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## RECONCILING STATE SOVEREIGN IMMUNITY WITH THE FOURTEENTH AMENDMENT

The United States was and is an experiment with a previously unknown form of government: not a single sovereign, not a loose coalition of independent states, but both together.<sup>1</sup> When ratified in 1788, the Constitution “split the atom of sovereignty” and established an “unprecedented” federal system.<sup>2</sup> The states remained autonomous, but — after the hard lessons of the disastrous Articles of Confederation — also ceded some of their independence to a powerful national government. Exactly how much sovereignty the states ceded, and precisely how powerful the national government should be, have remained subjects of great controversy since.

One particular challenge revolves around balancing the autonomy of the several states with the enforcement of federal law. Of course, federal law is “supreme” and binding on state courts, “any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”<sup>3</sup> Yet due to the Madisonian Compromise, state courts often serve as frontline arbiters of federal rights — not as mere conscripts in the federal court system, but as semi-autonomous actors that apply their own procedural and jurisdictional rules.<sup>4</sup> In particular, as courts of general jurisdiction, state courts are presumed to be available to hear claims for relief under federal law, including claims against the states themselves.<sup>5</sup> And given the whole host of barriers to access to federal court, the reality is that many claimants “depend, as a practical matter, entirely on state judges for the vindication of their federal rights.”<sup>6</sup>

All this means that the balance between state autonomy and federal rights turns in large part on a concept not designed with dual federalism in mind: state sovereign immunity. That doctrine refers to the traditional common law immunity of a state from suit in its own courts

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<sup>1</sup> Though federal-style republics existed prior to 1788, the American polity was and remains unique for the degree to which it combined state autonomy with federal power. Cf. THE FEDERALIST NO. 20, at 129–30 (James Madison with Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>2</sup> U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>3</sup> U.S. CONST. art. VI, cl. 2.

<sup>4</sup> See, e.g., Howlett v. Rose, 496 U.S. 356, 367 (1990); Tafflin v. Levitt, 493 U.S. 455, 464–67 (1990); *id.* at 469–70 (Scalia, J., concurring); see also James Madison, Notes of the Committee of the Whole (June 5, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 125 (Max Farrand ed., Yale Univ. Press 1911) (statement of James Madison and James Wilson).

<sup>5</sup> See JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION § 7.4.4, at 208 (2d ed. 2011) (describing “a fairly impressive collection of cases in which the Court appeared to assume that state courts were open for the enforcement of federal rights”).

<sup>6</sup> Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 192 (1981).

without its consent,<sup>7</sup> and it extends to the federal courts as well through the Eleventh Amendment.<sup>8</sup> Where it applies, sovereign immunity is a powerful defensive mechanism, empowering states to bar consideration of a plaintiff's claims, however meritorious. The doctrine thus has a profound impact on the enforcement of federal rights. Such limits are justified in part on the basis that, were the states subjected to suit without limit, state autonomy would be substantially undermined and state treasuries might quickly bleed out.<sup>9</sup> Over the last two hundred years, the seemingly unattainable balance between these federal and state interests has played out in the pages of the *U.S. Reports*.

Today, an individual whose federal rights have been violated by a state has relatively limited options. If the violation is ongoing, she can bring suit in federal court against a state officer for injunctive or declaratory relief. But if the violation has run its course and she seeks only legal damages to compensate for her losses, she is often out of luck.<sup>10</sup> These strict limits on private suits for damages were once understood to operate only in federal court — implicitly directing litigants to the alternative of bringing suit in state court<sup>11</sup> — but that assumption proved misguided when the Supreme Court held that the Constitution preserves state immunity from private suit in state court as well. And while Congress does have the power to abrogate sovereign immunity for certain types of claims, that power too has been cut back.<sup>12</sup>

Thus, it is fair to say that state sovereign immunity has never been more impenetrable. These modern-day barriers could be seen as an uneasy stalemate, or even the appropriate balance. But pockets of significant doctrinal tension remain, particularly for two distinct types of constitutional claims: first, claims seeking just compensation for a temporary taking of property by a state; and second, claims seeking a refund of taxes paid unlawfully to the state. By definition, both seek a retroactive payment from the state treasury, making injunctions and

<sup>7</sup> *Sovereign Immunity*, BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>8</sup> U.S. CONST. amend. XI. Some scholars have posited a clear distinction between state sovereign immunity (which applies in the states' own courts) and Eleventh Amendment immunity (which applies only in federal court). See, e.g., Wolcher, *supra* note 6, at 195–96. In light of the Court's recent jurisprudence in this area, this Note will use "state sovereign immunity" to refer to both concepts.

<sup>9</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 2.10.2, at 194–95, § 2.10.4.1, at 208 (4th ed. 2011).

<sup>10</sup> Litigants may seek money damages from state officers *personally* under 42 U.S.C. § 1983, but this remedy may also be quite limited as state officers are entitled to qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

<sup>11</sup> See, e.g., Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 73–75 (1988); Henry Paul Monaghan, *The Supreme Court, 1995 Term — Comment: The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 125–26 (1996).

<sup>12</sup> See *infra* section I.B, pp. 1073–74.

declaratory relief insufficient. Both involve remedies the Constitution itself demands, whether expressly in the case of just compensation or by implication in the case of tax refunds. And both involve remedies the Court has suggested might, in some cases, trump state sovereign immunity. At the same time, more recent decisions have suggested the opposite — that state sovereign immunity might be an absolute bar to suit, raising the specter of leaving two well-established constitutional rights without any remedy at all.

This Note argues that one of the few limits on state sovereign immunity the Court has repeatedly affirmed — congressional abrogation under section 5 of the Fourteenth Amendment — holds the key to resolving this tension. In *Fitzpatrick v. Bitzer*,<sup>13</sup> the Court recognized that the Fourteenth Amendment marked a fundamental shift in the federal-state relationship. As a result of that shift, state sovereign immunity must give way in the face of congressional action under section 5 of the Fourteenth Amendment. This Note claims that the outcome should be no different where the Fourteenth Amendment acts of its own force — namely, in the takings and tax refund contexts. Part I sets the scene by exploring the Court's state sovereign immunity jurisprudence and the *Fitzpatrick* exception. Part II argues that *Fitzpatrick's* reasoning demands a broader abrogation of state sovereign immunity under the Fourteenth Amendment than currently understood. And Part III discusses the practical implications of *Fitzpatrick's* reasoning in the context of the just compensation and tax refund remedies.

### I. STATE SOVEREIGN IMMUNITY AND THE *FITZPATRICK* EXCEPTION

This Part begins with a brief history of state sovereign immunity and its exceptions. The exceptions have been and remain numerous, but one in particular stands out: Congress's power to abrogate state sovereign immunity. The Supreme Court first announced that power in *Fitzpatrick*, where the Court singled out the Fourteenth Amendment as a basis for expanding Congress's abrogation power. *Fitzpatrick* has endured since then, even after the Rehnquist Court cut back dramatically on Congress's authority to abrogate state sovereign immunity under other provisions of the Constitution. Having weathered decades of doctrinal scrutiny and storm, *Fitzpatrick* continues to stand firmly for the proposition that the Fourteenth Amendment altered the federal-state balance in a way that allows Congress to neutralize state sovereign immunity in certain instances.

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<sup>13</sup> 427 U.S. 445 (1976).

### A. State Sovereign Immunity and Its Exceptions

Despite its obvious importance, the doctrine of state sovereign immunity crept into American constitutional law in an unexpected manner. Not long after ratification, the Supreme Court held in *Chisholm v. Georgia*<sup>14</sup> that sovereign immunity did *not* bar a private damages action asserted against a state by a citizen of another state.<sup>15</sup> The decision sparked an immediate backlash, and the Eleventh Amendment was ratified just two years later.<sup>16</sup> By its text, the amendment barred several types of suits, including the one at issue in *Chisholm*.<sup>17</sup>

But nearly a century later, the Court clarified in *Hans v. Louisiana*<sup>18</sup> that the Eleventh Amendment should not be limited to its precise terms. By repudiating *Chisholm*, the *Hans* Court explained, the Eleventh Amendment restored the original understanding of the Founders: a state cannot be sued without its consent.<sup>19</sup> Effecting that understanding would require going beyond the metes and bounds of the words themselves in certain cases. Thus, ever since *Hans*, the Court has interpreted the Eleventh Amendment atextually, following instead “the plan of the convention”<sup>20</sup> — a nebulous phrase treated as synonymous with the Constitution and the federal system.<sup>21</sup>

Since *Hans*, the Court has divined a number of important exceptions to state sovereign immunity in the plan of the Convention. Most simply and intuitively, states may waive their sovereign immunity by consenting to suit.<sup>22</sup> Additionally, the Eleventh Amendment does not bar suits against local governments — including municipalities and other political subdivisions of states<sup>23</sup> — unless the suit would result in a money judgment paid directly out of the state treasury.<sup>24</sup> Furthermore, state sovereign immunity still permits suits against state officers for prospective injunctive relief. In *Ex parte Young*,<sup>25</sup> the case best known for this doctrinal wrinkle, the Court established that the Elev-

<sup>14</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>15</sup> See *id.* In reaching their decision, the Justices in the majority relied on the text of Article III, which appears to expressly contemplate suits between states and citizens of another state, and on the nature of the federal system. See, e.g., *id.* at 450–51 (opinion of Blair, J.).

<sup>16</sup> *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

<sup>17</sup> U.S. CONST. amend. XI (“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.”).

<sup>18</sup> 134 U.S. 1.

<sup>19</sup> *Id.* at 12–13.

<sup>20</sup> See THE FEDERALIST NO. 81, *supra* note 1, at 487 (Alexander Hamilton).

<sup>21</sup> See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 277 & n.25 (1985) (Brennan, J., dissenting).

<sup>22</sup> See, e.g., *id.* at 238 (majority opinion).

<sup>23</sup> See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

<sup>24</sup> See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 n.34 (1984).

<sup>25</sup> 209 U.S. 123 (1908).

enth Amendment is consistent with suits against state officers to enjoin violations of federal law, even where the remedy enjoins official state policy.<sup>26</sup> Though this exception has proven to be immensely consequential for the vindication of federal rights,<sup>27</sup> *Ex parte Young* suits continue to encounter serious limits on their scope and reach.<sup>28</sup>

Perhaps the most contested exception, though, has been Congress's abrogation power. For most of the latter half of the twentieth century, the Court found that Congress could forcibly surmount state sovereign immunity through a number of means.<sup>29</sup> Most importantly, in *Fitzpatrick v. Bitzer*, the Court held that Congress could enforce the "substantive guarantees of the Fourteenth Amendment" by lancing the "shield of sovereign immunity afforded the State by the Eleventh Amendment."<sup>30</sup> The opinion began with the Fourteenth Amendment's text, noting that it "quite clearly contemplates limitations on [states'] authority"<sup>31</sup> and concluding that the amendment represented a momentous "shift in the federal-state balance."<sup>32</sup> As a result, the Court reasoned, "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."<sup>33</sup> Accordingly, "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."<sup>34</sup>

A little over a decade later, the Court raised congressional power over state sovereign immunity to its apotheosis in *Pennsylvania v. Union Gas Co.*,<sup>35</sup> where it held that Congress could abrogate state sov-

<sup>26</sup> *Id.* at 159–60; see also CHEMERINSKY, *supra* note 9, § 2.10.4.1, at 205–06.

<sup>27</sup> 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524.3 (3d ed.), Westlaw (database updated April 2015).

<sup>28</sup> Those limits operate for reasons and in ways too complex to explore here. In short, though, such suits are limited by the Eleventh Amendment's prohibition on injunctions resulting in substantial expenditures from state treasuries. In *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), *overruled on other grounds by* *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002), and *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court held that the Eleventh Amendment prohibits *Ex parte Young* actions that result in retroactive payment from state treasuries, *id.* at 677.

<sup>29</sup> See, e.g., *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964).

<sup>30</sup> 427 U.S. 445, 448 (1976).

<sup>31</sup> *Id.* at 453.

<sup>32</sup> *Id.* at 455.

<sup>33</sup> *Id.* at 456. Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

<sup>34</sup> *Fitzpatrick*, 427 U.S. at 456.

<sup>35</sup> 491 U.S. 1 (1989).

foreign immunity pursuant to its Article I Commerce Power.<sup>36</sup> Led by Justice Brennan, a plurality traced the state sovereign immunity line of decisions back to *Fitzpatrick* and argued that they “mark[ed] a trail unmistakably leading to the conclusion that Congress may permit suits against the States for money damages.”<sup>37</sup>

*B. The Rehnquist Revolution and the Fall  
of the Congressional Abrogation Power*

For the century after *Hans*, the Court worked out state sovereign immunity doctrine and its exceptions in a common law fashion, developing the doctrine one step at a time. But in the mid-1990s, the Rehnquist Court was caught in the throes of a federalism revolution that emphasized the rights of states against the federal government in a number of constitutional areas. During this period, the Court repudiated many of its earlier holdings, cut back on Congress’s abrogation power, and dramatically expanded state sovereign immunity.

The federalism pendulum began to swing back in favor of the states in *Seminole Tribe of Florida v. Florida*.<sup>38</sup> There, the Rehnquist Court overruled *Union Gas* and held that “Article I cannot be used to circumvent” state sovereign immunity.<sup>39</sup> In doing so, *Seminole Tribe* affirmed and extended the view of *Hans* that common law sovereign immunity is built into the contours of the judicial power in Article III. But while controversial,<sup>40</sup> the decision could be understood as merely dictating Congress’s choice of forum: state courts remained open as courts of general jurisdiction not subject to the limits of Article III.<sup>41</sup>

Just three years later, however, the Court announced an even greater expansion of sovereign immunity in *Alden v. Maine*.<sup>42</sup> For the first time, the Court held that state sovereign immunity bars suit against unwilling states not only in federal court but in state court as well — even where a plaintiff seeks enforcement of a valid federal law, and even where the state consents to similar suits based on state law.<sup>43</sup> State sovereign immunity was, the Court explained, not a doctrine lim-

<sup>36</sup> See *id.* at 5; *id.* at 57 (White, J., concurring in the judgment in part and dissenting in part).

<sup>37</sup> *Id.* at 14 (plurality opinion). The plurality acknowledged that *Fitzpatrick* had “emphasized the ‘shift in the federal-state balance’ occasioned by the Civil War Amendments,” *id.* at 16 (quoting *Fitzpatrick*, 427 U.S. at 455), but found that factor irrelevant to the case at hand, *id.* at 16–17.

<sup>38</sup> 517 U.S. 44 (1996).

<sup>39</sup> *Id.* at 73; see also *id.* at 66.

<sup>40</sup> CHEMERINSKY, *supra* note 9, § 2.10.6, at 232.

<sup>41</sup> See Monaghan, *supra* note 11, at 125–26. Suits against state officers under *Ex parte Young*, see *supra* section I.A, pp. 1071–73, also remained, though *Seminole Tribe* appeared to limit that remedy as well. See generally Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997).

<sup>42</sup> 527 U.S. 706 (1999).

<sup>43</sup> See *id.* at 712. But see *Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that states cannot discriminate against federal claims).

ited to either the Eleventh Amendment or even Article III. Rather, it was derived “from the structure of the original Constitution itself.”<sup>44</sup> As Justice Kennedy wrote for the 5–4 majority, “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.”<sup>45</sup> Looking to history and common law norms, to the statements of the Founders and the reaction to *Chisholm*, and ultimately to the structure of the Constitution and the federalism principles it enshrines, the Court held that sovereign immunity is forum independent.<sup>46</sup>

In the space of a few short years, the Court had overthrown most of its congressional abrogation precedents. In their place, the Court substituted a muscular and often unyielding state sovereign immunity barrier.

### C. Fitzpatrick Lives On

Yet despite the wounds inflicted on the congressional abrogation power by the Rehnquist Court, *Fitzpatrick* has emerged from the fray mostly unscathed.<sup>47</sup> Unlike the ill-fated *Union Gas*, *Fitzpatrick* was reaffirmed in a number of cases prior to the purge orchestrated by the Rehnquist Court.<sup>48</sup> More importantly, the Rehnquist Court expressly spared *Fitzpatrick* from its revolution. In *Seminole Tribe*, the Court distinguished the rationales for *Fitzpatrick* and *Union Gas*, criticizing only the latter.<sup>49</sup> Later, the Court held expressly that “‘appropriate’ legislation pursuant to the Enforcement Clause of the Fourteenth Amendment could abrogate state sovereignty.”<sup>50</sup>

To be sure, the Court has reworked *Fitzpatrick* to jibe with the new era of state sovereign immunity law. Originally, the decision rested on dual rationales — *Fitzpatrick* could be read narrowly as an opinion about changes to the federal-state balance after the Civil War, or

<sup>44</sup> *Alden*, 527 U.S. at 728; see *id.* at 713, 728–29.

<sup>45</sup> *Id.* at 713. Significantly for the discussion that follows in Parts II and III, Justice Kennedy immediately qualified this sweeping statement as follows: “except as altered by the plan of the Convention or certain constitutional Amendments.” *Id.*

<sup>46</sup> See *id.* at 713–24.

<sup>47</sup> “Mostly” because *Fitzpatrick* got caught in the crossfire of a skirmish over the overall scope of Congress’s section 5 powers. In 1997, the Court held that Congress could act pursuant to its section 5 powers only if there was “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). The Court has since policed this requirement ruthlessly. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999).

<sup>48</sup> See, e.g., *Missouri v. Jenkins*, 491 U.S. 274, 279 (1989); *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989).

<sup>49</sup> See 517 U.S. 44, 59, 65–66 (1996); see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

<sup>50</sup> *Fla. Prepaid*, 527 U.S. at 637. “Appropriate” here refers to the requirements of *City of Boerne*. See *supra* note 47.

broadly as an opinion about Congress's plenary power over the states. (Indeed, in *Union Gas*, the plurality adopted the latter interpretation.<sup>51</sup>) But in *Seminole Tribe*, the Court adopted the narrower view, stressing the unique properties of the Fourteenth Amendment.

Under the *Hans* line of cases, the Court interpreted the Eleventh Amendment as preserving a particular federal-state balance — that is, the one originally envisioned by the Founders. But that federal-state balance was decimated in practice on the fields of the Civil War, and this shift was memorialized thereafter in the Civil War Amendments.

Along with its constitutional siblings, then, the Fourteenth Amendment represented a new conception of federal government. At the Founding, states were generally seen as a bulwark protecting the people from the predations of a distant and potentially tyrannical national government. But now the states had revealed themselves as independent threats to individual liberty. And the Fourteenth Amendment sought to meet this newly realized danger on two fronts: First, the amendment restrained the states directly by limiting their ability to, among other things, “deprive any person of life, liberty, or property, without due process of law.”<sup>52</sup> Second, it gave new powers to the federal government to enforce those limits through section 5, the Fourteenth Amendment's enforcement arm.<sup>53</sup>

While these provisions echoed limitations and authorities found in the text of the original Constitution,<sup>54</sup> they were far more powerful. “[B]y expanding federal power at the expense of state autonomy,” the Fourteenth Amendment “fundamentally altered the balance of state and federal power struck by the Constitution.”<sup>55</sup>

The Court has relied on this balance-altering shift to explain why section 5 enables the federal government to override state sovereign immunity: “*Fitzpatrick* was based upon [the] rationale . . . that the Fourteenth Amendment, *adopted well after* the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.”<sup>56</sup> By ratifying the Fourteenth Amendment, the states “surrender[ed] a portion of the

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<sup>51</sup> See *supra* note 37.

<sup>52</sup> U.S. CONST. amend. XIV, § 1.

<sup>53</sup> *Id.* § 5. The amendment also sought to protect individual rights by tying congressional representation to the right to vote, see *id.* § 2, and barring from office those who had taken up arms during the Civil War, see *id.* § 3. However, these provisions remained largely unenforced in subsequent decades for political reasons. See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 369–70.

<sup>54</sup> See, e.g., U.S. CONST. art. I, § 4, cl. 1; *id.* § 10; *id.* art. IV, § 1; *id.* art. VI, cl. 2.

<sup>55</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996).

<sup>56</sup> *Id.* at 65–66 (emphasis added). This language repudiated dicta suggesting the contrary in *Ex parte Young*. See 209 U.S. 123, 150 (1908).

sovereignty that had been preserved to them by the original Constitution,” including their right to sovereign immunity.<sup>57</sup> So when Congress chooses to abrogate state sovereign immunity through section 5, it is not breaching the walls of federalism. Instead, it is acting within its proper realm, a province annexed by the “shift in the federal-state balance” occasioned by the Fourteenth Amendment.

## II. TAKING *FITZPATRICK* AT ITS WORD: THE FOURTEENTH AMENDMENT AND STATE SOVEREIGN IMMUNITY

While *Fitzpatrick* dealt with direct congressional abrogation under section 5, this Note argues that its reasoning should apply whenever the Fourteenth Amendment acts of its own force to impose a remedial obligation on the states under the Due Process Clause. In other words, although states and their citizens have tussled over the circumstances under which Congress can abrogate state sovereign immunity, the clash is largely beside the point whenever the Fourteenth Amendment wades directly into the fray. In those cases, the Fourteenth Amendment requires states to provide an effective remedy for their unlawful conduct — even if Congress sits idly by.

Because it operates automatically, this constitutional abrogation is powerful medicine. But it is also administered sparingly: there are relatively few provisions found within the capacious bounds of the Fourteenth Amendment that provide an express (or even implied) cause of action against a state. Thus, the logic of *Fitzpatrick* does not seriously disrupt the federal-state balance envisioned in recent years by the Rehnquist and Roberts Courts.

### A. *The Fourteenth Amendment Trumps State Sovereign Immunity*

*Fitzpatrick* holds that the Fourteenth Amendment prevails in a clash with the Eleventh Amendment. In *Fitzpatrick* itself, the Court dealt with only one provision of the Fourteenth Amendment, section 5. But if state sovereign immunity does not limit section 5, then neither should it limit section 1 — or any other provision of the Fourteenth Amendment.

After all, there is little reason to think that section 5 can perforate state sovereign immunity in a way that section 1 cannot. First, very little of *Fitzpatrick*'s reasoning depended on any special properties of section 5. Its analysis opens with discussion of the amendment in its entirety, noting that “[a]s ratified by the States after the Civil War, [the Fourteenth] Amendment quite clearly contemplates limitations on their authority.”<sup>58</sup> And general references to “[t]he impact of the Fourteenth

<sup>57</sup> *Alden v. Maine*, 527 U.S. 706, 756 (1999).

<sup>58</sup> *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976).

Amendment upon the relationship between the Federal Government and the States” are legion.<sup>59</sup>

Second, to the extent that *Fitzpatrick* placed any emphasis on congressional action,<sup>60</sup> those references dropped out in *Seminole Tribe* and subsequent cases. This doctrinal shift made tactical sense in light of the pro-federalism currents sweeping through the Court at the time. The Rehnquist Court had no interest in playing up the importance of congressional action at a time when it was cutting back on that branch’s authority in this area. Likewise, the Court had every reason to draw attention to the unique status of the Fourteenth Amendment writ large, since the amendment’s exceptionalism was what permitted the Court to distinguish it from the pedestrian authority found in Article I. But the shift was more than just good tactics. Sections 1 and 5 bookend the same constitutional amendment, and the entire amendment — not any one provision within it — shifted the federal-state balance.

This interpretation of *Fitzpatrick* aligns with the Court’s broader approach to state sovereign immunity as well. In recent cases, the Court has emphasized that state sovereign immunity derives from the constitutional “plan of the Convention” rather than any particular textual provision.<sup>61</sup> To guide its inquiry, the Court “has engaged in a gradual common law elaboration of the ways in which state sovereign immunity fits or does not fit, in different contexts, with our structure of government.”<sup>62</sup> Whatever the merits of this approach,<sup>63</sup> the “plan of the Convention” was altered drastically in the wake of the Civil War. Thus, the Court cannot inform its understanding of state sovereign immunity by looking merely to the Framers’ antebellum plans and designs. Indeed, the Court has made this point explicitly: “The States have consented . . . to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments.”<sup>64</sup> Accordingly, as *Fitzpatrick* recognized implicitly, no part of the Fourteenth Amendment should be limited by state sovereign immunity.<sup>65</sup>

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<sup>59</sup> *Id.*; see also, e.g., *id.* at 454, 455.

<sup>60</sup> See, e.g., *id.* at 456 (framing the issue as “the relationship between the Eleventh Amendment and the enforcement power granted to Congress under § 5 of the Fourteenth Amendment”).

<sup>61</sup> See *Alden*, 527 U.S. at 755; see also *supra* notes 20–21 and accompanying text.

<sup>62</sup> John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1731 (2004).

<sup>63</sup> For criticism, see *id.* at 1665–71.

<sup>64</sup> *Alden*, 527 U.S. at 755 (emphasis added).

<sup>65</sup> That argument may apply to other constitutional provisions as well, including the Thirteenth, Fifteenth, and Nineteenth Amendments, which share a number of relevant similarities with the Fourteenth Amendment. That extension is beyond the scope of this Note but would be worth exploring in the future.

This interpretation also comports with the broader constitutional preference not to leave rights without remedies. While far from an ironclad rule in practice,<sup>66</sup> the principle that every right has a remedy has always served as one of the law's better angels.<sup>67</sup> Legal scholars have argued persuasively that the constitutional structure — even or especially in the context of a constitutionalized doctrine of state sovereign immunity — demands a measure of accountability for state violations of constitutional rights.<sup>68</sup> That demand may not require a damages remedy against the state in every instance.<sup>69</sup> But a damages remedy should be available in situations where other forms of relief are categorically inadequate. Such situations — which are discussed in Part III — require abrogation of state sovereign immunity pursuant to *Fitzpatrick*'s logic.

Putting all this together, it is hard to justify the view that when the Fourteenth Amendment and Congress work together through section 5, they can abrogate sovereign immunity in a way the Fourteenth Amendment could not on its own. Such a theory depends on congressional action adding some extra — and necessary — “oomph” to section 5's abrogation power, a boost that section 1 lacks by virtue of being self-executing.<sup>70</sup>

But the “oomph” theory errs by forgetting that Congress derives its abrogation authority from the Fourteenth Amendment in the first place. The Constitution embraced state sovereign immunity, and what the Constitution granted with one hand (the Eleventh Amendment), it later

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<sup>66</sup> Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991) (“[T]he principle of a remedy for every rights violation cannot plausibly claim status as an unyielding imperative.”).

<sup>67</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*23, \*109).

<sup>68</sup> See, e.g., Fallon & Meltzer, *supra* note 66, at 1778–79 (identifying a “structural” principle, *id.* at 1778, that “demands a system of constitutional remedies adequate to keep government generally within the bounds of law,” *id.* at 1778–79); David L. Shapiro, *The Supreme Court, 1983 Term — Comment: Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 62, 83–84 (1984) (arguing that a constitutionalized doctrine of sovereign immunity is at odds with “the principle that government must be accountable to the people through the courts,” *id.* at 62, embodied in exceptions like *Ex parte Young*).

<sup>69</sup> Fallon & Meltzer, *supra* note 66, at 1779–80.

<sup>70</sup> Somewhat oddly, *Fitzpatrick* included language doubting the self-executing nature of the Fourteenth Amendment. In one portion of the opinion, *Fitzpatrick* quoted extensively from a case dating back to a few years after the ratification of the Fourteenth Amendment that suggested “there might be room for argument that the first section [of the Fourteenth Amendment] is only declaratory of the moral duty of the State.” *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (quoting *Ex parte Virginia*, 100 U.S. 339, 347 (1879)). This view was wrong at the time of *Fitzpatrick*, and it remains incorrect today. Most obviously, in a state prosecution, a defendant can rely on section 1 for her defense even if Congress has not provided any statutory basis for doing so. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). And by the time *Fitzpatrick* was decided, the Court had already implied at least one cause of action under the Fourteenth Amendment. See, e.g., *Ward v. Bd. of Cty. Comm'rs*, 253 U.S. 17 (1920); see also *infra* section III.B, pp. 1084–89.

took away, in part, with the other (the Fourteenth Amendment). Thus, it makes little sense to think of congressional action as tipping the scales. Regardless of whether section 1 or section 5 is considered, the Fourteenth Amendment is being weighed against the Eleventh. The Fourteenth Amendment wins that numbers game under *Fitzpatrick*.

Moreover, the “oomph” theory runs counter to the original understanding and subsequent interpretation of the Fourteenth Amendment. When the Republican Congress passed the Fourteenth Amendment, it aimed to establish broad protections for individual rights.<sup>71</sup> Making these protections entirely dependent on congressional action would have limited them unnecessarily, so the Framers structured the amendment to be enforceable by *either* Congress *or* the courts.<sup>72</sup> Requiring congressional action to abrogate sovereign immunity would frustrate this original purpose. Perhaps in part for that reason, the Court has never held that section 1 and section 5 differ in their capacities to breach state sovereign immunity. To the contrary, the Court has affirmed on a number of occasions that section 1 *can* — of its own force — override state sovereign immunity.<sup>73</sup>

### B. The Limiting Principle

At first blush, *Fitzpatrick* appears to create a massive exception to state sovereign immunity for almost all constitutional claims. In practice, however, this automatic abrogation has significant limits. The Fourteenth Amendment will trump state sovereign immunity only when the two come into direct conflict, which can happen in one of two ways: First, Congress can authorize suit against the states under the Fourteenth Amendment. Second, the Constitution itself can authorize suit against the states, in which case *Fitzpatrick*'s reasoning suggests that state sovereign immunity will prove no obstacle. Neither conflict arises frequently.

Consider first a congressionally instigated clash between the Fourteenth Amendment and state sovereign immunity. As noted in Part I, that situation is already governed by *Fitzpatrick*'s holding, and it remains unaffected by this Note's extension of *Fitzpatrick*'s reasoning. In any event, the federal-state balance has not been particularly upset by congressional subversions of state autonomy up to this point. For nearly all statutory causes of action for constitutional claims, Congress has decided not to exercise its *Fitzpatrick* abrogation power. While there are occasional exceptions,<sup>74</sup> for the most part one whose constitu-

<sup>71</sup> See WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 62–63 (1988).

<sup>72</sup> See *id.* at 55, 58.

<sup>73</sup> See *infra* section III.B, pp. 1084–89.

<sup>74</sup> See, e.g., 42 U.S.C. § 2000e(a) (2012) (defining “person” to include “governments” for the purposes of Title VII litigation).

tional rights are aggrieved by a state official must rely on § 1983.<sup>75</sup> That provision authorizes private causes of action only against:

[A] *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.<sup>76</sup>

By limiting suits to state officials, Congress has effectively avoided authorizing suits against states and thus abrogating state immunity.<sup>77</sup>

The broader lesson of *Fitzpatrick* outlined in this Note *does* make a difference in cases where the Constitution itself authorizes suit. The Court has not yet seriously probed the intersection of its cases in this area with state sovereign immunity. But if the argument in the previous section is correct, then private litigants should be permitted to sue the state free and clear of sovereign immunity barriers whenever they bring a claim under the Fourteenth Amendment itself. The Court, however, has been increasingly reticent to recognize such causes of action. Of those it *has* recognized, only a few are affected by *Fitzpatrick*'s logic one way or the other.

So while the Fourteenth Amendment works of its own force to trump state sovereign immunity, that primacy is quite limited. Simply put, there is no *Fitzpatrick*-compelled piercing of sovereign immunity in most cases because the Fourteenth Amendment only rarely comes into direct contact with state sovereign immunity. But "rarely" does not mean "never."

### III. FITZPATRICK APPLIED

The Supreme Court has identified four notable exceptions to the general rule that the Constitution does not provide a cause of action. Right off the bat, however, two of those exceptions — the *Bivens* suit<sup>78</sup>

<sup>75</sup> *Id.* § 1983.

<sup>76</sup> *Id.* (emphasis added); *see also* *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that states are not "persons" within the meaning of § 1983).

<sup>77</sup> Notably, Congress could have meant to abrogate state sovereign immunity under § 1983 by allowing suits against state officials in their official capacity. But as interpreted by the Court, § 1983 allows damages suits only against state officials in their personal capacity. *See Will*, 491 U.S. at 71. As a result, suits against state officials in their official capacity are "limited to prospective injunctive relief," *Edelman v. Jordan*, 415 U.S. 651, 677 (1974), and Congress has authorized no other far-reaching abrogation of state sovereign immunity. Even if Congress wanted to do so, though, it would be severely restricted by the "congruence and proportionality" requirement of *City of Boerne*. *See supra* note 47.

<sup>78</sup> In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny, the Court explained that in some (increasingly narrow) situations, constitutional violations can give rise to a direct damages suit against federal officers in federal court even without statutory authorization. *See generally* RICHARD H. FALLON, JR. ET AL., HART

and the writ of habeas corpus<sup>79</sup> — are not affected by state sovereign immunity regardless of *Fitzpatrick*'s logic.<sup>80</sup> However, *Fitzpatrick* does bear on the remaining two causes of action. First, the Constitution allows private litigants to bring suits to recover just compensation for unlawful takings.<sup>81</sup> Second — and perhaps less well known — the Due Process Clause of the Fourteenth Amendment demands that states provide a “clear and certain remedy”<sup>82</sup> for the unlawful exaction of taxes.<sup>83</sup> For these two claims, the Constitution itself props open the courthouse door and demands a particular remedy.

These two categories of claims — takings and tax refund suits — function similarly. Both may involve private claims for damages brought directly against a state (or state officials acting in an official capacity), thereby implicating the state treasury, and neither is covered by the conventional sovereign immunity exceptions. Perhaps for that reason, both categories of claims have had historically uneasy relationships with state sovereign immunity. Initially, the Court suggested (in dicta) that state sovereign immunity would not bar claims brought under either doctrinal line. But more recently, the Court has seemingly retreated from that view, suggesting instead (again, in dicta) that both types of claims may be thwarted by state sovereign immunity after all, at least in some cases.

That retreat is wrong. Although the Court has not squarely ruled on the intersection of takings or tax refund suits with state sovereign immunity, *Fitzpatrick* demands that both categories of claims be able to proceed, state sovereign immunity notwithstanding. The remainder of this Part lays out the doctrinal warp and woof for each type of claim and then explains how that foundation aligns with — and even supports — *Fitzpatrick*'s logic.

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AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 762–77 (7th ed. 2015) [hereinafter HART & WECHSLER].

<sup>79</sup> The Constitution can be read to demand the availability of the writ of habeas corpus except in cases of suspension. See U.S. CONST. art. I, § 9, cl. 2; see also *Boumediene v. Bush*, 553 U.S. 723, 745 (2008); *INS v. St. Cyr*, 533 U.S. 289, 305 (2001); Fallon & Meltzer, *supra* note 66, at 1779 & n.244.

<sup>80</sup> Both *Bivens* and habeas suits fall into the *Ex parte Young* exception to state sovereign immunity because they are suits against *officials* rather than the states themselves, see *supra* note 26 and accompanying text, and *Bivens* suits are brought against federal — not state — officials, see PFANDER, *supra* note 5, § 6.8, at 167.

<sup>81</sup> See *infra* section III.A, pp. 1082–84.

<sup>82</sup> *Reich v. Collins*, 513 U.S. 106, 108 (1994) (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)).

<sup>83</sup> See *infra* section III.B, pp. 1084–89.

*A. Takings Litigation*

The Takings Clause directs that “private property [shall not] be taken for public use, without just compensation.”<sup>84</sup> As its text indicates, “this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power.”<sup>85</sup>

This Note is not the first work to suggest that “takings and state sovereign immunity cases are fundamentally incompatible with each other.”<sup>86</sup> The takings cases seem to provide an unqualified right to obtain “just compensation” (that is, money damages) from the government — including state governments. This right, however, runs squarely against the Court’s sovereign immunity jurisprudence, which protects states from private damages suits.

To be sure, many (if not most) takings suits will not raise a sovereign immunity problem. The “paradigmatic” takings action is an eminent domain suit.<sup>87</sup> Such suits arise when the government condemns property for public use.<sup>88</sup> The government “must initiate judicial proceedings to complete a transfer of title” in such suits, and thus it “necessarily consents to judicial determination of questions about the scope of its obligations under the Constitution.”<sup>89</sup> Because the government initiates the suit, sovereign immunity provides no protection. Additionally, no sovereign immunity issues arise when a takings suit is brought against a county or city government, or when a plaintiff seeks nonmonetary relief.<sup>90</sup>

However, in another subset of takings cases, a plaintiff *will* be seeking money damages against a state. Such a suit may arise, for example, where a government regulation restricts the use of property and an owner later sues for the loss of use while the regulation was in effect.<sup>91</sup> In such cases, sovereign immunity and takings come to a head.<sup>92</sup>

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<sup>84</sup> U.S. CONST. amend. V. The Fourteenth Amendment incorporates this clause against the states. *See* *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

<sup>85</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

<sup>86</sup> Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 494 (2006).

<sup>87</sup> Thomas W. Merrill, Essay, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1637 (2015).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1643.

<sup>90</sup> *See supra* notes 23–28 and accompanying text.

<sup>91</sup> *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 (2002).

<sup>92</sup> Berger, *supra* note 86, at 501.

The Court has not resolved this conflict.<sup>93</sup> Far from providing clear guidance, the Court has instead offered scattered and contradictory remarks in dicta. The Court's first foray into explaining how sovereign immunity and takings might interact came in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.<sup>94</sup> There, the Court held that the Takings Clause demanded the availability of an inverse condemnation action.<sup>95</sup> As the suit was brought against a county, the case did not require the Court to grapple with sovereign immunity. But the United States had argued in its amicus brief that "the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision."<sup>96</sup> In a now-famous footnote, the Court rejected this proposition, explaining that "[t]he cases cited in the text . . . refute the argument" and "make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking."<sup>97</sup> The Government's "principles of sovereign immunity" mattered little to the Court — the takings remedy would prevail in cases of a conflict.

A decade later, though, the Court retreated from that dictum in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*<sup>98</sup> Like *First English*, the suit was against a municipality, rendering any holding on sovereign immunity impossible. But, also like *First English*, the Court did not let that inconvenient fact stop it from wading in. Responding to one of the dissent's arguments resting on the historical presence of sovereign immunity in takings suits, a plurality of the Court explained that "[e]ven if the sovereign immunity rationale retains its vitality in cases where [the Fifth] Amendment is applicable" — dropping a citation to *First English's* footnote — "it is neither limited to nor coextensive with takings claims."<sup>99</sup> Thus, the Court transformed *First English's* unqualified rejection of a sovereign immunity bar into an open question ripe for decision.<sup>100</sup>

<sup>93</sup> However, three courts of appeals have handed down post-*Alden* decisions confronting the issue. In each of those cases, the court rejected the availability of a federal forum to grant relief under the Takings Clause against a state, but either left open the question of whether a state would have to provide such relief or declared that a state forum would be required for a takings suit against a state. See *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 & n.8 (9th Cir. 2008); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 528 (6th Cir. 2004).

<sup>94</sup> 482 U.S. 304 (1987).

<sup>95</sup> See *id.* at 307.

<sup>96</sup> *Id.* at 316 n.9 (citation omitted).

<sup>97</sup> *Id.*

<sup>98</sup> 526 U.S. 687 (1999).

<sup>99</sup> *Id.* at 714 (plurality opinion).

<sup>100</sup> See HART & WECHSLER, *supra* note 78, at 880.

Despite the clash in tone, both *Del Monte* and *First English* share a common — and erroneous — presumption that prevents the Court from reconciling state sovereign immunity and the Takings Clause. *First English* focused on the constitutional source of the just compensation right, ignoring the fact that sovereign immunity is *also* instantiated in the Constitution. In turn, *Del Monte* emphasized the constitutional underpinnings of sovereign immunity but failed to explain how those underpinnings could be harmonized with an express constitutional provision. In short, by placing sovereign immunity and the right to just compensation on equal footing, these cases necessarily set up an irreconcilable clash.

As this Note argues, however, that conflict is unnecessary. Instead, *Fitzpatrick* reveals that the Fourteenth Amendment reshuffled the constitutional deck, subjugating sovereign immunity to those rights that spring from the Fourteenth Amendment. Thus, *First English* had it right and *Del Monte* was wrong to suggest there was an open question about the interaction of the Takings Clause with sovereign immunity — *Fitzpatrick* had resolved that question two decades prior.

### B. Tax Refund Litigation

Since its inception, the Supreme Court has recognized that “the power to tax involves the power to destroy.”<sup>101</sup> And the Court has also protected citizens from abuse of that power, especially when the state wields it unlawfully. In a series of cases over the course of the twentieth century, the Court explained that the Due Process Clause of the Fourteenth Amendment demands that individuals be given the ability to challenge the legality of taxes and, upon a finding of illegality, that states provide a “clear and certain remedy” to correct that unlawful deprivation.

*Ward v. Board of County Commissioners*<sup>102</sup> exemplifies both the Court’s early efforts to set forth that remedy and, with its stark facts, the remedy’s importance. The *Ward* plaintiffs were members of the Choctaw Tribe, which had been allotted land by statute in 1898.<sup>103</sup> In addition to granting the land, the statute also provided that the land could not be taxed for a period of twenty-one years so long as the Tribe maintained possession.<sup>104</sup> Within a decade, however, Congress changed its mind and extinguished that exemption.<sup>105</sup> Local governments rushed to take advantage and, frustrated by the promise be-

<sup>101</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

<sup>102</sup> 253 U.S. 17 (1920).

<sup>103</sup> *Id.* at 19.

<sup>104</sup> *Id.* (citing Curtis Act, ch. 517, 30 Stat. 495, 507 (1898)).

<sup>105</sup> Act of May 27, 1908, ch. 199, 35 Stat. 312, 313.

trayed, members of the tribe turned to the courts to challenge the legality of the taxes now being levied on their land.<sup>106</sup>

One such locality, Love County, Oklahoma, issued a threat alongside its new tax: if the landowners did not pay, their land would be sold and the owners fined an eighteen percent penalty.<sup>107</sup> Faced with this unenviable possibility, the *Ward* plaintiffs paid the taxes while continuing to press their challenge to the tax's legality in court.<sup>108</sup> Eventually, the Supreme Court vindicated their position<sup>109</sup> — but it was too late. Armed with the Court's verdict, the *Ward* plaintiffs sought a refund of the now concededly illegal taxes, but found themselves rebuffed once again. The Oklahoma Supreme Court held that the taxes had been paid "voluntarily" under state law, and that no statute provided for a refund of taxes so paid.<sup>110</sup> Additionally, and again relying on state law, the state supreme court held that counties could not be compelled to refund taxes already paid over to the state treasury, as at least some of the taxes in question had been.<sup>111</sup>

Combined, these holdings created a devastating dilemma for the landowners. They could not realistically challenge the tax's legality before the deprivation, given the draconian consequences that would follow. But they were also barred under state law from recovery post-deprivation. If allowed to stand, the Oklahoma Supreme Court's ruling would have provided a blueprint for any state to impose a tax immune from legal challenge.

Recognizing that danger, the U.S. Supreme Court reversed. Allowing "the county [to] collect these unlawful taxes by coercive means and not incur any obligation to pay them back" would be tantamount to permitting it to "take or appropriate the property of these Indian allottees arbitrarily and without due process of law."<sup>112</sup> Such a result would "[o]f course . . . be in contravention of the Fourteenth Amendment."<sup>113</sup> The message was clear: the Constitution would not permit an unchallengeable tax.

While *Ward* danced around the source of this remedial obligation, the Court got more specific half a century later. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*,<sup>114</sup> the Court explained that this sort of tax refund suit rested on an almost definitional resort

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<sup>106</sup> See *Ward*, 253 U.S. at 19–20.

<sup>107</sup> *Id.* at 20.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (citing *Choate v. Trapp*, 224 U.S. 665 (1912); *Gleason v. Wood*, 224 U.S. 679 (1912); *English v. Richardson*, 224 U.S. 680 (1912)).

<sup>110</sup> *Id.* at 21.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 24.

<sup>113</sup> *Id.*

<sup>114</sup> 496 U.S. 18 (1990).

to the Fourteenth Amendment: “[E]xaction of a tax constitutes a deprivation of property.”<sup>115</sup> As such, “the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause.”<sup>116</sup> At minimum, these procedural safeguards included “a fair opportunity to challenge the accuracy and legal validity of [the] tax obligation.”<sup>117</sup> But the opportunity to challenge a tax without the assurance that the opportunity would translate into meaningful relief would be an empty right.<sup>118</sup> It followed that the state also had to provide a “clear and certain remedy” to accompany the ability to challenge the tax.<sup>119</sup>

Four years later, the Court hit home the point in *Reich v. Collins*.<sup>120</sup> Writing for a unanimous Court, Justice O’Connor made clear that a state was free to choose among predeprivation, postdeprivation, or hybrid remedial schemes.<sup>121</sup> But it had to select one of these options.<sup>122</sup> What it could not do was “hold out what plainly appears to be a ‘clear and certain’ postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists” after all.<sup>123</sup> Otherwise, the state would leave taxpayers without any meaningful opportunity to challenge the disputed tax, a violation of due process.<sup>124</sup>

Significantly, the Court noted, albeit in dicta, that sovereign immunity could provide no protection. While previous cases like *Ward* and *McKesson* had left open the interaction between this type of claim and state sovereign immunity,<sup>125</sup> the *Reich* Court suggested that those cases stood “for the proposition that ‘a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment,’ *the sovereign immunity States traditionally enjoy in their own courts notwithstanding.*”<sup>126</sup> Though the statement was

<sup>115</sup> *Id.* at 36.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 39; *see also* Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

<sup>118</sup> *McKesson*, 496 U.S. at 39 (explaining that states must provide a remedy “to ensure that the opportunity to contest the tax is a meaningful one”).

<sup>119</sup> *Id.* at 43.

<sup>120</sup> 513 U.S. 106 (1994).

<sup>121</sup> *Id.* at 108, 110–11.

<sup>122</sup> *See id.*; *see also* HART & WECHSLER, *supra* note 78, at 757.

<sup>123</sup> *Reich*, 513 U.S. at 108.

<sup>124</sup> *See id.* at 114; *cf.* Gen. Oil Co. v. Crain, 209 U.S. 211, 226 (1908).

<sup>125</sup> Sovereign immunity does not protect municipalities like Love County from suit, so *Ward* did not raise the issue. *See supra* notes 23–24 and accompanying text. And in *McKesson*, Florida conceded it had waived its sovereign immunity through its statute authorizing a refund action in state court. *See* *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 49 n.34 (1990).

<sup>126</sup> *Reich*, 513 U.S. at 109–10 (emphasis added) (citation omitted) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930)). Immediately afterward, *Reich* added parenthetically: “We should note

dictum because the court below did not rest its holding on sovereign immunity,<sup>127</sup> the sweeping language was striking. The Court seemed willing to declare broadly that states could not use their sovereign immunity as a shield from suits seeking to challenge taxes' illegality.

Just five years later, though, the Court in *Alden* retreated from this dictum with its own bit of counterdictum. While purporting to affirm *Reich*, *Alden* read it differently, and more narrowly, as standing for the principle that a state may not renege on a promised postdeprivation remedy once an invalid tax has been paid:

In *Reich v. Collins*, we held that, despite its immunity from suit in federal court, a State which holds out what plainly appears to be “a clear and certain” postdeprivation remedy for taxes collected in violation of federal law may not declare, after disputed taxes have been paid in reliance on this remedy, that the remedy does not in fact exist. This case arose in the context of tax-refund litigation, where a State may deprive a taxpayer of all other means of challenging the validity of its tax laws by holding out what appears to be a “clear and certain” postdeprivation remedy. In this context, due process requires the State to provide the remedy it has promised.<sup>128</sup>

According to the *Alden* dictum, and contrary to the more natural reading of *Reich*, the constitutional sin in *Reich* and its predecessors was merely a bait and switch.<sup>129</sup> The remedial obligation, if it can be

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that the sovereign immunity States enjoy in *federal* court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum.” *Id.* So while the Due Process Clause can trounce state sovereign immunity in state courts, it does not pack the same punch in federal courts.

At first glance, this outcome seems inconsistent with *Fitzpatrick*'s logic. If the Fourteenth Amendment trumps state sovereign immunity under the Eleventh Amendment, then why should it matter whether suit is brought in federal or state court? Either way, the Fourteenth Amendment should win out. But the “state court only” limitation stems not from the interaction between the two amendments but rather from the Due Process Clause itself. In *Reich* and its progeny, the Court operated under the assumption that a plaintiff could find no remedy in any quarter, whether state or federal, for the unlawful exaction of taxes. In the Court's eyes, though, the Due Process Clause demands that *some* remedy exist. At the same time, there is no reason to imply an unnecessarily expansive remedy because the wider the remedy, the more it impinges on state sovereignty. So the Court fashioned the narrowest — and least intrusive — remedy possible. *See The Supreme Court, 1989 Term — Leading Cases*, 104 HARV. L. REV. 129, 194–95 (1990) (recognizing the “gentle federalization,” *id.* at 195, offered by *McKesson* and the tax refund litigation cases). The clause not only gives states the choice of timing — whether to offer a remedy before or after the exaction of the tax — but also the courtesy of initial adjudication in their own courts. Thus, the Due Process Clause breaks down the barrier of sovereign immunity only in state courts because it provides a cause of action only in state courts in the first place.

<sup>127</sup> See HART & WECHSLER, *supra* note 78, at 757.

<sup>128</sup> *Alden v. Maine*, 527 U.S. 706, 740 (1999) (citations omitted).

<sup>129</sup> It is possible to read *Alden* as carefully preserving *Reich* — and some state and lower federal courts have done just that, *see, e.g.*, *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954–56 (9th Cir. 2008) — but the predominant view is that *Alden* narrows *Reich*, *see, e.g.*, HART & WECHSLER, *supra* note 78, at 757–58, 880, 975. Which view is right is ultimately irrelevant to

called that, is not to provide a “clear and certain remedy,” but rather to provide the *promised* remedy — which could, in theory, be no remedy at all.

But that reading of the tax refund litigation cases cannot possibly be correct. The *Reich* remedy is rooted in due process, which not only implies a constitutional remedy but also demands a forum for that remedy. For that very reason, *Reich* and its predecessors expressly forbid states from closing the last remaining forum for a federal constitutional right.<sup>130</sup> Whether the state eliminates that forum through statutory barriers or a sovereign immunity defense, the result is the same: a violation of the due process right to a “clear and certain remedy.”

At the same time, there is real tension between *Alden* and *Reich*. Putting the two cases side by side, it is hard to reconcile the due process account of *Reich* with the structural conception of state sovereign immunity offered by *Alden*. In *Reich*, suit was barred in federal court under the Eleventh Amendment. Nonetheless, the Court stated confidently that things were different in state court. But in *Alden*, the Court seemingly obliterated any distinction between sovereign immunity in state and federal courts.<sup>131</sup> Indeed, *Alden*'s cramped reading of *Reich* is just a symptom of its broader structural account of sovereign immunity. The Court in *Alden* reconceptualized state sovereign immunity as part of the structure of the Constitution — stemming not only from the Tenth and Eleventh Amendments, but also from Article III, the Supremacy Clause, the Necessary and Proper Clause, and beyond.<sup>132</sup> Faced then with two imperfect alternatives — either to mangle tax refund litigation doctrine or to undermine its structural account of state sovereign immunity — the *Alden* Court chose the former option.

By offering a third alternative, though, this Note resolves the tension between *Reich* and *Alden*. It recognizes and restores the conventional interpretation of *Reich*.<sup>133</sup> But it also upholds *Alden*'s structural

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this Note's argument. What is worrisome is the Court's equation of constitutional sovereign immunity in state and federal court, not its interpretation of *Reich*'s holding.

<sup>130</sup> Cf. Wolcher, *supra* note 6, at 190 (“It now seems fundamental that explicitly or implicitly, the constitutional concept of ‘due process of law’ requires an opportunity to assert one’s substantive constitutional rights in some judicial forum, state or federal.”).

<sup>131</sup> See Berger, *supra* note 86, at 550–54.

<sup>132</sup> See *Alden*, 527 U.S. at 712–13, 732–33, 752.

<sup>133</sup> One counterargument warrants additional discussion. At first glance, this Note's interpretation of *Fitzpatrick* could be read to run counter to the spirit of one *Reich*-related case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999). In the patent infringement context, *Florida Prepaid* considered whether congressional abrogation of state sovereign immunity under section 5 was “congruent and proportional” to the evil that Congress was trying to remedy. See *id.* at 639–40. In the constitutional equivalent of “if it ain't broke, don't fix it,” the Court concluded that the abrogation was not congruent and proportional: Congress had failed to demonstrate the inadequacy of state remedies, so it had not adequately justified the need for an abrogation of state sovereign immunity pursuant to section 5. See *id.* at

account by meeting it on its own terms. If common law immunity is built into the very structure of the Constitution, then only a structural change can displace it. As Part II demonstrated and *Fitzpatrick* recognized, the Fourteenth Amendment restructured the balance between federal and state power, modifying the original design of the Constitution and the original plan for state sovereign immunity. Thus, *Alden*'s dictum about tax refund litigation was wrong at the time of writing because *Fitzpatrick*, taken to its logical extension, demands that private plaintiffs can recover unlawfully exacted taxes without being barred by state sovereign immunity.

### CONCLUSION

The doctrine of state sovereign immunity is a constitutional puzzle, at once unmoored from the precise text of the Constitution and at the core of the federal-state balance enshrined therein. With a federal system that values both state autonomy and state accountability, trying to strike (and restrike) the appropriate balance between the two through the doctrine of state sovereign immunity may be a constant feature of the American legal order. But under the Court's current doctrine, a few things seem relatively clear. As *Fitzpatrick* recognized, the Fourteenth Amendment represents a fundamental reshaping of the federal-state relationship — including the very structural postulates from which the Court has drawn its modern sovereign immunity doctrine. Thus, when a state deprives a person of property without just compensation or refuses to refund tax monies unlawfully exacted, due process demands a remedy — state sovereign immunity notwithstanding. Rights for which the Fourteenth Amendment itself provides a cause of action cannot be shielded from the courts.

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640, 643. But if there actually were no adequate state remedies available, then that situation would seem to give rise to a due process problem akin to the one raised in the tax refund cases, which this Note argues would automatically abrogate sovereign immunity. This sets up a Catch-22: Congress has either no basis for acting (adequate state remedies) or no reason to act (adequate state remedies, triggering a constitutional remedy).

The Catch-22 is more apparent than real, however, because a closer reading of *Florida Prepaid* establishes room for congressional action even if state remedies are largely adequate. The Court suggested that Congress should have "limit[ed] the coverage of the Act to cases involving arguable constitutional violations," *id.* at 646 (emphasis added), or that it should have "provid[ed] for suits only against States with questionable remedies or a high incidence of infringement," *id.* at 647 (emphases added). In each of these cases, a constitutional remedy would not kick in so long as there were any adequate state remedies, "questionable" or not. Yet Congress could legitimately target these cases with prophylactic legislation under its section 5 power. Thus, even if the Constitution automatically provided a remedy for the most egregious violations of the Fourteenth Amendment, it would still leave room for Congress to step in and interpose an additional protective barrier. Accordingly, *Florida Prepaid* is certainly reconcilable with *Fitzpatrick*'s logic and the due process ideas underlying the *Reich* line of cases.