

Against Sovereign Immunity

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In recent years, the Supreme Court has substantially expanded the scope of state sovereign immunity. These decisions provide an important occasion for a reconsideration of the entire doctrine of sovereign immunity. This article argues that sovereign immunity is an anachronistic concept, derived from long-discredited royal prerogatives, and that it is inconsistent with basic principles of the American legal system. Sovereign immunity is justified neither by history nor, more importantly, by functional considerations. Sovereign immunity is inconsistent with fundamental constitutional requirements such as the supremacy of the Constitution and due process of law. This article concludes that sovereign immunity, for government at all levels, should be eliminated by the Supreme Court.

I. INTRODUCTION: OF COURSE, THE GOVERNMENT CAN DO WRONG

Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law. The principle of sovereign immunity is derived from English law, which assumed that “the King can do no wrong.”¹ Since the time of Edward the First, the Crown of England has not been suable unless it has specifically consented to suit.² Throughout American history, United States courts have applied this principle, although they often have admitted that its justification in this country is unclear.³

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1. See 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 6-7 (2d ed. 1984) (quoting Blackstone); 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE 210 (1985). Actually, as John Orth pointed out to me, the phrase, “the King can do no wrong,” has many possible meanings. It might simply mean that when a wrong occurs, someone else must have done it, because the King can do no wrong. Alternatively, it might mean that a remedy must exist, because the King cannot do a wrong, as would occur if a harm went unremedied.

2. *United States v. Lee*, 106 U.S. 196, 205 (1882).

3. *Id.* at 207 (“[T]he principle has never been discussed or the reasons for it given, but

A doctrine derived from the premise that “the King can do no wrong” deserves no place in American law. The United States was founded on a rejection of a monarchy and of royal prerogatives.⁴ American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable. Sovereign immunity undermines that basic notion.

The doctrine is inconsistent with the United States Constitution. Nowhere does the document mention or even imply that governments have complete immunity to suit. Sovereign immunity is a doctrine based on a *common law* principle borrowed from the English common law. However, Article VI of the Constitution states that the Constitution and laws made pursuant to them are the supreme law, and, as such, it should prevail over government claims of sovereign immunity.⁵ Yet, sovereign immunity, a common law doctrine, trumps even the Constitution and bars suits for relief against government entities in violation of the Constitution and federal laws.

Sovereign immunity is inconsistent with a central maxim of American government: no one, not even the government, is above the law. The effect of sovereign immunity is to place the government above the law and to ensure that some individuals who have suffered egregious harms will be unable to receive redress for their injuries.⁶ The judicial role of enforcing and upholding the Constitution is rendered illusory when the government has complete immunity to suit. Moreover, sovereign immunity undermines the basic principle, announced in *Marbury v. Madison*, that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁷

All of this seems so clear and obvious. Yet sovereign immunity is not fading from American jurisprudence; quite the contrary, the Supreme Court is dramatically expanding its scope. In *Alden v. Maine*, the Court held that sovereign immunity broadly protects state governments from being sued in state court without their consent, even to enforce federal laws.⁸ In *Seminole Tribe v. Florida*, the Court greatly limited the ability of Congress to authorize suits against state governments and to override sovereign immunity.⁹ The Court applied this principle within the past couple of years to bar suits against

it has always been treated as an established doctrine.”) (citations omitted).

4. See, e.g., U.S. CONST. art. I, § 9 (“No Title of Nobility shall be granted by the United States.”).

5. U.S. CONST. art. VI.

6. John E. H. Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Courts of Claims*, 22 ADMIN. L. REV. 39, 58 (1969).

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

8. 527 U.S. 706 (1999).

9. 517 U.S. 44 (1996). Congress may authorize suits against states only when acting pursuant to section five of the Fourteenth Amendment and not pursuant to any other federal power. *Id.* At 59.

states for patent infringement¹⁰ and for age discrimination.¹¹ Although all of these cases involve suits against state governments, the Court has indicated no willingness or likelihood of relaxing the sovereign immunity of the United States government.

In this article, I argue that this entire body of law is simply wrong and that the doctrine of sovereign immunity should be banished from American law. No government—federal, state, or local—should be accorded sovereign immunity in any court. Part II considers the constitutional status of sovereign immunity and makes two arguments: first, that sovereign immunity is not a doctrine based in the United States Constitution; and second, that sovereign immunity should be regarded as inconsistent with the Constitution. Part III then considers the policy justifications for sovereign immunity and argues that it is an undesirable doctrine that undermines both government accountability and compensation for injured individuals. In Part III, I also consider the primary justifications for sovereign immunity—protecting government treasuries, separation of powers, the lack of authority for suits against government entities, the existence of adequate alternatives to suits against the government, and tradition—and argue that none of these justify the doctrine.

Obviously, I do not foresee the Supreme Court eliminating sovereign immunity any time soon. The trend, unquestionably, is in the opposite direction. Yet, I feel confident in the prediction that there is a time that the Supreme Court will abolish sovereign immunity. The doctrine conflicts with too many basic constitutional principles to survive.

II. THE UNCONSTITUTIONAL STATUS OF SOVEREIGN IMMUNITY

The Supreme Court unquestionably has found that sovereign immunity, particularly for state governments, is a constitutional requirement. In *Alden v. Maine*, the Court declared: “We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”¹² In *Seminole Tribe v. Florida*, the Court was explicit that the Eleventh Amendment is a constitutional limit on federal subject matter jurisdiction, and that Congress can override it by statute only pursuant only to Section Five of the Fourteenth Amendment.¹³ In other words, the Court has found state sovereign immunity to be part of the Constitution and thus prevented Congress, by statute, from overriding it. In essence, the Court has found sovereign immunity to be a right of state governments and to operate just like individual rights: it limits the

10. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999).

11. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

12. 527 U.S. 706, 712 (1999).

13. 517 U.S. 44, 59 (1996).

legislative power and trumps all other claims.

Moreover, the sovereign immunity of the United States government is firmly established. Long ago, Chief Justice John Marshall declared that “[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States.”¹⁴ Many times the Supreme Court has reiterated this principle, holding that “the United States cannot be lawfully sued without its consent in any case.”¹⁵

In this section, I make two distinct arguments. First, I contend that sovereign immunity is not a constitutional doctrine. Second, I argue that sovereign immunity should be regarded as an unconstitutional doctrine; it conflicts with many aspects of the United States Constitution. It is important to separate these two steps in the analysis. The former explains why the doctrine should not be found in the United States Constitution. By itself, this does not justify abolishing the doctrine, though if this conclusion is accepted, it would mean that Congress by statute could authorize suits against governments. The latter argument, however, goes further and maintains that the doctrine should be deemed unconstitutional and therefore must be eliminated.

A. *Is There a Constitutional Basis for Sovereign Immunity?*

For the last several decades, discussions about constitutional interpretation have been dominated by a debate between originalist and non-originalist modes of interpretation. Originalism is the view that “judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.”¹⁶ In contrast, non-originalism is the “contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.”¹⁷ Originalists believe that the Court should find a right to exist in the Constitution only if it is expressly stated in the text or was clearly intended by its framers. If the Constitution is silent, originalists say it is for the legislature, unconstrained by the courts, to decide the law. Nonoriginalists think that it is permissible for the Court to interpret the Constitution to protect rights that are not expressly stated or clearly intended. Sovereign immunity cannot be found in the Constitution under either of these theories of constitutional interpretation.

Actually, the more important argument is demonstrating that sovereign immunity cannot be justified under an originalist approach. All of the recent cases expanding the scope of sovereign immunity—*Seminole Tribe v. Florida*,

14. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-412 (1821).

15. *United States v. Lee*, 106 U.S. 196, 204 (1882); *see also* *Kennecott Copper Corp. v. State Tax Commn.*, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting); *Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850); *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834) (noting the same).

16. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 3 (1980).

17. *Id.*

Alden v. Maine, *Florida Prepaid v. College Savings Bank*, *College Savings Bank v. Florida Prepaid*, *Kimel v. Florida Board of Regents*, and *Board of Trustees of the University of Alabama v. Garrett*¹⁸—have been decided by 5-4 margins. In each case, the majority was comprised of the five most conservative Justices on the Court: Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. These are the Justices who most frequently profess an originalist philosophy.¹⁹ Yet, sovereign immunity cannot be justified under a faithful adherence to an originalist approach to constitutional interpretation.

Originalists maintain that rights should be found in the Constitution only if stated in the text or clearly intended by its framers. Sovereign immunity, as applied by the Rehnquist Court, is a right of governments to be free from suit without their consent. Yet, it is a right that cannot be found in the text or the framers' intent.

The text of the Constitution is silent about sovereign immunity. Not one clause of the first seven articles even remotely hints at the idea of governmental immunity from suits. No constitutional amendment has bestowed sovereign immunity on the federal government.

A claim might be made that the Eleventh Amendment provides sovereign immunity to state governments. Yet, if this is a textual argument, a careful reading of the text does not support the claim. The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state." Initially, it should be noted that the Eleventh Amendment applies only in federal court; it is a restriction solely on "the judicial power of the United States." Indeed, in *Alden v. Maine*, the Court recognized this and based its holding entirely on the broad principle of state sovereign immunity and not in any way on the text of the Eleventh Amendment. Justice Kennedy, writing for the majority, stated: "[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."²⁰

Moreover, the text of the Eleventh Amendment only restricts suits against states that are based on diversity of citizenship; it says that the federal judicial power does not extend to a suit against a state by a citizen of another state or of a foreign country. Nothing within it bars a suit against a state by its own citizens. This was the holding of *Hans v. Louisiana*,²¹ more than a century ago, but it certainly isn't based on a textual argument regarding the Eleventh

18. 121 S. Ct. 955 (2001).

19. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 23-25 (1998) (expressing adherence to a philosophy of original meaning).

20. 527 U.S. 706, 728 (1999).

21. 134 U.S. 1 (1890).

Amendment.

In *Alden v. Maine*, Justice Kennedy makes a textual argument for sovereign immunity by stating that the existence of states is mandated by the Constitution. He writes: “[T]he founding document ‘specifically recognizes the States as sovereign entities.’ Various textual provisions of the Constitution assume the States’ continued existence and active participation in the fundamental processes of governance.”²² Yet, the fact that the Constitution preserves states as entities says absolutely nothing about whether states should have immunity in state court or sovereign immunity more generally. The Constitution, of course, recognizes the existence of state governments, but that does not give any indication of the scope of state power or the existence of state immunity.

Nor can sovereign immunity be justified from an originalist perspective based on framers’ intent. It is important to remember that originalists believe that a right is protected under the Constitution where the text is silent only if the framers’ intent is clear in justifying protection.²³ If the intent is unclear, the right is not constitutionally protected. At the very least, the framers’ intent is completely ambiguous as to sovereign immunity.

There was no discussion of sovereign immunity at the Constitutional Convention in Philadelphia in 1787. The issue did arise in the state ratifying conventions. The dispute was over whether Article III authorized suits against unconsenting states in federal court. Two of the clauses of Article III, § 2, specifically deal with suits against state governments. These provisions permit suits “between a State and Citizens of another state” and “between a State . . . and foreign . . . Citizens.” The dispute was over whether the above-quoted language of Article III was meant to override the sovereign immunity that kept states from being sued in state courts. As Justice Souter recently observed,

The 1787 draft in fact said nothing on the subject, and it was this very silence that occasioned some, though apparently not widespread, dispute among the Framers and others over whether ratification of the Constitution would preclude a State sued in federal court from asserting sovereign immunity as it could have done on any matter of nonfederal law litigated in its own courts.²⁴

There is no record of any debate about this issue or these clauses at the Constitutional Convention.

However, at the state ratification conventions the question of suits against state governments in federal court was raised and received a great deal of attention. States had incurred substantial debts, especially during the Revolutionary War, and there was a great fear of suits being brought against the

22. 527 U.S. at 713 (citations omitted).

23. See, e.g., Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 7 (1981) (articulating the originalist philosophy); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990) (defending originalist constitutional interpretation).

24. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 104 (1996) (Souter, J., dissenting).

states in federal court to collect on these debts. More generally, the concern was expressed that although sovereign immunity was a defense to state law claims in state court, it would be unavailable if the same matter were raised against a state in a diversity suit in federal court.

Thus, at the state ratification conventions there was a debate over whether states could be sued in federal court without their consent.²⁵ One group argued that the text of Article III clearly made states subject to suit in federal court. In Virginia, George Mason opposed ratification of the Constitution and particularly disliked the provisions which made the states liable in federal court:

Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender?²⁶

Mason believed that Article III's explicit provision for suits against the states would have the effect of abrogating the states' sovereign immunity defense.²⁷

Likewise, Patrick Henry opposed the Constitution at the Virginia convention, in part based on his belief that Article III unmistakably permitted litigation against states in federal court. He labeled as "incomprehensible" the claim that Article III allowed states to be plaintiffs, but not defendants.²⁸ Henry said "[t]here is nothing to warrant such an assertion. . . . What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant."²⁹ In Pennsylvania, North Carolina, and New York there were major objections to this part of the Constitution.³⁰

Nor was this view that Article III overrides state sovereignty and permits suits against unconsenting states in federal court limited to Virginia statesmen or other opponents of ratification. Many of the Constitution's supporters also agreed that Article III permitted states to be sued in federal court. They argued that this lack of immunity was desirable to ensure that states could not escape their liabilities or avoid litigation necessary to hold them properly accountable. Edmund Randolph, a member of the Committee of Detail at the Constitutional Convention, argued: "I ask the Convention of the free people of Virginia if there can be honesty in rejecting the government because justice is to be done

25. See, e.g., John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1902-1914 (1983) (recounting the debate).

26. 3 THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 526-527 (Jonathan Elliot ed., 1937).

27. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 265 (1985) (Brennan, J., dissenting) (describing Mason's opposition to Article III).

28. ELLIOT, *supra* note 26, at 543.

29. *Id.*

30. Gibbons, *supra* note 25, at 1902-1914.

by it? . . . Are we to say that we shall discard this government because it would make us all honest?"³¹ In Pennsylvania, Timothy Pickering argued that it was important for federal courts to be able to give relief against states to citizens of other states or nations who had been wronged and might be unable to receive fair treatment in a state's own courts.³²

In sharp contrast, many other supporters of the Constitution argued that Article III did not override state sovereignty and that, notwithstanding its provisions, states could be sued in federal court only if they consented to be a party to the litigation. Alexander Hamilton wrote in the *Federalist Papers*:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity . . . it will remain with the States.³³

Similarly, Madison argued that states have sovereign immunity and Article III serves only to allow states to come to federal court as plaintiffs, not to permit them to be sued as defendants without consent.³⁴ Madison said that "jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court."³⁵

This recounting of the ratification debates reveals that there was no consensus, even among the Constitution's supporters, about whether state sovereign immunity survived Article III. Justice Souter, after a detailed recounting of this history, observed: "[T]he Framers and their contemporaries did not agree about the place of common-law state sovereign immunity even as to federal jurisdiction resting on the Citizen-State Diversity Clauses."³⁶ In reviewing the Eleventh Amendment's history, the Supreme Court has rightly observed that "the historical materials show that, at most, the intentions of the Constitution's Framers and Ratifiers were ambiguous."³⁷ Justice Souter explained:

There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable. Whether one looks at the period before the framing, to the ratification

31. ELLIOT, *supra* note 26, at 575.

32. 14 JOHN P. KAMINSKI & GASPARE J. SALADINO, *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 204 (1983).

33. *THE FEDERALIST* NO. 81, at 487-488 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

34. ELLIOT, *supra* note 26, at 533.

35. *Id.*

36. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 142-143 (1996) (Souter, J., dissenting).

37. *Welch v. Texas Dept. of Highways & Pub. Transp.*, 483 U.S. 469 (1987).

controversies, or to the early republican era, the evidence is the same. Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common-law power defeasible, like other common-law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common-law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it. Natural law thinking on the part of a doubtful few will not, however, support the Court's position."³⁸

Nor can sovereign immunity be based on the contemporary practices at the time.³⁹ The reality is that there was not uniformity among the states. As Justice Souter explains in dissent in *Alden v. Maine*,

The American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone; 'antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states,' Several colonial charters, including those of Massachusetts, Connecticut, Rhode Island, and Georgia, expressly specified that the corporate body established thereunder could sue and be sued.⁴⁰

An argument might be made in response that the ratification of the Eleventh Amendment indicates the framers' desire to protect sovereign immunity. Yet, as scholars such as John Gibbons and William Fletcher have persuasively argued, the purpose of the Eleventh Amendment was limited to precluding diversity suits against the states.⁴¹ The Eleventh Amendment was enacted to overrule *Chisholm v. Georgia*, a case only involving the latter.⁴² Therefore, it makes sense to view the Eleventh Amendment as restricting only diversity suits against state governments.

As a result, Justice Kennedy, in *Alden v. Maine*, can only defend sovereign immunity as implicit in the framers' silence. Justice Kennedy invokes this silence as key evidence of the framers' intent. He writes:

We believe, however, that the founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity. In light of the overriding concern regarding the States' war-time debts, together with the well known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is most instructive. It suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established

38. 527 U.S. 706, 764 (1999) (Souter, J., dissenting).

39. Elsewhere, I have questioned whether contemporary practices should matter in constitutional interpretation. See Erwin Chemerinsky, *The Jurisprudence of Antonin Scalia: A Critical Appraisal*, forthcoming U. HAW. L. REV. (2000).

40. 527 U.S. at 764 (Souter, J., dissenting) (quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION 149 (5th ed. 1891)).

41. 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 STAN. L. REV. 1033 (1983); Gibbons, *supra* note 25.

42. 2 U.S. (Dall.) 419 (1793).

that no one conceived it would be altered by the new Constitution.⁴³

The problem with this argument is that silence is inherently ambiguous. Perhaps Justice Kennedy is correct that the framers were silent because they thought it obvious that states could not be sued in state court. Alternatively, it could mean they thought it clear that states could be sued in state court. Most likely, though, the framers were silent because the issue did not come up and they never thought about it. Silence is inherently uncertain and a highly questionable basis for knowing intent. For example, I am highly skeptical that originalists such as Justices Scalia and Kennedy would accept the argument that the framers' silence about the right to privacy is indicative that they thought it so obvious and clear that it was unnecessary to enumerate.

Simply put, my point is that sovereign immunity cannot be found in the Constitution from an originalist perspective.⁴⁴ The power in this argument is that it is the originalists on the Court who are the champions of state sovereign immunity. A nonoriginalist, like me, would argue that the framers' intent as to sovereign immunity, even if it could be known should not be controlling. The Constitution's text neither mandates nor prohibits sovereign immunity. Therefore, the Court's decisions about it should be faced on contemporary functional considerations, not the framers' intent. The framers' conception of government is radically different from how government operates in the Twenty-First Century. Therefore, their views about sovereign immunity should not be binding upon us today.

From a nonoriginalist viewpoint, the issue is whether sovereign immunity is a value that should be seen as embodied in the Constitution. This question is implicitly answered in the following sections of this paper. The next section argues that sovereign immunity should be seen as inconsistent with the Constitution. Part III then considers the policy justifications for sovereign immunity and concludes that they do not warrant the continued existence of the doctrine.

B. *Does Sovereign Immunity Violate Basic Constitutional Principles?*

In this section, I argue that sovereign immunity is inconsistent with three fundamental constitutional principles: the supremacy of the Constitution and federal laws; the accountability of government; and due process of law. Each of these constitutional doctrines should be regarded as sufficient to justify declaring the doctrine unconstitutional.

43. *Alden*, 527 U.S. at 741.

44. Indeed, before joining the Supreme Court, Antonin Scalia expressed the view that sovereign immunity is not based on historical understanding. He wrote that “[a]t the time of *Marbury v. Madison* there was no doctrine of domestic sovereign immunity, as there never had been in English law.” Antonin Scalia, *Historical Anomalies in Administrative Law*, in 1985 YEARBOOK 103, 104 (Supreme Court Historical Society) (emphasis in original). I am grateful to Jay Bybee for bringing this to my attention.

1. *The supremacy of the Constitution and federal laws.*

Article VI of the Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary Notwithstanding.⁴⁵

This is one of the most important provisions in the entire Constitution for it ensures that the document is not merely aspirational, but that it shall trump all other law. Indeed, in *Marbury v. Madison*, Chief Justice John Marshall relied, in part, on the supremacy clause to explain the authority for judicial review.⁴⁶ Without judicial review, there is no way to ensure that the Constitution and federal laws are supreme.

In *McCulloch v. Maryland*, Chief Justice John Marshall further elaborated on the importance of the supremacy clause: “This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them.”⁴⁷ Chief Justice Marshall stated:

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. . . . The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, ‘this constitution, and the laws of the United States, which shall be made in pursuance thereof,’ ‘shall be the supreme law of the land,’ and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘anything in the constitution or laws of any state to the contrary notwithstanding.’⁴⁸

The doctrine of sovereign immunity is inconsistent with the supremacy clause. Most simply, it allows a common law doctrine to reign supreme over the Constitution and federal law. A plaintiff asserting a federal constitutional or statutory claim against the federal or a state government will lose because of the defendant’s invocation of sovereign immunity.

Sovereign immunity also frustrates the supremacy of federal law by

45. U.S. CONST. art. VI.

46. 5 U.S. (1 Cranch) 137, 180 (1803).

47. 17 U.S. (4 Wheat) 316, 426 (1819).

48. *Id.* at 405-06.

preventing the enforcement of the Constitution and federal statutes. How can the supremacy of federal law be assured and vindicated if states can violate the Constitution or federal laws and not be held accountable? The probation officers in *Alden* have a federal right to overtime pay, but there is no way of forcing the states to meet their federal obligation. College Savings Bank has a federal patent right that was allegedly infringed by the State of Florida, but there is no way to hold it liable for patent infringement. In *Kimel*, the Court did not declare unconstitutional the application of the Age Discrimination Act to state governments. Instead, it said that states cannot be sued for violating it. In sum, the states are left free to disregard federal law.

At oral argument in *Alden*, the Solicitor General of the United States, Seth Waxman, quoted to the Court from the Supremacy Clause of Article VI and contended that suits against states are essential to assure the supremacy of federal law. Justice Kennedy's response to this argument is astounding. He states:

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. 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 "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. CONST., Art. VI.⁴⁹

What, then, is the assurance that state governments will comply with federal law? Trust in the good faith of state governments. Is it possible to imagine that thirty or forty years ago, at the height of the civil rights movement, the Supreme Court would have issued such a statement that state governments simply could be trusted to voluntarily comply with federal law? James Madison said that if people were angels, there would be no need for a Constitution, but there would be no need for a government either.⁵⁰ The reality is that state governments, intentionally or unintentionally, at times will violate federal law. To rely on trust in the good faith of state governments is no assurance of the supremacy of federal law at all.

The Supreme Court should declare that claims of sovereign immunity by federal and state governments are inconsistent with the Supremacy Clause of the Constitution. The Court should hold that sovereign immunity cannot be used as a defense to a federal constitutional or statutory claim.

49. *Alden v. Maine*, 527 U.S. 706, 754-55 (1999).

50. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

2. Government accountability.

I believe that the principle of government accountability is inherent in the structure of the Constitution and embodied in many specific constitutional provisions. Long ago, in *Marbury v. Madison*, Chief Justice John Marshall explained that the central purpose of the Constitution is to limit the actions of government and government officers.⁵¹ In other words, the government is accountable for its actions. In *Marbury*, the Court emphasized the need for accountability and redress in its declaration that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁵² Chief Justice Marshall declared, “[t]he government of the United States has been emphatically termed a government of laws, and not of men.”⁵³

Sovereign immunity is inconsistent with all of these basic principles. Sovereign immunity allows the government to violate the Constitution or laws of the United States without accountability. Constitutional and statutory rights can be violated, but individuals are left with no remedies. The probation officers in *Alden*, the company with the patent in *Florida Prepaid*, and the state employees in *Kimel* and *Garrett*, all have federal rights, but due to sovereign immunity, no remedies. Sovereign immunity makes the laws of the United States subordinate to the will of the men and women making government decisions.

Consider a simple and tragic example. In *United States v. Stanley*, the Supreme Court held that neither the federal government nor federal officers could be sued for injuries caused by illegal human medical experimentation.⁵⁴ In *Stanley*, a former serviceman sued because of severe injuries he allegedly sustained as a result of having been given LSD, without his knowledge or consent, in an army experiment in 1958. The Supreme Court held that the United States government was immune from suit. Moreover, the Court concluded that suits also were not possible against the government officers who subjected Stanley to the medical experimentation without his permission. In an opinion by Justice Scalia, the Court flatly declared that “no *Bivens* remedy is available for injuries that ‘arise out of or are in the course of activity incident to service.’”⁵⁵

Sovereign immunity meant that a person subjected to unconsented human experimentation was left with no remedy whatsoever. As Justice O’Connor said in dissent, “conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be

51. 5 U.S. (1 Cranch) 137, 176-77 (1803).

52. *Id.* at 163.

53. *Id.*

54. 483 U.S. 669 (1987).

55. *Id.* at 683.

considered a part of the military mission.”⁵⁶ Likewise, Justice Brennan drew parallels to the Nazis’ medical experimentations and argued that victims such as Stanley must have a remedy for violations of their constitutional rights.⁵⁷

The principle that the government must be accountable can be found in many parts of the Constitution. Professor Akhil Amar has argued that this accountability is embodied in the first words of the Constitution, “We the People,” a phrase which makes the people sovereign.⁵⁸

Moreover, the Constitution rejects, implicitly and explicitly, royal prerogatives of all sorts. Scholars have shown that sovereign immunity in the United States is very much based on English law and particularly the idea that “the King can do no wrong.”⁵⁹ Yet, if there is any universally agreed upon interpretation of the American Constitution, it is its rejection of a monarchy and royal prerogatives. Article II’s simple declaration that the “executive Power shall be vested in a President of the United States,” who serves for a limited four year term, is an emphatic rejection of royalty in the United States. Article I, Section 9, prohibits any title of nobility being granted by the United States, a prohibition designed to ensure an accountable government.

A constitutional principle of accountability can be found in other constitutional provisions as well. Professor James Pfander has persuasively argued that the right-to-petition clause, found in the First Amendment, is inconsistent with the notion of sovereign immunity.⁶⁰ Professor Pfander demonstrates that “the Petition Clause guarantees the right of individuals to pursue judicial remedies for government misconduct.”⁶¹ In a lengthy and carefully researched article, he shows that “[t]he Petition Clause affirms the right of the individual to seek redress from government wrongdoing in court, a right historically calculated to overcome any threshold government immunity from suit.”⁶²

My point is that a constitutional principle of government accountability can be found in many parts of the Constitution. Sovereign immunity is inconsistent with this basic precept because it prevents accountability, even when the government egregiously violates the Constitution and federal laws. Damages are often essential to ensuring accountability. The prospect and actuality of damages can be crucial in creating the incentive for the government to comply with the law. I have certainly seen this repeatedly in examining the Los

56. *Id.* at 709 (O’Connor, J., concurring and dissenting).

57. *Id.* at 710-711 (Brennan, J., dissenting).

58. Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

59. See Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989).

60. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997).

61. *Id.* at 906.

62. *Id.* at 980.

Angeles Police Department; it is damage awards, and concern over them, that provides the city the incentive for implementing controls that would not otherwise exist. Without damage awards, often no relief is available and no incentive for state compliance with federal law.

3. *Due process of law.*

Even if sovereign immunity is found in the structure of the Constitution, and I argue above that there is no basis for such a conclusion, two constitutional amendments should be seen as modifying and eliminating sovereign immunity: the Fifth and Fourteenth Amendment's assurance that no person will be deprived of life, liberty, or property without due process of law. The Due Process Clause certainly can be used to strengthen the above argument as to the Constitution's assurance of government accountability. But even more specifically, it should be understood as imposing a constitutional mandate that those who suffer a loss of life, liberty, or property at the hands of the government are entitled to redress.

On many occasions, the Supreme Court has recognized that the absence of any court, state or federal, raises a serious due process issue.⁶³ In a long line of cases, the Court has said that, because due process requires a judicial forum, it would interpret federal laws that appeared to preclude all jurisdiction as not doing so.⁶⁴ The Court has emphasized in these cases the importance of a judicial forum to provide redress when there is a deprivation of life, liberty, or property.⁶⁵

However, the Court's recent sovereign immunity decisions mean that there will be many instances in which individuals will be injured without having any judicial forum available. The probation officers in Maine have a federal property right to overtime pay,⁶⁶ but there is no way for them to get due process. College Savings Bank has a federal property right in its patent, but it cannot get any due process; federal and state judicial forums are both closed to it. The state employees in *Kimel* have a liberty and property interest, created by

63. See, e.g., *Oestereich v. Selective Serv. Local Bd., No. 11*, 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring) (noting that a person should not be deprived of personal liberty without a tribunal hearing); see also Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993) (arguing that the issue of whether there is a constitutional right to judicial review depends on the underlying substantive law).

64. *Johnson v. Robison*, 415 U.S. 361, 368-70 (1974); see also *Webster v. Doe*, 486 U.S. 592, 599-600 (1988) (refusing to find statute to preclude review of a claim by an employee of the CIA who alleged that he was fired because he was a homosexual).

65. See, e.g., *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-95 (1991) (noting this point); *United States v. Mendoza-Lopez*, 481 U.S. 828, 835 (1987) (noting this point).

66. See *Roth v. Bd. of Regents*, 408 U.S. 564, 576-78 (1972) (finding existing property interest if law creates a reasonable expectation to a benefit).

federal law, in being free from age discrimination, but they are denied due process by the absence of any forum.

Thus, I contend that sovereign immunity is inconsistent with the supremacy of the Constitution and federal statutes, the basic principle of government accountability, and the central requirements of due process of law. On all of these grounds, the Supreme Court should banish the doctrine from American law.

III. IS SOVEREIGN IMMUNITY JUSTIFIED?

Conceptions of tort law have changed dramatically from the time that the United States Constitution was written and ratified. Today, liability is justified primarily based on two rationales: the need to provide compensation to injured individuals and the desire to deter future wrong-doing.⁶⁷ In fact, the Supreme Court has recognized the importance of these rationales in the context of suits against the government. In *Owen v. City of Independence*, the Supreme Court held that local governments are liable even when their constitutional violations are a result of actions taken in good faith.⁶⁸ The Court stressed that allowing cities good faith immunity would frustrate the underlying purposes of Section 1983 in terms of deterrence and risk spreading.⁶⁹

Sovereign immunity frustrates compensation and deterrence. Individuals injured by government wrong-doing are left without a remedy. Stanley received no compensation for the human experimentation inflicted on him; nor were the probation officers in *Alden* or the company in *College Savings Bank* or the state employees in *Kimel* and *Garrett* compensated for their injuries. Moreover, sovereign immunity frustrates deterrence as government knows that it can violate federal law without risking liability.

What, then, are the justifications for sovereign immunity and do they warrant its continued existence? Six primary rationales are discussed below: the importance of protecting government treasuries; separation of powers; the absence of authority for suits against the government; the existence of adequate alternative remedies; a curb on bureaucratic powers; and tradition. I argue, in turn, that none of these are persuasive or justify the continued existence of sovereign immunity.

A. *Protecting Government Treasuries*

Sovereign immunity unquestionably has the virtue of protecting

67. JOSEPH W. LITTLE, TORTS: THE CIVIL LAW OF REPARATION FOR HARM DONE BY WRONGFUL ACT 2-7 (1985) (describing changing conceptions of tort law).

68. 445 U.S. 622 (1980).

69. *Id.* at 651-52.

government treasuries from the costs of damage suits.⁷⁰ Indeed, that is its main effect. Doctrines exist to facilitate suits for injunctive relief against the government through the ability to sue individual government officers for prospective remedies.⁷¹ But sovereign immunity protects government treasuries from damage judgments.

In *Alden v. Maine*, Justice Kennedy expressly spoke of this justification for sovereign immunity:

Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.⁷²

This concern underlies all of the Court's sovereign immunity decisions. Allowing the government to be sued means that it can be held liable and the ultimate cost is to the taxpayer. But this argument rests on an unsupported, and I believe unsupportable, assumption: that protecting the government treasury is more important than the benefits of liability in terms of ensuring compensation and deterrence. Sovereign immunity assumes that providing the government immunity, so as to safeguard government treasuries, is more important than ensuring government accountability. Yet, in none of the sovereign immunity cases has the Supreme Court ever justified this value choice. Moreover, I believe that it is the wrong value priority under the Constitution. As argued in the prior section, basic constitutional principles such as ensuring the supremacy of federal law, holding the government accountable, and providing due process, all make sovereign immunity unacceptable. Although abolishing sovereign immunity would impose financial burdens on the government, it is better to spread the costs of injuries from illegal government actions among the entire citizenry than to make the wronged individual bear the entire loss.

B. *Separation of Powers*

A separate, though interrelated argument for sovereign immunity, is based on separation of powers. The argument is that the operation of government would be hindered if the United States were liable for every injury it inflicted.⁷³ The argument is that sovereign immunity is necessary to protect the

70. See Noel P. Fox, *The King Must Do No Wrong: A Critique of the Current Status of Sovereign and Official Immunity*, 25 WAYNE L. REV. 177, 187 (1979); Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1526 (1962).

71. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908) (ability to sue state officers for injunctive relief not barred by the Eleventh Amendment).

72. *Alden v. Maine*, 527 U.S. 706, 749 (1999).

73. See *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868) ("[T]he public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen.").

government from undue interference by the judiciary.⁷⁴ Sovereign immunity preserves the unhampered exercise of discretion and limits the amount of time the government must spend responding to lawsuits. The Supreme Court declared that the “[g]overnment, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.”⁷⁵

Again, this argument rests on assumptions that are unsupported and seemingly unsupportable. There is no evidence offered that suits against the government would prevent effective governance. In fact, the evidence is to the contrary. The Supreme Court has held that local governments are not protected by sovereign immunity⁷⁶ and that they can be sued under Section 1983.⁷⁷ Yet there is no evidence that such liability has unduly disrupted the actions of government.

Moreover, it is unclear why suits for money damages will be more disruptive of government than suits for injunctive relief against government officers which already are allowed. The likely answer is that suits for monetary compensation might cost money that could be used for other government activities. This, though, collapses the separation of powers argument into the prior claim concerning the need to protect the government fisc.

Separation of powers never has been understood as insulating the activities of other branches of government from judicial review. Quite the contrary, ever since *Marbury v. Madison*, it has been accepted that separation of powers is judicially enforceable. As Chief Justice John Marshall emphasized, enforcing the limits of the Constitution necessitates judicial review and government accountability.

Also, the effect of sovereign immunity is to cause lawsuits to be filed against the individual government officers. The Supreme Court long has held that sovereign immunity prevents suits against the government entity, but not against the officers.⁷⁸ Hence, individuals seeking redress from the federal

74. *Littell v. Morton*, 445 F.2d 1207, 1214 (4th Cir. 1971) (“The rationale for sovereign immunity essentially boils down to substantial bothersome interference with the operation of government.”); James Samuel Sable, *Sovereign Immunity: A Battleground of Competing Considerations*, 12 Sw. U. L. REV. 457, 465 (1981).

75. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

76. *See, e.g., Lincoln County v. Luning*, 133 U.S. 529 (1890) (showing this point); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Some criticize these decisions on the ground that states should be able to transfer their immunity to local governments, which are created by the state and through which the states govern. *See, e.g.,* Margreth Barrett, *Comment, The Denial of Eleventh Amendment Immunity to Political Subdivisions of the States: An Unjustified Strain on Federalism*, 1979 DUKE L.J. 1042 (making this criticism).

77. *Monell v. Department of Soc. Serv.*, 436 U.S. 658 (1978) (holding that local governments are persons within the meaning of section 1983).

78. *Schneider v. Smith*, 390 U.S. 17 (1968); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947); *see also Ex parte Young*, 209 U.S. 123 (1908).

government must sue its officers for money damages to be paid from the officers' own pockets.⁷⁹ Many believe this undesirable and would prefer to have the government entity sued rather than its officers.⁸⁰ For example, it has been argued that the exercise of discretion is more likely to be chilled if officers are personally liable than if the government entity is held responsible.

C. *Lack of Authority for Suits Against the Government*

A third justification for sovereign immunity is that there is no authority in the Constitution or federal laws for suits against the government. Justice Oliver Wendell Holmes argued that liability cannot exist unless the law provides for it.⁸¹ Justice Holmes said that claiming a right to sue the government is "like shaking one's fist at the sky, when the sky furnishes the energy that enables one to raise the fist."⁸² From this viewpoint, rights do not exist independent of positive law. The right to sue must be grounded in a statute in order for it to exist.

However, this argument would mean that any statute can override sovereign immunity. Justice Holmes' argument is simply that there must be authority for suits. It means that Congress can override sovereign immunity and authorize suits if it is acting pursuant to any congressional power. This was the approach taken by the Court in *Pennsylvania v. Union Gas*,⁸³ but rejected in *Seminole Tribe v. Florida*.

Moreover, the positive argument for sovereign immunity ignores the Constitution as a basis for suits. The authority for litigation against the government is the Constitution itself and its assurance of the supremacy of federal law, government accountability, and due process.

D. *Existence of Adequate Alternatives*

Implicit in many defenses of sovereign immunity is the claim that government liability is unnecessary because there are adequate alternatives. Most notably, individual government officers can be sued, particularly for injunctive relief, rendering suits against government entities unnecessary.

79. If the monetary relief, in reality, would be against the government, the suit is barred, even though the individual officer is named as the defendant. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. at 687 ("[T]he crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign."); *see also* *Hawaii v. Gordon*, 373 U.S. 57, 98 (1963) (noting the same).

80. *See* KENNETH DAVIS, *supra* note 1, at 22-24; PETER H. SCHUCK, *SUING GOVERNMENT* 90-91 (1983).

81. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

82. Letter from Justice Oliver W. Holmes to Harold J. Laski 2 (January 29, 1926) (quoted in *HOMES-LASKI LETTERS* 822 (Mark DeWofe Howe ed., 1953)).

83. 491 U.S. 1 (1989) (holding that Congress could override the Eleventh Amendment if the statute was explicit in its text in doing so).

Although such suits are important in ensuring the supremacy of federal law, they are inadequate replacements. Injunctive relief obviously can prevent future violations, but it does nothing to provide redress for past infringements; this, something I argue above, is a constitutional mandate. The probation officers in *Alden* can sue for an injunction to ensure that they are paid overtime in the future, but the injunction does not provide them a remedy for the prior violations of their rights under the federal Fair Labor Standards Act. College Savings Bank might get an injunction against state officers to protect their patents from future infringements by the State of Florida, but that gives them no remedy for past wrongful actions. For all of the states' violations of federal law that occurred prior to the injunction, and for many reasons they could be extensive and impose great harm, the supremacy of federal law is undermined.

It also is quite possible that the Supreme Court could restrict injunctive relief against government officers in the years ahead. Justice Kennedy, in a part of the opinion in *Idaho v. Coeur d'Alene Tribe* joined only by Chief Justice Rehnquist, urged a much broader new exception to *Ex parte Young*. Declaring *Young* "an obvious fiction,"⁸⁴ Justice Kennedy argued that state officers should be subject to suit in federal court only in two narrow circumstances. First, state officers could be sued if "there is no state forum available to vindicate federal interests."⁸⁵ Second, state officers could be sued in federal court when there is a showing of a particular need for federal court interpretation and enforcement of federal law. Justice Kennedy observed that this concern could lead to "expansive application of the *Young* exception" and that there was no indication that "States consented to these types of suits in the Plan of the convention."⁸⁶ Justice Kennedy stated that such claims against state officers generally could be brought in state court and noted that "[n]either in theory nor in practice has it been shown problematic to have federal claims resolved in state courts . . ."⁸⁷ Thus, Justice Kennedy advocated a case-by-case balancing approach, with federal courts exercising jurisdiction in a suit against a state officer only if there were a showing of the above two circumstances.

Justice Kennedy's approach, had it attracted support from a majority of the Court, would have radically altered constitutional litigation in the United States. Virtually all constitutional challenges to state laws and state government actions, now brought to federal court pursuant to *Ex parte Young*, would have been shifted to state courts. Rarely is a state forum unavailable and seldom under Justice Kennedy's approach could it be shown that there was a special need for federal court review. Justice Kennedy's approach would have largely overruled *Ex parte Young*.

Seven Justices rejected Justice Kennedy's attempt to reformulate *Ex parte*

84. 521 U.S. 261, 269 (1997).

85. *Id.* at 271.

86. *Id.* at 274.

87. *Id.* at 274-75.

Young. In an opinion concurring in the judgment, Justice O'Connor, joined by Justices Scalia and Thomas, rejected replacing *Young*'s brightline rule with a case-by-case balancing approach.⁸⁸ Additionally, the four dissenting Justices—Justices Stevens, Souter, Ginsburg, and Breyer—also rejected Justice Kennedy's attempt to carve a new, dramatic exception to *Ex parte Young*.⁸⁹ But it is possible that in the future Kennedy's approach might attract support from a majority of the Court. It is curious, for example, why Justices Scalia and Thomas, fervent advocates of state sovereign immunity, did not join Justice Kennedy's opinion. Perhaps if Justice Kennedy had argued less for case by case balancing and more for a bright line test, they would have agreed to substantially restrict *Ex parte Young*.

In her excellent paper in this symposium, Professor Pamela Karlan argues that often injunctive relief is more intrusive than damages remedies.⁹⁰ Based on these considerations, it would not be surprising to see the Court limit suits for injunctive relief against government officers in the future. If so, a key alternative to damage claims would be curtailed.

Nor are suits against government officers for money damages a substitute for litigation against government entities. Sometimes, the Court has ruled that there is no cause of action. For instance, in *Stanley v. United States*, discussed above, the Court held that there is no cause of action against military officers, even when they engage in egregious violation of rights.⁹¹ Even when a cause of action exists, whether under *Bivens* or Section 1983, some officers have absolute immunity to suits for money damages, such as judges, prosecutors, and legislators.⁹² Consider, for example, a claim that state court judges are systematically violating criminal defendants rights, such as by setting bail according to racist prejudices or by paying criminal defense attorneys too little to protect defendants' Sixth Amendment rights.⁹³ Who can be sued in such an instance? The state government cannot be named as a defendant in federal or state law. State judges cannot be sued for damages or for injunctive relief because of a federal law that expressly bars such suits.⁹⁴ It seems that no suit could be brought, even though there is an allegation of a serious violation of a basic constitutional right.

Government officials who do not have absolute immunity all have

88. *Id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment).

89. *Id.* at 297 (Souter, J., dissenting).

90. Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311 (2001).

91. See text accompanying notes 54-57 *supra*.

92. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 500-12 (reviewing cases providing absolute immunity to these officers).

93. *O'Shea v. Littleton*, 414 U.S. 488 (1974) (declaring nonjusticiable a suit contending that the defendants, a magistrate and a judge, discriminated against blacks in setting bail and imposing sentences).

94. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309 (a)-(b), 110 Stat. 3847 (1996).

qualified immunity, which often makes recovery for violations of federal law impossible. The Supreme Court has held that government officials can be held liable only if they violate a clearly established right that a reasonable officer should know.⁹⁵ The result is that often injured individuals have no recourse except to sue the government entity. Without such litigation, the supremacy of federal law often cannot be protected. Again, *McCulloch v. Maryland* is instructive: “It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain.”⁹⁶

E. *Curbing Bureaucratic Power*

In this symposium, Professor Roderick Hills, Jr., offers a new defense of sovereign immunity: that it serves to curb bureaucratic power.⁹⁷ He argues that sovereign immunity “might serve the function of strengthening the position of elected non-federal policy generalists—that is, politicians with non-specialized jurisdiction like mayors, governors, state legislators, city councilors, and county commissioners.”⁹⁸ He argues that sovereign immunity can protect the powers and discretion of these elected officials from unelected bureaucrats and agencies in state government. He contends that sovereign immunity increases legislative control over the government’s budget.

This is an intriguing theory, but it has troubling implications and rests on questionable assumptions. First, by the logic of Professor Hills’ argument, sovereign immunity should be extended to local governments. Everything that Professor Hills argues applies with equal force to cities and counties. Perhaps, for political reasons, his claims about the need for checks on bureaucratic power, apply with even greater force at that level. His theory thus would mean a dramatic expansion of sovereign immunity to all levels of government.

Second, Professor Hills assumes that the net effect of sovereign immunity is to increase accountability of government. His argument is that sovereign immunity strengthens the power of elected officials, especially in the budget process. Why is this desirable? Implicitly, Professor Hills’ argument is that democratic accountability is desirable and that therefore it is good to shift responsibility from unelected bureaucrats to elected officials. But even if he is correct, the question has to be whether overall sovereign immunity enhances or detracts from government accountability. There unquestionably is a cost to sovereign immunity in terms of accountability: Government can violate the

95. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

96. 17 U.S. (4 Wheat) 316, 427 (1819).

97. Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225 (2001).

98. *Id.* at 1226.

law and avoid liability. Professor Hills' argument assumes that the gain in terms of accountability outweighs its loss because of sovereign immunity.

Finally, Professor Hills assumes that the benefits of the bureaucratic check outweigh the costs of sovereign immunity. Even if he is correct that sovereign immunity lessens the power of unelected agencies, he assumes that this benefit is more important than providing compensation to injured individuals, upholding the supremacy of federal law, and providing due process.

I applaud Professor Hills' attempt to defend sovereign immunity on functional, non-historical grounds. I hope that others will accept his invitation to try and empirically assess his proposition. But even if he is right, I question whether the benefits that he identifies outweigh the costs of the doctrine of sovereign immunity.

F. *Tradition*

The strongest argument for sovereign immunity likely is tradition: It has existed, in some form, through most of American history and is based on English law. But this begs the central question: Is this a tradition that should continue? As Justice Blackmun remarked in another context: "Like Justice Holmes, I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'"⁹⁹

Sovereign immunity conflicts with other, more important traditions in American law: enforcing the Constitution and federal laws, ensuring government accountability, and providing due process of law.

I do not think that it is possible to deny that there is a tradition of protecting sovereign immunity. The nature and extent of the tradition might be questioned. For example, as Justice Souter has demonstrated, there was no such clear tradition in the early American states.¹⁰⁰ Also, there was no tradition prior to 1999 and *Alden v. Maine* of according states sovereign immunity in their own courts. But these reservations aside, sovereign immunity long has been a part of American law.

This descriptive statement, though, says nothing normative about the desirability of continuing sovereign immunity. Slavery, enforced racial segregation, and the subjugation of women also were deeply embedded traditions. Sovereign immunity, too, is a repugnant doctrine, at odds with the most basic precepts of the American Constitution, and it should be repudiated.

CONCLUSION

Criticisms of sovereign immunity are not new. President Abraham Lincoln

99. 478 U.S. 186, 199 (1986), quoting O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

100. *Alden v. Maine*, 527 U.S. 706, 762-803 (1999) (Souter, J., dissenting).

declared: "It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals."¹⁰¹ Unfortunately, the current Supreme Court is unpersuaded by such criticisms and is expanding, not narrowing the reach of sovereign immunity.

I believe that someday the Supreme Court will change course and abolish the doctrine of sovereign immunity from American law. I hope that day comes soon.

101. 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 51 (1898), *quoted in* *Kennecott Copper Corp. v. State Tax Comm'n.*, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting).