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*Federalism — State Sovereign Immunity — War Powers —*  
*Torres v. Texas Department of Public Safety*

In the words of Justice Kagan, the Supreme Court’s state “sovereign immunity decisions have not followed a straight line.”<sup>1</sup> The Court’s first foray into state sovereign immunity was the 1793 case *Chisholm v. Georgia*,<sup>2</sup> in which the Court held that under the new Constitution, states did not enjoy immunity from suits by citizens of other states in federal court.<sup>3</sup> After this decision was rapidly and explicitly superseded by the Eleventh Amendment, however, the Court shifted to a markedly more immunity-friendly approach. In the 1890 case *Hans v. Louisiana*,<sup>4</sup> the Court looked beyond the Eleventh Amendment — the plain text of which only addresses the diverse party configuration exemplified by *Chisholm* — to hold that state sovereign immunity also bars federal question suits by nondiverse plaintiffs.<sup>5</sup> Continuing this line of cases, in the 1996 case *Seminole Tribe of Florida v. Florida*,<sup>6</sup> the Court took *Hans* one step further and held that Congress could not abrogate state sovereign immunity in federal court.<sup>7</sup> And shortly thereafter, in *Alden v. Maine*,<sup>8</sup> “the Court extended the nonabrogation rule of *Seminole Tribe* to state courts.”<sup>9</sup>

The twenty-first century has brought with it a new pivot in the Court’s sovereign immunity doctrine. In *Central Virginia Community College v. Katz*,<sup>10</sup> a decision that seemed largely unassuming at the time, the Court subtly began a new line of sovereign immunity cases, focusing on language about the “plan of the Convention” to avoid explicitly overruling the cases prohibiting abrogation while carving out bankruptcy<sup>11</sup> and, in a later case, eminent domain<sup>12</sup> from state sovereign immunity’s reach. Last Term, in *Torres v. Texas Department of Public Safety*,<sup>13</sup> the

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<sup>1</sup> *Torres v. Tex. Dep’t of Pub. Safety*, 142 S. Ct. 2455, 2469 (2022) (Kagan, J., concurring).

<sup>2</sup> 2 U.S. (2 Dall.) 419 (1793). Some scholars have called *Chisholm* “the first great constitutional case decided by the Supreme Court.” See, e.g., Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1729 (2007).

<sup>3</sup> *Chisholm*, 2 U.S. (2 Dall.) at 420.

<sup>4</sup> 134 U.S. 1 (1890).

<sup>5</sup> *Id.* at 15 (looking to whether the states would have adopted an amendment allowing suit by their citizens in federal question cases and determining that was “almost an absurdity on its face”); see also Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 516 (1978) (“[T]he [E]leventh [A]mendment is universally taken *not* to mean what it says.”).

<sup>6</sup> 517 U.S. 44 (1996).

<sup>7</sup> *Id.* at 47; see William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 12 (2017).

<sup>8</sup> 527 U.S. 706 (1999).

<sup>9</sup> Baude, *supra* note 7, at 15.

<sup>10</sup> 546 U.S. 356 (2006).

<sup>11</sup> *Id.* at 373.

<sup>12</sup> *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2251–52 (2021).

<sup>13</sup> 142 S. Ct. 2455 (2022).

Supreme Court added war powers to this list of carveouts.<sup>14</sup> While the Court had the opportunity in *Torres* to clarify this “crazy-quilt pattern”<sup>15</sup> of a doctrine, it instead applied a pragmatic test that leaves lower courts with little guidance and opens the door for relitigation of precedents thought to be long settled.

In 2007, Army Reservist Le Roy Torres was working as a Texas state trooper when he was called to active duty.<sup>16</sup> While Torres was deployed to Iraq, he “was exposed to toxic burn pits, a method of garbage disposal that sets open fire to all manner of trash, human waste, and military equipment,” and developed constrictive bronchitis.<sup>17</sup> Because of this respiratory condition, when he received an honorable discharge and returned to Texas, he was no longer able to work as a state trooper.<sup>18</sup> The Texas Department of Public Safety refused to grant his request to transfer to a different role.<sup>19</sup>

Torres sued under the Uniformed Services Employment and Reemployment Rights Act of 1994<sup>20</sup> (USERRA) in Texas state court, claiming that “Texas had violated USERRA’s mandate that state employers rehire returning servicemembers, use ‘reasonable efforts’ to accommodate any service-related disability, or find an ‘equivalent’ position (or its ‘nearest approximation’) where such disability prevents the veteran from holding his prior position.”<sup>21</sup> Texas responded by claiming sovereign immunity and moving to dismiss the suit.<sup>22</sup> The trial court denied the motion.<sup>23</sup>

The Court of Appeals of Texas reversed.<sup>24</sup> Writing for the panel, Justice Contreras noted that “[f]or Congress to validly abrogate a State’s sovereign immunity, it must (1) unequivocally express its intent to do so, and (2) act ‘pursuant to a constitutional provision granting Congress the power to abrogate.’”<sup>25</sup> Addressing the second prong first, Justice Contreras recalled that, in 1996, “[t]he United States Supreme Court held in *Seminole Tribe of Florida v. Florida* that Congress lacks power under Article I to abrogate States’ sovereign immunity to suits commenced or prosecuted in federal courts,”<sup>26</sup> and that three years later, in

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<sup>14</sup> *Id.* at 2460.

<sup>15</sup> *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 519 n.19 (1987) (Brennan, J., dissenting).

<sup>16</sup> *Torres*, 142 S. Ct. at 2461.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

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

<sup>20</sup> 38 U.S.C. §§ 4301–4335.

<sup>21</sup> *Torres*, 142 S. Ct. at 2461 (quoting 38 U.S.C. § 4313(a)(3)).

<sup>22</sup> *Id.*

<sup>23</sup> *Torres v. Tex. Dep’t of Pub. Safety*, No. 2017-CCV-61016-1, 2017 WL 8226710, at \*1 (Tex. Cnty. Ct. Nov. 21, 2017).

<sup>24</sup> *Tex. Dep’t of Pub. Safety v. Torres*, 583 S.W.3d 221, 223 (Tex. App. 2018).

<sup>25</sup> *Id.* at 225 (quoting *Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 195 (Tex. 2010)).

<sup>26</sup> *Id.* at 225–26.

*Alden*, the Court held that this applied equally to suits brought in state courts “save where there has been ‘a surrender of this immunity in the plan of the convention.’”<sup>27</sup> Based on the “history, practice, precedent, and structure of the Constitution,”<sup>28</sup> the *Alden* Court held that the states had not surrendered their immunity with respect to Congress’s Article I powers.<sup>29</sup> While *Alden* could be read narrowly to apply solely to the Article I power at issue — the Interstate Commerce Clause<sup>30</sup> — Justice Contreras observed that “the *Alden* majority opinion did not mention the subject matter of the legislation at issue, nor did it mention the specific Article I enumerated power pursuant to which that legislation was enacted.”<sup>31</sup> Justice Contreras then distinguished the Supreme Court’s 2006 decision in *Katz*, writing that, “[t]hough *Katz* recognized a limited exception to this rule for actions to enforce certain bankruptcy statutes, the Court made clear that this exception is derived from the particular attributes of *in rem* bankruptcy jurisdiction which are not present in this case.”<sup>32</sup> The appellate court also held that the Texas legislature had not waived the State’s immunity.<sup>33</sup> Justice Benavides dissented,<sup>34</sup> arguing that Texas validly waived its sovereign immunity through state statutes.<sup>35</sup> The Texas Court of Appeals denied a petition to rehear the case en banc,<sup>36</sup> and the Texas Supreme Court denied discretionary review.<sup>37</sup>

A year later, with Torres’s petition for certiorari under review, the U.S. Supreme Court decided *PennEast Pipeline Co. v. New Jersey*,<sup>38</sup> where it “recognized that the States had waived their sovereign immunity as to the exercise of the federal eminent domain power under the structure of the Constitution pursuant to the ‘plan of the Convention.’”<sup>39</sup> In light of this development, the Court granted Torres’s petition.<sup>40</sup>

<sup>27</sup> *Id.* at 226 (quoting *Alden v. Maine*, 527 U.S. 706, 730 (1999)).

<sup>28</sup> *Id.* (quoting *Alden*, 527 U.S. at 754).

<sup>29</sup> *Id.* In contrast, the Court held that states did surrender their immunity with respect to section 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

<sup>30</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>31</sup> *Torres*, 583 S.W.3d at 228.

<sup>32</sup> *Id.* at 229.

<sup>33</sup> *Id.* at 232.

<sup>34</sup> *Id.* at 233 (Benavides, J., dissenting).

<sup>35</sup> *Id.* at 236 (citing TEX. GOV’T CODE ANN. § 613(a)(1) (West 2021)).

<sup>36</sup> *Tex. Dep’t of Pub. Safety v. Torres*, No. 13-17-659 (Tex. App. Dec. 19, 2018) (order denying motion for rehearing en banc).

<sup>37</sup> *Tex. Dep’t of Pub. Safety v. Torres*, No. 13-17-659 (Tex. June 5, 2020) (order denying petition for review).

<sup>38</sup> 141 S. Ct. 2244 (2021).

<sup>39</sup> *Torres*, 142 S. Ct. at 2461 (quoting *PennEast*, 141 S. Ct. at 2258).

<sup>40</sup> *Id.*

The Supreme Court reversed.<sup>41</sup> Writing for the Court for the final time before his retirement, Justice Breyer<sup>42</sup> held that “[u]pon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military.”<sup>43</sup> Thus, under *PennEast*, states could not use sovereign immunity to block suits authorized by Congress under the War Powers Clauses,<sup>44</sup> such as those authorized by USERRA.<sup>45</sup>

While states generally retained their sovereign immunity when they joined the Union, Justice Breyer noted that the Court had, over the years, recognized several exceptions, including where there is case-specific state consent, where Congress abrogated the immunity under the Fourteenth Amendment, or where there was blanket state consent “at the founding” as part of the “plan of the Convention.”<sup>46</sup> The Court had recognized this last category of “structural waiver” for suits between states,<sup>47</sup> by the federal government against a state,<sup>48</sup> by private parties pursuant to federal bankruptcy laws,<sup>49</sup> and — just last year — by private parties enforcing the federal government’s eminent domain power.<sup>50</sup> The test, as defined in *PennEast*, is “whether the federal power at issue is ‘complete in itself, and the States consented to the exercise of that power — in its entirety — in the plan of the Convention.’”<sup>51</sup>

The war powers satisfied this test.<sup>52</sup> Beginning with the text, Justice Breyer explained that the war powers were given to the federal government “in many broad, interrelated provisions” of the Constitution<sup>53</sup> and almost entirely removed from the states.<sup>54</sup> Moving to the history, the Court emphasized that “[t]he Framers ‘had emerged from a long struggle which had taught them the weakness of a mere confederation’”;<sup>55</sup> thus, the need for “a strong national [war] power . . . was one of the ‘recognized necessities’ for calling the Constitutional Convention.”<sup>56</sup>

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<sup>41</sup> *Id.* at 2469.

<sup>42</sup> Justice Breyer was joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Kavanaugh.

<sup>43</sup> *Torres*, 142 S. Ct. at 2460.

<sup>44</sup> See U.S. CONST. art. I, § 8, cls. 11–13.

<sup>45</sup> See *Torres*, 142 S. Ct. at 2461.

<sup>46</sup> *Id.* at 2462 (quoting *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2263 (2021)).

<sup>47</sup> *Id.* (citing *South Dakota v. North Carolina*, 192 U.S. 286 (1904)).

<sup>48</sup> *Id.* (citing *United States v. Texas*, 143 U.S. 621 (1892)).

<sup>49</sup> *Id.* (citing *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006)).

<sup>50</sup> *Id.* at 2463 (citing *PennEast*, 141 S. Ct. 2244).

<sup>51</sup> *Id.* (citing *PennEast*, 141 S. Ct. at 2263).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (citing U.S. CONST. pmbl.; *id.* art. I, § 8, cls. 1, 11–16; *id.* art. II, § 2, cl. 1; *id.* art. IV, § 4).

<sup>54</sup> *Id.* at 2463–64 (citing U.S. CONST. art. I, § 10, cls. 1, 3; *id.* art. I, § 8, cl. 16).

<sup>55</sup> *Id.* at 2466 (quoting *Lichter v. United States*, 334 U.S. 742, 780 (1948)).

<sup>56</sup> *Id.* at 2464 (quoting *Selective Draft Law Cases*, 245 U.S. 366, 381 (1918)).

Concluding with a review of the Court's precedents,<sup>57</sup> the Court noted that the "lesson" to be drawn was that "[t]he power to wage war is the power to wage war successfully."<sup>58</sup>

Justice Kagan concurred.<sup>59</sup> Although she noted that she had written for the Court in 2020 that the "plan of the Convention" analysis was "good" only for the Bankruptcy Clause,<sup>60</sup> she argued that the result was nonetheless compelled by the Court's holding in *PennEast*.<sup>61</sup>

Justice Thomas dissented.<sup>62</sup> As a preliminary matter, Justice Thomas argued that the Court should have employed the constitutional avoidance canon to read USERRA narrowly — interpreting its "requirement that employee damages actions be 'in accordance with the laws of the State' . . . to include a State's 'laws' that render it immune from suit in the State's own courts, as well as any 'laws' that expressly waive such immunity."<sup>63</sup> As his core argument, Justice Thomas maintained that *Alden* "directly controls this case."<sup>64</sup> There, the Court "held — without qualification — that 'the powers delegated to Congress under Article I of the United States Constitution *do not include* the power to subject nonconsenting States to private suits for damages in state courts."<sup>65</sup> Emphasizing that "[b]oth *Katz* and *PennEast* considered plan-of-the-Convention waivers applicable to federal, not state, court,"<sup>66</sup> Justice Thomas rejected the majority's holding that those cases had "silently carved an exception from *Alden*'s categorical rule."<sup>67</sup>

Even if *Katz* and *PennEast* applied to state court cases, Justice Thomas argued, "it is clear that the States did not implicitly agree to surrender their state-court immunity against congressional exercises of the war powers."<sup>68</sup> In *Seminole Tribe*, the Court held that "state sovereign immunity . . . is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government."<sup>69</sup> Although *Seminole Tribe* was a congressional abrogation case, Justice Thomas argued that "its logic applies equally" to plan-of-the-Convention waiver.<sup>70</sup> Based on this understanding, "*PennEast* is

<sup>57</sup> *Id.* at 2465 (citing, for example, *Tarble's Case*, 80 U.S. (13 Wall.) 397, 398 (1872); *Selective Draft Law Cases*, 245 U.S. at 381; *United States v. Oregon*, 366 U.S. 643, 644–49 (1961); *Perpich v. Dep't of Defense*, 496 U.S. 334, 349 (1990)).

<sup>58</sup> *Id.* (quoting *Lichter*, 334 U.S. at 780).

<sup>59</sup> *Id.* at 2469 (Kagan, J., concurring).

<sup>60</sup> *Allen v. Cooper*, 140 S. Ct. 994, 1002–03 (2020).

<sup>61</sup> *Torres*, 142 S. Ct. at 2469 (Kagan, J., concurring).

<sup>62</sup> *Id.* (Thomas, J., dissenting). Justice Thomas was joined by Justices Alito, Gorsuch, and Barrett.

<sup>63</sup> *Id.* at 2472.

<sup>64</sup> *Id.* at 2473.

<sup>65</sup> *Id.* at 2470 (quoting *Alden v. Maine*, 527 U.S. 706, 712 (1999)).

<sup>66</sup> *Id.* at 2474.

<sup>67</sup> *Id.* at 2474 n.4.

<sup>68</sup> *Id.* at 2475.

<sup>69</sup> *Id.* at 2476 (alterations in original).

<sup>70</sup> *Id.* at 2476 n.5.

best read to stand for the proposition that, because every federal power must be ‘complete in itself,’ the States surrendered their sovereign immunity with respect to any federal power that is ‘inextricably intertwined’ with judicial proceedings, like eminent domain; otherwise, . . . the federal power would be incomplete.”<sup>71</sup> This must be the case, Justice Thomas argued, because “States have significant residual police powers that overlap with Congress’ power over the military.”<sup>72</sup> Thus, applying the Court’s reading of *PennEast* would mean that “States would have consented in the plan of the Convention to surrender their immunity against the exercise of *any* Article I power.”<sup>73</sup>

Finally, Justice Thomas would have also “‘attribute[d] great significance’ to the absence of analogous suits ‘at the time of the founding or for many years thereafter’”<sup>74</sup> and argued that “[c]onstitutional structure” precluded the result.<sup>75</sup> A lack of sovereign immunity in this context “is uniquely offensive to the States’ dignity because it . . . ‘turn[s] the State against itself’ and ‘commandeer[s] the entire political machinery of the State against its will.’”<sup>76</sup> Moreover, damages actions “threaten[] the financial integrity of the States,”<sup>77</sup> and “[p]olitical accountability . . . breaks down when ‘the Federal Government asserts authority over a State’s most fundamental political processes.’”<sup>78</sup>

In *Torres*, the Court applied an ad hoc, pragmatic test that leaves lower courts with little guidance for future cases. The Court’s opinion can be read narrowly or broadly, and the nature of its downstream interpretation will shape the significance of the decision and the future of state sovereign immunity doctrine. A narrow reading would place *Torres* in the same category as *Katz* — good only for the exceptional circumstances of the War Powers Clauses. A broader reading could undermine the Rehnquist Court’s state sovereign immunity holdings and revive challenges to state immunity across a wide spectrum of congressional powers. While the *Torres* Court sent certain signals that could support a narrow interpretation, its broad language and selective citation of precedent indicate the opening of new fields of litigation on state sovereign immunity. By cementing this vague test and failing to

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<sup>71</sup> *Id.* at 2482 (quoting *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2259–60 (2021)); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 5 (1824) (“If there were no power in the general government, to control this extreme belligerent legislation of the States, the powers of the government were essentially deficient, in a most important and interesting particular.”).

<sup>72</sup> *Torres*, 142 S. Ct. at 2476 (Thomas, J., dissenting).

<sup>73</sup> *Id.* at 2477.

<sup>74</sup> *Id.* (alteration in original) (quoting *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002)).

<sup>75</sup> *Id.* at 2478.

<sup>76</sup> *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 749 (1999)).

<sup>77</sup> *Id.* at 2479 (quoting *Alden*, 527 U.S. at 750).

<sup>78</sup> *Id.* (quoting *Alden*, 527 U.S. at 751).

explain the precise difference between the abrogation and plan-of-the-Convention inquiries or the relevance of a state versus federal forum, the Court effectively gutted the blanket *Seminole Tribe-Alden* Article I rule and gave parties a new opportunity to argue for clause-by-clause plan-of-the-Convention waivers.

Though the majority offered a laundry list of possibly relevant features of the war powers,<sup>79</sup> it provided little substantive guidance on how to determine whether any other federal power is “complete in itself.”<sup>80</sup> As the dissent noted: “The Court does not define what it means for a federal power to be ‘complete in itself,’ except that “‘the States consented to the exercise of that power — in its entirety — in the plan of the Convention.’”<sup>81</sup> Although the test applied by the Court is superficially originalist — asking about text and Founding-era history<sup>82</sup> — in practice, the Court’s approach seems far more pragmatic. As Justice Thomas concluded in *Torres*, “the Court has devised a method that has the certainty and objectivity of a Rorschach test.”<sup>83</sup>

Interpreted narrowly, the Court’s originalist test is like *Katz* and ultimately “good” for one clause only.<sup>84</sup> As Justice Thomas posited in a footnote, the “opinion at least suggests” several very specific criteria.<sup>85</sup> First, “the Constitution [must] include[] ‘many broad, interrelated provisions’ delegating the relevant power to the Federal Government.”<sup>86</sup> Second, “the Constitution [must] expressly ‘divest[] the States of like power.’”<sup>87</sup> Finally, “the power at issue [must be] ‘essential to the survival of the Union’ and . . . ‘itself a foundational purpose’ for abandoning the Articles of Confederation and ‘drafting the Constitution.’”<sup>88</sup>

<sup>79</sup> See *id.* at 2463–67 (majority opinion).

<sup>80</sup> *Id.* at 2466 (quoting *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2263 (2021)).

<sup>81</sup> *Id.* at 2483 (Thomas, J., dissenting) (citation omitted).

<sup>82</sup> See *id.* at 2463 (majority opinion). The historical analysis here is particularly suspect because the power of Congress to directly command the states was exactly what was not working about the Articles of Confederation, which prompted the shift under the Constitution to allow Congress to act with respect to individuals instead. See Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1819 (2010); see also THE FEDERALIST NOS. 15, 16 (Alexander Hamilton). Originalism, a hallmark of last Term, see, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022), is also not without critiques. After all, judges are rarely historians, and the venture to understand the mindset of historical figures often produces competing interpretations. Compare *West Virginia v. EPA*, 142 S. Ct. 2587, 2641–42 (2022) (Kagan, J., dissenting) (citing law review articles for the proposition that “[t]he kind of agency delegations at issue here go all the way back to this Nation’s founding,” *id.* at 2641), with *id.* at 2625 n.6 (Gorsuch, J., concurring) (responding that “if a battle of law reviews were the order of the day, it might be worth adding to the reading list” and offering his own list of supporting sources).

<sup>83</sup> *Torres*, 142 S. Ct. at 2481 (Thomas, J., dissenting) (citations omitted).

<sup>84</sup> See *Allen v. Cooper*, 140 S. Ct. 994, 1002–03 (2020).

<sup>85</sup> *Torres*, 142 S. Ct. at 2481 n.9 (Thomas, J., dissenting).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

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

A narrow construction would also conform with the Court's previous jurisprudence that treats the war powers differently than most others, especially in times of war. Since the Founding era, the war powers have been interpreted to give broad authority to the federal government.<sup>89</sup> As the Court wrote in *Rostker v. Goldberg*,<sup>90</sup> "in no other area has the Court accorded Congress greater deference" than "in the context of Congress' authority over national defense and military affairs."<sup>91</sup> As noted at oral argument in *Torres* — though conspicuously absent from the published opinions — Congress has even used its war powers for programs that an ordinary citizen would perhaps not consider to be directly related to the national security. For example, the creation of the interstate highway system<sup>92</sup> and the first federal issuance of financial assistance to local schools<sup>93</sup> were both instances where Congress invoked the war powers.<sup>94</sup>

This seems to come from a pragmatic prioritization of national security interests. Since the Founding, a moral commitment to the continued existence of the nation has at times outranked other deeply held values. Thomas Jefferson once said that "[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means."<sup>95</sup> Abraham Lincoln repeated a similar sentiment when he suspended habeas corpus during the Civil War, stating that insurrection "in nearly one-third of the States" had subverted the faithful execution of "[t]he whole of the laws" and questioning whether "all the laws *but one* [are] to go unexecuted, and the government itself [is to] go to pieces, lest that one be violated."<sup>96</sup> While protections for returning veterans might not presently appear to

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<sup>89</sup> See THE FEDERALIST NO. 23 (Alexander Hamilton) (arguing for a broad construction of the war powers to allow the country to meet unanticipated future national security emergencies).

<sup>90</sup> 453 U.S. 57 (1981).

<sup>91</sup> *Id.* at 64–65. Beyond just reading the power expansively, the Court has even "suggested that Congress would have plenary power to conduct a war even if the Constitution had been silent on the subject" as "an inherent attribute of sovereignty." NIKOLAS BOWIE, FEDERAL CONSTITUTIONAL LAW 301 (2022) (citing *N. Pac. Ry. v. North Dakota ex rel. Langer*, 250 U.S. 135, 149 (1919); *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 86 (1875); *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 67–70 (1795)). This was most clearly articulated in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), where the Court stated: "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." *Id.* at 318.

<sup>92</sup> See Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, § 108, 70 Stat. 374, 378. Indeed, Congress formally named the interstate highway system the "National System of Interstate and Defense Highways." *Id.* (emphasis added).

<sup>93</sup> See National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580.

<sup>94</sup> BOWIE, *supra* note 91, at 304.

<sup>95</sup> Letter from Thomas Jefferson to John B. Colvin 1 (Sept. 20, 1810), <https://www.loc.gov/item/mtjbib020420> [<https://perma.cc/NXD3-K5XS>].

<sup>96</sup> Draft Message from Abraham Lincoln to Congress 12–13 (June/July 1861), <https://www.loc.gov/item/mal1057200/> [<https://perma.cc/4GK2-EK8B>].

reach that level of necessity, the Court's unwillingness to question Congress's command aligns with the Court's general approach of giving wide latitude to the political branches in this area.

Yet the Court's analysis in *Torres*, a repetition of the *PennEast* framework, sits — at best — uncomfortably with *Seminole Tribe* and *Alden*, which could suggest a broader reading.<sup>97</sup> While the Court did not overrule those two cases, much of their underlying analysis has now been called into question. Not only does the majority fail to explain when the old *Seminole Tribe* congressional-abrogation analysis applies — reinforcing Justice Thomas's critique of the distinction as “murky”<sup>98</sup> — it also turns *Alden* on its head, emphasizing the exception<sup>99</sup> over the rule.<sup>100</sup> Moreover, the *Torres* majority does not directly address why the state court forum does not alter the inquiry; instead, it merely assumes the applicability of the tests developed by *Katz* and *PennEast* for suits in federal court.

By shifting analytical terms — from whether Congress has the power to abrogate an existing state immunity in the present day to whether the states waived their immunity entirely at the plan of the Convention — the Court effectively resets the doctrine in these areas and allows for a second chance to argue against sovereign immunity in many more areas of federal authority. Although the Court purported to distinguish *Seminole Tribe* and its progeny, it did so unconvincingly.<sup>101</sup> After all, the Court has often described the Commerce Clause as “plenary”<sup>102</sup> — and even invalidated state regulation incompatible with that exclusive federal control under the dormant commerce clause.

Still, this is not to say that the Court will necessarily accept these arguments. As Chief Justice Roberts and Justice Kavanaugh were the deciding votes in *Torres*, the doctrine will go as far as (and no further than) they wish to take it.

Due to the confused nature of sovereign immunity doctrine, the Court should have broken with the *PennEast* model and provided a

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<sup>97</sup> See *Torres*, 142 S. Ct. at 2481 (Thomas, J., dissenting) (“Beyond its inconsistency with *PennEast*, this contrivance also threatens to rework or erase the Court's prevailing sovereign immunity jurisprudence.”).

<sup>98</sup> *Id.* at 2471.

<sup>99</sup> *Alden v. Maine*, 527 U.S. 706, 730–31 (1999) (“Congress may subject the States to private suits in their own courts . . . if there is ‘compelling evidence’ that the States were required to surrender this power to Congress pursuant to the constitutional design.” (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781 (1991))).

<sup>100</sup> *Id.* at 712 (“[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”).

<sup>101</sup> See *Torres*, 142 S. Ct. at 2484 (Thomas, J., dissenting) (arguing that the Court's analysis “makes no sense” because “one could just as easily say that Congress's power under the Army and Navy Clauses is ‘less than complete’ because ‘federal regulation of soldiers involves men and women who, before they join the military, are subject to regulation by a sovereign other than the Federal Government’”).

<sup>102</sup> See, e.g., *id.* (citing *Armour & Co. v. Virginia*, 246 U.S. 1, 6 (1918)).

coherent framework that could be applied outside the war powers context, directly addressing the “murky” distinction between “plan-of-the-Convention” waivers and congressional abrogation, and deciding whether and why the choice of forum — state or federal court — matters. In a nominally textualist era,<sup>103</sup> the Court has continued to build its sovereign immunity doctrine on an unstable, nontextual foundation.<sup>104</sup> Accordingly, the doctrine had been “widely criticized”<sup>105</sup> even before *Torres* was decided. Rather than deciding cases on an ad hoc basis, the Court should consider articulating a cohesive doctrinal framework. Whether the Court decides to move back to the pre-*Katz* framework of strong state sovereign immunity<sup>106</sup> or completely revisit the doctrine to allow for at least some damages suits,<sup>107</sup> the Court should do so in a clear manner — explicitly overruling the precedents that no longer apply and giving the bench and bar guidance for a path forward. Only then can the Court get this “crazy quilt” of a doctrine back on the straight and narrow.

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<sup>103</sup> *But see* *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (“Some years ago, I remarked that ‘[w]e’re all textualists now.’ . . . It seems I was wrong. The current Court is textualist only when being so suits it.” (alteration in original) (citation omitted)).

<sup>104</sup> Professor Stephen Sachs has called this a “constitutional backdrop.” Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012); *see also* Baude, *supra* note 7, at 8 (“A constitutional backdrop is a common law rule like any other, with one key difference: Some part of the Constitution insulates that rule from being changed.”). In this case, the insulation from change is argued to come from “the properly limited nature of Articles I and III.” *Id.*

<sup>105</sup> Baude, *supra* note 7, at 2 (citing Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1205 (2001); Lawrence C. Marshall, Commentary, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1346 (1989); Eric J. Segall, *The Constitution According to Justices Scalia and Thomas: Alive and Kickin’*, 91 WASH. U. L. REV. 1663, 1670–71 (2014); David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 50–52 (2015); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004)).

<sup>106</sup> For an argument explaining the coherence of this position, see generally Clark, *supra* note 82.

<sup>107</sup> For example, the Court could adopt some version of the diversity theory. *See* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 261–62 (1985) (Brennan, J., dissenting); *see also* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473–84 (1987).