The Metes and Bounds of State Sovereign Immunity

by SCOTT DODSON*

Table of Contents

I. Introduction

Sovereign immunity, the right of a sovereign to refuse to appear as a defendant in court, has been a principal topic of a recent Supreme Court focus on states' rights. Although the textual codification of state sovereign immunity, the Eleventh Amendment, by its terms prohibits only suits brought against a state in federal court by a citizen of another state or by a citizen of a foreign nation, the Court has pronounced the states immune from a far more expansive list of suits: lawsuits brought by citizens of the same state,[1] by foreign nations,[2] by Indian tribes,[3] by public corporations,[4] by a

*Attorney, United States Department of Commerce. The views expressed herein are mine alone and do not necessarily represent those of any other person or entity.

1. *See* Hans v. Lousiana, 134 U.S. 1 (1890).

2. *See* Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

3. *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991); *see also* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268-69 (1997) (reaffirming *Blatchford*).

4. *See* Smith v. Reeves, 178 U.S. 436 (1900).

government when a private party is the real party in interest,[5] by private parties under admiralty law,[6] by private parties under various Article I legislation in federal court,[7] by private parties under various Article I legislation in state courts,[8] by private parties for state law claims in federal court under pendent or supplemental jurisdiction,[9] and by private parties before agency administrative proceedings.[10]

On the other hand, the Court has refused to afford states immunity from suits brought under appropriate legislation enforcing the Fourteenth Amendment,[11] from appeals to the Supreme Court from state courts,[12] from suits brought by the federal government or its agencies,[13] from suits brought by states,[14] from suits by private parties in a different state's court,[15] from suits where the state has

5. *See* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); *see also* Maryland v. Louisiana, 451 U.S. 725, 745 n.21 (1981) ("[A]n original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals.").

6. *See In re* New York, 256 U.S. 490 (1921).

7. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (Trademarks); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (Interstate Commerce Clause and Patent Clause); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (Indian Commerce Clause).

8. *See* Alden v. Maine, 527 U.S. 706 (1999).

9. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

10. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S 743 (2002).

11. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

12. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); *see also* McKesson Corp. v. Fla. Alcohol & Tobacco Div., 496 U.S. 18, 26-29 (1990) (reaffirming *Cohens*).

13. *See* United States v. Texas, 143 U.S. 621 (1892) (explaining that the peace of the Union might be threatened were not federal courts empowered to adjudicate controversies between states and the federal government); *see also* United States v. Mississippi, 380 U.S. 128, 140-41 (1965) (reaffirming *Texas*).

14. *See* South Dakota v. North Carolina, 192 U.S. 286 (1904); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) (asserting jurisdiction over a border dispute between two states).

15. *See* Nevada v. Hall, 440 U.S. 410 (1979). Although the Supreme Court has not explicitly retreated from *Hall*, the reasoning underlying the decision has been complicated by *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), and its progeny. Much of *Hall*'s rationale is based on the finding that the sovereign immunity of one State in another State's courts has no constitutional dimension. The dissenters in *Hall* disagreed with the majority on that point, a point emphatically made law by *Alden v. Maine*, 527 U.S. 706 (1999). *Compare Hall*, 440 U.S. at 430 (Blackmun, J., dissenting) ("I must agree with the Court that if the judgment of the California Court of Appeal is to be reversed, a constitutional source for Nevada's sovereign immunity must be found. I would find that source not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism."); *and id.* at 439 (Rehnquist, J., dissenting) ("Art. III and the Eleventh Amendment are built on important concepts of sovereignty that do not find expression in the literal terms of those provisions, but which are of constitutional

waived its immunity,[16] from suits against state officers for prospective injunctive relief,[17] and (implicitly) from suits by any authorized party under appropriate Spending Clause legislation.[18]

No coherent theory of the applicable state sovereign immunity readily arises from this bizarre quagmire. Alexander Hamilton famously, but rather incompletely, gave his explanation for the applicability of state sovereign immunity: "Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States."[19] The Court has long adopted this opaque reference as a guidepost.[20]

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dimension because their derogation would undermine the logic of the constitutional scheme."), *with Alden*, 527 U.S. at 733 ("[T]he structure and history of the Constitution make clear that the immunity exists today by constitutional design."). Moreover, a state's supposed indignity of being forced to appear as a defendant, a rationale used by the court to uphold immunity in federal courts, a state's own courts, and federal adjudicative tribunals, *see In re Ayers*, 123 U.S. 443, 505 (1887); *Alden*, 527 U.S. at 748-49; *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 759-60 (2002), would be no less profound in a sister state's courts. The Court will have an opportunity to overrule or affirm *Nevada v. Hall*, 440 U.S. 410 (1979), this term in *Franchise Tax Bd. of Cal. v. Hyatt*, No. 02-42 (U.S. 2002). Amici have urged the Court to topple *Hall*. *See* Amicus Brief of the States of Fla., Alaska, Colo., Conn., Del., Haw., Ill., Ind., Me., Md., Mich., Miss., Mont., N.D., Ohio, Utah, Vt., Va., W. Va., and the Commonwealth of P.R., 2002 WL 31863327 (Dec. 9, 2002).

16. *See* Clark v. Barnard, 108 U.S. 436 (1887). Recently, the Court affirmed that the state's voluntary removal of a case to federal court constituted a waiver of sovereign immunity. *See* Lapides v. Bd. of Regents of Univ. of Ga., 535 U.S. 613 (2002).

17. *See Ex parte* Young, 209 U.S. 123, 159-160 (1908); *see also* Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002) (reaffirming *Young*).

18. *See* South Dakota v. Dole, 483 U.S. 203 (1987) (affirming Congress' ability to regulate, under the Spending Clause, matters expressly reserved to the states under the Twenty-First Amendment); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947) (holding the Tenth Amendment no bar to Spending Clause legislation otherwise unauthorized by Article I enumerated powers); *see also Alden*, 527 U.S. at 755 (stating that Congress has the authority and means to seek a state's voluntary consent to private suits and citing *Dole*). Spending Clause "abrogation" is, according to the Court, more accurately described as a state's voluntary waiver of its sovereign immunity in exchange for some federal financial incentive. Of course, the spending power is not unlimited. If the financial incentive is so great as to be coercive, i.e., when "pressure turns into compulsion," Spending Clause legislation may not be valid. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937); *accord* College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683 (1999).

19. THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

20. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); *Alden*, 527 U.S. at 730-31; Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 781 (1991); McKesson Corp. v. Fla. Alcohol & Tobacco Div., 496 U.S. 18, 28-29 (1990); Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989); *Union Gas*, 491 U.S. at 33, 40 (Scalia, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Nevada v. Hall, 440 U.S. 410, 440 (1979); Edelman v. Jordan, 415 U.S. 651,

If Hamilton had explained a little more about what he meant by that statement, perhaps it would not be difficult to distill a recognizable rule.[21] Unfortunately, the historical record on state sovereign immunity is remotely barren, and the Court's *ad hoc* development of state sovereign immunity under Hamilton's aegis has not fared well.[22] In Part II, I briefly recount the Court's state

662 n.9 (1974); Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare of Mo., 411 U.S. 279, 317 (1973); Principality of Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934); South Dakota v. North Carolina, 192 U.S. 286, 318 (1904); United States v. Texas, 143 U.S. 621, 646 (1892); Hans v. Louisiana, 134 U.S. 1, 13 (1890); *cf.* Cohens v. Virgnia, 19 U.S. (6 Wheat.) 264, 380 (1821) (Marshall, C.J.) ("And if a State has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides."); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting) ("Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved."). The Court skipped a beat with *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), which only mentioned Hamilton's phrase in quoted passing. *See Seminole Tribe*, 517 U.S. at 68.

21. Justice Breyer has criticized reliance on the "plan of the convention" for its ill-defined parameters. *See Federal Mar.*, 535 U.S. 743, 772 (Breyer, J., dissenting) ("Considered purely as constitutional text, these words—constitutional design, system of federalism, and plan of the convention—suffer several defects. Their language is highly abstract, making them difficult to apply. They invite differing interpretations at least as much as do the Constitution's own broad liberty-protecting phrases, such as due process of law or the word liberty itself. And compared to these latter phrases, they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution.").

22. *See, e.g.*, Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 2 (2002) ("The history of sovereign immunity in the United States is a history of mistakes."); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1652-53 & nn. 400-02 (2002) (citing scholarly criticism); Scott Fruehwald, *The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism*, 53 MERCER L. REV. 811, 836-63 (2002) (criticizing the majority's state sovereign immunity jurisprudence as "unprincipled"); Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 859-60 (2000) (noting two conflicting strains of justification for the federalism doctrine); Ann Althouse, *The* Alden *Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 647 (2000) (analyzing *Alden* and concluding that the Court's federalism underpinnings to state sovereign immunity permit "the national interest [to] win whenever we think it is important enough"); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1012 (2000); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.1 (3d ed. 1999) (recording that the Court's Eleventh Amendment case law has been maligned as "tortuous" and "hodgepodge"); Eric S. Johnson, Note, *Unsheathing Alexander's Sword:* Lapides v. Board of Regents of the University System of Georgia, 51 AM. U. L. REV.

sovereign immunity jurisprudence.

The next logical question, and one with which recent commentary has toyed,[23] is: What are the parameters of state sovereign immunity? The Court has made clear that certain provisions of Article I contain no authority for overriding state sovereign immunity, while at least one other provision, the Fourteenth Amendment, permits Congress to abrogate the states' sovereign immunity. How is this constitutional line drawn? It is temporally bound?[24] In other words, are only certain Amendments

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1051, 1052 (2002) ("The conflicting, inconsistent, and contrived rationales delineating the contours of this Eleventh Amendment Gordian knot often obscure rather than illuminate the boundaries the Eleventh Amendment seeks to define."); *see also* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (describing the state sovereign immunity doctrine as a strange "hybrid"). *But see* William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1169 (2002) ("The jurisprudence of the Rehnquist Court in matters of federalism is principled, coherent, and true to the text and structure of the Constitution.").

Professor Evan Caminker metaphorically describes the Supreme Court's vision of the "plan of the convention" as anthropomorphic states sitting around a board room table, with the United States as the chairman, trading sovereign immunities pursuant to some major deal about to go through. *See* Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 113 (1999). Years ago, Chief Justice John Marshall disavowed such a vision:

> The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments .... The government of the Union, then ... is, emphatically, and truly, a government of the people.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819). *But see* THE FEDERALIST No. 39 (James Madison) (Clinton Rossiter ed., 1961) (suggesting that the assent was given by state conventions with significant state presence). Patrick Henry made the same observation, albeit in protestation: "[W]hat right had [the Framers] to say, We, the People .... [W]ho authorised them to speak the language of We, the People, instead of We, the States?" 2 THE DEBATE ON THE CONSTITUTION, FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 595, 596 (Bernard Bailyn ed. 1993) [hereinafter BAILYN'S DEBATES].

23. A few scholars have briefly acknowledged the issue. *See, e.g.*, Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 726 n.69 (2002); Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1260-61 (2001). Professor Susan Bandes, the one scholar to directly address the issue, argues that state sovereign immunity could be a clause-bound inquiry under the current Court majority's understanding. Susan Bandes, *Treaties, Sovereign Immunity, and "The Plan of the Convention,"* 42 VA. J. INT'L L. 743, 747 (2002). As this article demonstrates, I reach a different conclusion.

24. The Court was clearly concerned with timing. *See Seminole Tribe*, 517 U.S. at 66 (citing *Union Gas*, 491 U.S. at 42 (Scalia, J., dissenting)). Although courts following *Seminole Tribe* have cited chronology as the justification for its holding, *see, e.g.*,

enacted after the Eleventh Amendment free from absolute subservience to state sovereign immunity? Or, does it divide the original Constitution and its Amendments, meaning that state sovereign immunity permeates the original Constitution but does not infiltrate certain Amendments, even those ratified before the Eleventh? Is state sovereign immunity article-bound, which would prohibit Congress from subjecting the states to private suit under any Article I power, but leave open the possibility that Article II or Article IV might overcome immunity? Or perhaps it is clause-bound, which would really provide no rule at all, and require a clause-by-clause analysis of Hamilton's plan of the convention? Part III answers that the state sovereign immunity envisioned by the Court is an Amendment-driven inquiry: it is inviolable to the extent of the original Constitution, and even such nationalistic powers as Congress' Article I War Powers or the Treaty Power of Article II cater to it. However, the Fourteenth Amendment changed the rules. Thus certain Amendments may enable its abrogation, even those ratified before the Eleventh Amendment if their precepts were incorporated into the Fourteenth.

Velasquez v. Frapwell, 160 F.3d 389, 391 (7th Cir. 1998) (Posner, C.J.) (interpreting *Seminole Tribe* to hold that the Commerce Power cannot limit Eleventh Amendment sovereign immunity because it was ratified before the Eleventh Amendment), *vacated on other grounds*, 165 F.3d 593 (7th Cir. 1999) (per curiam), the Court actually did not firmly root its holding on those grounds.

The *Seminole Tribe* majority was likely quite wary of Justice Brennan's cogent observation that timing was irrelevant if the *principle behind* the Eleventh Amendment was something more ancient than the text of the Amendment itself. *See Union Gas*, 491 U.S. at 17-18 (criticizing Justice Scalia's dissent). Additional flaws weaken the timing argument. For example, if the Fourteenth Amendment permits Congress to subject states to suit despite the immunity found in the Eleventh Amendment simply because of chronology, it should also permit Congress to authorize, as a means of enforcing the Fourteenth Amendment, cruel and unusual punishments otherwise unconstitutional under the Eighth Amendment. No one seriously takes this position. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, 573-74 (1990). Moreover, the Fourteenth Amendment framers could not have intended to override states' immunity under federal law because at the time the Eleventh Amendment had not been interpreted to extend that far. *See* Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 21. Finally, *Seminole Tribe* did not address the logical corollary that the Fourteenth Amendment may also have altered the rest of the Constitution in ways previously superceded by the Eleventh Amendment. *See* Jackson, *supra* note 23 at 1259 (suggesting that the Fourteenth Amendment could be read in conjunction with the rest of the Constitution as promulgating a new federal-state balance to the entire document).

II. The Development of State Sovereign Immunity

Sovereign immunity has enjoyed a firm place in history for many centuries.[25] The British heritage derived from the presumption that the King could do no wrong[26] and had supremacy over the judiciary.[27] The American colonists, of course, dispensed with both justifications when they declared their independence, rejected royalty, and established a republic.[28] Nevertheless, in the matriculation from colonies to states, the states became endowed with some form of that sovereign right of immunity, either directly inherited from the crown, or bestowed by the liberated colonists.[29] By ratifying the

25. *See* Nevada v. Hall, 440 U.S. 410, 414 (1979).

26. *See id.* at 415 n.7 (quoting 1 BLACKSTONE'S COMMENTARIES 246 ("The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing.")). It has been argued that this axiom originally meant that the sovereign was *not permitted* to do wrong, rather than was not held accountable for acts otherwise deemed wrongful. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 4 (1963); David. E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 3 (1972). Others have suggested that the phrase meant that the wrongful acts of the King's subordinates would not be attributable to the King. Vázquez, *supra* note 23, at 866.

27. *See Hall*, 440 U.S. at 414-15 (explaining sovereign immunity on the basis that no tribunal could be higher than the King).

28. *See* THE DECLARATION OF INDEPENDENCE ¶ 13 (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states."). In designing the Constitution, the Framers adopted and discarded various English political and legal postulates with a discriminating eye. *See, e.g.*, Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829) (Story, J.) ("The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."); Akhil Reed Amar, *Foreword: The Document and the Doctrine, The Supreme Court 1999 Term*, 114 HARV. L. REV. 26, 115 (2000) (explaining that the Framers broke with English tradition in a variety of ways, including English understanding of sovereignty). For a variety of reasons, the colonists' desire to depart from many traditional English views had been simmering well before independence. *See, e.g.*, PAUL REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 58 (1899). The current Court majority, however, has taken the position that the Framers did not depart from traditional notions of state sovereign immunity. Alden v. Maine, 527 U.S. 706, 715-16 (1999) ("Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.").

29. *See Alden*, 527 U.S. at 713 ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."). It is a debatable question whether the states inherited sovereignty directly upon independence or whether the people first inherited sovereignty and then ceded it to the states. For one famous case illustrating the Court's struggle with this concept, see *Ware v. Hylton*, 3 U.S. 199 (1796). One commentator has suggested that the states' immunity is not derived from English nations

Constitution, however, the states agreed to its parameters and in the process ceded much of their sovereign authority, including some of the control over their sovereign immunity, to the new federal government.[30]

While it is clear that the states surrendered *some* of their sovereign immunity in ratifying the Constitution, it is equally clear that the states did not cede *all* of their sovereign immunity. The question which has entangled just about everyone confronting the issue is *which parts* the states surrendered.[31]

The question is framed by Article III of the Constitution, which states, in part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[32]

Some Founders argued that this section, which extends the judicial power to controversies "between a State and Citizens of another State," permits certain private suits against states.[33] Others,

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at all but is rather a novel American creation. *See* Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 489 (2001) ("[O]ur conception of the doctrine is seriously skewed if we conceive of it as deriving from English law. We derived it independently, in the same way as did England—and Italy and Japan.").

30. *See* Tarble's Case, 80 U.S. 397, 407 (1871)

> (The Constitution . . . was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the General government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a State, or from State authorities.).

31. *Cf.* Pennsylvania v. Union Gas Co., 491 U.S. 1, 33 (1989) (Scalia, J., dissenting) ("What is subject to greater dispute, however, is how much sovereign immunity was implicitly eliminated by what Hamilton called the 'plan of the convention.'").

32. U.S. CONST. art. III, § 2, cl.1.

33. *See, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 207 (J. Elliot ed., 1876) [hereinafter ELLIOT'S DEBATES] (Edmund Randolph) ("I admire that part [of the Constitution] which forces Virginia to pay her debts."); 3 *id.* at 491 (James Wilson) ("When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand

most notably Alexander Hamilton, James Madison, and John Marshall, argued that Article III did not extend jurisdiction to suits brought against states by individuals.[34] Whatever the original

on a just and equal footing."); 3 *id.* at 526-27 (George Mason) (maligning the Constitution for enabling the "state to be brought to the bar of justice like a delinquent individual"); 3 *id.* at 543 (Patrick Henry) ("What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant."); 3 *id.* at 549 (Edmund Pendleton) ("The impossibility of calling a sovereign state before the jurisdiction of another sovereign state, shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party."); 3 *id.* at 566-67 (Grayson) ("My honorable friend, whom I much respect, said that the consent of the parties must be previously obtained .... [I]t is not so with our states. It is fixed in the Constitution that they shall become parties."); 3 *id.* at 573 (Edmund Randolph) ("I think ... that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words where a state shall be a party."); 3 *id.* at 637-38 (Tyler) ("No gentlemen here can give such a construction of [Article III] as will give general satisfaction."); 4 *id.* at 205-06 (Lenoir) ("This state has made a contract with its citizens. The public securities and certificates I allude to. These may be negotiated to men who live in other states. Should that be the case, these gentlemen will have demands against this state on that account."); 2 THE COMPLETE ANTI-FEDERALIST 245 (Federal Farmer) (Herbert J. Storing ed., 1981) (objecting that the Consituttion enables suits against states); 2 *id.* at 245 (Federal Farmer) (presupposing that a private individual could bring suit against a state); 2 *id.* at 429-31 (Brutus) ("[Article III] is improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to."); 1 BAILYN'S DEBATES, *supra* note 22, at 673-74 (Agrippa) ("This power extends to all cases between a state and citizens of another state. Hence a citizen, possessed of the notes of another state, may bring his action ...."); J. MAIN, THE ANTIFEDERALISTS 157 (1961) (quoting a letter invoking the fear that Article III would expose the states to suit by individual creditors); 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 72 (J. Kaminski & G. Saladino eds., 1983) (contrasting the ability of the states to oppress their own citizens without judicial redress but not diverse citizens); *see also* Randall, *supra* note 22, at 47 ("Apart from Madison and Marshall in the Virgina ratification debates, the recorded comments of every other participant in the ratification debates—Federalist and Antifederalist alike—show that they read the Constitution to extend the national judicial power to cases brought against the states by diverse citizens.") (footnote omitted). The New York Convention proposed the following amendment to Article III: "nothing in the Constitution now under consideration contained is to be construed to authorize any suit to be brought against any state, in any manner whatever." 2 ELLIOT'S DEBATES, *supra*, at 409. The Conventions of Virginia, North Carolina, Rhode Island, Massachusetts, and New Hampshire also proposed similar amendments. *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1051-52 (1983). None was adopted.

34. *See, e.g.*, THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."); 3 ELLIOT'S DEBATES, *supra* note 33, at 555 (John Marshall) ("I hope that no gentleman will think that a state will be called at the bar of the federal court .... It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states."); 3 *id.* at 533 (James Madison) ("It is not in the power of

meaning, if there was one at all,[35] the language was adopted and ratified.

The Court was quick to pick up the state sovereign immunity debate.[36] In 1793, the Court decided *Chisholm v. Georgia*,[37] a suit under state common law brought by a citizen of South Carolina to recover a debt against the State of Georgia. The suit clearly fell within the literal language of that section of Article III, establishing federal court jurisdiction over controversies between a state and citizens of another state.[38] Nevertheless, Georgia argued that the Court lacked jurisdiction over it as a sovereign state.[39]

Justice James Iredell agreed.[40] Although conceding that Congress could subject the states to suit under the express terms of

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individuals to call any state into court. The only operation it can have is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court."); 3 *id.* at 329 (New York Convention) ("[T]he judicial power of the United States, in cases in which a state may be a party, does not . . . authorize any suit by any person against a state . . . ."); 3 *id.* at 336 (Rhode Island Convention) (same).

35. It is entirely possible that some states ratified believing Article III permitted suits against them, while other states ratified trusting the statements of Madison, Marshall, and Hamilton. After all, by the time Hamilton's statements in *The Federalist* were published on January 9, 1788, five states—Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut—had already ratified the Constitution. Joan Meyler, *A Matter of Misinterpretation, State Sovereign Immunity, and Eleventh Amendment Jurisprudence: The Supreme Court's Reformation of the Constitution in* Seminole Tribe *and its Progeny*, 45 HOW. L.J. 77, 86 n.33 (2001). By the time Madison spoke at the Virginia convention on June 21, 1788, four more states—Massachusetts, Maryland, South Carolina, and New Hampshire—had already ratified the Constitution. *Id.* Still other states may have ratified the Constitution without ever coming to a definitive determination regarding the effect of Article III on state sovereign immunity. *See* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 27-40 (1972) (concluding that Pennsylvania, Massachusetts, Virginia, New York, North Carolina and Rhode Island failed to reach a definitive determination regarding whether state sovereign immunity survived Article III). Indeed, at the Virginia Convention, Edmund Randolph stated: "It is said to be disgraceful [to name a state as a defendant]. What would be the disgrace? Would it not be that Virginia, after eight states had adopted the government, none of which opposed the federal jurisdiction in this case, rejected it on this account?" 3 ELLIOT'S DEBATES, *supra* note 33, at 573 (Edmund Randolph). For more on the states' understandings of Article III, see Randall, *supra* note 22, at 54-61.

36. Private suits against the states were filed during this time period in sufficient numbers to suggest that a significant portion of the public believed—or, at least, hoped—that such suits were permitted by the Constitution. *See* 5 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 1-5 (Maeva Marcus et al. eds., 1994) (noting that nine private suits against states were litigated in the 1790s).

37. 2 U.S. (2 Dall.) 419 (1793).

38. *See* U.S. CONST. art. III, § 2, cl. 1.

39. *See Chisholm*, 2 U.S. at 419 (statement of Robert Forsyth).

40. *See id.* at 449 (Iredell, J., dissenting).

Article III,[41] Justice Iredell concluded that Congress had not chosen to do so with the Judiciary Act, the jurisdictional statute implementing Article III, which limited jurisdiction to that "agreeable to the principles and usages of law."[42] Iredell thus found himself with a case which turned, in his mind, on whether subjecting a state to private suit was contemplated by that language in the Judiciary Act.[43]

To determine whether suits against states were "agreeable to the principles and usages of law," Iredell returned to "the principles of the pre-existent laws, which must remain in force till superceded by others,"[44] also known as the common law, which controls in the absence of legislation to the contrary.[45] He recognized that English common law directed that no remedy could be sought against the sovereign,[46] and, after an extensive analysis of the English common law tradition of sovereign immunity, he inferred that the American states inherited this relic.[47] For Iredell, state sovereign immunity was alive and incorporated (or, at least, left unabridged) by the Judiciary Act, and therefore Georgia was not amenable to suit.[48]

In a final statement which he admitted to be dictum,[49] Iredell

41. *See id.* at 435-36 (Iredell, J., dissenting) ("[T]he general Government has a Judicial Authority in regard to such subjects of controversy, and the Legislature of the United States may pass all laws necessary to give such Judicial Authority its proper effect. So far as States under the Constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited.").

42. *Id.* at 434 (Iredell, J., dissenting).

43. *See id.* at 449 (Iredell, J., dissenting). Justice Stevens has argued that Justice Iredell essentially relied on statutory construction, rather than on constitutional interpretation. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 78-81 (1996) (Stevens, J., dissenting). His view joins unlikely bedfellows. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 36 (Scalia, J., dissenting) (recognizing that "it was the statutory ground of interpretation of the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80, rather than the constitutional ground, that Justice Iredell had relied upon in his dissent in *Chisholm*").

44. *Chisholm*, 2 U.S. at 437 (Iredell, J., dissenting).

45. *See id.* at 435 (Iredell, J., dissenting) (describing the common law as "a law which I presume is the ground-work of the laws in every State in the Union, and which I consider, so far as it is applicable to the Peculiar circumstances of the country, and where no special act of Legislation controls it, to be in force in each State, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country").

46. *See id.* (Iredell, J., dissenting).

47. *See id.* at 437-49 (Iredell, J., dissenting).

48. *See id.* at 449 (Iredell, J., dissenting) ("My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case.").

49. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 450 (Iredell, J., dissenting) ("This

commented:

> [M]y present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a state for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power.[50]

Justice Iredell's views did not prevail, at least not then. The other four Justices found that both the Constitution and the Judiciary Act established the Court's jurisdiction over Georgia despite the state's claim of immunity.[51]

The reaction to *Chisholm*, in the form of the Eleventh Amendment, was swift and decisive.[52] Whereas *Chisholm* had held

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opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial.").

50. *Id.* at 449-50 (Iredell, J., dissenting).

51. The Justices issued their opinions seriatim. Justice John Blair confined his analysis to the Constitution, and, in accordance with the literal language of Article III, he found jurisdiction. *See id.* at 450-51 (Blair, J.). Justice James Wilson, part of the five-member committee that introduced the language of Article III into the Constitution, echoed the extreme stance of popular sovereignty he espoused in the Pennsylvania ratification debates: that the people, rather than the states, were the font of sovereignty. *See id.* at 457 (Wilson, J.). That the people had exercised their sovereign prerogative to subject their state governments to suit was, to Wilson, evident both from the clear text of Article III and from the logical step that if the people could be hauled into court, then entities of lesser sovereignty, such as the states, could as well. *See id.* at 465-66 (Wilson, J.). Justice William Cushing reasoned that the Union's design, as a practical matter, was most appropriately interpreted as withholding state sovereign immunity. *See id.* at 467-68 (Cushing, J.). Chief Justice John Jay delivered the final opinion in a synthesis of the previous three concurrants. Like Wilson, Jay believed the Crown's sovereignty to pass to the people, rather than to the colonies or the states, and that their amenability to suit undermined state immunity from suit. And, like Cushing, Jay recognized that the design of a federal government could be most effective when states were subservient to a supreme national power. However, like Blair, he resorted to the text of the Constitution to discern that sovereignty actually had been overcome. *See id.* at 470-77 (Jay, C.J.).

52. Proposals for overturning *Chisholm* were adopted within two days. *See* Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1436-40 (1975). On January 2, 1794, almost a year later, the present version was introduced. *Id.* It passed both Houses in spring of 1794 by an overwhelming majority. *Id.* The states, surprisingly, were slow to act. The Amendment was not formally announced as law until 1798. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 196 (1997). By that time, two states had still not acted on, and two others had flat-out rejected the Amendment. 1 ELLIOT'S DEBATES, *supra* note 33, at 340-41. For a detailed look at the history of the adoption of the Eleventh Amendment, see John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1926-934 (1983).

that the Court had jurisdiction over a common law suit against a state brought by a citizen of another state, the Eleventh Amendment established: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[53] The Eleventh Amendment not only neatly displaced *Chisholm*,[54] but also prevented Congress from returning to it.[55]

Over the next hundred years, the issue of state sovereign immunity trickled along. In 1890, in *Hans v. Louisiana*,[56] the Supreme Court considered the reach of the Eleventh Amendment in a case brought by a citizen of the same state he was suing.[57] The Court admitted that the Eleventh Amendment facially applies only to suits brought by citizens of a different state.[58] Not a problem, explained

53. U.S. CONST. amend. XI.

54. While there can be little doubt that the Eleventh Amendment was a direct response to the Supreme Court's decision, the response does not mean that the *Chisholm* majority misinterpreted the Constitution. *See, e.g.*, Fletcher, *supra* note 33, at 1060-63; Gibbons, *supra* note 52, at 1894. Nor does it mean that Justice Iredell got it right. I note only that the Eleventh Amendment actually did "draft with a broader brush," Alden v. Maine, 527 U.S. 706, 724 (1999), because it prohibited suits against states brought by citizens of foreign states, an issue not at all raised by *Chisholm*. Had the drafters merely intended to eliminate *Chisholm*, they would not have included the excess language in the Eleventh Amendment. And if they nevertheless included excess language precluding suits between foreign citizens and states, why did they not consider including other language precluding suits between states and their own citizens? Surely it would have been easiest to write "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted by any citizen against one of the United States." Indeed, the day after *Chisholm* was announced, a resolution was introduced in the House of Representatives which stated that "no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States." 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 101 (1937). This proposal was abandoned in favor of the present version.

55. After all, because *Chisholm* was at bottom a question of statutory construction, Congress could have overturned the decision simply by amending the Judiciary Act of 1789. Instead, the decision was negated more pointedly by a constitutional amendment.

56. 134 U.S. 1 (1890).

57. *Id.* at 9 ("The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.").

58. *Id.* at 10 ("In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by citizens of another State .... It is true, the amendment does so read [to permit the suit] and if there were no other reason or ground for abating his suit, it might be

the Court, because the Eleventh Amendment text is not the sole consideration.[59] Citing Justice Iredell's dissent, the "startling and unexpected . . . shock" of *Chisholm*,[60] the comments of Hamilton, Madison, and Marshall,[61] the pre-Constitution tradition of sovereign immunity, and the "anomaly" of prohibiting suit by an out-of-state

maintainable.").

59. *See id.* at 10-15.

60. *Id.* at 11. The Justices have quibbled over whether the decision in *Chisholm* actually created such surprise. *Compare* Alden v. Maine, 527 U.S. 706, 720-21 (1999) (citing authorities), *with* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 82 n.7 (1996) (Stevens, J., dissenting) (intimating that "the reaction to *Chisholm* reflected the popular hostility to the Federal Judiciary more than any desire to restrain the National Legislature"), *and id.* at 107 n.5 (Souter, J., dissenting) (explaining that "there is ample evidence contradicting the 'shock of surprise' thesis"). The question is one which may never be resolved conclusively. Clearly, the decision met with some hostility. Georgia immediately passed a bill which decreed that any individual attempting to enforce a judgment against the State would be "guilty of a felony and shall suffer death, without the benefit of clergy, by being hanged." JACOBS, *supra* note 35, at 56-57. The Massachusetts and Virginia legislatures called for a constitutional amendment. *See* Resolves of Mass. 28 (1793) (No. 45); Acts of Virginia 52 (1793). But ex post hostility does not necessarily translate to surprise. Additionally, negative reactions were not universal; the Federalists applauded the decision. *See* Gibbons, *supra* note 52, at 1926; Nowak, *supra* note 52, at 1433-36. The current majority continues to believe the theory. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).

61. *See supra* note 34. There is strong evidence that the statements of Hamilton, Marshall, and Madison, when put into context, do not meet the unambiguous status to which they have been elevated. *See* Mark Strasser, Chisholm, *the Eleventh Amendment, and Sovereign Immunity: On* Alden*'s Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605, 634-45 (2001) (arguing that these luminaries would not have agreed with the current Court's take on sovereign immunity); Gibbons, *supra* note 52, at 1905-14 (explaining the context of these statements). For example, Hamilton and Madison were writing rejoinders to the anti-Federalist propaganda. Their primary goal was to persuade and assuage (specifically on the bitter New York battlefront) with their own Federalist rhetoric, not necessarily to state their (or anyone else's) understanding. *See, e.g.*, Randall, *supra* note 22, at 14 ("Against the weight of evidence, Madison's, Hamilton's, and Marshall's statements must be understood as part of the polemics of the ratification process rather than as the prevailing interpretation of the founding generation."); Paul E. McGreal, *Saving Article I from* Seminole Tribe*: A View from* The Federalist Papers, 55 SMU L. REV. 393, 401 n.50 (2002) (citing authorities); Gibbons, *supra* note 52, at 1906, 1912 n.112; *see also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 270 n.20 (1985) (Brennan, J., dissenting) ("Their fervent desire for ratification could have led them to downplay the features of the new document that were arousing controversy."). Likewise, if there were any doubt as to John Marshall's views on state sovereign immunity, even after the Eleventh Amendment, they are clarified in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). *See Cohens*, 19 U.S. (6 Wheat.) at 382 ("[The judicial department] is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party."); *id.* at 412 ("[I]n its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.").

citizen while permitting it to an in-state citizen,[62] the Court held that a state is immune from its own citizens' suits, notwithstanding the textual limitations of the Eleventh Amendment.[63] As the current Court minority has pointed out, *Hans* queried only whether state sovereign immunity controlled absent congressional intent to the contrary.[64]

Almost ninety years later,[65] the Court confronted the question not fully presented in *Hans*: can Congress affirmatively abrogate state sovereign immunity? In 1976, the Court decided *Fitzpatrick v. Bitzer*,[66] a case involving Congress' attempt to abrogate state sovereign immunity through Fourteenth Amendment legislation.[67]

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62. Hans v. Louisiana, 134 U.S. 1, 10 (1890)

> ([W]e should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts.).

63. *See id.* at 21. See Gibbons, *supra* note 52, at 1998-2002, for an insightful political explanation of the result in *Hans*.

64. *See Seminole Tribe*, 517 U.S. at 84-85 (Stevens, J., dissenting) ("*Hans* instead reflects, at the most, this Court's conclusion that, as a matter of federal common law, federal courts should decline to entertain suits against unconsenting States .... Justice Bradley explained that the State's immunity from suit by one of its own citizens was based not on a constitutional rule but rather on the fact that Congress had not, by legislation, attempted to overcome the common-law presumption of sovereign immunity."); *id.* at 116-17 (Souter, J., dissenting) ("The parties in *Hans* raised, and the Court in that case answered, only what I have called the second question, that is, whether the Constitution, without more, permits a State to plead sovereign immunity to bar the exercise of federal-question jurisdiction .... [T]he *Hans* Court had no occasion to consider whether Congress could abrogate that background immunity by statute."). Justice Stevens reads *Hans* to rely principally upon congressional statute—or, rather, the lack of one—rather than constitutional interpretation. *Id.* at 84-85 (Stevens, J., dissenting). He is, perhaps, alone among the Justices in that belief. *Id.* at 119 n.15 (Souter, J., dissenting) (recognizing support for Justice Stevens' view but declining to join it).

65. One case I omit in this review of the development of state sovereign immunity jurisprudence is *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), which held federal courts without jurisdiction over a state-law suit by a foreign sovereign against a state. *Monaco*, 292 U.S. at 317. Although there is much language in *Monaco* to support state sovereign immunity, I do not view *Monaco* as adding much substance to the debate. *Monaco* closely follows *Hans*, adopts its logic, quotes the same founding era statements, and harps upon the same "shock of surprise" theory of *Chisholm*. *See id.* at 320-30.

66. 427 U.S. 445 (1976).

67. *See id.* at 447-48.

> (In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination [outlawed by the statute]. The principal question presented by these cases is whether, as against the shield of sovereign immunity afforded the State by the Eleventh

The Court held that the Fourteenth Amendment does provide Congress the authority to abrogate state sovereign immunity and to subject the states to private suit.[68]

The Court relied pointedly upon the Fourteenth Amendment, noting that the Civil War Amendment "clearly contemplates limitations on [the states'] authority,"[69] and effectively created a new "shift in the federal-state balance" of power.[70] This "expansion of Congress' powers—with the corresponding diminution of state sovereignty—" infuses Congress with an abrogation authority "previously reserved to the States."[71] Thus, the Court held that the Eleventh Amendment and state sovereign immunity are limited by the enforcement provisions of the Fourteenth Amendment.[72]

Fitzpatrick determined that state sovereign immunity could be trumped by Congress acting pursuant to the Fourteenth Amendment. What other parts of the Constitution authorized such a power? In *Pennsylvania v. Union Gas Co.*,[73] a plurality of the Court reasoned that the Interstate Commerce Clause[74] also permitted Congress to eliminate state sovereign immunity because the states surrendered sovereignty with respect to interstate commerce when they ceded to Congress plenary power to regulate it.[75]

Although admitting that its conclusion was novel, the plurality began by following several prior cases marking a "trail" leading to its conclusion, including *Fitzpatrick*.[76] The plurality reasoned that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the states."[77] Importantly, for the plurality, it was the

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Amendment . . . Congress has the power to authorize federal courts to enter such an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment.).

68. *Id.* at 456.

69. *Id.* at 453.

70. *Id.* at 455.

71. Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976).

72. *Id.* at 456.

73. 491 U.S. 1 (1989).

74. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "to regulate Commerce . . . among the several States").

75. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 16-17 (1989).

76. *See id.* at 14 ("Though we have never squarely resolved this issue of congressional power, our decisions mark a trail unmistakably leading to the conclusion that Congress may permit suits against the States for money damages.").

77. *Id.* at 16; *accord id.* at 17.

(The important point, rather, is that the provision both expands federal power

simultaneous cessation of *regulatory* power from the states and corresponding grant to the federal government that implicated a surrender of abrogation authority to the national government.[78] Accordingly, the plurality had little difficulty finding that the states surrendered their sovereign immunity to Congress' power under the Commerce Clause.[79] Justice White, whose concurrence provided the fifth vote, added cryptically that while he concurred in the result, he did "not agree with much of [the plurality's] reasoning."[80]

Seven years and several changes in the Court's membership later, the Court overruled *Union Gas* in *Seminole Tribe of Florida v. Florida*.[81] There, the Seminole Indian Tribe sued the State of Florida under the Indian Gaming Regulatory Act, a statute enacted pursuant to the Indian Commerce Clause[82] which authorized an Indian tribe to bring a cause of action against a state for breach of the state's duty to negotiate with Indian tribes in good faith.[83]

The Court began by citing the Eleventh Amendment and stating that the Amendment has long stood for a meaning beyond its literal text.[84] That meaning, explained the Court, was that unconsenting states, by virtue of their sovereignty, are not amenable to suit by private individuals.[85] This position was not remarkable. A host of prior Court decisions had recognized substantive meaning beyond the

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and contracts state power; that is the meaning, in fact, of a 'plenary' grant of authority, and the lower courts have rightly concluded that it makes no sense to conceive of § 5 as somehow being an 'ultraplenary' grant of authority.).

78. *See id.* at 19-20.

(Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.).

79. *See id.* at 20.

80. *Id.* at 57 (White, J., concurring & dissenting).

81. 517 U.S. 44 (1996).

82. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "to regulate Commerce . . . with the Indian Tribes").

83. 25 U.S.C. § 2710(d) (1996).

84. *Seminole Tribe*, 517 U.S. at 54 ("Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'") (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) (ellipsis in *Seminole Tribe*)).

85. *Seminole Tribe*, 517 U.S. at 54 ("[F]ederal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'") (quoting Hans v. Louisiana, 134 U.S. 1, 15 (1890)).

Eleventh Amendment's text.[86] *Seminole Tribe* merely reiterated that

86. *See, e.g.*, 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."); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) ("As we have recognized, the significance of this Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution.") (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984)); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974) ("While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State."); Employees of the Dep't of Pub. Health & Welfare of Mo. v. Dep't of Pub. Health & Welfare of Mo., 411 U.S. 279, 280 (1973) ("Although the Eleventh Amendment is not literally applicable since petitioners who brought suit, are citizens of Missouri, it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State."); Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) ("Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control."); *In re* N.Y., 256 U.S. 490, 497 (1921) ("[I]t has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."); *In re* Ayers, 123 U.S. 443, 505-06 (1887) ("To secure the manifest purposes of the constitutional exemption guarantied by the [eleventh] amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose.").

The Court has continued to cling steadfastly to a breadth of the Eleventh Amendment distended from its text. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002) ("As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) ("Although by its terms the Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) ("[W]e have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States."); Alden v. Maine, 527 U.S. 706, 736 (1999) ("[T]he . . . text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit."); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669 (1999) ("Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished must more: It repudiated the central premise . . . that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union."); Fla. Prepaid Postsecondary Educ. Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634-35 (1999) (quoting *Seminole Tribe*, 517 U.S. at 54); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997) ("The Court's recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment.").

extra-textual proposition[87] and established that, at least in the absence of congressional abrogation, Florida was immune from the suit.[88]

The Court then turned to whether Congress had validly abrogated that immunity.[89] Of course, *Union Gas*, which held that Congress could abrogate pursuant to the Interstate Commerce Clause, almost squarely answered that question, especially on Justice Brennan's broad reasoning. But the *Seminole Tribe* Court reconsidered *Union Gas*. Holding that *Union Gas*'s reasoning was fully supported by only a minority of Justices,[90] "deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans*,"[91] and relied on cases which were off-point,[92] the Court overruled it. The Court concluded:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government.[93]

Three years later, in *Alden v. Maine*,[94] the Court considered whether Congress could abrogate state sovereign immunity in state court. Here, the majority Justices confronted a perplexing twist on the Eleventh Amendment. If, as *Seminole Tribe* recited, the Eleventh Amendment stood as the nontextual font of the elusive principle of state sovereign immunity, the majority was in a bind when it came to state courts because the Eleventh Amendment clearly speaks only to a limitation of *federal court* jurisdiction.[95]

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87. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 n.7 (1996) (citing cases).

88. *Id.* at 55-56.

89. *Id* at 58.

90. *Id.* at 63-64, 66.

91. *Id.* at 64.

92. *Id.* at 65-66 (criticizing the *Union Gas* plurality for relying on waiver cases and *Fitzpatrick*).

93. *Id.* at 72.

94. 527 U.S. 706 (1999).

95. *See* U.S. CONST. amend. XI ("The Judicial power *of the United States* shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.") (emphasis added); *see also* Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 204-05 (1991) ("[T]he Eleventh Amendment does not apply in state courts.") (quoting Will v. Mich. Dept. of State Police, 491 U.S. 58, 63-64 (1989)). All nine Justices in *Alden* recognized this obvious quandary. *Alden*, 527 U.S. at 730; *id.* at 760 (Souter, J., dissenting) ("[T]he Court of course confronts the fact that the state forum renders the Eleventh Amendment beside the point . . . .").

To reach the decision that Congress lacked authority to abrogate state sovereign immunity in state courts, the Supreme Court promptly distanced state sovereign immunity from the Eleventh Amendment.[96] Rather than confining the principle to that provision, *Alden* found state sovereign immunity incorporated between the Constitution's lines of text as part of the essence of federalism.[97]

Such a holding required that the state sovereign immunity principle was a part of the original Constitution, misinterpreted by *Chisholm* and restored by the Eleventh Amendment. The Court first viewed pre-ratification historical evidence indicating that the States universally recognized sovereign immunity[98] and comments by the Framers advocating the retention of state sovereign immunity in general.[99] Turning to post-ratification evidence, the Court cited the Eleventh Amendment's overruling of *Chisholm* as evidence that the fledgling nation considered state sovereign immunity to be left relatively undisturbed by the Constitution's text.[100]

Concluding that the historical evidence amply supported its conclusion that the original meaning of the Constitution did not extend judicial power to suits against states, the Court next examined its prior decisions. Citing the plethora of cases discerning immunity outside the literal text of the Eleventh Amendment, the Court interpreted the amalgam to stand for the idea that state sovereign immunity was captured in the whole of the Constitution, not merely the Eleventh Amendment.[101] State sovereign immunity "inheres,"

96. *Alden*, 527 U.S. at 713 ("We have, as a result, sometimes referred to the States' immunity from suit as 'Eleventh Amendment immunity.' The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."); *cf. id.* at 761 (Souter, J., dissenting) ("Indeed, if the Court's current reasoning is correct, the Eleventh Amendment itself was unnecessary."); *Seminole Tribe*, 517 U.S. at 95 (Stevens, J., dissenting) ("The fundamental error that continues to lead the Court astray is its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment.") (internal quotation marks omitted).

97. *Alden*, 527 U.S. at 730 ("This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution.").

98. *Id.* at 715-16 ("Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.").

99. *Id.* at 716-19 (reviewing the writings of Hamilton, Madison, and Marshall).

100. *Id.* at 720-27 (suggesting that the Eleventh Amendment meant to restore, rather than alter, the original meaning of the Constitution).

101. *Id.* at 728 ("These holdings reflect a settled doctrinal understanding, consistent

according to the Court, in the "structure" of the Constitution, and the mere fact that the Eleventh Amendment only speaks to federal court jurisdiction does not mean that the states have any less immunity in state courts.[102] To the contrary, *Alden* found no state surrender of sovereign immunity in the "plan of the Convention" with respect to federal claims in state courts.[103]

The Court buttressed its historical findings with principles of normative concerns: the respect for the dignity of states as sovereigns,[104] the alignment of state sovereignty with federal sovereignty in some semblance of symmetrical sovereignty,[105] the fiscal concern of burdening state treasuries with a few private, but massive, judgments,[106] the republican concern of disrupting local governance,[107] the hesitancy to create anomalies, such as state immunity in federal court but not in their own courts,[108] and the

with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.").

102. Alden v. Maine, 527 U.S. 706, 730-31 (1999); *accord id.* at 733-34 ("[T]he structure and history of the Constitution make clear that the immunity exists today by constitutional design."). The Court distinguished *Nevada v. Hall*, 440 U.S. 410 (1979), which held that states can be privately sued in other states' courts, as not speaking to the issue of whether states could be hailed into their own courts. *Hall*, 440 U.S. at 738-40. A sovereign's amenability to suit in another's courts, *Alden* expounded, is a matter of comity, while a sovereign's amenability to suit in its own courts is solely within the province of the sovereign. *Alden*, 527 U.S. at 749; *accord Hall*, 440 U.S. at 416 ("[A] claim of immunity in another sovereign's courts . . . necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.").

103. *Alden*, 527 U.S. at 760. The investigation turned up silence, which, the Court inferred, meant that the states had no intention of surrendering their immunity in their own courts. *See Alden*, 527 U.S. at 741 ("[T]he silence is most instructive. It suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution."). Silence also is consistent with at least two other logical possibilities: that everyone plainly understood the states to surrender immunity or that no one really considered the issue. Nevertheless, by making silence dispositive, the opponents of abrogation have dealt it a heavy blow.

104. *Id.* at 749-50.

105. *Id.*

> (It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege.).

106. *Id.* at 750.

107. *Id.* at 751.

108. *Alden*, 527 U.S. at 752-53.

practical reality that other means of assuring state compliance exist.[109]

As these cases demonstrate, the Court has not been hesitant to answer new state sovereign immunity questions in the last few years, and the correctness of its answers has been the subject of heated debate among commentators and the Court itself. The debate is saturated on both sides, and I need not enter the fray here. Instead, I seek the rule of law. Accepting that state sovereign immunity is a constitutional right which was only surrendered by the states pursuant to the plan of the convention (as the Court has), where does their sovereign immunity end and the government's power to abrogate begin? With this backdrop, I turn now to the task of discerning the boundaries of the current state sovereign immunity doctrine.

III. The Boundaries of State Sovereign Immunity

So where does state sovereign immunity yield to the federal government's power to abrogate? I believe that the Court understands state sovereign immunity to trump all federal powers granted by the original Constitution. Though obscure on this point, *Seminole Tribe of Florida v. Florida*[110] is best read to stand for the proposition that Congress has no power under Article I to abrogate state sovereign immunity. *Seminole Tribe* and other sovereign immunity cases also strongly suggest that the federal government has no power under any other provision in the original Constitution to abrogate state sovereign immunity. However, the Fourteenth Amendment clearly does provide Congress a limited abrogation power. Amendments enacted subsequent to the Fourteenth Amendment are built upon the federal-state shift the Civil War Amendments created and, therefore, may also provide abrogation power. Additionally, because the Fourteenth Amendment retroactively incorporated most of the rights protected by the Bill of Rights, it is best understood as permitting abrogation under certain Amendments predating the Eleventh Amendment. In other words, state immunity is inviolable with respect to the original Constitution but may be susceptible to abrogation under its Amendments. State sovereign immunity, therefore, is not a clause-driven, but rather an amendment-driven, inquiry.[111]

109. *See id.* at 755.

110. 517 U.S. 44 (1996).

111. As support for the contrary view, Professor Bandes states: "The notion of a generally applicable sovereign immunity doctrine is at odds with the current doctrinal understanding, which is highly clause-bound." Bandes, *supra* note 23, at 745. For this

A. Article I

Seminole Tribe, perhaps the preeminent decision defining the contours of state sovereign immunity, strongly supports the view that state sovereign immunity trumps all Article I powers.[112] The case involved a suit against the State of Florida brought under Indian Commerce Clause legislation. The Court noted that the only other time it had recognized Congress' power to abrogate pursuant to an Article I power was *Pennsylvania v. Union Gas Co.*,[113] which found abrogation power in the Interstate Commerce Clause. *Seminole Tribe* characterized *Union Gas* as follows: "We think it clear that Justice Brennan's opinion finds Congress' power to abrogate under the Interstate Commerce Clause from the states' cession of their sovereignty when they gave Congress plenary power to regulate interstate commerce."[114] According to *Seminole Tribe*, *Union Gas* reasoned that the surrender of plenary regulatory authority to Congress also necessitated the surrender of abrogation authority to Congress.[115] Because Congress has at least the same plenary power (if not more) to regulate commerce with the Indian tribes, *Union Gas*, if

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proposition, she cites a recent article authored by Professor Vicki Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001). Under my reading, Professor Jackson actually argues quite the opposite: "In its recent decisions, the Court's analysis of the constitutional scope of federal powers has been particularly 'clause-bound,' while its analysis of state immunities has focused on a more holistic appreciation of the structure and relationship of different parts of the Constitution to each other." Jackson, *supra* note 23, at 1260-61. Professor Bandes also suggests that the *Ex parte Young* doctrine has been applied "in an increasingly clause-bound manner." Bandes, *supra* note 23, at 751. However, this "clause-bound manner" has developed only between Article I powers and the Fourteenth Amendment, the same parameters of state sovereign immunity in general. *See id.* at 751 n.46 (comparing Indian Commerce Clause and Fourteenth Amendment cases).

112. In my own view, *Seminole Tribe* at best is an extremely weak opinion and at worst, a deeply flawed one. Based solely on the opinion itself, I would consider anything other than its narrowest holding to be an open question. Nevertheless, when read in light of *Union Gas* and subsequent cases, I believe its broader intent is clear.

113. 491 U.S. 1 (1989).

114. *Seminole Tribe*, 517 U.S. at 61.

115. *See id.* at 62 ("Indeed, it was in those circumstances where Congress exercised complete authority that Justice Brennan thought the power to abrogate most necessary."). This is a fair characterization of the plurality's reasoning. *See Union Gas*, 491 U.S. at 19-20 ("Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.").

correctly decided, directed that Florida lose.[116]

The Court, however, overruled *Union Gas*.[117] The Court went out of its way to expressly state its rejection of the reasoning of *Union Gas*, as well as its holding.[118] In other words, the states' cession of "complete law-making authority over a particular area" does not necessarily require their cession of abrogation authority as well.[119] The Court concluded: "In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government."[120]

Importantly, *Seminole Tribe* makes sense only if it actually holds that Congress has no power under Article I to subject the states to private suit. *Seminole Tribe* repudiated *Union Gas*'s reasoning that abrogation power follows plenary regulatory power, and, having done so, the Court need not have overruled the *Union Gas* holding.[121] Deprived of its reasoning, *Union Gas* no longer directed the result in *Seminole Tribe*. The Court could have just as easily left the Interstate Commerce Clause power open for another day and focused instead on a clause-specific analysis of whether Hamilton's plan of the convention contemplated congressional abrogation of state sovereign immunity under the Indian Commerce Clause.

The Court did not engage in such a clause-specific inquiry,

116. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62-63 (1996).

117. *See supra* text accompanying notes 89-93.

118. *Seminole Tribe*, 517 U.S. at 66-67 (focusing specifically on the *Union Gas* reasoning).

119. *Id.* at 72.

120. *Id.*

121. *See id.* at 66-67. Indeed, a strong case can be made that *Seminole Tribe* was merely setting up the *Union Gas* plurality's reasoning as a straw man. Under *Marks v. United States*, 430 U.S. 188 (1977), "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193. Because Justice White agreed with the result in *Union Gas* but not the expansive reasoning of the plurality, his concurrence is the narrowest rationale. Under *Marks*, *Seminole Tribe* should have read *Union Gas* for its narrowest holding, Justice White's, and disregarded the plurality's rationale for the result. That narrow holding was simply that Congress could abrogate state sovereign immunity under the Commerce Clause. Thus, because *Seminole Tribe* did not involve the Commerce Clause (and, indeed, specifically recognized the differences between the Commerce Clause and the Indian Commerce Clause), it was not bound by, and need not have reconsidered, *Union Gas*.

however. Rather, the Court overruled *Union Gas* and engaged in very little clause-specific analysis of the Indian Commerce Clause, except to affirm that the states' cession of plenary regulatory authority is irrelevant. The only way to achieve this result was for the Court to rely on a similarly broad rule applying to both the Indian Commerce Clause and the Interstate Commerce Clause.

This is exactly what *Seminole Tribe* did, by implicitly extending state sovereign immunity at least to the reaches of Article I. I say "implicitly" because the Court's precise reasoning (if not its intent) is difficult to fathom; however, three reasons convince me that *Seminole Tribe* did establish this rule. First, the opinion reads extremely broadly and its scope appears to encompass all of Article I: "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[122] Second, such a rule was necessary to justify both overruling *Union Gas*'s holding and dictating the result in *Seminole Tribe*, especially without any in-depth discussion of the two Clauses at issue. Finally, both the dissent and a host of subsequent decisions have recognized *Seminole Tribe* as standing for the proposition that Article I cannot be used to abrogate state sovereign immunity.[123] For these reasons *Seminole Tribe* and its

122. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996).

123. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 749-50 (2002) (stating that in *Seminole Tribe* "we held that Congress, pursuant to its Article I powers, cannot abrogate state sovereign immunity"); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80 (2000) ("In *Seminole Tribe*, we held that Congress lacks power under Article I to abrogate the States' sovereign immunity."); Alden v. Maine, 527 U.S. 706, 712 (1999) ("[*Seminole Tribe*] made it clear that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts."); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause."); *see also* Hibbs v. Dep't of Human Res., 273 F.3d 844, 850 (9th Cir. 2001); Reickenbacker v. Foster, No. 00-31121 (5th Cir. Dec. 3, 2001) (citing *Seminole Tribe* for the proposition that "[I]t is now settled that Congress may not act to abrogate state sovereign immunity through any of its Article I enumerated powers"); Yselta del Sur Pueblo v. Laney, 199 F.3d 281, 288 (5th Cir. 2000); *In re* Sacred Heart Hosp. of Norristown, 133 F.3d 237, 243 (3d Cir. 1998) ("The *Seminole Tribe* Court held that Congress may not abrogate state sovereign immunity by legislation passed pursuant to its Article I powers."); Velasquez v. Frapwell, 160 F.3d 389, 394 (7th Cir. 1998) (Posner, C.J.), *vacated on other grounds*, 165 F.3d 593 (7th Cir. 1999) (per curiam); Close v. New York, 125 F.3d 31, 38 & n.2 (2d Cir. 1997) (citing cases); *cf.* Pennyslvania v. Union Gas Co., 491 U.S. 1, 40 (1989) (Scalia, J., dissenting) ("If private suits against States, though not permitted under Article III (by

progeny provide strong evidence that Article I abrogation questions are not deemed to be clause-bound under current state sovereign immunity jurisprudence.

Recently, a Sixth Circuit panel in *In re Hood*[124] held, in conflict with five other Courts of Appeals,[125] that the Bankruptcy Clause of Article I provides Congress with the power to abrogate state sovereign immunity.[126] The text of the Bankruptcy Clause provides that Congress may "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[127] *Hood* suggested that the term "uniform" necessarily contemplates a surrender of state sovereign immunity pursuant to the plan of the convention. *Hood* reasoned that the states necessarily ceded regulatory power under the Bankruptcy Clause because "[g]ranting the federal government the power to make uniform laws is, at least to some extent, inconsistent with states retaining the power to make laws over that issue."[128]

Regardless of the import of the term 'uniform,' it cannot, under *Seminole Tribe* and its progeny, necessarily equate to the surrender of state sovereign immunity. The term cannot mean that all parties to a bankruptcy proceeding must be treated equally. Rather, the term most plausibly applies only to conflicting codes and procedures. In other words, the importance is structural uniformity, rather than party equality. In such a case, a state's assertion of immunity does nothing to destroy "uniformity," since the bankruptcy laws, including the exception for state sovereign immunity, would be the same in

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virtue of the understanding represented by the Eleventh Amendment), are nonetheless permitted under the Commerce Clause, or under some other Article I grant of federal power, then there is no reason why the other limitations of Article III cannot be similarly exceeded. That Article would be transformed from a comprehensive description of the permissible scope of federal judicial authority to a mere default disposition, applicable unless and until Congress prescribes more expansive authority in the exercise of one of its Article I powers. That is not the regime the Constitution establishes."). *But see* Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609, 616 n.9 (1st Cir. 1996) (proclaiming, without explanation, that *Seminole Tribe* "does not control the War Powers analysis").

124. 319 F.3d 755 (6th Cir. Feb. 3, 2003).

125. *See In re* Nelson, 301 F.3d 820 (7th Cir. 2002); *In re* Mitchell, 209 F.3d 1111 (9th Cir. 2000); *In re* Fernandez, 123 F.3d 241 (5th Cir. 1997), *amended by In re* Fernandez, 130 F.3d 1138 (5th Cir. 1997); *In re* Creative Goldsmiths of Wash., D.C., 119 F.3d 1140 (4th Cir. 1997).

126. *See Hood*, 319 F.3d at 758 ("[W]e conclude that Article I, section 8 of the Constitution gives Congress the power to abrogate states' sovereign immunity.").

127. U.S. CONST. art. I, § 8, cl. 4.

128. *Hood*, 319 F.3d at 763; *accord id.* at 764 ("In order for laws to be uniform, the laws must be the same everywhere. That uniformity would be unattainable if states could pass their own laws.").

every case.

At most, the term means that the power to pass bankruptcy laws resides exclusively in the federal government.[129] *Hood* adopts this interpretation[130] and relies on *The Federalist No. 32* as support for the conclusion that where federal power is exclusive, the states waived their sovereign immunity.[131] But *Seminole Tribe* pointedly disavowed that exclusive regulatory power does not necessarily include an abrogation power.[132] Justice Stevens warned that the reasoning of *Seminole Tribe* would apply equally to the Patent Clause and the Bankruptcy Clause.[133] The majority was nonplussed.[134] Justice Souter,

129. The Court has, however, early on eschewed this interpretation. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193-96 (1819) (holding that the Bankruptcy Clause prohibited state regulation only where Congress had already acted).

130. *See Hood*, 319 F.3d at 764 ("As it was initially understood, the Bankruptcy Clause represented the states' total grant of their power to legislate on bankruptcy.").

131. *See id.* at 765 ("*The Federalist* suggests that the states shed their immunity from suit along with their power to legislate together when the states agreed to the Bankruptcy Clause's uniformity provision."). *Hood* recognizes that the power to legislate may be divorced from the power to abrogate. *See id.* at 765 ("Of course, it is possible that in ceding some sovereignty with the Bankruptcy Clause, the states ceded their legislative powers but not their immunity from suit .... This could suggest that the power to legislate and the immunity from suit were distinct aspects of sovereignty in the early Americans' minds, and that the decision to cede one aspect to the federal government does not by itself imply a surrender of the other.").

132. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62-63, 72-73 (1996).

> (Under the rationale of *Union Gas*, if the States' partial cession of authority over a particular area includes cession of the immunity from suit, then their virtually total cession of authority over a different area must also include cession of the immunity from suit .... We agree with petitioner that the plurality opinion in *Union Gas* allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause .... In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even 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. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.).

133. *See id.* at 77 (Stevens, J., dissenting) ("Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."); *id.* at 93-94 (Stevens, J., dissenting) ("In confronting the question whether a federal grant of jurisdiction is within the scope of Article III, as limited by the Eleventh Amendment, I see no reason to distinguish among statutes enacted pursuant to the power granted to Congress to regulate commerce among the several States, and with the Indian tribes, Art. I, § 8, cl. 3, the power to establish

in dissent, presented the same *Federalist No. 32* argument as *Hood*,[135] but his words fell on deaf ears—the majority did not even deign to respond, choosing instead to rely on the sweeping statements of precedent.[136] *Hood* is, I believe, in irreconcilable conflict with *Seminole Tribe.*

I am more sympathetic to the argument that some Article I clauses, such as the War Powers Clauses, might provide abrogation authority because of their extreme federal slant.[137] The nation's need to act quickly and without internal resistance in military matters is extremely important.[138] Finally, federalism concerns are arguably weaker in the War Powers context.[139] Thus, in the area of foreign

uniform laws on the subject of bankruptcy, Art. I, § 8, cl. 4, the power to promote the progress of science and the arts by granting exclusive rights to authors and inventors, Art. I, § 8, cl. 8, the power to enforce the provisions of the Fourteenth Amendment, § 5, or indeed any other provision of the Constitution.").

134. *See id.* at 72 n.16 (stating that "it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity" and arguing that the efficacy of these statutes do not necessitate suits against states).

135. *See id.* at 143 n.39 (Souter, J., dissenting) ("As I explain further below, the views of Madison and his allies on this more difficult question can be divined, if at all, only by reference to the more extended discussions by Hamilton in *The Federalist No. 32*, and by Justice Iredell in his *Chisholm* dissent. Both those discussions, I submit, tend to support a congressional power of abrogation."); *id.* at 145-49 (Souter, J., dissenting) (arguing that *The Federalist No. 32* supports an abrogation power when the federal government has exclusive regulatory control over a particular subject).

136. *See id.* at 68-71.

137. The U.S. government has taken this stance in several War Powers cases. *See* Vázquez, *supra* note 23, at 726 n.66 (citing briefs of the U.S. Attorney in various cases).

138. An America on the brink of war could little benefit from a "cacophony of conflicting policies," Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 344 (1999), insisted upon by various state positions. State resistance to national military and international policies could undermine the security of the nation as a whole. At the very least, state resistance could embarrass the national government. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 827-28 (1989). Such conflict between the states and the national government was a principal impetus for replacing the Articles of Confederation.

139. In addition to serious detriments of state resistance to congressional War Powers legislation, the primary benefits justifying federalism are weakened in the context of the War Powers. One commonly invoked justification for federalism is that the states provide independent training grounds for novel governmental matters. *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397 (1997). In the context of military and international affairs, any "testing" would be virtually nonexistent because war falls in the exclusive province of the national government. A second justification for federalism, local expertise, *see id.* at 401-02; *cf.* United States v. Lopez, 514 U.S. 549, 581-83 (1995) (Kennedy, J., concurring), is similarly inapplicable. States usually have less expertise than the federal government in international matters, both because the issues may involve matters having very little to do with the state and because the states have traditionally

affairs, national uniformity is paramount, and one could argue persuasively that the ability of the states to resist federal coercion should diminish with respect to Congress' War Powers.

Indeed, the majority in *Seminole Tribe* recognized that not all Article I clauses are alike in their federal character when it distinguished between the Interstate Commerce Clause and the Indian Commerce Clause.[140] Implicitly, *Seminole Tribe* momentarily opened the door to the possibility that if an Article I clause had sufficient federal *chutzpah*, it might authorize abrogation of state sovereign immunity. However, *Seminole Tribe* did not go down that path. The Court refused to take a clause-specific approach, favoring instead wholesale line-drawing.[141]

In any case, I find it most unlikely that the current Court would find a War Powers exception, even if the Court made the inquiry. In addition to the arguments I make in the following Subpart, there are two reasons why there is no room in the current majority's understanding for a War Powers exception. First, the War Powers Clause's preeminent federal nature does not approach the dramatic shift in federal-state power effectuated by the Fourteenth Amendment, the one constitutional provision which the Court has identified as sufficiently federal to encompass an abrogation power. Second, the Court has long held that not even the War Powers Clause, at least in times of peace,[142] can override individual rights secured by the Constitution.[143] Given the majority's recent propensity for comparing the stature of state sovereign immunity to that of individual rights,[144] the majority probably would view a War Powers

been excluded from international and military affairs. *See* Bilder, *supra* note 138, at 828.

140. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 61-62 (1996).

141. *See supra* text accompanying notes 121-122.

142. Of course, constitutional lines drawn for peacetime application may buckle in times of war. Whether war alters the interplay between state sovereign immunity and the government's abrogation authority, however, is well beyond the scope of this article.

143. *See* Reid v. Covert, 354 U.S. 1, 34-35 (1957) (holding that Congress could not contravene the right to trial by jury through exercise of its War Powers during peacetime).

144. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) ("State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected."). My own view finds the analogy of state sovereign immunity to individual rights highly problematic. The Tenth Amendment, for example, which speaks of states, speaks only of "powers," not "rights," U.S. CONST. amend. X, even though its precursor, Article 2 of the Articles of Confederation, stated that: "[E]ach 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 . . . ." ART. OF CONFEDERATION art. II. Of the states' sovereignty, freedom, independence, power, jurisdiction, and right, only state "power" graduated to

exception with great suspicion.

Although a creative Court with different members might use the War Powers Clause to reopen the door that *Seminole Tribe* slammed shut, it seems to me extremely unlikely that the current Court would ever do so. The majority is set on expanding state sovereign immunity to the reaches of Article I, without exception. Based on *Seminole Tribe* and many of the reasons I explain in the following Subpart, I am convinced that the Court views Article I as proving no abrogation authority.

B. The Original Constitution

While *Seminole Tribe* and its progeny convince me that the majority believes state sovereign immunity to extend at least to the reaches of Article I, the opinions of those cases are meticulously worded not to extend *Seminole Tribe*'s holding beyond Article I. Therefore, the question of whether the federal government may abrogate state sovereign immunity pursuant to some other Article's power, such as the Treaty Power of Article II, is more difficult. Nevertheless, while the Court's opinions are phrased with care, there are several reasons why the majority does not understand any part of the entire original Constitution to permit the federal government to abrogate state sovereign immunity.

First, the Court has often characterized Eleventh Amendment state sovereign immunity as a limitation on the Article III jurisdiction of the federal courts.[145] Article III imparts jurisdiction on three general bases: the source of the law, the subject-matter of the suit, or the parties in the case.[146] The Eleventh Amendment tracks the party-

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the protections of the Tenth Amendment. By contrast, the Ninth Amendment speaks of "rights," but directs that the "rights" are retained by the *people*—it grants nothing to the states. U.S. CONST. amend. IX. Indeed, throughout the Amendments, "rights" are given to the people, not states. *See id.* amends. I, II, IV, and VI.

145. *See Seminole Tribe*, 517 U.S. at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

146. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

based language of Article III,[147] thus indicating that the drafters of the Eleventh Amendment meant specifically to address that part of Article III. The Eleventh Amendment, however, provides no exceptions based on the constitutional source of the abrogation attempt; instead, the Amendment's prohibition extends to "*any* suit in law or equity."[148] It thus implicitly incorporates the entire source-of-law-jurisdiction found in Article III, which extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made."[149] Accordingly, the Eleventh Amendment's restriction applies, if the other requirements are satisfied, whether the constitutional authorization came from Article I, Article II, or any other Article. Nothing in the interplay between the Eleventh Amendment and Article III imparts significance to the particular source of the law in question. Therefore, because the Court has held that Article I cannot alter the jurisdictional limits of Article III (as explained by the Eleventh Amendment and other aspects of state sovereign immunity),[150] it would be difficult for the Court to justify how other parts of the original Constitution could do so.[151]

Second, the Court has also proclaimed that the broader principle of state sovereign immunity affects much more than just Article III because it is a balance struck by the very federal fabric of the original Constitution.[152] If so, there is no reason to draw lines of distinction

147. *Cf. id. with* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

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

149. U.S. CONST. art. III, § 2.

150. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996).

151. *Cf.* Principality of Monaco v. Mississippi, 292 U.S. 313, 328-32 (1934) (breaking down the sovereign immunity analysis by Article III distinctions); Pennsylvania v. Union Gas Co., 491 U.S. 1, 39-40 (1989) (Scalia, J., dissenting) ("When we have turned to consider whether 'a surrender of [state] immunity [is inherent] in the plan of the convention,' we have discussed that issue under the rubric of the various grants of jurisdiction in Article III, seeking to determine which of those grants must reasonably be thought to include suits against the States. We have never gone thumbing through the Constitution, to see what other original grants of authority—as opposed to Amendments adopted after the Eleventh Amendment—might justify elimination of state sovereign immunity.") (internal italics omitted).

152. *See* Alden v. Maine, 527 U.S. 706, 730 (1999) ("This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution."); *see also id.* at 713 ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."); Fed. Mar. Comm'n v. S.C. State Ports

between various parts of the original Constitution. The balance exists as part of the original Plan *in toto* and does not wax or wane depending upon the particular constitutional source of a law.[153] The entire original Constitution is the framework for state sovereign immunity, and therefore every provision therein is bound by the federalism constraints it imposes.

Third, the Framers designed the Supremacy Clause of Article VI[154] as the primary mechanism to maintain the federal government's power over the states. The Clause makes all laws and treaties, irrespective of their source, supreme over state law in almost exactly the same way and without meaningful distinction.[155] If the Supremacy Clause does not permit overriding state sovereign immunity under the authority of Article I statutes, then, *ipso facto*, neither does it for laws made under the authority of other provisions of the Constitution. In effect, *Seminole Tribe* and its progeny can perhaps be more appropriately read not as Article I cases, or even as Eleventh Amendment cases, but rather as Supremacy Clause cases: that the Supremacy Clause alone does not contemplate the abrogation of state sovereign immunity.[156]

Auth., 535 U.S. 743, 753 (2002) ("As a result, the Eleventh Amendment does not define the scope of the States sovereign immunity; it is but one particular exemplification of that immunity."); *id.* at 768 n.18 ("The principle of state sovereign immunity enshrined in our constitutional framework, however, is not rooted in the Tenth Amendment.").

153. In contrast, the Fourteenth Amendment was specifically designed to alter the federal-state balance of power struck by the original Constitution. The analysis of those parts of the Constitution and its Amendments which were affected by the Fourteenth Amendment, therefore, differs from the analysis of the original Constitution. *See infra* Subpart C.

154. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

155. *See id.* The Founders were concerned with ineffective enforcement of federal laws (treaties, statutes, and the Articles themselves) against the states under the Articles of Confederation. They rectified this in the same way: with a Supremacy Clause directed at all three. *See* Vázquez, *supra* note 23, at 733; Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1108 (1992) ("[I]n the end, the Framers adopted the very same mechanism for enforcing treaties, federal statutes, and the Constitution itself. It consisted of the Supremacy Clause and its corollary in Article III.").

156. For the Court's recent discussion of this concept, see *Alden*, 527 U.S. at 732-33 ("When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States . . . . [N]either the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States' immunity from suit in federal court.").

Fourth, the Court has resurrected the once-discredited[157] rationale that state sovereign immunity protects the dignity of the states.[158] The dignity of the states is, according to the majority, offended when the state is called to the bar of an adjudicative authority.[159] The affront to dignity ostensibly exists irrespective of the source of the calling, be it powers under Article I or any other

157. *See* South Dakota v. North Carolina, 192 U.S. 286, 315 (1904) ("That [the Eleventh Amendment's] motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state."); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821) ("That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment .... We must ascribe the amendment, then, to some other cause than the dignity of a State."). The current minority of Court Justices adheres to Marshall's *Cohens* view. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 96-97 (1996) (Stevens, J., dissenting) (quoting *Cohens*, 19 U.S. at 406-07); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 151 (1993) (Stevens, J., dissenting) (lambasting the justification as "embarrassingly insufficient").

158. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) ("States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government."); *id.* at 760 ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'"); Alden v. Maine, 527 U.S. 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity . . . ."); *id.* at 749-50 (discussing the indignity of coercing unwilling states to appear before a judicial tribunal); *Seminole Tribe*, 517 U.S. at 58 (explaining that state sovereign immunity serves "to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties") (internal quotation marks omitted); *Metcalf & Eddy*, 506 U.S. at 146; *In re* Ayers, 123 U.S. 443, 505 (1887) ("The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer to complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals, without their consent, and in favor of individual interests.").

159. The Court has used the dignity rationale sweepingly. *See, e.g.*, *Federal Mar.*, 535 U.S. 743 (barring an adjudicative proceeding against a state before an executive agency on the grounds that the forced appearance offended the state's dignity); *Alden*, 527 U.S. at 748-49 (explaining that the states' dignity is offended by being coerced into appearing before their own courts).

Article, so long as it is a federal source.[160]

Finally, the Court has often justified its state sovereign immunity stance on the recognition that other safeguards exist for state compliance with the law, such as the good faith of the states to abide by the law, the chance that a state might consent to suit, the federal government's ability to sue for enforcement, Section 5 private enforcement, suits brought by other states, and *Ex parte Young*.[161] There is no reason to think that these safeguards are less effective with respect to non-Article I decrees.[162]

Like the War Powers analysis, I am sympathetic to the powerful arguments that certain non-Article I clauses, such as the Treaty Clause,[163] might provide the federal government with abrogation authority.[164] The Treaty Clause, for example, exhibits a stark pro-federal, anti-state balance similar to that inherent in the War Powers Clauses.[165] It is also arguably beyond the reach of *Seminole Tribe*

160. There is, of course, nothing in the Constitution about protecting the dignity of the states. Ironically, then, the justification cannot be tethered to a particular part of the Constitution and circumvented by resorting to other parts.

161. *See Federal Mar.*, 535 U.S. 743; *Alden*, 527 U.S. at 755-57, *Seminole Tribe*, 517 U.S. at 71 n.14.

162. To be sure, commentators have been critical of the sufficiency of these additional safeguards. *See, e.g.*, Ramsey, *supra* note 138 (arguing that governmental agencies have neither the resources nor the motivation to combat state infractions at a level equal to that of individual plaintiffs). To the extent these arguments have weight, however, they do not necessarily have more weight with respect to non-Article I laws. In any case, it could be argued that the more nationally important state compliance is, the more likely these other enforcement mechanisms will be employed.

163. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . . .").

164. Some commentators have concluded that the treaty power is subject to the Court's state sovereign immunity. *See, e.g.*, Vázquez, *supra* note 23, at 715; Mitchell N. Berman, R. Anthony Reese, Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix"* Florida Prepaid *(And How Not To)*, 79 TEX. L. REV. 1037, 1188-94 (2001); Jean O. Melious, *Enforcing the Endangered Species Act Against the States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 605, 657-58 (2001). Others have suggested the contrary. *See, e.g.*, Cory Eichhorn, Comment, *Eleventh Amendment Immunity Jurisprudence in an Era of Globalization: The Tension between State Sovereign Rights and Federal Treaty Obligations*, 32 INTER-AM. L. REV. 523 (2001); Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1460-64 (2000); John O'Connor, Note, *Taking TRIPS to the Eleventh Amendment: The Aftermath of the College Savings Cases*, 51 HASTINGS L.J. 1003, 1031-40 (2000).

165. The states are prohibited by the Constitution from entering into treaties. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . ."). And it is widely recognized that the states gave up much of their sovereignty to the federal government in the arena of foreign affairs. *See* Zschernig v.

because it is housed in Article II, not Article I.[166] Furthermore, the Treaty Clause's requirement of consent of both a supermajority of Senators and the President provides internal structural federalism safeguards;[167] consequently, the exercise of the treaty power might not need an additional state sovereign immunity safeguard. Also, the desire for state compliance with treaties is arguably greater than that for statutes[168] and, in any case, was certainly of paramount concern to the Framers.[169] Finally, the Court has held, in *Missouri v. Holland*,[170]

Miller, 389 U.S. 429 (1968) (developing a dormant foreign affairs power). Professor Peter Menell suggests that because the states ceded much of their sovereignty with respect to foreign affairs, domestic cases such as *Seminole Tribe* and its progeny do not support state sovereign immunity in the face of a treaty. *See* Menell, *supra* note 164164, at 1461 n.240 ("States possessed sovereignty with regard to domestic affairs (as would be relevant to the Commerce Clause and the Patent Clause), but not foreign affairs. These powers have always resided at the national level. Therefore, it would not be appropriate to read *Florida Prepaid* as precluding Congress from abrogating the States' Eleventh Amendment sovereign immunity under its treaty or foreign relation powers."). While this position is by no means indefensible, it unjustifiably conflates state sovereign immunity with all other attributes of state sovereignty. The position more aligned with the Court's recent opinions is that the states, while ceding much of their sovereign regulatory authority over foreign affairs to the federal government, did not cede that part of their sovereignty which enables them to resist suits by private individuals, even in the face of a national foreign affairs power. As the Court has reiterated, it is not dispositive that a power resides exclusively in the hands of the federal government. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996).

166. *See* Robert Knowles, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 NW. U. L. REV. 735, 740 (2001) ("The inclusion of the Treaty Clause within Article II gives it special significance: it provides a unique and independent grant of power to the federal government.").

167. Structural federalism safeguards include equal state suffrage in the Senate, the Senate supermajority requirement, and the Electoral College. As originally conceived, the first two requirements ostensibly safeguarded state interests because senators were selected by the state legislatures. Now, of course, these protections have been winnowed by the Seventeenth Amendment, which eliminated state selection of senators in favor of direct election by the people. U.S. CONST. amend. XVII. Nevertheless, the modern Court has relied upon these federalism protections to restrict state sovereignty in the Tenth Amendment context. *See* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 551 n.11 (1985).

168. *See* Vázquez, *supra* note 23, at 729-30. One nation's breach of a treaty provision entitles non-breaching nations to void the treaty. *See* THE FEDERALIST No. 43, at 280 (Clinton Rossiter ed., 1961) (James Madison) ("It 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 authorizes them, if they please, to pronounce the compact violated and void."); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 261 (1796) (Iredell, J.) ("It is a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void.").

169. *See* THE FEDERALIST No. 3, at 42-45 (John Jay)(Clinton Rossiter ed., 1961); *see also* Vázquez, *supra* note 155, at 1102-03.

that Congress could implement a treaty without transgressing the Tenth Amendment even though the implementing statute was not authorized under any enumerated power.[171]

Despite the appeal of some of these points, I believe the current majority would not permit treaties to override state sovereign immunity.[172] Aside from the reasons I have already articulated that cover the Treaty Clause and the rest of the original Constitution, several other reasons specific to treaties lend support to that position.

There is a contextual argument against recognizing the Treaty Clause as containing abrogation authority. After the present version of the Eleventh Amendment was introduced in the Senate, Senator Albert Gallatin moved to amend the resolution to exempt "cases arising under treaties, made under the authority of the United States" from the Amendment's circumscription of Article III.[173] The proposal was rejected, which could indicate that the Eleventh Amendment, and thus state sovereign immunity, was not intended to be susceptible to the Treaty Clause.[174]

Historical evidence demonstrates that treaties were not understood to be mechanisms for circumventing states' rights. At the Convention, Edmund Randolph stated: "[N]either the life nor property of any citizen, nor the particular right of any state, can be affected by a treaty."[175] Thomas Jefferson wrote later that the treaty power could not supercede "the rights reserved to the states; for

170. 252 U.S. 416 (1920).

171. *See id.* at 432 ("To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.").

172. Several lower courts agree. *See, e.g.*, Atl. Legal States Found. v. Babbit, 83 F. Supp. 2d 344 (N.D.N.Y. 2000).

173. 4 ANNALS OF CONG. 30 (1794).

174. *See* Alden v. Maine, 527 U.S. 706, 735 (1999) ("Congress' refusal to modify the text of the Eleventh Amendment to create an exception to sovereign immunity for cases arising under treaties . . . suggests the States' sovereign immunity was understood to extend beyond state-law causes of action."). Of course, it is also possible that the amendment was rejected for other reasons, such as a preference for a total repeal of diversity jurisdiction under Article III, *see* James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1362 (1998), or a belief that the additional language was unnecessary, *see* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 287 n.40 (1985) (Brennan, J., dissenting).

175. 3 ELLIOT'S DEBATES, *supra* note 33, at 469, 504 (Edmund Randolph).

surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way."[176] Despite their fear that the states might resist treaty obligations, the Framers understood the treaty power to be limited by federalism concerns.

The Court itself has recognized that the Treaty Power is limited by federalism considerations.[177] Treaties must be "not inconsistent with the nature of our government and the relation between the States and the United States,"[178] and that the treaty power covers all matters "which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments."[179] In *Reid v. Covert*,[180] a plurality of the Court explained:

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions .... The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.[181]

Missouri v. Holland[182] is consistent with the reasoning in *Reid*. Justice Holmes explicitly acknowledged that the treaty in that case was not limited by the passive Tenth Amendment.[183] He was careful

176. THOMAS JEFFERSON, *A Manual of Parliamentary Practice: For the Use of the Senate of the United States (1812), reprinted in* JEFFERSON'S PARLIAMENTARY WRITINGS at 421(Wilber S. Howell ed., 1988).

177. Even Justice Holmes in *Holland* disavowed a limitless treaty power. *See* Missouri v. Holland, 252 U.S. 416, 433 (1920) ("We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way.").

178. Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872).

179. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569 (1840).

180. 354 U.S. 1 (1957).

181. *Reid*, 354 U.S. at 17. Although only four Justices in *Reid* joined this particular language, Justice Frankfurter joined the proposition that neither treaties nor their implementing legislation could trump express constitutional rights. *Id.* at 41 (Frankfurter, J., concurring). Other cases express similar language. *See, e.g.*, Geofroy v. Riggs, 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.").

182. 252 U.S. 416 (1920).

183. *Id.* at 434; U.S. CONST. amend. X ("The powers not delegated to the United

not to imply that the treaty power permitted what was otherwise affirmatively prohibited by the Constitution.[184] The distinction is critical. The current Court's conception of state sovereign immunity does not radiate from the Tenth Amendment,[185] although it has been so misinterpreted.[186] Rather, according to the Court, state sovereign immunity is an affirmative—and express, in the case of the Eleventh Amendment—limitation on judicial power. Consequently, a treaty-sovereign immunity case would fall more appropriately under *Reid* than *Holland*. Under *Reid*, the treaty power cannot override such constitutional prohibitions as state sovereign immunity.[187] Indeed, the current majority has already intimated that state sovereign immunity shields states from treaty claims.[188]

Additionally, permitting the government to abrogate through treaties, but not statutes, would work a number of paradoxes in both theory and practice. Statutes and treaties stand on equal footing,[189]

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). The text of the Tenth Amendment affirmatively grants nothing; it is a tautological confirmation of the obvious. United States v. Darby, 312 U.S. 100, 124 (1941).

184. *See Holland*, 252 U.S. at 433-34 ("The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.").

185. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002) ("The principle of state sovereign immunity enshrined in our constitutional framework, however, is not rooted in the Tenth Amendment."). One commentator has suggested that the state sovereignty principles enshrined in the Tenth Amendment should yield to federal foreign affairs authorities such as the treaty power. *See* Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277 (1999). Whether or not persuasive, this argument does not control the question of state sovereign immunity, which neither derives from, nor is confined by, the Tenth Amendment. Thus, the restrictions on the Tenth Amendment do not necessarily translate to limit state sovereign immunity.

186. *See* Alden v. Maine, 527 U.S. 706, 761 (1999) (Souter, J., dissenting) ("There is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood . . . .").

187. Commentators have objected that the right at issue in *Reid* was an individual right, as opposed to a state right, *see, e.g.*, Flaherty, *supra* note 185, at 1300 (noting that the right at issue in *Reid* was the individual right to a trial by jury), but it is doubtful that the current majority would see this distinction as significant. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) ("State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected.").

188. *See* Breard v. Greene, 523 U.S. 371, 377 (1998) (per curiam) (suggesting that Paraguay's claims against a state for a treaty violation would be barred by the Eleventh Amendment).

189. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both

and one can override the other.[190] If state sovereign immunity extended only to Article I, a treaty could override state sovereign immunity, but a subsequent statute could only reduce—as opposed to expand—the states' exposure. This situation is not an impossibility, but it is rather peculiar[191] and could work difficulties in practice.[192] Also, in the event the United States ratifies a non-self-executing treaty[193] requiring state suability, Congress would be unable to implement (and the courts unable to enforce) that requirement, even though the nation would still be bound by the treaty conditions.[194] Lastly, the emergence of an international community and global identity have blurred many of the demarcations the Founders initially envisioned between treaties and statutes. Today, Congress regularly enacts statutes with ramifications far beyond domestic borders,[195] and congressional-executive agreements[196] have somewhat usurped the

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are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other."); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an act of the legislature . . . .").

190. *See Breard*, 523 U.S. at 376 ("We have held 'that an Act of Congress . . . is on full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of [a] conflict renders the treaty null.'") (quoting Reid v. Covert, 354 U.S. 1, 18 (1957)); Head Money Cases, 112 U.S. 580, 599 (1884) ("In short, we are of [the] opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.").

191. *See Reid*, 354 U.S. at 18 ("It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overriden by a statute that must conform to that instrument.").

192. For example, Congress might desire to alter the treaty abrogation by narrowing it in some aspects but broadening it in others, with the overall effect of reducing state exposure. It would be an undecided question whether such an attempt would be constitutional.

193. Treaties can be either self-executing, which are immediately enforceable, or non-self-executing, which require implementation by congressional statute. *Compare* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (self-executing), *and* Cook v. United States 288 U.S. 102, 119 (1933) (self-executing), *with* Edye v. Robertson, 112 U.S. 580, 598 (1884) (non-self-executing).

194. This result assumes that implementing statutes are identical to Article I statutes for state sovereign immunity purposes. Because both derive their authorization from the Necessary and Proper Clause, see *Missiouri v. Holland*, 252 U.S. 416, 432 (1920) and *Neely v. Henkel*, 180 U.S. 109, 121-22 (1901), the assumption is a strong one.

195. Congress has the power to legislate foreign affairs not covered by its enumerated powers, even though the Constitution does not expressly authorize such legislation. *See* Perez v. Brownell, 356 U.S. 44, 57 (1958); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

196. Though they circumvent the Senate supermajority requirement of treaties,

traditional treaty role. Because international statutes, congressional-executive agreements, and treaties are used interchangeably as a practical matter,[197] it would be problematic to differentiate between them on state sovereign immunity grounds. The slew of anomalies and uncertainties which a treaty exception to state sovereign immunity would create stands in the way of the current majority's rule-oriented jurisprudence.

For these reasons, the current majority's understanding of state sovereign immunity leaves no room for a treaty exception. Such an exception, while supported by some evidence, would enable plaintiffs to end-run around one of the Court's favorite state rights. This the majority would not sanction. Rather, state sovereign immunity is a principle which pervades the entire original Constitution, and nothing therein contains the power to override it.[198]

C. Amendments

Having determined that the Court's understanding recognizes state sovereign immunity as a limitation on the powers of the federal government as conceived in the original Constitution, the question remains whether the various Amendments to the Constitution either changed the contours of Hamilton's plan for state sovereign immunity or provided Congress with certain limited powers to abrogate.

The Court answered that question in at least one context. Section 5 of the Fourteenth Amendment[199] authorizes Congress to subject the states to private suit for the purpose of enforcing the mandates of that Amendment.[200] The Fourteenth Amendment does

congressional-executive agreements are accorded the same stature as treaties. They are both constitutional and supreme with respect to state laws, just as federal statutes and treaties are. *See* United States v. Belmont, 301 U.S. 324, 331 (1937); *see generally* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995).

197. In recent years, treaties and congressional-executive agreements have invaded a host of domestic and state-province issues. *See* Knowles, *supra* note 166, at 749-50.

198. Professor Bandes argues for a clause-specific state sovereign immunity inquiry, at least with respect to the Treaty Power. *See* Bandes, *supra* note 23, at 747. Her point is that the "plan of the convention" is the pertinent guidepost, and that "it is still necessary to determine the current scope of state sovereignty by examining the 'structural principles inherent in our system of federalism.'" *Id.* (quoting Jackson, *supra* note 23, at 1277). I do not disagree; I only suggest that a current majority of the Court understands Hamilton's rubric to be a structural rule already dispositive of the examination, and that the Court would be more willing to rely on that rule than sew together a patchwork quilt of *ad hoc* clause-by-clause analyses.

199. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

200. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

so, according to the Court, because it specifically contemplates direct congressional regulation of the states[201] and dramatically altered the federal-state balance of power in favor of the federal government.[202]

Based on *Fitzpatrick*, it is virtually a foregone conclusion that the other Amendments with enforcement clauses directed at regulating the states[203] also provide Congress a limited abrogation power.[204] Indeed, because the Civil War Amendments' shift in the federal-state balance is ostensibly still in effect today, any Amendments enacted after the Fourteenth would have been ratified on the understanding that the federal-state balance of power, and its contingent effects on state sovereign immunity, had changed. Thus, any post-Civil War Amendment arguably possesses inherent abrogation potential.

The more interesting question is whether those Amendments ratified before the Eleventh Amendment also allow abrogation.[205] Although not a part of the original Constitution, and therefore arguably not constrained by the original plan's federalism framework, the Bill of Rights was ratified in 1791, only a few years after the original Constitution took effect and was contemplated well beforehand. It is highly improbable that the majority would ascribe both to the "profound shock" theory of *Chisholm* and to a contemporaneous consent to private suits under the first ten Amendments. The Court's opinions assume that the balance of federal-state power struck by the original Constitution remained relatively static until the Civil War Amendments,[206] a time period

201. *See id.* at 453; *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) ("We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.'") (quoting U.S. CONST. amend. XIV, § 5).

202. *See Fitzpatrick*, 427 U.S. at 455; *see also Seminole Tribe*, 517 U.S. at 59 (explaining that the Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution").

203. *See* U.S. CONST. amends. XIII, § 2, XV, § 2, XIX, XXIV, § 2, XXVI, § 2.

204. *See* Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 107 n.33 (1996); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203, 1228-29 (1978).

205. I say Eleventh Amendment here because the Thirteenth Amendment, which outlaws slavery, is a Civil War Amendment in the same vein as the Fourteenth, and the Twelfth Amendment, which merely limits the term of the President, provides no basis for a cause of action against a state. *See* U.S. CONST. amends. XIII, XII.

206. *See Seminole Tribe*, 517 U.S. at 65-66 (stating that before the Civil War Amendments were adopted, there existed a "pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment").

inclusive of the ratification of the Bill of Rights. This is no great surprise. The Bill of Rights originally granted the people various civil rights vis-à-vis the *federal* government but not vis-à-vis the *state* governments.[207] Under their original meaning, the pre-Eleventh Amendments clearly did not contemplate abrogation of state sovereign immunity.

But the Civil War convinced the nation of the need to curb abusive state infringements on individual liberties. The Fourteenth Amendment was ratified in response, and the Due Process Clause has been held to incorporate the following individual rights against state infringement:[208] the First Amendment's protections of free speech,[209] free press,[210] freedom of assembly;[211] free exercise of religion,[212] and non-establishment;[213] the Fourth Amendment's restrictions on

207. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247-49 (1833) (emphasizing this point); *see also, e.g.*, U.S. CONST. amend. I (explicitly restricting "Congress" but nowhere mentioning the states). Curiously, the first ten Amendments were originally quite defensive of state authority. They permitted states to, for example, establish a state church (which some did), while at the same time insulating such establishments from intrusion by the federal government by barring Congress from making any law respecting an establishment of religion. *See* Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1223-24 (2002).

208. The Due Process Clause is arguably the wrong Clause to incorporate named rights against the states. The Privileges or Immunities Clause of the Fourteenth Amendment—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"—by its terms would incorporate all the rights of U.S. citizens found in the Bill of Rights and bind the states with them. U.S. CONST. amend. XIV, § 1. But the Court in 1873 held that clause virtually powerless. *See* The Slaughter-House Cases, 83 U.S. 36 (16 Wall.) (1873); *see also* Saenz v. Roe, 526 U.S. 489, 521 (1999) (Thomas, J., dissenting) (stating that "the Court all but read the Privileges or Immunities Clause out of the Constitution"); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140, 144 (1949) (proclaiming that the Court had rendered the Clause "practically a dead letter"). As a result, the burden of impressing civil rights and Reconstruction notions of fairness upon the states fell upon the inauspicious Due Process Clause. Revisiting *The Slaughter-House Cases*' interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment could result in an expanded congressional abrogation power. *See* William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity*, 28 HASTINGS CONST. L.Q. 235 (2001) (arguing that the Privileges or Immunities Clause of the Fourteenth Amendment creates a broad abrogation power).

209. Gitlow v. New York, 268 U.S. 652, 664 (1925); Stromberg v. California, 283 U.S. 359, 368 (1931).

210. Near v. Minnesota, 283 U.S. 697, 707 (1931).

211. De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

212. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

213. Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947).

warrants, searches, and seizures;[214] the Fifth Amendment's proscriptions against taking property without just compensation,[215] compelled self-incrimination,[216] and double-jeopardy;[217] the Sixth Amendment's rights to a public trial,[218] to counsel,[219] to confront accusers,[220] to a speedy trial,[221] to compulsory process,[222] and to a jury trial;[223] and the Eighth Amendment's bans on cruel and unusual punishment[224] and excessive bail.[225] The Court has also interpreted the Fifth Amendment's Due Process Clause to contain a Fourteenth Amendment-type Equal Protection component.[226] In each of these cases, the Court has defined the protected liberty as a "fundamental right" protected by the Fourteenth Amendment.[227] The only major exceptions are the Second Amendment's right to keep and bear arms, the Fifth Amendment's grand jury requirement, and the Seventh Amendment's preservation of a right to civil trial by jury.[228]

Thus, in the wake of the Civil War, the states ratified the Fourteenth Amendment and through that act made most of the first eight Amendments applicable to themselves. The individual rights enshrined in those Amendments and incorporated into the Due Process Clause are therefore protectable by Congress through abrogation of state sovereign immunity. However, the provisions contained in the original Constitution provide no abrogation power.[229]

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214. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (Fourth Amendment); Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (exclusionary rule).

215. Chicago, Burlington, & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

216. Mallory v. Hogan, 378 U.S. 1, 8 (1964).

217. Benton v. Maryland, 395 U.S. 784, 793 (1969).

218. *In re* Oliver, 333 U.S. 257, 273 (1948).

219. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

220. Pointer v. Texas, 380 U.S. 400, 403 (1965).

221. Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967).

222. Washington v. Texas, 388 U.S. 14, 18-19 (1967).

223. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

224. Robinson v. California, 370 U.S. 660, 667 (1962).

225. Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

226. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

227. Although the Court has never fully endorsed Justice Hugo Black's bright-line theory that the Bill of Rights was "incorporated" into the Fourteenth Amendment, see *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting), it has very nearly reached the same result by categorizing each right individually as "fundamental."

228. The Third Amendment has not been incorporated either, but it makes few appearances in the annals of constitutional law.

229. Because I have argued that the Fourteenth Amendment permits abrogation pursuant to Amendments that were not understood to permit abrogation before the

State sovereign immunity, therefore, is inviolable within the confines of the original document; outside those confines, however, the tide turns, and Congress is empowered to abrogate it in appropriate circumstances.

IV. Conclusion

I make no intimation of my own views of state sovereign

Fourteenth Amendment was adopted, I take seriously Professor Vicki Jackson's musings that the Fourteenth Amendment also may have shifted the federal-state power balance with respect to parts of the original Constitution. *See* Jackson, *supra* note 23. She argues that the Fourteenth Amendment's shift in federal-state power could have expanded Congress' Article I enumerated powers to permit abrogation. *See id.* Indeed, her argument generally supports my identification of the abrogation power in Amendments antedating the Eleventh Amendment. But I do not believe the current majority would sanction its expansion to the original Constitution.

The Fourteenth Amendment did not affect all of the Constitution's provisions in the same way. The Amendment was specifically directed at the unfair and unequal treatment of citizens by states. Although the Bill of Rights initially restrained only the federal government, it listed those basic individual civil liberties deemed "fundamental" to fairness and equality. That those liberties should be made applicable to the states, and that Congress was enabled to enact appropriate enforcements in derogation of the Eleventh Amendment to sanction the recalcitrant states, is no stretch. It is an entirely different matter to read the Fourteenth Amendment as expanding Congress' Article I powers, such as the Commerce Clause power, to fit the Fourteenth Amendment's purposes. The Commerce Clause simply does not have the same focus as the Amendments. Moreover, to permit the expansion of an enumerated power beyond what Article I expressly permits would threaten the very concept of limited government to which the majority very much adheres. *See* United States v. Morrison, 529 U.S. 598, 615-19 (2000); Printz v. United States, 521 U.S. 898, 918-22 (1997); United States v. Lopez, 514 U.S. 549, 579-80 (1995).

I therefore do not believe the Court would maintain that the Fourteenth Amendment fundamentally changed the meaning of the Eleventh Amendment or expanded parts of the original Constitution in ways permitting abrogation. Rather, the Fourteenth poked holes in the Eleventh in a very selective way not applicable to the original Constitution. Section 5 permits abrogation, despite the Eleventh Amendment and structural principles of state sovereign immunity, when necessary to prevent state abridgment of certain fundamental rights protected by the Constitution.

This is not to say that Professor Jackson's theory is neither thought-provoking nor correct. I am simply skeptical, as is she, see Jackson, *supra* note 23, at 1263, 1307 n.172, that there is much room in the Court's federalism juggernaut for it. *Cf.* Pennsylvania v. Union Gas Co., 491 U.S. 1, 42 (1989) (Scalia, J., dissenting) ("The plurality asserts that it is no more impossible for provisions of the Constitution adopted *concurrently* with Article III to permit abrogation of state sovereign immunity than it is for provisions adopted *subsequently*. We do not dispute that that is possible, but only that it happened .... An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable. The Fourteenth Amendment, on the other hand, was avowedly directed against the power of the States, and permits abrogation of their sovereign immunity only for a limited purpose.") (italics in original).

immunity; rather, my goal is to distill a coherent structural rule for the Court's state sovereign immunity jurisprudence. Under that understanding, the line between state sovereign immunity and abrogation authority is most tenably drawn at the outskirts of the original Constitution. There are weaknesses to such a rule—perhaps even exceptions.[230] But they will be exceptions which prove the existence of the rule in the first place.

230. The obvious exception is Congress' Spending Clause power. U.S. CONST. art. I, § 8, cl. 1. As I have noted, however, that power is a solicitation of voluntary waiver, not forced abrogation. *See supra* note 18. In that respect, the Spending Clause is the "exception" that proves the rule. More intriguing is the Privileges and Immunities Clause of Article IV. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). That Clause speaks directly to the states and restricts state authority in favor of individuals, just as the Fourteenth Amendment does. Moreover, Publius, in interpreting the Privileges and Immunities Clause, suggested that the federal courts should have jurisdiction over controversies between citizens and states arising under its dictates. *See* THE FEDERALIST No. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("[T]he citizens of each State shall be entitled to all the privileges and immunities of the several States' . . . [i]t will follow that . . . the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another state or its citizens.'"). This statement by Publius is extremely revealing. The rule that the citizens of each state shall be entitled to all the privileges and immunities of the several states implies a right for citizens only, not states. Thus, in a controversy arising under that rule, only citizens could logically be plaintiffs. When Publius then immediately discusses the jurisdiction of the federal courts over such controversies, he must necessarily be contemplating jurisdiction over suits brought by private citizens against a state. To my knowledge, no one has extensively addressed how Article IV itself relates to state sovereign immunity and congressional abrogation. *Cf.* Rich, *supra* note 208208, at 241-49 (analyzing the Privileges and Immunities Clause of Article IV as support for his principal theory that the Fourteenth Amendment's Privileges or Immunities Clause creates a broad abrogation power).