A Flickering Light in the Wilderness: Could the Recent "Plan of the Convention" Cases Correct and Simplify the Supreme Court's State Sovereignty Doctrine?

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The Supreme Court's interpretations of the Eleventh Amendment and its related doctrine of "state sovereign immunity" are uniquely untethered and puzzling. Imagine a world where the Supreme Court creates a state sovereign immunity doctrine contrary to written limitations contained in the Constitution. Imagine further that the Court, using this doctrine, holds that a person cannot obtain a remedy in any court for a right explicitly and legitimately mandated by Congress. Unfortunately, this nightmare is all too real. For example, the federal government, through the Fair Labor Standards Act, plainly can require states to pay a congressionally mandated minimum wage to its employees;[1] yet, if the state fails to abide by this federal law and pays less than the minimum wage, the employee cannot sue the employer-state (or a state-wide agency) for the past-due wages in either federal or state court because of "state sovereign immunity." This incongruous result shows that the Supremacy Clause can be a paper tiger and that a person can possess a right but have no remedy.[2]

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1 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (deciding that "the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause").

2 *See* Alden v. Maine, 527 U.S. 706, 706–07 (1999). The *Alden* case, and the Supreme Court's state sovereign immunity doctrine, has produced an enormous scholarly reaction. For example, an entire issue of the Notre Dame Law Review, including ten articles from noted scholars, was dedicated to the issue. *See, e.g.*, 75 NOTRE DAME L. REV. 817–1161 (2000); *see also* Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine: *Judicial Review, Sovereign Immunity, and the*

But hold the presses. Relatively recently, a slim and shifting majority of the Court has decided two cases, buttressed by a 2006 decision, holding that Congress can overcome Eleventh Amendment or "state sovereign immunity" by legislating pursuant to its Article I powers of eminent domain and war powers.[3] These were not instances where Congress had attempted to "abrogate" the Eleventh Amendment by legislating pursuant to its Fourteenth Amendment powers by clearly allowing suits to be brought against states in federal court. Instead, the Court held in these recent cases that in such areas as bankruptcy, eminent domain, and war powers, the states are deemed to have "consented" to the lawsuits by the "plan of the Convention" which, we are told, is "shorthand for 'the structure of the original Constitution itself.'"[4] In other words, the Constitution gave nearly plenary power in these areas to the federal government, while concepts of state "sovereign immunity" were non-existent according to the "plan of the Convention."

This "plan of the Convention" reasoning is sound and, as the vigorous dissents fear, this reasoning is applicable to other Article I powers. Indeed, the "plan of the Convention" cases, if extended, could remedy much of the confusion sown by the Supreme Court's Eleventh Amendment and "state sovereignty" jurisprudence. Whether the majority of the Supreme Court will take the invitation to extend the "plan of the Convention" cases and correct some of its earlier erroneous holdings is questionable. Only time will tell.

I. A Brief Look at the Winding Road

In order to understand the significance of the Supreme Court's recent "plan of the Convention" cases, a brief review of the tangled web of Eleventh Amendment caselaw is necessary. Do not despair; the review is brief and the history of Eleventh Amendment interpretation is sufficiently surprising to make it interesting.[5]

As I tell my bewildered Federal Courts class each semester, the Eleventh

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Rehnquist Court, 33 LOY. L.A. L. REV. 1283 (2000); Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure,* 41 WM. & MARY L. REV. 1601 (2000); Daan Braveman, *Enforcement of Federal Rights Against States:* Alden *and Federalism Non-Sense*, 49 AM. U. L. REV. 611 (2000). The purpose of this article is not to plow ground that has been (perhaps excessively) plowed before. Instead, I wish to focus on a future possibility, namely that the recent "plan of the Convention" cases may provide an exit ramp by which the Supreme Court can remedy its past mistakes.

[3] Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2463, 2467, 2469 (2022) (involving war powers); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2254–56 (2021) (involving eminent domain); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006) (holding that States implicitly consented to bankruptcy lawsuits based on "the plan of the Convention").

[4] *PennEast Pipeline Co.*, 141 S. Ct. at 2258.

[5] Plenty of noted scholars have reviewed the peculiar history of the Eleventh Amendment. *See, e.g.*, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Henry P. Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102 (1996); Young, *supra* note 2, at 1606–16.

is the first true amendment to the Constitution. The first ten amendments, i.e., the Bill of Rights, were promised during the ratification process and, thus, were essentially part and parcel of the original Constitution. As most everyone who has taken a Federal Courts class remembers, the Eleventh Amendment is the result of the Supreme Court's decision in *Chisholm v. Georgia*.[6] The Supreme Court that decided *Chisholm* in 1793 (a mere five years after the Constitution was ratified) was walking and talking "original intent." That Supreme Court was led by loyal Federalist John Jay, one of the three authors of the *Federalist Papers*. Three of the other Court members were members of the Constitutional Convention. The remaining two justices (the Supreme Court consisted of six members at the time) were members of their respective states' ratifying conventions.[7] In a 4–1 decision,[8] the majority rather easily concluded that the South Carolina executor could sue the State of Georgia in federal court. After all, Article III of the Constitution envisions exactly such a lawsuit being brought in federal court: Section 2 of Article III extends potential federal jurisdiction to cases "between a State and Citizens of another State."[9]

States, many of which were burdened by a variety of Revolutionary War debts, were not happy with the *Chisholm* holding, and state and federal legislators quickly raised a hue and cry.[10] The House of Representatives of Georgia, always prickly about federal intervention on its local prerogatives, promptly passed a bill that declared that any person attempting to execute upon the *Chisholm* judgment was "declared to be guilty of felony and

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[6] 2 U.S. 419, 420 (1793).

[7] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.2, 440 (7th ed. 2016) ("[I]t must be remembered that the four justices in the majority in *Chisholm* had impeccable credentials, especially in discussing the intent behind constitutional provisions.").

[8] In the manner of the time, there was no "majority" opinion as each justice wrote separately. Chief Justice Jay along with Justices Cushing, Blair, and Wilson found the suit to be a constitutional exercise of jurisdiction. On the date of the *Chisholm* decision, the Supreme Court, although authorized to have six members, only had five sitting justices. Only Justice Iredell of North Carolina dissented on *statutory* grounds. Iredell believed that the statute at issue, Section 13 of the Judiciary Act, did not permit the lawsuit. *See* John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia (1793), 73 N.C. L. REV. 255, 256 (1994). One of the many peculiarities of Eleventh Amendment caselaw is that later members of the Supreme Court have implied that Iredell's dissent rested on constitutional/state sovereignty grounds. *See* Hans v. Louisiana, 134 U.S. 1, 12 (1890); Seminole Tribe v. Florida, 517 U.S. 44, 109–11 (1996) (Souter, J., with Ginsburg and Breyer, JJ., dissenting); Alden v. Maine, 527 U.S. 706, 720 (1999).

[9] U.S. CONST. art. III, § 2. *See generally* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 527–36 (1978) (discussing the conflicting views of the framers of the Constitution as to the amenability of states to sue in federal court, from Hamilton to Madison to George Mason to James Wilson to Edmund Randolph, and concluding that *Chisholm*'s construction of Article III "was not therefore the clear contravention of a general understanding that it has long been said to be").

[10] *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1922).

[would] suffer death, without the benefit of clergy, by being hanged."[11] The more reserved legislature of the Commonwealth of Massachusetts adopted a resolution demanding the overturn of *Chisholm*.[12] On the federal side, the reaction was equally swift. Two days after the *Chisholm* decision, federal Representative Theodore Sedgwick of Massachusetts filed a proposed amendment to the Constitution in the House and Massachusetts Senator Strong filed the same proposed amendment in the Senate. Sedgwick's proposed amendment read:

> That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.[13]

But despite Sedgwick's power and popularity, his proposed amendment fell on deaf ears.[14] When passing the proposed Eleventh Amendment, Congress rejected the much broader language proposed by Sedgwick (which would have barred federal court suits against a state brought by citizens of the same state) and adopted the narrower wording of the Eleventh Amendment: "[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." Deciding upon the narrower language of the Eleventh Amendment was eminently sensible. Citizens of a state are much more likely to have dealings and disagreements with the state in which they reside and may be in need of a neutral federal forum (i.e., a federal court) to hear the disagreement. The occurrence of a citizen of one state suing another state would be much less frequent (particularly given the mobility of citizens in 1795) and such a citizen of "another state" would be unlikely to hold a loyalty or allegiance to another state; thus, there was a need for such a suit to be heard in the distant state's court. One can view the Eleventh Amendment as essentially giving the state a home court advantage to any suit brought by a citizen of "another State."[15]

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[11] *Id.* at 100.

[12] *Id.* at 99–100.

[13] William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1269 (1989) (providing an excellent history of the adoption of the Eleventh Amendment).

[14] *See* RICHARD E. WELCH, JR., THEODORE SEDGWICK, FEDERALIST: A POLITICAL PORTRAIT 106, 107 n.2, 205 (1965) (discussing Sedgwick's background and his proposed amendment). Sedgwick became the Speaker of the House of Representatives within six years of the *Chisholm* decision.

[15] I am hardly the first to have reached this conclusion. *See, e.g.*, Monaghan, *supra* note 5, at 125 ("In large measure, the Eleventh Amendment operates only as a forum selection clause. Because the Eleventh Amendment doctrine prohibits federal claims against states sued in their

In 1890, however, the Supreme Court decided *Hans v. Louisiana*.[16] The *Hans* Court rejected the plain wording of the Eleventh Amendment, not to mention its legislative history, and vastly expanded the Amendment's scope by barring federal suits against a state by citizens of a different state *or* the same state. Justice Bradley, writing for the Court, acknowledged that the language of the Eleventh Amendment only prohibits "suits against a state which are brought by the citizens of another state . . . ." Confronted with this plain language, Bradley simply brushed it away by asking the following questions:

> 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? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the states?

Having asked the questions, Justice Bradley answered them by concluding: "The supposition that it would is almost an absurdity on its face."[17]

The glaring problem with Bradley's reasoning in *Hans* is that Congress *did* understand that the Amendment "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 foreign states, was indignantly repelled . . . ." After all, Sedgwick (a rather formidable political presence in 1793) proposed just the wording envisioned by the *Hans* Court, but that broader language was rejected and the narrower language (which did indeed distinguish between suits brought by citizens of the same versus another state) was adopted. Although it would be a fool's errand to attempt to find one original intent of the framers or ratifiers of the Eleventh Amendment, one can easily conclude that the wording of the Eleventh Amendment, or Mr. Hans' argument that the Eleventh Amendment did not apply to suits by citizens of the *same* state, is not "an absurdity on its face."[18] Despite the weakness of its analysis, the

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own name from being heard in federal court, it necessitates that plaintiffs either recast their claims as suits against state officers or bring them in state court. In *Reich v. Collins*, decided in the 1994 Term, a unanimous Court made clear that state courts must provide adequate relief when state officials deprive persons of their property in violation of federal law, irrespective of 'the sovereign immunity States traditionally enjoy in their own courts.'").

[16] 134 U.S. 1 (1890).

[17] *Id.* at 15. Here is a hint from a retired judge: whenever a judge uses language like "an absurdity on its face," the court is having a hard time with its reasoning and its research.

[18] The reasoning of *Hans* is a frequent target of criticism. *See, e.g.*, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1205–06 (2001); Bradford R. Clark, *The Eleventh*

Hans decision is considered by the current Court to be the cornerstone of its Eleventh Amendment or state "sovereign immunity" doctrine.[19]

The Court's 1996 *Seminole Tribe of Florida v. Florida* decision reaffirmed the over-century-old *Hans* holding and barred Congress from abrogating the Eleventh Amendment by passing a law pursuant to an Article I power (i.e., the Indian Commerce Clause).[20] Writing for the majority (this is an area of law that never produces unanimous decisions and often produces vigorous and lengthy dissents), Chief Justice Rehnquist stated: "[e]ven when the Constitution vests in Congress complete law making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states."[21] At the same time, *Seminole* reaffirmed the *Fitzpatrick v. Bitzer*[22] holding (also written by then-Justice Rehnquist) that Congress could abrogate the "states' sovereign immunity" by legislating pursuant to the Fourteenth Amendment.[23] In distinguishing between abrogation pursuant to legislation passed pursuant to Article I versus the Fourteenth Amendment, the Court essentially used a time-line analysis: "the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."[24] In

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Amendment and the Nature of the Union, 123 HARV. L. REV. 1817, 1820–21 (2010); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1683–86 (2004).

[19] *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69–70 (1996); Alden v. Maine, 527 U.S. 706, 720–27 (1999); Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2470–71 (2022).

[20] 517 U.S. at 54, 69, 72.

[21] *Id.* at 72.

[22] 427 U.S. 445 (1976).

[23] *Seminole*, 517 U.S. at 59; *see Fitzpatrick*, 427 U.S. at 456–57. Using *Fitzpatrick*, which involved a 1972 amendment to Title VII of the Civil Rights Act of 1964, as an example of proper abrogation (versus Article I of the Indian Commerce Act involved in *Seminole*) shows the oddity of the *Seminole* majority's insistence upon a distinction between Congress' Article I and Fourteenth Amendment powers. Title VII of the Civil Rights Act of 1964 was passed solely under Congress' Article I Commerce Clause power (when Title VII passed in 1964, Congress believed that the Fourteenth Amendment power was insufficient to reach private discrimination) and the 1972 amendment was passed pursuant to *both* the Commerce Clause and the Fourteenth Amendment. The exact same piece of legislation could be passed pursuant to either the Commerce Clause or the Fourteenth Amendment. This fact begs the questions: (1) what if Congress does not specify the power under which it is legislating; and (2) is it appropriate for the Court to force Congress to categorize the power under which it is legislating? In the case of *Fitzpatrick*, it may be fair to say that Title VII primarily involved Congress legislating under its Article I Commerce Clause power; yet the Court assumed that the only issue at play was Congress' power under the Fourteenth Amendment.

[24] *Seminole*, 517 U.S. at 65–66. To be sure, the Court used an alternative reason to explain the difference between Article I and Fourteenth Amendment powers: the Fourteenth Amendment expanded federal power "at the expense of state autonomy" and Section 5 of the Fourteenth

other words, the Fourteenth Amendment came after, and, the reasoning goes, limits Eleventh Amendment immunity; but Article I, adopted before the Eleventh Amendment, is therefore limited by the Eleventh Amendment. Thus, once the smoke cleared after *Seminole*, Congress, if it used clear language, could abrogate the Eleventh Amendment if it legislated under its Fourteenth Amendment powers, but not pursuant to its Article I powers.

Post-*Seminole*, Congress accepted the Supreme Court's challenge and passed various laws under the Fourteenth Amendment's enforcement clause while also clearly abrogating Eleventh Amendment state immunity to suit. For example, Congress likened patents to "property" to be protected from violation by various parties, including state entities, by the Fourteenth Amendment's Due Process Clause.[25] In response, the Supreme Court majority established the "congruence and proportionality" test to determine if the congressional legislation was "appropriate legislation" as required by Section 5 of the Fourteenth Amendment.[26] Applying the "congruence and proportionality" test has been a quixotic effort at best.[27] Finally, in his *Tennessee v. Lane* dissent, Justice Scalia, who earlier had trumpeted "congruence and proportionality," rejected the test and concluded, with more than a little justification, that:

> The 'congruence and proportionality' standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worst still, it casts the Court in the role of Congress's taskmaster. Under it, the courts . . . must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional.[28]

Still, the congruence and proportionality test survives despite its subjectivity and foundational weakness.

Amendment contains an explicit enforcement provision. *Id.* at 59. But this reasoning does not hold up under the most rudimentary analysis because Article I's Indian Commerce Clause also expanded federal power "at the expense of state autonomy" and the Necessary and Proper Clause of Article I contains the equivalent enforcement powers that Section 5 of the Fourteenth Amendment provides.

[25] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 627–28 (1999).

[26] *Id.* at 639; City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

[27] *Compare* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001), *with* Tennessee v. Lane, 541 U.S. 509, 510 (2004); *compare* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 728 (2003), *with* Coleman v. Ct. of App. of Md., 566 U.S. 30, 30 (2012). Justice Breyer described whether a particular piece of legislation would survive the test as a "great constitutional unknown." Allen v. Cooper, 140 S. Ct. 994, 1009 (2020) (Breyer, J., concurring).

[28] *Lane*, 541 U.S. at 557–58 (2004) (Scalia, J., dissenting); *see Coleman*, 566 U.S. at 44–45 (2012) (Thomas, J., concurring) ("[T]he varying outcomes we have arrived at under the 'congruence and proportionality' test make no sense . . . . This grading of Congress's homework is a task we are ill suited to perform and ill advised to undertake.").

One must also add into this stew of confusion the Supreme Court's rather startling holding in *Alden v. Maine*.[29] *Alden* extended Eleventh Amendment immunity to the state courts and changed the immunity terminology from "Eleventh Amendment immunity" to "sovereign immunity of the States."[30] Justice Kennedy, writing for the majority, found this sovereign immunity not in the Constitution,[31] but in "the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."[32] Extending immunity from suit to state court proceedings is a major expansion of state sovereignty. Prior to *Alden*, it was an article of faith that the Eleventh Amendment, or any related immunity doctrine, did not apply in state courts.[33] Thus, in *Quern v. Jordan*, the plaintiffs were able to pursue damages against the Illinois treasury in state court after *Edelman v. Jordan* ruled that *Ex Parte Young* relief did not include past damages. *Maine v. Thiboutot*[34] was also an action brought in state court for damages against the State of Maine (oddly enough, the same state later involved in *Alden*) for violations of the federal Social Security Act. Likewise, the Federal Employers' Liability Act, which allowed a damage action against a state employer, was enforced in state court in *Hilton v. South Carolina Public Railways*[35] (a decision the Court took extra and awkward pains to distinguish in *Alden*). But when Mr. Alden attempted to enforce his rights under the Federal Fair Labor Standards Act against his state employer in state court, the Supreme Court held that state sovereign immunity forbade such a lawsuit. Justice Kennedy, writing for the majority, stated with assurance that "the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself."[36] Really?

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[29] *See* Alden v. Maine, 527 U.S. 706, 759–60 (1999).

[30] *Id.* at 713.

[31] *Id.*; *see* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996). In deciding *Seminole*, the majority found that the state's immunity from suit embedded in the Eleventh Amendment, which superseded Congress' Article I powers, was limited by the later adoption of the Fourteenth Amendment. The *Alden* rationale appears to undermine the timeline explanation which underpinned the *Seminole* holding.

[32] *Alden*, 527 U.S. at 713.

[33] Monaghan, *supra* note 5, at 122–23 (1996). The noted constitutional and federal courts scholar Henry Monaghan was not alone in definitively stating, three years before the *Alden* decision: "state courts are available—indeed required—to hear suits against states for the violation of federal claims . . . ." Monaghan, *supra* note 5, at 122. *See also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989); Maine v. Thiboutot, 448 U.S. 1, 10–11 (1980); Nevada v. Hall, 440 U.S. 410, 421 (1979). The language in these cases indicate that the Eleventh Amendment does not apply in state court.

[34] 448 U.S. at 3.

[35] Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 200–01 (1991).

[36] *Compare Alden*, 527 U.S. at 749, *with id.* at 814 (Souter, Stevens, Ginsburg, & Breyer, JJ., dissenting) (Justice Souter's lengthy dissent in *Alden* concluded: "The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking…. [T]he Court has chosen to close the century by conferring like status on a conception of state sovereign

The state sovereign immunity announced in *Alden* is rather jaw-dropping because it appears inconsistent with a long string of cases that have held that the general jurisdiction of the state courts is always available should there be a constitutional or federal statutory violation that cannot be addressed in federal court.[37] Remember that state courts have a duty to hear federal causes of action even if it is against their will.[38] Also, a series of cases spanning nearly a century has held that state courts have a duty to provide constitutional remedies.[39] This line of cases is underpinned by the Madisonian Compromise incorporated in Article III of the Constitution.

At the risk of restating well-established history, but to refresh the possibly rusty memories of some, Article III of the Constitution was the product of a compromise negotiated by James Madison. Initially, Madison and other Virginians wished the new Constitution to establish and mandate a separate federal judiciary. Many at the Constitutional Convention objected to such a structure as overkill because the existing state courts, with their general jurisdiction over both state and federal law, could deal with all lawsuits under the supervision of the United States Supreme Court. When Madison realized that he did not have the votes, he compromised. Article III, as approved, provided that there "shall" be one Supreme Court, but that

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immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.").

[37] *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (concluding that Congress can restrict federal court jurisdiction under Article III because one always has the general jurisdiction of the state courts to fall back upon).

[38] *See* Testa v. Katt, 330 U.S. 386, 393–94 (1947); *see also* Tafflin v. Levitt, 493 U.S. 455, 469–70 (1990) (Scalia, J., with Kennedy, J., concurring); Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are."). Justice Gorsuch relatively recently relied on *Testa* and *Claflin* and observed: "State courts that refused to entertain federal causes of action found little sympathy when attempting the very separate sovereigns theory underlying today's decision. In time, too, it became clear that federal courts may decide state-law issues, and state courts may decide federal questions." Gamble v. United States, 139 S. Ct. 1960, 1999 (2019) (Gorsuch, J., dissenting).

[39] Reich v. Collins, 513 U.S. 106, 109–10 (1994) (emphasizing the state court's duty to provide monetary remedy against the state for unconstitutional action notwithstanding "the sovereign immunity states traditionally enjoy in their own courts"); McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 51–52 (1990) (finding that state courts must provide a remedy for unconstitutional deprivation of tax moneys); Ward v. Bd. of Cnty. Commissioners of Love Cnty., 253 U.S. 17, 24 (1920) (holding that even if state law provides no remedy, state court must provide remedy for constitutional violation and provide restitution or compensation due to Fourteenth Amendment); Gen. Oil v. Crain, 209 U.S. 211, 226 (1908) (noting that "[i]f a suit against state officers is precluded in the national courts by the 11th Amendment," there must be jurisdiction in the state courts or else "many provisions of the Constitution . . . could be nullified as to much of its operation").

any lower federal courts would only be established "from time to time" at the discretion of Congress. This so-called Madisonian Compromise is the basis of the well-established doctrine that Congress always can limit and curtail the jurisdiction of the lower federal courts.[40] The lack of lower federal courts, or lower federal court jurisdiction, is not a problem because Article III was drafted with the assumption that the state courts would be available to handle any federal matters. Indeed, state courts exclusively dealt with most federal questions until 1875, because Congress did not grant general federal question jurisdiction to the lower federal courts until then.[41] *Alden*'s assertion of complete "state sovereign immunity" in its own courts appears in tension with the Madisonian Compromise and these cases that are premised upon the Compromise.

II. More than a Feeling: Confronting History

At the heart of the Supreme Court's current insistence, states possess a "dual sovereignty" with the federal government.[42] Since at least *Seminole*, the majority of the Court seems to be frantically searching for a constitutional mooring for its deeply held belief that the states are sovereign. Citing "fundamental postulates implicit in the constitutional design"[43] and inherent state sovereignty,[44] which are never mentioned in the Constitution, the Court has woven its own state sovereignty doctrine. As the respected constitutional scholar Henry P. Monaghan has observed, the Court treats sovereign immunity as a "historical given, an article of faith incapable of and not needing justification, neither as to its existence nor as to its scope."[45] For a Court increasingly enamored with historical inquiry and insistent on textual support for any right, this is a startlingly discordant approach.[46] Nevertheless, the Court repeatedly insists, the "States entered into the federal system with their sovereignty intact."[47] This belief is the true

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[40] *See* Sheldon v. Still, 49 U.S. 441, 449 (1850); *see also* Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004–05 (1965).

[41] CHEMERINSKY, *supra* note 7, § 5.2.

[42] *See, e.g.*, *Tafflin*, 493 U.S. at 458 (terming "dual sovereignty" an "axiom"); *see* Alden v. Maine, 527 U.S. 706, 713–14 (1999).

[43] *Alden*, 527 U.S. at 729.

[44] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.").

[45] Monaghan, *supra* note 5, at 118.

[46] Young, *supra* note 2, at 1602 ("It is hard to see how a textualist could view Alden as anything other than a disaster. The Court's state sovereign immunity jurisprudence has always had a somewhat strained relationship to the text of the Eleventh Amendment. But Alden drops the textual fig leaf entirely, acknowledging that any principle of immunity applicable in state court can have no basis in the Eleventh Amendment.").

[47] *Alden*, 527 U.S. at 713 (quoting *Blatchford*, 501 U.S. at 779); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2258

foundation of the Court's state sovereign immunity doctrine. Unfortunately, this foundational statement is, at best, a misleading exaggeration, or at worst, a heartfelt sentiment that is demonstrably false.

Any objective view of the Constitution, and the considerable debate over its ratification, shows that the States gave up large chunks of "sovereignty" to the federal government.[48] There is a reason why the Articles of Confederation start with the assurance that the States retain their sovereignty, and the later Constitution does not mention state sovereignty.[49] For example, the States gave up their rights to negotiate, fight, or trade with the Indian Nations. The Constitution shifted that power exclusively to the federal government. Likewise, only Congress could regulate interstate commerce, immigration and naturalization, and patents and trademarks. Section 10 of Article I forbade the states from their former powers of levying customs duties, raising a navy, coining money, or producing paper money. In 1788, these were significant subtractions from state power. After all, levying duties on imports and exports was the primary vehicle states used to produce revenue. The coining of money and production of paper money was a power that states jealously guarded (and that aristocratic lenders,

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(2021); Torres v. Tex. Dept. of Pub. Safety, 142 S.Ct. 2455, 2470 (2022) (Thomas, J. dissenting). Judge John T. Noonan, Jr. addressing this statement has eloquently said: "'The States entered the federal system with their sovereignty intact.' If written in 1791, this sentence would have been understood as an anti-federalist's reservation as to the constitution. Uttered fifty years later in 1841, it would have expressed the new sectionalism and, in particular, the sensitivity of the South to any Northern encroachment on its peculiar institution of chattel slavery. But this statement was not made in 1791 or 1841. It was made in 1991 and was not made by an anti-federalist or a potential secessionist. It was made by the Supreme Court of the United States . . . .The Supreme Court repeated this statement with approbation in 1997 and again . . . in 1999. It is foundational for the current court's claim that the immunity of sovereigns is enjoyed today by each of the fifty states. To anyone familiar with the precedents of that court or with the text of the constitution of the United States or with the history of the Civil War, it is an extraordinary statement." JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 2 (2002).

[48] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 520–21 (1969); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 36–37 (2009).

[49] ARTICLES OF CONFEDERATION, art. II. The Supreme Court has stated that the Constitution "specifically recognizes the States as sovereign entities." *Alden*, 527 U.S. at 713 (quoting *Seminole Tribe of Fla.*, 517 U.S. at 71, n. 15). The problem with this definitive statement that the Constitution "specifically recognizes" state sovereignty is that it is flatly false. Unlike the explicit assurance in Article II of the Articles of Confederation that each state retains its "sovereignty, freedom and independence, and every Power, Jurisdiction and right," no equivalent assurance is contained in the Constitution. Indeed, the word sovereignty is never used in the Constitution, particularly in relation to states that gave up so many of their sovereign powers when entering into the Constitution. Certainly, the general assurances of the Tenth Amendment do not "specifically recognize" state sovereignty. That Amendment simply restates the truism that those powers not given to Congress are retained by the states or the people of the United States.

many of whom designated themselves Federalists, despised and considered immoral). The Constitution's reshuffling of these powers to the federal government, particularly when combined with the Taxing, Spending, and Supremacy Clauses, produced great opposition from the Anti-Federalists precisely because the states were being denuded of their sovereign powers.[50] No wonder that John Tyler of Virginia, no political slouch in 1788, expressed his shock when reading the proposed Constitution: "it had never entered my head we should quit liberty and throw ourselves in the hands of an energetic government."[51]

Because the loss of sovereignty of the states was such a central complaint of the opponents of the proposed Constitution, the Federalists spent considerable effort explaining that sovereignty might be divided—the states having sovereign powers in all spheres which Congress did not. But when the Anti-Federalists continued to complain about the obvious power grab by the centralized federal government, the Federalist James Wilson of Pennsylvania "came up with a solution to break the deadlock."[52] As the historian Gordon S. Wood explains:

> Wilson shrewdly avoided choosing between the federal government or the states. Instead of lodging this sovereignty in either Congress or the state legislatures, he relocated it outside of both. Sovereignty in America, he said, did not reside in any institution of government, or even in all the institutions of government put together. Instead, sovereignty, the final, supreme, indivisible lawmaking authority, remained with the people themselves, the people at large.[53]

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[50] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1441 (1987) ("Although the Constitution's most sweeping assertions of federal power on behalf of individual rights lay three-quarters of a century and a Civil War away, the Federalists at Philadelphia succeeded in imposing significant federal restrictions on state power. Federal courts would prevent states from passing bills of attainder or ex post facto laws, coining money or emitting bills of credit, denying the privileges and immunities of out-of-staters, or impairing the obligation of contract; Congress would guarantee citizens of each state a republican state government by refusing to seat representatives from anti-republican regimes, and by helping to put down attempted insurrections and coups; and the President would retain ultimate command of state militias when they were called into national service.").

[51] GORDON S. WOOD, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 75 (Oxford Univ. Press, 2021).

[52] *Id.* at 93.

[53] *Id. See also* Amar, *supra* note 50, at 1440 ("The Federalists dissolved the dilemma by crafting the Constitution as a set of broad yet bounded delegations of sovereign power from the sovereign People to various agents who would constitute the new central government."); THE FEDERALIST NO. 81, at 601–02 (Alexander Hamilton) (John Church Hamilton ed., 1864). One must remember that the newspaper essays that are collected in *The Federalist Papers* were attempts by Madison, Hamilton, and Jay to "sell" the newly drafted Constitution and achieve its ratification in New York State. Thus, the authors attempted to minimize the states'

The Federalists loved this reasoning, traces of which can be seen in the later adoption of the Tenth Amendment, and accepted it fully.[54] The beauty of Wilson's theory is that it avoided the primary truth which animated so much opposition to the Constitution. Likewise, Hamilton and Madison attempted to minimize the stripping of state sovereignty in their essays which later constituted *The Federalist Papers*.[55] Like most political horse trading, particularly when trying to reach consensus on a document such as a constitution, the amount of "sovereignty" or power left to the states after the Constitution was a flash point that was left vague and open to later debate and compromise.[56] But there is no doubt that the states gave up vast powers once the Constitution was ratified and were no longer all-powerful or "sovereign" in any true sense of the word. To say that the states entered into the Constitution with their "sovereignty intact" is to deny history and to read the Constitution with blinders.

III. A Light Beyond These Woods: The Recent "Plan of the Convention" Cases

To paraphrase the American singer and songwriter Nanci Griffith, there may be a "light beyond these woods."[57] The woods of the Eleventh Amendment/state sovereign immunity doctrine are tangled and dark indeed. But the recent "plan of the Convention" cases show the way to that light.

A. *The Cases*

The modern "plan of the Convention" cases began in 2006 with *Central Virginia Community College v. Katz*.[58] Katz, the court-appointed liquidating

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diminished role under the proposed Constitution. But Hamilton did admit, somewhat vaguely, that the doctrine of sovereign immunity from suits against states would be "surrender[ed]" in some portion due to "the plan of the convention."

[54] WOOD, *supra* note 51, at 94, 98.

[55] WOOD, *supra* note 51, at 78–79 (citing letter from James Madison to Edmund Randolph (April 8, 1787), *in Papers of Madison* 9, 369–70). Although the current Supreme Court majority frequently cites Madison as a supporter of state sovereign immunity, history tells a somewhat different story. As the historian Gordon Wood explains, Madison saw the Constitution as a limit on and guard against states and their legislatures dominated by "middling" men. Madison believed that the states should not retain any of their "individual independence." His idea was that the new federal government held a "supremacy . . . while leaving in force the local authorities in so far as they can be useful."

[56] *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1781–1788, at 84–85 (2010) (noting that the famous Federalist Papers are best viewed as intelligent propaganda written to downplay the more controversial provisions of the proposed Constitution that shifted so much power from the states to the centralized federal government).

[57] NANCI GRIFFITH, THERE'S A LIGHT BEYOND THESE WOODS (MARY MARGARET) (B.F. Deal Records 1978).

[58] 546 U.S. 356, 379 (2006).

supervisor of the bankrupt estate, sued a state college ("an arm of the State") in the federal Bankruptcy Court in order to set aside allegedly preferential property transfers by a then-insolvent bookstore. The state college asserted sovereign immunity, and citing the *Seminole* decision, argued that the immunity could not be abrogated by Congress as the federal bankruptcy power resided in Article I. The five-member majority decision authored by Justice Stevens found that abrogation was not necessary in that Section 8 of Article I gave Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States" and that Congress had enacted the federal bankruptcy code.[59] Bankruptcy litigation, the Court reasoned, is rather unique in that it often involves examining property transfers to state entities. As the Court reasoned, "[i]nsofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity."[60] The Court hastened to add that the "scope of this consent was limited" in that bankruptcy proceedings are "chiefly *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction."[61] Thus, the Court concluded, Congress could require states to face bankruptcy lawsuits in federal court, despite the Eleventh Amendment and *Seminole*, because the states had "consented" to such suits by ratifying the Constitution.[62]

Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Kennedy, began the dissent in *Central Virginia Community College* with the observation that the holding was "impossible to square with this Court's settled state sovereign immunity jurisprudence."[63] Relying on the *Seminole* and *Hans* holdings, the dissent emphasized that there was nothing special about the Article I bankruptcy power and that history showed that Congress did not create a national bankruptcy law until the late nineteenth century. Emphasizing the sovereignty of each state and quoting *Hans*, the dissent said a state had the "privilege of paying their own debts in their own way" without interference from Congress.[64] Thomas, apparently recognizing that the wording, intent, and history of Article I's Indian Commerce Clause and the Bankruptcy Clause were not readily distinguishable, concluded that: "It would be one thing if the majority simply wanted to overrule *Seminole Tribe* altogether. That would be wrong, but at least the terms of our disagreement would be transparent."[65]

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[59] *Id.* at 376 n.13.

[60] *Id.* at 357.

[61] *Id.* at 378.

[62] *Id.* at 377.

[63] 546 U.S. at 379.

[64] *Id.* at 387.

[65] *Id.* at 393.

In the 2021 *PennEast Pipeline v. New Jersey* case, the Supreme Court (in another 5–4 decision, consisting of a majority of Chief Justice Roberts and Justices Breyer, Alito, Sotomayor, and Kavanaugh) concluded that the Article I federal eminent domain power shared characteristics with the Bankruptcy Clause.[66] As a result, the Court concluded that states had consented to suits in federal court as part of the "plan of the Convention."[67] An eminent domain suit filed against the state of New Jersey in federal court, *PennEast* confronted the Eleventh Amendment directly because the plaintiff was an out-of-state corporation that the United States had delegated eminent domain powers to for the purpose of building a natural gas pipeline. Thus, tracking the actual language of the Eleventh Amendment, *PennEast* truly was a suit in federal court against a state by a citizen of a different state. Chief Justice Roberts, who had dissented in *Central Virginia Community College*, apparently felt differently about Congress' bankruptcy power versus the eminent domain power and wrote the majority opinion. Or perhaps the Chief Justice had a change of heart. After restating the highly questionable belief that "the States entered the federal system . . . with their sovereignty intact," he explained the states "consented" to certain suits through the "plan of the Convention":

> [A] State may be sued if it has agreed to suit in the "plan of the Convention," which is shorthand for "the structure of the original Constitution itself."[68] The "plan of the Convention" includes certain waivers of sovereign immunity to which all States implicitly consented at the founding.[69] We have recognized such waivers in the context of bankruptcy proceedings,[70] suits by other States, and suits by the Federal Government.[71]

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[66] 141 S. Ct. 2244, 2266 (2021).

[67] *Id.* at 2258.

[68] *Id.* (quoting Alden v. Maine, 527 U.S. 706, 728 (1999)).

[69] *Id.* (citing *Alden*, 527 U.S. at 755–56).

[70] *Id.* (citing *Cent. Va. Cmty. Coll.*, 546 U.S. at 379; Allen v. Cooper, 140 S. Ct. 994, 1002–03 (2020)).

[71] *Id.* (citing South Dakota v. North Carolina, 192 U.S. 286, 318 (1904); United States v. Texas, 143 U.S. 621, 646 (1892)). It is true that the Supreme Court has long held that states may be sued in federal court by other states and by the federal government regardless of any Eleventh Amendment or sovereignty constraint. Lately, the Court has shoehorned these much earlier rulings into the "plan of the Convention" construct. Reading those earlier opinions reveals that the "plan of the Convention" was never explicitly mentioned. Although the Court in *Texas* did reason that suits by the United States against a state were authorized because it "does no violence to the inherent nature of sovereignty" for a state to be sued by "the government established for the common and equal benefit of the people of all the States." *United States v. Texas*, 143 U.S. at 646. Overall, however, the Court mostly relied on the facts that Article III of the Constitution mentions that federal jurisdiction could include such suits (reasoning similar to that found in the discredited *Chisholm* decision) and that the Court had earlier allowed such lawsuits.

The Chief Justice then reviewed the history of the federal eminent domain power and found that "[s]ince its inception, the Federal Government has wielded the power of eminent domain, and it has delegated that power to private parties."[72] Based on Congress' far-reaching eminent domain power and its historical use, the majority opined: "The plan of the Convention contemplated that States' eminent domain power would yield to that of the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.'"[73]

Justice Barrett's main dissent (joined by Justices Thomas, Kagan, and Gorsuch) pointed out that, unlike the Bankruptcy Clause, the federal government's eminent domain power is not mentioned in any Article I clause.[74] But, as the Chief Justice argued, the Fifth Amendment's "Takings Clause" makes little sense if not for the implicit federal eminent domain power. Justice Barrett was equally critical of the majority's historical research. While there was a long history of the use of eminent domain and the delegation of that federal power to private parties, the dissent emphasized that there was no history of suits by the delegee against a state. The dissent argued that when stripped to its essentials, this was only "a private suit against a State that Congress has authorized pursuant to its commerce power."[75] As such, *Seminole*, the Eleventh Amendment, and state sovereignty prohibited the lawsuit.

While joining Justice Barrett's main dissent, Justice Gorsuch wrote a separate dissent (joined only by Justice Thomas) based on the Eleventh Amendment.[76] He saw no exception from the plain terms of the Amendment.

The recent *Torres v. Texas Department of Public Safety*[77] decision built on *PennEast*'s theory of consent through the structure of the original Constitution. *Torres* implicated the state sovereignty doctrine established in *Alden* as it involved a federal right being enforced in state court. This case involved Congress' war powers in that a federal law required employers (including state employers) to rehire workers after military service. Initially the federal law permitted veterans to sue their former employers in federal court. After the *Seminole* decision (but before the *Alden* decision), Congress amended the law to allow veterans to sue in state court and thus avoid Eleventh Amendment problems.

Torres was again a 5–4 decision with Justices Breyer, Roberts, Sotomayor, and Kavanaugh constituting the majority because Kagan concurred.[78] The

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[72] PennEast Pipeline Co., LLC, 141 S. Ct. at 2257.

[73] *Id.* at 2259 (quoting Kohl v. United States, 91 U.S. 367, 372 (1876)).

[74] *Id.* at 2266 (Barrett, J., with Thomas, Kagan and Gorsuch, JJ., dissenting).

[75] *Id.* at 2271 (Barrett, J., dissenting).

[76] *Id.* at 2263–65 (Gorsuch, J., dissenting).

[77] 142 S. Ct. 2455 (2022).

[78] *Id.*

makeup of the majority shifted from *PennEast*. Alito was now in the dissent, and Kagan (who dissented in *PennEast*) now accepted the *PennEast* decision and concurred with the majority. Alito's change in position is unexplained, although *Torres* involved a suit in state court (unlike *PennEast* which was brought in federal court) and implicated the *Alden* decision.[79]

Following the history-heavy analysis format set forth by Chief Justice Roberts in *PennEast*, Justice Breyer's majority opinion found "consent to suit" from the structure of the Constitution.[80] Citing Alexander Hamilton's essay in *The Federalist Papers* (No. 23) and the ratification debates, the majority stated "[t]he States ultimately ratified the Constitution knowing that their sovereignty would give way to national military policy."[81] Breyer also emphasized that Congress' Article I war power was exclusive to the federal government, or in other words "complete in itself."[82] Thus, the Court concluded:

> Text, history, and precedent show the States agreed that their sovereignty would "yield . . . so far as is necessary" to national policy to raise and maintain the military. . . . We consequently hold that, as part of the plan of the Convention, the States waived their immunity under Congress' Article I power "[t]o raise and support Armies" and "provide and maintain a Navy."[83]

In her concurrence, Justice Kagan accepted the *PennEast* decision as controlling law and reasoned that "the war powers—more than any other power, and surely more than eminent domain—were 'complete in themselves.' They were given by the States, entirely and exclusively, to the Federal Government."[84]

Justice Thomas wrote the dissent (joined by Justices Alito, Barrett, and Gorsuch) and argued that the *Alden* decision foreclosed this lawsuit.[85] Thomas reiterated the idea that states are "sovereign" and quoted the old chestnut that the states entered the Constitution "with their sovereignty intact" and that this sovereignty included immunity from private lawsuits.[86] The dissent argued that the *Alden* prohibition against any private lawsuit applied to all Article I powers, including the war power because in *Alden*,

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[79] *Compare id.*, *with PennEast Pipeline*, 141 S. Ct. at 2244 (illustrating Alito's change in position). The *Alden* decision was written by Justice Anthony Kennedy, whom both Justices Gorsuch and Kavanaugh clerked for. It is interesting that Gorsuch and Kavanaugh were on opposite sides in both *PennEast* and *Torres*.

[80] *Torres*, 142 S. Ct. at 2460.

[81] *Id.* at 2464.

[82] *Id.* at 2466 (quoting *PennEast Pipeline*, 141 S.Ct. at 2263).

[83] *Id.* (referring to U.S. Const. art. I, § 8, cls. 12–13).

[84] *Id.* at 2469 (Kagan, J., concurring).

[85] *Id.* at 2470 (Thomas, J., dissenting).

[86] *Torres*, 142 S. Ct. at 2470 (Thomas, J., dissenting).

"we did not engage in a clause-by-clause parsing of Article I's various powers."[87] Left unsaid was the fact that a "clause-by-clause parsing" never occurred because *Alden* only involved the Commerce Clause.[88] But this mattered little to the dissent because of its firm belief that "[s]tates would not have surrendered to Congress any of the immunity they enjoyed in their own courts."[89] The dissent also argued that the "complete in themselves" rationale used in *Torres* was contradicted by the reasoning of the *Seminole* case.[90] Justice Thomas noted that the Commerce Clause or the Indian Commerce Clause could be "complete in itself" and, according to *Seminole*, this Article I power was not sufficient to overcome the Eleventh Amendment prohibition.[91]

The shifting makeup of the dissents in the "plan of the Convention" cases is interesting and does not mirror the "conservative/liberal" split often found in the contentious area of state sovereignty. Justice Thomas has been consistent in his opposition, while Justice Breyer has consistently joined the majority. Chief Justice Roberts, by 2021, had shifted to be in the majority in *PennEast* and *Torres*. Justice Alito was in the majority in both *Central Virginia Community College* and *PennEast*, but shifted to opposing the federal law mandating suit against a state in state court in *Torres*. Justice Kagan dissented in *PennEast*, but abandoned her opposition to the "plan of the Convention" reasoning a year later and joined the majority in *Torres*. Justice Kavanaugh sided with the majority in both *PennEast* and *Torres*, while Justices Gorsuch and Barrett dissented in both cases. Given Chief Justice Roberts and Justice Kavanaugh's steady support for the doctrine, plus the occasional agreement of Justice Alito, one can assume that there will exist a reliable majority in any future "plan of the Convention" cases. This conclusion is based on two important, but reasonable, assumptions: (1) Justice Jackson will follow the now-retired Justice Breyer's consistent support for the "plan of the Convention" rationale; and (2) Justice Kagan's change of heart will continue in that she will accept that other Article I powers may justify the "plan of the Convention" reasoning.

IV. The Implications of the "Plan of the Convention" Cases and the Way Forward

The Supreme Court majority is plainly correct in holding that states sacrificed their sovereignty when ratifying the Constitution, at least in terms of lawsuits authorized by Congress based on Article I powers that are either unique to the federal government or evidence a strong preference for a

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[87] *Id.* at 2474 (Thomas, J., dissenting).

[88] *Id.*

[89] *Id.*

[90] *Id.* at 2483–84 (Thomas, J., dissenting).

[91] *Id.* at 2475 (Thomas, J., dissenting).

national uniformity. The Supreme Court prefers to term this as the state "consenting" to suit as part of the plan of the Constitutional convention and ratification. While there may be a bit of fictionalizing by calling this "consent," it is a construct that works well enough and it reflects the truth of the ratification debates.

The Supreme Court continues to appear intent on enshrining the Eleventh Amendment/state sovereignty triumvirate of *Hans*, *Seminole*, and *Alden* as constitutional interpretation.[92] But the "consent by plan of the Convention" cases are an important exception to both the *Seminole* and *Alden* holdings. Under this doctrine, Congress, if it evidences a clear intent, can enforce its Bankruptcy Clause, eminent domain, and war powers by permitting suits against states in either federal or state courts. As Chief Justice Roberts and Justice Breyer detail in both *PennEast* and *Torres*, the Constitution explicitly gives the eminent domain and war powers to Congress at the expense of the states.[93] For this reason, these powers are deemed "complete in themselves."

The question that remains is what is the limit of this "plan of the Convention" doctrine? Using the "consent" derived from the "plan of the Convention" doctrine, assuming that Congress grants an explicit cause of action, one would think that a person could sue in either federal or state court pursuant to a federal statute passed, for example, under the Trademark/Patent Clause, the Naturalization/Immigration Clause, the Coining of Money Clause, (all of Section 8 of Article I) and the treaty probation or import/export duties prohibition (contained in Section 10 of Article I). All of these powers are exclusively granted to the federal government and taken from the states as a result of the Constitution's ratification. Thus, to use the Court's terminology, these powers are "complete in themselves."

The dissenting justices recognize these implications fully. Thus, the vigor of the dissents. As Justice Thomas argued in his *Torres* dissent, the Indian Commerce Clause at issue in *Seminole* stands on the identical footing as the "complete in themselves" powers of bankruptcy, war, or eminent domain.[94] Under the Articles of Confederation, each state retained its sovereign powers to deal with the Indian Nations. Yet, the Constitution's Indian Commerce Clause (located in Article I Section 8) took that power

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[92] *See* Richard E. Welch III, *Mr. Sullivan's Trunk: Constitutional Common Law and Federalism*, 46 NEW ENG. L. REV. 275, 275 (2012). I previously argued that the expansive interpretation of *Hans* should be deemed "constitutional common law." But that argument has fallen on deaf ears, and the Supreme Court currently appears to reject the concept of "constitutional common law" while, rather paradoxically, accepting that the Court may make "prophylactic rules" to enforce Constitutional guarantees. Vega v. Tekoh, 142 S. Ct. 2095, 2106–07 (2022); Egbert v. Boule, 142 S. Ct. 1793, 1797 (2022).

[93] PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2254 (2021); *Torres*, 142 S. Ct. at 2463.

[94] *Torres*, 142 S. Ct. at 2483 (Thomas, J., dissenting).

away from the states and granted it exclusively to the federal government. Since early in the country's history, the Supreme Court has held that states cannot invade this exclusive federal domain.[95] Therefore, the *Seminole* ruling that Congress cannot authorize a lawsuit in federal court pursuant to its Indian Commerce Clause powers appears inconsistent with its "consent by plan of the Convention" reasoning. Whether the Supreme Court majority has the fortitude to reverse the *Seminole* holding remains unclear.

Likewise, the *Florida Prepaid* holding may conflict with the "plan of the Convention" cases.[96] The statute at issue in *Florida Prepaid* involved Congress' Trademark and Patent power, but following the *Seminole* decision, Congress decided to pass the law pursuant to the Fourteenth Amendment. The statute failed to satisfy the Court's "congruence and proportionality" test. In the 2020 *Allen v. Cooper* decision,[97] Justice Kagan found that the *Florida Prepaid* holding required the same result in the area of copyright protection. Kagan explicitly rejected the argument that the *Central Va. Community College* "plan of the Convention" reasoning should apply to the Intellectual Property Clause. She deemed the bankruptcy clause unique.[98] But, query if Justice Kagan would feel the same after seeing the progression of the "plan of the Convention" theory from bankruptcy (when she was not on the Court) to eminent domain (when she joined the dissent confining the "plan of the Convention" theory to bankruptcy) to war powers (where she joined the majority and accepted *PennEast* as binding precedent). After *PennEast* and *Torres*, a nearly identical statute could be passed by Congress using its Article I patent and trademark power to bypass the hazards of the "congruence and proportionality" test. After all, Article I gave the federal government plenary power over patents and trademarks and Congress has historically exercised exclusive jurisdiction over this area. This sure sounds like a power that is "complete in itself." While, as shown in the *Allen v. Cooper* case, the pull of stare decisis is strong, one must remember the Supreme Court's words in this area:

> Nevertheless, we always have treated *stare decisis* as a "principle of policy," and not as an "inexorable command[.]" "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" Our willingness to reconsider our earlier decisions has been "particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'"[99]

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[95] *E.g.*, Worcester v. Georgia, 31 U.S. 515, 570 (1832).

[96] *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647–48 (1999).

[97] 140 S. Ct. 994, 1007 (2020).

[98] *Id.* at 1002.

[99] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996) (quoting Helvering v. Hallock,

One can easily envision statutes passed pursuant to Congress' Article I immigration/naturalization power that might permit lawsuits against states in either federal and/or state court.[100] Congress would also pass these hypothetical statutes under their exclusive and plenary power explicitly conferred to them from state to federal authority pursuant to the "plan of the Convention." Thus, these statutes could be upheld and would not have to be analyzed under the Court's abrogation doctrine or be subjected to the "congruence and proportionality" test.

The elephant in the room, of course, is the Commerce Clause. *Union Gas*, a case holding that Congress could abrogate the Eleventh Amendment pursuant to the Commerce Clause, was reversed in *Seminole* in no uncertain terms.[101] The Commerce Clause grants Congress the exclusive power to regulate interstate commerce. As the Dormant Commerce Clause cases indicate, the states cannot interfere with or burden interstate commerce. The government has long held interstate commerce as an exclusive federal domain. Despite the logical consistency of including the Commerce Clause power within the "plan of the Convention" construct, it may be an unrealistic expectation. The Commerce Clause power has been broadly and extensively used and the current Court seems leery of Congress' efforts to pass legislation on the outer rim of this historic power.[102] Further, states can pass legislation that concerns interstate commerce as long as the commerce is not burdened. Ergo, one might expect that the current Court will attempt to distinguish Commerce Clause cases from the "plan of the Convention" holdings.

Still, the dissents are correct that the "plan of the Convention" line of cases is a powerful exception to the current Court's Eleventh Amendment/state sovereignty doctrine. Given the Court's unjustified expansions of state sovereignty, the "plan of the Convention" cases and their anticipated cousins are good news. After all, the "plan of the Convention" rationale is plainly correct. There simply is no doubt that the Constitution shifted power away from the states to the federal government to exclusively deal with immigration, naturalization, the raising of armed forces, dealings with Native American tribes, the issuance of currency, the regulation of patents and trademarks, etc. Article III of the Constitution makes it clear that

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309 U.S. 106, 119 (1940); Payne v. Tennessee, 501 U.S. 808, 827–28 (1991)).

[100] U.S. CONST., art. I, § 8. At the risk of sounding like a law professor, imagine a state engaged in extensive efforts to enforce, perhaps excessively, the federal immigration laws by arresting citizens and aliens with little regard to their rights and forcibly shipping them to other states. Assume that Congress, pursuant to its Article I Immigration and Naturalization powers, passes a law prohibiting these practices and providing a cause of action to anyone illegally detained by the state to sue that state for damages in state or federal court.

[101] 491 U.S. 1, 19, 23 (1989).

[102] *See, e.g.*, Printz v. United States, 521 U.S. 898, 923–24 (1997); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549–50, 552, 557, 560, 588 (2012).

Congress may create lower federal courts and grant them jurisdiction, but state courts are to aid in enforcing federal law. The "plan of the Convention" cases recognize these simple but significant Constitutional truths.

Using this relatively new doctrine, Congress may legislate in areas explicitly and traditionally reserved for the federal government. And Congress may constitutionally enforce its legislation by authorizing suits against states or state-wide agencies in either federal or state courts. Such "plan of the Convention" legislation would avoid the use of *Seminole's* rather artificial distinction between Article I and Fourteenth Amendment powers. It would also limit the use of the subjective and controversial "congruence and proportionality" test. Finally, such lawsuits would be a salutary restriction on *Alden's* state sovereignty doctrine. As emphasized in *Torres*, states do not have an absolute right to immunity from federal damage suits in their own courts. After all, states cannot close their courthouse doors to federal damage actions because federal and state laws form one integrated system of jurisprudence.[103] Furthermore, despite some contrary statements in *Alden*, state courts have an obligation to provide a remedy to violations of federal constitutional rights. That is what the Madisonian Compromise and Article III are all about.

CONCLUSION

Call me a traditionalist. I have always assumed that if someone is provided a federal right for which Congress has explicitly created a cause of action, that person is entitled to enforce that right and obtain a remedy. I believe that anyone steeped in English common law, as were many of the men who drafted and ratified the Constitution, would tend to agree with me. I have also always understood Article I of the Constitution to grant certain finite, but important, powers that are within the primary control of Congress; these powers were taken from the states at the time of ratification of the Constitution. This shifting of power from the states to a centralized federal government was the primary cause of the Anti-Federalist opposition to the newly drafted Constitution. But the Anti-Federalists lost and the Federalists won. Thus, the states surrendered large amounts of government powers and hence lost their "sovereignty." Given constitutional history and centuries of caselaw, Article III and the entire constitutional structure are based on the availability of state courts to enforce federal rights when a federal forum does not exist. Indeed, the state courts are obligated to provide a forum for federal constitutional deprivations. To me, at least, these are basic constitutional truths–truths the "plan of the Convention" doctrine implicitly recognizes.

The Supreme Court's earlier efforts to expand and strengthen the Eleventh Amendment and to develop a "state sovereign immunity" doctrine

[103] Testa v. Katt, 330 U.S. 386, 389–90, 393–94 (1947).

in state courts are unjustified. The Court's attempt to weave a state-immunity-from-federal-suit doctrine has no basis in the text of the Constitution or the history of its ratification. This approach is rather surprising for a Court so tied to historical inquiry and textual requirements when interpreting other constitutional provisions. But recently, a majority of the Supreme Court correctly held that Congress can legislate under such exclusive and/or important Article I powers such as bankruptcy, eminent domain, and war. Congress may enforce that legislation by authorizing damage actions by individuals against states in either federal or state court. In these cases, the Court reasons that states have "consented" to these lawsuits as part of the "plan of the Convention." There is no logical reason to confine this new doctrine to the three powers of bankruptcy, eminent domain, and war. The "plan of the Convention" rationale applies equally to Congress' Indian Commerce, Patent and Trademark, and Naturalization/Immigration Clauses, along with other Article I powers. By legislating in this fashion, Congress can avoid many of the unfortunate restrictions erected by the Court in its efforts to protect so-called "state sovereignty." This salutary result can be achieved if the Supreme Court continues to extend its "plan of the Convention" reasoning appropriately and logically. But only time will tell if the Court takes up this opportunity and responsibility.