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STATE SOVEREIGN IMMUNITY AND THE NEW PURPOSIVISM

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ABSTRACT

Since the Constitution was first proposed, courts and commentators have debated the extent to which it alienated the States' preexisting sovereign immunity from suit by individuals. During the ratification period, these debates focused on the language of the citizen-state diversity provisions of Article III. After the Supreme Court read these provisions to abrogate state sovereign immunity in Chisholm v. Georgia*, Congress and the States adopted the Eleventh Amendment to prohibit this construction. The Court subsequently ruled that States enjoy sovereign immunity independent of the Eleventh Amendment, which neither conferred nor diminished it. In the late twentieth-century, Congress began enacting statutes seeking*

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to override state sovereign immunity. In reviewing these acts, the Court established that Congress may abrogate immunity when exercising its powers to enforce the Fourteenth Amendment, but not when exercising its Article I powers. This distinction is consistent with the original public meaning of the constitutional text understood in historical context. Recently, in a surprising turnabout, the Court abandoned this established paradigm by finding that the States agreed to an implied "structural waiver" of their sovereign immunity in the "plan of the Convention" whenever such immunity would "thwart" or "frustrate" the purpose underlying a congressional power that is "complete in itself." The Court's new purposive approach to state sovereign immunity is incompatible with the Constitution because it gives courts open-ended discretion to alter the federal-state balance established by the instrument. As Alexander Hamilton explained, because the Constitution "aims only at a partial union or consolidation," "the whole tenor of the instrument" requires adherence to "the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor." Under this rule, the "plan of the Convention"—properly understood—divested the States of their sovereign rights only when it did so clearly and expressly or by unavoidable implication. By relying on a strongly purposive methodology to find implied structural waivers of state sovereign immunity, the Court's new approach disregards this fundamental rule and thus the Constitution itself.

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INTRODUCTION

The Constitution's precise effect on state sovereign immunity has been contested since the Founding. After achieving their independence, the American States (the States) possessed all the sovereign rights and powers enjoyed by sovereign states under the law of nations, including sovereign immunity.[1] The States initially alienated some of their sovereign rights in the Articles of Confederation, but after all the States breached the Articles, their people elected to alienate a somewhat different and more significant subset of sovereign rights in the Constitution. During the ratification period, the Founders vigorously debated whether the citizen-state diversity provisions of Article III would alienate the States' right to sovereign immunity from suit by out-of-state or foreign citizens. Anti-Federalists objected to these provisions because they authorized federal courts to hear suits "between a State and Citizens of another State" and "between a State ... and foreign ... Citizens or Subjects."[2] Federalists denied that these provisions would abrogate state sovereign immunity, but the Supreme Court promptly read them to do so in *Chisholm v. Georgia*.[3] In response to *Chisholm*, the Eleventh Amendment prohibited construing the judicial power to extend to suits *against* States by out-of-state citizens but said nothing about other suits.[4]

Near the end of the nineteenth century, the Supreme Court considered whether citizens could sue their own States in federal court and concluded that they could not because the States retained their sovereign immunity from such suits.[5] Nearly a century later, the

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1. In this Article, we use the phrase "state sovereign immunity" to refer to the States' sovereign immunity from suit by individuals. It does not refer to suits between States or between a State and another sovereign.

2. U.S. CONST. art. III, § 2; *see* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1864 (2010) [hereinafter Clark, *Eleventh Amendment*].

3. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 479 (1793); *see* Clark, *Eleventh Amendment*, *supra* note 2, at 1864-66.

4. U.S. CONST. amend. XI; *see* Clark, *Eleventh Amendment*, *supra* note 2, at 1821.

5. *See* Hans v. Louisiana, 134 U.S. 1, 20-21 (1890); *cf.* Louisiana *ex rel.* Elliott v. Jumel, 107 U.S. 711, 727-28 (1883) (holding that the Eleventh Amendment bars federal courts from hearing suits by out-of-state citizens against States arising under federal law).

Court again took up the question of sovereign immunity when Congress enacted statutes seeking to abrogate it. In a series of landmark decisions, the Court established its modern framework, under which Congress may abrogate state sovereign immunity when exercising its authority under Section 5 of the Fourteenth Amendment, but not when exercising its Article I powers.[6] As discussed in Parts II and III, this distinction was consistent with the original meaning of the constitutional text taken in historical context. With one narrow exception for bankruptcy cases,[7] the Court maintained this distinction until 2021.

In two recent decisions, however, the Supreme Court dispensed with this framework in favor of a novel purposive approach. Instead of holding that the States retain sovereign immunity unless the Constitution explicitly authorizes its abrogation, the Court held that the States agreed to an implied "structural waiver" of their sovereign immunity in the "plan of the Convention" wherever the Constitution grants Congress an Article I power that is "complete in itself."[8] This approach simply asks whether state sovereign immunity would "thwart" or "frustrate" the general purpose of the federal power in question.[9] If so, the Court infers that States waived their sovereign immunity merely by adopting the "plan of the Convention."[10] Given the current Court's commitments to textualism and originalism in other contexts, its recent embrace of strong purposivism to override state sovereign immunity is surprising.

The Court's new purposive approach to sovereign immunity is incompatible with the original public meaning of the Constitution. Sovereign immunity was an integral part of what it meant to be a State at the Founding. By adopting the Constitution, the people

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6. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress may abrogate state sovereign immunity when exercising its powers under Section 5 of the Fourteenth Amendment); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996) (holding that Congress may not abrogate state sovereign immunity in federal court under the Commerce Clauses); Alden v. Maine, 527 U.S. 706, 754 (1999) (holding that Congress may not abrogate state sovereign immunity in state court under the Commerce Clauses).

7. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378-79 (2006).

8. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2463 (2022) (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2263 (2021)).

9. *See Torres*, 142 S. Ct. at 2463 (quoting *PennEast*, 141 S. Ct. at 2256-57) (internal quotation marks omitted).

10. *Id.* (quoting *PennEast*, 141 S. Ct. at 2263).

transferred an important subset of the States' sovereign rights and powers to a new federal government, but the States necessarily retained all others.[11] Under long-standing background rules of interpretation recognized by the law of nations, a legal instrument was capable of alienating sovereign rights and powers—including sovereign immunity—only if it did so expressly or by unavoidable implication.[12] Such well-established rules of interpretation, presumably known to both the adopters and readers of a legal instrument, are inseparable from the text of the instrument itself.[13] As Alexander Hamilton explained, because the Constitution was an instrument used to alienate and transfer sovereign rights and powers, the long-established background rules of interpretation governing alienation and transfer of sovereign rights and powers were "admitted by the whole tenor of the instrument."[14] The Court's recent willingness to infer structural waivers of sovereign rights from general constitutional purposes contradicts these interpretive rules and thus the Constitution itself.

Although the Articles of Confederation and the Constitution alienated materially different subsets of the States' sovereign rights and powers, both instruments were designed and adopted to alienate sovereign rights within the framework established by these rules. The Articles failed in part because they gave Congress no power to tax and regulate individuals within the States or to subject States to suits by individuals, so these rights and powers remained with the States. Rather than alienate these rights and powers, the Articles authorized Congress to commandeer or requisition the States to raise revenue and staff the armed forces on its behalf.[15] This alienation proved inadequate because the States increasingly ignored requisitions, and Congress had no means to enforce them.[16]

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11. *See infra* notes 128-29 and accompanying text (explaining the limited transfer of sovereign rights in the Constitution); *see infra* note 77 and accompanying text.

12. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 530, 530 n.35 (2022) [hereinafter Bellia & Clark, *The Constitutional Law of Interpretation*].

13. *See infra* notes 326-30 and accompanying text.

14. THE FEDERALIST NO. 32, at 202-03 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

15. *See* ARTICLES OF CONFEDERATION of 1781, art. IX.

16. *See* Vices of the Political System of the United States (Apr. 1787), *in* 2 THE WRITINGS OF JAMES MADISON 361, 364 (Gaillard Hunt ed., 1901) [hereinafter MADISON WRITINGS] (describing the States' failure to fulfill their obligations under the Articles of Confederation).

Consequently, by 1787, the United States was unable to perform basic functions and pay its bills. The background rules governing instruments used to alienate sovereign rights foreclosed reading the Articles purposively to alienate more of the States' authority than the text conveyed. The only safe and effective way to augment federal authority under the rules was to adopt a new instrument explicitly alienating a larger subset of the States' sovereign rights and powers.

Accordingly, the Founders adopted the Constitution to replace the Articles. The Constitution solved the requisition problem not by authorizing Congress to enforce requisitions against States, but by withholding the requisition power and instead giving Congress enumerated powers to tax and regulate persons and things within the States' borders directly. These explicit powers alienated—for the first time—the States' sovereign right to exercise exclusive regulatory authority over persons and things within their territory. At the same time, the Constitution omitted federal power to requisition the States, thereby avoiding the need to enforce such commands. The Constitutional Convention rejected requisitions because enforcing them against States was too dangerous and could lead to civil war. For this reason, as Madison explained, the Constitution abandoned the principle of confederation employed by the Articles and instead "embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them."[17]

Although the Constitution departed from the Articles of Confederation by replacing congressional power to requisition States with congressional power to tax and regulate persons and property within the States, it explicitly continued the Articles' practice of requiring disputes between States to be resolved at the federal level. Specifically, Article III of the Constitution authorized federal courts to hear controversies between two or more States in the hope that litigation in a neutral forum would provide a more peaceful resolution than armed conflict.[18] The Constitution's effect on state

17. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 131, 131-32 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND'S RECORDS].

18. U.S. CONST. art. III, § 2; *see* Clark, *Eleventh Amendment*, *supra* note 2, at 1873

sovereign immunity in disputes between States and out-of-state *citizens* was less clear. The Articles did not alienate state immunity in such cases because the instrument did not contain any language doing so. The Constitution, however, included the citizen-state diversity provisions in Article III. As read by some, these provisions abrogated a State's immunity when sued by an out-of-state citizen. Thus, the proposed Constitution raised the important question whether it abrogated a State's sovereign immunity not only from suit by another State, but also from suit by an out-of-state *individual*.

The citizen-state diversity provisions authorized federal courts to hear suits "between" States and "between" citizens of different States or foreign states.[19] Anti-Federalists feared that judges would read this language to override state sovereign immunity and objected that, if judges did so, these provisions would generate "the very enforcement problems that Federalists insisted the Constitution was designed to avoid."[20] Federalists responded by denying that the language in question would alienate sovereign immunity because it was not clear and express enough to authorize suits by out-of-state citizens *against* States.[21] At most, Federalists argued, this language authorized suits *by* States against such individuals.[22] Despite these assurances, the Supreme Court read Article III to permit suits by individuals against States in *Chisholm v. Georgia*.[23] In response, Congress proposed, and the States adopted, the Eleventh Amendment to prohibit this construction.[24] In so doing, the Amendment negated the only language in the original Constitution that was arguably sufficient to alienate state sovereign immunity from suits by individuals.

Until recently, the Supreme Court's approach to state sovereign immunity following the Eleventh Amendment generally aligned

("[F]ederal jurisdiction over suits between states (and perhaps between a state and a foreign state) might frequently provide the very means of avoiding a war between states, whereas federal jurisdiction over suits by individuals against states might actually provoke a civil war."). *Id.* at 1870.

19. *See* U.S. CONST. art. III, § 2.

20. *See* Clark, *Eleventh Amendment*, *supra* note 2, at 1823.

21. *Id.*

22. *See infra* notes 163-76 and accompanying text.

23. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 479 (1793).

24. U.S. CONST. amend. XI; *see* Clark, *Eleventh Amendment*, *supra* note 2, at 1821.

with the original public meaning of the constitutional text. Under background rules that were an inseparable part of the meaning of the text, States retained their preexisting right to sovereign immunity unless an express provision (such as Section 5 of the Fourteenth Amendment) clearly abrogated it. In two recent decisions, however, the Court adopted a surprising new methodology. According to the Court, an Article I power that is "complete in itself" implies that Congress may subject States to suit notwithstanding their traditional sovereign immunity.[25] By ratifying the Constitution, the Court announced, the States agreed to an implicit "structural waiver" of sovereign immunity when such immunity would "thwart" or "frustrate" the purposes underlying a federal power "complete in itself."[26]

This novel purposive approach is a problematic example of what Dean John Manning has called the Court's "new structuralism."[27] "New structuralism" refers to a kind of "free-form structural inference" that "first shifts the Constitution's level of generality upward by distilling from diverse clauses an abstract shared value—such as property, privacy, federalism, nationalism, or countless others—and then applies that value to resolve issues that sit outside the particular clauses that limit and define the value."[28] Such inferences elevate a supposed broad purpose of the provision in question over its original public meaning. Under the background rules that governed the alienation of sovereign rights and shaped the Constitution, the people could divest their States of the right to sovereign immunity only by adopting an explicit constitutional provision alienating that right expressly or by unavoidable implication.[29] By focusing on the broad purposes underlying Article I, rather than on the original meaning of the constitutional text, the Court has ignored these rules and thus misinterpreted the Constitution.

This Article proceeds in three parts. Part I details the Founding Era background rules that governed how legal instruments could

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25. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2463 (2022) (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244 (2021)).

26. *See id.*

27. *See* John F. Manning, *The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2014) (internal quotation marks omitted) [hereinafter Manning, *Constitutional Power*].

28. *Id.* at 32.

29. *See infra* note 62 and accompanying text.

alienate sovereign rights and explains why these rules became an integral part of the Constitution adopted by the Founders to replace the Articles of Confederation. Part II reviews the Supreme Court's traditional understanding of Congress's limited constitutional authority to abrogate state sovereign immunity, and then contrasts this approach with the Court's recent embrace of broad purposivism to find implied structural waivers of state sovereign immunity in the "plan of the Convention."[30] Part III argues that the Court's recent embrace of implied structural waivers is inconsistent with the original public meaning of the Constitution because it contradicts the background rules of interpretation that were an integral part of all instruments used or claimed to alienate sovereign rights.

I. ALIENATING SOVEREIGN RIGHTS AT THE FOUNDING

In order to evaluate the Supreme Court's new purposive approach to state sovereign immunity, it is necessary first to understand the background rules that governed legal instruments used to alienate sovereign rights and powers. These rules shaped and informed the meaning of both the Articles of Confederation and the Constitution. The law of nations permitted states—or their people as ultimate sovereigns—to use legal instruments to alienate sovereign rights and powers, but only if such instruments did so clearly and expressly or by unavoidable implication.[31] If an instrument failed to satisfy this requirement, then no transfer occurred and the rights in question remained with the original holder.[32] Alexander Hamilton applied these rules in both explaining and defending the

30. *PennEast*, 141 S. Ct. at 2263 (citing Kohl v. United States, 91 U.S. 367, 374 (1875)).

31. Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 530. Although these methods of alienation are framed as alternatives, in practice they both require alienation to be unambiguous on the face of the instrument. As discussed in Part III, in order for the Constitution to alienate a sovereign right of the States by unavoidable implication, it must grant "an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." THE FEDERALIST NO. 32, *supra* note 14, at 200 (Alexander Hamilton). Under this standard, the Constitution must alienate sovereign rights in unmistakable terms. Accordingly, "[i]t is not a mere possibility of inconvenience in the exercise of powers, but [only] an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty." *Id.* at 202.

32. *See infra* notes 67-69 and accompanying text; *see also* Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 854-57 (2020) [hereinafter Bellia & Clark, *International Law Origins of Federalism*].

Constitution. As he put it, because the Constitution involved a "division of the sovereign power," it necessarily "admitted" the "rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[33] For this reason, it was simply not possible to ascertain the meaning and effect of an instrument such as the Constitution without employing the background rules that governed the transfer of sovereign rights and powers.[34]

This Part first describes the background rules supplied by the law of nations to govern all instruments used to alienate sovereign rights and powers. It next explains the process by which the British Colonies in North America became free and independent States. Finally, it explains that the Articles of Confederation and the Constitution—understood in light of the relevant background rules—transferred materially different subsets of the States' sovereign rights and powers to a new federal government.

A. The Background Rules

All sovereign states enjoyed a well-established set of rights and powers under the law of nations, free from interference by other states.[35] Three of these rights and powers played a prominent role in the compromises struck at the Federal Convention. The first was the sovereign right to exercise exclusive governmental power over the people and property within a state's territory.[36] The second was a state's right to conduct its governmental operations free from interference by another sovereign.[37] The third, which went hand in

33. THE FEDERALIST NO. 32, *supra* note 14, at 202-03 (Alexander Hamilton).

34. *See generally* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12.

35. *See* BELLIA & CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017), at 44-48.

36. "The empire united to the domain," Vattel explained, "establishes the jurisdiction of the nation in its territories, or the country that belongs to it." 1 M. DE VATTEL, THE LAW OF NATIONS bk. II, § 84, at 147 (J. Newbery et al. eds., 1760) [hereinafter 1 VATTEL, THE LAW OF NATIONS]. Nations not only must "respect" the territory of another, Vattel wrote, but they also must "abstain from every act contrary to the rights of the sovereign: for a foreign nation can claim no right to it." *Id.* § 93, at 151.

37. As Vattel explained, "It is a manifest consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another state." *Id.* § 54, at 138. *See also* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 849-51 (describing

hand with the second, was a state's right to sovereign immunity. The reason for such immunity is that "[i]t does not ... belong to any foreign power to take cognizance of the administration of this sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it."[38]

As the next section explains, the Articles of Confederation and the Constitution struck materially different bargains regarding the extent to which the States alienated and retained these particular sovereign rights. The Articles gave Congress no power to tax and regulate individuals within the States, opting instead to leave the States' exclusive right to govern within their borders intact. Rather than divest the States of this right, the Articles empowered Congress to requisition the States, thereby alienating their right not to be commandeered by another sovereign. Because the Articles gave Congress no means of enforcing its commands, however, this arrangement proved ineffective. Finally, the Articles made no mention of—and therefore did not alienate—state sovereign immunity.

The Constitution took a different approach. Unlike the Articles, it gave the federal government no power to commandeer or requisition the States. Instead, it gave the federal government enumerated powers to tax and regulate individuals within the States directly, thereby alienating the States' exclusive right to govern persons and things within their borders.[39] By doing so, the Constitution enabled the federal government to exercise direct regulatory authority over the citizens of the States. Proponents of the Constitution defended this innovation on the ground that continuing to allow the federal government to requisition States (as it had under the

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this right).

38. 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 55, at 138. These were not the only sovereign rights and powers that the Constitution implicated. Nations also enjoyed other rights and powers that the Declaration of Independence specifically recognized:

> to prevent and vindicate injuries by other nations ("Power to levy War" and "conclude Peace"), make treaties ("contract Alliances" and "establish Commerce"), enjoy neutral use of the high seas ("establish Commerce"), and exercise territorial sovereignty and diplomatic rights ("all other Acts and Things which Independent States may of right do").

Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 754 (2012).

39. Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 546.

Articles) would be neither safe nor effective.[40] The central government could successfully commandeer state governments only if the Constitution also authorized it to use force against delinquent States—a power the Founders considered too dangerous to confer. Accordingly, the people of the several States chose to forgo requisitions against States and instead alienate a different sovereign right in order to enable the federal government to make effective regulations: the right to exclusive territorial sovereignty over individuals. Finally, unlike the Articles, the Constitution arguably compromised the States' sovereign immunity from suits by individuals by extending the judicial power to suits "between" a State and the citizens of another State or the citizens or subjects of a foreign state.[41]

Sovereign states possessed many rights, and it was relatively common for a legal instrument to alienate a limited subset of a sovereign's rights and powers, whether the instrument was a statute, a treaty, or some other form of enactment or agreement. The Articles of Confederation and the Constitution both performed this familiar function.[42] The law of nations supplied rules governing the formation and interpretation of such instruments because misreading an instrument to alienate more sovereign rights than it actually divested was fraught with danger. An erroneous finding of alienation had the potential to generate conflict or even war.[43] To avoid this consequence, interpreters read legal instruments to alienate a sovereign right only if the terms of the instrument did so clearly and expressly or by unavoidable implication. This rule of interpretation was not a rule of strict construction. If a provision (such as the Commerce Clause) clearly alienated a sovereign right (such as the right to exercise exclusive territorial sovereignty), then interpreters were to give the provision its ordinary and natural meaning, not a strict or narrow construction.[44] But if a provision (such as the Commerce Clause) did not clearly alienate a different sovereign right (such as the States' right not to be commandeered by another sovereign), then interpreters erred on the side of caution and read

40. *Id.*
41. U.S. CONST. art III, § 2.
42. *See* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 541-51.
43. *Id.* at 531.
44. *Id.*

the provision not to do so.[45] These rules had direct application to the Constitution because it was indisputably an instrument used to alienate a portion of the States' sovereign rights and powers. As Hamilton put it, because the Constitution performed this function, "the whole tenor of the instrument" "admitted" these rules, meaning that they were an integral part of the Constitution's meaning from its inception.[46] As discussed in Part III, the Court's new purposive approach to state sovereign immunity contradicts these background rules, which were an inseparable part of the Constitution itself.

1. General Rules of Interpretation

At the Founding, the law of nations and the common law established general rules of interpretation that applied to all legal instruments, including those used to alienate sovereign rights. As all prominent writers on interpretation explained, the goal of interpreting a legal instrument was to ascertain the intent of the parties who made it, regardless of whether it was a statute,[47] a contract,[48] a treaty,[49] or other binding instrument. Of course, determining the intent of those who made a legal instrument was fraught with difficulties, and so the work of interpretation was to examine "signs the most natural and probable"[50] or the "outward mark"[51] of intent. To determine the outward signs of intent, interpreters were to apply a common set of interpretive rules to legal instruments. For the Founders, perhaps the most useful explanation of these rules was that of Emmerich de Vattel. His treatise *The Law*

45. *Id.*

46. THE FEDERALIST NO. 32, *supra* note 14, at 203 (Alexander Hamilton).

47. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *59 ("The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made.").

48. *See* 2 THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW: BEING THE SUBSTANCE OF A COURSE OF LECTURES ON *GROTIUS DE JURE BELLI ET PACIS* 307 (1756) ("A Promise, or a contract, or a will, gives us a right to whatever the promiser, the contracter, or the testator, designed or intended to make ours.").

49. *See* 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 270, at 218 (stating in the context of agreements between sovereigns that "the lawful interpretation of a contract ought to tend only to the discovery of the thoughts of the author, or authors of that contract").

50. 1 BLACKSTONE, *supra* note 47, at *59.

51. 2 RUTHERFORTH, *supra* note 48, at 307. "The collecting of a [person's] intention from such signs or marks is called interpretation." *Id.* at 308.

of Nations was the most influential treatment of the law of nations in England and America in the period leading up to the Founding.[52] Although this work had a special focus on treaties, it provided a broader explanation of the general rules that governed interpretation of all legal instruments.

The first and foremost rule of interpretation was that interpreters were to give the words of a legal provision their natural and customary meaning,[53] as understood at the time of adoption.[54] If the meaning was clear, then interpreters were to treat that meaning as the intent of the lawmaker.[55] At the same time, the ordinary and natural meaning of words was not always clear from the terms alone.[56] When the meaning of words was unclear, interpreters were to use a set of rules designed to help ascertain their meaning.[57] For example, in the face of ambiguity, interpreters were to examine the context of the words, including the sense in which lawmakers used the same terms in related provisions or instruments,[58] identify the

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52. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 15-16 (2009).

53. *See* 1 BLACKSTONE, *supra* note 47, at *59 ("Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use."); *see also* 2 RUTHERFORTH, *supra* note 48, at 313 ("[The] true signification [of words] must be looked for ... in common use and custom."); HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 353 (J. Barbeyrac trans., W. Innys et al. eds., 1738) ("[T]he Words are to be understood according to their Propriety, not the grammatical one ... but what is vulgar and most in Use."); 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO bk. V, § 3, at 794 (C.H. Oldfather & W.A. Oldfather trans., Clarendon ed., 1934) (1688) ("[T]he rule is [that] words are to be understood in their proper and so-called accepted meaning, one that has been imposed upon them, not so much by their intrinsic force and grammatical analogy as by popular usage.").

54. As Vattel explained, "The custom of which we are speaking is, that of the time in which the treaty, or the act in general, was concluded and drawn up." 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 272, at 219. Thus, "[w]hen an ancient act is to be interpreted, we should then know the common use of the terms, at the time when it was written." *Id.*

55. *See* 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 262, at 215.

56. As Vattel observed, the ideas conveyed by language are not "always distinct, and perfectly determined," and in drafting laws "it is impossible to foresee and point out, all the particular cases, that may arise." *Id.*

57. *Id.* § 284, at 224.

58. *See* 1 BLACKSTONE, *supra* note 47, at *60 (explaining that if words are "dubious," their meaning may be established from "the *context*," which includes "comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point") (emphasis added); 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 284, at 224 (explaining that interpreters are to "presume[ ] [a lawmaker's] thoughts have been the same on the same occasions; so that if he has any where clearly shewn

subject matter of the provision to determine whether one sense was more appropriate for the subject matter than another,[59] and avoid absurdities.[60] In limited circumstances, interpreters were to consider the reason for the law—if one was identifiable and clear—in order to determine the applicability of the law to unforeseen circumstances.[61] These rules helped interpreters determine the manifested intent of those who adopted a legal text.

2. Rules for the Adjustment of Sovereign Rights

The law of nations also prescribed additional, more specialized rules of interpretation that governed all legal instruments claimed to alienate sovereign rights and powers. The principal rule was relatively straightforward. Interpreters were to read a legal instrument to alienate a specific sovereign right or power only if the instrument did so in clear and express terms or by unavoidable implication.[62] The reason for this requirement was to mitigate the

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his intention, with respect to any thing, we ought to give the same sense to what he has elsewhere said obscurely on the same affair").

59. *See* 1 BLACKSTONE, *supra* note 47, at *60 (explaining that words should "be understood as having a regard" to the "*subject matter*") (emphasis added); 2 RUTHERFORTH, *supra* note 48, at 323 ("When any words or expressions in a writing are of doubtful meaning, the first rule in mixed interpretation is to give them such a sense, as is agreeable to the subject matter, of which the writer is treating."); 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 280, at 221 ("We ought always to give to expressions the sense most suitable to the subject, or to the matter to which they relate.").

60. *See* 1 BLACKSTONE, *supra* note 47, at *60 ("[T]he rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them."); 2 RUTHERFORTH, *supra* note 48, at 325 ("[Interpreters should] give all doubtful words or expressions that sense, which makes them produce some effect; this effect must in general be a reasonable one."); 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 282, at 222 ("As it cannot be presumed, that any one desires what is absurd, it cannot be supposed, that he who speaks has intended that his words should be understood in a manner from which an absurdity follows.").

61. *See* 1 BLACKSTONE, *supra* note 47, at *61 ("[T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it.") (emphasis added); 2 RUTHERFORTH, *supra* note 48, at 328-29 (explaining that if "the meaning of a law [is] uncertain," "that ... meaning [may] be determined by the reason of it"); 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 287, at 225 ("The reason of the law ... is one of the most certain means of establishing the true sense, and great attention ought to be paid to it, whenever it is required to explain an obscure, equivocal, and undetermined point, ... or to make an application of them to a particular case.").

62. *See* 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 305, at 233-34 ("For the

risk of misunderstanding, fraud, conflict, and even war.[63] If one nation erroneously read a legal instrument to alienate the rights of another, the law of nations gave the affected nation the right to redress the injury by taking unilateral actions.[64] If diplomacy failed, the affected nation had the right to retaliate in various ways, including retortion, reprisals,[65] and, if necessary, waging war against the offending nation.[66] In short, (mis)reading a legal instrument to alienate a sovereign right in contravention of the background rules posed a significant risk of conflict, including war.

To mitigate this risk, the law of nations applied a clear statement rule of sorts to the alienation of sovereign rights and powers.[67] If the ordinary and customary meaning of a legal provision alienated a sovereign right or power in clear and express terms or by unavoidable implication, then interpreters were to give effect to that meaning. No state had cause to object to that interpretation under the law of nations. But if the general rules of interpretation revealed that a provision did not clearly alienate a sovereign right, then interpreters were to err on the side of caution and maintain the *status quo ante*. Vattel described this rule in his chapter on treaties, but he made clear that the rule applied equally to all legal instruments claimed to alienate sovereign rights, including "concessions, conventions, and treaties," and "all contracts as well as ... laws."[68]

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proprietor can only lose so much of his right as he has ceded of it; and in a case of doubt, the presumption is in favour of the possessor. It is less contrary to equity, not to give to a proprietor what he has lost the possession of by his negligence, [then] to strip the just possessor of what lawfully belongs to him."). Alienation by unavoidable implication occurred when one sovereign granted another a right or power that was absolutely incompatible with retention of the same power by the original holder. For example, if one party agreed to withdraw from the territories of a second party, it would be unavoidably implied that party one could no longer claim a right to access that land because party two now had an implied right to exclude. Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 530 n.35 (citing 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, at 233). This kind of alienation was an application of the well-established rule that a legal instrument should not be interpreted to reserve a right or power that would render an express provision of that instrument a complete nullity. *See* 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 305, at 233-34.

63. *See* 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 338, at 248.

64. *See id.*

65. *Id.* §§ 341-42, at 249.

66. *Id.* § 22, at 6-7.

67. *See id.* § 262, at 215-16.

68. *Id.* § 262, at 215. In this connection, Vattel drew a distinction between provisions relating to things that are "favourable" and provisions relating to things that are "odious." *Id.*

Of necessity, this rule governed not only the interpretation, but also the formation, of legal instruments claimed to alienate sovereign rights and powers.[69] Thus, if parties drafting and adopting legal instruments actually wished to alienate sovereign rights and powers, they had to memorialize that intent in explicit terms. Otherwise, their failure to do so left sovereign rights and powers with the original holder.

B. The Emergence of Free and Independent "States"

The rules governing alienation of sovereign rights under the law of nations apply to the Constitution because it was a legal instrument used to alienate such rights.[70] The law of nations provided the legal framework within which the Constitution was drafted and ratified. As Hamilton explained, because the Constitution was a legal instrument used to transfer a limited set of sovereign rights and powers from the existing States to a new federal government, it admitted the background rules governing the alienation of sovereign rights and cannot be understood separate and apart from those rules.

Two historical developments reveal how and why the Constitution admitted these background rules. First, the status of British Colonies in North America changed from dependent colonies to free and independent states following the Declaration of Independence. In the Declaration, the Colonies declared themselves to be "Free and Independent States" entitled to all the rights as such under the law of nations. Second, the Articles of Confederation and the Constitution divested the States and transferred to a central authority two

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§§ 300-301, at 232. "Favourable" provisions were those that advantaged all affected parties, *id.* § 301, at 232, and "odious" provisions were those that potentially advantaged one party at the expense of the other. *Id.* §§ 301-05, at 232-34. According to Vattel, a legal provision was clearly "odious" if it changed the status quo by alienating a preexisting sovereign right. *Id.* § 306, at 234. A legal instrument could perform this "odious" operation, but only if it did so in clear and express terms. *Id.* § 304, at 233. As Vattel explained, when an indeterminate provision relates to "odious" things, "we should ... take the terms in the most confined sense, ... without going directly contrary to the tenour of the writing, and without doing violence to the terms." *Id.* § 308, at 235. In other words, "in a case of doubt, the presumption is in favour of the possessor." *Id.* § 305, at 233-34.

69. *See* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 535-36.

70. *See id.* at 587-94.

somewhat different sets of sovereign rights. The rules controlling alienation of sovereign rights and powers under the law of nations necessarily governed—and became an integral part of—both the Articles and the Constitution because each instrument was used to alienate a distinct subset of the States' sovereign rights and powers.

1. The Declaration of Independence

To understand the relationship between the Constitution and the rules governing the alienation of sovereign rights, one must appreciate how the former British Colonies in North America sought and attained the status of "states" within the meaning of the law of nations. In announcing their independence from Great Britain, the Colonies declared themselves to be "Free and Independent States," entitled to all the sovereign rights and powers that accompanied that status under the law of nations:

> [T]hese United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.[71]

Under the law of nations, all free and independent states enjoyed a well-known set of sovereign rights and powers, including the right to govern exclusively within their territory, the right not to be commandeered by another sovereign, and the right to sovereign immunity.[72] Britain initially denied that the Colonies were entitled to this status, but by the end of the War of Independence, Britain

71. THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776).

72. Bellia & Clark, *The Law of Nations as Constitutional Law*, *supra* note 38, at 754. These rights and powers included those to "prevent and vindicate injuries by other nations ('Power to levy War' and 'conclude Peace'), make treaties ('contract Alliances' and 'establish Commerce'), enjoy neutral use of the high seas ('establish Commerce'), and exercise territorial sovereignty and diplomatic rights ('all other Acts and Things which Independent States may of right do')." *Id.*

expressly recognized its former colonies as "free, Sovereign and independent States."[73]

As free and independent states, the States—or the people thereof as the ultimate source of sovereign authority—had the same ability under the law of nations as all other sovereign states to use legal instruments to alienate a portion of their rights and powers. The American States exercised their option to alienate distinct portions of their sovereign rights first by entering into the Articles of Confederation and later by adopting the Constitution to replace them.

2. The Articles of Confederation

After declaring their independence, the American States entered into the Articles of Confederation, a treaty of sorts under which they ceded a limited set of their sovereign rights and powers to a Congress of the United States. The Articles were widely regarded as a compact among thirteen "Free and Independent States"[74] in which the States expressly alienated a relatively narrow subset of their sovereign rights while retaining all others. Although the States did

73. Provisional Articles, U.S.-Gr. Brit., art. I, Nov. 30, 1782, 8 Stat. 54.

74. THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776). As Professor Gordon Wood has observed, the Articles of Confederation were a treaty among thirteen free and independent States. Gordon S. Wood, *Federalism from the Bottom Up: The Ideological Origins of American Federalism*, 78 U. CHI. L. REV. 705, 724 (2011) (book review). In his words, "forming the Articles of Confederation posed no great theoretical problems. Thirteen independent and sovereign states came together to form a treaty that created a 'firm league of friendship,' a collectivity not all that different from the present-day European Union." *Id.* (footnote omitted) (quoting ARTICLES OF CONFEDERATION OF 1781, art. III).

For examples of contemporaneous understandings of the Articles of Confederation as a confederation among individual states, see 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1103 (Worthington C. Ford ed., 1906) (statement of Dr. Witherspoon) ("[T]hat the colonies should in fact be considered as individuals; and that as such in all disputes they should have an equal vote. [T]hat they are now collected as individuals making a bargain with each other, and of course had a right to vote as individuals."); *id.* at 1104 (statement of John Adams) ("[I]t has been said we are independent individuals making a bargain together. [T]he question is not what we are now but what we ought to be when our bargain shall be made. [T]he confederacy is ... to form us ... into one common mass."). Even the more nationally minded James Wilson characterized the Articles of Confederation as allowing consolidated action only with respect to those matters that the States referred to Congress. *See id.* at 1105 (statement of James Wilson) ("[I]t is strange that annexing the name of 'State' to ten thousand men, should give them an equal right with forty thousand.... [A]s to those matters which are referred to Congress, we are not so many states; we are one large state.").

not alienate as many sovereign rights and powers as they would in the Constitution, they nonetheless ceded important powers to Congress, especially in matters of war and foreign relations, and agreed to corresponding restrictions on their own powers.[75] Notably, however, the Articles contained no language compromising the States' right to sovereign immunity. Nor did the Articles alienate the States' exclusive territorial sovereignty by giving Congress direct legislative power to tax and regulate the individuals within their borders. Instead, the Articles empowered Congress to regulate through the medium of the States by requisitioning or commanding them to provide money to fund federal operations and to supply troops to staff the armed forces.[76]

In transferring these rights and powers from the States to Congress, the Articles provided that they were to be interpreted restrictively: "Each State retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[77] This reservation went beyond the default rules of interpretation prescribed by the law of nations because it appeared to foreclose reading the Articles to transfer sovereign rights by unavoidable implication. Under the law of nations, a legal instrument could divest sovereign rights expressly or by unavoidable implication. Significantly, neither the original Constitution nor the Tenth Amendment included language precluding alienation of sovereign rights by unavoidable implication.[78]

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75. For example, the Articles gave Congress "the sole and exclusive right and power of determining on peace and war," "of sending and receiving ambassadors," and "entering into treaties and alliances." ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1. The Articles also gave Congress limited powers over matters of *internal* governance, such as "the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states," and "fixing the standards of weights and measures throughout the united states." *Id.* para. 4.

76. *Id.* para. 5.

77. *Id.* art. II.

78. *See* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 604. Under the law of nations, the clear and express terms of an instrument used to alienate sovereign rights could do so by unavoidable implication. *See id.* at 530. The Articles arguably foreclosed alienation by unavoidable implication by specifying that the States retained all sovereign rights not delegated "expressly." *Id.* at 604. The Tenth Amendment, by contrast, omitted the term "expressly," and thus permitted the Constitution to alienate sovereign rights by unavoidable implication in accord with the law of nations. *See id.*

The alienation of sovereign rights set forth in the Articles ultimately proved inadequate to solve the States' collective action problems. In particular, although the Articles obligated each State to comply with congressional requisitions,[79] the instrument gave Congress no means of enforcing its commands. Not surprisingly, the States increasingly violated their obligations with impunity.[80] These violations contributed to the Founders' decision to abandon the Articles in favor of an entirely new Constitution that would alienate a different, and somewhat larger, set of the States' rights and powers, and eliminate the need for enforcement of federal law against States by permitting enforcement against individuals instead.[81]

C. Devising a New Constitution

Even though the Articles purported to be "perpetual,"[82] by 1787 the people of every State considered themselves free to abandon them and reclaim or redistribute their State's sovereign rights as they saw fit.[83] Under the law of nations, when one party committed a material breach of a treaty, other parties had the option to rescind it.[84] Most, if not all, of the States had violated the Articles in material ways.[85] Because the States had committed such widespread violations, each member was free under the law of nations to

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79. The Articles provided that "[e]very state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them." ARTICLES OF CONFEDERATION OF 1781, art. XIII, para. 1.

80. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 862.

81. *See* James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 2 MADISON WRITINGS, *supra* note 16, at 364 (stating that because acts of Congress depend "for their execution on the will of the State legislatures," they are "nominally authoritative, [but] in fact recommendatory only").

82. ARTICLES OF CONFEDERATION of 1781, art. XIII, para 1.

83. On February 21, 1787, the Confederation Congress called upon the States to send delegates to a convention to "be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation." Confederate Congress Calls the Constitutional Convention (Feb. 21, 1787), *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 185, 187 (Merrill Jensen ed., 1976) [hereinafter 1 DHRC]. The Federal Convention ultimately exceeded this charge by proposing an entirely new constitution to replace, rather than merely revise, the Articles.

84. 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, §§ 200, at 190.

85. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1048 (1988) [hereinafter Amar, *Philadelphia Revisited*].

abandon the Articles.[86] Accordingly, although Congress convened a Convention of the States merely to propose amendments to the Articles, the delegates realized that the only viable option was to abandon the Articles in favor of an entirely new Constitution.

1. Alienating a Different Set of Sovereign Rights

To understand the Constitution's effect on state sovereign immunity, it is necessary to recognize that the Articles and the Constitution alienated materially different subsets of the States' sovereign rights and powers. A fundamental threshold question faced by the delegates to the Federal Convention was whether to authorize Congress to regulate States (as the Articles had) or individuals (an unprecedented innovation). In the Articles, the States made the choice to alienate their right not to be commandeered by another sovereign by giving Congress the power to requisition them—a power that proved ineffective because the Articles gave Congress no means of enforcement.[87] Because the Constitutional Convention considered the requisition power too dangerous to enforce against States, the delegates declined to confer it (or any power to enforce requisitions) in the new Constitution.[88] Instead, the proposed Constitution (ultimately adopted by the people of the several States) gave Congress novel power to tax and regulate individual citizens directly within the territory of the States. This

86. *See id.* (explaining that the States had a legal right to adopt the Constitution because, under the law of nations, repeated violations of the Articles gave them the legal right to rescind them). James Madison confirmed this understanding. "On what principle," he asked rhetorically, may "the confederation, which stands in the solemn form of a compact among the States, ... be superceded without the unanimous consent of the parties to it?" THE FEDERALIST NO. 43, *supra* note 14, at 297 (James Madison). The answer was that

> [i]t is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others; and authorises them, if they please, to pronounce the treaty violated and void.

Id.

87. As James Madison lamented before the Constitutional Convention, because acts of Congress depend "for their execution on the will of the State legislatures," they are "nominally authoritative, [but] in fact recommendatory only." James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 2 MADISON WRITINGS, *supra* note 16, at 364.

88. *See infra* notes 101-02 and accompanying text.

feature of the Constitution alienated for the first time the States' right to exercise exclusive legislative authority over their own citizens within their own borders. The shift from legislation for States (under the Articles) to legislation for individuals (under the Constitution) enabled the Constitution to succeed where the Articles failed because the federal government could more feasibly enforce its commands against individuals rather than States.

During this process of forging a new Constitution, state sovereign immunity was at most an afterthought. The Articles were silent on the matter and thus left the States' immunity intact. The proposed Constitution, however, included language in Article III that arguably enabled out-of-state citizens to sue States in federal court.[89] This language emerged late in the Convention and generated no discussion regarding its effect on state sovereign immunity. During the ratification debates, however, Anti-Federalists seized upon Article III to argue that the proposed Constitution would abrogate state sovereign immunity and thus create the very enforcement problems that Federalists had insisted the Constitution was designed to avoid. Federalists had argued that the Articles were beyond repair because the only way to make them effective was to authorize the military to enforce requisitions against States—a solution too dangerous to adopt. Authorizing out-of-state citizens to sue States in federal court would pose the same risk. If the Constitution permitted such citizens to obtain judgments against States, then Congress would have necessary and proper power to "provide for levying an execution on a state."[90] Although Article III expressly authorized States to sue other States in federal court as a calculated means of preventing war between the States, leading Federalists insisted that the language of Article III was not clear enough to allow suits against States by out-of-state individuals. These denials may have smoothed the path toward ratification, but they did not prevent the Supreme Court from reading the

89. U.S. CONST. art. III, § 2 (extending the judicial power to "Controversies ... between a State and Citizens of another State, ... and between a State ... and foreign ... Citizens or Subjects").

90. Brutus, Letter XIII, N.Y. J., Feb. 21, 1788, *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 795, 797 (John P. Kaminski et al. eds., 2004) [hereinafter 20 DHRC] 797; *see infra* notes 166-74 and accompanying text.

citizen-state diversity provisions otherwise in *Chisholm*, triggering the adoption of the Eleventh Amendment.

a. The Convention

At the start of the Convention, Edmund Randolph and James Madison introduced the Virginia Plan as a framework for the new charter. In its original form, the Plan would have continued and augmented Congress's powers under the Articles. The Plan proposed

> that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.[91]

As noted, "the Legislative Rights vested in Congress by the Confederation" included the power to regulate States, but not individuals.[92] If the Constitution was to retain Congress's power to requisition States, however, it would also have to include a means of enforcing such commands. Thus, as originally introduced, the Virginia Plan proposed authorizing the National Legislature "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof."[93]

This proposal raised alarm among the delegates, and they quickly rejected it. George Mason objected to reliance on military force on the ground that a central government could not use coercion and punishment safely against the States.[94] Instead, he argued for creation of "such a Govt ... as could directly operate on individuals, and would punish those only whose guilt required it."[95] Moved by Mason's remarks, Madison reconsidered his endorsement of force in

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91. James Madison, Notes on the Constitutional Convention (May 29, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 17, at 21.

92. *Id.*

93. *Id.* The proposal to empower Congress to use force to coerce States into complying with federal commands was not new. Madison urged this solution repeatedly under the Articles of Confederation. *See* Clark, *Eleventh Amendment*, *supra* note 2, at 1840-42.

94. James Madison, Notes on the Constitutional Convention (May 30, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 17, at 34.

95. *Id.*

the Virginia Plan, stating "that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually."[96] He went so far as to observe that "[a] Union of the States (containing such an ingredient) seemed to provide for its own destruction" because "[t]he use of force agst. a State, would look more like a declaration of war, than an infliction of punishment."[97] Accordingly, he hoped that the Convention could frame a system that would "render this recourse unnecessary."[98]

Following this exchange, the Convention rejected all proposals to continue the Articles' power to requisition States in the new plan. In lieu of authority to commandeer States, the Convention proposed to give the federal government the power to regulate individuals. This shift satisfied George Mason, who observed: "Under the existing Confederacy, Congs. represent the *States* not the *people* of the States: their acts operate on the *States* not on the individuals. The case will be changed in the new plan of Govt."[99] The issue of whether Congress should regulate States or individuals arose again, however, when William Paterson introduced the New Jersey Plan as a complete substitute for the Virginia Plan. Paterson's Plan would have "revised, corrected & enlarged" the Articles of Confederation.[100] To solve the enforcement problem, the New Jersey Plan proposed the same mechanism originally included in the Virginia Plan—authorizing the federal government "to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts."[101]

The New Jersey Plan provoked strong opposition. Edmund Randolph pronounced coercion against States "to be *impracticable, expensive, cruel to individuals*" and urged the Convention to resort "to a national *Legislation over individuals*" instead.[102] Alexander

96. James Madison, Notes on the Constitutional Convention (May 31, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 17, at 54.

97. *Id.*

98. *Id.*

99. James Madison, Notes on the Constitutional Convention (June 6, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 17, at 132-33.

100. James Madison, Notes on the Constitutional Convention (June 15, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 17, at 242.

101. *Id.* at 245.

102. James Madison, Notes on the Constitutional Convention (June 16, 1787), *in* 1

Hamilton also rejected reliance on force against States in the plan of the Convention: "But how can this force be exerted on the States collectively. It is impossible. It amounts to a war between the parties."[103] Similarly, George Mason warned that the use of coercive force against States would lead their citizens to "rise as one Man, and shake off the Union altogether."[104]

After this debate, the Convention rejected the New Jersey Plan and resumed the work of fashioning a new Constitution to replace—rather than merely amend—the Articles of Confederation. As finally devised, the Constitution withheld congressional power to regulate through the medium of commandeering the States.[105] Instead, for the first time, it gave Congress direct power to regulate individuals within the territory of the States.[106] As Madison wrote to Thomas Jefferson shortly after the Convention, the new plan abandoned the principle of confederation because it required the use "of a military force both obnoxious & dangerous."[107] In its place, the Convention "embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them."[108]

b. Ratification

The proposal of an entirely new Constitution caught the public by surprise and required an explanation. Hamilton defended the Constitution by repeating and amplifying many of the arguments made at the Convention. He explained that the Articles were beyond repair because they contained "fundamental errors" which required

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FARRAND'S RECORDS, *supra* note 17, at 256.

103. James Madison, Notes on the Constitutional Convention (June 18, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 17, at 282, 285. James Madison urged the smaller states who favored the New Jersey Plan to consider that the coercive force upon which the Plan depends "can never be exerted but on themselves" because "[t]he larger States will be impregnable." James Madison, Notes on the Constitutional Convention (June 19, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 17, at 320.

104. James Madison, Notes on the Constitutional Convention (June 20, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 17, at 339-40.

105. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 920-23.

106. *Id.*

107. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 17, at 131-32.

108. *Id.* at 132.

"an alteration" of their "first principles."[109] As he put it: "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist."[110] Enforcement of such "LEGISLATION for STATES" would have required the Constitution to authorize "COERTION of arms."[111] This option was unacceptable because in such a system "every breach of the laws must involve a state of war."[112] He stressed that if the United States wished to avoid "this perilous situation," then "we must extend the authority of the union to the persons of the citizens—the only proper objects of government."[113]

Proponents of the Constitution joined Hamilton in emphasizing the need for a radical shift from "LEGISLATION for STATES"[114] to legislation for individuals. For example, Oliver Ellsworth explained at the Connecticut Convention: "This Constitution does not attempt to coerce sovereign bodies, states in their political capacity. No coercion is applicable to such bodies, but that of an armed force."[115] Instead, the Constitution proposes "coercion by law, that coercion which acts only upon delinquent individuals."[116] Similarly, in the Massachusetts Convention, Rufus King argued that "[l]aws to be effective ... must not be laid on states, but upon individuals."[117] In the South Carolina House of Representatives, Charles Pinckney explained that "the necessity of having a government which should

109. THE FEDERALIST NO. 15, *supra* note 14, at 93 (Alexander Hamilton).

110. *Id.*

111. *Id.* at 93, 95.

112. *Id.* at 96.

113. *Id.* at 95. Hamilton expanded on these points in The Federalist No. 16 as well. *See* THE FEDERALIST NO. 16, *supra* note 14, at 99-101 (Alexander Hamilton) (arguing that alternative of employing coercive force against States was impracticable and likely to cause "the violent death of the confederacy").

114. THE FEDERALIST NO. 15, *supra* note 14, at 93 (Alexander Hamilton).

115. The Connecticut Convention (Jan. 4, 1788), *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 541, 553 (Merrill Jensen ed., 1978) [hereinafter 3 DHRC].

116. *Id.*

117. Massachusetts Convention Debates (Jan. 21, 1788), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1282, 1287 (John P. Kaminski et al. eds., 2000) [hereinafter 6 DHRC].

at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present" at the Convention.[118]

In the New York Convention, Hamilton responded to a call to retain the Articles by reiterating that the Articles were beyond repair: "It has been well observed, that to coerce the States is one of the maddest projects that was ever devised. A failure of compliance will never be confined to a single State: This being the case, can we suppose it wise to hazard a civil war?"[119] He continued: "What, Sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do."[120] This cure, he explained, meant that "[w]e must totally eradicate and discard [the fundamental principle of the Old Confederation] before we can expect an efficient government."[121] These arguments prevailed, and the state ratifying conventions adopted a new Constitution under which "the government was not to operate against states, but against individuals."[122]

Modern observers have largely failed to appreciate the significance of this fundamental shift and its implications for understanding the Constitution's effect on state sovereignty (including state sovereign immunity). By replacing congressional power to commandeer States with congressional power to regulate individuals, the Constitution clearly and expressly alienated a different set of the States' sovereign rights and powers than the Articles had. Whereas the Articles alienated the States' right not to be commandeered by another government, the Constitution left this right with the States, and instead alienated—for the first time—the States' distinct right to exercise exclusive territorial sovereignty over the individuals within their borders.[123] As discussed in Part II, the Constitution—by

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118. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 256, 256 (Jonathan Elliot ed., 2d ed. 1901) [hereinafter ELLIOT'S DEBATES].

119. Alexander Hamilton, Speech in the New York Ratifying Convention (June 20, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1722, 1724 (John P. Kaminski & Gaspare J. Saladino eds., 2008) [hereinafter 22 DHRC].

120. *Id.* at 1725.

121. *Id.*

122. Samuel Spencer, Address to North Carolina Convention (July 29, 1788), *in* 4 ELLIOT'S DEBATES, *supra* note 118, at 163.

123. This fundamental shift was the reason why many Anti-Federalists regarded the

including the citizen-state diversity provisions—also arguably alienated (for the first time) the States' sovereign immunity from suit by individuals. The prospect that the Constitution alienated this right threatened ratification because Anti-Federalists argued that it would generate the very same enforcement problems that the Constitution was supposed to avoid. Federalists denied that the Constitution would be read to alienate state sovereign immunity. Only a few years later, however, the Supreme Court read it just that way in *Chisholm*.[124] In response, the Eleventh Amendment prohibited the *Chisholm* Court's construction, thereby restoring the States' preexisting immunity.[125] As discussed in Part III, the Supreme Court's recent decisions have misunderstood the plan of the Convention by using the States' alienation of one sovereign right (exclusive territorial sovereignty over their citizens) to find an implied structural waiver of an entirely different sovereign right (immunity from suit by individuals). The rules governing the alienation of sovereign rights in legal instruments, which the whole tenor of the Constitution admitted according to Hamilton, preclude this reading of the Constitution.

2. Integrating Background Rules of Interpretation

The Constitution was subject to an important set of background rules drawn from the law of nations.[126] These rules governed all instruments used to alienate sovereign rights and powers. As Hamilton explained, because the Constitution performed this function, "the whole tenor of the instrument" admitted these rules.[127] One of the Constitution's innovative features was that it gave Congress

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adoption of a Bill of Rights as essential to safeguard individual liberties. *See* Clark, *Eleventh Amendment*, *supra* note 2, at 1853 (observing that "because the Constitution conferred legislative power over individuals, [Anti-Federalists] now demanded a Bill of Rights"). A Bill of Rights was unnecessary under the Articles because it gave Congress power to regulate States but not individuals. By contrast, a Bill of Rights was essential under the Constitution because it empowered Congress to regulate individuals rather than States. *Id.*

124. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 466-67 (1793).

125. U.S. CONST. amend. XI.

126. For an earlier, important discussion of "how atextual rules can enjoy continuing legal force under a written Constitution," see Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1818 (2012).

127. *See* THE FEDERALIST NO. 32, *supra* note 14, at 203 (Alexander Hamilton).

enumerated powers to regulate individuals within the territory of the States, thereby alienating the States' exclusive sovereign right to govern these individuals. Some Anti-Federalists feared that the federal government would exceed its powers, thereby usurping the States' residual authority. Federalists offered two primary responses to allay these fears.

First, they emphasized that the instrument effected only a limited transfer of sovereign rights and powers to the federal government, and that all other rights and powers would remain with the States. For example, when George Washington transmitted the proposed Constitution to Congress on September 17, 1787, he observed that it would transfer only certain rights and powers from the States to a government of the United States, reserving all remaining "rights of independent sovereignty" to the States.[128] Madison likewise described the Constitution as involving a limited transfer of sovereign rights and powers. As he explained in *The Federalist No. 45*:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, [negotiation], and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[129]

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128. As Washington explained:

> It is obviously impracticable in the fœderal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all—Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was encreased by a difference among the several States as to their situation, extent, habits, and particular interests.

Letter from George Washington to Congress (Sept. 17, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 17, at 666-67.

129. THE FEDERALIST NO. 45, *supra* note 14, at 313 (James Madison).

Second, Federalists emphasized that the Constitution included built-in safeguards against federal usurpation of the States' residual rights and powers. These safeguards included not only political safeguards,[130] but also judicial safeguards.[131] Federalists explained that rather than authorizing a central government to enforce federal commands against States through "the violent and sanguinary agency of the sword," the Constitution would enable the federal government to enforce federal law against individuals through "the mild influence of the Magistracy,"[132] in other words, through the judicial process. Anti-Federalists, however, doubted that judicial review would prevent the abuse of federal power. They feared that federal officials, including judges, would read the Constitution too broadly at the expense of state authority. They were especially concerned that federal courts might construe vague or ambiguous provisions to divest the States of sovereign rights and powers never actually relinquished.[133]

Federalists responded by insisting that the federal judiciary would be a fair and impartial arbiter of the respective powers of the state and federal governments because it was "made independent."[134] Moreover, they pointed out that federal courts, like all courts, would be bound to interpret the Constitution in accordance with well-established rules of interpretation. These rules included those supplied by the law of nations to determine the extent to which a legal instrument (such as the Constitution) alienated preexisting sovereign rights and powers. For example, in *The Federalist*

130. *See id.* at 311-12.

131. *See generally* Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319 (2003).

132. THE FEDERALIST NO. 15, *supra* note 14, at 94 (Alexander Hamilton).

133. For example, Brutus charged that federal judges "will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution." Brutus, Letter XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 417, 420 (Herbert J. Storing ed., 1981). Thus, Brutus lamented that the Supreme Court "will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and o[bvious] meaning of the words, but also according to the spirit and intention of it." Brutus, Letter XV, N.Y. J., Mar. 20, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 440 (Herbert J. Storing ed., 1981) (alteration in original). In his view, this meant that "[i]n the exercise of this power they will not be subordinate to, but above the legislature." *Id.*

134. Oliver Ellsworth, Debates in the Connecticut Ratification Convention (Jan. 7, 1788), *in* 3 DHRC, *supra* note 115, at 547, 553.

No. 78, Hamilton acknowledged that judges could abuse their power if they exercised "WILL instead of JUDGMENT," but he argued that this concern was mitigated by strict rules that constrained judicial discretion in this context.[135] "To avoid an arbitrary discretion in the courts," he wrote, "it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[136]

The strict rules to which Hamilton referred included the rules governing the extent to which a legal instrument alienated sovereign rights and powers. In *The Federalist No. 32*, Hamilton explained that because the Constitution involved a "division of the sovereign power," it necessarily "admitted" the rule of interpretation "that all authorities, of which the States are not explicitly divested in favour of the Union, remain with them in full vigour."[137] He used this rule to explain that the States would retain concurrent sovereign authority in all cases in which they did not explicitly alienate complete authority in favor of the federal government. Under this rule, the Constitution gave the federal government *exclusive* authority in only three circumstances, all of which involved alienation of the States' authority either expressly or by unavoidable implication:

> But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution *in express terms* granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.[138]

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135. THE FEDERALIST NO. 78, *supra* note 14, at 526 (Alexander Hamilton).

136. *Id.* at 529. Hamilton also opined that those appointed to the federal bench should have "requisite integrity" and the "requisite knowledge" to fulfill this duty. *Id.* at 530.

137. THE FEDERALIST NO. 32, *supra* note 14, at 203 (Alexander Hamilton).

138. *Id.* at 200 (second emphasis added). Hamilton applied these principles when later addressing the Anti-Federalists' fears that the Citizen-State diversity provisions of Article III

Hamilton did not invent this framework. He was merely paraphrasing and applying the background rules that governed all instruments used to alienate sovereign rights and powers under the law of nations.

Hamilton understood these rules to apply to the Constitution because it brought about a "division of the sovereign power,"[139] and instruments that performed this function were universally subject to these rules. As he put it, the rule that the States retain all powers not explicitly divested "is not only a theoretical consequence of that division, but is clearly admitted by *the whole tenor of the instrument* which contains the articles of the proposed constitution."[140] In other words, because the Constitution was an instrument used to alienate and transfer sovereign rights, the basic rules that governed the formation and interpretation of such instruments became an inextricable part of the Constitution upon ratification.[141] It was impossible to separate these rules from the Constitution because they were an integral part of a single legal transaction used to transfer a limited set of sovereign rights and powers from the States to a new federal government.[142] As Part III explains, the constitutional text—understood in light of these rules—supports the Supreme Court's traditional understanding that Congress may not use its Article I powers to abrogate state sovereign immunity.

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would override the States' sovereign immunity from suit by individuals. Once again invoking the rule drawn from the law of nations, Hamilton wrote: "Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal." THE FEDERALIST NO. 81, *supra* note 14, at 549 (Alexander Hamilton).

139. THE FEDERALIST NO. 32, *supra* note 14, at 203 (Alexander Hamilton).

140. *Id.* (emphasis added). Similarly, Hamilton saw the fact that the Constitution set forth *express* prohibitions on the States in Article I, Section 10 as "furnish[ing] a rule of interpretation *out of the body of the act* which justifies the position I have advanced, and refut[ing] every hypothesis to the contrary." *Id.* (emphasis added).

141. *See generally* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12.

142. *See id.* at 592-94. Although there was always a chance that federal officials, including courts, would abuse their power by disregarding these rules, Madison considered this risk to be minimal. Disregard of such rules posed the same risk of conflict, and even war, as it posed on the international plane. As Madison explained, "ambitious encroachments of the Fœderal Government, on the authority of the State governments ... would be signals of general alarm" among the States. THE FEDERALIST NO. 46, *supra* note 14, at 320 (James Madison). Thus, "unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made" as in the case of foreign encroachments on state sovereignty. *Id.*

II. SUPREME COURT PRECEDENT

Before the Supreme Court's recent embrace of implied structural waivers, its traditional approach to state sovereign immunity was largely consistent with the rules governing transfers of sovereign rights. Even in construing Article III to abrogate state sovereign immunity in *Chisholm v. Georgia*,[143] the Justices applied the applicable background rules in their respective opinions.[144] After the Eleventh Amendment prohibited *Chisholm*'s construction, the Court repeatedly recognized that the States enjoy sovereign immunity from suit by individuals unless the Constitution unmistakably authorized its abrogation in clear and express terms or by unavoidable implication.

In the second half of the twentieth century, Congress passed certain laws attempting to abrogate state sovereign immunity. In decisions addressing these laws, the Supreme Court recognized an important distinction between Congress's powers under the original Constitution and its powers to enforce the Reconstruction Amendments. Congress, these decisions held, generally lacks constitutional authority to abrogate state sovereign immunity under its Article I powers (such as the Commerce Clause), but may do so pursuant to its power to enforce the Fourteenth Amendment. In 2006, the Court recognized a narrow exception to this general rule for Congress's bankruptcy power, stressing "the Bankruptcy Clause's unique history, combined with the singular nature of bankruptcy courts' jurisdiction."[145] As late as 2020, the Court emphasized that this exception was "good-for-one-clause-only."[146]

In the last two Terms, however, the Supreme Court dispensed with this established framework. Instead, it employed a form of strong purposivism to find that the States implicitly waived their sovereign immunity by granting Congress certain Article I powers that are "complete in themselves."[147] This novel approach elevates

143. 2 U.S. (2 Dall.) 419, 466-67, 475 (1793).

144. *See* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 553-59.

145. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 369 n.9 (2006).

146. Allen v. Cooper, 140 S. Ct. 994, 1003 (2020).

147. *See* Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2469 (2022) (Kagan, J., concurring) (citing PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2263 (2021)).

the broad purposes underlying Congress's enumerated powers over the constitutional text as understood in historical context. This purposive approach is incompatible with the long-standing rules governing the alienation of sovereign rights that informed the original meaning of the Constitution. Under these rules, the States were capable of alienating their preexisting sovereign immunity only if they did so clearly and expressly or by unavoidable implication. As discussed in Part III, the Court's new approach satisfies neither condition.

A. The Pre-2021 Paradigm

In order to evaluate the Supreme Court's new purposive approach to state sovereign immunity, it is important first to understand the long-standing approach that the Court's new approach displaces. Prior to *PennEast* and *Torres*, the Court's decisions regarding state sovereign immunity were largely consistent with the original public meaning of the Constitution and its subsequent Amendments. Although the *Chisholm* Court's reading of the citizen-state diversity provisions was debatable, the Eleventh Amendment quickly established the contrary construction. In subsequent decades, the Court correctly interpreted Article I to give Congress no power to abrogate state sovereign immunity, while reading Section 5 of the Fourteenth Amendment to permit Congress to abrogate such immunity as a means of enforcing the Amendment's prohibitions on the States. The Court's new purposive approach threatens to upend this established framework by substantially expanding congressional power to override state sovereign immunity in violation of the Constitution's original public meaning.

The Constitution continued to use the term States—first employed by the Declaration of Independence and the Articles of Confederation—to refer to the political entities from which the people transferred sovereign rights and powers to the newly created federal government. Prior to the Constitution's adoption, the American States enjoyed a well-established set of rights and powers under

the law of nations, including sovereign immunity.[148] Because the Constitution was an instrument used to alienate a limited set of the States' sovereign rights, it admitted—and was thus subject to—the background rules that governed all instruments of this kind. Under these rules, the relevant question is not whether the text of the Constitution affirmatively grants States sovereign immunity; rather, the question is whether the text explicitly alienates such immunity.[149] With the possible exception of Article III's citizen-state diversity provisions (nullified by the Eleventh Amendment), the original Constitution gave Congress no power to commandeer States or override their preexisting right to sovereign immunity. The Fourteenth Amendment, by contrast, expressly empowered Congress to enforce its prohibitions against States.[150] Thus, the constitutional text—understood in its full historical context—supports the Court's traditional distinction between impermissible congressional abrogation of state sovereign immunity pursuant to Article I and permissible abrogation pursuant to Section 5 of the Fourteenth Amendment.

As discussed in Part I, following the Declaration of Independence, the former Colonies in North America became "Free and Independent States."[151] As such, they possessed the full complement of sovereign rights and powers recognized by the law of nations. The States necessarily retained all of these rights and powers except to the extent that they alienated them in accordance with the rules prescribed by the law of nations. Those rules permitted sovereign states to relinquish their rights and powers in a binding legal instrument, but only if the instrument did so clearly and expressly or by unavoidable implication. Initially, the States alienated a small subset of their sovereign rights in the Articles of Confederation. When the Articles failed, the States used the Constitution to relinquish a larger, and somewhat different, portion of their sovereign rights and powers. The most important difference between the Articles and the Constitution was that whereas the former empowered Congress to act solely through the States by making requisitions,

148. *See supra* Part I.A.
149. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 896-99.
150. *See* U.S. CONST. amend. XIV, § 5.
151. THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776).

the latter withheld this general power and authorized Congress to tax and regulate individuals directly instead.

This background is essential to understanding the Constitution's effect on the States' preexisting right to sovereign immunity. Because the Constitution proposed to replace rather than merely amend the Articles of Confederation, Federalists initially carried the burden of persuading skeptics that the Articles were beyond repair. They succeeded by stressing that the Articles could not be fixed without authorizing Congress to use military force against States that refused to carry out its commands. This mechanism, they stressed, would be ineffective (because Congress would be reluctant to use it), unfair (because it would punish the innocent as well as the guilty), and dangerous (because it could lead to civil war and a dissolution of the Union).[152] Federalists explained that the only way to avoid these ills was to adopt an entirely new Constitution that avoided the need to enforce federal commands against States by "extend[ing] the authority of the union to the persons of the citizens—the only proper objects of government."[153]

These arguments proved persuasive, and Federalists shifted their focus to responding to the Anti-Federalists' concerns about the proposed Constitution. One serious Anti-Federalist charge was that the language of Article III would enable individuals to sue States without their consent in federal court.[154] The language to which Anti-Federalists objected appeared in the citizen-state diversity provisions of Article III. These provisions extended the judicial power "to Controversies ... between a State and Citizens of another State, ... and between a State ... and foreign ... Citizens or Subjects."[155] The Constitutional Convention did not discuss whether or how these provisions might affect the States' preexisting sovereign immunity, perhaps because the Convention adopted them near the end of its proceedings, and the provisions did not in terms authorize suits *against* States.[156] During the ratification debates, however,

152. *See supra* Part I.C.1.

153. THE FEDERALIST NO. 15, *supra* note 14, at 95 (Alexander Hamilton).

154. *See supra* note 138 and accompanying text.

155. U.S. CONST. art. III, § 2.

156. The Committee of Detail proposed the citizen-state diversity provisions on August 6, 1787. *See* James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 17, at 177, 186. The Convention adopted them without objection

Anti-Federalists strongly objected that these provisions would be construed to permit out-of-state citizens and foreigners to sue States in federal court.[157]

This objection posed a serious impediment to ratification for at least two reasons. First, the prospect of suits against States to enforce their debts endangered their solvency. During the Revolutionary War, the States confiscated a fair amount of property belonging to British subjects[158] and borrowed heavily from private creditors to finance the war.[159] The States were also subject to potential litigation concerning the disputed ownership of western lands.[160] The States did not want the federal government to force them to honor these obligations, and thus Article III threatened their financial well-being.[161] Judicial orders commanding States to pay these claims "would have imposed enormous burdens on state taxpayers and threatened some states with financial ruin."[162]

Second, and perhaps more fundamentally, authorizing federal courts to issue judgments against States at the behest of individuals created the very enforcement difficulties that Federalists had insisted the Constitution was designed to avoid. The Constitution's proponents claimed that the Articles of Confederation were beyond repair because there was no safe and effective way to enforce requisitions against States without risking civil war and disunion.[163] If understood to authorize suits against States, the citizen-state diversity provisions of Article III posed the same dilemma and thus undercut the Federalists' primary rationale for adopting the Constitution instead of merely amending the Articles.[164] If these provisions permitted federal courts to issue judgments against States, then presumably Congress would have possessed necessary and proper power to enforce them. As Brutus put it, federal jurisdiction

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or discussion on August 28, 1787. *See* James Madison, Journal of the Constitutional Convention (Aug. 28, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 17, at 422, 423-25, 434-35.

157. *See supra* note 136 and accompanying text.

158. *See* Clark, *Eleventh Amendment*, *supra* note 2, at 1877.

159. *See id.* at 1863.

160. *See id.* at 1876-77.

161. *Id.* at 1863.

162. *Id.*

163. *See* James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* MADISON WRITINGS, *supra* note 16, at 364.

164. Clark, *Eleventh Amendment*, *supra* note 2, at 1869-70.

over such cases would enable Congress to "provide for levying an execution on a state."[165] In his view, such enforcement against States would be "pernicious and destructive."[166]

Leading Federalists (including Alexander Hamilton, James Madison, and John Marshall) denied the Anti-Federalists' construction of Article III and dismissed the specter that the federal government could enforce judgments in favor of individuals against States. They argued that "Controversies ... *between* a State" and an out-of-state or foreign citizen should not be taken literally to refer to suits both "by" and "against" a State. Rather, in their view, these provisions merely enabled a State—if it so chose—to bring a suit in federal court as a plaintiff. For example, in the Virginia ratifying convention, John Marshall stated: "I see a difficulty in making a State defendant, which does not prevent its being plaintiff."[167] Similarly, James Madison insisted that "[i]t is not in the power of individuals to call any State into Court."[168] In his view, "[t]he only operation [the language of Article III] can have, is, that if a State should wish to bring suit against a citizen, it must be brought before the Federal Court."[169]

Perhaps most famously, Alexander Hamilton argued in *The Federalist* that Article III would not alienate the States' preexisting sovereign immunity. He began with the established principle that "[i]t is inherent in the nature of sovereignty, not to be amenable to

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165. Brutus, Letter XIII, N.Y. J., Feb. 21, 1788, *reprinted in* 20 DHRC, *supra* note 90, at 797.

166. *Id.* at 796. Although Anti-Federalists objected to allowing federal courts to hear suits by individuals against States, they did not object to allowing such courts to hear suits between States. As Madison explained in the Virginia ratifying convention, jurisdiction over suits between States "is not objected to," and was already provided for "by the existing [A]rticles of Confederation." James Madison, Address to the Virginia Convention (June 20, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1412, 1414 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter 10 DHRC]. Under these circumstances, he thought "there c[ould] be no impropriety in referring such disputes to this tribunal." *Id. See also* Clark, *Eleventh Amendment*, *supra* note 2, at 1874 ("[T]he Founders recognized that the underlying dispute between states—rather than any federal judgment attempting to resolve it—posed the greater risk of sparking hostilities.").

167. John Marshall, Address to the Virginia Convention (June 20, 1788), *in* 10 DHRC, *supra* note 166, at 1433.

168. James Madison, Address to the Virginia Convention (June 20, 1788), *in* 10 DHRC, *supra* note 166, at 1414.

169. *Id.*

the suit of an individual *without its consent*."[170] Therefore, he explained, unless "there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal."[171] Hamilton found no such surrender in the Constitution. He explained that all alleged surrenders of this kind must be assessed by a "recurrence to the principles" specifying the "circumstances which are necessary to produce an alienation of state sovereignty."[172] In *The Federalist No. 32*, he examined these principles in detail "in considering the article of taxation."[173] On that occasion, he recited and applied "the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[174] This rule, he explained, "is not only a theoretical consequence of [the division of the sovereign power], but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution."[175] As discussed in Part I, this basic background rule was an inextricable part of all instruments—including the Constitution—used to alienate preexisting sovereign rights. In *The Federalist No. 81*, Hamilton applied this rule to conclude that the language of Article III was not clear enough to justify finding an alienation of state sovereign immunity.[176]

Although these assurances presumably contributed to the Constitution's ratification, they did not persuade the Supreme Court. In *Chisholm v. Georgia*, the Court interpreted Article III to permit a citizen of South Carolina to sue Georgia in federal court. Significantly, all members of the Court applied the same background principles

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170. THE FEDERALIST NO. 81, *supra* note 14, at 548 (Alexander Hamilton).

171. *Id.* at 549.

172. *Id.*

173. *Id.* (referring to FEDERALIST NO. 32).

174. THE FEDERALIST NO. 32, *supra* note 14, at 203 (Alexander Hamilton).

175. *Id.*

176. After discussing the language in question, he concluded that "there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." THE FEDERALIST NO. 81, *supra* note 14, at 549 (Alexander Hamilton). He added that reading the Constitution to authorize suits against a State would serve no purpose because recoveries could not be enforced "without waging war against" the State. *Id.* He concluded that "to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." *Id.*

of interpretation that Hamilton employed, including "the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[177] Unlike Hamilton, however, the Court found that the citizen-state diversity provisions did in fact clearly and expressly divest the States of their immunity from the suits described therein. Whereas Hamilton (and other Federalists) read controversies "between" a State and citizens of another State to refer solely to suits *by* a State, the *Chisholm* Court understood the ordinary meaning of the term to encompass suits both *by* and *against* a State.[178] It is hard to fault the Court's interpretation because it was arguably the most natural reading of the text.[179] Nonetheless, it quickly triggered a constitutional amendment to avoid the ills that would arise from federal enforcement of judgments against States.

The Eleventh Amendment effectively overruled *Chisholm* and reinstated the Federalists' preferred construction of Article III. The Amendment was not an affirmative grant of sovereign immunity to the States. Rather, it merely reinstated the States' preexisting immunity by directing that "[t]he 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."[180] In so doing, the Amendment neutralized the only language in the original Constitution that was arguably clear and express enough to authorize individuals to sue States. As adopted, the Amendment did exactly what multiple state legislatures called on their Senators and Representatives to do—namely,

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177. THE FEDERALIST NO. 32, *supra* note 14, at 203 (Alexander Hamilton).

178. *See*, *e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 450-51 (1793) (opinion of Blair, J.) (finding that the "clear and positive directions" of Article III "expressly extended" the authority to hear a suit against Georgia by a citizen of South Carolina); *id.* at 476 (opinion of Jay, C.J.) (reading the citizen-state diversity clause to permit suits against States because the words of the clause were "express, positive, [and] free from ambiguity"). Even James Wilson, who wrote the opinion most broadly justifying allowing the suit against Georgia to proceed, concluded that Georgia's amenability to suit "rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the *direct* and *explicit declaration* of the Constitution itself" in the citizen-state diversity provisions. *Id.* at 466 (opinion of Wilson, J.).

179. *See* Clark, *Eleventh Amendment*, *supra* note 2, at 1879 ("*Chisholm* was arguably the Supreme Court's first major textualist decision.").

180. U.S. CONST. amend. XI (emphasis added).

> to obtain such amendments in the Constitution of the United States as will remove or explain any clause or article of the said constitution which can be construed to imply or justify a decision that a state is compellable to answer in any suit by an individual or individuals in any Court of the United States.[181]

Under the applicable rules governing the alienation of sovereign rights, no provisions of the original Constitution other than the citizen-state diversity provisions of Article III even arguably authorized such suits. Accordingly, by countermanding these provisions, the Eleventh Amendment was precisely tailored to accomplish its objective of restoring the States' preexisting immunity from suit by individuals.[182]

As James Pfander has shown, the Eleventh Amendment was an "explanatory" amendment.[183] Historically, legislatures used explanatory statutes "to correct or clarify ambiguities in the law" and to nullify erroneous judicial interpretations of the law.[184] Because a

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181. RESOLUTION OF THE MASSACHUSETTS GENERAL COURT (Sept. 27, 1793), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 440, 440 (Maeva Marcus ed., 1994). Five States adopted similar resolutions and three more were in the process of doing so when Congress proposed the Eleventh Amendment. *See* Clark, *Eleventh Amendment*, *supra* note 2, at 1890.

182. This understanding favors a literal reading of the Eleventh Amendment. Will Baude and Stephen Sachs explain the implications of such a reading as follows:

> It eliminates federal judicial power over one set of cases: suits filed against states, in law or equity, by diverse plaintiffs. It strips subject-matter jurisdiction in *all* such cases, regardless of why or how the plaintiffs are in federal court, and in *only* such cases. It can't be waived. It can't be abrogated. It applies in the Supreme Court. It means what it says.

William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PENN. L. REV. 609, 612-13 (2021). For additional arguments in favor of a literal reading of the Amendment, see Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135 (2009); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1722 (2004) [hereinafter Manning, *Eleventh Amendment*]; Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1028 (2002); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1344-45 (1989).

183. *See generally* James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

184. *Id.* at 1315. "A declaratory or expository statute is one passed with the purpose of removing a doubt or ambiguity as to the state of the law, or to correct a construction deemed by the legislature to be erroneous." *Id.* at 1314 (quoting HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 370 (1896), a leading nineteenth century treatise on legislative interpretation) (internal quotation marks omitted).

statute could not correct a constitutional interpretation, Congress and the States adopted a constitutional amendment to perform this function. As the Supreme Court explained shortly after its adoption, the Amendment operated both retroactively and prospectively to "supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State."[185]

The Supreme Court did not take up the question of state sovereign immunity again until after the Civil War when individuals sought to force States to honor their bond obligations. The Court initially dismissed several suits on the ground that they were veiled attempts to circumvent the express prohibitions of the Eleventh Amendment.[186] In *Hans v. Louisiana*, however, the Court recognized state sovereign immunity as one of the States' preexisting sovereign rights, not as a novel grant of protection by the Eleventh Amendment.[187] In *Hans*, a citizen of Louisiana sued Louisiana to collect the interest due on state bonds.[188] Hans argued that he was "not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State."[189] The Court acknowledged that "the amendment does so read," but ruled that the States' sovereign immunity is not limited to the terms of the Eleventh Amendment.[190]

The *Hans* Court provided several reasons for its decision. First, it endorsed the reasoning of Justice Iredell's *Chisholm* dissent.[191] Iredell rejected reading the Constitution to subject the States to suit in federal court on the ground "that nothing but express words, or an insurmountable implication ... would authorize the deduction of so high a power."[192] In this passage, he recited and applied the law

185. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 378 (1798).

186. *See* New Hampshire v. Louisiana, 108 U.S. 76, 88-89 (1883) (dismissing a suit by New Hampshire because its citizen was the real party in interest); Louisiana *ex rel.* Elliott v. Jumel, 107 U.S. 711, 720 (1883) (holding that a suit against state officials by out-of-state bondholders was in effect a suit against the State).

187. 134 U.S. 1, 20 (1890).

188. *Id.* at 1.

189. *Id.* at 10.

190. *Id.*

191. *Id.* at 12.

192. Chisholm v. Georgia, 2 U.S. 419, 450 (2 Dall.) (1793) (opinion of Iredell, J.).

of nations rule governing the alienation of sovereign rights. Second, the *Hans* Court recalled Hamilton's similar argument made during the ratification debates.[193] Hamilton maintained that the citizen-state diversity provisions were not clear enough to divest state sovereign immunity, and that "to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."[194]

According to the *Hans* Court, "looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things," the Eleventh Amendment demonstrated that these members of the founding generation were "clearly right."[195] The Eleventh Amendment, the Court explained, "did not in terms prohibit suits by individuals against the States," and thus did not affirmatively grant sovereign immunity.[196] Instead, the Amendment "declared that the Constitution should not be construed to import any power to authorize the bringing of such suits."[197] The Court then proceeded to highlight other statements in the ratification debates and judicial precedent that supported this understanding.[198] In light of this evidence, the Court posed the following rhetorical question: "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?"[199] According to the Court, this supposition was "almost an absurdity on its face."[200]

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193. *Hans*, 134 U.S. at 12-13.

194. *Hans*, 134 U.S. at 13 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).

195. *Id.* at 14.

196. *Id.* at 11.

197. *Id.*

198. *Id.* at 14.

199. *Id.* at 15.

200. *Id.* Scholars have focused on this passage to criticize *Hans* as a purposive exercise in imaginative reconstruction. For example, John Manning has observed that "the Court relied on [the Eleventh Amendment's] apparent background purpose to engage in 'imaginative reconstruction' of the true intentions of those who framed and ratified" it. *See* Manning, *Eleventh Amendment*, *supra* note 182, at 1682-83. Accordingly, he has argued that "*Hans* fit nicely within the strongly purposive tradition typified by its equally famous contemporary, *Church of the Holy Trinity v. United States*." *Id.* at 1685 (citing 143 U.S. 457 (1892)). Understood in context, however, the language in the opinion to which Manning objects is

The Court's reliance on Iredell and Hamilton, and its description of the Eleventh Amendment as an explanatory amendment, is consistent with a textualist defense of sovereign immunity. Because the States became free and independent sovereign States before their people adopted the Constitution on their behalf, the relevant question is not whether the constitutional text expressly granted sovereign immunity to the States, but whether the text expressly took it away.[201] Hamilton understood this to be the proper inquiry when he argued that the original Constitution would not abrogate the States' sovereign immunity.[202] Following the Declaration of Independence, the former Colonies became "Free and Independent States" with full sovereign rights and powers under the law of nations (including sovereign immunity).[203] The "States" to which the Constitution referred could alienate those rights and powers only in accordance with the rules established by the same law. As Part I explains, the law of nations permitted a legal instrument to alienate sovereign rights only when it did so clearly and expressly or by the unavoidable implication.[204] Because the citizen-state diversity provisions were the only provisions of the original Constitution that arguably met this test, the Eleventh Amendment's prohibition against that construction was precisely tailored to restore the full sovereign immunity that States enjoyed from suits by individuals prior to the Constitution.

As discussed in Part III.B, the Supreme Court's decisions recognizing that Congress has limited authority to abrogate state sovereign immunity are consistent with the original meaning of the Constitution and the background rules it admitted to govern the alienation of sovereign rights. In the latter half of the twentieth century, Congress began enacting statutes that sought to abrogate such immunity. In response, the Court upheld congressional abrogation when Congress acted to enforce the Fourteenth Amendment, but

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better understood as a rhetorical flourish to emphasize the Court's agreement with Iredell and Hamilton regarding the original meaning of the Constitution.

201. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 897-917 (explaining why this was the relevant question under background rules of the law of nations).

202. THE FEDERALIST NO. 81, *supra* note 14, at 541, 549 (Alexander Hamilton).

203. THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776).

204. *See supra* Part I.A.

invalidated such abrogation when Congress used its Article I powers for this purpose.

In *Fitzpatrick v. Bitzer*, the Court considered whether "Congress has the power to authorize federal courts to enter [an award for money damages] against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment."[205] In upholding this federal power, Justice Rehnquist's opinion for the Court stressed that Congress was acting pursuant to its express power to enforce the Fourteenth Amendment, the provisions of which "themselves embody significant limitations on state authority."[206] Because the Fourteenth Amendment expressly constrained state action taken against individuals and expressly empowered Congress to enforce these constraints, the Court concluded "that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."[207]

Two decades later, the Supreme Court addressed whether Congress could override state sovereign immunity pursuant to its Article I powers. After one false start in a plurality opinion,[208] the Court rejected such authority in *Seminole Tribe of Florida v. Florida*.[209] *Seminole Tribe* relied heavily on *Hans*, explaining "that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'"[210] Although *Seminole Tribe* did not provide a comprehensive account of state sovereign immunity, the Court suggested that the constitutional basis of such immunity was independent of—and predated—the Eleventh Amendment. For example, the Court relied on Justice Scalia's observation that "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition ... which it confirms."[211] Similarly, the Court stressed that "[f]or over a century we have reaffirmed that federal

205. 427 U.S. 445, 448 (1976).
206. *Id.* at 456.
207. *Id.* (citation omitted).
208. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (plurality opinion).
209. 517 U.S. 44, 47 (1996).
210. *Id.* at 69 (quoting Hans v. Louisiana, 134 U.S. 1, 15 (1890)).
211. *Id.* at 54 (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) (internal quotation marks omitted)).

jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"[212] These statements acknowledge the importance of background context in constitutional interpretation and echo the Court's famous observation in *Principality of Monaco v. Mississippi* that "[b]ehind the words of the constitutional provisions are postulates which limit and control."[213]

In addition to reaffirming the States' immunity under the original Constitution, the *Seminole Tribe* Court invalidated Congress's attempt to use its commerce power to override such immunity. It stated categorically that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[214] The Court distinguished *Fitzpatrick* on the ground that the Fourteenth Amendment "had fundamentally altered the balance of state and federal power struck by the [original] Constitution."[215] More specifically, the Court explained that—unlike Article I—the Amendment "contained prohibitions expressly directed at the States" and "expressly provided" that Congress shall have power to enforce those prohibitions against States.[216] By contrast, Congress enacted the statute at issue in *Seminole Tribe* pursuant to its Article I powers (which make no mention of the States or suits against them).[217] Accordingly, the Court distinguished *Fitzpatrick* and stated, as a categorical matter, that Congress cannot use its Article I powers to abrogate state sovereign immunity.[218] And this limitation on congressional authority, the Court explained, holds "[e]ven when the Constitution vests in Congress complete law-making

212. *Id.* (quoting *Hans*, 134 U.S. at 15).
213. 292 U.S. 313, 322 (1934).
214. *Seminole Tribe*, 517 U.S. at 73.
215. *Id.* at 59.
216. *Id.*
217. *Id.* at 73.
218. In this regard, the *Seminole Tribe* Court "treat[ed] the Constitution as a linear series of provisions" and rejected any suggestion that "the Fourteenth Amendment enlarge[d] the scope of Congress's Article I powers" retroactively. Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 991 (2012). At least one scholar has suggested that the Court should consider using a form of holistic interpretation that would retroactively interpret "older parts of the Constitution through the lens of more recent amendments" in order to enable Congress to abrogate state sovereign immunity pursuant to Article I. *See* Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1262 (2001).

authority over a particular area."[219] Properly understood, *Seminole Tribe* turned not on the Eleventh Amendment, but on Congress's lack of enumerated power to override the States' preexisting sovereign immunity.

The Court extended *Seminole Tribe* by invalidating congressional attempts to use Article I power to subject States to suit in state court and before federal administrative agencies.[220] In *Alden v. Maine*, in which the Court invalidated a federal statute subjecting States to suit in their own courts, the Court undertook a more thorough constitutional analysis of state sovereign immunity than it did in *Seminole Tribe*.[221] Because *Alden* did not implicate federal judicial power, the Eleventh Amendment was inapposite. For this reason, the Court explained that state sovereign immunity "inheres in the system of federalism established by the Constitution."[222] According to the Court, "[v]arious textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance."[223] And because the Constitution "specifically recognizes the States as sovereign entities,"[224] they retained their sovereign immunity—an immunity "inherent in the nature of sovereignty."[225] On this basis, the Court explained, "Hamilton, Madison, and Marshall, understood the [original] Constitution as drafted to preserve the States' immunity from private suits."[226] The Court endorsed "the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'"[227]

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219. *Seminole Tribe*, 517 U.S. at 72.

220. *See* Alden v. Maine, 527 U.S. 706, 760 (1999) (Souter, J., dissenting); Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743, 747 (2002). For a discussion of these decisions, see Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 911-13.

221. 527 U.S. 711-30 (Kennedy, J., majority opinion).

222. *Id.* at 730.

223. *Id.* at 713.

224. *Id.* (quoting *Seminole Tribe*, 517 U.S. at 71 n.15).

225. *Id.* at 716 (quoting THE FEDERALIST NO. 81, *supra* note 14, at 548 (Alexander Hamilton)); *see also id.* at 715 ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.").

226. *Id.* at 718. The Court continued its embrace of state sovereign immunity outside the Eleventh Amendment by holding that States also enjoy immunity before federal administrative agencies. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 769 (2002).

227. *Alden*, 527 U.S. at 730 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313,

From this premise, the Court proceeded to hold that "the specific Article I powers delegated to Congress" do not "necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers."[228] "[U]nder the plan of the Convention,"[229] the Court explained, there must be "compelling evidence" that the Constitution authorizes such a "derogation of the States' sovereignty,"[230] and Article I does not satisfy that test.[231] The Court again distinguished Section 5 of the Fourteenth Amendment on the ground that the Amendment "impos[es] explicit limits on the powers of the States and grant[s] Congress the power to enforce them."[232] Thus, unlike Article I, "the [Fourteenth] Amendment 'fundamentally altered the balance of state and federal power struck by the [original] Constitution.'"[233]

322-23 (1934)).

228. *Id.* at 732.

229. *Id.* at 760.

230. *Id.* at 741 (internal quotation marks omitted) (citing Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 781 (1991).

231. *See id.* at 748.

232. *Id.* at 756.

233. *Id.* (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996)). More recently, the Court tied this reasoning more directly to sovereign rights under the law of nations. Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493-95 (2019) (overruling Nevada v. Hall, 440 U.S. 410 (1979)). The case involved a suit by a Nevada resident against a California state agency in Nevada state court. *Id.* at 1490-91. The Nevada Supreme Court rejected the defendant's claim of sovereign immunity, but the Supreme Court accepted it. *Id.* at 1491-92. Justice Thomas's opinion for the Court began by observing that, "[a]fter independence, the States considered themselves fully sovereign nations" pursuant to the Declaration of Independence. *Id.* at 1493. The Court quoted Vattel for the proposition that "[i]t does not ... belong to any foreign power to take cognisance of the administration of [another] sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it." *Id.* (alteration in original) (internal quotation marks omitted) (quoting 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 55, at 138). Thus, under the law of nations, "[t]he sovereign is 'exemp[t] ... from all [foreign] jurisdiction.'" *Id.* at 1494 (last two alterations in original) (quoting 2 M. DE VATTEL, THE LAW OF NATIONS, § 108, at 158 (J. Coote ed., 1759)). The common law recognized similar immunity. *Id.* at 1493-94. The Court grounded both forms of immunity in the constitutional text: "The Constitution's use of the term 'States' reflects both of these kinds of traditional immunity. And the States retained these aspects of sovereignty, 'except as altered by the plan of the Convention or certain constitutional Amendments.'" *Id.* at 1494-95 (quoting *Alden*, 527 U.S. at 713). The Court acknowledged that Article III altered the States' immunity from suit in federal court but stressed that the Constitution contains no provisions alienating the States' preexisting immunity from suit in the courts of another State. *Id.* at 1494-96. As we

For the next decade, the Supreme Court maintained this sharp distinction between permissible abrogation of state sovereign immunity under Section 5 of the Fourteenth Amendment and impermissible abrogation under Article I. Then, in 2006, the Court recognized a "singular" and "unique" exception for the Article I bankruptcy power in *Central Virginia Community College v. Katz*.[234] In *Katz*, the Court held that Congress could use its Article I bankruptcy power to authorize bankruptcy judges to recover preferential payments made by insolvent debtors to state entities. The Court acknowledged that "nothing in the *words* of the Bankruptcy Clause evinces an intent on the part of the Framers to alter the 'background principle' of state sovereign immunity,"[235] but asserted nonetheless that the bankruptcy power "was understood to carry with it the power to subordinate state sovereignty."[236] Specifically, although "the jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*," it was sometimes necessary for this jurisdiction to reach beyond the *res* to interested parties.[237] Thus, the Court concluded that, by adopting "the plan of the Convention,"[238] "the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts."[239]

The Court's reasoning in *Katz* was relatively narrow and appeared to be limited to bankruptcy cases. In recognizing this exception, the Court cited "the Bankruptcy Clause's unique history" and "the singular nature of bankruptcy courts' jurisdiction" to find "a surrender by the States of their sovereign immunity."[240] As late

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have explained elsewhere, *Hyatt* identified a persuasive textual basis for the States' immunity from suit by individuals. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 837-38, 915-17.

234. 546 U.S. 356, 369 n.9 (2006).

235. *Id.* at 376 (quoting *Seminole Tribe*, 517 U.S. at 72).

236. *Id.* at 377.

237. *Id.* at 378.

238. *Id.* at 377.

239. *Id.* at 378.

240. *Id.* at 369 n.9.

as 2020, the Court characterized *Katz*'s analysis as "good-for-one-clause-only."[241] Notwithstanding these disclaimers, the Court embarked on a dramatic change of course in 2021. For the first time, a majority of the Court employed a strongly purposive reading of Article I to hold that States implicitly waived sovereign immunity in the "plan of the Convention" whenever sovereign immunity would "thwart"[242] or "frustrate"[243] a federal power. In these circumstances, the Court said, it is proper to find an implied "structural waiver" of state sovereign immunity.[244] This new analysis contradicts the rule, under the original plan of the Convention, that States retained their sovereign immunity unless the constitutional text alienated it clearly and expressly or by unavoidable implication.

B. The Court's New Purposive Approach

Starting in 2021, the Supreme Court appeared to adopt an entirely new—and much broader—approach to congressional abrogation of state sovereign immunity. In *PennEast Pipeline Co. v. New Jersey*, a closely divided Court approved abrogation under an Article I power other than the Bankruptcy Clause.[245] Specifically, the Court upheld provisions of the Natural Gas Act that delegated federal eminent domain power to private companies and authorized them to sue States to acquire property rights they needed to build a pipeline. Although "the Constitution and Bill of Rights ... did not include the words 'eminent domain,'" the Court explained that the negative implication of the "Takings Clause of the Fifth Amendment ('nor shall private property be taken for public use, without just compensation') nevertheless recognized the existence of such a power."[246] In 1810, the Court initially approved the use of this power to take private property located in "areas subject to exclusive federal

241. Allen v. Cooper, 140 S. Ct. 994, 1003 (2020) (holding that Congress could not use its Article I power to protect copyrights to abrogate the States' sovereign immunity from copyright infringement suits).

242. PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2256 (2021).

243. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2464 (2022).

244. *Id.*

245. *PennEast*, 141 S. Ct. at 2251-52.

246. *Id.* at 2255.

jurisdiction,"[247] and later decided in 1876 "that federal eminent domain extended to [private] property within state boundaries as well."[248] It was not until 1941, however, that the Court recognized that the power of "federal eminent domain applies to state property interests as well" as to private property.[249] Following this ruling, the United States could employ two mechanisms to condemn state-owned property without implicating state sovereign immunity. First, it could simply take the property without going to court, leaving the State to sue the United States for just compensation.[250] Second, the United States could institute a condemnation proceeding against the State since States are not immune from suits brought by the United States.[251]

The United States employed neither approach in *PennEast*. Instead, Congress enacted the Natural Gas Act, which empowered the pipeline company to condemn New Jersey's property by suing the State itself.[252] The Act delegates federal eminent domain power to private companies that cannot reach agreements with landholders to acquire property they seek for approved projects.[253] In such instances, the Act authorizes companies to sue to "acquire the same by the exercise of the right of eminent domain."[254] New Jersey asserted sovereign immunity as a defense to the action. The district court rejected this defense, but the Third Circuit reversed, reasoning that Congress did not intend to delegate the United States' power to sue nonconsenting States, and that it is doubtful whether the Constitution would permit Congress to do so.[255] In an opinion by Chief Justice Roberts, the Supreme Court reversed, holding (1) that

247. *Id.* (citing Custiss v. Georgetown & Alexandria Tpk. Co., 10 U.S. (6 Cranch) 233 (1810)).

248. *Id.* (citing Kohl v. United States, 91 U.S. 367 (1876)).

249. *Id.* (citing Oklahoma *ex rel*. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941)). Of course, if (as the Court suggested) the negative implication of the Takings Clause is the source of federal eminent domain power, it is not obvious why that power extends beyond the taking of "private property." *See id.* at 2255.

250. *See id.* at 2257.

251. *See id.* In 1892, the Supreme Court held that the Constitution permits the United States to sue States without their consent. *See* United States v. Texas, 143 U.S. 621, 646 (1892).

252. *See PennEast*, 141 S. Ct. at 2252-53.

253. *See id.*

254. 15 U.S.C. § 717f(h).

255. *PennEast*, 141 S. Ct. at 2253-54.

the Act delegated the United States' power to override state sovereign immunity to the pipeline company, and (2) that New Jersey had implicitly waived its sovereign immunity to exercises of the federal eminent domain power in "the plan of the Convention."[256]

With respect to sovereign immunity, the *PennEast* Court took the position that "[t]he 'plan of the Convention' includes certain waivers of sovereign immunity to which all States implicitly consented at the founding."[257] The Court stated that it had previously "recognized such waivers in the context of bankruptcy proceedings, ... suits by other States, ... and suits by the Federal Government."[258] The Court believed that a similar structural waiver for federal eminent domain proceedings was implicit in the plan of the Convention. In reaching this conclusion, the Court did not undertake a close interpretation of the constitutional text, but simply offered several conclusory statements that an implied waiver furthered the purposes underlying the federal eminent domain power. For example, the Court observed that if private parties could not sue States to condemn their property, then they would have to "[t]ake [the] property now and require States to sue for compensation later."[259] Alternatively, the United States itself would have to sue the States to acquire the property needed for the project.[260] In the Court's view, the Constitution did not require Congress to rely on these more cumbersome alternatives if it preferred simply to subject the States to suits by private parties.

In upholding the Act, the *PennEast* Court purported not to overrule *Seminole Tribe*, but merely to distinguish its general rule against using Article I to abrogate state sovereign immunity. The Court acknowledged that "it is undoubtedly true under our precedents that—with the exception of the Bankruptcy Clause ... —'Article I cannot justify haling a State into federal court.'"[261] But the Court insisted that "congressional abrogation is not the only

256. *See id.* at 2257.

257. *Id.* at 2258 (citing Alden v. Maine, 527 U.S. 706, 755-56 (1999)).

258. *Id.* (citations omitted). Given the language of Article III, suits against States by other States or the United States can be distinguished from suits by individuals against States. *See infra* note 457.

259. *Id.* at 2260.

260. *Id.*

261. *Id.* at 2259 (citation omitted) (quoting Allen v. Cooper, 140 S. Ct. 994, 1002 (2020)).

means of subjecting States to suit," and that "States can also be sued if they have consented to suit in the plan of the Convention."[262] According to the Court, "where the States 'agreed in the plan of the Convention not to assert any sovereign immunity defense,' 'no congressional abrogation [is] needed.'"[263] Without much explanation of this distinction, the Court asserted that "the States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees."[264]

Justice Barrett, joined by Justices Thomas, Kagan, and Gorsuch, dissented. She raised two main objections to the Court's novel ruling. First, she pointed out that "the Constitution enumerates no stand-alone 'eminent-domain power.'"[265] Thus, "[a]ny taking of property provided for by Congress is ... an exercise of another constitutional power—in the case of the Natural Gas Act, the Commerce Clause—augmented by the Necessary and Proper Clause."[266] Under *Seminole Tribe*, however, "Congress cannot authorize private suits against a nonconsenting State pursuant to its Commerce Clause power."[267]

Second, Justice Barrett rejected the Court's argument that the States implicitly waived their sovereign immunity to eminent domain suits in the constitutional structure. In her view, the historical evidence cited by the Court was "beside the point"[268] because it consisted exclusively of prior decisions involving "suits brought by States, suits brought by the United States, suits brought by private parties against other private parties, and suits brought by Indian tribes against private parties—none of which implicate state sovereign immunity."[269] In addition, she pointed out that "for 75 years after the founding, it was unsettled whether the Federal Government could even exercise eminent domain over *private land* within a State," and that it took another 77 years before the Court

262. *Id.*
263. *Id.* (alteration in original) (quoting *Allen*, 140 S. Ct. at 1003).
264. *Id.*
265. *Id.* at 2266 (Barrett, J., dissenting).
266. *Id.* at 2267.
267. *Id.* (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996)).
268. *Id.* at 2268.
269. *Id.*

concluded that the United States could take land owned by a State.[270] Given how long it took to resolve these threshold questions, Justice Barrett concluded that "it strains credulity to say that history unequivocally establishes that States surrendered their immunity to private condemnation suits in the plan of the Convention."[271]

The Supreme Court might have confined *PennEast*'s structural analysis to suits condemning state-owned property. In *Torres v. Texas Department of Public Safety*, however, Justice Breyer's opinion for the Court substantially expanded the notion that the States implicitly waived substantial portions of their sovereign immunity in "the plan of the Convention."[272] Employing a strongly purposive approach, the Court opined that whenever the assertion of state sovereign immunity could "thwart"[273] or "frustrate" the exercise of congressional powers that are "complete in [themselves]," the States implicitly waived their immunity by adopting the Constitution.[274] This new purposive approach includes no clear limits on Congress's power to abrogate state sovereign immunity under Article I.

Torres involved a suit by a former army reservist and state trooper, Le Roy Torres, against the State of Texas.[275] The suit alleged that Texas violated a federal statute by failing to accommodate Torres' service-related disability with a new position (since he could no longer perform the duties of a state trooper).[276] The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) requires employers, including States, to reemploy

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270. *Id.*

271. *Id.* Justice Gorsuch joined Justice Barrett's dissent in full but wrote separately to encourage the district court to dismiss the case on remand because it presented "the rare scenario" barred by the text of the Eleventh Amendment: a suit against a State (New Jersey) brought by a citizen of another State (Delaware). *See id.* at 2265 (Gorsuch, J., dissenting). The Court responded that no party had asked it to reconsider its precedents that understand "the Eleventh Amendment to confer 'a personal privilege which [a State] may waive at pleasure.'" *Id.* at 2262 (majority opinion) (alteration in original) (quoting Clark v. Barnard, 108 U.S. 436, 447 (1883)). Justice Gorsuch characterized the Court's response as "a drive-by rumination" because "[a]ll of the cases it cites fall outside of the Eleventh Amendment's text." *Id.* at 2265 n.2 (Gorsuch, J., dissenting).

272. 142 S. Ct. 2455, 2463 (2022).

273. *Id.* (citing *PennEast*, 141 S. Ct. at 2256).

274. *Id.*

275. *Id.* at 2461.

276. *Id.*

veterans after a period of service and to make accommodations for those who cannot perform their prior duties because they incurred a service-related disability.[277] USERRA further provides that, subject to certain administrative remedies, either the United States or an individual may sue a State to enforce this obligation.[278] When Torres sued Texas under these provisions, Texas successfully asserted sovereign immunity in state court, but the Supreme Court reversed.[279] The Court began by reciting the basic principle "that courts may not ordinarily hear a suit brought by any person against a nonconsenting State,"[280] but then invoked *PennEast*'s construct that "States may be sued if they agreed their sovereignty would yield as part of the 'plan of the Convention.'"[281] The Court characterized this form of abrogation as a "structural waiver."[282] The test for such waivers, the Court asserted, is "whether the federal power at issue is 'complete in itself, and the States consented to the exercise of that power—in its entirety—in the plan of the Convention.'"[283] According to the Court, such consent is implicit whenever the States' retention of immunity would "thwart"[284] or "frustrate" the purposes of the underlying federal power.[285]

The *Torres* Court began by emphasizing the comprehensive nature of Congress's constitutional authority to provide for the common defense, including its enumerated powers to "raise and support Armies" and to "provide and maintain a Navy."[286] At the same time, the Court observed that "[t]he Constitution divests the States" of related authority to keep or deploy troops.[287] The States, for example, may not "engage in War, unless actually invaded," "enter into any Treaty," or "keep Troops, or Ships of War in time of

277. 38 U.S.C. § 4313(a)(3).
278. *Id.* § 4323(a).
279. *Torres*, 142 S. Ct. at 2461.
280. *Id.* at 2461-62.
281. *Id.* at 2462.
282. *Id.*
283. *Id.* at 2463 (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2263 (2021)).
284. *Id.* (quoting *PennEast*, 141 S. Ct. at 2256).
285. *Id.*
286. *Id.* (quoting U.S. CONST. art. I, § 8, cls. 12-13).
287. *Id.*

Peace."[288] The Court observed that these provisions "strongly suggest[ ] a complete delegation of authority to the Federal Government to provide for the common defense."[289]

From these relatively uncontroversial observations, Justice Breyer—an avowed purposivist—purported to derive an implied structural waiver of state sovereign immunity.[290] According to the Court, "[t]hese substantial limitations on state authority, together with the assignment of sweeping power to the Federal Government," mean more than what the text of the Constitution alone conveys.[291] These provisions, the Court asserted, "provide strong evidence that the *structure* of the Constitution prevents States from *frustrating* national objectives in this field."[292] The Court claimed that, by adopting these provisions, "the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military."[293] Moreover, this implicit consent ousted state sovereignty not merely in the case of direct conflicts with federal policy, but also whenever a State's assertion of its sovereign rights could "thwart"[294] or "frustrate" federal goals.[295] The Court thus sought to further the purposes underlying federal power at a high level of generality.

In deploying this new form of analysis, the Court gave itself broad discretion to recognize waivers of state sovereignty unsupported by the text of the Constitution and, as discussed in Part I, incompatible with the background rules of interpretation governing legal instruments used or claimed to alienate sovereign rights. In addition, as discussed in Part III, the *Torres* Court's new purposive approach has no logical stopping point and has the potential to extend beyond the Army and Navy Clauses and to override other aspects of state sovereignty beyond sovereign immunity.[296]

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288. U.S. CONST. art. I, § 10, cls. 1, 3.

289. *Torres*, 142 S. Ct. at 2463.

290. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85 (2005).

291. *Torres*, 142 S. Ct. at 2464.

292. *Id.* (emphasis added).

293. *Id.* at 2460.

294. *Id.* at 2463 (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2256 (2021)).

295. *Id.*

296. The Court's reliance on history was similarly misplaced. For example, the Court stated

Justice Thomas, joined by Justices Alito, Gorsuch, and Barrett, dissented.[297] He argued that *Alden v. Maine* foreclosed the Court's decision and that in any event "the States did not implicitly agree to surrender their state-court immunity against congressional exercises of the war powers."[298] He began by quoting *Alden*'s broad holding: "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."[299] In his view, "*Alden* should have squarely foreclosed [the Court's] holding."[300] He also found the Court's supposed distinction between "plan-of-the-Convention waiver" and "congressional abrogation" to be unpersuasive because both inquiries ask the same basic question—"whether Congress has authorized suit against a nonconsenting State pursuant to 'a valid exercise of constitutional authority.'"[301]

Justice Thomas further explained that, even if a "plan-of-the-Convention waiver" were consistent with *Alden*, the "stringent" test for such waivers was not met in this case.[302] In his view, that test requires "compelling evidence," including "evidence of the original understanding of the Constitution, early congressional practice, the structure of the Constitution itself, and the theory and reasoning of our earlier cases."[303] He found each of these indicia lacking.[304] Finally, he criticized the Court for adopting "a test [for plan-of-the-Convention waivers] that even Torres did not press"—"whether the

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that an early Congress required "Virginia to give land to some Revolutionary War officers" and suggested that the Commonwealth could not have refused to do so. *Id.* at 2464. The statute in question, however, involved federal land that Virginia ceded to Congress under the Articles of Confederation for the purpose of rewarding military officers from Virginia. *See* Gregory Ablavsky, *The Rise of Federal Title*, 106 CAL. L. REV. 631, 654 (2018) (mentioning federal government's use of federal statute to distribute "Virginian grants"). Congress, therefore, made no attempt to command the Commonwealth or its resources against its will.

297. *Torres*, 142 S. Ct. at 2469.

298. *Id.* (Thomas, J., dissenting).

299. *Id.* at 2474 (quoting Alden v. Maine, 527 U.S. 706, 712 (1999)). Notably, Justice Kagan acknowledged her previous belief "that our precedents had shut the door on further Article I exceptions to state sovereign immunity." *Id.* at 2469 (Kagan, J., concurring).

300. *Id.* at 2470 (Thomas, J., dissenting).

301. *Id.* at 2471 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000)).

302. *Id.* at 2475.

303. *Id.* (internal quotation marks omitted) (citations omitted).

304. *Id.*

federal power at issue is 'complete in itself.'"[305] Justice Thomas characterized this test as a "contrivance" that "has the certainty and objectivity of a Rorschach test."[306] That approach, he explained, "threatens to rework or erase the Court's prevailing sovereign immunity jurisprudence," particularly *Seminole Tribe*.[307] Although the Court had used the phrase in *PennEast*, he explained that the federal eminent domain power in that case was "'inextricably intertwined' with judicial proceedings."[308] He accused the Court of abandoning this limiting principle without adequately defining what it means for a federal power to be "complete in itself."[309] He regarded the Court's conclusory explanation (that "the States consented to the exercise of that power—in its entirety—in the plan of the Convention") to be "self-referential" and question-begging.[310]

The *Torres* dissent is persuasive as far as it goes, but there are at least three additional reasons why the Court's use of strong purposivism in this context is incompatible with the Constitution's text as understood in its full historical context. First, as Hamilton explained, the Constitution "admitted" a set of background rules that both governed and limited the alienation of sovereign rights in legal instruments used for this purpose.[311] These rules did not permit—but prohibited—implied structural waivers of the kind found by the Court. Under these rules, the States recognized by the Constitution could alienate their sovereign rights—including their sovereign immunity—only if the constitutional text did so clearly and expressly or by unavoidable implication.[312] Congress's Article I powers fail this test. Second, the *Torres* Court's invocation of implied structural waivers is an especially problematic example of the kind of freeform purposivism that overrides the hard-fought

305. *Id.* at 2481 (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2262 (2021)).

306. *Id.*

307. *Id.*; *see also id.* at 2485 ("Therefore, if *Seminole Tribe* was right, then the Court's decision today is wrong.").

308. *Id.* at 2482 (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2260 (2021)).

309. *Id.* at 2483 (quoting *PennEast*, 141 S. Ct. at 2263).

310. *Id.*

311. THE FEDERALIST NO. 32, *supra* note 14, at 203 (Alexander Hamilton).

312. *See* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 530.

compromises built into the Constitution's precise text. These compromises included abandoning Congress' power to requisition States under the Articles of Confederation in favor of granting Congress the novel alternative power to tax and regulate individuals directly. The grant of federal power to regulate individuals within the States' territory, however, does not support finding an implied waiver of the States' distinct right to sovereign immunity from suits by individuals—a right that the original Constitution (as affirmed by the Eleventh Amendment) left intact. Third, although *Torres* purported to apply Hamilton's test for finding an alienation of the States' sovereign rights, it both distorted and misapplied the test. Part III addresses these points in turn.

III. EVALUATING IMPLIED STRUCTURAL WAIVERS

The Supreme Court's newfound doctrine of implied structural waivers of state sovereign immunity is difficult to square with the constitutional text as understood in historical context. The constitutional structure has two essential features—federalism and separation of powers.[313] Both were designed to provide significant checks and balances against the concentration and abuse of government power and thus to play a significant role in preserving individual liberty.[314] The Supreme Court has long recognized that both features of the constitutional structure were designed to protect individual liberty.[315] But the Constitution did not adopt federalism

313. *See* THE FEDERALIST NO. 51, *supra* note 14, at 351 (James Madison) ("In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments.").

314. As James Madison observed, by employing both features, the constitutional structure provides "a double security ... to the rights of the people." *Id.* Similarly, Madison later explained that by dividing governmental power between two governments (state and federal) and then subdividing that power in three branches, the Constitution "increases the security of liberty more than any Government that ever was." James Madison, Address to the Virginia Convention (June 14, 1788), *in* 10 DHRC, *supra* note 166, at 1258, 1295.

315. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); Bowsher v. Synar, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure

and separation of powers as abstract values. These concepts are shorthand for a series of hard-fought compromises over allocation of government power expressed in the constitutional text. Thus, the content of separation of powers and federalism can be found only by recovering the meaning of the text in its full historical context. It is not possible to ascertain the scope of federalism or separation of powers solely by invoking the general purposes of the text irrespective of the meaning of the language actually employed. Moreover, legal texts generally reflect competing purposes pitched at different levels of generality. For example, the purpose of allocating limited powers to the federal government was *both* to grant power and to limit it. Accordingly, reasonable minds can and do differ regarding the "purpose" of any particular constitutional provision.

For this reason, as John Manning has observed, "the Constitution adopts *no freestanding principle of separation of powers*" divorced from the Constitution's specific allocations of governmental power.[316] Separation of powers in the Constitution, rather, "reflects many particular decisions about how to allocate and condition the exercise of federal power."[317] Likewise, "there is no meaningful sense in which the constitutionmakers or the constitutionmaking process can be said to have adopted federalism in the abstract" divorced from the Constitution's specific allocation of powers to the federal government and reservations of residual powers to the States.[318] Thus, when the Court grounds its structural decisions in the abstract purposes of constitutional provisions, it risks distorting the Constitution's actual allocation of sovereign rights and powers. Rather than define federalism according to broad constitutional purposes, interpreters should understand federalism by reference to "the way it was hammered out in the document."[319]

Because federalism is not an abstract theory subject to freeform judicial divination, the proper way for judges to determine the

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liberty.'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).

316. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) [hereinafter Manning, *Separation of Powers*].

317. *Id.* at 1945.

318. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2007 (2009) [hereinafter Manning, *Federalism*].

319. *Id.* at 2008.

extent to which the States retained their sovereign immunity—an essential element of federalism—is to ascertain the meaning of the constitutional text in historical context. As discussed in Part I, the law of nations established background rules governing the interpretation of all legal instruments used to alienate sovereign rights. And as Hamilton explained, given the function of the Constitution to divide "the sovereign power," the "whole tenor of the instrument" "admitted" these rules.[320] Under these rules, a legal instrument—such as the Constitution—could alienate a sovereign state's preexisting rights only by doing so clearly and expressly or by unavoidable implication.[321] Vague or ambiguous provisions did not alienate such rights. This framework grounds state sovereign immunity in the proper understanding of the constitutional text. It also underscores the problematic nature of the *Torres* Court's new purposivism, which conceptualizes the federal-state balance at a high level of generality untethered from the original public meaning of the constitutional text.

This Part makes three points. First, the Supreme Court's new purposive approach to state sovereign immunity ignores the background rules of interpretation that informed the language and meaning of the Constitution and thus, as explained, became an integral part of the Constitution itself. Specifically, the Court's approach treats the *express* alienation of one sovereign right in the original Constitution—the States' right to exercise exclusive legislative authority over their own citizens within their own territory—as an *implied* structural waiver of an entirely different sovereign right—the States' immunity from suit by individuals. The rules governing the alienation of sovereign rights at the Founding did not permit but prohibited such implied waivers. In addition, the Court's new purposivism represents a form of freestanding alienation of state prerogatives antithetical to a written Constitution comprised of hard-fought compromises. The Constitution was an instrument used by the people of the several States to transfer a fixed subset of the States' sovereign rights and powers to the federal government. By expanding the scope of this transfer through novel

320. THE FEDERALIST NO. 32, *supra* note 14, at 203 (Alexander Hamilton).

321. *See* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 530.

and highly malleable purposive inquiries, the Court's recent decisions are at odds with the very nature of the Constitution. The Court should abandon its new approach in favor of the long-standing rule that Hamilton used to ascertain and defend the meaning of the constitutional text.

Second, understood in context, the Constitution's text supports the Supreme Court's traditional understanding that Congress lacks Article I power to abrogate state sovereign immunity. With the arguable exception of the citizen-state diversity provisions of Article III (later neutralized by the Eleventh Amendment), no provision of the original Constitution was sufficiently clear to alienate the States' sovereign immunity from suit by individuals. The absence of such provisions supports the Court's decisions in *Seminole Tribe* and *Alden* that Congress lacks Article I power to abrogate state sovereign immunity. By contrast, because the Reconstruction Amendments imposed clear and express prohibitions on the States and gave Congress express power to enforce them against States, these provisions support the Court's conclusion in *Fitzpatrick* that Congress may subject States to suit as a means of enforcing the Amendments.

Third, the Supreme Court's new purposive approach to state sovereign immunity not only contradicts the original meaning of the Constitution's text, but confers open-ended discretion upon the judiciary to remake the federal system. The Court's opinion in *Torres* illustrates the breadth of this discretion. The Court elevated the perceived purpose of the Army and Navy Clauses over the meaning of the constitutional text as understood in historical context. It also purported to apply—but badly distorted—Hamilton's test for finding an alienation of the States' sovereign rights. Moreover, the Court's approach has no logical stopping point and arguably enables Congress to override state sovereign immunity—and all of the States' other residual sovereign rights—pursuant to any and all Article I powers. Such sweeping power is at odds with the rules of interpretation governing legal instruments used or claimed to alienate sovereign rights—rules that are an inseparable part of the Constitution's meaning.

A. The Problem with a Purposive Approach

In *Torres*, the Court employed a problematic type of freeform purposivism antithetical to a written Constitution used to divide rights and powers among different sovereigns. The *Torres* Court found an implied "structural waiver" of state sovereignty without attempting to recover the original public meaning of the Constitution's text in historical context.[322] Dean John Manning has criticized the Rehnquist and the Roberts Courts for engaging in what he calls the "new structuralism," which relies on "freestanding principles of federalism and separation of powers" to resolve questions of constitutional structure.[323] Without passing on the merits of the Court's specific decisions, Manning observes that this type of purposive reasoning pays too little attention to the hard-fought compromises built into the constitutional text and thus gives the judiciary excess discretion. The *Torres* Court's finding of an implied "structural waiver" employs the kind of reasoning Manning rejects because it relies on a freestanding conception of the constitutional structure rather than a careful interpretation of the constitutional text. As discussed below, had the *Torres* Court attempted to understand the Constitution's text in its full historical context, it would have concluded—as Alexander Hamilton did—that "there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of" their sovereign immunity from suit by individuals.[324]

The overarching constitutional structure undoubtedly plays a role in constitutional interpretation, but there are limits to its appropriate use.[325] Merely invoking the constitutional structure in the

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322. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2462 (2022).

323. *See* Manning, *Constitutional Power*, *supra* note 27, at 4.

324. *See* THE FEDERALIST NO. 81, *supra* note 14, at 549 (Alexander Hamilton). Although Manning has criticized the Court's use of freestanding federalism to justify state sovereign immunity beyond the terms of the Eleventh Amendment, *see* Manning, *Eleventh Amendment*, *supra* note 182, at 1682-83, he has acknowledged the possibility that "support for some of the Court's holdings [may] remain[ ] to be found in parts of the historical record it has yet to explore." Manning, *Constitutional Power*, *supra* note 27, at 80, 80 n.454 (citing Clark, *Eleventh Amendment*, *supra* note 2). This Article examines that historical record.

325. *See* Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CAL. L. REV. 699, 720-21 (2008); Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Fi-*

abstract does not justify reaching conclusions that contradict the text. The text creates the constitutional structure, and whatever rules of interpretation generally apply to the constitutional text should also apply to the provisions of the text that establish the structure. Accordingly, to ascertain the precise contours of the constitutional structure, one must carefully examine the meaning of the constitutional text used to create the structure, understood in its full historical and legal context. In this case, the relevant context necessarily includes the background rules governing the alienation of sovereign rights.

When a legal text is adopted against the background of a long-standing and well-established rule of interpretation applicable to the subject matter of the text, the rule of interpretation is inseparable from the text, and the rule itself is an essential component of its meaning. As Justice Antonin Scalia explained in the context of statutory interpretation, when canons of interpretation "have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language."[326] In other words:

> It might be said that rules like these, so deeply ingrained, must be known to both drafter and reader alike so that they can be considered *inseparable* from the meaning of the text. A traditional and hence anticipated rule of interpretation, no less than a traditional and hence anticipated meaning of a word, imparts meaning.[327]

John Manning has endorsed and elaborated this understanding. As he puts it, "If the meaning of a text depends on the shared background conventions of the relevant linguistic community, then any reasonable user of language must know 'the assumptions shared by the speakers and the intended audience.'"[328] When a legal text is

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nance Reform and Congressional Timidity, 92 GEO. L.J. 833, 841 (2004); Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 730 (2000).

326. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RESERVE L. REV. 581, 583 (1990).

327. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 31 (2012) (emphasis added).

328. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2467 (2003)

claimed to make an extraordinary change in the status quo ante, there is even greater reason to presume that the lawmaker and the governed understood the text by reference to the applicable background rule.

This familiar mode of interpretation applies to the Constitution's alienation of sovereign rights and powers,[329] and can be summarized in the following steps. First, the law frequently recognizes well-established background rules of interpretation to govern legal instruments used to perform certain functions. In the context of the Constitution, the law of nations provided that legal instruments of all kinds (treaties, statutes, and the like) should be interpreted to divest preexisting sovereign rights or powers only if the instrument in question did so in clear and express terms or by unavoidable implication. Second, it is fair to presume that lawmakers and the governed were aware of such long-standing and well-established rules when the law was formulated and adopted, just as it fair to presume that they understood the linguistic meaning of the words they employed. And this presumption is stronger when the legal operation to which the rule applies is extraordinary. The legal operation that the Constitution performed—divesting States of sovereign rights and powers—was far from routine, and misinterpreting an instrument to perform that operation when it was unclear could lead to conflict or war. As we have explained, there is abundant evidence that those who participated in the ratification debates were well aware of this rule. Third, because the text is adopted on the presupposition that the rule will contribute to its meaning, the rule is inseparable from the text. These principles apply fully to the relationship between the Constitution and the background rule governing legal instruments used to alienate sovereign rights. Hamilton applied this familiar mode of interpretation when

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[hereinafter Manning, *The Absurdity Doctrine*] (quoting Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1991)); *id.* at 2457 (explaining that even strict textualists "believe that [legal instruments] convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts").

329. *See* Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 595-98 (explaining that faithful interpretation of the Constitution requires courts to interpret its text in accordance with the background rules that governed the transfer of sovereign rights at the Founding).

he observed that the Constitution, by its "whole tenor," "admitted" the rule that the States retained their preexisting sovereign rights—including their sovereign immunity from suit by individuals—unless the Constitution divested them "expressly" or by unavoidable implication.[330]

In *Torres*, the Supreme Court did not undertake to ascertain the meaning of the constitutional text by reference to the background rule integral to all instruments used to transfer sovereign rights. Instead, it relied on a conclusory finding of a "structural waiver" inferred from broad constitutional purposes divorced from the text.[331] As John Manning has explained, this kind of

> free-form structural inference first shifts the Constitution's level of generality upward by distilling from diverse clauses an abstract shared value—such as property, privacy, federalism, nationalism, or countless others—and then applies that value to resolve issues that sit outside the particular clauses that limit and define the value.[332]

The *Torres* opinion followed this pattern. "When abstracted from particular constitutional provisions or specific historical practices, such broad values leave judges with a great deal of discretion."[333] The *Torres* Court's exercise of such broad discretion contradicts the rules admitted by the Constitution as part of its original meaning. Under those rules, the Constitution was capable of alienating the States' right to sovereign immunity only by including constitutional provisions that did so expressly or by unavoidable implication. The Army and Navy Clauses at issue in *Torres* do not meet this test.

John Manning has criticized the Supreme Court's reliance on this kind of "new structuralism" in both separation of powers[334] and federalism cases.[335] His objections to "freestanding federalism," however, apply with particular force to the *Torres* Court's new purposive approach to state sovereign immunity. As he has pointed out, the

330. THE FEDERALIST No. 32, *supra* note 14, at 203 (Alexander Hamilton).

331. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2463 (2022) (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2263 (2021)).

332. Manning, *Constitutional Power*, *supra* note 27, at 32.

333. *Id.*

334. *See* Manning, *Separation of Powers*, *supra* note 316, at 1944.

335. *See* Manning, *Federalism*, *supra* note 318, at 2007.

Constitution does not define federalism—the balance between federal and state power—in the abstract. Rather, because the founders simultaneously pursued both "the goal of federalism or state autonomy" and "the competing goal of strengthening national authority,"[336] the federal structure created by the Constitution "simply lacks meaning, considered apart from the way it was hammered out in the document."[337] By resting its decision on an implied "structural waiver" of state sovereign immunity inferred from the broad abstract purposes underlying the Army and Navy Clauses, the *Torres* Court "ignore[d] the resultant bargains and tradeoffs that made their way into the document."[338] As discussed in Part I, these tradeoffs included the Founders' decisions to abandon Congress's power under the Articles to command States to raise and support the armed forces and instead to empower Congress to accomplish these goals through the alternative of taxing and regulating individuals directly. This shift clearly and expressly alienated the States' right to exercise exclusive territorial sovereignty over their citizens, but said nothing about—and therefore left intact—the States' separate and distinct right to sovereign immunity.

Ignoring the trade-offs embedded in the constitutional text is particularly problematic with respect to instruments like the U.S. Constitution that allocate authority among multiple sovereigns. As Vicki Jackson has explained, "federal constitutional arrangements are typically put together as a specific 'compromise' among existing power holders and ... these arrangements are typically part of a set of interrelated arrangements (a 'package deal')."[339] Thus, "[c]onstitutionmaking entails disagreement and compromise by stakeholders who have the right to insist upon compromise as the price of their assent."[340] This dynamic was evident at the Philadelphia Convention, which brokered innumerable compromises between the larger and smaller States who favored more or less federal and state power and sought very different checks and balances.[341] The resulting

336. *Id.* at 2008.

337. *Id.*

338. *Id.*

339. Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L. J. CONST. L. 91, 110 (2004).

340. Manning, *Federalism*, *supra* note 318, at 2004.

341. *See* Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83

constitutional text reflected these compromises. When courts forgo careful analysis of the text and instead pursue abstract constitutional values at a high level of generality, they override these hard-fought compromises and unravel the package deal. In other words, reliance on purposive structural inferences improperly permits "judges to go outside—that is, to shift—the level of generality set by those who bargained over the means, as well as the ends, of the relevant constitutional provisions."[342]

The Supreme Court disregarded just such compromises in *Torres*. The Court characterized the goals of the Army and Navy Clauses at a high level of generality, and ignored the compromises struck by the Convention to restrict the means available to the federal government to pursue those ends. As explained in Part I, the Articles of Confederation gave Congress power to raise and support the armed forces but required it to exercise that power solely by requisitioning the States. This approach failed, in part because the Articles gave Congress no means of enforcing requisitions. Like the Articles, the Constitution empowered Congress to raise and support the armed forces but gave it completely different means to do so. Instead of empowering Congress to requisition—or commandeer—the States, the Constitution chose the novel means of allowing Congress to tax and regulate individuals directly.[343] This innovation compromised, for the first time, the States' right to exercise exclusive territorial sovereignty over their own citizens. Notably, however, the Constitution did not give Congress express power to commandeer the States or to subject them to suit by individuals. As discussed, the Founders relied on the first means (power to regulate individuals) because they regarded the alternative (power to force States to raise and support the armed forces) as too dangerous to confer. Thus, the only means that the constitutional text gave Congress to raise and support the armed forces was to tax and regulate persons and property directly. It gave Congress no power

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NOTRE DAME L. REV. 1421, 1435 (2008).

342. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 442 (2010).

343. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2483 (2022) (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2263 (2021)).

to commandeer the States to raise the armed forces on its behalf or to subject States to suit for failure to do so.

Given this conscious shift from the Articles of Confederation to the Constitution, the *Torres* Court was wrong to claim that the "plan of the Convention" alienated the States' sovereign immunity merely by giving Congress power to raise and support the armed forces.[344] No matter how broadly one construes these substantive provisions, they do not include the power to commandeer the States' assistance or to override their sovereign immunity. At the Founding, States possessed (among others) three distinct rights: (1) the right to exercise exclusive territorial sovereignty over their citizens, (2) the right not to be commandeered by another sovereign, and (3) the right to enjoy sovereign immunity from suit by individuals.[345] By adopting the Constitution, the people clearly and expressly alienated the first right (among others) on behalf of their respective States, but left the second and third rights undisturbed. *Torres* conflated these distinct rights by holding that the States' alienation of the first right somehow gave rise to an implied structural waiver of the third right. This was clear error. Under the rules governing the alienation of sovereign rights, the people of the several States could have waived—or alienated—state sovereign immunity only by including constitutional provisions that did so expressly or by unavoidable implication. The Army and Navy Clauses did neither.

B. The Article I/Section 5 Dichotomy

Before evaluating *Torres* in detail, it is useful to recall the textual basis for the Supreme Court's traditional distinction between permissible congressional abrogation of state sovereign immunity under Section 5 of the Fourteenth Amendment and impermissible abrogation pursuant to Article I. The Constitution continued to use the term "States" to refer to the political entities from which the people transferred rights and powers to a newly created federal government. Prior to the Constitution's adoption, the States enjoyed a well-established set of rights and powers under the law of nations,

344. *See* U.S. CONST., art. I, § 8, cl.1.
345. *See supra* Part I.C.1.b.

including sovereign immunity.[346] A legal instrument could alienate those rights and powers, but only if it did so clearly and expressly or by unavoidable implication. As explained, the only provisions of the original Constitution that arguably could be construed to meet this standard were the citizen-state diversity provisions found in Article III. Once the Eleventh Amendment foreclosed this construction, there was no other plausible basis in the original Constitution for finding that the States alienated their sovereign immunity from suit by individuals.

Following the Eleventh Amendment's adoption, the Supreme Court proceeded to uphold state sovereign immunity for the next two centuries.[347] The Eleventh Amendment was not the source of this immunity because it neither conferred nor sought to restrict it. As elaborated below, the source of the States' immunity was the rule, inextricably woven into the Constitution itself, that governed all alienations of rights and powers by sovereign states. Because neither the Eleventh Amendment nor—in its aftermath—the original Constitution contained explicit provisions alienating state sovereign immunity, it remained an inherent right of the States.[348] The rules admitted by the Constitution to govern the alienation of sovereign rights, did not recognize implied structural waivers of the kind found in *Torres*, and thus such implied "waivers" did not exist as a means of divesting sovereign rights.

The settled understanding of state sovereign immunity endured until the second half of the twentieth century when Congress began adopting statutes that purported to abrogate such immunity. As discussed in Part II, the Supreme Court generally invalidated abrogation provisions enacted under Article I,[349] but generally upheld abrogation provisions enacted pursuant to Section 5 of the

346. *See supra* Part I.A.

347. *See supra* notes 184-230 and accompanying text.

348. Dean John Manning has tentatively suggested that "the specific text of the Eleventh Amendment, read in context, appears to convey a negative implication that should preclude the derivation of further classes of state sovereign immunity from suit in federal court." Manning, *Eleventh Amendment*, *supra* note 182, at 1671. Whatever rules govern negative implications in other contexts, the background rules governing constitutional interpretation permit the alienation of the States' sovereign rights only when the constitutional text does so expressly or by unavoidable implication. *See supra* Part I. The Eleventh Amendment does not meet this test.

349. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996).

Fourteenth Amendment.[350] This dichotomy is consistent with the original meaning of the plan of the Convention as understood against the background rules that governed the interpretation of instruments used to alienate sovereign rights. If one looks beyond the ambiguous provisions of Article III clarified by the Eleventh Amendment, "there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."[351] Thus, *Seminole Tribe* correctly interpreted Article I to grant Congress no power to abrogate state sovereign immunity. As discussed, Article I was designed to give Congress power to issue and enforce legislative commands against the people and things within the States, but not to commandeer the States or subject them to suits by individuals to enforce such commands. The Founders' rationale behind this choice of means, of course, was to avoid a civil war.

Those who drafted and ratified the Reconstruction Amendments had a different perspective and made a different choice because they were adopting constitutional amendments to restrain recalcitrant States in the immediate aftermath of the Civil War. These Amendments imposed explicit new constraints on the States, and gave Congress explicit power to enforce them against States.[352] Because "[t]hese constitutional provisions arose out of the Civil War, ... their proponents were more than willing to enforce them against states through suits and—if necessary—military force."[353] By ratifying these Amendments, the States alienated sovereign rights that they had not relinquished in the original Constitution, including their right to sovereign immunity from suits that Congress might authorize to enforce the Amendments.[354] Seen in this light, the same background rules that preclude reading Article I to override state

350. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

351. THE FEDERALIST NO. 81, *supra* note 14, at 549 (Alexander Hamilton).

352. *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1233-37 (2012) (explaining that the Reconstruction Amendments represented a reduction in state sovereignty and an expansion of congressional power to abrogate such sovereignty).

353. Clark, *Eleventh Amendment*, *supra* note 2, at 1909.

354. *See* Tolson, *supra* note 352, at 1233-37.

sovereign immunity support reading the Reconstruction Amendments to empower Congress to alienate state sovereign immunity to enforce their prohibitions.[355]

Two of the Supreme Court's leading decisions adopted this distinction. In *Fitzpatrick v. Bitzer*, the Court held that Congress may use its Section 5 power to subject States to suit by individuals who allege violations of their Fourteenth Amendment rights.[356] The Court reasoned, in part, that the Fourteenth Amendment—unlike Article I—gives Congress explicit authority to enforce prohibitions against the States.[357] *Seminole Tribe* reaffirmed this understanding of the Fourteenth Amendment in the course of holding that Article I does not suffice to alienate state sovereign immunity.[358] Understood against the backdrop of the rules governing the alienation of sovereign rights, these differences between the Reconstruction Amendments and the original Constitution provide a persuasive textual basis for the Court's traditional dichotomy between permissible abrogation pursuant to Section 5 and impermissible abrogation under Article I.

In 2022, the Supreme Court upended this paradigm in *Torres* by elevating the abstract purposes underlying the Constitution's structure over the meaning of its text in historical context. Rather than finding a narrow exception to *Seminole Tribe* and its progeny, the Court used a form of strong purposivism to recognize implied structural waivers of state sovereign immunity whenever Congress subjects States to suit pursuant to an Article I power that is "complete in itself."[359] The Court's new approach calls into question

355. *See supra* Part I.A.

356. 427 U.S. 445, 456 (1976).

357. *See* Tolson, *supra* note 352, at 1233-37. Not all commentators agree that the Fourteenth Amendment gave Congress this power. *See* John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 369 (concluding that the Fourteenth Amendment did not give Congress power to override state sovereign immunity); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 490, 537-38 (2001) (arguing that the Court's decision in *Fitzpatrick* was "dubious" and that if its "result is constitutionally sustainable, it is not on any ground advanced by the Court").

358. 517 U.S. 44, 72-73 (1996). In keeping with the Court's dichotomy, Will Baude has suggested that because the Fourteenth Amendment's enforcement power is arguably broader then Article I's necessary and proper power, the Fourteenth Amendment may include an abrogation power even though Article I does not. *See* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 19-20 (2017).

359. Torres v. Texas Dep't of Pub. Safety, 142 S. Ct. 2455, 2466 (2022) (quoting PennEast

almost all of the Court's sovereign immunity decisions beginning with *Seminole Tribe*. If Congress's power to raise and support armies gives rise to an implied structural waiver of state sovereign immunity, then most, if not all, of Congress's other powers can be read the same way. In addition, the *Torres* Court's structural reasoning is not limited to abrogation of state sovereign immunity, but appears to encompass other aspects of state sovereignty as well. Whether or not the Court intended such a broad restructuring of the federal system, its opinion leaves the door open to this result. As the next section explains, *Torres* not only threatens to overturn decades of precedent, but also employs a problematic type of freeform purposivism that is inappropriate for interpreting a written Constitution used to divide sovereign rights and powers.

C. The Torres *Court's Missteps*

Torres is a textbook example of freeform purposivism divorced from the original public meaning of the constitutional text. The *Torres* Court concluded that the States implicitly waived their sovereign immunity merely by granting Congress an Article I power that the Court characterized as "complete in itself."[360] In *Torres*, the Court first identified an abstract value underlying the Army and Navy Clauses ("raising and maintaining the national military"),[361] and then applied that value to resolve an issue not addressed by those Clauses (whether Congress may abrogate state sovereign immunity as a means of furthering that value). This approach disregards the original public meaning of the constitutional text and the compromises it expresses.

As discussed below, the *Torres* Court's opinion suffers from three fundamental flaws. First, the Court's reliance on the broad purposes that it believes underlie the Army and Navy Clauses gives the judiciary open-ended discretion to override the hard-fought compromises hammered out in the constitutional text. Second, finding an implied structural waiver of the States' sovereign rights violates the background rules of interpretation admitted by the Constitution,

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Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2263 (2021)).

360. *Id.* at 2466 (quoting *PennEast*, 141 S. Ct. at 2263).

361. *Id.* at 2464.

and—contrary to the Court's assertion[362]—finds no support in Hamilton's writings. Third, the Court's assertion that an Article I power "complete in itself"[363] gives rise to implied structural waivers of sovereign rights[364] has no logical stopping point. As Chief Justice Marshall recognized, every power "vested in Congress" is "complete in itself."[365] Thus, the Court's broadly worded test, if taken seriously, has the potential to undermine, if not eviscerate, the federal system. Properly construed, the Constitution's grant of "complete" powers to the federal government alienated the States' right to exercise exclusive territorial sovereignty over its citizens. That grant did nothing, however, to alienate the States' separate and distinct right to sovereign immunity.

1. Elevating Purpose Over Text

In finding an implied structural waiver of state sovereign immunity, the *Torres* Court elevated its abstract conception of the Constitution's purpose over the precise meaning of its text taken in historical context. The Court began its analysis by making several basic observations about the federal system. It acknowledged that "[t]he Constitution forged a Union, but it also protected the sovereign prerogatives of States within our government."[366] The States, the Court explained, "'entered the federal system with their sovereignty,' including their sovereign immunity, 'intact.'"[367] In addition, the Court continued, "basic tenets of sovereign immunity teach that courts may not ordinarily hear a suit brought by any person against a nonconsenting State."[368] These standard observations are all consistent with the constitutional plan.[369]

362. *See id.* at 2462 (citing Hamilton's writings).

363. *Id.* at 2466 (quoting *PennEast*, 141 S. Ct. at 2263).

364. *See id.* at 2469 ("Text, history, and precedent show that the States, in coming together to form a Union, agreed to sacrifice their sovereign immunity for the good of the common defense.").

365. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

366. *Torres*, 142 S. Ct. at 2461.

367. *Id.* (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)).

368. *Id.* at 2461-62.

369. *See supra* Part I.C. (describing the Constitutional plan).

The Court made a fundamental error, however, in asserting that the States implicitly waived their sovereign immunity in the structure of the Constitution simply by granting Congress the power to raise and support the armed forces—a power that it characterized as "complete in itself."[370] The Court first noted that "the Constitution's text, across several Articles, strongly suggests a complete delegation of authority to the Federal Government to provide for the common defense."[371] The Court then noted that "[t]he Constitution also divests the States of like [power]"[372] because Article I, Section 10 provides that "States may not 'engage in War, unless actually invaded,' 'enter into any Treaty,' or 'keep Troops, or Ships of War in time of Peace.'"[373] These observations are uncontroversial, but say nothing about the Constitution's effect on state sovereign immunity. According to the Court, however, these provisions "provide strong evidence that the structure of the Constitution prevents States from frustrating national objectives in this field,"[374] and state sovereign immunity would "thwart"[375] or "frustrate"[376] those objectives. The Court concluded that "[t]he States ultimately ratified the Constitution knowing that their sovereignty would give way to national military policy."[377]

The *Torres* Court's reasoning is a problematic example of freeform purposivism because the Court first "shift[ed] the Constitution's level of generality upward by distilling from diverse clauses an abstract shared value" (preventing States from frustrating national military objectives), "and then applie[d] that value to resolve issues that sit outside the particular clauses that limit and define the value" (whether the States alienated their sovereign immunity).[378] According to the Court, because the States' retention of sovereign

370. *Torres*, 142 S. Ct. at 2466 (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2263 (2021)).
371. *Id.* at 2463.
372. *Id.*
373. *Id.* (quoting U.S. CONST. art. I, § 10, cls. 1, 3).
374. *Id.* at 2464.
375. *Id.* at 2463 (quoting *PennEast*, 141 S. Ct. at 2256).
376. *Id.*
377. *Id.* at 2464.
378. *See* Manning, *Constitutional Power*, *supra* note 27, at 32.

immunity would "thwart"[379] or "frustrat[e] national objectives,"[380] the Constitution includes an implied "structural waiver" of such immunity.[381] Contrary to the Court's reasoning, however, the States did not implicitly waive their sovereign immunity simply because the federal government would benefit from its absence. This form of analysis improperly gives courts discretion to glean federal power from high-level abstract values and sidestep the careful demarcation of federal and state powers set forth in the constitutional text.

In order to determine whether the States waived their sovereign immunity in the plan of the Convention, the *Torres* Court should have looked not to the abstract purposes underlying Article I, but to the precise meaning and effect of the constitutional text as understood in light of the rules governing the alienation of sovereign rights. This was Alexander Hamilton's approach in *The Federalist*. As he explained, because the Constitution involved a "division of the sovereign power," it necessarily "admitted" "the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[382] Under this rule, the States retained all sovereign rights and powers that the Constitution did not alienate expressly or by unavoidable implication. As discussed, by granting Congress legislative powers over the individuals within their borders, the States clearly and expressly alienated—for the first time—their right to exercise exclusive territorial sovereignty over such individuals.[383] At the same time, however, the Constitution consciously omitted provisions that would have alienated other sovereign rights possessed by the States—such as their rights not to be commandeered by another sovereign and to sovereign immunity.[384] Under the rules governing the alienation of sovereign rights, the mere grant of an enumerated power to regulate individuals within the States—whether "complete" or incomplete—cannot justify finding an implied waiver of the States' distinct

379. *Torres*, 142 S. Ct. at 2463 (quoting *PennEast*, 141 S. Ct. at 2256).

380. *Id.* at 2464.

381. *Id.* at 2468.

382. THE FEDERALIST NO. 32, *supra* note 14, at 203 (Alexander Hamilton).

383. *See supra* Part I.C.1.

384. *See supra* Part I.C. (discussing the debates amongst leaders of the States over which States' rights the Constitution would alienate during the constitutional convention).

sovereign rights and powers.[385] Any such waiver—or alienation—could only be accomplished according to the same rules.

McCulloch v. Maryland illustrates the proper application of these principles. In *McCulloch*, the Supreme Court held that Congress had enumerated power to charter a Bank of the United States because doing so was "plainly adapted" to carrying into execution Congress's "great powers."[386] The conventional account is that *McCulloch* read Article I broadly to give Congress implied powers incidental to its enumerated powers. In fact, the Court simply applied the traditional rules of interpretation governing instruments claimed to alienate sovereign rights and sought to give the text of Article I its most natural meaning.[387] Chief Justice Marshall acknowledged that no provision of the Constitution explicitly granted Congress specific authority to charter a Bank, but he nonetheless found that Congress's "great powers" necessarily included this choice of means.[388] Among Congress's enumerated powers, he observed, "we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."[389] These powers expressly enabled Congress to pursue the most important ends of government, but they were silent regarding the means available to accomplish these ends.[390] The Court interpreted Congress's "great powers" to confer "ample means for their execution," including the power to charter a bank.[391]

While the *McCulloch* Court read the Constitution to empower Congress to charter a bank, it rejected the suggestion that Congress could use its Article I powers, including the Necessary and Proper power, to compel the States to charter their own banks. In this respect, *McCulloch* was the Court's first opinion to acknowledge that Congress lacks power to commandeer States to serve as

385. *See supra* Part I.B.2.

386. 17 U.S. (4 Wheat.) 316, 421, 424.

387. *See generally* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 880-81 (discussing *McCulloch* and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

388. *McCulloch*, 17 U.S. (4 Wheat.) at 406-07 ("Among the enumerated powers, we do not find that of establishing a bank or creating a corporation.").

389. *Id.* at 407.

390. *See id.* at 408.

391. *Id.* at 407-08. The Court also rejected the suggestion that these powers were constrained by the Necessary and Proper Clause. *Id.* at 408-09.

instruments of federal regulation. Under the law of nations, all sovereign "states" enjoyed the right not to be commandeered by another sovereign.[392] A legal instrument could alienate this right only if it did so clearly and expressly or by unavoidable implication.[393] The commandeering question arose because opponents of the Bank argued that it was unnecessary for Congress to create a national bank insofar as it could rely on state-chartered banks to support federal operations.[394] Marshall rejected this argument because he refused "[t]o impose on [the federal government] the necessity of resorting to means *which it cannot control*, which another government may furnish or withhold."[395] Requiring Congress to rely on state banks would "create a dependence on other governments, which might disappoint its most important designs."[396] Thus, although *McCulloch* is best known for upholding Congress's power to charter a bank, it is also the Court's first opinion recognizing the anti-commandeering principle.

If the Marshall Court had employed *Torres*' mode of analysis in *McCulloch*, then it could have recognized congressional power to commandeer the States to charter their own banks. In *Torres*, the Court found an implied structural waiver of state sovereign immunity because the States' retention of this right would have "frustrat[ed] national objectives" underlying the Army and Navy Clauses.[397] As in *Torres*, there is little doubt that the States' retention of their distinct sovereign right (not to be commandeered) would have "thwart[ed]"[398] or "frustrat[ed]"[399] the broad objectives underlying Congress's "great powers."[400] The *McCulloch* Court, however, denied the existence of congressional power to commandeer the States to create their own banks because the Constitution,

392. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 917-18.

393. *See supra* note 70 and accompanying text.

394. Joseph Hopkinson argued to the Court in *McCulloch* that the state banks were competent to serve all the purposes asserted to justify a Bank of the United States. *McCulloch*, 17 U.S. (4 Wheat.) at 333 (argument of counsel).

395. *Id.* at 424 (emphasis added).

396. *Id.*

397. Torres v. Texas Dep't of Pub. Safety, 142 S. Ct. 2455, 2463 (2022).

398. *Id.* (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2256 (2021)).

399. *Id.*

400. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

fairly read, could not be interpreted to alienate this aspect of state sovereignty.

Finally, the *Torres* Court's use of strong purposivism essentially conflates the "plan of the Convention"[401] with the failed plan of the Articles of Confederation. As discussed, the Articles gave Congress express power to requisition or commandeer the States to raise and support the armed forces, but no power to raise and support such forces directly itself.[402] The Constitution consciously adopted the opposite approach.[403] It gave Congress express power to raise and support the armed forces by taxing and regulating individuals directly, but withheld power to requisition the States.[404] Using abstract purposivism, the *Torres* Court essentially found that Congress's express power to raise and support armies directly includes an implied power to command the States to do so on its behalf and subject States to suits by individuals for failure to comply with such directives. Under this analysis, the Constitution gave Congress power not only to tax and regulate individuals directly, but also, by mere implication, to requisition States and to enforce such commands through judicial process at the behest of individuals. This approach violates the rules admitted by the Constitution to ascertain the extent to which it alienated the States' sovereign rights by confusing the plan of the Convention with the plan of the Articles of Confederation. As explained below, the Court's reasoning, taken to its logical conclusion, would enable Congress to compel the States

401. *Torres*, 142 S. Ct. at 2463.

402. *See supra* Part I.C.

403. *See supra* Part I.C. (discussing how the Constitution consciously alienated a different set of rights than the Articles of Confederation).

404. *See supra* Part I.C. It is unnecessary—and space does not permit us—to consider whether *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), properly overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976). Nor do we consider whether the breadth of *Garcia*'s reasoning comports with the background rules of interpretation governing the alienation of sovereign rights and the Convention's general plan to regulate individuals rather than States. Nonetheless, it is worth noting that *Garcia* did not purport to disturb the Court's earlier understanding that Congress lacks constitutional power to override other aspects of state sovereignty never surrendered in the plan of the Convention, such as a State's right to choose the location of its capital. *See* Coyle v. Oklahoma, 221 U.S. 559, 574 (1911). And, of course, *Garcia* was no impediment to the Court's subsequent holdings that the Constitution left important State sovereign rights in place, such as the right not to be commandeered. *See* New York v. United States, 505 U.S. 144, 161 (1992); Printz v. United States, 521 U.S. 898, 909 (1997); and state sovereign immunity, *see* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 53-54 (1996); Alden v. Maine, 527 U.S. 706, 712 (1999).

to shoulder the nation's defense obligations by subjecting States to suits for failure to fulfill them.

2. Misapplying Hamilton's Framework

In the course of finding an implied structural waiver, the *Torres* Court purported to apply, but badly distorted, the framework set forth by Alexander Hamilton in *The Federalist No. 32*. Although the Court accurately quoted Hamilton, it proceeded to mischaracterize his position, and then misapply it. In keeping with the law of nations, Hamilton identified only three circumstances in which the Constitution would alienate the States' sovereign rights and powers.[405] The *Torres* Court described Hamilton's framework as follows:

> Alexander Hamilton described three circumstances where the "plan of the Convention" implied that the States waived their sovereign immunity: "where the Constitution *in express terms* granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."[406]

The *Torres* Court proceeded to misapply this framework by suggesting that it supported an implied structural waiver of state sovereign immunity whenever such immunity would "frustrate"[407] or "thwart" a congressional power "complete in itself"[408]—a conclusion antithetical both to Hamilton's framework and to the law of nations upon which it was based.

First, the *Torres* Court turned Hamilton's analysis on its head by reading it to support implied waivers of sovereign immunity based on mere "frustration" of federal objectives.[409] Contrary to the Court's characterization, Hamilton was not describing "three circumstances

405. THE FEDERALIST NO. 32, *supra* note 14, at 200 (Alexander Hamilton).

406. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2462 (2022) (quoting THE FEDERALIST NO. 32, *supra* note 14, at 200 (Alexander Hamilton) (first emphasis added)).

407. *Id.* at 2463.

408. *Id.* (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2256, 2264 (2021)).

409. *See Torres*, 142 S. Ct. at 2463.

where 'the plan of the Convention' implied that the States waived their sovereign immunity."[410] Rather, he was describing the three precise circumstances in which the Constitution explicitly alienated preexisting State sovereign rights and powers either expressly or by unavoidable implication. As he explained, because "the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States."[411] Delegations or alienations of state sovereignty, he explained, were governed by "the rule that all authorities of which the States are not explicitly divested in favour of the Union, remain with them in full vigour."[412]

Applying this rule, he identified "three cases" in which the Constitution would operate to deprive the States of their sovereign rights.[413] The first two cases are relatively straightforward and inapplicable to *Torres*. The first case occurred "where the Constitution *in express terms* granted an exclusive authority to the Union."[414] The second case occurred "where [the Constitution] granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority."[415] This category relied on an express delegation to the federal government combined with an express prohibition on the States' exercise of similar authority. *Torres* fell within neither of these categories. The original Constitution does not grant Congress express power to override state sovereign immunity. Nor does it expressly prohibit the States from asserting their sovereign immunity.

At first blush, Hamilton's third category may appear to be a better candidate because it acknowledges that the text of the Constitution can alienate state sovereignty by unavoidable implication. This kind of "implied" alienation of state sovereign rights, however, is a narrow category.[416] It applies only when the Constitution "granted an authority to the Union, to which a similar authority in

410. *Id.* at 2462.
411. THE FEDERALIST NO. 32, *supra* note 14, at 200 (Alexander Hamilton).
412. *Id.* at 203.
413. *Id.* at 200.
414. *Id.* (emphasis added).
415. *Id.*
416. *See id.*

the States would be absolutely and totally *contradictory* and *repugnant*."[417] Whether one characterizes this category as recognizing explicit or implicit alienations of state sovereignty is largely semantic.[418] In either case, the prerequisite for finding alienation is that retention of similar authority by the States would be absolutely and totally incompatible with an explicit grant of constitutional authority to the federal government.[419] In this scenario, Hamilton explained that "[i]t is not ... a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty."[420]

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417. *Id.* This third category recited the well-established rule, described by Vattel, that legal instrument should not be interpreted to reserve a right or power that would render an express provision of that instrument a complete nullity. 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 283, at 223-24. For example, Vattel explained, if a party to a treaty expressly agreed to withdraw from the territories of the second party, the first party could not later claim a reserved right to occupy particular territory on the ground that the occupied territory did not belong to the second party though it was within its boundaries. To exempt such territory would nullify the other party's right to exclude the first party. *Id.*

418. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 884 ("If one regards these delegations as involving the kind of authority that may be exercised by only one sovereign at a time, then such delegations to the federal government necessarily convey a clear and express surrender of concurrent state sovereignty.").

419. There are several potential examples of alienation by unavoidable implication in the Constitution. For example, Article II states that "[t]he President shall be Commander in Chief ... of the Militia of the several States, when called into the actual Service of the United States." U.S. CONST. art. II, § 2, cl. 1. Although the text does not specify that this power is exclusive, a similar power in a state governor to be commander *in chief* of the militia on these occasions would be absolutely and totally contradictory and repugnant to the vesting of that power in the President. Two different governments cannot exercise this power at the same time because there can be only one "Commander in Chief." Another example is the federal Appointments Clause, which expressly provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court, and all other Officers of the United States." U.S. CONST. art. II, § 2, cl. 2. Even though the Constitution does not expressly indicate that this power is exclusive or expressly prohibit the States from appointing federal officers and judges, the grant of this power to the President and Senate necessarily precludes the States from exercising the same authority. Allowing the States to appoint federal officers would be "absolutely and totally *contradictory* and *repugnant*" to the finely wrought process expressly set forth in the Constitution. *See* THE FEDERALIST NO. 32, *supra* note 14, at 200 (Alexander Hamilton).

420. *Id.* at 202. Hamilton's approach corresponds to the rules supplied by the law of nations to govern the alienation of sovereign rights. In a "case of doubt," Vattel explained, "the presumption is in favor of the possessor," not the grantee. 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 305, at 233.

For at least two interrelated reasons, Hamilton's third category provides no support for the Court's holding in *Torres*. First, the States' possession of sovereign immunity is not "absolutely and totally *contradictory* and *repugnant*"[421] to Congress's Article I power to raise and support the armed forces. By the Court's own account, the States' possession of sovereign immunity would merely "frustrate" Congress's goal of encouraging military service. The Court says that such frustration would be "strongly '*contradictory* and *repugnant*' to the constitutional order," quoting Alexander Hamilton.[422] But that formulation is not Hamilton's test. The proper inquiry is whether the States' retention of a particular sovereign power would be "absolutely and totally contradictory and repugnant" to a similar federal authority.[423] Mere frustration of a federal power by an unrelated State right does not suffice. It is difficult to conclude that state sovereign immunity is absolutely and totally contradictory and repugnant to Congress's powers under the Army and Navy Clauses given that Congress exercised those powers for two centuries without overriding state sovereign immunity. Thus, Congress possessed ample means of recruiting and supporting service members through the innumerable methods it employed prior to enacting the USERRA. Although state sovereign immunity might make it more difficult for Congress to shift its military obligations to the States, such immunity is in no sense absolutely repugnant to Congress's authority to support the armed forces with the vast resources at its disposal.

Second, under Hamilton's third category, in order to find an irreconcilable conflict capable of alienating a state right by unavoidable implication, the state power must be "like" or "similar" to the federal power in question.[424] As Hamilton explained, it is only the concurrent exercise of *similar* powers that can generate the absolute and total repugnancy required to alienate state sovereignty.[425]

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421. THE FEDERALIST NO. 32, *supra* note 14, at 200 (Alexander Hamilton).

422. Torres v. Texas Dep't of Pub. Safety, 142 S. Ct. 2455, 2467 (2022). *See* THE FEDERALIST NO. 32, *supra* note 14, at 202 (Alexander Hamilton) ("It is not however a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty.").

423. THE FEDERALIST NO. 32, *supra* note 14, at 200 (Alexander Hamilton).

424. *Id.* at 200.

425. *Id.*

Torres does not satisfy this requirement. The States' right to sovereign immunity is not "similar" to Congress's power to raise and support the armed forces in the sense Hamilton described. It is only by envisioning a loose, vague, and extended chain of causation that state sovereign immunity poses any obstacle whatsoever to the exercise of federal power. For example, the Court asserted that, if States maintain sovereign immunity, their refusal to rehire veterans could "thwart national military readiness."[426] This type of attenuated causation has no logical stopping point and is a far cry from the kind of absolute and total repugnancy between similar state and federal powers envisioned by Hamilton's third category.[427]

Hamilton's actual application of these requirements in *The Federalist No. 32* highlights the deficiencies in the Court's reasoning. There, he addressed whether—by granting Congress the power to tax—the States would risk alienating their own sovereign right to tax within their own borders.[428] Anti-Federalists feared that Congress could use its power to tax to restrict the States' parallel authority.[429] Hamilton assured skeptics that established rules of interpretation would not permit an alienation of state authority in this instance.[430] Hamilton explained that the Constitution would alienate the States' preexisting power to tax only where it did so explicitly.[431] The Constitution contained only one explicit alienation and its specificity left the States' general power to tax undisturbed. Article I, Section 10 provides: "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws."[432] Accordingly, Hamilton "affirm[ed] that (with the sole exception of duties on imports and exports) [the States] would under the plan of the Convention retain that authority in the most

426. *Torres*, 142 S. Ct. at 2468-69.

427. For additional discussion of alienation of sovereign rights by unavoidable implication, see Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 12, at 604-06; Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 884-87.

428. *See* THE FEDERALIST NO. 32, *supra* note 14, at 201-02 (Alexander Hamilton).

429. Brutus, Letter I, N.Y. J., Oct. 18, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, 363, 367 (Herbert J. Storing ed., 1981); THE FEDERALIST NO. 32, *supra* note 14, at 201 (Alexander Hamilton).

430. THE FEDERALIST NO. 32, *supra* note 14, at 201-02 (Alexander Hamilton)

431. *Id.*

432. U.S. CONST. art. I, § 10, cl. 2.

absolute and unqualified sense."[433] He even went so far as to say "that an attempt on the part of the national Government to abridge [the States] in the exercise of [their power to tax] would be a violent assumption of power unwarranted by any article or clause of its Constitution."[434] Hamilton explained that because "the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States."[435]

Hamilton then described the three categories of exclusive delegation discussed above and concluded that none of them supported alienation of the States' right to tax. The first category was inapplicable because the Constitution did not expressly grant the United States exclusive taxing power.[436] The second category was limited to Article I, Section 10's narrow prohibition on laying "any imposts or duties on imports or exports," and Hamilton stressed that the Constitution did not include any other express limitations on the States' authority to tax.[437] Turning to the third category, Hamilton rejected alienation by unavoidable implication. Although the Constitution gave Congress the power to lay and collect taxes, the States' similar authority to raise revenue was not "absolutely and totally *contradictory* and *repugnant*" to Congress's power.[438] It was not enough, he stressed, that there was "a mere possibility of inconvenience in the exercise of powers."[439] Rather, he insisted that only "an immediate constitutional repugnancy ... can by implication alienate and extinguish a pre-existing right of sovereignty."[440]

Hamilton's analysis underscores the Supreme Court's missteps in *Torres*. Ironically, it was in defending the States' sovereign authority that Hamilton first used the phrase "the plan of the Convention."[441] The Court distorted his analysis by finding an implied

433. THE FEDERALIST NO. 32, *supra* note 14, at 199 (Alexander Hamilton).
434. *Id.*
435. *Id.* at 200.
436. *Id.* at 201.
437. *Id.* at 200-01 (quoting U.S. CONST. art. I, § 10, cl. 2).
438. *Id.* at 200.
439. *Id.* at 202.
440. *Id.*
441. *Id.* at 200.

structural waiver of state sovereign immunity in that "plan" because such immunity might "thwart"[442] or "frustrate"[443] Congress's goal of military readiness.[444] Under Hamilton's framework, this kind of indirect friction with the exercise of congressional power does not suffice to divest the States of a preexisting sovereign right. Undoubtedly, the States' ability to tax the same transactions that Congress wishes to tax could "frustrate" or "thwart" Congress's ability to raise revenue. After all, there is a limit to how much taxation people will tolerate and can afford. But, as Hamilton explained, mere "inexpediency"[445] is not sufficient to alienate the sovereign authority of the States.[446] Rather, there must be a "direct contradiction" of power[447] or an "immediate constitutional repugnancy"[448] between similar state and federal powers.[449] The *Torres* Court's contrary conclusion not only dilutes this standard but also applies it in a different context than the one Hamilton was describing. Unlike state and federal powers to tax, state sovereign immunity and the federal power to raise armies are not even "similar" powers in the sense Hamilton described. In short, *The Federalist No. 32* does not support—but affirmatively refutes—the *Torres* Court's finding of an implied structural waiver of sovereign immunity.

Hamilton's subsequent application of this framework to state sovereign immunity confirms this conclusion. In *The Federalist No. 81*, Hamilton addressed Anti-Federalist fears that the judicial power conferred by the citizen-state diversity provisions of Article III

442. Torres v. Texas Dep't of Pub. Safety, 142 S. Ct. 2455, 2463 (2022) (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2256 (2021)).

443. *Id.*

444. *Id.* at 2466-67.

445. THE FEDERALIST NO. 32, *supra* note 14, at 202 (Alexander Hamilton).

446. As Hamilton explained in denying that the Constitution would alienate the States' sovereign right to tax: "[I]t is, indeed, possible that a tax might be laid on a particular article by a State which might render it INEXPEDIENT that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax." *Id.* In *Torres*, the Court erroneously equated state "frustrat[ion]" of federal objectives with the kind of total and absolute contradiction and repugnancy that Hamilton envisioned. *See Torres*, 142 S. Ct. at 2467 (stating that "an assertion of state sovereignty to frustrate federal prerogatives to raise and maintain military forces would be strongly '*contradictory* and *repugnant*' to the constitutional order") (quoting THE FEDERALIST NO. 32, *supra* note 14, at 200 (Alexander Hamilton)).

447. THE FEDERALIST NO. 32, *supra* note 14, at 200 (Alexander Hamilton).

448. *Id.* at 202.

449. *Id.*

would alienate the States' sovereign immunity.[450] Hamilton reiterated that the mere grant of power to the federal government could not, by mere implication, divest the States of a preexisting sovereign right such as sovereign immunity.[451] As he put it, unless "there is a surrender of this immunity in the plan of the convention, it will remain with the states."[452] Such surrenders, he explained, were governed by the principles set forth in *The Federalist No. 32*. Applying these principles to Article III, he found a lack of those "circumstances which are necessary to produce an alienation of state sovereignty."[453] He concluded that "there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."[454]

Hamilton also stressed that (mis)reading Article III to alienate state sovereign immunity would serve no purpose because recoveries could not be enforced "without waging war against the contracting state."[455] In his view, "to ascribe to the federal courts, *by mere implication*, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."[456] Although one might question Hamilton's application of the background rules governing the alienation of sovereign rights to the language of Article III, there is no question that he categorically rejected the notion that the Constitution could divest the States of sovereign rights by mere implication short of an absolute and total repugnancy between

450. THE FEDERALIST NO. 81, *supra* note 14, at 548-49 (Alexander Hamilton).
451. *Id.*
452. *Id.* at 549.
453. *Id.*
454. *Id.*
455. *See id.*
456. *Id.* (emphasis added).

similar state and federal powers.[457] His approach refutes the *Torres* Court's contrary conclusion.

Finally, it is worth noting that state sovereign immunity in this context does not appear to satisfy even the *Torres* Court's loose test for implied structural waivers. Even in those limited contexts in which the Court has held that Congress may subject States to generally applicable employment regulations,[458] the Court has long held that, unless Congress acted pursuant to Section 5 of the Fourteenth Amendment, States retained their sovereign immunity from suits by individuals to enforce such regulations.[459] In such instances, under Supreme Court precedent, enforcement is available only through private actions against state officials (as opposed to States), or in suits by the United States against a State, which USERRA itself authorizes.[460] Even apart from these enforcement mechanisms, Congress has complete power to fulfill the its obligations to United

457. The *Torres* Court also mischaracterized "suits between States, and suits by the United States against a State" as involving "structural waivers." 142 S. Ct. at 2462 (citations omitted). Earlier Courts allowed such suits not on the basis of implied structural waivers, but because of an *actual* surrender of sovereign immunity in the text of Article III. In *Principality of Monaco v. Mississippi*, the Court explained that the States generally retained their sovereign immunity in the plan of the Convention, with limited exceptions. 292 U.S. 313 (1934). In *Monaco*, the question before the Court was whether States enjoyed immunity from suit by a foreign nation (which it held they did). "The question," the Court stated in *Monaco*, "is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a State." *Id.* at 323. The *Monaco* Court explained that Article III's express grant of jurisdiction to federal courts over controversies between States "involved a distinct and essential principle of the constitutional plan which provided means for the judicial settlement of controversies between States of the Union." *Id.* at 328. Likewise, the Court explained that "the jurisdiction of this Court of a suit by the United States against a State" rests "[u]pon a similar basis." *Id.* at 329. Importantly, the *Monaco* Court made clear that these jurisdictional grants for the peaceful resolution of disputes between States and between the United States and a State in no way "disturb[ed]" the sovereign immunity of States in suits by individuals. *Id.* at 327-28. The *Monaco* Court did not regard these express surrenders of sovereign immunity as implied structural waivers, and these specific surrenders did not disturb the States' residual sovereign immunity from suit by individuals.

458. *See* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985) *aff'd*, 838 F.2d 1411 (5th Cir. 1988)

459. *See* Tennessee v. Lane, 541 U.S. 509 (2004), *aff'd* in part 315 F.3d 680 (6th Cir. 2003).

460. Moreover, notwithstanding State sovereign immunity, Congress has other ample means to raise and support armies. If Congress considered reemployment of veterans to be essential for military recruitment, it could use its spending power to give States a financial incentive to cooperate and waive their sovereign immunity. A federal mandate that strips States of their sovereign immunity does little to further federal policy other than to shift the cost to the States.

States veterans by marshaling the resources of the United States. That was, after all, the plan of the Convention.

3. The Exception Swallows the Rule

The *Torres* Court's embrace of strong purposivism to find an implied waiver of state sovereign immunity in the Army and Navy Clauses could have far-reaching implications. The Court's test for finding implied structural waivers of state sovereignty has no apparent stopping point. First, at a minimum, its reasoning would allow Congress to abrogate state sovereign immunity in any case in which Congress commanded the States to take action in support of federal military policy. Second, its reasoning is not limited to the Army and Navy Clauses but extends in principle to all enumerated powers of Congress. Third, the Court's reasoning extends beyond state sovereign immunity and potentially would allow Congress to abrogate all of the States' other sovereign rights as well. We discuss each point in turn.

First, the Court's opinion suggests that Congress could abrogate state sovereign immunity simply by imposing a legal obligation on the States to support any aspect of federal military policy. According to the Court, because the power to raise and support armies is "complete in itself," the States implicitly waived their ability to "frustrate federal policy" by asserting sovereign immunity in suits seeking to enforce federal commands.[461] In *Torres* itself, the Court determined that a State's immunity from suit by a disabled veteran frustrated federal policy because it would "thwart" military readiness.[462] On this reasoning, a State's refusal to submit to suit for violating any obligation Congress imposes on States for the benefit of veterans (or other military personnel) would frustrate federal military policy and give rise to an implied "structural waiver." For instance, Congress could authorize suits against States for failing to fill government positions with veterans; for declining to exempt veterans from state taxes; or for refusing to give veterans priority for any number of state benefits. Taken to its logical conclusion, the

461. *Torres*, 142 S. Ct. at 2463 (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2263 (2021)).

462. *Id.* at 2468.

Court's reasoning gives Congress sweeping power to offload to the States most—if not all—of the *nation's* moral and financial obligations to its veterans, and to subject States to suit for failing to do so. Under the plan of the Convention, the nation is responsible for the debt it owes its veterans. The plan of the Convention was not to empower Congress to pass off that responsibility to the States. Although the result in *Torres* seems to benefit veterans, the Court's approach enables Congress to outsource—and thus evade or underfund—its solemn obligations to those who have served their country.

Second, the Court's analysis is not limited to the Army and Navy Clauses but potentially encompasses all enumerated powers of Congress. The requirement that a federal power be complete in itself to trigger an implied structural waiver fails to distinguish the Army and Navy Clauses from all other Article I powers. The phrase "complete in itself" originated with Chief Justice Marshall, and he understood *all* enumerated powers to be complete in themselves. In *Gibbons v. Ogden*, Marshall explained that the power to regulate commerce, "*like all others vested in Congress*, is *complete in itself*."[463] By "complete in itself," he explained, the power "is vested in Congress as absolutely as it would be in a single government," subject, of course, to the "restrictions on the exercise of the power as are found in the Constitution of the United States."[464] As explained, one such restriction was that Congress could not exercise its powers to abrogate preexisting rights of the States that the Constitution did not alienate expressly or by unavoidable implication. Five years earlier, of course, Marshall himself recognized this restriction in *McCulloch v. Maryland* when he made clear that the "great powers" found in Article I—including the power "to raise and support armies and navies"—enable Congress to charter a national bank, but do not empower Congress to command States to charter state banks.[465] Marshall's distinction reflects the fact that the Constitution clearly and expressly authorized Congress to take the former, but not the latter, action. By invoking the phrase "complete in itself" but ignoring this important qualification, the *Torres* Court arguably gave

463. 22 U.S. (9 Wheat.) 1, 196 (1824) (emphasis added), *rev'g* 17 Johns. 488 (N.Y. 1820).
464. *Id.* at 197.
465. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407-08 (1819).

Congress the green light to override the States' sovereign rights in the exercise of any of its enumerated powers.[466] If the Court seeks to uphold the Constitution's actual division of powers, it should repudiate this unwarranted suggestion and recognize that the States retained all sovereign rights and powers that the Constitution did not alienate clearly and expressly or by unavoidable implication. As the Court explained in *Seminole Tribe*, that a federal power is "complete" says nothing in itself about whether Congress may use it to abrogate state sovereign immunity or another sovereign right that the Constitution did not clearly and expressly divest. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area," Congress may not authorize "suits by private parties against unconsenting States."[467]

Third, the *Torres* Court's recognition of implied structural waivers extends in principle beyond state sovereign immunity to all other sovereign rights and powers possessed by the States. The Court's opinion stated on multiple occasions that the States implicitly waived not merely their sovereign immunity, but their *sovereignty* itself. When a "federal power ... is 'complete in itself,'" the Court stated, "the States implicitly agreed that their sovereignty 'would yield to that of the Federal Government.'"[468] Because the Court found the power to raise and support the armed forces to be "complete in itself," it concluded that "[u]pon entering the Union, the States implicitly agreed that their sovereignty would yield to

466. The *Torres* Court attempted to distinguish the Army and Navy Clauses from certain other federal powers, but the distinctions it drew are unpersuasive. "None of those [other] powers (*e.g.*, Indian commerce, interstate commerce, or intellectual property)," the Court argued, "[1] is expressly denied to the States, or [2] operates for the benefit of the entire Nation, or [3] proves comparably essential to the survival of the Union." 142 S. Ct. at 2467. First, parts of the commerce power, for example, are denied to the States. *See* U.S. CONST. art. I, § 10, cls. 2-3 (providing that no State shall "lay any Imposts or Duties on Imports or Exports," nor "lay any Duty of Tonnage"). Second, the whole point of including the commerce power in the Constitution (as opposed to relying exclusively on state regulation of commerce) was to "benefit the entire Nation." *Torres*, 142 S. Ct. at 2467. Third, the commerce power was considered "essential to the survival of the Union." *Id.* As Hamilton explained, it is "evident, on the most superficial view, that there is no object ... that more strongly demands a Fœderal superintendence" than the regulation of commerce. THE FEDERALIST NO. 22, *supra* note 14, at 136 (Alexander Hamilton).

467. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996).

468. *Torres*, 142 S. Ct. at 2463 (quoting PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2259 (2021)).

federal policy to build and keep a national military."[469] In another passage, the Court wrote that, by adopting the Army and Navy Clauses, the States agreed "to sacrifice their sovereignty for the common defense."[470]

To be sure, the States alienated one of their most important sovereign rights—the right to exercise exclusive territorial sovereignty over their citizens—by approving the Army and Navy Clauses (and other Article I powers). Under the Articles of Confederation, Congress had no power to tax or regulate individuals within the States. Thus, the States retained their traditional sovereign right to exercise exclusive territorial sovereignty over their citizens. By adopting the Constitution, the States reversed this state of affairs by clearly and expressly alienating their right to exclusive territorial sovereignty and empowering Congress to tax and regulate citizens within their borders. In and of itself, this shift gave Congress enormous new power to regulate the individuals within the States, but under the background rules admitted by the Constitution, it did not alienate any of the States' other sovereign rights.

The States' residual sovereign rights included not just sovereign immunity, but other well-defined rights. As the *Torres* Court recognized elsewhere in its opinion, sovereign immunity is just one right of sovereignty. The States, the Court explained, "entered the federal system with their sovereignty, including their sovereign immunity ... intact."[471] The Court's assertion that the States implicitly waived their "sovereignty" whenever a federal power is "complete in itself" thus raises the possibility that Congress could override not only the States' sovereign immunity, but all of their other sovereign rights, including their right not to be commandeered by another sovereign.[472] As discussed in Part I, the Articles of

469. *Id.* at 2460.

470. *Id.* at 2466.

471. *Id.* at 2461 (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)) (internal quotation marks omitted).

472. "It is a manifest consequence of the liberty and independence of nations," Vattel explained, "that all have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another state." 1 VATTEL, THE LAW OF NATIONS, *supra* note 36, § 54, at 138. *See also* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 32, at 849-51 (describing this right).

Confederation clearly alienated this right by giving Congress express power to requisition the States, but the Founders omitted this power from the Constitution because they regarded it as too dangerous to confer.[473] The logic of *Torres* would authorize Congress to resurrect its long-defunct requisition power and commandeer the States to raise and support the armed forces on its behalf. Although this approach would resuscitate the failed plan of the Articles of Confederation, it has no basis in the actual "plan of the Convention."

CONCLUSION

From the Eleventh Amendment's repudiation of *Chisholm* in the 1790s until 2020, the Supreme Court has maintained a relatively stable body of precedent upholding the States' right to sovereign immunity from suit by individuals. The Court's longstanding approach is consistent with the constitutional text because only one portion of the original Constitution—the citizen-state diversity provisions of Article III—even arguably alienated this preexisting right. When the *Chisholm* Court interpreted these provisions to do just that in 1793, the States quickly adopted the Eleventh Amendment to prohibit this construction. Since then, the Court has generally recognized and upheld broad state sovereign immunity under the original Constitution even in the face of increasing congressional attempts to override it. In 2006, the Court recognized a narrow exception for bankruptcy proceedings, but suggested that this exception was "good-for-one-clause-only."[474] In its two most recent decisions, however, the Court employed a novel purposive approach to find implied "structural waivers" of state sovereign immunity in the "plan of the Convention."[475] These decisions depart sharply from prior precedent by finding such waivers whenever state sovereign immunity could thwart or frustrate the purposes underlying Congress's Article I powers. They also contradict the original public meaning of the Constitution because they circumvent the rules admitted by the Constitution to govern the alienation of sovereign

473. *See generally* Printz v. United States, 521 U.S. 898 (1997), *rev'g* 66 F.3d 1025 (9th Cir. 1995); New York v. United States, 505 U.S. 144 (1992).

474. Allen v. Cooper, 140 S. Ct. 994, 1003 (2020).

475. *Torres*, 142 S. Ct. at 2463.

rights. As Hamilton explained, the Constitution could alienate the States' sovereign rights only by doing so clearly and expressly or by unavoidable implication. The governing rules—and thus the Constitution itself—did not recognize implied structural waivers of sovereign rights. The Court should abandon its new purposive approach and return to Hamilton's "rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[476]

476. THE FEDERALIST NO. 32, *supra* note 14, at 203 (Alexander Hamilton).