



User Name: David Skover

Date and Time: 04/09/2014 3:53 PM EDT

Job Number: 9264965

Document(1)

1. ARTICLE:ELEVENTH AMENDMENT SCHIZOPHRENIA, 75 Notre Dame L. Rev. 859

Client/Matter: -None-

ARTICLE:ELEVENTH AMENDMENT SCHIZOPHRENIA

March, 2000

Reporter: 75 Notre Dame L. Rev. 859

Length: 26112 words

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LexisNexis Summary

... Running through the opinions of the Justices who comprise the current Supreme Court majority on Eleventh Amendment immunity have been two distinct and conflicting analytical strains. ... Presumably, an abrogation of state sovereign immunity is not "genuinely necessary" to prevent future violations of federal law if the alternative mechanisms left open by the Eleventh Amendment are adequate. ... Relying in part on the habeas cases, the Court in *Ex parte Young* held that sovereign immunity does not bar a suit against a state official seeking prospective relief. ... I consider whether, in light of current doctrine, these mechanisms are indeed adequate to the task of assuring compliance with federal law, and relatedly, whether this regime differs from a regime without state sovereign immunity in anything other than form. ... Constitutionalization of official immunity thus seems to follow from the court's holding in *Seminole Tribe* and *Alden* that Congress lacks the power to abrogate state sovereign immunity under Article I, combined with its refashioning of official immunity as a doctrine designed to achieve optimal compliance with federal law. ... In the absence of abrogation, the supremacy of federal law would be protected by the availability of suits by the federal government, private suits for prospective relief, and private suits seeking damages from officials who have violated clearly established federal law. ...

Text

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Introduction

Running through the opinions of the Justices who comprise the current Supreme Court majority on Eleventh Amendment immunity have been two distinct and conflicting analytical strains.¹ One strain, which I shall call the "supremacy" strain, has stressed the practical insignificance of Eleventh Amendment immunity. The decisions in this strain recognize that the states' immunity from suit does not absolve them from complying with federal law, and they acknowledge the need for judicial remedies to ensure that the states comply, but they insist that state sovereign immunity does not impede that goal. This view is reflected in the portions of the Court's opinions that have addressed the argument made forcefully by commentators and by dissenting Justices that the Amendment is an anachronistic abomination that frustrates the effective enforcement of the federal obligations of the states and thus the rule of law. "Undoubtedly," the majority has responded, "the Constitution envisions the necessary judicial means

¹ I use the term "Eleventh Amendment immunity" to refer broadly to the immunity from suit to which the states are constitutionally entitled. According to the Supreme Court, this immunity is confirmed by, but does not have its source in, the Eleventh Amendment, and it includes the right of states not to be sued without their consent in their own courts as well as in the federal courts. See *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999) ("We have ... sometimes referred to the States' immunity from suit as 'Eleventh Amendment immunity.' The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment."); cf. Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683, 1723 (1997) (using "the term 'Eleventh Amendment immunity' [as] shorthand for the protection that any part of the Constitution gives the states from the federal government's power to impose and enforce judicial remedies against them").

to assure compliance with the Constitution and laws.”² The Eleventh [*860] Amendment does not deny the federal government the “necessary judicial means” to enforce the federal obligations of the states; it merely reflects the conclusion that some “means” are unnecessary. These means are not necessary because the alternative mechanisms left open by the Eleventh Amendment, including suits by the federal government and private suits against state officials for prospective and retrospective relief, are adequate to “assure compliance with the Constitution and laws.”³ If the Eleventh Amendment merely denies the federal government unnecessary means of enforcing the federal obligations of the states, the immunity it confers must not be very important.

As I and others have argued, the alternative mechanisms for enforcing federal law left open by the Eleventh Amendment do reduce significantly the problems that the Amendment would otherwise pose for the efficacy of the federal legal obligations of the states.⁴ The existence of these alternative remedies suggests that the protections of the Eleventh Amendment are, to a significant extent, requirements of form rather than substance. This thesis, however, conflicts with a second strain in the Supreme Court’s majority opinions, one that has been increasingly prominent in the Court’s majority opinions. This second strain, which I shall call the “state sovereignty” strain, is reflected in the Court’s statements that the Eleventh Amendment reflects a “fundamental” and “vital” principle of federalism,⁵ and that the protection it offers the states is “real” and thus cannot be evaded through “elementary mechanics of captions and pleading.”⁶

[*861] Although the two strains have been detectable in the Court’s opinions for some time, the increasing prominence of the state sovereignty strain in the Court’s opinions may suggest that the Court is poised to reject or narrow some of the alternative mechanisms for enforcing the federal obligations of the states referred to in the opinions reflecting the supremacy strain. To the extent the Court does narrow the availability of these alternative mechanisms, however, the Eleventh Amendment will come into conflict with the federal interest in vindicating the federal obligations of the states. In other words, to the extent the protections of the Amendment are indeed “real,” as the Court has been increasingly insisting, the Amendment is problematic from a supremacy perspective.

² [Pennsylvania v. Union Gas Co., 491 U.S. 1, 33 \(1989\)](#) (Scalia, J., concurring in part and dissenting in part). I include Justice Scalia’s dissenting opinion in Union Gas among the opinions reflecting the views of the current majority in 11th Amendment cases. The majority in [Seminole Tribe v. Florida, 517 U.S. 44 \(1996\)](#), endorsed Justice Scalia’s analysis when it reversed Union Gas. The majority in Seminole Tribe consisted of the four Justices who had joined Justice Scalia’s opinion in Union Gas plus Justice Thomas, who had in the interim replaced Justice Marshall. Justice Thomas’s only separate opinion in a state sovereign immunity case does not disclose any pertinent disagreement with the views expressed by Justice Scalia. See [Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 654 \(2000\)](#) (Thomas, J., concurring in part and dissenting in part).

³ Union Gas, 491 U.S. at 33-34.

⁴ See John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, [84 Va. L. Rev. 47, 49-50 \(1998\)](#); Vazquez, supra note 1, at 1686.

⁵ See, e.g., [Welch v. Texas Dep’t of Hwy. & Pub. Transp., 483 U.S. 468, 486-87 \(1987\)](#) (“The fundamental principle enunciated in [Hans \[v. Louisiana, 134 U.S. 1 \(1890\)\]](#) has been among the most stable in our constitutional jurisprudence,” and it “plays a vital role in our federal system.”).

⁶ [Idaho v. Coeur d’ Alene Tribe, 521 U.S. 261, 270 \(1997\)](#). The conflict I identify is different from the antinomy between formal and functional approaches to federalism issues identified by Kathleen M. Sullivan in Comment, *Dueling Sovereignties*, U.S. Term Limits, Inc. v. Thornton, [109 Harv. L. Rev. 78 \(1995\)](#). The two antinomies are related, however, as the parts of the Court’s opinions reflecting the supremacy strain tend to take a functionalist approach, while those reflecting the state sovereignty strain tend to take a formalist approach. The two strains correspond more closely to the two ideologies identified by Professor Richard H. Fallon, Jr., in The Ideologies of Federal Courts Law, [74 Va. L. Rev. 1141 \(1988\)](#). The supremacy strain clearly reflects the nationalist ideology, and the state sovereignty strain the federalist ideology. In his contribution to this Symposium, Professor Meltzer notes the apparent contradiction I identify here, but he attributes this “duality” to Justice Kennedy, who tends to be the swing vote in federalism cases. See Daniel Meltzer State Sovereign Immunity: Five Authors in Search of a Theory, [75 Notre Dame L. Rev. 1011, 1042 \(2000\)](#). While it may be that Justice Kennedy exhibits the severest symptoms, evidence of this schizophrenia can be detected as well in opinions authored by other Justices. See Union Gas, 491 U.S. at 33 (Scalia, J., concurring in part and dissenting in part).

The Court may have an opportunity to resolve this apparent conflict in its cases when it confronts its burgeoning Eleventh Amendment abrogation docket. When it held in *Seminole Tribe v. Florida*⁷ that Congress lacks the power to abrogate the states' Eleventh Amendment immunity pursuant to Article I, the Court reaffirmed the holding of *Fitzpatrick v. Bitzer*⁸ that Congress has the power to abrogate such immunity pursuant to Section 5 of the Fourteenth Amendment, which gives Congress the power to enforce the first four sections of that Amendment through "appropriate" legislation.⁹ The Court's first post-Seminole forays into this field have indicated that an abrogation of Eleventh Amendment immunity is "appropriate" under Section 5 only if it is "carefully delimited"¹⁰ and "genuinely necessary to prevent violation of the Fourteenth Amendment."¹¹ Presumably, an abrogation of state sovereign immunity is not "genuinely necessary" to prevent [*862] future violations of federal law if the alternative mechanisms left open by the Eleventh Amendment are adequate. If these alternative mechanisms are the "necessary judicial means to assure compliance with the Constitution and laws," then it is unclear when, if ever, an abrogation of Eleventh Amendment immunity will be "genuinely necessary" and hence "appropriate" legislation under Section 5. As long as the alternative mechanisms for enforcing the federal obligations of the states remain available and supply the necessary judicial means for enforcing federal law against the states, the Court's recognition in *Fitzpatrick* that Congress has the power to authorize additional means by abrogating state sovereign immunity will be at worst illusory, and at best insignificant, as the Eleventh Amendment would not pose a significant obstacle to the vindication of federal law even when it is applied fully.

On the other hand, the Court's recent indications that the Eleventh Amendment imposes fundamental and real limits on federal power suggest that the abrogation power recognized in *Fitzpatrick* constitutes an important weapon in the federal arsenal, a weapon critical to ensuring the efficacy of the obligations imposed on the states by or through the Fourteenth Amendment. That would be true, however, only if the mechanisms available to enforce federal law in the absence of abrogation were no longer adequate to the task. The recent decisions may thus portend a narrowing of the alternative mechanisms for enforcing federal law against the states, most importantly officer suits against state officials, and their replacement with a power of Congress to make the states themselves liable in damages to individuals under the Fourteenth Amendment.

If so, the resulting regime would pose significant rule of law problems. First, abrogation is available only to "enforce" the Fourteenth Amendment. Congress would be powerless to supplement the (by hypothesis) inadequate remedies available to enforce the obligations it validly imposes on the states pursuant to Article I. Even with respect to the Fourteenth Amendment, moreover, the regime would not be entirely satisfying. Until now, Congress has abrogated Eleventh Amendment immunity pursuant to Section 5 primarily with respect to substantive rights it has created itself. Congress's power to impose substantive obligations on the states pursuant to Section 5 of the Fourteenth Amendment, however, has been substantially curtailed by recent decisions such as *City of Boerne v. Flores*.¹² In light of these decisions, the abrogation power would appear to be available primarily, if not only, as a mechanism for giving efficacy to the self-executing provisions of the Fourteenth Amendment. Yet relying on Congress to [*863] establish the remedies for enforcing those provisions is unsatisfying because Congress is a majoritarian branch while the relevant constitutional provisions are countermajoritarian.

I. The Supremacy Strain

Sovereign immunity in all its forms is often decried as unjust because it denies a remedy for some wrongs committed by the state.¹³ Indeed, the existence of sovereign immunity is sometimes understood to negate the existence of

⁷ [517 U.S. 44 \(1996\)](#).

⁸ [427 U.S. 445 \(1976\)](#).

⁹ See U.S. Const. amend. XIV, 5.

¹⁰ [College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.](#), 119 S. Ct. 2219, 2224 (1999).

¹¹ [Id. at 2225](#).

¹² [521 U.S. 507 \(1997\)](#).

¹³ See, e.g., [Muskopf v. Corning Hosp. Dist.](#), 359 P.2d 457, 458 (Cal. 1961) ("Governmental immunity ... must be discarded as mistaken and unjust."); Kenneth C. Davis, Sovereign Immunity Must Go, 22 Admin. L. Rev. 383, 383 (1970); George W. Pugh, Historical Approach to the Doctrine of Sovereign Immunity, 13 La. L. Rev. 476, 494 (1953).

legal limits on the state.¹⁴ The notion that the state is not subject to legal limits is, of course, antithetical to a nation with a written Constitution that purports to limit governmental power and is regarded as the supreme law of the land.¹⁵ The existence of sovereign immunity could be squared with the idea that the state is subject to legal limits by denying that the existence of legal limits implies that there must be a judicial remedy for violations of such limits, but that notion, too, is in conflict with our traditions.¹⁶ Instead, the Court has attempted to reconcile sovereign immunity with the supremacy of federal law by construing the immunity narrowly. Sovereign immunity has been held to bar certain mechanisms for enforcing the law against the state, while leaving open other mechanisms.

Perhaps the most important mechanism for enforcing the federal obligations of the states is defensive: a court faced with a legislative act that contravenes applicable federal law will regard the illegal act as null. But this mechanism is ineffectual when the state violates the law without recurring to the courts. Affirmative rights of action are necessary to vindicate federal law in such circumstances, and they have been recognized from the start.¹⁷ For example, a person illegally [*864] deprived of his liberty by the state is entitled to obtain a judicial order requiring his release - a right that is, indeed, enshrined in the Constitution.¹⁸ The availability of habeas relief has been squared with notions of sovereign immunity on the ground that a habeas proceeding is not against the state but against the official who is illegally depriving the individual of liberty.¹⁹ The distinction between suits against the state and suits against state officials has in turn been generalized. Relying in part on the habeas cases, the Court in *Ex parte Young*²⁰ held that sovereign immunity does not bar a suit against a state official seeking prospective relief. Indeed, since the beginning of our history, suits against officers for prospective and retrospective relief have been the mechanism by which the legal obligations of the federal government have been judicially enforced in the absence of a waiver of sovereign immunity.²¹

In the case of the states, private suits against officers are supplemented by the availability of suits by the federal government. The states' sovereign immunity has long been held inapplicable to suits brought by the executive branch of the federal government.²² Officer suits and suits by the federal government are the compulsory mechanisms for enforcing the federal obligations of the states that the Court has regarded as adequate to ensure compliance with those obligations.²³

¹⁴ See, e.g., *The Federalist No. 81*, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (equating the existence of sovereign immunity with the absence of a substantive legal obligation).

¹⁵ See U.S. Const. art. VI, 2.

¹⁶ See, e.g., *Marbury v. Madison*, 5 U.S. (5 Cranch) 137, 163 (1803). See generally Carlos Manuel Vazquez, *The Constitution as Law of the Land: The Supremacy Clause and Judicial Review* (1997) (unpublished manuscript, on file with the Notre Dame Law Review). The political question doctrine is the exception that proves the rule. See *id.*

¹⁷ But cf. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 88 (1999) (suggesting that the defensive remedy may be the only one that is constitutionally required).

¹⁸ See U.S. Const. art. I, 9, cl. 2. On the scope of the Suspension Clause, see David Cole, *Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 Geo. L.J. 2481, 2494-95 (1998); Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 Colum. L. Rev. 1068 (1998); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 Mich. L. Rev. 862 (1994).

¹⁹ See generally Carlos Manuel Vazquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 Geo. L.J. 1 (1998).

²⁰ 209 U.S. 123 (1908). Though *Ex parte Young* is the case most closely associated with this distinction, it was not the first to draw it. The Court in *Poindexter v. Greenhow*, 114 U.S. 270 (1885), for example, had earlier recognized that sovereign immunity does not bar a suit seeking a legal remedy from an official who has violated applicable law. See also *infra* notes 27-29 and accompanying text.

²¹ See generally Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. L. Rev. 396 (1987); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77 (1997).

²² See *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999).

²³ In reconciling sovereign immunity with federal supremacy, the Court also often cites Congress's ability to procure waivers of sovereign immunity through the spending power. See *id. at 2267*. The power to make waiver of sovereign immunity a condition

[*865] The supremacy strain in Eleventh Amendment doctrine has long been evident in the decisions affirming the availability of these alternative mechanisms. The Eleventh Amendment has been thought to exemplify and confirm the "postulate that States of the Union, still possessing attributes of sovereignty, [are] immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'"²⁴ Of course, the plan of the convention prominently included the supremacy of federal law, as expressly set forth in Article VI of the Constitution. For this reason, the Court might defensibly have held that the Eleventh Amendment does not bar suits arising under federal law. The Court rejected that interpretation in *Hans v. Louisiana*,²⁵ but in roughly contemporaneous cases it relied on the Supremacy Clause in holding that the states are not immune from being sued by the federal government:

The submission to judicial solution of controversies arising between two governments [i.e., the federal government and a state], "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to objects committed to the other," but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to all cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties, (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign states,) ... Consent [to suit by the United States] was given by Texas when admitted into the Union ...²⁶

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In other roughly contemporaneous cases, the Court held that the state's sovereign immunity does not protect state officers from being sued by private parties for their violations of federal law. In *Poindexter v. Greenhow*,²⁷ for example, the Court reasoned that, since federal law prevails over state law, the states lack the authority to authorize their officials to violate federal law: "that which ... is unlawful because made so by the supreme law ... is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name."²⁸ A state official who violates federal law accordingly "stands ... stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence."²⁹ On this theory, the Court upheld the availability of specific relief at law against state officials who had violated federal law. The Court in *Ex parte Young* gave similar reasons, ultimately grounded in the Supremacy Clause, to affirm the availability of injunctive relief in federal court against state officers who violated federal law.³⁰ The same day,

of the receipt of federal funds undoubtedly diminishes even further the practical importance of state sovereign immunity. The schizophrenia reflected in the Court's spending power doctrine, however, goes well beyond state sovereign immunity. It suffuses the Court's federalism jurisprudence, threatening to reduce all of it to a matter of form rather than substance. The broader schizophrenia reflected in the coexistence of 10th Amendment limits on Congress's power to impose substantive obligations on the states with such cases as [New York v. United States, 505 U.S. 144, 174 \(1992\)](#) (holding that Congress can give the states a choice between administering a federal scheme and having their law preempted by a valid federal statute), and [South Dakota v. Dole, 483 U.S. 203 \(1987\)](#) (holding that Congress can "encourage" states to agree to do something in exchange for money even if it cannot directly require them to do it), is beyond the scope of this Article. For a treatment of one aspect of this broader schizophrenia, see Carlos Manuel Vazquez, Beard, Printz, and the Treaty Power, [70 U. Colo. L. Rev. 1317 \(1999\)](#).

²⁴ [Monaco v. Mississippi, 292 U.S. 313, 322-23 \(1934\)](#) (quoting The Federalist No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

²⁵ [134 U.S. 1 \(1890\)](#).

²⁶ [United States v. Texas, 143 U.S. 621, 646 \(1892\)](#) (quoting [McCulloch v. Maryland, 17 U.S. \(4 Wheat.\) 316, 400, 410 \(1819\)](#)).

²⁷ [114 U.S. 270 \(1885\)](#).

²⁸ [Id. at 290](#).

²⁹ [Id. at 288](#).

³⁰ See [Ex parte Young, 209 U.S. 123, 159-60 \(1908\)](#).

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting to use the name of the State

in *General Oil Co. v. Crain*,³¹ it again relied on the Supremacy Clause in holding that the Constitution itself gives state courts the power and duty to enjoin state officials who are alleged to be violating federal law.

Although it had antecedents in the common law of England - where the phrase "the King can do no wrong" was understood to mean that the wrongful acts of subordinate officials were not attributable to the King³² - the counterintuitive idea that a suit against a state [~~*867~~] official challenging conduct taken in an official capacity is not a suit against the state is not widely embraced among legal systems that do not derive from England's. Systems that recognize the state's immunity typically regard a rule permitting such suits to go forward against an official as an evasion of such immunity.³³ Even the U.S. Supreme Court has resisted the distinction; for a time, *Ex parte Young* coexisted uneasily with a line of cases seeking to ascertain when a suit against a state official was "really" a suit against the state.³⁴ The "authority stripping" rationale relied on in *Ex parte Young* for avoiding the Eleventh Amendment bar also presented a bit of a conundrum: if state officials who violate federal law are transformed into private citizens, how can [~~*868~~] their conduct be state action so as to implicate the Constitution in the first place?³⁵

In *Pennhurst State School & Hospital v. Halderman*,³⁶ the Court recognized the obvious: suits seeking prospective relief from state officials alleged to be violating federal law are, for all practical purposes, suits against the states. *Ex parte Young* rested on a fiction insofar as it suggested that these suits "[do] not affect the State in its sovereign or to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id.

³¹ [209 U.S. 211 \(1908\)](#).

³² See 10 W.S. Holdsworth, *A History of English Law* 651 (1938).

The rule that the servants of the Crown are personally responsible to the law for wrongs committed by them ... was ... a logical deduction from two leading principles of constitutional law - first, the principle that the King can do no wrong, and, secondly, the principle of the supremacy of the law.

Id. (citations omitted).

³³ For descriptions of the international law of sovereign immunity, see, for example, *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [1999] 2 All E.R. 97, 114 (Lord Browne-Wilkinson) ("Immunity ratione personae applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state."), *id.* at 171 (Lord Millett) ("This is a subject matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual... The immunity is the same whatever the rank of the office holder... It is an immunity from the civil and criminal jurisdiction of foreign national courts, but only in respect of governmental or official acts."), and *id.* at 186 (Lord Phillips) ("This is an immunity of the state which applies to preclude the courts of another state from asserting jurisdiction in relation to a suit brought against an official or other agent of the state, present or past, in relation to the conduct of business of the state while in office... There would seem to be two explanations for immunity ratione materiae. The first is that to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damage made against the individual."). I should add, however, that the number of legal systems that retain a doctrine of state sovereign immunity is dwindling.

³⁴ See [Brown v. General Serv. Admin., 425 U.S. 820, 826-27 \(1976\)](#) (stating that a suit is really against the state if the effect of the judgment would be "to restrain the government from acting or to compel it to act" (quoting [Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 \(1949\)](#)); [Hawaii v. Gordon, 373 U.S. 57, 58 \(1963\)](#) (stating that a suit is really against the state if it would "affect the public administration of government agencies"); [Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 \(1945\)](#) (stating that a suit is really against the state if the state is the "real, substantial party in interest"). The principal current significance of this line of cases is that it serves as the basis for the doctrine that a suit seeking money from the state treasury is a suit against the state, even if a state official is the nominal defendant. See [Edelman v. Jordan, 415 U.S. 651, 663 \(1974\)](#) (relying on Ford Motor Co.). On this line of cases, see generally Vazquez, *supra* note 19, at 16-18. As discussed below, a suit seeking money from state officials who are alleged to have violated federal law is not regarded as a suit against the state.

³⁵ See [Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 \(1984\)](#).

³⁶ *Id.*

governmental capacity.”³⁷ Such suits are nevertheless permitted as an “exception” to the Eleventh Amendment, not because the states have less interest in them, but because of the overriding need to secure the supremacy of federal law:

The Young doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to “the supreme authority of the United States.”... “Ex parte Young was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.”³⁸

The Court repeated the point in such cases as *Green v. Mansour*,³⁹ in which it said that suits seeking prospective relief against state officials who are violating federal law are not barred by the Eleventh Amendment because such suits are “necessary to vindicate the federal interest in assuring the supremacy of [federal] law.”⁴⁰

That the Eleventh Amendment does not bar remedies that the Court regards as “necessary to vindicate ... the supremacy of [federal] law” is reflected further in the recent decisions that confront the recent scholarly challenge to Hans posed by the diversity theorists. If the states are entitled to immunity save where a surrender of the immunity is implicit in the “plan of the convention,” then shouldn’t the states be deemed to have waived their immunity in suits arising under federal law? After all, the plan of the convention included the supremacy of federal law. Such reasoning was at the heart of Justice [*869] Brennan’s dissents championing the diversity interpretation of the Eleventh Amendment, under which the Amendment withdraws Article III’s grant of diversity jurisdiction over suits against states by citizens of other states or of foreign states, but leaves unaffected the grant of jurisdiction over cases arising under federal law.⁴¹

In declining to reverse Hans, the majority has not denied that the plan of the convention included the supremacy of federal law, or that this meant that there had to be adequate judicial remedies for the violation of federal law by the states. As noted, Justice Scalia in *Union Gas* affirmed for what has become the majority in Eleventh Amendment cases that, “undoubtedly, the Constitution envisions the necessary judicial means to assure compliance with the Constitution and laws.”⁴² Similarly, the majority in *Coeur d’Alene* endorsed and relied on “the principle that the plan of the Convention contemplates a regime in which federal guarantees are enforceable so long as there is a justiciable controversy,”⁴³ citing as support Hamilton’s statement in *The Federalist No. 80* that “there ought always to be a constitutional method of giving efficacy to constitutional provisions.”⁴⁴ Instead, the majority has found the Eleventh Amendment to be consistent with the need for federal supremacy because it does not bar the “necessary judicial

³⁷ [Id. at 144.](#)

³⁸ [Id. at 105](#) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908), and *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring)); see also David L. Shapiro, Wrong Turns: The Eleventh Amendment and the *Pennhurst* Case, [98 Harv. L. Rev. 61, 83 \(1984\)](#) (praising *Pennhurst*’s “frank recognition that state sovereign immunity must consistently yield to the effective enforcement of federal law”). See generally Vazquez, *supra* note 19, at 16-18.

³⁹ [474 U.S. 64 \(1985\).](#)

⁴⁰ [Id. at 68.](#)

⁴¹ See *Welch v. Texas Dep’t of Hwy. & Pub. Transp.*, 483 U.S. 468, 509-18 (1987) (Brennan, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 261-63, 301 (1985) (Brennan, J., dissenting). For scholarly defenses of the diversity theory, see Akhil R. Amar, Of Sovereignty and Federalism, [96 Yale L.J. 1425 \(1987\)](#); William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction, 35 Stanford L. Rev. 1022 (1983); John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, [83 Colum. L. Rev. 1889 \(1983\)](#); Vicki C. Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, [98 Yale L.J. 1 \(1988\)](#); and James E. Pfander, History and State Suitability: An “Explanatory” Account of the Eleventh Amendment, [83 Cornell L. Rev. 1269 \(1998\)](#).

⁴² [Pennsylvania v. Union Gas Co.](#), 491 U.S. 1, 33 (1989) (Scalia, J., concurring in part and dissenting in part).

⁴³ [Idaho v. Coeur d’ Alene Tribe](#), 521 U.S. 261, 271 (1997).

⁴⁴ The *Federalist No. 80*, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *Coeur d’ Alene*, 521 U.S. at 271 (quoting *The Federalist No. 80*, *supra*).

means" of assuring compliance with federal law.⁴⁵ These means, according to Justice Scalia in *Union Gas*, include suits against the states by the federal government, suits by private parties seeking "a federal injunction against the state officer, which will effectively stop the unlawful action,"⁴⁶ and suits by private parties seeking "money [*870] damages against state officers ... under 42 U.S.C. 1983."⁴⁷ In other words, the Eleventh Amendment is harmless because the judicial means it bars are wholly superfluous in light of the judicial means it does not bar.

In this Section, I summarize the Court's case law regarding the existing regime for enforcing federal guarantees applicable to the states, a regime consisting of suits by the federal government against the states themselves and private suits against state officers. I consider whether, in light of current doctrine, these mechanisms are indeed adequate to the task of assuring compliance with federal law, and relatedly, whether this regime differs from a regime without state sovereign immunity in anything other than form.

A. Suits by the Federal Government

The Eleventh Amendment has been held not to apply to suits brought by the federal government. This apparently means that the federal government can maintain an action against a state for prospective relief, to recover a fine, or even for money damages. Suits by the government for compensatory relief are apparently permitted even if the suit seeks to remedy an injury suffered by an individual, and even if the money recovered from the state is to be turned over to the individual. When a state is sued by a sister state, the Eleventh Amendment generally does not apply, but the Court has held that a state cannot sue another state to enforce a private right.⁴⁸ Before *Alden v. Maine*,⁴⁹ the Court had not confronted a similar situation with respect to suits brought by the federal government, and thus a similar limitation might in theory have been held applicable to such suits.⁵⁰ In *Alden*, however, the majority clearly stated that, "under the plan of the Convention, the States have consented to suits" brought by the federal government on behalf of private parties such as the plaintiffs in that case,⁵¹ a view that appeared to be shared by all the Justices and litigants at the oral argument.⁵² If so, then the only requirement for [*871] bringing the suit within this exemption from the Eleventh Amendment appears to be that the federal government retain control over the initiation and litigation of the suit.⁵³

The availability of federal government suits against the states for both prospective and retrospective relief alleviates the rule of law problems attributable to the Eleventh Amendment significantly but not entirely. Effective government

⁴⁵ *Union Gas*, 491 U.S. at 33 (Scalia, J., concurring in part and dissenting in part).

⁴⁶ [Id. at 34.](#)

⁴⁷ *Id.*; see also [Welch v. Texas Dep't of Hwy. & Pub. Transp.](#), 483 U.S. 468, 488 (1987) (denying the dissenters' claim that the 11th Amendment's effect was "pernicious" because it allowed states to escape the consequences of their illegal conduct, noting that "relief often may be obtained through suits against state officials rather than the State itself, or through injunctive or other prospective remedies").

⁴⁸ See [New Hampshire v. Louisiana](#), 108 U.S. 76, 91 (1883).

⁴⁹ [119 S. Ct. 2240, 2269 \(1999\).](#)

⁵⁰ See Vazquez, *supra* note 1, at 1706 n.110.

⁵¹ See *Alden*, 119 S. Ct. at 2269.

⁵² See United States Supreme Court Official Transcript at 6, *Alden* (No. 98-46), available in 1999 WL 216178. At a more recent oral argument, Justice Kennedy cast doubt on an argument made by counsel because the argument appeared to be inconsistent with the proposition that the federal government may maintain an action against a state for the benefit of a private party. See [United States Supreme Court Official Transcript at 36, Vermont Agency of Natural Resources v. United States ex rel Stevens](#), 119 S. Ct. 2391 (1999) (No. 98-1828), available in 1999 WL 1134650.

⁵³ See *Alden*, 119 S. Ct. at 2267 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State...."); *id.* ("A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed,' ... differs in kind from the suit of an individual." (quoting U.S. Const. art. II, 3)); [id. at 2269](#) ("The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State"). The Court may address this term whether the power to bring suit in the name of the United States can be delegated to private individuals without running afoul of the 11th Amendment. See [Vermont Agency v. United States ex rel. Stevens](#), 119 S. Ct. 2391 (1999). The quoted passages from *Alden* suggest a negative answer.

enforcement schemes would appear to be available to redress state violations of federal statutes where the violation affects large groups of people in a similar way, as it did in *Alden*.⁵⁴ Government enforcement seems more problematic, however, where the violation affects particular individuals. Relying on government lawyers to litigate such cases might be inefficient;⁵⁵ if so, a [*872] constitutional rule forbidding private suits to enforce the federal obligations of the states could result in a dead weight loss to society. The problem could be alleviated, without running afoul of the Eleventh Amendment, by establishing a procedure whereby much of the out-of-court legal work could be done by private parties. Such arrangements would appear to satisfy the Court's Eleventh Amendment doctrine as long as the final decision whether or not to bring and maintain the suit were retained by the government.⁵⁶ It might even be possible to delegate much of the in-court litigation to private counsel.⁵⁷ But a sort of user-fee arrangement, whereby the private counsel would effectively be paid by the private parties who stand to benefit from the lawsuit, would probably be regarded as too transparent an evasion of the Eleventh Amendment.⁵⁸ Moreover, if only the Executive Branch could enforce federal statutes against the states, the efficacy of a given statute would ebb and flow with each subsequent Administration's support for it.⁵⁹

Relying on the executive and legislative branches to enforce the states' constitutional obligations is even more problematic. With respect to obligations imposed on the states by Congress, presumably Congress has the incentive to design and fund an effective government-enforcement scheme. Constitutional norms, on the other hand, [*873] purport to prevent majorities from doing things they want to do. Because the executive and legislative branches are designed to be responsive to majorities, they are unlikely to be reliable enforcers of such norms. It is true that the preferences of a national majority may not coincide with that of a majority in any given state. To the extent they diverge, the executive branch of the federal government might at a given time be a vigorous enforcer of constitutional norms being violated by certain states. But the content of constitutional norms and the immediate preferences of a national majority will not always, or even usually, coincide. An enforcement regime that depended on such a coincidence would not appear to be one that "assures compliance" with the constitutional obligations of the states.

⁵⁴ Cf. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301 (1977) (involving a federal government action under Title VII alleging a "pattern or practice" of employment discrimination and seeking an award of "backpay to victims of past illegal discrimination"). It is possible that Congress might impose obligations on the states without wanting them enforced vigorously. If Congress for that reason intentionally designed a suboptimal enforcement system, there would admittedly be a sort of rule of law problem: Congress would have created illusory rights, possibly eroding public confidence in the efficacy of law. But this sort of problem is one that our system tolerates. For example, it is clear that Congress can impose an obligation on the states but fail to create a retrospective remedy. See Vazquez, *supra* note 1, at 1687 n.21. For purposes of our analysis, if Congress wants only half-hearted enforcement of an obligation it has imposed on the states, then half-hearted enforcement is the optimal amount of enforcement of such an obligation.

⁵⁵ It might be inefficient if private or in-house lawyers generally possessed more knowledge of the facts of the relevant disputes. On the other hand, assigning a corps of government lawyers the responsibility to litigate particular categories of lawsuits against the states would appear to be more efficient in that the relevant lawyers would gain a greater expertise on the law than private lawyers who handle a range of legal work for the private parties involved.

⁵⁶ Ironically, the converse regime, in which private parties initiate and litigate a claim against the states on behalf of the federal government, may stand on weaker ground, albeit because of Article III "case or controversy" problems. See United States Supreme Court Official Transcript, Vermont Agency (No. 98-1828). There is no Article III problem where the federal government brings suit for the benefit of an individual.

⁵⁷ The government often hires private counsel to represent it in litigation. See William V. Luneburg, Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis, 63 *Notre Dame L. Rev.* 399 (1988). A prominent recent example is the hiring of David Boies to represent the government in the civil suits against Microsoft. See On Microsoft's Case: Who's in the Lineup?, Legal Times, May 25, 1998, at 8. On the other hand, the Court in *Alden* appeared to require that the suit "be commenced and prosecuted... by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed.'" *Alden*, 119 S. Ct. at 2267 (quoting U.S. Const. art. II, 3) (emphasis added).

⁵⁸ Would it run afoul of the 11th Amendment for the federal government to say that it will authorize a lawsuit on behalf of a private party, to be litigated by private counsel, but only if the private party concerned donated to the government an amount of money equivalent to the fees of such counsel? In that situation, the government is accepting political responsibility, cf. *Alden*, 119 S. Ct. at 2266, but perhaps the Court would say that the government's unwillingness to pay for the litigation indicates that it does not "deem the case of sufficient importance," *id. at 2269*.

⁵⁹ See Meltzer, *supra* note 6, at 1025.

The federal courts, on the other hand, were insulated from majoritarian pressures precisely to make them more effective guardians of constitutional norms.⁶⁰ This institutional advantage would be squandered by a rule making judicial intervention dependent on executive branch intervention. It is not surprising that, throughout our history, the constitutional rights of individuals and minorities have primarily been enforced through private suits. Although Congress has often relied on private suits to enforce the rights it has created, it is primarily with respect to rights against government (which is what constitutional rights are) that private suits appear to be absolutely necessary to assure adequate compliance with the law. The enforcement of the constitutional obligations of the states has occurred throughout our history through the vehicle of officer suits.

B. Officer Suits

Because a state can act (or refrain from acting) only through its officers, a regime that bars suits against states but permits suits against state officers would appear to afford the states protection as a matter of form but not substance. Although the Court at one time flirted with a purely formal distinction of this kind, it later began to distinguish suits against state officials that were really suits against officials from suits against officials that were really suits against the states. Although the Court eventually abandoned that distinction, it has also elaborated doctrines to circumscribe the availability of suits against officers, thus limiting the usefulness of these suits as a mechanism for assuring compliance with federal law.

This Section discusses the distinction in current doctrine between suits against state officials and suits against the states, and considers [*874] the extent to which the availability of officer suits alleviates the remaining rule-of-law problems with state sovereign immunity.

1. Suits for Prospective Relief

As noted, the Court in *Ex parte Young* and its predecessors held that suits against state officials who violate federal law are not suits against the state. Because the states cannot legally authorize their officers to violate federal law, any such violations are *ipso facto* unauthorized.⁶¹ On this theory, there can never be a violation of federal law attributable to a state; the Eleventh Amendment would bar no relief. Although later cases attempted to distinguish between suits against state officials that were really against the officials and suits against state officials that were really against the state, the Court in *Pennhurst* recognized that all suits against state officials seeking compliance with federal law were for all practical purposes against the state. They are permitted as an exception to the Eleventh Amendment because of the need to vindicate the supremacy of federal law.⁶² As far as prospective relief is concerned, the protection afforded the states by the Eleventh Amendment is almost purely a matter of form.⁶³

The principal limit on the availability of prospective relief is the Court's current case law concerning standing, ripeness, and mootness.⁶⁴ Some of these limits are troublesome from the perspective of assuring compliance with federal law.⁶⁵ But these limits have been read by the Court into the "case" or "controversy" requirement of Article III, and hence would be applicable to suits brought against the states themselves if there were no doctrine of sovereign immunity. These limits accordingly fail to distinguish the officer-liability regime from a government-liability regime.

[*875] The availability of prospective relief alleviates further the rule of law problems with sovereign immunity doctrine. It assures that a violation of federal law that causes an injury to an individual will be temporary. If a violation

⁶⁰ See, e.g., *The Federalist No. 78*, at 470-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶¹ See *supra* notes 28-30 and accompanying text.

⁶² See *supra* notes 36-38 and accompanying text.

⁶³ But cf. *infra* Part IV.B. (discussing *Coeur d'Alene*). There are some technical differences between an individual capacity suit for prospective relief and an official capacity suit for prospective relief: for example, in an individual capacity suit, a successor in office is not automatically substituted for the original plaintiff. See Richard H. Fallon, Jr. et al., *The Federal Courts and the Federal System* 1125 n.1 (4th ed. 1996). Since the 11th Amendment does not bar official capacity suits for prospective relief, it should never be advisable to bring an individual capacity suit for prospective relief.

⁶⁴ Another limit on the availability of prospective relief was recognized in *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261 (1997). The precise contours of this exception is a matter of some doubt. See *infra* Part IV.B. See generally Vazquez, *supra* note 19.

⁶⁵ See, e.g., [City of Los Angeles v. Lyons](#), 461 U.S. 95 (1983).

of federal law has begun or is threatened, it can be stopped. Some have suggested that prospective relief is all that is constitutionally necessary.⁶⁶ If only prospective relief were available, however, states would often lack a reason to comply with federal law until a court ordered them to do so.⁶⁷ States could costlessly go about their work in total ignorance of unadjudicated federal law. A regime in which the only available relief were prospective would thus be likely to produce numerous, albeit temporary, violations of federal law. The Court's standing jurisprudence also renders a prospective-relief-only regime inadequate to deter violations that can be completed quickly and are unlikely to be repeated. The Court has accordingly not relied solely on the availability of this form of relief in concluding that alternative remedies are adequate to assure compliance with federal law.

2. Suits for Retrospective Monetary Relief

In listing the alternative remedies that make suits against the states unnecessary, the Court has included not just suits by the federal government and officer suits for prospective relief, but also individual capacity suits against officers for money damages.⁶⁸ Although suits seeking money from the state treasury are barred by the Eleventh Amendment,⁶⁹ suits seeking money from the state official's personal resources are not. The former suits are called official-capacity suits, the latter individual-capacity suits. This terminology has caused much confusion, as an individual-capacity suit can be, and usually is, based on action performed by the official in his official capacity. The Court itself has confused an official-capacity suit with a suit predicated on action performed in an official capacity. When it said in *Will v. Michigan Department of State Police* that 1983 does not afford a right of action [*876] against states and state officials acting in an official capacity,⁷⁰ some lower courts took the statement seriously,⁷¹ and the Court quickly had to clarify that it did not mean what it had said. *Hafer v. Melo* should eliminate any doubt that the Eleventh Amendment does not bar suits against state officials acting in their official capacities, as long as the damages are sought from the official personally.⁷²

There are two aspects of the officer-liability regime that potentially limit its usefulness as means for enforcing the federal obligations of the states. The first is the doctrine of official immunity, which limits the sorts of legal violations that can ground an individual capacity suit for damages. The second is the set of problems that flow from the fact that the damages in these suits must be sought from the officer's personal resources.

a. Official Immunity

Although suits seeking damages from state officials personally are not barred by the Eleventh Amendment, they are subject to another type of immunity, known as "official immunity." Most state officials are entitled to qualified immunity.⁷³ The Court refashioned the doctrine of qualified immunity significantly in *Harlow v. Fitzgerald*.⁷⁴ Under current doctrine, an officer is immune from damage liability if the federal law he is alleged to have violated was

⁶⁶ See, e.g., [Green v. Mansour, 474 U.S. 64, 68 \(1985\)](#).

⁶⁷ States would have an incentive to design new programs in a way that meets federal standards if changing the program later to comply with federal standards would cost more than investigating and complying with federal standards from the start. But, in the absence of retrospective relief, states would appear to lack an economic incentive to alter existing programs to comply with federal law until ordered to do so by a court.

⁶⁸ See [Alden v. Maine, 119 S. Ct. 2240, 2267-68 \(1999\); Pennsylvania v. Union Gas Co., 491 U.S. 1, 34 \(1989\)](#) (Scalia, J., concurring in part and dissenting in part); [Scheuer v. Rhodes, 416 U.S. 232, 237-38 \(1974\)](#).

⁶⁹ See [Edelman v. Jordan, 415 U.S. 651 \(1974\)](#). See generally Vazquez, *supra* note 19.

⁷⁰ [491 U.S. 58, 65-66 \(1989\)](#).

⁷¹ See, e.g., [Gurley v. Hafer, No. 89-2685, 1989 U.S. Dist. LEXIS 16459](#), at *10 n.5 (E.D. Pa. Oct. 18, 1989), rev'd sub nom. *Melo v. Hafer*, 912 F.2d 628, 633 (3d Cir. 1990), aff'd sub nom. [Hafer v. Melo, 502 U.S. 21 \(1991\)](#).

⁷² See Jeffries, *supra* note 4, at 63 (arguing that Hafer proves that the distinction between official capacity actions and personal capacity actions is merely one of pleading). But cf. *id.* at 66-68 (finding that the 11th Amendment may bar suits seeking monetary relief from an officer if a state is the real party in interest and the action sounds contract, but noting that this exception is "vanishingly small").

⁷³ Judges, prosecutors, and legislators are ordinarily entitled to absolute immunity. See Hart & Wechsler, *supra* note 63, at 1167-71. Other officials are entitled to qualified immunity.

not "clearly established" at the time of the alleged violation.⁷⁵ As the Court currently applies that standard, the officer is immune from damage liability unless the law was clear at a fact-specific level.⁷⁶ The Supreme Court's application of this standard in such subsequent cases as *Anderson v. [877] Creighton* has been criticized as too stringent.⁷⁷ Certainly, it leaves many violations of federal law unremedied.

At least in theory, though, the current doctrine of official immunity is not in significant conflict with the goal of assuring compliance with federal law.⁷⁸ As discussed above, damage suits are necessary for this purpose, but only to fill in a gap. The availability of prospective relief ensures that ongoing violations of federal law will be temporary. Retrospective relief is needed to deter temporary violations, and violations that can be completed quickly and are unlikely to be repeated. Limiting retrospective relief to violations of clearly established law seems sensible if the goal is to deter, as it is difficult to deter someone from violating an unclear legal norm.⁷⁹

The Court's qualified immunity decisions have been based in part on the belief that, without such immunity, personal liability is likely to over-deter - that is, to lead an officer to forego too much conduct that is not in fact illegal.⁸⁰ An officer-liability regime that over-deters may succeed in minimizing violations of federal norms that limit state power, but it does so at the cost of the enforcement of valid state law norms. Since there may be said to be a federal interest in the enforcement of valid state law norms (call it a Tenth Amendment interest), the goal of assuring compliance with federal law requires that the officer-liability regime walk a fine line: it must deter but not over-deter. It appears that the Court's official immunity decisions attempt [*878] to draw that line.⁸¹ If so, then official immunity doctrine seeks to produce the optimum level of compliance with federal law (broadly understood to include the Tenth Amendment norm).⁸² If a regime that awards damages for violations of not-clearly-established federal

⁷⁴ [457 U.S. 800 \(1982\)](#).

⁷⁵ See [Mitchell v. Forsyth, 472 U.S. 511, 530 \(1985\)](#).

⁷⁶ See [Anderson v. Creighton, 483 U.S. 635, 640 \(1987\)](#).

⁷⁷ See Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1751-52 (1991); Jeffries, supra note 17, at 91.

⁷⁸ As to whether official immunity conflicts with the goal of compensating victims of constitutional violations, see Jeffries, supra note 4, at 71 (finding official immunity compatible with the goal of compensation because "the normative claim for compensation rests ... on the fact of wrongful injury"), and Vazquez, supra note 1, and see also infra Part I.B.2.b.

⁷⁹ Liability for violating unclear norm A can be expected to deter all conduct that arguably violates the norm. Thus, such liability secures compliance with a broader norm which prohibits all conduct that arguably violates norm A. In other words, such liability deters violations of norm A, but also deters much conduct that does not violate norm A.

⁸⁰ See [Harlow v. Fitzgerald, 457 U.S. 800, 806 \(1982\)](#) (stating that "public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability"); *id. at 814* (fear of lawsuits may "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties" (quoting [Gregoire v. Biddle, 177 F.2d 579, 581 \(2d Cir. 1949\)](#))). See generally Alan K. Chen, The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests, 81 Iowa L. Rev. 261, 275-76 (1995).

⁸¹ In addition to deterring violations of federal law and avoiding over-deterrance of valid enforcement of state law, the Court's decisions take account of the victim's interest in being compensated and the unfairness to the official of imposing monetary liability for conduct that was not blameworthy. See Chen, supra note 80, at 263-64. The interest in compensating the victim, however, would cut in favor of narrowing the immunity; this factor thus tends to promote deterrence of federal law violations (our main concern here). To the extent considerations of fairness to the officer would lead the Court to broaden the immunity beyond what would be necessary to guard against over-deterrance, this factor would appear to be canceled out by the interest in compensating the victim, leaving the deterrence/overdeterrence calculation as the operative test. If the interest in fairness to the officer is not canceled out by the interest in compensating the victim, the Court should rethink its approach in light of the fact that states generally protect their officers through indemnification. In any event, it is unlikely that courts would find it unfair to hold officers liable in damages for violations of federal laws that reasonable officers would have been deterred but not over-deterrred from violating.

⁸² Cf. Paul M. Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605, 633 (1981) (arguing that limitations on powers of federal government reflect "principles of ... federalism which themselves have constitutional status"). But cf. Jeffries, supra note 17, at 99 (referring to the "fear that strict liability might inhibit government from legitimate activities" as a "nonconstitutional cost" and asserting that "constitutional concerns ... lie entirely on one side of the calculus").

law would over-deter, it would provide excessive assurance of compliance with federal norms that prohibit state conduct, but insufficient assurance of compliance with federal norms that permit state conduct.⁸³

I tend to agree with those who have concluded that the Court's current application of the "clearly established" standard is too stringent and in fact under-deters violations of prohibitory federal norms.⁸⁴ If so, the Court should adjust its doctrine to achieve its goals more effectively. Since the Court has self-consciously fashioned this doctrine as a form of federal common law to achieve those goals, it is free to revise the doctrine if it concludes that it is flawed.

[*879] If the goal of official immunity doctrine is to produce the optimum amount of deterrence of state violations of federal law, then the officer-liability regime is not inferior to the government-liability regime from the perspective of assuring compliance with federal law. If there were no sovereign immunity, the Court would presumably seek to design a system of remedies against the states themselves that similarly seeks to deter violations of prohibitory federal law without over-deterring.⁸⁵ This system might well include a standard of liability similar to that reflected in the official immunity decisions. If the government-liability regime did not include a similar standard, this absence would presumably reflect the Court's conclusion that the over-deterrance problem stemmed from the risk of personal liability and thus would not exist if the liability were imposed on the state directly. This conclusion seems contestable, but then so is the conclusion that personal liability produces excessive deterrence.⁸⁶ Empirical research would be valuable in answering these questions. Whatever the answer, a judgment will ultimately have to be made about the liability standard that will produce the optimum amount of deterrence of federal law violations by the states, whether or not sovereign immunity exists. The Court's official immunity decisions reflect its best judgment on that question in the context of an officer-liability regime. The judgment may well be flawed, but there is no assurance that it would be less flawed in the context of a government-liability regime. What matters is that the Court ask the right question. Because the question would have to be confronted either way, the existence of a doctrine of official immunity (as distinguished from its content) does not render the officer-liability regime inferior to a government-liability regime as a means of assuring compliance with federal law.

b. State Indemnification

Another objection often raised against an officer-liability regime is more basic, as it concerns the very aspect of this regime that distinguishes it from the government-liability regime: the fact that the damages must be sought from the officer's personal resources rather than the state treasury. This renders the officer-liability regime less attractive than a government-liability regime, in the view of some, because, [*880] if the officer lacked the resources to satisfy the judgment, the victim of the legal violation may remain without full compensation.⁸⁷

To the extent this is a problem, however, it relates primarily to the goal of fully compensating victims of federal law violations. From the perspective of assuring compliance with federal law, there is some basis for believing that an officer-liability regime is more effective. That, at least, appears to be the belief of the Supreme Court.⁸⁸ While full

⁸³ Professor Jeffries has argued that official immunity doctrine may result in under-deterrance of constitutional violations, but the cost of such under-deterrance is offset, and thus justified, by the constitutional interest in constitutional change. See Jeffries, *supra* note 17, at 91 ("Underdeterrence of constitutional violations is a cost and must be counted as such, even if one believes (as I do) that the cost might be justified by competing concerns."). He may be right that the requirement of fault is justified by the need to prevent ossification of constitutional law. If the prevention of constitutional ossification were an interest of constitutional dimension, however, one could say that a remedial regime designed to protect it, along with the other relevant constitutional interests, does not under-deter, but deters optimally.

⁸⁴ See *supra* note 77.

⁸⁵ Cf. Jackson, *supra* note 41, at 6-7 (arguing that much of 11th Amendment doctrine could be retained as a matter of federal common law, even if *Hans v. Louisiana* were overruled).

⁸⁶ See *infra* Part II.B.2.b.

⁸⁷ See Peter Schuck, *Suing Government* 98-106 (1983); Larry Kramer & Alan O. Sykes, *Municipal Liability Under 1983: A Legal and Economic Analysis*, 1987 Sup. Ct. Rev. 249, 277-80; Meltzer, *supra* note 6, at 1021.

⁸⁸ See [FDIC v. Meyer](#), 510 U.S. 471, 485 (1994).

compensation of persons who have been harmed by government conduct may be desirable, it is clear that our constitutional system is not inflexibly committed to such a goal.⁸⁹

In any event, the goal of compensating victims is not sacrificed in most cases because, in reality, damage judgments rendered against individual state officers are usually paid by the state.⁹⁰ It is not difficult to understand why. The risk of damage liability for violations of federal law is a significant risk of being employed by the state. To get the best qualified employees, the state is likely to find it necessary to offer to indemnify employees for such damage judgments. Even where the state does not indemnify, officers are often able to obtain insurance to protect themselves against the risk of personal liability.⁹¹ Since the risk of damage liability or the need to pay insurance premiums to guard against the risk will be taken into account by a prospective state employee in evaluating his compensation package, the cost of such insurance is ultimately borne indirectly by the state. Thus, the state either pays the judgment directly, indemnifies the officer, pays the employee more to enable him to obtain insurance, or gets a less competent employee. The last option, admittedly, may result in inadequate compliance with federal law, but other considerations deter the states from pursuing that strategy. The first three strategies should [*881] ordinarily result in substantial compensation for the victims of state violations of federal law.⁹²

⁸⁹ See Fallon & Meltzer, *supra* note 77, at 1778; Jeffries, *supra* note 17, at 88; Vazquez, *supra* note 1, at 1686.

⁹⁰ See Jeffries, *supra* note 4, at 50 n.16; Vazquez, *supra* note 1, at 1795-96 & n.464.

⁹¹ See Vazquez, *supra* note 1, at 1796 & n.465. Personal liability insurance is available to employees of government agencies, both state and federal, but it is not widely purchased outside the areas of health care and law enforcement, probably because the practice of indemnification is so common. This information is based on a telephone Interview with Carolyn Grobb, Professional Liability Underwriter, Admiral Insurance Co. (Dec. 3, 1999).

⁹² In his contribution to this Symposium, Professor Meltzer argues that, where a state follows a policy of indemnifying its officials only for amounts actually paid out to judgment creditors (as opposed to directly writing a check to the judgment creditor for the amount of the judgment), someone with a \$ 200,000,000 judgment against an official with a net worth of \$ 100,000 will likely wind up settling for an amount close to \$ 100,000. See Meltzer, *supra* note 6, at 1020-21. The usual rule, however, is that someone with an unsatisfied judgment against a government official can recover the amount of the judgment directly from the government that has obligated itself to indemnify the official. See Phillip E. Hassman, Annotation, Validity and Construction of Statute Authorizing or Requiring Governmental Unit to Indemnify Public Officer or Employee for Liability Arising Out of Performance of Public Duties, [71 A.L.R.3d 90 \(1976\)](#). This appears not to be the rule in Massachusetts, see [Restivo v. Town of Swansea, 495 N.E.2d 838, 839 \(Mass. 1986\)](#), but it is far from clear that, under Massachusetts law, the officer would be required to pay the judgment creditor from his personal resources and seek reimbursement later. Professor Meltzer acknowledges that, in [Filippone v. Mayor of Newton, 467 N.E.2d 182, 186-87 \(Mass. 1984\)](#), the Supreme Judicial Court cast doubt on the latter approach. In fact, the Court's analysis strongly supports the conclusion that the officer has a right to demand that the state pay the judgment creditor directly upon entry of the judgment. See [id. at 186](#) ("Provisions for indemnity should be construed in a manner which will effectuate their purpose."); [id. at 187](#) ("As a matter of policy, public indemnification of public officials serves in part to encourage public service. Judgments against such public officials in actions for civil rights or intentional torts could cause financial ruin. This policy would be defeated if the legal expenses of civil rights litigation were to be borne personally throughout years of pretrial activity, trial, and appeal and only later, if at all, reimbursed.").

Even if, under applicable state law, the government were only required to reimburse officers for amounts actually paid out to the judgment creditor, it seems to me that a settlement closer to \$ 200,000,000 than to \$ 100,000 could be expected. See Vazquez, *supra* note 1, at 1796 n.467. Assume that, under state law, only \$ 50,000 of such an officer's assets are attachable by the judgment creditor. Once the officer has paid out the \$ 50,000 to the judgment creditor, he will be entitled to reimbursement of such amount by the state. Once the officer has been reimbursed, he will have an additional \$ 50,000, which should be available to satisfy the remaining \$ 199,950,000 of the judgment. Once the officer has paid the judgment creditor the second installment of \$ 50,000, he will be entitled to reimbursement again from the state, which will in turn make an additional \$ 50,000 available to satisfy what remains of the judgment. Eventually, the judgment creditor should receive the entire amount of the judgment, less legal fees. There would appear to be no reason for the state to put the creditor through this process, except perhaps to attempt to wear him down. I have to believe that a state is unlikely to pursue this strategy, if only because it also imposes a considerable burden on its employee, not to mention the state's courts and treasury. Thus, even if the officer lacked the legal right to demand that the state write a check directly to the victim for the amount of the judgment, a state agency interested in maintaining decent employee relations would be likely to do so anyway.

A more difficult case would be presented if the state official had no attachable assets. If he continues to work for the state, however, he presumably gets paid periodically. A percentage of his paycheck should be garnishable after payment (even if state sovereign immunity prevents garnishment before payment). See [15 U.S.C. 1673](#) (1994) (generally limiting garnishment to 25% of

[*882] [*883] For present purposes, the more significant problem with these strategies would appear to be that, by assuming the risk themselves, the states are dampening the incentive to comply with federal law produced by the prospect of personal liability. As already discussed, the doctrine of official immunity appears to be designed to produce the optimal amount of deterrence; its point is to reduce the risk of over-deterrence that might otherwise be expected from an officer-liability regime. Further protection of the official through a state policy of indemnification would appear to be unjustified. It is possible that over-deterrence could result from the mere fact that the officer is being singled out in court as the defendant,⁹³ and it is true that this risk would not be reduced by official immunity doctrine,⁹⁴ particularly in light of the Court's recent holdings that courts must determine if the officer committed a constitutional violation before considering whether the officer is immune from liability.⁹⁵ Even if this fear of embarrassment did produce over-deterrence, however, the problem would not be addressed by state indemnification of its officials.⁹⁶ The risk would remain as long as the nominal defendant were the official; the state could guard

debtor's disposable earnings). Once this admittedly small amount is paid to the judgment creditor, the officer would be entitled to reimbursement from the state, thus commencing a process that should eventually result in full payment, less legal fees.

The judgment creditor would face additional obstacles if the officer declared bankruptcy, but given the disadvantages of bankruptcy (bad credit, etc.), it seems that an officer who is entitled to reimbursement from the state would sooner pay and be reimbursed than declare bankruptcy. Moreover, if the officer's right to reimbursement is enforceable in court by the officer, as it would be in Massachusetts, see [Mass. Gen. Laws ch. 258, 12](#) (1988); [Dugan v. Board of Selectmen](#), [602 N.E.2d 563, 566 \(Mass. 1992\)](#), it is not clear that a declaration of bankruptcy would ultimately deny the judgment creditor a significant amount of the money to which he is entitled. Presumably, the \$ 200,000,000 judgment would constitute by far the greatest portion of the bankrupt officer's debt. If the officer has \$ 50,000 in assets, virtually all of that would go to the victim. See [11 U.S.C. 726\(b\)](#) (1994) (bankrupt's creditors paid pro rata). At that point, the trustee would presumably have the right to seek reimbursement from the state pursuant to state law. See *id.* 541(a)(1); cf. [In re Minoco Group of Cos., Ltd.](#), [799 F.2d 517 \(9th Cir. 1986\)](#) (discussing debtor's right to indemnification under insurance policies as estate property). Once that reimbursement were received by the trustee, the greatest portion of it would presumably be turned over to the victim, and so on until the judgment has been paid off. If this analysis is correct, then the state would not save much money if the officer were to declare bankruptcy. In any event, the officer does not appear to have anything to gain from declaring bankruptcy and so presumably would not do so.

Undoubtedly, an officer liability regime gives the state the ability to make it difficult for the judgment creditor to get the judgment satisfied. But I doubt that many states would act with that degree of bad faith. A colleague has suggested to me in conversation that since, by hypothesis, the state has already invoked sovereign immunity to avoid responsibility for the injury, we must assume that the victim is dealing with the governmental equivalent of the Holmesian "bad man." Although I agree that the efficacy of the federal obligations of the states cannot be left to the good faith of the states, see Vazquez, *supra* note 1, at 1780, I would not go so far as to assume that states will typically engage in scorched earth tactics towards the victims of their officers' violations of federal law. The state's invocation of sovereign immunity may reflect simply its view that it should be liable (indirectly) only when its officers violate clearly established law. It does not follow that a state that seeks to avail itself of this immunity will be uncooperative once a violation of clearly established law has been found. In any event, the state's recalcitrance will ultimately burden its official, and this alone should deter the states from pursuing such a strategy.

Admittedly, the victim's ability to obtain full relief would be frustrated by state indemnification policies that have exceptions for willful and malicious conduct or that cap the amount of indemnification. See, e.g., [Mass. Gen. Laws ch. 258, 9](#) (1988) (capping indemnification at \$ 1,000,000 and excluding cases where the employee violates a claimant's civil rights "in a grossly negligent, wilful, or malicious manner"). The cap on indemnification, in particular, is likely to lead to a settlement in an amount close to the cap. While these limits are unfortunate for the victims of violations that do occur, their existence is, perhaps ironically, beneficial insofar as it deters such violations from occurring in the first place. Indeed, as discussed below, without such limits, state policies of indemnification might be regarded as in conflict with the federal interest in deterring state officials from violating federal law.

⁹³ See William P. Kratzke, Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts, [9 Admin. L.J. Am. U. 1105, 1160 \(1996\)](#) ("The 'street-level' public official will go to great lengths to avoid the personal calamity of being named as a defendant in a lawsuit, and such an official is well situated to engage in self-protective strategies, such as inaction, delay, formalism, and substitution of low-risk acts for higher-risk acts." (citations omitted)).

⁹⁴ See Jeffries, *supra* note 4, at 50-51 & n.17.

⁹⁵ See [Wilson v. Layne](#), [119 S. Ct. 1692, 1697 \(1999\)](#); [County of Sacramento v. Lewis](#), [523 U.S. 833, 840-42 n.5 \(1998\)](#).

⁹⁶ See Kratzke, *supra* note 93, at 1160-61 ("The street-level public official does not alter this risk-avoidance strategy significantly merely because he or she may be assured of free legal defense, indemnification, insurance, or a good faith immunity." (citations omitted)). Professor Kratzke recommends that the federal government address this problem by immunizing its officers and subjecting

against that risk only by agreeing in advance to substitute itself for its officials as the defendant in actions alleging a violation of federal law.⁹⁷ A state's agreement to substitute itself as the defendant, however, might conflict with federal policy if the choice of officer suits [^{*884}] as opposed to government suits reflects the view that officer suits are more desirable precisely because they deter more effectively.⁹⁸

If the doctrine of qualified immunity is designed to produce the optimal amount of deterrence, then a state policy of indemnification would appear to conflict with the federal regime of officer liability. Such indemnification subsidizes and thus encourages violations of federal law that, according to the federal regime, should be deterred.⁹⁹ One solution might be to make it clear to the trial court and jury that the money will be paid by the state, and to allow the jury to adjust the amount of the judgment accordingly. Indemnification would seem to be a problem only if, in calculating the judgment, the court or jury erroneously assumes that the money will be paid by the officer. An amount that would be likely to deter officers if paid by them personally is unlikely to have the same deterrent effect if the cost were spread to the entire tax base. To have the desired deterrent effect, a judgment paid by the state would have to be large enough that the responsible supervisory officials would be induced to take action against the officers more directly responsible for the violation or to take other steps to prevent a reoccurrence of the problem.¹⁰⁰ The current system has been criticized because it prohibits an indemnification or insurance arrangement from being revealed to the jury.¹⁰¹ This problem could be alleviated by recognizing an exception to otherwise applicable rules of evidence for cases involving suits to enforce federal law against officers. If accompanied by an instruction to the jury making it clear that the amount of the judgment should be such as to produce the proper amount of deterrence, this doctrinal change should produce larger judgments when indemnification or insurance arrangements exist.¹⁰²

[^{*885}] Such measures could work, however, only if there were a preexisting indemnification agreement not subject to exceptions of ambiguous scope.¹⁰³ They could not prevent post hoc, individual decisions to indemnify.¹⁰⁴ Such indemnification would remain problematic in light of the federal remedial regime, but, even if it were regarded as unconstitutional for that reason, it is difficult to see who would have standing to challenge it, either before or after it occurs. Indeed, the party most likely to be disadvantaged by a challenge to the practice of indemnification would be, ironically, the victim of the federal law violation.

A different solution might be to adjust official immunity doctrine. It might be argued that, in light of the practice of indemnification, the Court should reject the doctrine of official immunity to the extent it is grounded in the belief

itself to liability instead. See *id.* at 1180-81. Any attempt by the states to address the overdeterrence problem in this way, however, may violate federal law. See *infra* note 97 and accompanying text.

⁹⁷ The federal government has the power to substitute itself as the defendant in Bivens actions. See *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). A state statute purporting to substitute itself for its officials in actions under 1983, however, might run afoul of the Supremacy Clause.

⁹⁸ See *FDIC v. Meyer*, 510 U.S. 471, 485 (1994).

⁹⁹ Cf. Schuck, *supra* note 87, at 85 (observing that insurance for public officials may violate public policy because in conflict with deterrence goal). But cf. *Williams v. Horvath*, 548 P.2d 1125, 1132-33 (Cal. 1976) (finding indemnification not a violation of policy of 1983).

¹⁰⁰ See Schuck, *supra* note 87, at 98 (arguing that "much official wrongdoing is ultimately rooted in organizational conditions and can only be organizationally deterred").

¹⁰¹ See Cornelius T.L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens, 88 Geo. L.J. 65, 93 (1999).

¹⁰² Alternatively, the Court might adjust official immunity doctrine by denying the official the benefit of official immunity if an indemnification arrangement exists. This solution would not be as finely tuned to the problem as an adjustment of the amount of the judgment would be. The officer would be found liable more often than under the current system, but the judgment would still be much lower in amount than what would be necessary to deter adequately. Nevertheless, this second possible doctrinal change could be expected to address the problem indirectly by deterring the states from entering into an indemnification arrangement in the first place.

¹⁰³ If the indemnification agreement were subject to limitations of ambiguous scope, it would be unfair to the officer to suggest to the jury that the state will (or may) ultimately bear the cost. Most indemnification statutes do not extend to bad faith or egregious violations. See Schuck, *supra* note 87, at 86.

¹⁰⁴ The latter sorts of arrangements, however, arguably violate the state's due process or equal protection obligations if the determinations about whom to indemnify were arbitrary.

that officers will be excessively deterred by the prospect of personal liability. Such a move might be defended additionally on the theory that the loss should be borne by the taxpayers of the state that hired the official, rather than the victim of the legal violation.¹⁰⁵ The merits of this argument will be discussed in Part IV. For now, I merely note that accepting the argument would come close to reducing the Eleventh Amendment to a mere formality.¹⁰⁶

Short of such a step, the practice of indemnification would appear to be in tension with the deterrence goals of the officer-liability regime. The doctrinal changes I suggested above that would not implicate the Eleventh Amendment would alleviate the problem with respect to institutionalized policies of indemnification, but the problem of informal or discretionary indemnification would persist. The possibility [*886] of under-deterrence as a result of state indemnification is offset by several factors. Even if the officer were ultimately indemnified, there would remain the embarrassment of having been found responsible for a violation of federal law. Moreover, when no formal indemnification scheme is in place, or when the indemnification agreement is subject to exceptions of uncertain scope, there will always be the risk that the officer will not ultimately be indemnified.¹⁰⁷ The fact that most states cap their indemnification obligation¹⁰⁸ adds to the risk that the officer may not be indemnified fully. The combination of these risks should narrow significantly, if not close, the deterrence gap left by suits for prospective relief and suits by the government for retrospective relief.

c. Congress's Power to Alter the Officer-Liability Regime

As noted, the Court has fashioned the doctrine of official immunity as a doctrine of federal common law.¹⁰⁹ If the immunity has such status, then Congress presumably has the power to alter or even eliminate it. This gives Congress the power effectively to transform the officer-liability regime permitted by the Eleventh Amendment into a government-liability regime that would otherwise be barred by that Amendment. For example, anticipating *Alden v. Maine*¹¹⁰ and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*¹¹¹ after the Seminole Tribe decision, I suggested that Congress might respond to such decisions by making it clear that heads of agencies will be strictly liable for patent infringements committed by their agencies.¹¹² While such liability may seem unfair, the officers would not in reality be paying such judgments themselves. If federal law provided for strict liability, then officers would be even less likely than they are now to agree to work for the state without a prior indemnification agreement. A federal law subjecting the heads of state agencies to strict personal liability would, in fact, be very likely to bring about an arrangement between the officer and the state that would precisely [*887] mirror a government-liability regime. Persons who have been offered a position as head of an agency could be expected to possess the sophistication and the clout to secure an indemnification agreement from the state.

Thus, if Congress does have the power to narrow or eliminate the official immunity that officers would otherwise enjoy in suits for violations of federal law, Congress would be able to establish a system that would approximate closely a regime of government-liability. Indeed, if Congress eliminated official immunity, an officer-liability regime would appear to differ from a government-liability regime only in form.

¹⁰⁵ Cf. [Owen v. City of Independence](#), 445 U.S. 622 (1980).

¹⁰⁶ Perhaps some scope would remain to official immunity - the scope necessary to compensate for the over-deterrence caused by the embarrassment of being the defendant. But the resulting standard of liability is not likely to be much narrower than the standard of liability under a government-liability regime, as an official is likely to suffer embarrassment as a result of being identified as the source of the wrong even if he is not the defendant.

¹⁰⁷ Indeed, some maintain that the problem of overdeterrence persists despite the government's indemnification of its officers. See Kratzke, *supra* note 93, at 1160-61.

¹⁰⁸ See Schuck, *supra* note 87, at 86.

¹⁰⁹ See, e.g., [Tower v. Glover](#), 467 U.S. 914, 923 (1984) (holding that immunity for public defenders did not exist at common law); Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, [93 Colum. L. Rev.](#) 309, 356 (1993); Fallon & Meltzer, *supra* note 77, at 1785; Michael Wells, Constitutional Torts, Common Law Torts, and Due Process of Law, [72 Chi.-Kent L. Rev.](#) 617, 654 (1997).

¹¹⁰ [119 S. Ct. 2240 \(1999\)](#).

¹¹¹ [119 S. Ct. 2199 \(1999\)](#).

¹¹² See Vazquez, *supra* note 1, at 1798-99.

This power of Congress significantly alleviates the rule of law problems with the Eleventh Amendment, but only with respect to federal norms established by Congress itself. It is only with respect to such norms that we can be reasonably confident that Congress will want to establish an effective officer-liability regime. Congress would have the power to narrow the scope of official immunity for suits against state officials alleging a violation of constitutional norms, but it will often lack the incentive to do so. The regime for enforcing the constitutional obligations of the states is thus likely to remain the default officer-liability regime the Court has articulated, which is subject to a doctrine of official immunity and a power of the states to indemnify the officer.

C. Summary

Although the default officer-liability regime for enforcing the federal obligations of the states is far from perfect, the Court was not entirely off the mark when it stated that, notwithstanding the Eleventh Amendment, the Constitution provides "the necessary judicial means to assure [state] compliance with the Constitution and laws."¹¹³ Even without congressional action, suits seeking prospective or retrospective relief may be brought by the federal government against the state itself. The Eleventh Amendment also permits private suits against state officials for prospective relief, which differ from suits seeking such relief from the state only in form. State officials are, in theory, further deterred from violating federal law by the prospect of personal liability for injuries caused by such violations. The effectiveness of such suits at deterring violations of federal law is rendered problematic by the fact that both the federal government and the states are simultaneously seeking to prevent state officials from being over-deterring - the **[*888]** federal government through the doctrine of official immunity and the states through the practice of indemnification. Whether the combination of official immunity plus indemnification necessarily results in under-deterrence is difficult to determine. If it does, however, current doctrine permits the federal government to address the problem, without implicating the Eleventh Amendment, by narrowing or eliminating the officials' immunity.

Government suits are available to enforce the constitutional obligations of the states as well, but there is reason to question the eagerness of the majoritarian executive branch in enforcing the Constitution's countermajoritarian norms. Even if the executive branch were eager, the majoritarian Congress might not be willing to fund such efforts. A system that relies on private actions would thus appear to be necessary to assure compliance with the Constitution. For the same reason, with respect to the states' constitutional obligations, we cannot count on congressional action to enhance the efficacy of the default officer-liability regime that the Court itself has set up as a matter of federal common law.¹¹⁴ This regime can and should be improved by the Court. In its current form, the default regime is flawed but appears to provide significant assurance that the federal constitutional obligations of the states will not be violated.

II. The State Sovereignty Strain

Parallel to the supremacy strain has run a conflicting strain in Eleventh Amendment cases that has emphasized that the Eleventh Amendment affords states fundamental and real protections not avoidable through simple pleading maneuvers. Justice Kennedy's opinion in *Coeur d'Alene*¹¹⁵ is a good example. The Court in that case narrowed the *Ex parte Young* doctrine, which, as refined in such earlier decisions as *Pennhurst*, had stood for the proposition that the Eleventh Amendment does not bar suits seeking an injunction requiring prospective compliance with federal law. The Court in *Coeur d'Alene* recognized an exception under which certain types of suits for prospective relief are barred by the Eleventh Amendment.¹¹⁶ In defending this narrowing of *Ex parte Young*, the majority stressed that the **[*889]** Eleventh Amendment's protections were a "real limitation on a federal court's federal-question

¹¹³ [Pennsylvania v. Union Gas Co., 491 U.S. 1, 33 \(1989\)](#) (Scalia, J., concurring in part and dissenting in part).

¹¹⁴ My analysis here admittedly assumes that the Constitution itself authorizes the courts to articulate and enforce judicial remedies for constitutional violations even without authorization from Congress. For a partial defense of that assumption, see Vazquez, *supra* note 1, at 1778-85. For a fuller defense, see Vazquez, *supra* note 16.

¹¹⁵ [Idaho v. Coeur d' Alene Tribe, 521 U.S. 261 \(1997\)](#).

¹¹⁶ The precise scope of the exception adopted in that case will be discussed below. See generally Vazquez, *supra* note 19, at 42-51.

"jurisdiction" which cannot be avoided through "elementary mechanics of captions and pleading."¹¹⁷ A broad *Ex parte Young* doctrine, the Court seemed to reason, would treat the Eleventh Amendment's protections as formal and easily avoidable, rather than substantive and real.

The opinion this past term in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*¹¹⁸ also reflects the state sovereignty strain. The plaintiffs in that case had defended the validity of Congress's abrogation of state sovereign immunity in the Lanham Act, arguing that, since Congress could have precluded states altogether from the sorts of commercial activities that could give rise to liability under the Lanham Act, Congress could validly give the states a choice between not engaging in such activities and waiving their sovereign immunity from private suits. Overruling the last remnants of *Parden v. Terminal Railway of the Alabama State Docks Department*,¹¹⁹ the Court held that Congress cannot make the states' waiver of sovereign immunity a condition of the states' engaging in "otherwise lawful activity."¹²⁰ The Court thus appears to have held that states have a constitutional right to engage in any activity that private parties can legally engage in, only on more favorable terms. In defending this disparate treatment, the Court wrote that "evenhandedness between individuals and states is not to be expected: 'The constitutional role of the States sets them apart from other employers and defendants.'"¹²¹ To be sure, the Court here was not directly addressing the content of state sovereign immunity; it was merely saying that states enjoy it and private parties do not. But the Court's rhetoric suggests strongly that the Court did not view the immunity as purely formal. One does not come away from the opinion with the sense that the Court was rejecting "evenhandedness" only with respect to form, or that the Court believed the states' constitutional roles set them apart from other employers or defendants only in a purely formal sense.

[*890] *Alden* also reflects the state sovereignty strain. The Court there rejected an interpretation of state sovereign immunity doctrine that would have reduced even further the practical significance of such immunity as an obstacle to the enforcement of the federal obligations of the states. Under the so-called forum-allocation interpretation of the Eleventh Amendment, the states would have been protected from private suits for damages in the federal courts, but not in the states' own courts. The plaintiffs in *Alden* were employees who alleged that their employer, the state of Maine, had violated the minimum wage provision of the Fair Labor Standards Act (FLSA). They had initially brought suit in a federal court, but that suit was dismissed after the Court held in *Seminole Tribe* that Congress lacks the power to subject states to suit in federal court pursuant to Article I. They then brought suit in the Maine Courts. Pressing the forum-allocation interpretation, they argued that, because Congress had imposed an obligation on the states and subjected them to liability to individuals for damages, the states were obligated under the Supremacy Clause to entertain such suits in their own courts. And, they argued further, since the Eleventh Amendment does not limit the Supreme Courts' appellate jurisdiction, the Supreme Court was empowered to reverse the state court's judgment refusing to enforce the federal obligation on grounds of sovereign immunity.¹²²

Although there was substantial support for the forum-allocation interpretation in the Court's earlier decisions,¹²³ the Court in *Alden* rejected that interpretation and adopted instead what I have called the immunity-from-liability interpretation of the Eleventh Amendment, under which the Eleventh Amendment (or more accurately the background principle of state sovereign immunity of which the Eleventh Amendment is an exemplification) protects the states

¹¹⁷ See *Coeur d' Alene*, 521 U.S. at 270. Although the concurring Justices, whose votes were necessary to make a majority, would not have narrowed *Ex parte Young* quite as far as Justice Kennedy and the Chief Justice would have, they concurred in the portion of Justice Kennedy's opinion containing the language quoted in the text. See [id. at 291-92](#) (O'Connor, J., concurring).

¹¹⁸ [119 S. Ct. 2219 \(1999\)](#).

¹¹⁹ [377 U.S. 184 \(1964\)](#).

¹²⁰ *College Sav. Bank*, 119 S. Ct. at 2231; see also *id.* (stating that Congress cannot threaten a state with exclusion from "otherwise permissible activity").

¹²¹ *Id.* (quoting [Welch v. Texas Dep't of Highways & Pub. Transp.](#), 483 U.S. 468, 477 (1987)).

¹²² See [South Cent. Bell Tel. Co. v. Alabama](#), 119 S. Ct. 1180, 1184 (1999).

¹²³ For evidence of this support, see, in particular, Justice Kennedy's opinion for the majority in [Hilton v. South Carolina Public Railways Commission](#), 502 U.S. 197 (1991). See generally Vazquez, *supra* note 1.

from being subjected to private damage liability.¹²⁴ In rejecting the forum- [*891] allocation view, the Court repeated the statement from *Coeur d'Alene* that "the real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading."¹²⁵ It stressed the fundamental importance of state sovereign immunity:

Not only do the ratification debates and the events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States' constitutional immunity from suit, they also underscore the importance of sovereign immunity to the founding generation. Simply put, "the Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself."¹²⁶

The Court also emphasized the "substance" of sovereign immunity: "Underlying constitutional form are considerations of great substance. Private suits against non-consenting States - especially suits for money damages - may threaten the financial integrity of the States."¹²⁷ If the states could not be subjected to suits in federal court but could be required to entertain the case in its own courts, the doctrine would not in fact serve the substantive purpose prior cases had indicated it was designed to serve: the protection of state treasuries.¹²⁸ The forum allocation interpretation had to be rejected to prevent the Eleventh Amendment from being reduced to a mere jurisdictional provision.¹²⁹

Yet Alden also reflects the Court's schizophrenia. The Court emphasized that the validity of the state's obligation under the FLSA to pay a minimum wage was not in question,¹³⁰ and, in the last section of its opinion, it denied that its sovereign immunity holding would compromise the effective enforcement of that obligation. As the majority-to-be had done in *Union Gas*, the Court noted the availability of suits by the federal government and suits against state officials for prospective and retrospective relief.¹³¹ If the Court's sovereign immunity [*892] holding does not absolve the states from the financial cost imposed on them by federal law, however, and if the Constitution gives the federal government the necessary means to assure compliance with that law, it is unclear how the Court's holding protects the states' "financial integrity."

There appear to be two conceivable ways to reconcile these apparently conflicting strains of Eleventh Amendment analysis, but neither captures what the Court appears to have in mind. One possibility is that the Court is saying that state sovereign immunity is narrow in scope but, within that narrow scope, it is of fundamental importance. This appears inconsistent with the Court's statements that the alternative mechanisms for enforcing federal law exhaust the "necessary judicial means" to accomplish that goal. The latter statements indicate that the Court does not regard the judicial means precluded by the Eleventh Amendment as necessary for this purpose; unnecessary means hardly qualify as fundamental. Alternatively, the Court might be conceding that the protection afforded by the

¹²⁴ For a defense of the claim that the Court in *Alden* and its companion cases adopted the immunity-from-liability view, see Carlos Manuel Vazquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 Yale L.J. (forthcoming June 2000) (on file with the Notre Dame Law Review). Technically, the states are protected from being sued *eo nomine* even where a suit seeks relief other than money damages. But insofar as a suit seeks prospective relief permitted by *Ex parte Young*, the protection afforded by that doctrine is purely formal. My description of state sovereign immunity in the text is too narrow in that it does not take into account *Coeur d'Alene*'s narrowing of *Ex parte Young*. As to how much this understates the current scope of the doctrine, see *infra* Part IV.B.

¹²⁵ *Alden*, 119 S. Ct. at 2267 (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997)).

¹²⁶ *Id.* at 2253 (quoting *Atascadero State Hosp. v. Scalon*, 473 U.S. 234, 239 n.2 (1985)).

¹²⁷ *Id.* at 2264.

¹²⁸ For a discussion of the significance of the goal of protecting state treasuries to the issue decided in *Alden*, see Vazquez, *supra* note 1, at 1722-32.

¹²⁹ See also *Blatchford v. Native Village*, 501 U.S. 775, 780 (1991) (noting that the 11th Amendment is not merely a matter of jurisdiction).

¹³⁰ See *Alden*, 119 S. Ct. at 2269.

¹³¹ See *id. at 2267-68*. The Court also mentioned the power of Congress to abrogate sovereign immunity pursuant to Section 5 of the 14th Amendment, the case law establishing that the 11th Amendment does not bar suits against local governments, and Congress's ability to procure waivers of sovereign immunity through the Spending Clause.

Eleventh Amendment is purely formal - i.e., it prevents the state from being sued by private parties *eo nomine* - but that this formal protection is important, even fundamental. This does not appear to be the Court's point, either. The Court has maintained in these cases that, while the Amendment does protect the states' dignitary interests, it also has a more substantive purpose: protection of the state treasury. As noted, the Court in *Alden* relied on this purpose in rejecting the forum-allocation principle. And the Court in *Coeur d'Alene* appeared to be emphasizing that the Amendment does not merely protect dignitary interests when it stated that "the real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading."¹³²

If the Court does now believe that the protections afforded the states by the Eleventh Amendment are both fundamental and real, then this may signal a retreat from the position that the Constitution itself envisions the necessary judicial means for assuring compliance [^{*893}] with federal law. In other words, the Court may be contemplating cutting back on the alternative judicial mechanisms for enforcing the federal obligations of the states.

III. Supremacy and Abrogation

The Court's decisions concerning Congress's power to abrogate Eleventh Amendment immunity offer additional support for the state sovereignty strain. In first recognizing an abrogation power under the Fourteenth Amendment in *Fitzpatrick v. Bitzer*,¹³³ and in later holding that there is no such power under Article I, the Court emphasized the fundamental alteration in federal-state relations wrought by the Civil War and the constitutional Amendments that followed it. The abrogation decisions of this past Term also subtly undermine the supremacy view. These cases appear to hold that an abrogation is valid under Section 5 of the Fourteenth Amendment only if a withdrawal of Eleventh Amendment immunity is "genuinely necessary" to assure compliance by the states with their federal obligations. The decisions reflecting the supremacy strain, however, indicate that the Eleventh Amendment does not bar the judicial means necessary for this purpose. If the Court adhered to the supremacy view, abrogation would never be appropriate, and *Fitzpatrick* would be reduced to nothing.

The decisions indicating that the abrogation power is important, together with those that restrict abrogation to situations in which it is "genuinely necessary," suggest that the Court may be about to depart from the supremacy view by narrowing the scope of the alternative mechanisms currently available for enforcing the federal obligations of the states and substituting a congressional power to create remedies against the states under Section 5. If it does this, *Fitzpatrick* would retain its importance, but the resulting regime would be problematic in a number of respects.

A. Abrogation in *Fitzpatrick*, *Union Gas*, and *Seminole Tribe*

In holding that Congress has the power to abrogate Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment, the Court in *Fitzpatrick* reasoned that the Fourteenth Amendment gave Congress a power to abrogate an otherwise constitutionally protected immunity because that Amendment wrought a basic alteration in the relations between the federal and state governments.¹³⁴ In *Union Gas*, a majority of the Court decided that Congress [^{*894}] possessed the power to abrogate Eleventh Amendment immunity pursuant to the Commerce Clause as well,¹³⁵ but that decision was overruled in *Seminole Tribe*. Once again, the Court distinguished Congress's powers under the Fourteenth Amendment from its powers under "antecedent" provisions of the Constitution because of the basic alteration in federal-state relations wrought by that Amendment.¹³⁶ These cases support the state sovereignty strain. An immunity that can be abrogated only because of a change in our constitutional system so fundamental it could be accomplished only through a Civil War would seem to be an important one indeed.

¹³² *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 270 (1997) (noting that the dissenters' position would "adhere to an empty formalism"). The "real interests" the Court may have had in mind in *Coeur d'Alene* may have been interests concerning federal jurisdiction. See *id.* ("Eleventh Amendment immunity represents a real limitation on a Federal court's federal-question jurisdiction."). But Justice Kennedy's subsequent opinion in *Alden* shows that the majority no longer believes that the amendment serves primarily forum-allocation interests. Significantly, *Alden* quotes the "real interests" language from *Coeur d'Alene*. See *Alden*, 119 S. Ct. at 2269.

¹³³ 427 U.S. 445 (1976).

¹³⁴ See *Fitzpatrick*, 427 U.S. at 456.

¹³⁵ See *Union Gas*, 491 U.S. at 14.

¹³⁶ See *Seminole Tribe v. Florida*, 517 U.S. 44, 65 (1996).

The Court's descriptions of state sovereign immunity in its abrogation opinions confirm this inference. In dissenting from the Court's holding in *Union Gas* that Congress had the power to abrogate sovereign immunity pursuant to Article I, Justice Scalia, writing for four of the five Justices in the current majority on Eleventh Amendment issues, described state sovereign immunity as "a fundamental principle of federalism,"¹³⁷ a "fundamental rule of jurisprudence,"¹³⁸ "an essential element of the constitutional checks and balances,"¹³⁹ a principle designed to "ensure the protection of 'our fundamental liberties,'"¹⁴⁰ a "broad constitutional principle,"¹⁴¹ and a doctrine of "fundamental structural importance."¹⁴² Of course, it was also Justice Scalia in *Union Gas* who wrote that the Eleventh Amendment does not bar the "necessary judicial means to assure compliance with the Constitution and laws."¹⁴³ This makes the *Union Gas* dissent, along with the majority opinion by the same Justices (plus one) in *Alden*, Exhibit A in support of my diagnosis of Eleventh Amendment schizophrenia.

B. Florida Prepaid and CollegeSavingsBank

The recent decisions addressing the scope of Section 5 of the Fourteenth Amendment - in particular Florida Prepaid, which for the [*895] first time since *Fitzpatrick* considered whether an abrogation of Eleventh Amendment immunity was a valid exercise of Congress's power under Section 5 - are also in some tension with the supremacy strain. These decisions appear to establish that an abrogation of sovereign immunity is valid if it is necessary to prevent a violation of the Fourteenth Amendment. It seems unlikely that the Court would ever find an abrogation of sovereign immunity necessary to deter violations of the Fourteenth Amendment while adhering to its position that the alternative mechanisms for enforcing the federal obligations of the states are the only means necessary to assure the states' compliance with those obligations. These cases suggest that, at a minimum, Congress must consider the adequacy of these alternative means before it resorts to means barred by the Eleventh Amendment. If so, then in the course of adjudicating whether an abrogation of immunity is valid, the Court will have occasion to clarify what the alternative mechanisms not barred by the Eleventh Amendment are. At any rate, if the alternative mechanisms of enforcement retain their current contours, the abrogation power would appear not to be of great significance for the efficacy of the federal obligations of the states. Such a conclusion seems inconsistent with *Fitzpatrick* and *Seminole Tribe*, however. If the abrogation power is as significant as the Court in those cases made it out to be, then surely the immunity to be abrogated must be significant. These cases thus suggest that the Court may be contemplating a narrowing of those alternative doctrines.

The issue in Florida Prepaid was whether Congress had validly abrogated the states' sovereign immunity in its amendments to the patent laws making states liable in damages to patentholders and subjecting them to private suits in federal court. Congress enacted the amendments before the Court had overruled *Union Gas*, and it relied in part on the Commerce Clause. But, perhaps anticipating *Seminole Tribe*, Congress also relied on the Due Process Clause of the Fourteenth Amendment. It reasoned that patents are property, and that accordingly Congress has the power to abrogate the states' sovereign immunity in order to "enforce" the states' obligation not to deprive individuals of property without due process of law.¹⁴⁴ The Court in Florida Prepaid agreed that patents were property, but it concluded that the abrogation was not "appropriate" legislation because there was insufficient evidence before Congress that the states were infringing patents and then failing to provide an adequate remedy.¹⁴⁵

[*896] The Court's approach to Section 5 in this case, as well as in the *Boerne* case, on which the Court relied, has been understood as an approach that asks whether there was in fact an adequate justification for the step taken by

¹³⁷ *Union Gas*, 491 U.S. at 37 (Scalia, J., concurring in part and dissenting in part).

¹³⁸ [Id. at 38.](#) (Scalia, J. concurring in part and dissenting in part) (quoting [Ex parte New York, 256 U.S. 490, 497 \(1921\)](#)).

¹³⁹ *Id.* at 39 (Scalia, J., concurring in part and dissenting in part).

¹⁴⁰ *Id.* (Scalia, J., concurring in part and dissenting in part) (quoting [Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 \(1985\)](#) (quoting [Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 \(1985\)](#) (Powell, J., dissenting))).

¹⁴¹ *Id.* (Scalia, J. concurring in part and dissenting in part) (quoting [Welch v. Texas Dep't of Hwy. & Pub. Transp., 483 U.S. 468, 486 \(1987\)](#)).

¹⁴² *Id.* at 44 (Scalia, J., concurring in part and dissenting in part).

¹⁴³ *Id.* at 33 (Scalia, J., concurring in part and dissenting in part).

¹⁴⁴ See [Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2206 \(1999\)](#).

¹⁴⁵ See [id. at 2208-09.](#)

Congress to enforce the Fourteenth Amendment. As the Court described the approach in the companion case of College Savings Bank, the Court asked whether the abrogation was "genuinely necessary to prevent violation of the Fourteenth Amendment."¹⁴⁶ An abrogation of Eleventh Amendment immunity would appear not to be "genuinely necessary" when alternative remedies not barred by the Eleventh Amendment provide the "necessary judicial means" for assuring compliance with federal law.

The Court's reliance in Florida Prepaid on the existence of adequate state remedies does not necessarily mean that alternative remedies are always relevant to the validity of an abrogation of state sovereign immunity. State remedies had a particular relevance in Florida Prepaid because the provision of the Fourteenth Amendment that Congress relied on in abrogating sovereign immunity was the Due Process Clause. The Court relied on its procedural due process cases holding that a deprivation of property does not give rise to a violation of the Due Process Clause unless it is unaccompanied by the necessary process. In such cases as *Parratt v. Taylor*¹⁴⁷ and *Zinermon v. Burch*,¹⁴⁸ the Court had held that sometimes the state satisfies due process by providing a post-deprivation hearing. And in those cases and others, such as *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*¹⁴⁹ and *Reich v. Collins*,¹⁵⁰ the Court had indicated that the post-deprivation hearing must be accompanied by an adequate compensatory remedy if the deprivation is found to have been contrary to law and cannot otherwise be cured. As the Court made clear in *Zinermon*, however, the existence of post-deprivation state remedies negates a finding of a constitutional violation only when the claimed violation is of procedural due process. The lack of state remedies does not negate a violation of other constitutional provisions, or even of the substantive component of the Due Process Clause.¹⁵¹ It is thus possible that the existence of alternative remedies has no bearing on the validity of an abrogation of state sovereign immunity from suits based on [*897] constitutional provisions other than the guarantee of procedural due process.¹⁵²

This conclusion is bolstered by the Court's statement in College Savings Bank that "genuine necessity" is the test for "prophylactic measures taken under purported authority of [Section] 5."¹⁵³ A "prophylactic" measure under Section 5 is apparently one that "prohibits conduct which is not itself unconstitutional."¹⁵⁴ It is possible that the Court regarded the abrogations of sovereign immunity in Florida Prepaid and College Savings Bank as prophylactic because Congress had claimed to be enforcing the procedural Due Process Clause, yet it had subjected states to suit in federal court without regard to whether there had been a completed violation of that clause.¹⁵⁵

¹⁴⁶ [College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2225 \(1999\)](#).

¹⁴⁷ [451 U.S. 527 \(1981\)](#).

¹⁴⁸ [494 U.S. 113 \(1990\)](#).

¹⁴⁹ [496 U.S. 18, 51 \(1990\)](#).

¹⁵⁰ [513 U.S. 106, 110 \(1994\)](#).

¹⁵¹ See *Zinermon*, 494 U.S. at 125-26.

¹⁵² This argument finds support in the Court's subsequent decision in [Kimel v. Florida Board of Regents, 120 S. Ct. 631 \(2000\)](#) (striking down the abrogation of sovereign immunity in the Age Discrimination in Employment Act (ADEA)). The Court held that the ADEA was not valid legislation under Section 5 because its prohibitions were far broader than what the Fourteenth Amendment prohibited, and because, given the lack of any pattern of unconstitutional age discrimination by the states, abrogation was "an unwarranted response to [an] inconsequential problem." *Kimel*, 120 S. Ct. at 648-50. Although the Court noted that remedies for age discrimination were available under state law, *id. at 650*, the Court did not rely on the existence of these remedies as a reason for finding the abrogation of sovereign immunity to be unwarranted. *Kimel* thus suggests, but does not hold, that the existence of alternative remedies is irrelevant to the question whether an abrogation of sovereign immunity is appropriate Section 5 legislation when the federal statute seeks to enforce a Fourteenth Amendment obligation other than that of procedural due process.

¹⁵³ [College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2225 \(1999\)](#) (emphasis added).

¹⁵⁴ [City of Boerne v. Flores, 521 U.S. 507, 518 \(1997\)](#).

¹⁵⁵ Characterizing the abrogation of sovereign immunity involved in Florida Prepaid and College Savings Bank as prophylactic on this theory is problematic, however. It is not true that a state's deprivation of property is never a completed violation of procedural due process. Post-deprivation remedies are sufficient to satisfy due process only if the deprivation was random and unauthorized. See also Meltzer, *supra* note 6, at 1056 & n.189 (criticizing Florida Prepaid for overlooking that, under existing precedents, a state commits a completed violation of due process when it deprives a person of property without having made provision for an adequate post-deprivation remedy). As I have argued elsewhere, the Supreme Court's case law appears to require that a

[*898] On the other hand, the Court in College Savings Bank indicated that the statute involved in that case was a prophylactic measure because it was a "prohibition of States' sovereign-immunity claims, which are not in themselves a violation of the Fourteenth Amendment."¹⁵⁶ This suggests that a state's insistence on sovereign immunity is never a violation of the Fourteenth Amendment and that a statute abrogating sovereign immunity is thus always prophylactic. But the claim that abrogation of state sovereign immunity is always prophylactic is problematic at a number of levels. First, if the Due Process Clause requires the state to provide an adequate remedy for deprivations of liberty or property, as the Court appeared to confirm in Florida Prepaid, then the state's invocation of sovereign immunity to deny such a remedy would appear to be a violation of the Fourteenth Amendment. Second, whether or not sovereign immunity claims are "in themselves a violation of the Fourteenth Amendment," abrogation of state sovereign immunity would appear to be remedial, not prophylactic, if the predicate for suing the state were a completed violation of the Fourteenth Amendment. It may be, then, that the Court meant to say that abrogations are only sometimes prophylactic measures, and that the "genuine necessity" standard applies only in such circumstances.

A conclusion that the "genuine necessity" standard does not apply to abrogations of state sovereign immunity for completed violations of the Fourteenth Amendment would be small comfort, however. Such a conclusion would make it easier for Congress to enact a statute along the lines of 1983, making the states themselves liable for violations of the self-executing provisions of the Fourteenth Amendment. But its power to do so has been clear since at least 1976, when Fitzpatrick was decided, and it is telling that it has not done so.¹⁵⁷ Telling, but not surprising: as noted above, Congress is institutionally disposed to undervalue the countermajoritarian norms found in the provisions of the Constitution protecting individual rights.¹⁵⁸ Congress has exercised its powers under Section 5 largely to prohibit conduct [*899] that does not itself violate the Fourteenth Amendment, and it has been these "prophylactic" exercises of Section 5 powers that have consumed the Court in the last several terms. To the extent it has exercised its power to abrogate Eleventh Amendment immunity, it has done so with respect to state violations of these sorts of statutes - statutes that, but for the abrogation of Eleventh Amendment immunity, could have been (and were) enacted pursuant to Article I.¹⁵⁹ Congress is far more likely to abrogate sovereign immunity with respect to obligations that it has decided to impose on the states itself than with respect to obligations imposed on the state (and on Congress itself) by the Constitution. Yet, under the Court's cases, the substantive prohibitions imposed on the states by such statutes will either be found to exceed the scope of Section 5, or will be upheld as valid "prophylactic measures" under Section 5. If the substantive prohibition falls within Section 5 only because it is "prophylactic," it is likely that the accompanying abrogation would be valid only if it meets the "genuine necessity" standard. If so, then the "genuine necessity" standard applies to the only sorts of statutes for which Congress is likely to want to abrogate Eleventh Amendment immunity.

If the "genuine necessity" standard does apply, then the recent abrogation decisions would reduce Fitzpatrick to nothing if we assumed the continuing vitality of the cases reflecting the supremacy strain. If the Court continued to

state make provision for a pre-deprivation hearing when such a hearing would be feasible, and in the patent context it would seem feasible for a state to provide for a hearing whenever a state officer is considering conduct that would arguably infringe a patent. See Vazquez, *supra* note 1, at 1710. If so, then all patent infringements by states would be completed violations of the Due Process Clause without regard to the post-deprivation remedies. But this point appears to have been completely missed by the Court, so I will not dwell on it here as a basis for denying that the Court viewed the abrogation in question as a prophylactic measure. Indeed, Florida Prepaid may reject Zinermon insofar as the latter would require the state to set up pre-deprivation procedures whenever feasible. This would not be surprising, as the majority in Zinermon included none of the Justices in the majority in Florida Prepaid.

¹⁵⁶ College Sav. Bank, 119 S. Ct. at 2225.

¹⁵⁷ Admittedly, it was not until 1989 that the Court ruled that states were not persons within the meaning of 1983. See [Will v. Michigan Dep't of State Police, 491 U.S. 58 \(1989\)](#). But the Court had held ten years before in [Quern v. Jordan, 440 U.S. 332 \(1979\)](#), that 1983 did not abrogate the states' 11th Amendment immunity from suit in federal court.

¹⁵⁸ The existence of [42 U.S.C. 1983](#) (Supp. III 1997) might be thought to contradict the argument I make here. If Congress is institutionally disposed to undervalue constitutional rights, it might be asked, then how did 1983 ever get enacted? My answer is that 1983 should not be viewed as an example of what Congress is institutionally disposed to do in ordinary times. It took a civil war to get us 1983.

¹⁵⁹ In addition to the statutes at issue in Florida Prepaid and College Savings Bank, see [Kimel v. Florida Board of Regents, 120 S. Ct. 631 \(2000\)](#) (ADEA). It bears emphasizing that, even if the statute does not fall within the scope of Section 5, the substantive provisions may validly be applied to the states under Article I, as long as the standard set forth in [Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 554-57 \(1985\)](#), and [New York v. United States, 505 U.S. 144, 166-69 \(1992\)](#), is satisfied.

regard the alternative mechanisms as adequate to assure compliance with federal law by the states, then it is hard to see how abrogation of Eleventh Amendment immunity would ever be genuinely necessary. If the "genuine necessity" standard did not apply, Congress would have more leeway to provide for damage suits against the states themselves, but this power would not be of much practical importance if we assumed the vitality of the supremacy strain. Precisely because the doctrine that undergirds the supremacy strain renders the abrogation of sovereign immunity such an unimportant matter, however, the cases that increasingly treat state sovereign immunity as fundamental and real (including the abrogation cases) suggest that substantial changes are in store for these alternative mechanisms. If these mechanisms are contracted, Congress's [*900] power to abrogate sovereign immunity will acquire an importance it otherwise would lack. Indeed, it would become critically important, as by hypothesis it would be the only way to produce the necessary compliance by the states with the federal laws that validly apply to them.

IV. Coming Contractions

The Court's indications in recent cases that Eleventh Amendment immunity is both fundamental and real may signal a retreat from the position that the Constitution envisions the necessary judicial means for assuring compliance with the states' federal obligations. The decisions that appear to regard the abrogation power as important in giving efficacy to the obligations imposed on the states by or through the Fourteenth Amendment suggest that the Court may be planning to extend the states' Eleventh Amendment immunity to curtail some of the judicial mechanisms that are not currently barred by that Amendment, replacing them with a congressional power to abrogate that immunity if doing so is necessary to deter violations of the Fourteenth Amendment. This Section considers doctrinal changes that the Court's recent decisions hint might be in store, and assesses the harm that such changes would do to the supremacy of federal law.

A. Constitutionalization of Official Immunity

As noted in Part I, the official immunity to which state officials are entitled in personal capacity damage actions has always been regarded as sub-constitutional in nature, meaning that Congress has the power to narrow or eliminate it. But the Court has recently given us signs that it now regards the immunity as having a constitutional foundation. The first of these signs was admittedly subtle. In his dissent in *Seminole Tribe*, Justice Stevens noted that the immunity of state officials from damage actions is plainly subject to alteration by Congress, and he saw "no reason why Congress's undoubted power to displace those common-law immunities should be either greater or lesser than its power to displace the common-law sovereign immunity defense."¹⁶⁰ In a footnote, the majority characterized Justice Stevens's argument as an argument that "no distinction may be drawn between state sovereign immunity and the immunity enjoyed by state and federal officials," and it responded that, "even assuming that the latter has no constitutional foundation, the distinction is clear: The Constitution specifically [*901] recognizes the States as sovereign entities, while government officials enjoy no such constitutional recognition."¹⁶¹ It is, of course, hazardous to predict doctrinal change on the basis of an assumption arguendo, but predictions made on the basis of similarly subtle hints in *Seminole Tribe* have proved accurate.¹⁶² Given that the Court has never before treated official immunity as having a constitutional stature, its otherwise gratuitous "assumption" for the sake of argument that the immunity has no constitutional stature seems like a strong hint that the majority might be contemplating a shift in course.¹⁶³

The *Alden* opinion includes an additional hint that the Court now views the immunity of state officials to be part and parcel of the constitutionally protected immunity of the states themselves. In listing the "important limits to the

¹⁶⁰ *Seminole Tribe v. Florida*, 517 U.S. 44, 88 (1996) (Stevens, J., dissenting). Justice Stevens had earlier expressed his view that state sovereign immunity had the status of common law.

¹⁶¹ *Id.* at 71 n.15 (emphasis added).

¹⁶² Compare Vazquez, *supra* note 1, at 1718-19 (citing footnote statement in *Seminole Tribe* that Supreme Court may review private suits against states from state courts if the state "consents" as indicating that the Court views state sovereign immunity as protecting states from suits based on federal law in state as well as federal suits), with *Alden v. Maine*, 119 S. Ct. 2240, 2240 (1999) (holding that state sovereign immunity protects states from suits based on federal law in state as well as federal courts).

¹⁶³ The remainder of the *Seminole Tribe* footnote might seem to negate the inference I am drawing from the assumption arguendo. The Court affirmed strongly that officials, unlike states, enjoy no constitutional recognition as sovereign entities. In light of the Court's assumption arguendo that the officials' immunity lacks constitutional stature, the rest of the footnote must be read as distinguishing sovereign immunity from official immunity on the ground that the officials are not sovereign. Admittedly, however, the Court's distinction here is in tension with the rationale given in this Section for regarding official immunity as having constitutional stature (i.e., that not doing so would give Congress the power to eviscerate the states' immunity). It is also admittedly

principle of sovereign immunity," the Court noted that "a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally."¹⁶⁴ This statement suggests that the Court views the doctrine of official immunity as, among other things, determining when a state official's violation of federal law is "fairly attributable" to him. More importantly, it suggests that the state's immunity prevents an official from being sued for money damages when this standard is not met.

Though these hints are admittedly ambiguous, the constitutionalization of official immunity is supported further by the broader language [*902] in recent cases to the effect that state sovereign immunity is both fundamental and real. As noted in Part I, if sovereign immunity were indeed just a matter of federal common law, subject to congressional narrowing or even elimination, then Congress would presumably have the power to enact a statute imposing a primary obligation on the states, and to provide further that the head of any state agency shall be strictly liable for any injury caused by a violation of that statute by the agency. For example, Congress could provide in the patent laws that agency heads will be strictly liable for infringements by their agencies. As discussed above, the agency heads most likely would not be paying such judgments themselves. Indeed, the point of placing such liability on the heads of agencies would be to make it more likely that indemnification or insurance schemes will be put in place, under which the judgment would ultimately be paid by the state. Since no one is likely to agree to be an agency head unless a reimbursement scheme were in place, and since prospective agency heads are likely to have the sophistication and clout to secure such an arrangement, a statute that makes such officers strictly liable would be very likely to approximate very closely a government-liability regime. Indeed, Congress could facilitate the shift from an officer-liability regime to a government-liability regime by making it clear in the statute that the state is free to immunize its agency heads from personal liability by waiving its own immunity from damage liability.

It seems virtually certain that, faced with such a statute, every state would either shift its immunity to the officer pursuant to the federal statute or enter into the substantially equivalent arrangement by state statute or by contract with the agency head. If so, then the states' sovereign immunity, which the Court had held was beyond Congress's power to abrogate under Article I, would be reduced to a matter of form rather than substance. By withdrawing the officials' personal liability in the manner suggested, Congress, under Article I, would effectively have the power to secure the states' waiver of their immunity. An officer-liability regime that can be so easily transformed by Congress into a government-liability regime does not seem to qualify as one that gives the states "real" protections. The Court's statements that this immunity is real, and not purely a matter of form, thus suggest the need to limit Congress's power to narrow the scope of the officials' immunity.

This doctrinal shift also seems to follow from the Court's stated rationale for the doctrine of official immunity. As noted, the Court appears to conceive of the doctrine of official immunity as designed to produce the optimal amount of deterrence of state violations of federal laws. It seeks to balance the interest in deterring state violations [*903] of federal law with the competing federal interest in enabling the vigorous but legal enforcement of valid state law. If so, then a congressional contraction of that immunity seems constitutionally problematic. As discussed above, despite the existence of official immunity, the states have found it necessary to offer to indemnify their officials for damage judgments. If official immunity were narrowed or eliminated, the need for such indemnification would be even greater. Narrowing or eliminating official immunity would thus effectively require the states to pay for the reduction of over-deterrence that official immunity doctrine now seeks to achieve. It would shift to the states the cost of enabling the vigorous but legal enforcement of valid state law. Congressional imposition of this financial burden on the states seems inconsistent with the Court's view that state sovereign immunity protects state treasuries.¹⁶⁵ Indeed, in light of the states' need to indemnify their officials, it seems fair to say that the doctrine of official immunity is the only immunity doctrine that in fact protects state treasuries. Without it, state sovereign immunity would be entirely a matter of form.

Constitutionalization of official immunity thus seems to follow from the court's holding in Seminole Tribe and Alden that Congress lacks the power to abrogate state sovereign immunity under Article I, combined with its

possible for the doctrine of official immunity to have a "constitutional foundation" but still be repealable by [Congress](#). Cf. [Prudential Ins. Co. v. Benjamin](#), 328 U.S. 408, 415-25 (1946) (finding dormant Commerce Clause doctrine subject to congressional revision).

¹⁶⁴ Alden, 119 S. Ct. at 2267-68.

¹⁶⁵ See generally Vazquez, *supra* note 1, at 1722-32.

refashioning of official immunity as a doctrine designed to achieve optimal compliance with federal law. To recognize a plenary congressional power to contract such immunity would be to allow Congress to shift to the states the cost of reducing the over-deterrence of state officials, and thus to make the states pay for the vigorous but legal enforcement of valid state laws.¹⁶⁶

[*904] Constitutionalization of official immunity would be the least problematic of the possible doctrinal changes the Court may be contemplating. To the extent the Court succeeds in attaining the goal it appears to have set for the doctrine - producing the optimal degree of deterrence of constitutional violations - constitutionalizing it would appear to be unobjectionable from the standpoint of federal supremacy. If the Court fell short of that goal, constitutionalizing the doctrine would, in theory, limit Congress's ability to correct the problem.¹⁶⁷ But, for a number of related reasons, replacing a congressional power to broaden the personal liability of officials under Article I with a congressional power to make the states themselves liable under the Fourteenth Amendment would not be such a great loss, as a practical matter, for the cause of federal supremacy and it could be a net gain.

First, the default personal liability regime as it currently exists advances the goal of deterring state violations of federal law imperfectly. As discussed above, the combination of official immunity and indemnification may result in under-deterrence. This risk of under-deterrence is offset in many states by the holes and limits these states have included in their indemnification statutes, but the uncertainty introduced by these holes and limits may in turn lead to over-deterrence,¹⁶⁸ and in any event, it reduces under-deterrence by compromising the victim's chances of full recovery. Congressional abrogation of state sovereign immunity through Section 5 appears to [*905] offer a promising solution to this set of problems. Since the state would be the defendant, abrogation reduces the possibility that the state will be under-deterring by jury awards grounded in the mistaken belief that the officer will be paying the judgment. The fact that the state is the defendant also minimizes the risk of over-deterrence caused by the officer's embarrassment in being named as a defendant as well as by the uncertainty that indemnification will be forthcoming. Finally, and importantly, governmental liability protects the interest of the victim of the legal violation to full compensation. (Indeed, unless the state were afforded some version of the officer's immunity, the range of cases for which such compensation would be available would be broader under a government-liability regime.) Although I noted earlier that this interest is not one to which our constitutional system is unyieldingly committed, it is nevertheless

¹⁶⁶ Instead of denying Congress all power to tinker with official immunity doctrine, the Court could establish a constitutional link between the immunity of state officers and the immunity of federal officers. Constitutionally linking the immunity of state and federal officials in this way would guard against a congressional decision based simply on the undervaluing of what I have called the Tenth Amendment interest in the vigorous enforcement of valid state laws. Scholars have suggested a linking of state and federal immunities as a way to address similar problems of federalism. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, [111 Harv. L. Rev. 2180, 2208 n.126 \(1998\)](#); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and Constitutional Compromise*, 52 Rutgers L. Rev. (forthcoming 2000); Vazquez, *supra* note 23, at 1351-52. And the Court itself has, in related contexts, linked the constitutional immunity of the states to that of the federal government. See [Pennsylvania v. Union Gas Co., 491 U.S. 1, 34 \(1989\)](#) (Scalia, J., concurring in part and dissenting in part) ("I think it impossible to find in the scheme of the Constitution a necessity that private remedies be expanded ... to include a remedy not available, for a similar infraction, against the United States itself."); see also [Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2211 n.11 \(1999\)](#) (finding abrogation of state sovereign immunity invalid, relying in part on the fact that Congress subjected states to remedies from which federal government was exempt).

Any such linkage would be a limited constitutionalization of official immunity. It would restrict a power that current doctrine now appears to give Congress: the power to secure the efficacy of the statutory obligations it validly imposes on the states by subjecting state officials to personal liability without the benefit of any immunity. It is not self-evident, moreover, that Congress should lack the power to exempt federal officials from strict compliance with certain federal laws, while insisting that state officials comply. It is hardly clear, for example, that Congress should be denied the power to determine that certain federal interests justify what would otherwise be a violation of patent rights by federal officials but not state officials.

¹⁶⁷ If the doctrine continued to be regarded as federal common law, Congress would have the power to address the problems with the official liability regime by narrowing or eliminating official immunity pursuant to its Article I powers. If the doctrine were regarded as constitutionally required, on the other hand, Congress would be able to address the problem only pursuant to its legislative power under Section 5 of the Fourteenth Amendment, which, after such decisions as *Boerne*, *Florida Prepaid*, and *Kimel*, is considerably narrower in scope.

¹⁶⁸ See Kratzke, *supra* note 93, at 1160-61.

a valid federal interest. Indeed, the recent Section 5 cases stress that remediation is the primary goal of Section 5.¹⁶⁹

It is true that, if official immunity were subject to congressional narrowing or repeal, these same goals could in theory be achieved through a statute eliminating the officials' immunity but allowing the states to protect their officials by waiving their own immunity.¹⁷⁰ But there appear to be substantial political obstacles to the enactment of such a law. Any attempt to subject state officials to strict personal liability for violations of federal law would likely be regarded by legislators as unfair to the officers involved and thus politically unattractive. [*906] That the point of such liability would be to bring about indemnification agreements under which the state would ultimately bear the liability might not fully relieve the unfairness concern, as some officials might get caught without such arrangements during the transition period. In any event, to the extent the unfairness concern were alleviated on this ground, a different problem would arise: Congress's action would be seen as a transparent attempt to circumvent an immunity to which the Court has held the states are entitled. Such transparent circumvention is likely to be unpopular even with persons who think the Court was wrong to hold the states entitled to such immunity in the first place.¹⁷¹ Legislators might also fear that such evasion would be struck down by the Supreme Court, or they might themselves regard such evasion as improper. Either of the last two possibilities would come close to an admission that the constitutionalization of the doctrine of official immunity follows from the Court's recent decisions concerning the related doctrine of state sovereign immunity. Even if not rejected on legal grounds, however, it appears that such a move would likely be rejected on political grounds.¹⁷²

¹⁶⁹ While the cases also mention deterrence and prevention of Fourteenth Amendment violations as proper Section 5 concerns, see [Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 \(2000\)](#) (deterrence); [College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2225 \(1999\)](#) (prevention), they stress that Section 5 is primarily a remedial provision, see Kimel, 120 S. Ct. at 644; Florida Prepaid, 119 S. Ct. at 2206; [City of Boerne v. Flores, 521 U.S. 507, 519 \(1997\)](#).

¹⁷⁰ Such a statute would, admittedly, be in tension with the general tenor of the Court's opinion in College Savings Bank as well as Alden. That is consistent with my argument that these latest cases suggest that the Court is contemplating a constitutionalization of official immunity. My discussion here of whether such constitutionalization would be harmful from the point of view of federal supremacy seeks to compare the consequences of a constitutionalized doctrine of official immunity to the consequences of a non-constitutionalized doctrine. In discussing the consequences of the latter, I accordingly must assume that a statute eliminating such immunity would be constitutional. If it would be, then a statute that goes on to authorize the states to restore such immunity by waiving their own immunity would appear to be valid as well. Under my assumptions, a statute granting the states the power to immunize their officials by waiving their own immunity merely confers a gratuity, and the Court has said that Congress has the power to encourage state waivers of sovereign immunity by offering them such gratuities as money or the approval of an interstate compact. See College Sav. Bank, 119 S. Ct. at 2231.

¹⁷¹ Cf. Mark Tushnet & Jennifer Jaff, Why the Debate Over Congress' Power to Restrict the Jurisdiction of the Federal Courts Is Unending, [72 Geo. L.J. 1311, 1326 \(1984\)](#) ("People may disagree with what the Court has done, but, except in special cases, they will grudgingly accept it. Further, there is a sense that playing games with the Constitution is not a nice thing, and that restricting jurisdiction is playing games. This notion stems from a well-founded suspicion that the real desire of proponents of restricting jurisdiction is to repudiate the underlying judicial decisions by adopting jurisdiction-restricting measures as a subterfuge or substitute for constitutional amendment or Court overruling."); see also Michael J. Perry, The Constitution, the Courts, and Human Rights 125-29 (1982). The Religious Freedom Restoration Act (RFRA) may be one of the special cases to which Tushnet and Jaff refer. That this apparent evasion was enacted may reflect the strength of the disagreement with the Court's decision, but it may also suggest that legislation granting rights that the Constitution, as interpreted by the Court, does not grant is not an "evasion" in the same sense as a law attempting to deny rights the Court has held the Constitution protects. In any event, the fate of RFRA suggests that even these sorts of evasions will ultimately be struck down by the Court. See Boerne, 521 U.S. at 536 (holding RFRA unconstitutional).

¹⁷² That a statute of the sort described above is regarded by Congress as either unconstitutional under the Court's recent decisions or politically infeasible is suggested by the fact that none of the proposals for responding to the Florida Prepaid decision have taken this approach. See Ritchenya A. Shepherd, Getting Around IP Immunity, Nat'l L.J., Feb. 28, 2000, at B6; Draft Revisions of State Immunity Bill Reveal Continued Interest in [Reform, 68 U.S.L.W. 2504 \(2000\)](#). It is possible that the decision not to pursue this course is merely strategic. It might be based on the fear that the current Court might strike down the move as an evasion of its sovereign immunity precedents, making it more difficult for a differently constituted Court to hold in the future that official immunity can be narrowed or eliminated by Congress. The fear that the current Court would strike the statute down, however, seems virtually equivalent to the conclusion that the statute violates the principles articulated in its recent decisions. And the fear that a decision by the current Court constitutionalizing official immunity would make it more difficult for a subsequent Court to deconstitutionalize it seems exaggerated, given that the four Seminole Tribe dissenters are prepared to overrule that

[*907] Denying Congress the power to narrow or eliminate official immunity might even be a net gain from the perspective of federal supremacy. If the Court were to apply the "genuine necessity" standard to abrogations of sovereign immunity under Section 5, then such abrogations would seem harder to justify if the option of narrowing or eliminating a nonconstitutional immunity of state officers remained available in theory. The argument that this option is politically unattractive is unlikely to carry much weight with the Court.¹⁷³ By taking this option off the table, constitutionalization of official immunity would substitute the politically more acceptable option of making states directly liable in damages to individuals for the politically unattractive, and probably less effective, option of making state officials strictly liable. Even if the latter power were in theory available under Article I, it does not have much value if there are significant political obstacles to exercising it.

At any rate, constitutionalization of official immunity helps resolve some of the contradictions that led to my diagnosis of schizophrenia. If the Constitution were read to entitle state officials (and thus indirectly the states themselves) to immunity for violations of not-clearly-established federal law, then the Eleventh Amendment's protections would not be purely formal. The Amendment would protect states from having to bear the cost of preventing over-deterrence. In the absence of abrogation, the supremacy of federal law would be protected by the availability of suits by the federal government, private suits for prospective relief, and private suits seeking damages from officials who have violated clearly established federal law. But Congress would retain the power to fine-tune the remedial scheme to improve deterrence of Fourteenth Amendment violations and, importantly, to protect the interest in full remediation for violations of that Amendment, by making states directly liable even for violations of not-clearly-established law. The chance that Congress would use this power to [*908] give efficacy to the countermajoritarian norms of the Fourteenth Amendment may be small, but its existence at least rescues the abrogation power from triviality. It is true that even a subconstitutional doctrine of official immunity would help explain some of the seemingly contradictory statements in the Supreme Court's opinions, at least if I am right in suggesting that Congress's power to narrow or eliminate official immunity is unlikely to be exercised. But, if official immunity were in theory repealable by Congress, the substantive protection offered the states by the Eleventh Amendment would be at bottom political, not legal. The members of the current majority on federalism issues have not been content to rely on political safeguards to protect the states from Congress.¹⁷⁴

B. Contraction of *Ex parte Young*

Of far greater concern from a supremacy perspective are the Court's recent decisions narrowing the *Ex parte Young* exception and hinting that further contraction may be in store. The first hints came with *Seminole Tribe*. The Court in that case interpreted a statute authorizing suits against the states themselves under limited circumstances as implicitly preempting suits against officials under an *Ex parte Young* theory. Although the Court's statutory interpretation left much to be desired,¹⁷⁵ the Court's conclusion that an action under *Ex parte Young* is unavailable if the statute that creates the right being enforced implicitly preempts such actions is unexceptionable. Indeed, in reaching its decision, the Court in *Seminole Tribe* appeared to assume a robust *Ex parte Young* doctrine. It assumed that, had the statute been construed not to preempt such actions, *Ex parte Young* would necessarily have authorized full and immediate compensatory relief.¹⁷⁶

decision the moment they are joined by a like-minded colleague. See *Kimel*, 120 S. Ct. at 653 (Stevens, J., dissenting, joined by Souter, Ginsburg, & Breyer, JJ.) ("Despite my respect for stare decisis, I am unwilling to accept *Seminole Tribe* as controlling precedent.").

¹⁷³ Admittedly, though, a Supreme Court decision striking down an abrogation of the states' sovereign immunity on the ground that Congress failed to consider the option of narrowing or eliminating official immunity would make the latter option less unattractive politically. As the Court would have invited such a move, the statute could not be criticized as an evasion of the Court's decision.

¹⁷⁴ See [Garcia v. San Antonio Metro. Transit Auth.](#), 469 U.S. 528, 565-66 (1989) (Powell, J., dissenting); *id.* at 587-88 (O'Connor, J., dissenting).

¹⁷⁵ See Vicki C. Jackson, *Seminole Tribe*, the Eleventh Amendment, and the Potential Evisceration of *Ex parte Young*, [72 N.Y.U. L. Rev. 495 \(1997\)](#); Jeffries, supra note 4, at 51 n.19; Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, [1996 Sup. Ct. Rev. 1, 43](#); Vazquez, supra note 1, at 1717.

¹⁷⁶ See *Seminole Tribe*, 517 U.S. at 75 (describing *Ex parte Young* as affording "more complete and more immediate relief" than relief afforded by the statute involved in *Seminole Tribe*).

In its opinion, however, the Court described *Ex parte Young* as recognizing a "narrow" exception to the rule established in the Eleventh Amendment.¹⁷⁷ This seemed to be a retreat from *Pennhurst*. As already explained, the Court in *Pennhurst* had reconceptualized *Ex [*909] parte Young* as an exception to the rule that suits in which the state is the real party in interest are barred by the Eleventh Amendment. Seminole Tribe was faithful to *Pennhurst* in characterizing *Ex parte Young* as an exception to that Eleventh Amendment principle, but it was unfaithful in characterizing the exception as narrow. The exception recognized in *Pennhurst* extended to all suits seeking prospective relief from state violations of federal law - hardly a narrow set of cases. Indeed, between *Pennhurst* and *Coeur d'Alene*, the only category of suit against state officials seeking prospective relief that was held to fall outside this exception was the category that the Court in *Pennhurst* excluded - suits based on state law.¹⁷⁸ Since such cases fall within the jurisdiction of the federal courts only if diversity or pendent jurisdiction exists, it seems odd to say that the exception is narrow because it excludes such cases.

The description of *Ex parte Young* as a "narrow" exception to the Eleventh Amendment rule led some commentators to fear that the Court was contemplating a major overhaul of the *Ex parte Young* doctrine.¹⁷⁹ The following term the Court apparently came close to accomplishing just that. Justice Kennedy's opinion in *Coeur d'Alene* would have drastically altered the doctrine, but three of the five Justices in the majority refused to go along. Nevertheless, those Justices concurred with Justice Kennedy in establishing an exception to *Ex parte Young*. The concurring Justices have been praised for heading off the drastic alteration of the *Ex parte Young* doctrine advocated by Justice Kennedy, and instead reaffirming in strong terms that prospective relief from violations of federal law is "ordinarily" permitted under *Ex parte Young*. Ironically, however, those Justices' reasons for adopting the exception they ultimately recognized were so directly at odds with the interpretation given to that case in *Pennhurst* that they threaten a potentially more significant evisceration of *Ex parte Young* than Justice Kennedy's overhaul would have accomplished.

As noted, the Court in *Pennhurst* recognized that *Ex parte Young* rested on the fiction that suits seeking prospective relief against state officials are not really against the state. The rationale of *Ex parte Young* was that, because of the Supremacy Clause, the states lack the power to authorize a violation of federal law, so a state official who is violating federal law is acting without the cloak of state authority.¹⁸⁰ Other cases decided before *Pennhurst*, however, denied immunity on [*910] the theory that the suit was really against the state.¹⁸¹ In *Pennhurst*, the Court synthesized its prior cases by recognizing that *Ex parte Young* suits are, for all practical purposes, against the state itself, but are nevertheless permitted as an exception to the Eleventh Amendment because of the need to give efficacy to the federal obligations of the states.

The concurring Justices in *Coeur d'Alene* reaffirmed that "ordinarily" a suit against a state official seeking prospective relief is not barred by the Eleventh Amendment, but they recognized an exception. As I have argued elsewhere, the opinion is best read to carve out an exceedingly narrow exception to *Ex parte Young* embracing only disputes about sovereignty over submerged lands.¹⁸² But some of the reasons the Court gave for recognizing the exception are fundamentally in conflict with *Pennhurst*'s characterization of *Ex parte Young*, and would support a far broader exception. The Court reasoned that it is impossible to distinguish a suit seeking the form of relief plaintiffs were seeking in *Coeur d'Alene* from a suit against the state.¹⁸³ The *Pennhurst* Court would have agreed, but only because it understood that all *Ex parte Young* actions are indistinguishable from a suit against the state. For that very reason, to hold that prospective relief is available against officers only if the suit is not "really" against the state would be to eviscerate *Ex parte Young*.

¹⁷⁷ See [*id.* at 76.](#)

¹⁷⁸ See [*Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 \(1984\).](#)

¹⁷⁹ See Jackson, *supra* note 181, at 535-36.

¹⁸⁰ See *Pennhurst*, 465 U.S. at 105.

¹⁸¹ See, e.g., [*Edelman v. Jordan*, 415 U.S. 651, 663 \(1974\)](#); Vazquez, *supra* note 19, at 22.

¹⁸² See Vazquez, *supra* note 19, at 47-51.

¹⁸³ See *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring) ("It simply cannot be said that the suit is not a suit against the State.").

Justice O'Connor's statement that she "would not narrow" *Ex parte Young*¹⁸⁴ suggests that the opinion should not be read as creating an exception for all suits that fit within her stated rationale. This, however, leaves us with an exception without a rationale, and the lower courts understandably resist reading a Supreme Court decision as simply decreeing an arbitrary rule. Three Courts of Appeal have accordingly interpreted *Coeur d'Alene* to bar suits for prospective relief where the case presents "special sovereignty interests," or where the relief sought is "as intrusive" as an award of damages against the state.¹⁸⁵

Alden subtly encourages this reading. Reiterating that the "real interests served by the Eleventh Amendment are not to be sacrificed" [*911] to elementary mechanics of captions and pleading,¹⁸⁶ the Court said that "some suits against state officials are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State."¹⁸⁷ The Court then cited *Ex parte Young* for the proposition that "the rule ... does not bar certain actions against state officers for injunctive or declaratory relief."¹⁸⁸ The "certain actions" language suggests that the *Ex parte Young* doctrine is indeed "narrow," as the Court said in *Seminole Tribe*. Perhaps more importantly, the Court now seems to view *Ex parte Young* not as an exception to the "real party in interest" test, as it had in *Pennhurst* and even in *Seminole Tribe*, but as an application of it. If the Court now understands *Ex parte Young* to permit only suits in which the state is not the "real party in interest," however, it has emasculated the doctrine.

This broad interpretation of *Coeur d'Alene* is, in the end, more troubling than the overhaul Justice Kennedy had proposed in *Coeur d'Alene*. In the earlier case, Justice Kennedy viewed *Ex parte Young* as serving a backstop function. He would apparently have denied *Ex parte Young* relief in the federal courts if similar relief were available in the state courts. But he would have insisted that some court be available in which to vindicate the federal obligations of the states. For Justices O'Connor, Scalia, and Thomas, on the other hand, the existence of a state forum was not important. If a suit falls within an exception to *Ex parte Young*, then for the concurring Justices there may be no remedy.

Justice Kennedy's opinion in Alden characterized the decision in *General Oil Co. v. Crain*¹⁸⁹ as an extension of *Ex parte Young* to the state courts.¹⁹⁰ As I have explained elsewhere, this reflects Justice Kennedy's abandonment of the backstop interpretation of *Ex parte Young* he had proposed in *Coeur d'Alene*.¹⁹¹ The Court now seems to view the state's obligation under *Crain* to provide a forum in which to obtain prospective relief against state officers who are violating federal law as coextensive with the federal government's power under *Ex parte Young* to provide a forum in the same cases. If so, then any narrowing of *Ex parte Young* is also a narrowing of *Crain*. If the concurring opinion in *Coeur d'Alene* is read to establish a broad exception to the *Ex parte* [*912] *Young* doctrine for suits that cannot be distinguished from suits against the states, then we have an exception that swallows the *Ex parte Young* rule and denies both a state and a federal forum in which to obtain prospective relief against state officers who are violating federal law.¹⁹²

The evisceration of *Ex parte Young* would be deeply troubling from a supremacy perspective. To the extent the Eleventh Amendment were read to bar prospective relief against state officials, the valid federal obligations of the states would be completely unenforceable in court by private parties, except to the extent the substantive obligation

¹⁸⁴ See [id. at 296](#).

¹⁸⁵ See [Summit Med. Assocs., P.C. v. Pryor](#), 180 F.3d 1326, 1337 (11th Cir 1999); [MacDonald v. Village of Northport](#), 164 F.3d 964, 971-73 (6th Cir. 1999); [ANR Pipeline Co. v. Lafaver](#), 150 F.3d 1178, 1188-90 (10th Cir. 1998).

¹⁸⁶ [Alden v. Maine](#), 119 S. Ct. 2240, 2267 (1999) (quoting *Coeur d' Alene*, 521 U.S. at 270).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ [209 U.S. 211 \(1908\)](#).

¹⁹⁰ See Alden, 119 S. Ct. at 2263.

¹⁹¹ See Vazquez, *supra* note 124 (on file with the Notre Dame Law Review).

¹⁹² The Court's suggestion in *Breard v. Greene*, 52 U.S. 371, 377-78 (1998), that suits seeking to stop an execution are barred by the 11th Amendment may also signal a narrowing of *Ex parte Young*. For an argument that this opinion should not be read as an 11th Amendment decision at all, see Vazquez, *supra* note 19, at 66-68.

could be upheld under the Court's demanding Section 5 test. The many, many cases upholding this form of relief against state officials, including all of the cases in which the federal courts have entertained habeas petitions by state prisoners, present an enormous precedential obstacle to a wholesale rejection of *Ex parte Young*. But even a limited rejection of the doctrine would call into question the supremacy of the federal laws affected. Suits by the federal government would still be available to enforce the affected obligations of the states, but, as discussed above, relying on Executive Branch enforcement is problematic in a number of respects, particularly with respect to constitutional obligations. Moreover, as discussed below, there are hints in the cases that the Court may be contemplating a narrowing of even this mechanism.¹⁹³

C. Non-Judicial Means of "Enforcing" the States' Federal Obligations

Perhaps the most disturbing aspect of the Court's recent sovereign immunity decisions is its suggestion that the federal legal obligations [*913] of the states depend on nonlegal means of enforcement. In *Alden*, the Court noted that its holding did not call into question the states' obligation to comply with federal laws. In emphasizing that such obligations remained the supreme law of the land, however, the Court did not refer immediately to the available compulsory mechanisms for enforcing the states' federal obligations. Instead, it expressed its confidence in the states' good faith:

We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."¹⁹⁴

When it did turn to available judicial mechanisms, it began by noting the possibility that the states, animated by "a sense of justice," might choose to consent to be sued on their federal obligations.¹⁹⁵

The Court's reliance on the states' good faith and their possible voluntary consent to suit contradicts the view expressed by the Framers that a norm that depends on the good faith of the norm-subject for its efficacy is not a legal norm at all.¹⁹⁶ The experience under the Articles of Confederation had convinced the Founders that the efficacy of national acts could not rest on the good faith of the states:

There was a time when we were told that breaches by the States of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union. This language, at the present day, would appear as wild as a great part of what we now hear from the same quarter will be thought, when we shall have received further lessons from that best oracle of wisdom, experience. It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power. Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint.¹⁹⁷

Since federal norms having the status of "supreme law" unquestionably bind the states, the efficacy of these norms cannot, consistent with the Constitution, be left to the good faith of the states.

¹⁹³ In addition to the discussion below, consider the Court's failure in *Kimel* to indicate that the obligations imposed by the ADEA remain binding on the states and may be enforced through suits for prospective relief and in actions brought by the federal government. See 29 U.S.C. 626(b) (1994) (authorizing EEOC to institute an action for violation of ADEA); id. 626(c)(1) (1994) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."). In the portion of the opinion where it has been customary for the Court to note that the federal obligations remain binding on the states and can be enforced through other means, the Court instead stated that "our decision today does not signal the end of the line for employees" who are victims of age discrimination because "state employees are protected by state age discrimination statutes." [Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 650 \(2000\)](#) (emphasis added).

¹⁹⁴ *Alden*, 119 S. Ct. at 2266 (quoting U.S. Const. art. VI).

¹⁹⁵ See [id. at 2267](#) (quoting [Great N. Life Ins. Co. v. Read, 322 U.S. 47, 53 \(1944\)](#)).

¹⁹⁶ See Vazquez, *supra* note 124 (on file with the Notre Dame Law Review).

¹⁹⁷ The Federalist No. 15, at 149 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[*914] To be sure, the Court in *Alden* went on to list the compulsory mechanisms for enforcing the federal obligations of the states that these Justices had elsewhere described as the "necessary judicial means" contemplated by the Constitution to assure state compliance with federal law. The Court's list of compulsory mechanisms for enforcing federal law against the states indicates that the Court is not willing to rely completely on the states' good faith. But its emphasis on good faith and consent may suggest that future decisions about the contours of these compulsory mechanisms will be based on assumptions about the states' disposition to comply voluntarily with federal norms that the Founders rejected. The Court's avowal of its confidence in the states' good faith may be a hint that the present majority would not be troubled by restrictions on the availability of these compulsory mechanisms, even if they left certain categories of federal obligations without a judicial means of enforcement.

Florida Prepaid also mentions a non-legal mechanism for enforcing the federal obligations of the states. As discussed above, the issue in Florida Prepaid was whether Congress's abrogation of the states' Eleventh Amendment immunity was a valid exercise of its power under Section 5 of the Fourteenth Amendment to "enforce" the latter Amendment by "appropriate" legislation.¹⁹⁸ The plaintiff argued that patents were property and thus Congress had the power to abrogate Eleventh Amendment immunity to "enforce" the state's obligation not to deprive it of this property without due process of law. The Court agreed that patents were property, but it held that abrogation would be appropriate only if the states were violating such property rights without affording an adequate remedy, as required by the Due Process Clause.¹⁹⁹ In its discussion of the sorts of remedies available to the plaintiff in Florida, the Court mentioned that there is a procedure in Florida for introducing private bills to seek reimbursement for injuries suffered at the hands of the state.²⁰⁰ The Court thus implied that a procedure for seeking redress in the state legislature satisfies the Due Process Clause's obligation that the state provide a remedy for its violations of federal law.

Like the Court's reliance on the states' good faith in *Alden*, the reliance on the existence of a legislative mechanism for enforcing the federal obligations of the states is in conflict with the statement that the Constitution envisions the necessary judicial means for the enforcement [*915] of the federal obligations of the states. Even if Florida did not have a formal procedure for introducing private bills, citizens are guaranteed by the First Amendment (as incorporated into the Fourteenth) the right to petition state governments.²⁰¹ Petition as they might, however, the state legislature is not required to accede to the request.²⁰² Any remedy procured through this method is received as a matter of the state's grace. A procedure for requesting an exercise of grace is as inadequate a method of "enforcing" federal law as reliance on the states' good faith. The Court could not have seriously meant to suggest that formalized supplication of this sort satisfies the remedial requirement of due process of law. Once again, however, the Court's pointed mention of this procedure may signal a willingness to leave certain state obligations without the backing of a compulsory mechanism of enforcement.

D. Fitzpatrick Revisited

Narrowing the scope of the existing judicial mechanisms for enforcing the federal obligations of the states and substituting a congressional power to authorize the "necessary judicial means to assure compliance with the Constitution and laws" would severely compromise the supremacy of these obligations. Without those necessary judicial means, the status of the underlying obligation as "supreme law" would be placed into doubt. Furthermore, Congress would lack the power to provide for such mechanisms with respect to state obligations having their source in antecedent provisions of the Constitution. To deny Congress the power to authorize the judicial means necessary to give efficacy to these obligations would be a backdoor way of denying Congress the power to impose these legal obligations in the first place.

Although such a state of affairs conflicts with the Supremacy Clause and with the Court's own insistence in *Alden* that these obligations remain the supreme law of the land, it was foreshadowed in *Fitzpatrick* itself. The Court in that

¹⁹⁸ See [Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank](#), 119 S. Ct. 2199, 2208 (1999).

¹⁹⁹ See [id. at 2209](#).

²⁰⁰ See [id. at 2209 n.9](#).

²⁰¹ See U.S. Const. amend. I, XIV; see also [Brandenburg v. Ohio](#), 395 U.S. 444, 449 (1969).

²⁰² Cf. [Printz v. United States](#), 521 U.S. 898, 972 (1997) (Souter, J., dissenting) ("The core power of a legislator ... is to make discretionary decisions.").

case inferred a congressional power to abrogate Eleventh Amendment immunity under Section 5 of the Fourteenth Amendment from the fact that that Amendment fundamentally altered federal-state relations by imposing significant new obligations on the states and gave Congress the power to enforce them. The Court cited no direct evidence that the Framers of that Amendment [*916] viewed the enforcement power as encompassing the power to abrogate the states' immunity. What it did cite suggests a view of the Eleventh and Fourteenth Amendments directly at odds with the supremacy view. In particular, the Court relied on the following analysis from *Ex parte Virginia*:

Were it not for the fifth section of [the Fourteenth] Amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State... But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete.²⁰³

The suggestion that, without Section 5, the Fourteenth Amendment might reasonably have been construed as imposing merely moral obligations is deeply troubling. If only a provision conferring a power to abrogate sovereign immunity could be deemed to impose truly legal obligations on the states, then decisions like *Seminole Tribe* and *Alden* would require the conclusion that the provisions of the unamended Constitution, or of statutes passed by Congress pursuant to the unamended Constitution, do not impose legal obligations on the states at all. This would be in line with the recent decisions that conflict with the supremacy view, as well as with the Court's recent reliance on nonjudicial mechanisms to "enforce" these provisions. But it would be plainly at odds with decisions roughly contemporaneous with *Ex parte Virginia*, such as *Poindexter*, as well as portions of the more recent cases, discussed above, such as the *Union Gas* dissent and the *Alden* majority. Indeed, it is at odds with the Supremacy Clause.

Conclusion

The supremacy strain in the Supreme Court's Eleventh Amendment jurisprudence finds all the support it needs from the constitutional text, which declares the federal obligations of states to be the "supreme law of the land." The Supremacy Clause should be construed to authorize the "necessary judicial means" to assure compliance by the states with their federal obligations. This does not mean that the necessary judicial means include suits against the states for retroactive monetary relief. But it does mean that the default mechanisms for enforcing the federal obligations of the states should continue to exist in their full vigor.

[*917] The state sovereignty strain stands on considerably weaker ground. The problem with state sovereign immunity from a supremacy perspective is a result of the Court's decision in *Hans* that states enjoy such immunity in cases arising under federal law. As discussed above, scholars and dissenting Justices have argued forcefully that the Eleventh Amendment was never intended to reach such cases. The Court considered those arguments in *Welch* and a plurality declined to overrule *Hans*, but not because it concluded that *Hans* correctly reflected the original intent behind the Eleventh Amendment. The plurality concluded that the historical evidence was "ambiguous."²⁰⁴ It decided to retain *Hans* for reasons of stare decisis, relying specifically on the judgment that *Hans*'s effects were not "pernicious" from a supremacy perspective because of the availability of alternative mechanisms for enforcing federal law against the states.²⁰⁵ Justice Scalia in *Union Gas* endorsed the plurality's analysis in *Welch*, similarly resting the decision to retain *Hans* on stare decisis.²⁰⁶ In his view, the "foremost argument" in favor of overruling *Hans* was that "waiver of immunity against suits presenting federal questions is ... implicit in the constitutional scheme" given

²⁰³ [Fitzpatrick v. Bitzer, 427 U.S. 445, 455 \(1976\)](#) (quoting [Ex parte Virginia, 100 U.S. 339, 347-48 \(1879\)](#)).

²⁰⁴ [Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 479 \(1987\)](#) (describing the historical evidence on this question as "ambiguous"); see also [id. at 483-84](#) ("At most, ... the historical materials show that - to the extent this question was debated - the intentions of the Framers and Rataifiers were ambiguous.")

²⁰⁵ [Id. at 478-70, 487-88.](#)

²⁰⁶ See [Pennsylvania v. Union Gas Co., 491 U.S. 1, 30-31 \(1989\); id. at 33](#) (noting that "the evidence is strong" that Article III did not eliminate sovereign immunity, and "even stronger" that the continued existence of state sovereign immunity was implicit in the Eleventh Amendment, but that the question whether this immunity was thought to extend to cases arising under federal law "is subject to greater dispute"); [id. at 34](#) (stating that "the question [of the original meaning of the Constitution, or the assumption adopted by the Eleventh Amendment] is at least close"). See generally Vazquez, *supra* note 19, at 86-88.

the supremacy of federal law.²⁰⁷ As already noted, he concluded that the supremacy of federal law did not require that private parties be permitted to sue states for money damages, as alternative mechanisms supplied the "necessary judicial means to assure compliance [by the states] with the Constitution and laws."²⁰⁸ In short, we have a doctrine of state sovereign immunity that extends to cases arising under federal law not because the Court believed that the Framers unambiguously decided to subordinate federal supremacy to state sovereignty, but because the Court determined that, in light of the existence of alternative mechanisms for enforcing the federal obligations of states, state sovereign immunity is consistent [*918] with federal supremacy. The Court's decisions in Seminole Tribe and Alden to retain a version of state sovereign immunity is thus defensible only to the extent the immunity is construed in such a way as to accommodate the supremacy principle.

One of the doctrinal changes the Court might be contemplating - the constitutionalization of official immunity - appears tolerable from a supremacy perspective. This is because the doctrine of official immunity purports to seek the optimal amount of deterrence of legal violations by state officials. A congressional power to expand such liability should be unnecessary as long as the doctrine of official immunity succeeds in achieving that goal. To the extent the doctrine fails at that goal, a congressional power to modify it might alleviate the problem with respect to the statutory obligations of the states, but it appears that such a power is unlikely to be exercised.

The other doctrinal changes the Court may be contemplating, on the other hand, are deeply troubling because they would eliminate necessary judicial means for enforcing the federal obligations of the states. Substituting a congressional power to abrogate such immunity is unsatisfying with respect to a broad category of federal norms: constitutional norms and statutory obligations imposed pursuant to Article I. As long as the necessary alternative means to enforce these obligations are preserved, a congressional power of abrogation should be unnecessary. This may well reduce the practical significance of Fitzpatrick, but that is as it should be. The power recognized in Fitzpatrick would be important only if the remedial scheme that existed in its absence were inadequate. The insignificance of Fitzpatrick would accordingly be a sign of a healthy remedial regime, one that reflected the constitutional interest, founded in the Supremacy Clause, to secure the efficacy of all of the federal obligations of the states, not just those having their source in the Fourteenth Amendment.

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²⁰⁷ Union Gas, 491 U.S. at 33.

²⁰⁸ Id.