professor Collins offers a thoughtful rebuttal to this position. He says, "[T]he attorney's fee incentive is less needed for most cases involving ordinary regulatory legislation. In that context, the economic incentives associated with enjoining enforcement of unconstitutional regulation itself often provides sufficient impetus to bring suit. . . . [Fee shifting is not] desirable in terms of its added burden on the public fisc as a consequence of good faith efforts at economic regulation." Collins, supra note 168, at 1561–62. For a business, for example one facing a confiscatory state action or one subjected to discriminatory treatment in violation of the Dormant Commerce Clause, this is undoubtedly true. I am focusing, however, on the incentive structure for actions that seek to enforce federal statutory or constitutional guarantees on behalf of individuals outside of a class action. Empirical scholarship on the matter is lacking. See Rowe, supra note 90, at 656. When a state as an employer fails to comply with a more elaborate federal regulatory regime, Professor Rowe's notion that Congress uses fee shifting to affect the relative strength of the parties when "[it] perceives a regular imbalance . . . [between] adversaries" not only explains the pattern seen among which statutes provide for fee shifting, but also seems like a good empirical hunch. Id. at 663–64.

171. See Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 108–10 (1989) (holding that the guarantees of the Supremacy Clause, while not themselves enforceable through § 1983, were nevertheless enforceable as through the federal statute, which guaranteed a right that preempted the state cause of action).

172. Quite to the contrary, state causes of action are now displacing federal causes of action for the deprivation of rights at the hands of federal officers. See, e.g., Peoples v. CCA Detention Ctrs., 422 F.3d 1090, 1108 (10th Cir. 2005).
§ 1983 has not been interpreted to provide an independent cause of action for its enforcement. But it is the idea of the supremacy of federal law that the Court freely admits drives the fiction of Ex Parte Young. In fact, when the need to ensure that federal law remains supreme is absent, e.g., when an injunction is brought on the basis of state law, the Court has abolished the Young action. It is difficult to shrug off, for all time, Congress's ability to provide market incentives for the vindication of the supremacy of federal law through § 1983 "and laws" actions when no suits against states would be permissible in the absence of supreme federal law.

B. Reexamining "Ancillary Awards"

In addition to the discussion in section IV.B, there are four more subtle meanings of "ancillary" that emerge from the case law. The first one turns on whether the enactment of §§ 1983 and 1988 pursuant to the Section 5 power makes "and laws" claims, which do not themselves arise out of a valid exercise of the Section 5 power, "ancillary" to the purposes of §§ 1983 and 1988 because most § 1983 litigation involves classical civil rights, which do arise out of a valid exercise of the Section 5 power. Put another way, perhaps "ancillary" means that a fee award for pre-Eleventh Amendment claims is a kind of Section 5 "congruent and proportional" remedy for post-Eleventh Amendment harms to which the Fourteenth Amendment is addressed. This argument is unpersuasive for several reasons. First, the Court treats § 1983 as a procedural vehicle only, not as a grant of substantive rights. A claim that a law violates a fair-labor-standards statute enacted under the Commerce Clause power is not converted, by virtue of having been brought through the § 1983 vehicle, into a claim within the penumbra of civil rights—or brought "under" § 1983

173. See supra note 171 and accompanying text.
175. See id.
176. Whether this is true as an empirical matter is unknown. Most research does not distinguish between classic § 1983 actions and "and laws" actions. See, e.g., Roger A. Hanson & Henry W.K. Daley, Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation (Dec. 1994) (No. 92-BJ-CX-K026). Looking at the categories that studies use, it appears that unless there is a very non-uniform distribution of cases, most § 1983 cases involve classical civil rights claims.
177. See Kimel v. Florida Bd. of Regents, 528 U.S. 62, 82 (2000). The Court has classified § 1988 as enacted pursuant to Congress' Section 5 power, at least when used to provide attorneys' fees in civil rights cases. See Hutto v. Finney, 437 U.S. 678, 698 n.31 (1978). For fees in non-civil rights cases, like "and laws" actions under § 1983, it is not clear what constitutional power Congress exercised when it enacted these statutes, but, presumably it used its interstate commerce power.
Admittedly, this type of argument has been successful in Fourteenth Amendment jurisprudence generally—witness the continued availability of relief for violations of select provision of the Bill of Rights, which are, of course, all pre-Eleventh Amendment rights. But when the Court has channeled selected portions of the Bill of Rights through the Fourteenth Amendment’s guarantee of due process, the Court has selectively determined which rights are actually within the textual meaning of due process itself. It is fair to call pre-Eleventh Amendment rights sifted in that manner true Fourteenth Amendment rights—they acquire a post-Eleventh Amendment quality and do not need to relate back to their original provisions for anything other than the substantive criteria by which violations will be judged to ensure congruence between restrictions on the state and federal governments.

The detailed constitutional review by the Court during in-


[Connecticut] seeks to distinguish this case from Hutto v. Finney on the ground that Hutto involved an adjudication of a constitutional violation, rather than a statutory violation. However, as Mr. Justice Rehnquist noted in his dissent, the underlying claim in Hutto was predicated on the Eighth Amendment as made applicable to the States by the Fourteenth Amendment rather than on any substantive provision of the Fourteenth Amendment itself. The prisoners’ claim in Hutto was therefore arguably more analogous to the statutory claim involved in this case than [sic] to the constitutional claims asserted here or to the equal protection claim asserted in Fitzpatrick v. Bitzer.

Id. at 133 n.16 (citations omitted). This footnote supports taking two extreme positions: (1) Congress cannot provide for fee-shifting incentives to litigate even the most classical violations of civil rights contained in the First through Tenth Amendments, because the process of incorporation does not alter the pre-Eleventh Amendment character of the rights; or (2) the Court has settled, as a constitutional matter, the power of Congress to provide for attorneys’ fees in litigation that asserts pre-Eleventh Amendment rights, whether or not those pre-Eleventh Amendment provisions acquire a Fourteenth Amendment character because they are incorporated against the states. It is unlikely that either extreme represents the true meaning of the Maher dicta. The Court seemed most interested in buttressing its argument that so long as substantial claims under the Fourteenth Amendment are pleaded, the fact that relief is ultimately granted on a non-civil rights statutory claim does not bring the Eleventh Amendment into play. Cf. supra note 129 and accompanying text; Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804 (1986) (linking substantiality of the federal interest in the claim pleaded to the existence of jurisdiction). That was the middle position in Maher, but other than as an atmospheric, it bears no relation to the conceptual problem in this Article.

179. But see Metro Broad., Inc. v. FCC, 497 U.S. 547, 597 (1990) (announcing a different standard for the Fifth and Fourteenth Amendment guarantees of equal protection), overruled by Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (restoring congruence). One consequence of not reading laws enacted under pre-Eleventh Amendment powers as converted into Fourteenth Amendment actions because § 1983 was enacted pursuant to this power is that the congruence sought by the Court in its Fourteenth Amendment jurisprudence is now vitiated. That
corporation ensures that these are truly Fourteenth Amendment rights, something very difficult to do with statutory rights that the Court, by hypothesis for the fee-problem to have arisen, has already determined to be incongruent or disproportionate responses to congressionally perceived, but constitutionally insufficient, instances of Fourteenth Amendment harms.\(^8\) The Court is not even unanimous on the transmutation argument for cause-of-action purposes, so I think that resting the permissibility of attorneys' fees on this rationale asks it to bear too much.\(^{181}\) If § 1983 is a procedural vehicle only, why should it alter the character of the rights asserted through it?

Finally, it is farfetched to contend that encompassing bankruptcy, patent, supremacy, and commerce issues would be congruent in any meaningful sense to the ends of § 1983; the statute can function as an adequate remedy for violations of civil rights without protecting those other rights. That distinguishes "and laws" actions from those rights entitled to incorporation—incorporated rights, in the Court's mind, form the very essence of the due process that the Fourteenth Amendment protects.

A second sense of "ancillary" turns on whether attorneys' fees fall outside of the categories of relief that the Eleventh Amendment bars (the *Edelman* question)—not whether Congress has spoken clearly enough and used a Post-Eleventh Amendment power.\(^{182}\) That is, like an injunction or an in rem bankruptcy proceeding, it may be possible that attorneys' fees do not impinge on the true concerns that motivated the Court to bar damage awards.\(^{183}\) This is not the same as calling attorneys' fees "prospective"; rather, this reading of "ancillary" simply states that fee awards are not "retroactive" relative to the policies that underlie that bar. If the concern about damages (prospective or retrospective) expressed in *Edelman* turns on whether damages encroach a state's ability to set its own priorities through its budget, then the question of whether attorneys' fees should be permissible re-

\(^{180}\) If the statute is a congruent and proportional remedy for violations of the Fourteenth Amendment, there is no problem obtaining either damages or attorneys' fees; the cause of action is a classical civil rights claim, not an "and laws" action.

\(^{181}\) See supra note 178 and accompanying text.

\(^{182}\) See Missouri v. Jenkins, 491 U.S. 274, 279–80 (1989); *Maher*, 448 U.S. at 131 n.14 (1980) (contending that *Fairmont Creamery Co. v. State of Minnesota*, 275 U.S. 70 (1927), stands for the proposition that attorneys' fees are outside the concerns of the Eleventh Amendment even when awarded pursuant to a statutory scheme enacted after *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); Hutto v. Finney, 437 U.S. 678, 695 (1978) ("Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity.").

\(^{183}\) See *Maher*, 448 U.S. at 123.
ally reduces to an empirical one—one which the Court has answered with a "no."184 Of course, such an approach also problematizes the Court’s approach to nominal damages. Yet it seems like a far less principled (or workable) distinction to permit nominal damages, while barring meaningful damages, than to bar damages, but not the costs associated with prosecuting a suit.185

Having left to one side the argument that fees are ancillary in the sense that they inhere in a court’s power to control the litigants before it—a notion put to rest in circumstances other than bad-faith litigation by Alyeska—there is one remaining sense in which fees might be meaningfully “ancillary”. It relates back to the original purpose given by the Court for permitting any type of suit against the state. As much as injunctive relief is crucial to the vindication of the supremacy of federal law, attorneys’ fees are crucial to the practical ability to bring suit. As such, they are ancillary in the sense of section IV.B because they are a necessary auxiliary to the vindication of the supremacy of federal law. Although this is not an elaborate argument in favor of awarding fees, it may be the most fundamentally persuasive. Sections 1983 and 1988 may have been intended to vindicate only “civil rights,” but Ex Parte Young exists to vindicate all federal rights. Consequently, incentives to ensure that such actions can be brought serve the same purposes underlying the very case which made any relief available at all.

This final approach deserves mention because it finds considerable support in the Court’s own characterizations of attorneys’ fees. For example, the Court said in Jenkins: “Unlike ordinary ‘retroactive’ relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.”186 Before Jenkins, Hutto187 and Maher188 had approvingly quoted § 1988’s legislative history. It is important that the Court has credited this rationale and that it is not just a feature of the congressional policies underpinning § 1988 and discussed in section II.B—a strong congressional policy is possibly


185. See supra note 149 and accompanying text.


187. Hutto, 437 U.S. at 694.

188. Maher, 448 U.S. at 129, 133.
useful as a matter of statutory interpretation, but it is of limited value on the constitutional question. The Court's acceptance of this incentive rationale provides an opportunity to fold the practical consequences of barring fee awards identified in section III.A into the conceptual problem. Fees can be considered "ancillary" in the constitutional sense of necessarily auxiliaries to *Ex Parte Young* actions, because without them the procedural ability to vindicate the supremacy of federal law would be a "hollow gesture." When the Court accepted Congress's treatment of market incentives for suit as bound up in the rights to be enforced, it opened the door to a role in the constitutional calculus for pragmatic concerns about litigants' access to the courts. The low-level due process concerns about financial access to the courts found in forum non conveniens cases and discussed in section III.A also enhance the constitutional relevance of market incentives for suit. Unfortunately, as discussed in section IV.B, *Edelman* takes a crabbed view of "ancillary award" as limited to costs associated with enforcing a particular court order.\(^{189}\) It would be quite a stretch to view a generalized concern about the proper functioning of the whole civil-rights-litigation market as the type of "ancillary" relief that *Edelman* really meant to preserve.

### C. Is *Edelman* the Problem?

Even though it is *Seminole Tribe* that creates the practical problem identified in this Article by foreclosing, as a constitutional matter, Congress's ability to provide damages for pre-Eleventh Amendment violations of federal law, the real conceptual problem in the first instance may rest with *Edelman*’s two rules for distinguishing between, on the one hand, permissible types of relief, and, on the other hand, remedies that will contravene the Eleventh Amendment unless Congress is empowered to abrogate the states' immunity (or there is a waiver).

The first rule holds that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."\(^{190}\) That is the rule which would seem to bar attorneys' fees because they are liabilities paid out of the state treasury. The second rule, applicable only if relief will cost money somehow, says that prospective relief is permissible, but retrospective relief is not.\(^{191}\) *Edelman* attempted to synthesize these two rules by adding that "an ancillary effect on the state treasury is permissible and often an inevitable consequence of the princi-

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190. Id. at 663.
191. Id. at 667–68. For further discussion, see Nagata, *supra* note 1, at 1182–1293.
ple" that prospective injunctive relief is available under *Ex Parte Young.*

The fee-award cases that grappled with the two rules after *Edelman,* but before *Seminole Tribe* cut off alternative paths to upholding congressional fee-shifting schemes, all share something notable. In *Hutto,* the Court said:

> The cost of compliance is "ancillary" to the prospective order enforcing federal law. The line between retroactive and prospective relief cannot be so rigid that it defeats the effective enforcement of prospective relief.

While the decisions allowing the award of costs against States antedate the line drawn between retroactive and prospective relief in *Edelman,* such awards do not seriously strain that distinction. Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.

*Jenkins* struggled with the same (if non-serious) "strain" that the "longstanding practice of awarding 'costs' against States" put on *Edelman.* Moreover, *Hutto* explicitly approved of a compensatory rationale in some cases because "that the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates prospectively." Yet, compensatory relief requires a retrospective vantage point by definition—otherwise there is nothing to compensate.

I believe that the post-*Edelman* fee cases have struggled with the two rules because costs and fees reveal that the rules do not completely partition the universe of remedies. A past versus future temporal continuum plus the "ancillary" concept does not exhaust all conceivable remedies, because not all non-prospective relief is retrospective, and not all non-retrospective relief is prospective. Some remedies look to the timing and conduct of the suit itself, making them more appropriately thought of as contemporaneous with the suit.

On the first step of the *Edelman* inquiry, attorneys' fees do come from the state treasury. They are therefore permissible only if they do not involve retrospective relief (or do involve prospective relief; the daylight, if any, between those two phrasings is, in fact, the problem). Fee awards do not flow from a defendant's compliance with the law in

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192. *Maher,* 448 U.S. at 668.
195. 437 U.S. at 691 n.17 (quoting Milliken v. Bradley, 433 U.S. 267, 290 (1977)).
196. See Carlos Manuel Vasquez, *Night and Day: Coeur d'Alene, Breard and the Unraveling of the Prospective Retrospective Distinction in Eleventh Amendment Doctrine,* 87 Geo L.J. 7 (1998). Other than attorneys' fees and costs, sanctions are another good example of a remedy (in that case, for affronts to the court) that do not look to the past or future conduct of the state, except as a litigant.
the future; so they are non-prospective, at least relative to the future compliance itself, if not the practical availability of obtaining it. But, fee awards are also not retrospective relief in the sense that the recipient of a fee award is compensated for a past harm; she is at most made whole for the costs of obtaining prospective relief. So, fee awards do not appear barred under the second rule if non-retrospectivity trumps non-prospectivity. Edelman's purported synthesis of the rules—the "ancillary" language—offers little guidance, particularly under Edelman's literal conception of "ancillary" as an expense for shaping "official conduct to the mandate of the Court's decrees."¹⁹⁷ Such an expense will always be at least somewhat prospectively directed because the definition refers to shaping conduct. Attorneys' fees are not prospective (relative to the relief itself), they are not retrospective (to the time of injury at least), and they are not clearly ancillary as discussed in sections II.B and IV.B. But they do involve the public fisc. Edelman's classification scheme is unworkable here.

Even if these factors could all be worked out in the individual case, Professor Rowe points out,¹⁹⁸ and other commentators confirm,¹⁹⁹ that fee awards have a chameleon-like quality; they further different policies based on minor changes to the facts.²⁰⁰ Yet courts have almost uniformly upheld the availability of fee awards against states, even though the rationales may differ greatly (e.g., punishment for bad-faith litigation versus a market incentive, etc.).²⁰¹ And so it seems that fee awards are neither fish nor fowl under Edelman's framework. This is probably why Jenkins, Maher, and Hutto all reached for a historical basis to exclude fee awards from sovereign immunity's reach in the first place.

¹⁹⁸. Rowe, supra note 90, at 653.
¹⁹⁹. DERFNER & WOLF, supra note 61, ¶ 1.02[1] ("[S]hould an award of attorney's fees be considered an element of costs or an element of damages? Is a request for fees ancillary to the case on the merits, or an integral part of the dispute itself? ... No definitive answers can be given to these questions without consideration of the specific context of the fee claim within the action. ... Indeed, the very same fee award may even be considered costs for one purpose in the action and damages for some other purpose. The attorney's fee is much more chameleon-like than most other forms of monetary relief." (footnotes omitted)).
²⁰⁰. This section could have been called "Are Fees the Problem?", but the onus is on Edelman v. Jordan, 415 U.S. 651 (1974), as a theory of what remedies should be available against states, to account for all three of the major categories of remedies. See infra note 212 and accompanying text.
²⁰¹. Hutto v. Finney is an example of a case that upheld both types of awards. 437 U.S. 678, 689 (1978) (bad faith); id. at 693 (§ 1988).
D. **The Hood and Katz Methodological Twists**

The three approaches above have difficulty using *Edelman* and *Seminole Tribe* to arrive at an answer. One might conclude that those problems preclude any clear conceptual resolution. Fortunately, the Court has tweaked its methodology when a bright-line approach would otherwise wreak havoc on systems that the early practices of the nation teach are inoffensive to states' sovereignty. The uniform application of federal bankruptcy law seems to be the first area that the Court has treated with this different approach. Whether these cases are motivated by the paradigmatic pragmatism of the ounce-of-history-for-a-pound-of-logic maxim, a fealty to the original understanding of the provisions at issue, or a genuinely unique history of the Bankruptcy Clause is beyond the scope of this Article. However, the methodology of these cases is useful.

In *Tennessee Student Assistance Corp. v. Hood*, the Court dealt with a bankrupt's effort to obtain a discharge from a debt she owed to Tennessee. Rather than address the question for which certiorari was granted—the ability of Congress to abrogate a state's immunity under the Bankruptcy Clause—the Court focused on a condition precedent to *Seminole Tribe*: The existence of a suit against a state for purposes of the Eleventh Amendment (the *Edelman* inquiry). The Court concluded that even though the bankruptcy court employed an "adversary proceeding," that proceeding was essentially *in rem*. From historical sources in admiralty and maritime law, the Court concluded that *in rem* actions could not be considered "suits" against a state, despite the Eleventh Amendment's proscription of all suits "in law or equity."

Bankruptcy's expansive power to hear suits, not just to enter discharges, prevented the Court from avoiding the question on which it granted certiorari in *Hood*. In *Central Virginia Community College v. Katz*, the Court used a detailed historical analysis of the Bankruptcy Clause to conclude that "[i]nsofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction . . . implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not

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204. *Id.* at 446 ("States, nonetheless, may still be bound by some judicial actions without their consent.").

205. *Id.* at 452.

206. *Id.* 446, 452–54.
to assert that immunity." This allowed the bankruptcy court to disgorge a preferential transfer from the state treasury, a remedy that approximates a damage award.

*Katz* represents a much more dramatic methodological break from *Seminole Tribe* than does *Hood*. There are relatively few phyla into which courts still classify the nature of their jurisdiction (*in personam*, *in rem*, and possibly quasi-*in rem*). As a methodological matter, *Hood* is consistent with the (ostensibly) bright line approaches of *Edelman* and *Seminole Tribe*—*Hood* simply carved out a readily identifiable and discretely defined set of actions from *Edelman*’s general rule, and that mooted the *Seminole Tribe* question. As a practical fit, an exemption from the Eleventh Amendment for an exercise of *in rem* jurisdiction that dissolves an obligation, but does not meddle directly with existing funds in a state’s control, is entirely consistent within *Edelman*’s reasoning. *Edelman* permits injunctions, which cost something in the future (like the write-off for a discharged loan), but bars damage awards, which take funds out of the state treasury (like a disgorgement). *Hood* is a limited circumvention of *Seminole Tribe* through *Edelman*.

The methodology and holding of *Katz* are irreconcilable with *Edelman* and *Seminole Tribe*, however. As a methodological matter, *Katz* is in tension with the bright-line approach of *Seminole Tribe*. Now there is no principled reason why every pre-Eleventh Amendment power should not be vulnerable to the type of historical deconstruction that the Court applied to the Bankruptcy Clause. And, on the practical fit, *Katz* cannot avoid outright inconsistency with *Seminole Tribe* and *Edelman*. After *Seminole Tribe*, *Edelman* means that awarding money from a state’s treasury, unless it is “ancillary” to prospective relief, is prohibited except for a post-Eleventh Amendment claim. *Katz* attempted to bootstrap the “ancillary” argument by noting that disgorgements of preferential transfers are ancillary to the exercise of *in rem* jurisdiction, something that is inoffensive to a state’s sovereignty under *Hood*. In doing so the Court ignored the fact that the very thing which made *Hood* inoffensive to sovereignty was

208. Id. at 378–79.
209. I am not the first to highlight the general concerns about *Hood* and *Katz* identified below. The dissents in both cases were vigorous and a substantial amount of scholarship has been devoted to the cases. See, e.g., Scott Fruehwald, The Supreme Court’s Confusing State Sovereign Immunity Jurisprudence, 56 Drake L. Rev. 253 293–301 (2008); Susan E. Hauser, Necessary Fictions: Bankruptcy Jurisdiction After Hood and Katz, 82 Tul. L. Rev. 1181, 1202–14 (2008).
210. It probably did not hurt that the phylum of actions *Hood* excepted is, today, less likely than *in personam* suits to subject states to large liabilities. *In rem* proceedings are exceedingly rare outside of bankruptcy and admiralty.
the absence of interference with money the state already had in the bank.

Perhaps what is bad for *Seminole Tribe* and *Edelman* may nevertheless be good for fee-shifting statutes. *Hood*, however, does not live up to the promise. First, the black-letter law of *Hood* is no help because fee awards must be exercises of *in personam* jurisdiction—the court exercises jurisdiction over a person, not a *res*, when it orders payment of fees. Second, *Hood*'s methodology is of little help. Although fees and damages, like the nature of a court's jurisdiction, are historically (and presently) categorized separately, no historical hook like the sovereign immunity exception for *in rem* admiralty actions exists to draw a meaningful distinction between the two categories for Eleventh Amendment purposes. If the distinction in nomenclature alone were more than a historical artifact or arbitrary convention, the problem would already be solved; there would be no need to look further than whatever relevant lines of cases drew the distinction between damages and fees for sovereign immunity purposes in the first place.

The best *Hood*-type argument is a general one: *Hood* teaches that if a statute furthers a federal, historically important scheme, then the Court is willing to craft an exception to the Eleventh Amendment when the exception can be cabined. Just as there is a discrete number of phyla into which jurisdiction can be classified, remedies break down into easily identifiable categories: equitable relief, legal relief, and costs, fees, and sanctions. Whatever exotic species of relief exist within each concept, exempting one of these categories as a whole would not present intractable problems of classification—particularly when the two groups other than the one that includes fee awards have well established Eleventh Amendment consequences. That use of *Hood* would do no violence to its methodological consistency with *Seminole Tribe*—the rule is a bright line. But this use begs the question. Without history like the *in rem* admiralty cases as background, there is no principled method to select between allowing and barring fee awards. Either option draws an equally bright line.

The historical approach of *Katz* is more promising, but does not give an unambiguously clear answer. Before discussing the history, there is a preliminary objection to *Katz*'s methodology that possibly accounts for its irremediable tension with *Edelman* and *Seminole Tribe*. Even if a clear historical message exists on one class of issues in sovereign immunity jurisprudence, the use of original intent on a

211. DERFNER & WOLF, supra note 61, ¶ 7.04[2].
212. You could add to this list, for example, by classifying punitive damages as a distinctive category of remedies. It would, however, be difficult to cut the list down much further other than by rolling costs and fees into one of the other categories, which would merely assume the answer to the question in this Article.
specific issue is problematic because no clear original intent pervades all of sovereign immunity generally.

If history enlightened us about every sovereign immunity issue, then the use of original intent to flesh out each individual issue would enhance doctrinal coherence (at least as originally intended). When we can derive a general framework or guiding principle for a constitutional idea from historical sources, but lack documentary evidence of the original intent on a few class of issues, doctrinal coherence is harder to obtain, but still possible—there is evidence that some organizing principle informs the original intent about the idea. Otherwise, we would have been unable to figure out, and find historical sources to support, the general framework initially. However, when an entire notion is hopelessly confused, all original intent can offer is a grab bag of disjointed, and possibly conflicting, answers to discrete issues—the amalgamation of which may have precluded creating a coherent scheme for the entire topic in the first place. This overstates the case, of course, but the history of sovereign immunity is a particularly poor candidate for divining rods. The concept is technical and very slippery, the phrase appears nowhere in the Constitution itself, and the Eleventh Amendment, the only possible textual basis for the concept, bars only suits grounded in diversity. The Court is prone to leave the concept's contours somewhat fuzzy: "The States thus retain 'a residuary and inviolable sovereignty' or the states "retain the dignity, though not the full authority, of sovereignty." Then, of course, there was an interpretation of Article III almost contemporaneous with the framing that held the states surrendered the traditional notion of sovereign immunity, which interpretation was then almost immediately overturned by the Eleventh Amendment. The starting point for modern sovereign immunity jurisprudence is a case, the logic of which is subjected to perennial attack, decided over 100 years after the Constitution was ratified.

Putting that skepticism to one side, a footnote in Alyeska provides a good analysis of the history of fee awards and Fairmont

215. See, e.g., Fletcher, supra note 66 at 1297.
216. Hans v. Louisiana, 134 U.S. 1, 11–12 (1890). Certain constitutional provisions that got off to a late start still have a discernable intent. For example, although it took close to a century and a half for the Court to seriously interpret the First Amendment, the notion that the Framers would disapprove of a congressionally established state church is pretty clear from the text and historical documents. In contrast, the framing generation could not agree about the type of jurisdiction or constitutional provision under which the states could be sued, and the issue whether states could be sued at all nearly caused a constitutional crisis.
Creamery Co. v. Minnesota\textsuperscript{218} provides a good history of taxable costs in its comprehensive survey covering the period from 1860–1927. In *Alyeska*, the Court credited a comment by the United States Code’s Reviser that “a sovereign is not liable for costs unless specific provision for such liability is made by law.”\textsuperscript{219} That statement cuts both ways. On the one hand, it makes immunity from fee awards seem like an incident of sovereignty. That conclusion is buttressed when the structure of the early statutes is considered. They permitted cost-shifting, but specifically excluded attorneys’ fees as costs taxable against the United States.\textsuperscript{220} On the other hand, the statement clearly contemplates the power of Congress to provide for attorneys’ fees. But, the crucial link to an original understanding of the question in this Article is missing. I have found no cases, statutes, or texts from the period of the framing that connect Congress’s power to waive the United States’ immunity from fee awards to Congress’s power to abrogate states’ immunity from the same.\textsuperscript{221} *Fairmont Creamery* comes the closest,\textsuperscript{222} but it identifies practices dating only to 1849, and *Alyeska*’s historical evidence draws a contrast between the taxing of costs to states, which may be a practice that the framers countenanced, and fee awards against states, for which none of the early statutes provided.\textsuperscript{223}

E. Summary

On balance, and without any other clear guidance, I think that the dicta in *Maher*, illuminated by at least one constitutionally indistinguishable practice for which old—if not framing generation—evidence exists, is the best conceptual solution to the problem of attorneys’ fee awards against states after *Seminole Tribe*. I also think that the tortuous path to that conclusion answers more than the narrow question about attorneys’ fees. Cases like *Seminole Tribe*, which upend longstanding and interconnected congressional schemes while reshaping fundamental doctrines, can be more objectionable conceptually than a

\textsuperscript{218} 275 U.S. 70, 77 (1927).
\textsuperscript{219} *Alyeska*, 421 U.S. at 267 n.42.
\textsuperscript{220} See id.
\textsuperscript{221} There is a general rule that cases about the sovereignty of the United States are relevant to the states’ sovereign immunity. California v. Deep Sea Research, Inc., 523 U.S. 491, 506–07 (1998). At most that proves the same immunity enjoyed by the United States devolved onto the states. It still does not address abrogation.
\textsuperscript{222} Most other cases focus on fee awards in litigation between two states. See, e.g., North Dakota v. Minnesota, 263 U.S. 583, 583–84 (1924); Missouri v. Iowa, 48 U.S. (7 How.) 660, 681 (1849). Two-state cases are not relevant to this inquiry because a separate textual abrogation of states’ sovereign immunity from suit applies. See U.S. Const. art. III, § 2; supra note 65 and accompanying text.
\textsuperscript{223} *Alyeska*, 421 U.S. at 266 n.42.
macro-level critique reveals. The shouting match about *Seminole Tribe*’s obvious holding—it significantly curtails congressional power to abrogate the states’ sovereign immunity—looks like it presents, at first glance, two plausible and readily comprehensible schools of thought about which there can be reasonable disagreements on first principles. The consequences at the periphery and on the micro-level reveal that the two positions are not equally balanced, at least as a matter of doctrinal coherence.

VI. FINAL THOUGHTS: STRATEGIC, PRACTICAL, AND CONCEPTUAL

From the above, it is hard to see a clear path out of the conceptual thicket. The considerations that I identify below as practical influences on the outcome of the attorneys’ fee question are a good deal easier to grasp, but, as with most ideological issues, much harder to handle.


The standard trope for a conclusion to an Article about civil rights today goes something like this: The Supreme Court will answer the question reserved in *Maher* by holding that awards of attorneys’ fees are barred by the states’ sovereign immunity when the underlying claims asserted relate to pre-Eleventh Amendment constitutional provisions and statutes. The antipathy of the Rehnquist Court to litigation generally, and to civil rights litigation and its fee-shifting statutes in particular, is not a well-kept secret.

224. I use this term loosely because, as demonstrated throughout the Article, a central tension between pre-Eleventh Amendment causes of action and *Seminole Tribe* is the non-civil-rights character of the claims. It was the channeling of all federal law into a classical civil rights statute that Justice Powell labeled “unprecedented” and ignorant of “the lessons of history, logic, and policy.” *Maine v. Thiboutot*, 448 U.S. 1, 12, 33 (1980) (Powell, J., dissenting). I do not have a hard time considering the *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1300 (W.D. Okla. 2006), plaintiffs’ full faith and credit claim a species of “civil rights” litigation, whether or not brought under the Fourteenth Amendment. Perhaps neither would Justice Powell—he seemed most concerned that the majority was creating causes of action for *every* federal statute, no matter how absurdly unrelated to any concept of civil rights, under a cause of action unquestionably enacted for violations of the classical notion of civil rights. Likewise, my concern is that *Seminole Tribe* may bar fee awards for *every* pre-Eleventh Amendment cause of action. In any event, if *actual* civil rights litigation (equal protection cases and the like) is out of favor, see infra note 225 and accompanying text, there is no reason to believe that pseudo-civil-rights litigation will fare much better.

Andrew Siegel has described the Rehnquist Court’s approach to attorneys’ fees as “paying heed to Congress’s notes while missing its tone.” That tone deafness causes Siegel to conclude disquietingly that “the very same Justices who express unease at implying or imposing judicially constructed remedies are perfectly sanguine about implying or imposing judicially constructed limitations on democratically enacted remedies.” The gnashing of teeth usually ends with an observation that there is not much reason to suspect that the Roberts Court will treat civil rights litigation any differently.

I, for one, am not convinced that fee-shifting will be so unceremoniously cast asunder or that such cynicism is justified. The aftershocks of Seminole Tribe on such seemingly unrelated matters as student loan programs have forced the Court to employ a nuanced reading of the case’s putatively sweeping scope. Even if the ideological undercurrents of Seminole Tribe are unmistakable, the Court has already been clear that the case does not always mean what it says. In Hood, the Court inched away from one disruptive (but foreseeable) consequence of Seminole Tribe. Two years later, the Court reversed gears entirely in Katz, at least for the Bankruptcy Clause. Like many seminal decisions, Seminole Tribe is being pared back. That circumscription of the case and the palpably favorable attitude towards fee shifting in the background cases like Fitzpatrick, Hutto, Maher and Jenkins are important countervailing forces to any general hostility towards civil rights litigation.

B. The Tenth or the Eleventh Amendment?

The proxy battle over the permissibility of congressional regulation of the states qua states through the commerce power also deserves mention. Removing the market incentive to bring suits for injunctive relief, combined with the unavailability of damage awards, makes suits to enforce federal laws other than those enacted under the Section 5 power practically unavailable to many plaintiffs without the

(“Over the last two decades, the Rehnquist Court has handed down a series of decisions that have chipped away at the availability of attorney's fees for civil rights plaintiffs. ... These decisions ... demonstrate both literal and theoretical hostility to litigation.”).

226. Siegel, supra note 225, at 1139.
227. Id. at 1130.
help of advocacy organizations. Congressional regulation of states in all areas other than around classical civil rights would become essentially dead letter, at least under the "private attorneys general" model. This is certainly a coherent, if circuitous, way to approach the availability of attorneys' fees. The result of such an approach, however, would be just as strange as has been that of the Court's proxy battle over the award of damages. Rather than returning to the National League of Cities-era, during which states were given a free hand in their traditional zones of activity, the states would be given a free hand to act contrary to federal law regardless of how avant-garde the activity is, yet any action—traditional or otherwise—that touches on the equal protection and due process provisions of the Fourteenth Amendment would potentially impose both damages and attorneys' fees on the state. Such a result might be consistent with the view that the guarantees of the Fourteenth Amendment are indeed special, and their impact on state sovereign immunity extraordinary, but it would not necessarily be consistent with the view of National League of Cities. Even if half a Tenth Amendment is better than none, this back and forth would be a disjointed method of advancing a coherent vision of federalism.

C. The Conceptual Value of the Problem

Putting aside those musings about the political issues surrounding the Tenth Amendment, the currents of Seminole Tribe, and the attitude towards civil rights litigation, the problems created by a resurgent and robust version of sovereign immunity for the support structure underlying § 1983 litigation, and many other general congressional schemes, have not been adequately addressed by the courts and scholars. The complexities that Seminole Tribe produces at the macro-level of civil rights litigation and sovereign immunity generally—whether conceptually, practically, or as a matter of history—

235. There is no constitutional bar to suits that seek to compel compliance with federal law brought by the federal government against states. See supra note 65 and accompanying text.

236. See supra notes 84–86 and accompanying text.

237. Barring fee awards could also provide a back-door method of revisiting Maine v. Thiboutot, 448 U.S. 1, 23, 34–37 (1980), by disincentivizing only those suits not properly thought of as civil rights actions. Such an attitude would produce a coherent approach to the problem, even if barring fees could not completely remedy any perceived error in Thiboutot.

238. See Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1996 S. Cr. Rev. 1, 62 (after discussing National League of Cities, noting that “[t]wo centuries after the Founding, [this situation] is a curious and unstable place for the last stand of state sovereignty”).

239. See supra section III.C.
have been well developed. As the case grows older, the initial objections have grown somewhat stale—whether as a function of their empirical predictions or the perhaps inevitable decline in the persuasiveness of an exhaustively developed and debated idea. We have begun to take the broad contours of Seminole Tribe's radical view of sovereign immunity for granted. The next wave of scholarship should explore the micro-level consequences of the opinion. For example, if we find that we can live without fee-shifting regimes for pre-Eleventh Amendment causes of action, or that Seminole Tribe does not interfere with them, then today's sovereign immunity revolution might have gotten the federalism balance right. If we find that we cannot, critiques of Seminole Tribe at the macro-level will be enriched as our understanding deepens. At a minimum, rigorous testing of concepts like Edelman's catch-all notion of permissible "ancillary" monetary relief can reveal hidden methodological problems, which in turn provide new ways of thinking about sovereign immunity as a whole.