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Available State Remedies and the Fourteenth Amendment: Comments on Florida Prepaid v. College Savings Bank

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"AVAILABLE STATE REMEDIES" AND THE FOURTEENTH AMENDMENT: COMMENTS ON *FLORIDA PREPAID V. COLLEGE SAVINGS BANK*

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Besides explaining the outcome of the case, a Supreme Court opinion typically contains reasoning that bears on other matters as well. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[1] decided during the Supreme Court's October 1998 Term, the specific point at issue was the scope of Congress's authority under Section 5 of the Fourteenth Amendment to impose liability for damages on state governments. In the Patent Remedy Act, Congress had abrogated the states' sovereign immunity from claims of patent infringement.[2] College Savings Bank argued for the validity of the statute on the grounds that patents are property; that patent infringements are deprivations of property; and that the statute simply and appropriately provides a remedy for deprivations of property without due process of law.[3] The Court agreed that patents are "a species of property,"[4] and that patent infringement could be a deprivation of property. But it rejected the rest of the argument, ruling that "for Congress to invoke section 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or

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1. 119 S. Ct. 2199 (1999).

2. 35 U.S.C. §§ 271(h), 296(a); *see* Pub. L. No. 102-560, Preamble, 106 Stat. 4230 (1993); *see also Florida Prepaid*, 119 S. Ct. at 2203 (explaining the congressional response to *Chew v. California*, 893 F.2d 331 (Fed. Cir. 1990), and similar cases).

3. *See Florida Prepaid*, 119 S. Ct. at 2208.

4. *Id.*

preventing such conduct."[5] In enacting the Patent Remedy Act, Congress failed to meet this standard.

My aim in this Article is not to mount a full-scale inquiry into the Court's reasoning in *Florida Prepaid*, but to examine just one of the arguments it advanced in support of its ruling.[6] While Chief Justice Rehnquist's majority opinion does not clearly separate one factor from another, it contains three distinct strands of reasoning. The Chief Justice began by noting that Congress had "identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."[7] He then pointed out that "Congress . . . barely considered the availability of state remedies for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment."[8] Third, the Patent Remedy Act swept too broadly in that it covered negligent as well as intentional patent infringements; negligent deprivations are not Fourteenth Amendment violations.[9]

For present purposes, I wish to put aside the first and third of these arguments and focus solely on the significance the Court accords to the "availability of state remedies."[10] In addition, I leave aside the question of how one determines whether state remedies are available and adequate,[11] though in practice, ascertaining adequacy may be a thorny problem.[12] My topic is the role of adequate state

5. *Id.* at 2207.

6. Though it contains no discussion of the issues I address here, a useful general introduction to this case may be found in *The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 200, 223-33 (1999).

7. *Florida Prepaid*, 119 S. Ct. at 2207.

8. *Id.* at 2209.

9. *See id.* at 2209-10.

10. *Id.* at 2209.

11. I treat these two terms as synonyms, as does the Court. *See id.* at 2208-09. A state remedy could not be deemed adequate unless it were available, and it could not fairly be considered available unless it were adequate.

12. For example, federal courts (1) would need to examine not only formal state law, but also the actual operation of state law, in order to determine whether a remedy that seems to be available is, in fact, routinely denied in practice; (2) would need to determine just what level of damages meets constitutional requirements, in the event a state places limits on recovery for patent infringement claims that differ from the rules followed in ordinary infringement cases against private parties; (3) may need to distinguish among states, in the event some state legislative and judicial systems behave differently than others; (4) may need to periodically revisit the issue with regard to any given state, if the level of protection afforded by the state varies over time; (5) may

remedies in the law of federal courts. I argue that, in awarding constitutional status to state remedies, *Florida Prepaid* seems to depart significantly from established law, for the rule has been that the Constitution is violated when the state official acts, no matter what state remedies may be available. Yet the opinion is ambiguous, and the Court does not seem to appreciate the implications of its holding. It will almost certainly have to find a way to cabin the principle it has unleashed. An even better solution would be to repudiate *Florida Prepaid*'s version of the available state remedies argument.

Part I describes the usual role of adequate state remedies in federal courts law—to serve as the means by which statutory and common law rules cut off access to federal courts for litigation involving constitutional questions. State remedies ordinarily have no bearing on whether the plaintiff states a constitutional claim in the first place. A central principle of constitutional law, established in *Home Telephone & Telegraph Co. v. City of Los Angeles*,[13] is that the constitutional violation is complete when officials act, even if their conduct is not authorized by state law.[14] Part II shows that the ambiguous and confusing opinion in *Florida Prepaid* may be at odds with the *Home Telephone* principle in that the *Florida Prepaid* Court seems to treat the availability of state remedies as a ground for finding that the plaintiff has not even stated a constitutional claim. Assuming this to be so, Part III suggests ways in which the *Florida Prepaid* principle may be cabined, so as to minimize the extent of the conflict with *Home Telephone*. In Part IV I turn to the merits of arguing that even if the ruling can be confined to a narrow class of cases, the Court was wrong to treat the availability of state remedies as a ground for denying the existence of a constitutional claim.

I. STATE REMEDIES AND THE FOURTEENTH AMENDMENT

A central topic in federal courts law is the principle of federalism—the distribution of power between federal and state courts,

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need to consider the adequacy of the state remedy on a case-by-case basis, as any particular litigant would seem to be entitled to make the *constitutional* argument that the state remedy received was inadequate.

13. 227 U.S. 278 (1913). *See* RICHARD FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1108-11 (4th ed. 1996).

14. *See Home Telephone*, 227 U.S. at 285-89.

especially in constitutional cases. The issue arises in a variety of contexts and has given rise to a complex body of constitutional, statutory, and common law rules. My concern here is with one narrow but crucial aspect of the general problem. I address the question whether there are constitutional objections to federal jurisdiction, as distinguished from statutory or common law grounds for requiring recourse to state court. In order to isolate the issue I seek to explore, it will be helpful to separate it from other federal courts doctrines with which it shares some superficially similar features.

Examples of statutory and judge-made rules requiring recourse to state remedies are common in federal courts law. Sometimes, as in the Johnson Act,[15] the Tax Injunction Act,[16] and the Prison Litigation Reform Act,[17] Congress explicitly provides that litigants must pursue adequate state remedies rather than taking their claims to federal court. Judge-made abstention doctrines provide that litigants must present their claims to state courts before federal courts will act.[18] There is, however, a crucial difference between these statutory and judge-made rules of deference and the argument that no constitutional violation has taken place until the state courts have ratified the challenged conduct.

Some early cases, notably *Barney v. City of New York*,[19] seem to adopt the latter view, distinguishing between the state and its instrumentalities and officers. Though the reasoning of these cases is "less than clear,"[20] they may be read as holding that the state does not commit a constitutional violation until the highest court of the state has ratified the action that someone seeks to challenge on constitutional grounds. Under this view, judicial review of state action would ordinarily take place in the state courts rather than the federal courts. One could not bring a suit in federal court to remedy the

15. 28 U.S.C. § 1342 (1994).
16. *Id.* § 1341.
17. 42 U.S.C § 1997e(a) (1994).
18. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 555-61 (1985). *See, e.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 718-23 (1996).
19. 193 U.S. 430 (1904).
20. *See* ROBERT N. CLINTON ET AL., FEDERAL COURTS 828 (1996); *see also* FALLON ET AL., *supra* note 13, at 1108-09 (discussing the *Barney* case and its aftermath).

unconstitutional act of a state officer because no constitutional violation takes place until the state's highest court has upheld the action.

In *Home Telephone & Telegraph Co. v. City of Los Angeles*,[21] the Court squarely rejected the proposition that there is no Fourteenth Amendment violation in the event state remedies are available. Home Telephone challenged a Los Angeles ordinance that fixed telephone rates at a level that displeased the company, complaining that the rates were "so unreasonably low that their enforcement would bring about the confiscation of the property . . . and hence the ordinance was repugnant to the due process clause of the Fourteenth Amendment."[22] Relying on *Barney* and similar cases, the city argued that, whatever the merits of its rate order, no constitutional violation would take place until the California courts upheld the ordinance.[23] But the Supreme Court sided with Home Telephone, declaring that "the provisions of the Amendment . . . are generic in their terms, are addressed, of course, to the states, but also to every person, whether natural or juridical, who is the repository of state power."[24] Even if state law forbids the official's act, "the Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment."[25] Driving the point home, the Court explicitly disavowed *Barney*: "[I]t would be our plain duty to qualify and restrict the *Barney Case* in so far as it might be found to conflict with the rule here applied."[26]

II. HOW *FLORIDA PREPAID* THREATENS *HOME TELEPHONE*

Do not underestimate what is at stake in the choice between *Home Telephone* and *Barney*. By ruling that the constitutional violation is complete when the official acts, even if state remedies are available to the person injured, *Home Telephone* established a key premise of modern constitutional litigation. Over the course of the nine decades since that case was handed down, most constitutional

21. 227 U.S. 278, (1913).
22. *Id.* at 281.
23. *See id.* at 294.
24. *Id.* at 286.
25. *Id.* at 288.
26. *Id.* at 294.

oversight of state and local governments, including school desegregation, reapportionment, voting rights, and prison reform litigation, has taken place in the federal courts. Professor Burt Neuborne has argued that the vigor with which federal courts have enforced Supreme Court decrees reflects the "elan" and "sense of mission" instilled by the "elite tradition" of which federal judges are a part.[27] Absent *Home Telephone*, the federal courts would rarely be authorized to hear federal constitutional challenges to state action.

The modern Supreme Court has never explicitly expressed any misgivings about *Home Telephone*. Yet some of the Court's reasoning in *Florida Prepaid* is hard to square with the earlier case. The Chief Justice states that "a State's infringement of a patent . . . does not by itself violate the Constitution."[28] Rather, the availability of a state remedy negates the College Savings Bank's Fourteenth Amendment claim that it was deprived of property without due process of law: "[O]nly where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result."[29] On its face this passage seems inconsistent with the *Home Telephone* rule, which provides that the constitutional violation is complete when the official acts. But this whole area of the law is rife with ambiguity and confusion, and the opinion may be read more narrowly. In this Part, I attempt to identify the issues that need to be clarified.

At the outset, it is necessary to distinguish between two varieties of due process rights, procedural and substantive.[30] Procedural due process claims arise in situations in which it is conceded that the government may properly deprive the plaintiff of life, liberty, or property, provided that it provides him or her with a fair hearing. Apart from the criminal process, procedural due process claims arise mainly in connection with government benefits and government jobs, some of which are considered "property" for purposes of the Fourteenth Amendment. An employee who is fired under a cloud has

27. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124 (1977).

28. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2208 (1999).

29. *Id.*

30. *See* Zinermon v. Burch, 494 U.S. 113, 125-26 (1990).

been deprived of property. A person confined by the state in a mental hospital or similar facility, even if there is a good reason for the confinement, also incurs a loss of liberty. Anyone suffering such injuries at the hands of government is entitled to due process. What these types of litigation have in common is that the government, on a proper showing, commits no constitutional violation when it locks up or executes persons convicted of crimes, dismisses employees, and incarcerates mentally ill individuals who pose a danger to themselves or others. Even so, it must, for the sake of preventing errors and giving people a chance to be heard, accord procedural protections to the persons who are to be deprived of life, liberty, or property, with the nature and scope of the protections varying according to the context.[31]

The distinctive feature of substantive due process is that some government actions that deprive individuals of life, liberty, or property are forbidden altogether, no matter what procedural safeguards may be in place. Thus, *Home Telephone* involved a substantive due process claim. Home Telephone did not argue that the process by which the rates were set was defective. It contended that the rates were simply too low to meet the substantive requirements of the Due Process Clause, which, at the time of the case in the heyday of economic due process, included strict limits on state economic regulation.[32] *Roe v. Wade*,[33] which on Fourteenth Amendment grounds bars the states from criminalizing most abortions, is another example of substantive due process. So, too, is the Court's ruling in *County of Sacramento v. Lewis*[34] that injured persons may recover damages from government officers whose behavior is deliberate or so egregious that it "shocks the conscience."[35] But a mere common law tort does not amount to a constitutional violation just because it is a violation of state law.[36] As with procedural due process, the precise

31. For a general introduction to procedural due process, see GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 615-27 (13th ed. 1997).

32. *See* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 281 (1913).

33. 410 U.S. 113 (1973).

34. 523 U.S. 833 (1998).

35. *Id.* at 846.

36. *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986) (negligence); Paul v. Davis, 424 U.S. 693 (1976) (defamation).

contours of this right depend on the circumstances. For example, officers are held to a higher standard in dealing with persons committed to their custody than in their interactions with ordinary citizens.[37]

A problem with the *Florida Prepaid* opinion is that one cannot be sure what target the Court had in mind in raising the "availability of state remedies" as an answer to the plaintiff's claim.[38] For the sake of setting out the problem the case presents with as much clarity as possible, I put aside for now the procedural due process reading of *Florida Prepaid* and will return to it a bit later. Initially, let us examine the implications of a substantive due process interpretation of the decision. Consider the Court's assertion in *Florida Prepaid* that "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result."[39] On the premise that by "due process" the Court means to refer to substantive due process, there is no way to reconcile *Florida Prepaid* with *Home Telephone*.[40] If, as *Home Telephone* holds, the substantive due process violation is complete when the official acts, without regard to state remedies, then it does not make any difference whether there are adequate state remedies. On the other hand, if the availability of state remedies means that there is no substantive due process violation, then it is hard to see how *Home Telephone* could still be good law.

Florida Prepaid's reference to state remedies may be just a stray comment in an isolated case. In that event, it could be dismissed as the product of haste and confusion of a court struggling to finish its work. And perhaps that is all it is. *Florida Prepaid* was decided at the end of the 1998 Term, and this area of constitutional law is afflicted by ambiguous and contradictory reasoning. It is a dark wood in which law clerks, and perhaps even Supreme Court Justices, could easily lose their way. But the reality may be more complicated than that, for this is not the first time the modern Court has cast doubt on

37. *See Lewis*, 523 U.S. at 851-53.

38. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2209 (1999).

39. *Id.* at 2208.

40. *Cf.* RICHARD FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 105 (Supp. 1999) (raising the issue, but not directly answering it).

Home Telephone. The *Florida Prepaid* opinion cites authority for the proposition it advances. The issue of what the Court in *Florida Prepaid* really meant to do cannot be put to rest without examining the cases on which the Court relies.

As support for the proposition that "a deprivation of property without due process [could] result"[41] only where "the State provides no remedy, or only inadequate remedies, to injured patent owners,"[42] the Court cited *Parratt v. Taylor*[43] and *Hudson v. Palmer.*[44] In *Parratt*, Nebraska prison officers had lost some property belonging to an inmate; the inmate then sued the officers for depriving him of property without due process of law.[45] The Court held that he had not stated a good constitutional claim, and the key to its reasoning was the distinction between the "deprivation" and the "due process" components of the Due Process Clause.[46] It is not enough, the Court said, to establish that officers have deprived the plaintiff of property. One must also show that the deprivation took place "without due process of law."[47] Sometimes a pre-deprivation hearing is required. When the act is "random and unauthorized,"[48] however, a pre-deprivation hearing may be impracticable, and a post-deprivation hearing will suffice for due process.[49] The loss of the plaintiff's property here fell into the latter category. Accordingly, if state remedies are available for the loss of property suffered at the hands of state officials, as they were in Nebraska, the plaintiff cannot allege a constitutional violation simply by charging that he was deprived of property by state officials.

Hudson added little to the principle established in *Parratt.* The Court merely applied *Parratt* to an intentional deprivation of property, reasoning that even an intentional act by a prison guard could come within the "random and unauthorized" category.[50]

41. *Florida Prepaid*, 119 S. Ct. at 2208.
42. *Id.*
43. 451 U.S. 527 (1981).
44. 468 U.S. 517 (1984).
45. *See Paratt*, 451 U.S. at 529.
46. *Id.* at 536-37.
47. *Id.* at 537.
48. *Id.* at 541.
49. *See id.*
50. *See* Hudson v. Palmer, 468 U.S. 527, 533 (1981).

These decisions, by ruling that there is no due process violation in the event state remedies are available, do indeed support the holding in *Florida Prepaid.* Like the *Florida Prepaid* opinion, the Court in *Parratt* and *Hudson* made no reference to *Home Telephone* or *Barney* or any of the other early cases bearing on whether the availability of state remedies means that an official has not committed a violation of substantive due process. Yet *Parratt*'s and *Hudson*'s bifurcation between "deprivation" and "without due process of law" are consistent with *Barney* and at odds with *Home Telephone.*[51]

In spite of all this, there may be a way to reconcile *Florida Prepaid* with *Home Telephone.* In order to harmonize the two cases, we must reject the substantive due process account of *Florida Prepaid* in favor of a procedural due process interpretation. Both the *Florida Prepaid* opinion and the case law on which it relied furnish grounds for reading *Florida Prepaid* in this way. After *Parratt* and *Hudson*, the court in *Zinermon v. Burch*[52] ruled that the *Parratt-Hudson* doctrine does not apply to substantive due process claims, only to procedural ones.[53] With regard to substantive claims, the Court in *Zinermon* explained, "the constitutional violation actionable under section 1983 is complete when the wrongful action is taken."[54] But the *Zinermon* plaintiff, a man who had been confined in a mental hospital, relied on procedural due process.[55] As the Court read his complaint, he conceded that he could lawfully be confined as a substantive matter, but asserted that he was deprived of liberty without the procedural safeguards required by the Fourteenth Amendment.[56] In such a case, the Court held, "[t]he constitutional violation . . . is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process."[57]

51. *See* Henry P. Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment,* 86 COLUM. L. REV. 979, 990-91 (1986); *see also* Larry Alexander, *Constitutional Torts, The Supreme Court, and the Law of Noncontradiction: An Essay on* Zinermon v. Burch, 87 NW. U. L. REV. 576, 581-83 (1993) (discussing the Court's endorsement of two lines of precedent and the price paid in judicial craft by the Court's failure to acknowledge and resolve this doctrinal inconsistency).

52. 494 U.S. 113 (1990).

53. *See id.* at 124-26.

54. *Id.* at 125.

55. *See id.* at 117.

56. *See id.* at 122-24.

57. *Id.* at 126.

Florida Prepaid quotes *Zinermon* for this very point.[58] Then, in the very next paragraph, the Court cites *Parratt* and *Hudson* for the proposition that a due process violation is not complete unless "the State provides no remedy, or only inadequate remedies."[59] One may infer from the Court's reference to *Zinermon* that the later references to *Parratt* and *Hudson* and state remedies have to do with procedural due process. In this view, *Florida Prepaid* is merely an application of the *Zinermon* rule.

Unfortunately, the procedural due process reading of *Florida Prepaid* does not furnish a wholly satisfactory resolution of the problem presented by the Court's reference to state remedies. The problem with it is that the nature of the underlying claim in *Florida Prepaid* seems to be substantive rather than procedural. The plaintiff's argument was not that the state, pursuing its regulatory and other functions, had authority to infringe its patent so long as it had in place procedural safeguards against error. Nor did the state claim any such power. On the contrary, College Savings Bank asserted a substantive right. It contended that the deliberate infringement of its patent was a deprivation of property without due process of law, without regard to any procedural protections that may be available. Given the substantive nature of College Savings Bank's claim, one could hardly be faulted for reckoning that, when the Court rejected the claim, it implicitly ruled that substantive due process is not offended in the event state remedies are available.

It appears that one can reconcile *Florida Prepaid* with *Home Telephone* only by willfully shutting one's eyes to the substantive nature of the plaintiff's claim in *Florida Prepaid.* If so, there is Supreme Court precedent for that, too. Like the patent infringement alleged in *Florida Prepaid,* the underlying claims in *Parratt* and *Hudson* also seem to be substantive rather than procedural. The inmates in those cases did not proceed from the premise that it may be substantively appropriate to lose or destroy their property, so long as

58. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2208 (1999) ("'[I]n procedural due process claims, the deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.'") (emphasis omitted in the *Florida Prepaid* opinion) (quoting *Zinermon,* 494 U.S. at 125).

59. *Id.* at 2208.

proper procedures were followed. They asserted a substantive right to the property and demanded compensation for its loss.[60] By brute force, the Court in *Zinermon* treated those cases as though they raised procedural due process issues, so as to limit the *Parratt* doctrine in a way that did not threaten *Home Telephone*. The downside of that strategy is that *Parratt* and *Hudson* remained unburied, the living dead, lying in wait for Chief Justice Rehnquist to revive them in *Florida Prepaid* as grounds for denying constitutional claims where state remedies are available, and to once again cast a shadow on *Home Telephone*.

III. LIMITING THE REACH OF *FLORIDA PREPAID*

A procedural due process reading of *Florida Prepaid*'s state remedies prong presents formidable analytical difficulties, yet it would avoid conflict with *Home Telephone*. Suppose, however, that the Court really does mean to treat the constitutional issue raised by a patent owner as a substantive due process claim, and really does mean to make an exception to the *Home Telephone* principle, albeit without explicitly discussing *Home Telephone*. If this is the right way to read *Florida Prepaid*, then further questions arise: Does the logic of *Florida Prepaid* wholly subvert the *Home Telephone* rule? Does *Florida Prepaid* merely carve out a limited exception to the general rule? What is the nature and scope of that exception? Since the Court recognizes no conflict between the two cases, it does not address these issues at all. In this Part, I take it as a given that *Home Telephone* will survive more or less intact, no matter what the logic may be of *Florida Prepaid*. Consequently, when and if the Court concludes that the *Florida Prepaid* opinion, as written, is badly conceived, it will have to return to the issues addressed in the case and find a way to restrict the inroads the case makes on *Home Telephone*.

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60. *See, e.g.*, CLINTON ET AL., *supra* note 20, at 885-86; Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 341-42 (1993); Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 222-23 (1984). The viability of their substantive claims is a separate issue. In *Daniels v. Williams*, 474 U.S. 327 (1986), decided several years after *Parratt*, the Court held that mere negligence is not sufficiently serious to support a substantive due process claim. After that case, a plaintiff advancing a claim like the one at issue in *Parrat* would lose on the merits.

This Part considers some means by which *Florida Prepaid* may be checked, and concludes that the best way to cabin it is to ignore much of Chief Justice Rehnquist's reasoning and to focus instead on what is left unsaid in the opinion.

A. Treating Property as a Special Case

The substantive constitutional claim in *Florida Prepaid* was for a deprivation of property without due process of law. One might distinguish between property, on the one hand, and life and liberty on the other, such that the availability of state remedies would foreclose the constitutional claim in property, but not liberty cases. Notice, too, that if *Florida Prepaid* indeed extends to "liberty" as well as "property" interests, it seems to cover claims derived from the Bill of Rights and applied to the states through "incorporation" into the Due Process Clause of the Fourteenth Amendment, such as free speech, unreasonable search and seizure, and cruel and unusual punishment.[61] Confining the available state remedies principle to property cases would preserve federal jurisdiction over all of these types of claims.

The problem with drawing such a distinction is that, however helpful it may be, there is little doctrinal support for it. Though some lower courts after *Parratt* had distinguished liberty from property, in *Zinermon* the Court refused to do so for procedural due process cases.[62] Moreover, there is no apparent basis for such a distinction in a substantive due process analysis. The point of the available state remedies prong of *Florida Prepaid* seems to be that a substantive due process claim has two distinct and independent components: (1) a deprivation of a constitutionally protected interest, i.e., of life,

61. *See* Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968) (citing various cases).

62. The ground for such a distinction could be that a loss of liberty is, in general, a more serious matter than a loss of property because "losses of property can more readily be made good by a remedy after-the-fact, whereas losses of liberty interests are somehow more irreparable." CLINTON ET AL., *supra* note 20, at 887 (expressing skepticism as to whether this supposed difference supports access to federal courts rather than "some kind of *pre*deprivation hearing when liberty . . . is involved"). The Court in *Zinermon*, a procedural due process case, found no "support in precedent for a categorical distinction between a deprivation of liberty and one of property." Zinermon v. Burch, 494 U.S. 113, 132 (1990).

liberty, or property; and (2) an absence of state remedies. So far as the Court's reasoning in *Florida Prepaid* is concerned, the nature of the constitutionally protected interest has no bearing on whether the availability of state remedies will thwart the constitutional claim.[63]

B. Congress's Section 5 Power

Recall that the point directly at issue in *Florida Prepaid* is not the viability of *Home Telephone*, but the scope of Congress's power under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity from suits for damages. It may be that *Florida Prepaid*'s rationale that *no constitutional claim exists where state remedies are available* only applies in Section 5 cases, leaving *Home Telephone* as the rule for other contexts.[64] Support for this view of the case comes from the long-established distinction between suits brought against state governments for damages and suits brought against state officers for prospective relief. Despite state sovereign immunity, persons seeking to challenge state action may bring suits for prospective relief under the principle of *Ex parte Young*,[65] in which the Court ruled that an official who violates the Constitution is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[66] Furthermore, *Ex parte Young* suits may be brought in federal court even when state remedies are available.[67] Nothing in the *Florida Prepaid* opinion suggests that this cause of action is no longer viable just because Congress, in attempting to abrogate state sovereign immunity, fails to pass legislation that meets the Court's test for valid Section 5 legislation. It appears, then, that there is a constitutional violation for

63. None of this is intended to deny the possibility that a distinction of this kind may be viable. It remains possible that the Court will, at some point in the future, assert that there is such a connection and put forth a cogent reason for it. In this regard, note that the Court has, with some textual justification, already carved out a special rule for "takings" cases. *See* discussion *infra* Part III.C. One could plausibly argue that every substantive due process "property" claim ought to be litigated as a "takings" claim.

64. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2208 (1999).

65. 209 U.S. 123 (1908).

66. *Id.* at 160.

67. This is one of the implications of *Home Telephone*. *See* CLINTON ET AL., *supra* note 20, at 1250.

lawsuits against the officer for prospective relief, but not lawsuits against the state government for damages.

One objection to this approach is that it concedes too much authority to *Florida Prepaid* because Congress's Section 5 power ought to be broad enough to authorize federal damage remedies even when a state cause of action is available. This goes to the merits of *Florida Prepaid* and will be discussed further in Part IV. Another objection to trying to confine *Florida Prepaid* in this way is the incongruity of treating the same set of circumstances as a constitutional violation for one purpose but not another. Yet this would not be the first instance in which *Home Telephone* is part of such a juggling act. Compare the rule in *Home Telephone*—that the Fourteenth Amendment violation is complete when the official acts, even if state law does not authorize the action—with the principle of *Ex parte Young*—that "the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity."[68] The Court has explained *Ex parte Young*, and its "'well-recognized irony' that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment,"[69] as a "fiction"[70] that "has been accepted as necessary to permit the federal courts to vindicate federal rights . . . ."[71] At the same time, the Court has limited the *Ex parte Young* principle to prospective relief, "recogniz[ing] . . . that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States."[72] If the Court is untroubled by the liberal use of fictions, it could defend such

68. *Ex parte Young*, 209 U.S. at 159; *see also* CLINTON ET AL., *supra* note 20, at 1101; RICHARD FALLON ET AL., *supra* note 13, at 1108. It is noteworthy that in *Home Telephone* the loser cited *Ex parte Young* in support of its position. *See* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 280 (1913).

69. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (citation omitted).

70. *Id.*

71. *Id.* Accordingly, the Court has refused to extend the *Young* doctrine to efforts to obtain prospective relief on *state* grounds, for in such circumstances the federal relief would not "vindicate the supreme authority of federal law." *Id.* at 106.

72. *Id.* at 105.

a distinction between the Section 5 issue and prospective relief in the same way.

C. Takings Law

There is a way to keep *Florida Prepaid* from overrunning the whole law of constitutional remedies without drawing arbitrary distinctions between liberty and property or prospective and retrospective relief, and without making special rules that unduly restrict Congress's Section 5 authority to enforce the Fourteenth Amendment. The Court could have avoided the broad issue of congressional power to enforce the Due Process Clause by adjudicating the case under the Takings Clause, which obliges governments to pay just compensation when they take private property for public use. Recall that College Savings Bank claimed that Florida had taken its property when the state deliberately infringed its patent, just as if the state had appropriated real property belonging to the bank. In advancing this theory, College Savings Bank stood on solid ground. The Court has long recognized that patents are "a species of property"[73] and that government interference with patents and other intellectual property may constitute a taking of that property for which just compensation must be paid.[74]

Though Chief Justice Rehnquist restricted his Section 5 analysis to the issue of whether the statute was an appropriate means of remedying violations of the Due Process Clause, the outcome of *Florida Prepaid* may be easier to justify by conceiving of the case as a takings problem, rather than by putting it in the due process domain. In the takings context, the Supreme Court has already carved out a narrow exception to *Home Telephone*. The Takings Clause does not forbid all takings of property, but only those effected "without just compensation."[75] Relying on this language, the Court held in *Williamson County Regional Planning Commission v. Hamilton Bank*[76]

73. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2208 (1999).

74. *See* Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After* Seminole Tribe*: The Eleventh Amendment and Other Immunity Doctrines*, 55 WASH. & LEE L. REV. 849, 864-73 (1998).

75. U.S. CONST. amend. V.

76. 473 U.S. 172 (1985).

that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[77] Beginning from this premise, the *Florida Prepaid* Court could have held that when state remedies are available to provide just compensation, Congress lacks grounds for authorizing access to federal court.

A crucial premise of this theory of the case is that the infringement claim should be decided under takings principles, rather than general due process law. The authority for this premise comes from *Graham v. Connor*,[78] in which the issue was whether the police were liable for using excessive force in arresting a suspect. Relying on earlier cases that established that personal security against physical injury is an aspect of Fourteenth Amendment "liberty," Graham advanced a substantive due process theory, charging that the officers' use of force deprived him of liberty without due process of law. The Court ruled that "such claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard."[79] Writing for the Court, Chief Justice Rehnquist explained the preference for a Fourth Amendment analysis: "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."[80]

Cases after *Graham* have reiterated this presumption against substantive due process.[81] In the context of government appropriations of private property for its own use, the Takings Clause is the explicit textual source of constitutional protection. One implication of putting substantive due process in the category of disfavored constitutional arguments and presumptively preferring "specific

77. *Id.* at 195.
78. 490 U.S. 386 (1989).
79. *Id.* at 388.
80. *Id.* at 395.
81. *See* Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion); Collins v. City of Harker Heights, 503 U.S. 115, 125-26 (1992); *see also* County of Sacramento v. Lewis, 523 U.S. 833, 842-44 (1998) (endorsing the maxim, but finding it inapplicable to this case).

constitutional standard[s],"[82] is that takings law ought to be the appropriate category for patent infringement. Treating it as such supplies a ready-made basis for recognizing a narrow, context-specific exception to *Home Telephone*. Assuming the Court is wedded to the outcome of *Florida Prepaid*, it could do worse than to reconstruct the ruling along these lines. In this way, simply by insisting that patent infringement claims be litigated under the Takings Clause, the Court could have put patent infringement within the pre-existing exception to *Home Telephone* for takings, thereby avoiding the problem of reconciling *Home Telephone* with *Florida Prepaid*'s seemingly unbounded "availability of state remedies" exception to substantive due process.[83]

IV. STATE REMEDIES, FEDERAL COURTS LAW, AND THE CONSTITUTION

The discussion in Part III of ways in which *Florida Prepaid* can be reconciled with *Home Telephone* leaves open the question of whether *Florida Prepaid* is correctly decided on the merits. In my view, the Court is simply wrong, however narrow the holding may be. In this Part, I contend that contrary to *Florida Prepaid*, the availability of state remedies should have no weight at all as an argument against the existence of a constitutional right.[84] Instead, the

82. *Graham*, 490 U.S. at 394.

83. The Court explained its refusal to treat the Patent Remedy Act as an effort to enforce the Takings Clause by observing that Congress did not rely on that clause in enacting the legislation:

> Since Congress was so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment, we think this omission precludes consideration of the Just Compensation Clause as a basis for the Patent Remedy Act.

Florida Prepaid, 119 S. Ct. at 2208 n.7. However, the grounds for the statute are irrelevant to the theory of the case that is advanced in the text. The underlying patent infringement claim should be treated as a takings issue, and rejected on the authority of *Williamson County*, unless the plaintiff can show that state remedies are not available. Whatever grounds the statute rests on, it cannot be used to enforce an underlying infringement claim that lacks constitutional status. In any event, there is ample support for the view that the Court should consider all possible grounds on which a statute may be upheld, and not just those that Congress identifies. *See* Heald & Wells, *supra* note 74, at 893.

84. The point here is not that state remedies ought to be constitutionally irrelevant. The absence or inadequacy of state remedies is actually a compelling

availability of state remedies is a factor that is appropriately considered by Congress in enacting jurisdictional statutes and by the Supreme Court in making judge-made rules limiting access to federal court.

The problem with according constitutional status to the availability of state remedies is not that state remedies are irrelevant to whether litigants should have access to federal court. On the contrary, the fact that state remedies are adequate is a valid argument against federal jurisdiction.[85] The flaw in *Florida Prepaid* is that the Court elevates "available state remedies" from a policy consideration to a constitutional barrier. There are powerful countervailing arguments in favor of access to federal court, based mainly on the disparity between federal and state judges. In brief, federal judges are, generally speaking, likely to be more talented than state judges, to have greater expertise than state judges in adjudicating federal issues, and to be more sympathetic to federal claims than state judges.[86] While I do not believe that this disparity gives anyone a constitutional right to litigate in federal court, it is a sound basis for statutory and judge-made rules that permit federal adjudication of constitutional claims, even if state remedies are available.

In addition, the strength of the adequate state remedies argument varies significantly among the variety of procedural and remedial contexts in which substantive federal law issues may arise. These contextual features can be, and are, taken into account by Congress or by judicial rule-making. Examples include: (1) the existence of a pending state proceeding in which the federal issue may be raised, and the value of avoiding disruption of that proceeding and duplication of effort, which underlies *Younger* abstention;[87] (2) the presence, in a case where *Pullman* abstention is appropriate, of both state and federal issues, in a case in which state law is uncertain and its

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argument in favor of a constitutional right of access to federal court. *See, e.g.*, Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 101 (1998). The argument is that the converse of this proposition is not true. While inadequacy may be constitutionally decisive, the adequacy of state remedies should not cut off a constitutional claim.

85. *See* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 611-22 (1981).

86. *See* Wells, *supra* note 84, at 108-09.

87. *See* Steffel v. Thompson, 415 U.S. 452, 462 (1974); Younger v. Harris, 401 U.S. 37 (1971).

resolution may enable the court to avoid a sensitive constitutional issue;[88] (3) the application of general principles of res judicata and collateral estoppel, in cases where state courts have already ruled, under the principle of *Allen v. McCurry*;[89] (4) the need, reflected in the exhaustion rule in habeas corpus, to shield the integrity of state criminal processes from federal court interference;[90] and (5) the minimization of the burden on the federal courts of matters that can be handled effectively at the local level.[91] It is entirely appropriate for Congress and the Court to take such considerations into account as grounds for context-specific limits on access to federal court. But the viability of such arguments for deference to state remedies lends no support at all to the constitutional rule of *Florida Prepaid*, which pays no attention to the remedial and procedural posture in which the substantive issues are presented and which Congress cannot modify. This charge would remain valid even if *Florida Prepaid* were cabined in the ways suggested in Part III, though *Florida Prepaid* would do less damage to the traditional role of federal courts in enforcing federal law, and therefore would be less objectionable, if it were construed narrowly rather than broadly.

In order to justify a constitutional rule of deference, one must put aside these narrow policies and articulate a far more general principle of deference to state remedies. The implicit premise of *Florida Prepaid*'s availability of state remedies prong seems to be that in our federal system, the balance of judicial power should favor state over federal courts in cases where litigants seek to strike down state law on federal grounds. To borrow Justice Frankfurter's formulation of the argument, "due regard for the natural sensitiveness of the states and for the appropriate responsibility of state courts to correct the action of lower state courts and state officials"[92] requires, *as*

88. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

89. 449 U.S. 90 (1980).

90. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 518 (1982) (detailing the need to minimize friction between state and federal governments by allowing the state to hear violations of "prisoners' federal rights")

91. *See* Wyatt v. Leonard, 193 F.3d 876, 878-79 (6th Cir. 1999) (discussing the purposes served by the exhaustion requirement of the Prison Litigation Reform Act).

92. Snowden v. Hughes, 321 U.S. 1, 16 (1944) (Frankfurter, J., concurring); *see also* FALLON ET AL., *supra* note 13, at 1109-10 (discussing Justice Frankfurter's attempt to resuscitate the Barney doctrine).

a matter of constitutional law, that the state courts have the primary responsibility for adjudicating federal challenges to state action, so long as they provide adequate remedies.

The point of the italicized phrase in the preceding sentence is to stress that the premise of *Florida Prepaid* is not merely that constitutional litigation ought to take place in the state courts. It is that this proposition has constitutional stature and, therefore, cannot be modified by Congress. Compare this premise with the traditional understanding of congressional power over federal jurisdiction. Under its broad Article III power over the jurisdiction of lower federal courts, Congress may cut off access to those courts and channel constitutional litigation to the state courts, whether for the reasons suggested by Justice Frankfurter or to lessen the burden of the federal judiciary or merely because it prefers the way state courts resolve these issues. The point is that these decisions about allocating decision-making between federal and state courts are for Congress to make.[93] Though scholars quarrel about the details, there is a broad judicial and scholarly consensus on the general principle of congressional control.

By striking down an effort by Congress to broaden access to federal courts for constitutional claimants, *Florida Prepaid* poses a radical challenge to the Court's solidly established doctrine on congressional control over jurisdiction. In my view, the established doctrine is correct and *Florida Prepaid* is wrong. As a matter of constitutional structure, Congress is well-suited to make decisions about the distribution of judicial power between the federal and state courts. Members of Congress are elected from the states, and therefore must be sensitive to local concerns. At the same time, no one parochial interest can easily prevail in Congress because any particular interest must compete with other values. It may be that protecting state governments from efforts by Congress to override their autonomy is a good reason for the Court to step in to protect the states in some circumstances. But when the issue is as it was in *Florida Prepaid*—the enforcement of Fourteenth Amendment

93. *See* Michael Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465, 476 (1991). At the subconstitutional level of federal common law rules, the Supreme Court also appropriately makes law on these matters. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 555-61 (1985).

rights—the case for judicial intervention to shield the states is especially weak. The traditional role of the judiciary is to vindicate individual rights against the states, not to save the states from congressional efforts to better enforce individual rights.[94]

94. The arguments advanced in this paragraph are further developed in Michael Wells, *Suing States for Money: Constitutional Remedies After* Alden *and* Florida Prepaid, RUTGERS L.J. (forthcoming 2000).