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War Powers Abrogation

Jeffrey M. Hirsch*

ABSTRACT

The United States' peacetime security is based entirely on its all-volunteer armed forces. These volunteers, split equally between full- and part-time servicemembers, risk not only their health and safety, but also their economic stability when they are called away from home for training or active duty. Servicemembers' duties also interfere with the demands of employers, creditors, and government agencies—which can result in job losses, financial difficulties, and other costs. As a result, the federal government has long used its constitutional war powers to enact legislation protecting servicemembers from many of these hardships. These statutes provide employment leave and antidiscrimination protection, tax relief, and special procedural rights that lessen the burden of military service to ensure that the United States has a sufficient number of well-trained soldiers.

Despite these statutes' importance to national security, their applicability to state entities is in doubt. Using the Supreme Court's fluctuating sovereign immunity jurisprudence, many state employers have invoked sovereign immunity to bar servicemembers' private claims for monetary relief. More often than not, courts have sided with the states and dismissed servicemembers' federal claims for want of jurisdiction. However, these decisions are based on erroneous interpretations of the Court's doctrine of sovereign immunity. Under current law, the federal government's ability to subject states to individual suits is analyzed from a historical perspective. The inquiry asks whether the states, in ratifying the Constitution, believed that they retained immunity in a given area. Based on misinterpretations of Court doctrine and a refusal to apply the required historical analysis, many courts have held that states are immune from claims filed under federal war powers legislation.

This Article provides the first comprehensive historical analysis of the constitutional balance of war powers between the federal and state governments. This analysis unequivocally shows that the Constitution was intended to provide the federal government with virtually all war powers. Moreover, the Constitution requires that the very limited war powers left to the states must be entirely under the control of the federal government. As a result of this history, the federal government has constitutional authority to subject states to suit through "war powers abrogation."

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INTRODUCTION

Conflicts involving military matters are not new. In the United States, great political and societal schisms formed during the Vietnam War. More recently, the country has been sharply divided over the use of U.S. military personnel in Iraq, Afghanistan, and Syria.¹ But there

1 See BRIAN MICHAEL JENKINS, RAND CORP., HOW THE CURRENT CONFLICTS ARE SHAPING THE FUTURE OF SYRIA AND IRAQ 23–24 (2015), <https://www.rand.org/pubs/perspectives/PE163.html> [<https://perma.cc/NYF4-2F7V>].

is an underanalyzed fault line: divisions between the federal and state governments. Although a central feature of the Constitution is the centralization of war powers in the federal government, states have attempted to interfere with that authority in the past and continue to do so now. The extent to which this interference continues hinges in many cases on an unexpected legal doctrine: state sovereign immunity.

Some state conflicts with federal war powers implicate the federal government's ability to call state militias into federal service. Imagine a governor objecting to the Iraq War or conflict in Syria and trying to block state National Guard members from being called into federal military service—acts that have occurred before.² Other forms of interference are less extreme, at least in isolation, such as state interference with soldiers' federal employment and residency rights.

The United States has long relied upon all-volunteer armed forces for its peacetime defenses. To encourage participation in the military, the federal government has enacted several pieces of legislation that grant servicemembers protections in employment, taxes, and other matters. Despite these protections, the all-volunteer system can make it difficult to ensure a sufficient number of servicemembers are enlisted. In recent years, for instance, as the United States' involvement in overseas conflicts has remained significant, the military's ability to recruit and retain soldiers has been described as a "crisis."³ Exacerbating this crisis is the fact that numerous servicemembers have alleged that state employers and other officials have been violating their federal rights. Whether due to hostility to military service or an attempt to avoid the costs associated with these protections, state actors have refused to comply with federal law encouraging military service. These violations undermine the goal of these laws—to strengthen the nation's security—and harm the servicemembers involved. Many servicemembers have been unable to sue states for monetary damages, even though the federal statutes, enacted pursuant to Congress's constitutional war powers, explicitly permit them to do so. The problem is judicial interpretation of the Supreme Court's state sovereign immunity jurisprudence. A confusing jurisprudence, to be sure, but one that this Article demonstrates should not allow states

² See *infra* notes 393–94.

³ Todd South, *Rising Costs, Dwindling Recruit Numbers, Increasing Demands May Bring Back the Military Draft*, MIL. TIMES (Nov. 19, 2019), <https://www.militarytimes.com/news/your-military/2019/11/19/rising-costs-dwindling-recruit-numbers-increasing-demands-may-bring-back-the-draft> [<https://perma.cc/VG9T-D4NS>].

to thwart federal war power efforts with claims of state sovereign immunity.

Over the last several decades, scholarly commentary on state sovereign immunity has been quite robust, tracking a sharp spike in interest by the Supreme Court in the 1990s. But commentary on “war powers abrogation”⁴—the federal government’s ability to subject individual states to suit—has been an exception.⁵ It is not entirely clear why this is so, although the prevalence of lower-stakes claims that attract less litigation and an erroneous assumption that Supreme Court precedent has already answered the question may be to blame. Whatever the reason, the lack of attention to war powers abrogation is belied by its importance. This issue not only goes to one of the most fundamental aspects of the Constitution—responsibility for the nation’s security—but also determines whether states can undermine the federal government’s ability to recruit and retain servicemembers through sovereign immunity claims.⁶ And there are a lot of servicemembers. As of 2018, the United States had approximately 2.1 million soldiers, split almost evenly between active and non-active duty.⁷ Perhaps for this reason, attention to war powers abrogation is on the rise. The Court recently sought the Solicitor General’s view on a certiorari petition raising the war powers abrogation question, which may be a sign of interest from the Court.⁸ In addition, more war powers plaintiffs appear willing to challenge state immunity claims and state courts may be taking these issues more seriously.⁹

State sovereign immunity is only implicated when federal law provides individuals the right to sue nonconsenting states for monetary damages.¹⁰ A variety of war powers statutes arguably permit such suits, even some that may not be obvious. For instance, in 1790, Con-

4 “Abrogation” is not the best technical term for this doctrine but will be used for simplicity. See *infra* Part II.

5 See Major Timothy M. Harner, *The Soldier and the State: Whether the Abrogation of State Sovereign Immunity in USERRA Enforcement Actions Is a Valid Exercise of the Congressional War Powers*, 195 MIL. L. REV. 91, 96–98 (2008); Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999 (2004).

6 See Hirsch, *supra* note 5, at 999.

7 Among non-active duty soldiers, 443,857 were in the National Guard and 595,451 were in the Reserves. Erin Duffin, *U.S. Military Force Numbers, by Service Branch and Reserve Component 2018*, STATISTA (Nov. 12, 2019), <https://www.statista.com/statistics/232330/us-military-force-numbers-by-service-branch-and-reserve-component> [https://perma.cc/JQH4-GTR5].

8 *Clark v. Va. Dep’t of State Police*, 137 S. Ct. 2149 (2017) (mem.).

9 See, e.g., *Tex. Dep’t of Pub. Safety v. Torres*, 583 S.W.3d 221, 224 (Tex. App. 2018).

10 See generally *Ex parte Young*, 209 U.S. 123 (1908) (permitting suit for injunctive relief against nonconsenting state official).

gress enacted the Trade and Intercourse Act¹¹ (often referred to as the “Indian Nonintercourse Act”) pursuant to its powers under both the Indian Commerce Clause and the War Powers Clauses.¹² The current Indian Nonintercourse Act limits the conveyance of American Indian land, which can lead to lawsuits by individuals against states that gain title to covered property.¹³ Some states, in turn, have invoked state sovereign immunity in defense of these claims, which courts have usually accepted.¹⁴

Most war powers abrogation litigation arises under federal laws granting various protections to servicemembers. One such statute is the Servicemembers Civil Relief Act (“SCRA”)¹⁵ which, among other things, guarantees that military personnel and their spouses who are forced to leave a state for military service will retain their residency for purposes of voting¹⁶ and state and local taxes.¹⁷ The SCRA also prohibits the sale of servicemembers’ property for the collection of non-income taxes or assessments without a court order, in addition to a number of other similar protections.¹⁸

SCRA rights have been explicitly extended to state National Guard members upon being called into federal service.¹⁹ Moreover, the SCRA provides for private rights of action, including those seeking monetary damages against states.²⁰ Despite the fact that Congress enacted the SCRA “to provide for, strengthen, and expedite the national defense,”²¹ the only reported decisions addressing state sover-

11 25 U.S.C. § 177.

12 See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832); *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 534 n.10 (2d Cir. 1983) (noting intent to avoid hostilities).

13 See, e.g., *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 283–84 (5th Cir. 2000).

14 The basis for these decisions is typically a lack of clear abrogation in the Indian Nonintercourse Act, but some also rely on an abandoned “chronological analysis” or fail to address war powers abrogation at all. See *infra* Section I.B; *Ysleta Del Sur Pueblo*, 199 F.3d at 288 (applying chronological analysis); *N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine*, No. 09-683(KSG), 2010 WL 2674565, at *8 n.15 (D.N.J. 2010) (addressing only the Indian Commerce Clause).

15 50 U.S.C. §§ 3901–4043.

16 *Id.* § 4025.

17 *Id.* § 4001.

18 *Id.* § 3992; see generally R. CHUCK MASON, CONG. RSCH. SERV., RL34575, THE SERVICEMEMBERS CIVIL RELIEF ACT (SCRA): AN EXPLANATION (2014), <https://www.justice.gov/crt-military/file/797396/download> [<https://perma.cc/44JR-5M54>].

19 Veteran’s Benefits Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820.

20 50 U.S.C. § 4042.

21 *Id.* § 3902; see *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (holding that the aim is to “protect those who have been obliged to drop their own affairs to take up the burdens of the nation” from exposure to personal liability without procedural protections).

eign immunity claims have allowed states to avoid their obligations under the statute.²²

The impact of war powers abrogation is most far-reaching under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”).²³ Congress enacted USERRA and its predecessors via its war powers²⁴ to promote the nation’s security through protections for the all-volunteer armed forces.²⁵ USERRA’s primary entitlement is the right of reemployment for employees who must take leave for military service, e.g., for National Guard training or active duty.²⁶ This reemployment right is enhanced through various measures, such as a one-year just cause period²⁷ and entitlement to promotions, raises, and benefits that would have occurred absent the leave.²⁸ In addition, USERRA prohibits employment discrimination based on applicants’ and employees’ membership or service in the military.²⁹ USERRA’s remedies are typical of an employment statute, with the possibility of equitable relief and, importantly for abrogation

²² *Webb v. California*, No. CV 17-8499-DMG (KSx), 2018 WL 6184776, at *5 (C.D. Cal. 2018) (seeking refund of state license fees and use taxes); *Hofelich v. Hawaii*, No. 11-00034 DAE BMK, 2011 WL 2117013, at *9 (D. Haw. 2011) (seeking damages against state for loss of property); *Hofelich v. Hawaii*, No. 05-CV-1178 IEG (JMA), 2005 WL 8173306, at *2 (S.D. Cal. 2005) (same). In these cases, the plaintiffs represented themselves, which may explain the courts’ acceptance of states’ sovereign immunity claims without any meaningful discussion of war powers abrogation.

²³ 38 U.S.C. §§ 4301–4335; *see generally* Marcy L. Karin, “*Other Than Honorable*” *Discrimination*, 67 *CASE W. RESV. L. REV.* 135, 140–44 (2016) (describing USERRA’s national security purpose); Harner, *supra* note 5, at 96–98; Hirsch, *supra* note 5, at 1013–16 (describing USERRA’s history, coverage, and protections).

²⁴ *Bedrossian v. Nw. Mem’l Hosp.*, 409 F.3d 840, 843 (7th Cir. 2005).

²⁵ *See* 38 U.S.C. § 4301(a)(1) (stating that the purpose is “to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service”); *id.* § 4301(a)(2) (stating that reemployment and antidiscrimination rights “minimize the disruption to the lives of persons performing service in the uniformed services”).

²⁶ *Id.* § 4312(a). Moreover, Congress amended the Family and Medical Leave Act of 1993 (“FMLA”), Pub. L. No. 103-3, 107 Stat. 6 (codified in scattered sections of 29 U.S.C.), to provide new employment leave rights for military families. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585, 122 Stat. 3, 128–32; *see* Marcy Karin, *Time Off for Military Families: An Emerging Case Study in a Time of War . . . and the Tipping Point for Future Laws Supporting Work-Life Balance?*, 33 *RUTGERS L. REC.* 46, 64 (2009). However, because the Court upheld FMLA family leave abrogation as valid under the Fourteenth Amendment in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), this provision has not faced state immunity claims.

²⁷ *See* 38 U.S.C. § 4316(c).

²⁸ *See id.* §§ 4311, 4314(a)(1)(A), 4316(b)(1), 4318.

²⁹ *See id.* § 4311(c)(1).

purposes, monetary relief which includes backpay, liquidated damages, attorney's fees, and costs.³⁰

The importance of these remedies is reflected in Congress' relatively quick attempt to save USERRA's application to state employers. A 1996 Supreme Court decision that overturned precedent to limit Congress's ability to abrogate state immunity³¹ threatened USERRA's longstanding coverage of state employers.³² Because the understanding at the time was that state sovereign immunity applied only in federal court, Congress amended USERRA to provide for state jurisdiction over claims against state employers.³³ In another twist, however, the Court held in 1999 that states could now claim sovereign immunity in their own courts.³⁴ The result is that USERRA plaintiffs now arguably lack *any* venue to bring their claims—unless Congress's abrogation of state sovereign immunity is deemed constitutional.

The impact that state sovereign immunity claims have had on USERRA is illustrated by *Texas Department of Public Safety v. Torres*.³⁵ Leroy Torres enlisted as a member of the U.S. Army Reserves in 1989 and served as a Texas state trooper starting in 1998.³⁶ In 2007, he was called into active duty and deployed to Iraq, where he developed a lung condition.³⁷ He received an honorable discharge in 2008 and, because of his service-related medical condition, Torres requested that his state employer allow him to return to a different position.³⁸ The employer refused, offering instead a "temporary duty offer" to his prior trooper position.³⁹ Torres resigned and sued for monetary damages, alleging that his employer's refusal to accommodate him violated USERRA.⁴⁰ The state employer moved to dismiss Torres's suit based on its sovereign immunity and a Texas trial court

³⁰ See *id.* § 4323(d)–(e), (h).

³¹ See *infra* Section I.B.

³² See 38 U.S.C. §§ 4303(4)(A)(iii), 4323(b).

³³ See *infra* note 111.

³⁴ See *infra* Section I.C.

³⁵ 583 S.W.3d 221 (Tex. App. 2018).

³⁶ *Id.* at 223.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

rejected the state's immunity claim.⁴¹ In a split decision, the court of appeals reversed and dismissed Torres's suit.⁴²

If state employers like Torres's are permitted to assert sovereign immunity, then many of this country's 2.1 million servicemembers may be unable to enforce their rights under federal war powers legislation.⁴³ Yet this result is not inevitable. As this Article demonstrates, the Constitution did not contemplate that states could use sovereign immunity claims to defy Congress's war powers legislation.

In Part I, this Article discusses the history of state sovereign immunity jurisprudence, ending with the historical analysis now required for novel abrogation questions. Next, in Part II, the Article engages in a first-of-its kind, comprehensive, historical analysis of the Constitution's balance of war powers between the federal government and the states—a balance that is almost entirely tilted in favor of the federal government, whose war powers actions were intended to be unfettered by state interference. Finally, in Part III, the Article addresses arguments opposing war powers abrogation and demonstrates that those arguments are unable to undermine the overwhelming historical evidence that the federal government can use its war powers to subject nonconsenting states to suit.

I. A HISTORY OF THE SUPREME COURT'S SHIFTING APPROACH TO STATE SOVEREIGN IMMUNITY

State sovereign immunity jurisprudence is famously opaque, with commentators and jurists frequently twisting themselves in knots to make sense of the doctrine. There are numerous theories attempting to square the doctrine,⁴⁴ but those will not be discussed here. Instead, this Article accepts the Court's holdings as a given, arguing that war

⁴¹ See *Torres v. Texas Dep't of Pub. Safety*, No. 2017-CCV-61016-1, 2017 WL 8226710, at *1 (Tex. Cnty. Ct. Nov. 21, 2017), *rev'd*, 583 S.W.3d 221 (Tex. App. 2018), *petition for cert. filed*, No. 20-603, 2021 WL 769686 (mem.).

⁴² *Torres*, 583 S.W.3d at 232. The author of this Article authored an amicus brief arguing that the Texas Supreme Court should hear Torres's appeal and reject the state's immunity claim. Brief of Amicus Curiae Professor Jeffrey M. Hirsch in Support of Petitioner, *Torres*, 583 S.W.3d 221 (2019) (No. 19-0197), <https://ssrn.com/abstract=3427212> [<https://perma.cc/S8B8-SAVD>]. An amicus brief has also been submitted on the author's behalf supporting certiorari before the U.S. Supreme Court. Brief of Professor Jeffrey M. Hirsch as Amicus Curiae in Support of the Petitioner, *Torres*, (No. 20-603), https://www.supremecourt.gov/DocketPDF/20/20-603/164648/20201223142439508_20-603_Amicus%20Brief.pdf [<https://perma.cc/T4M4-D5UR>].

⁴³ Some states have waived immunity under USERRA. See *infra* Section III.D.

⁴⁴ Justice Souter's dissent in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), describes different interpretations of Eleventh Amendment immunity, including one that would apply only in diversity suits against nonconsenting states. *Id.* at 109–15 (Souter, J., dissenting); see *infra* note 94 and accompanying text; William Baude & Stephen E. Sachs, *The Misunderstood*

powers abrogation remains valid under current doctrine. That doctrine now requires a historical analysis to determine whether the Constitution intended to permit state sovereign immunity claims in a given area—an analysis that strongly supports war powers abrogation.

A. *State Sovereign Immunity: The First 200 Years*

State immunity against unwelcome legal claims has been a major issue throughout America's history going back to the Revolutionary War. The colonies' wartime debts preoccupied the Framers as they met in Philadelphia to construct the new constitution.⁴⁵ But, as was the case for many issues, there were sharp disagreements about the contours of state sovereign immunity—disagreements that required vague compromises for succeeding generations to flesh out. Later developments have been no less contentious and have often failed to provide much-needed clarity.

The Constitution's text is silent on the matter of state sovereign immunity.⁴⁶ Yet, this omission does not mean the Framers thought states lacked such immunity or did not consider the issue. Instead, contemporary debates focused on the scope of state sovereignty, rather than the existence of state immunity.⁴⁷ Following the Declaration of Independence, the colonies largely considered themselves independent sovereign nations that enjoyed total immunity from most legal claims, absent their consent. This degree of independence, of course, was one of the central problems of the Articles of Confederation period, during which the lack of strong national authority prevented the confederation from engaging in many necessary tasks, most notably providing for national security.⁴⁸

Only a few years after the Constitution's ratification, the Supreme Court directly addressed states' sovereign immunity. In its 1793 *Chisholm v. Georgia*⁴⁹ decision, the Court faced one of the situations that preoccupied the Framers at the Constitutional Convention⁵⁰ when a South Carolina citizen sued the state of Georgia for repayment of Revolutionary War-era debts. Many states had amassed substantial

Eleventh Amendment, 169 UNIV. PA. L. REV. (forthcoming 2021), <https://ssrn.com/abstract=3466298> [<https://perma.cc/ND3Y-W7RJ>].

⁴⁵ See *Nevada v. Hall*, 440 U.S. 410, 418 (1979).

⁴⁶ *Seminole Tribe*, 517 U.S. at 104–06 (Souter, J., dissenting).

⁴⁷ See *infra* notes 329, 332.

⁴⁸ See *infra* notes 259, 261.

⁴⁹ 2 U.S. (2 Dall.) 419 (1793).

⁵⁰ See *Seminole Tribe*, 517 U.S. at 105 n.4 (Souter, J., dissenting).

debts during the war with few means to pay it off⁵¹ and, although there were numerous debates at the Convention regarding these debts, it would be many years until Alexander Hamilton's plan for a new national bank and taxation power was implemented.⁵²

The Court in *Chisolm*, over a lone dissent, held that Georgia lacked sovereign immunity to bar the claim.⁵³ The multiple opinions stressed that the Constitution, particularly Article III, granted the federal courts power to hear claims brought by individuals against non-consenting states.⁵⁴ This holding meant that states could not use sovereign immunity to block suits seeking monetary remedies, placing the budgets of debt-laden states at risk.

By some accounts, the states' reactions were swift and fierce.⁵⁵ Later that same year, Congress passed, and the states ratified, the Eleventh Amendment overturning *Chisholm*. The amendment states, in full: "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."⁵⁶

On its face, the Eleventh Amendment applies only to the jurisdiction of federal courts over suits brought by individuals who are not citizens of the same state. But the Court has expanded the scope of the Amendment and state sovereign immunity far past this text.⁵⁷

After *Chisholm*, litigation over state sovereign immunity largely went dark. It was not until 1890 that the Court, in *Hans v. Louisiana*,⁵⁸ finally provided a meaningful interpretation of the Eleventh Amendment. *Hans* involved a breach of contract claim brought by an individ-

⁵¹ See RON CHERNOW, *ALEXANDER HAMILTON* 297, 322–23 (2005) (noting \$25 million in state debt and \$54 million federal).

⁵² *Id.* at 355–57.

⁵³ 2 U.S. at 420.

⁵⁴ *Id.* at 450–79.

⁵⁵ Georgia's House of Representatives passed a bill that would subject anyone who attempted to enforce *Chisholm* to hanging without the benefit of clergy. *Alden v. Maine*, 527 U.S. 706, 720–21 (1999). Others have questioned whether the reaction was as strong, noting that although Congress was in session when *Chisholm* was announced and a constitutional amendment was introduced two days later, Congress did not immediately act upon the decision and it took two years before the Eleventh Amendment was ratified. *Seminole Tribe*, 517 U.S. at 106 n.5 (Souter, J., dissenting). *But see Alden*, 527 U.S. at 721 (stating that Congress, by near-unanimous vote, passed Eleventh Amendment within two months of *Chisholm*).

⁵⁶ U.S. CONST. amend. XI.

⁵⁷ See *Seminole Tribe*, 517 U.S. at 54 (noting that Court has interpreted Eleventh Amendment more broadly than its text); *infra* Sections II.B, C.

⁵⁸ 134 U.S. 1 (1890) (seeking payment of coupons).

ual against his own state.⁵⁹ The Court, while acknowledging that the text of the Eleventh Amendment did not apply to such suits, held that the state could invoke sovereign immunity.⁶⁰ According to the Court, it would be “anomalous” and an “absurdity on its face” to think that those ratifying the Eleventh Amendment would have prevented suits against a state by citizens of another state or foreign country, but not of the same state.⁶¹ The Court also pointed to Chief Justice John Marshall’s general comments about state immunity during the Virginia Constitution ratification convention, although it failed to address the fact that Marshall was discussing federal suits by citizens of a different state.⁶² Importantly, the Court relied upon Alexander Hamilton’s *The Federalist No. 81*, where he both extolled the virtues of state sovereign immunity and noted by reference instances where it would not apply.⁶³

The period following *Hans* was another quiet one for state sovereign immunity, with the next notable case occurring eighty-six years later. In *Fitzpatrick v. Bitzer*,⁶⁴ the Court addressed another aspect of state sovereign immunity jurisprudence: whether Congress could abrogate states’ immunity under the Fourteenth Amendment. The employee in *Fitzpatrick* sued his state employer under Title VII of the Civil Rights Act,⁶⁵ the preeminent federal employment discrimination statute.⁶⁶ Title VII explicitly permitted private rights of actions against state employers for monetary damages, thereby raising state immunity concerns.⁶⁷ Yet, in an opinion by then-Justice Rehnquist, the Court held that Congress could abrogate states’ sovereign immunity pursuant to its authority under the Fourteenth Amendment.⁶⁸ In addition to noting its earlier approval of abrogation under the Interstate Commerce Clause,⁶⁹ the Court emphasized that the Fourteenth Amendment’s “substantive provisions are by express terms directed at the States” and imposed duties upon them that Congress had the power to

⁵⁹ *Id.* at 1.

⁶⁰ *Id.* at 10–11.

⁶¹ *Id.* at 10, 15.

⁶² *Id.* at 14.

⁶³ *Id.* at 12–13; see *infra* notes 329–32.

⁶⁴ 427 U.S. 445 (1976).

⁶⁵ 42 U.S.C. §§ 2000e–2000e-17.

⁶⁶ *Fitzpatrick*, 427 U.S. at 448–49.

⁶⁷ 42 U.S.C. § 2000e-5.

⁶⁸ *Fitzpatrick*, 427 U.S. at 456.

⁶⁹ *Id.* at 452 (citing *Parden v. Terminal Ry. of the Ala. State Docks Dep’t*, 377 U.S. 184, 196 (1964)).

enforce via appropriate legislation.⁷⁰ Thus, the Fourteenth Amendment was a “limitation[] of the power of the States and enlargement[] of the power of Congress.”⁷¹ As a result of this “carv[ing] out” of state power, states are unable to assert sovereign immunity in the face of valid Fourteenth Amendment legislation.⁷²

Subsequently, in *Pennsylvania v. Union Gas Co.*,⁷³ the Court reasserted Congress’s ability to abrogate pursuant to the Interstate Commerce Clause in Article I.⁷⁴ The plaintiff sued the state of Pennsylvania under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),⁷⁵ seeking reimbursement for funds it paid to remediate a Superfund site.⁷⁶ Earlier decisions by the Court and several circuit courts had all suggested or held that Congress’s power to regulate interstate commerce included the ability to abrogate.⁷⁷ Borrowing from *Fitzpatrick*, the Court emphasized that when the Constitution gives the federal government authority to act in a certain area, states cannot interfere with the full exercise of that power.⁷⁸ The Interstate Commerce Clause did just that by giving Congress “plenary” power and taking it away from the states, which showed that the states had “surrender[ed] . . . [their] immunity in the plan of the [constitutional] convention.”⁷⁹ For this reason, and because the Eleventh Amendment limits only judicial—not legislative—authority, Congress had the power to abrogate state sovereign immunity.⁸⁰

⁷⁰ *Id.* at 453 (citing U.S. CONST. amend. XIV, §§ 1, 5).

⁷¹ *Id.* at 454 (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880)).

⁷² *Id.* at 455–56 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)); see also *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003) (FMLA family leave). However, the Court will strike down abrogation attempts under the Fourteenth Amendment that are not “congruent and proportional” to a statute’s goals. *Coleman v. Ct. of Appeals*, 566 U.S. 30, 43 (2012) (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)) (self-care provision of FMLA); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act).

⁷³ 491 U.S. 1 (1989).

⁷⁴ *Id.* at 8–13; U.S. CONST. art. I, § 8, cl. 3.

⁷⁵ 42 U.S.C. §§ 9601–9675.

⁷⁶ *Union Gas*, 491 U.S. at 5–6.

⁷⁷ *Id.* at 14–15.

⁷⁸ See *id.* at 16. The Court rejected the state’s argument that the Fourteenth Amendment fundamentally shifted the balance of power between states and the federal government, holding that the Constitution permitted abrogation prior to the Civil War Amendments. *Id.* at 16–17.

⁷⁹ *Id.* at 16–17, 19 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934); THE FEDERALIST NO. 81 (Alexander Hamilton)).

⁸⁰ *Id.* at 18–19.

Although *Hans*'s broad reading of the Eleventh Amendment still stood, *Union Gas* represented the nadir of states' modern sovereign immunity. Because Congress possesses wide powers under the Interstate Commerce Clause,⁸¹ its ability to abrogate state sovereign immunity was immense. But that power did not last long.

B. The Abandoned Chronological Analysis: Seminole Tribe and the Dangerous Dictum

A mere seven years after *Union Gas*, the Supreme Court reversed itself in *Seminole Tribe of Florida v. Florida*⁸² and invalidated commerce abrogation. This was a pivotal moment for the war powers.

After *Union Gas*, it seemed clear that Congress could use its war powers to permit private suits against states, as those powers—like the commerce powers—were part of Article I.⁸³ That Article I association, however, was subsequently responsible for casting doubt on war powers abrogation. Since *Seminole Tribe*, many courts have held (wrongly, as explained later) that war powers abrogation was not valid simply because the war powers are part of Article I.

The fixation on the placement of war powers is entirely the work of the decision in *Seminole Tribe*, even though the Court later shifted its analysis again. In *Seminole Tribe*, the Court addressed abrogation of state sovereign immunity in the Indian Gaming Regulatory Act,⁸⁴ which Congress enacted under the Indian Commerce Clause.⁸⁵ The Court applied what is now a familiar analytical structure for the validity of congressional abrogation. First, it asked whether Congress “unambiguously expresse[d] its intent to abrogate the immunity”⁸⁶ If so, the Court then examines “whether Congress has acted ‘pursuant to a valid exercise of power.’”⁸⁷

⁸¹ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012).

⁸² 517 U.S. 44 (1996) (addressing abrogation under the Indian Gaming Regulatory Act); see generally Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1; Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

⁸³ See, e.g., *Reopell v. Massachusetts*, 936 F.2d 12, 16 (1st Cir. 1991) (upholding USERRA's war powers abrogation); *Jennings v. Ill. Off. of Educ.*, 589 F.2d 935, 938 (7th Cir. 1979) (same).

⁸⁴ 18 U.S.C. §§ 1166–1168; 25 U.S.C. §§ 2701–2721.

⁸⁵ U.S. CONST. art. I, § 8, cl. 3.

⁸⁶ *Seminole Tribe*, 517 U.S. at 55 (alteration in original) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

⁸⁷ *Id.* (quoting *Green*, 474 U.S. at 68).

In *Seminole Tribe*, the Court assumed that the Indian Gaming Act clearly expressed an intent to abrogate,⁸⁸ but held that Congress lacked the power to do so.⁸⁹ In reversing *Union Gas*, the Court held that the Indian Commerce Clause, and the Interstate Commerce Clause by implication, does not give Congress the power to abrogate.⁹⁰ The Court acknowledged the obvious point that the Eleventh Amendment's text, read literally, did not provide states immunity from suits like the one in *Seminole Tribe*, where a citizen sues their own state.⁹¹ However, expanding upon *Hans*, the Court laid out a broad defense of state sovereign immunity:⁹² a defense in which the Eleventh Amendment oddly becomes the incredible shrinking constitutional provision.

According to the Court in *Seminole Tribe*, a central feature of state sovereign immunity is that it is a "background" constitutional principle.⁹³ At the time, there were disparate arguments about the source of state immunity, including the notion that the Eleventh Amendment was merely a codification of common law immunity that Congress could trump via legislation.⁹⁴ The common law argument would give Congress immense authority to abrogate state sovereign immunity, as that authority would have been coterminous with all of Congress's powers. Thus, *Seminole Tribe*'s holding that state sovereign immunity is constitutional in nature meant that congressional power to abrogate would be far more circumscribed.

The Court's justification for overruling *Union Gas* came down to a fundamental disagreement with the notion that when the Constitution gives Congress plenary power over an area, it also permits abrogation of state immunity.⁹⁵ Yet, the Court's holding in *Seminole Tribe* did not mean that Congress can never abrogate state sovereign immunity. In particular, the Court reaffirmed *Fitzpatrick* and stressed that,

⁸⁸ *Id.* at 56.

⁸⁹ *Id.* at 72.

⁹⁰ *Id.* at 72–73.

⁹¹ *Id.* at 54.

⁹² *Id.* at 68–70.

⁹³ *Id.* at 72.

⁹⁴ See *id.* at 82–83 (Souter, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 259–90 (1985) (Brennan, J., dissenting); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012) (arguing that sovereign immunity is a common law backdrop rule); Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 507–08 (1997). But see William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017) (arguing that sovereign immunity is common law backdrop rule protected from abrogation in most cases).

⁹⁵ Jackson, *supra* note 94, at 507–08.

unlike the Article I Commerce Clauses, the Fourteenth Amendment's Section 1⁹⁶ expressly prohibits states from engaging in certain actions, while Section 5⁹⁷ provides Congress the power to enforce that provision.⁹⁸ Thus, "by expanding federal power at the expense of state autonomy," the Fourteenth Amendment "had fundamentally altered the balance of state and federal power struck by the Constitution" and permitted abrogation.⁹⁹

As described below, the war powers also expand federal power at the expense of state autonomy—indeed they appear to do so more than any other constitutional area.¹⁰⁰ But an additional rationale in *Seminole Tribe* later muddled what should have been a noncontroversial understanding that the Constitution does not permit states to thwart federal war powers legislation.

This problem arose from an altogether unnecessary attempt to distinguish Commerce Clause abrogation through what I call the "chronological analysis."¹⁰¹ In distinguishing *Fitzpatrick*, the Court in *Seminole Tribe* stated that it was significant that the Fourteenth Amendment was ratified after the Eleventh Amendment.¹⁰² The later-enacted Fourteenth Amendment allowed abrogation because it "intrude[d] upon the province of the Eleventh Amendment,"¹⁰³ which was the source of state sovereign immunity.¹⁰⁴ Accordingly, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization [under Article I] of suits by private parties against unconsenting States."¹⁰⁵ This mention of Article I generally, rather

⁹⁶ U.S. CONST. amend. XIV, § 1 (stating, in part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

⁹⁷ *Id.* § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

⁹⁸ *Seminole Tribe*, 517 U.S. at 59.

⁹⁹ *Id.*

¹⁰⁰ See *infra* Section II.A.

¹⁰¹ *Seminole Tribe*, 517 U.S. at 65.

¹⁰² *Id.* at 65–66 ("*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."); see also Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 644 (2000).

¹⁰³ *Seminole Tribe*, 517 U.S. at 59.

¹⁰⁴ See *id.* at 67, 71. The Court noted that the "plan of the convention" contemplated states' immunity from suit, but the Eleventh Amendment set forth the specific principles of that immunity. *Id.* at 68 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 323 (1934)).

¹⁰⁵ *Id.* at 72.

than the Indian Commerce Clause power specifically at issue in the case, has become entrenched in some courts, despite the fact that it was dictum and later abandoned by the Court.¹⁰⁶ Under this view, because Article I was enacted *before* the Eleventh Amendment, *Seminole Tribe*'s chronological analysis meant that Congress can never abrogate pursuant to its Article I powers, even if it has exclusive authority over an area.¹⁰⁷

In the period immediately following *Seminole Tribe*, courts adopted this Article I dictum as a rule of law,¹⁰⁸ establishing a general understanding that no Article I powers would permit abrogation.¹⁰⁹ This included some courts striking down war powers abrogation under USERRA.¹¹⁰ Congress, recognizing the danger that *Seminole Tribe* posed to state employees' USERRA rights, amended the statute two years later to clarify its intent to abrogate state immunity and to provide jurisdiction for such suits in state courts—which, at the time, were considered to be outside the reach of the Eleventh Amendment.¹¹¹ The USERRA amendment's legislative history explained that it was a reaction to some states' successful use of sovereign immunity to avoid complying with the statute, which “raise[d] serious questions about the United States ability to provide for a strong national defense.”¹¹² Yet, some states continued to successfully assert sovereign immunity against USERRA claims,¹¹³ despite the fact that the “Article I dictum” is no longer valid. Like so many other state sovereign immunity issues, the Court shifted to yet another analysis that left the door open for some types of Article I abrogation.

C. *The Current Historical Analysis: Alden v. Maine*

Although *Seminole Tribe* expanded the scope of the Eleventh Amendment, it was still widely accepted at the time that state sover-

¹⁰⁶ See *infra* note 108.

¹⁰⁷ 517 U.S. at 73 (stating that “Article I cannot be used to circumvent the [Eleventh Amendment's] constitutional limitations placed upon federal jurisdiction”).

¹⁰⁸ See, e.g., Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999).

¹⁰⁹ See *Seminole Tribe*, 517 U.S. at 72 n.16 (appearing to confirm that *Seminole Tribe* would invalidate abrogation under Article I bankruptcy, antitrust, and copyright powers).

¹¹⁰ See, e.g., Velasquez v. Frapwell, 160 F.3d 389, 392 (7th Cir. 1998).

¹¹¹ Veterans Programs Enhancement Act of 1998 § 211, 38 U.S.C. § 4323(b).

¹¹² H.R. REP. NO. 105-448, at 5 (1998); see, e.g., Wilson-Jones v. Caviness, 99 F.3d 203, 210 (6th Cir. 1996).

¹¹³ See *infra* note 143.

eign immunity was limited to federal courts.¹¹⁴ Soon after *Seminole Tribe*, however, the Supreme Court fully cleaved state sovereign immunity from the text of the Eleventh Amendment—not only extending immunity beyond the federal courts, but also moving away from *Seminole Tribe*'s chronological analysis to one focused on constitutional history.

The seminal case *Alden v. Maine*¹¹⁵ ushered in a new abrogation framework: the “historical analysis” doctrine.¹¹⁶ The employees in *Alden* sued their state employer in federal court for overtime violations under the Fair Labor Standards Act of 1938 (“FLSA”),¹¹⁷ which contained a clear waiver of state immunity.¹¹⁸ After the employees filed their FLSA suit, the Court issued the *Seminole Tribe* decision, leading the district court in *Alden* to dismiss for lack of subject matter jurisdiction.¹¹⁹ The employees then refiled their case in state court, prompting the question addressed by the Court in *Alden*: are states immune from private suits for monetary damages in their own courts?¹²⁰ Despite the prior understanding that the Eleventh Amendment applied only to federal courts, the Court held that sovereign immunity extended to state courts as well.¹²¹ To justify allowing states to claim immunity in their own courts, the Court stressed that state sovereign immunity does not flow from the Eleventh Amendment, which speaks only to federal jurisdiction.¹²² That Amendment instead merely confirms pre-existing state immunity, which “is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the

¹¹⁴ See, e.g., *Velasquez*, 160 F.3d at 394.

¹¹⁵ 527 U.S. 706 (1999).

¹¹⁶ *Id.* at 743.

¹¹⁷ 29 U.S.C. §§ 201–219.

¹¹⁸ *Alden*, 527 U.S. at 711–12 (citing 29 U.S.C. §§ 203(x), 216(b)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Because this Article argues that war powers abrogation is valid under current law, it does not delve into the many criticisms of *Alden*. See, e.g., *id.* at 814 (Souter, J., dissenting); 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, 141–48 (2001); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895–1914 (1983); John E. 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, 1425–30 (1975).

¹²² *Alden*, 527 U.S. at 713 (“[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”).

plan of the Convention or certain constitutional Amendments.”¹²³ *Alden*, therefore replaced the chronological analysis with a historical one that looks to the “plan of the Convention” or relevant Amendments.¹²⁴ In particular, the Court presumes that states are immune from private suits absent “‘compelling evidence’ that the states were required to surrender [their immunity] to Congress pursuant to the constitutional design.”¹²⁵ Such evidence may be found in the “history, practice, precedent, and the structure of the Constitution.”¹²⁶

In *Alden*, the Court held that this historical analysis failed to show that the Constitution allowed Congress to abrogate state immunity in state court. First, the Court rejected the argument that under the Supremacy Clause,¹²⁷ substantive federal law was sufficient to abrogate state immunity on its own. That position, according to the Court, was inconsistent with *Hans* and states’ constitutional sovereignty.¹²⁸ Similarly, Congress’s “specific Article I powers . . . by virtue of the Necessary and Proper Clause or otherwise” did not give it the general power to subject states to suit to enforce federal enumerated powers.¹²⁹

After dispensing with these arguments, the Court turned to its central inquiry: “In determining whether there is ‘compelling evidence’ that this derogation of the States’ sovereignty is ‘inherent in the constitutional compact,’ we continue our discussion of history, practice, precedent, and the structure of the Constitution.”¹³⁰ To answer this question, the Court turned to historical evidence regarding state immunity in their own courts, such as the Founders’ silence on the topic;¹³¹ arguments raised by opponents of the Constitution;¹³² proponents’ response to these objections;¹³³ the background of *Chisholm* and the Eleventh Amendment;¹³⁴ the absence of language in

¹²³ *Id.*

¹²⁴ *See id.*

¹²⁵ *Id.* at 731 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781 (1991)).

¹²⁶ *Id.* at 741–54; *see also* *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (examining original understanding of Constitution and early congressional practice).

¹²⁷ U.S. CONST. art. VI.

¹²⁸ *Alden*, 527 U.S. at 732.

¹²⁹ *Id.* (noting reversals of *Parden* and *Union Gas*).

¹³⁰ *Id.* at 741 (citation omitted) (quoting *Blatchford*, 501 U.S. at 781).

¹³¹ *Id.*

¹³² *Id.* at 741–42 (noting objection to states being subject to suit in federal court, which “would have made little sense” if states gave up their immunity “in all events”).

¹³³ *Id.* at 742 (noting claim that states could not be sued in federal court without their consent).

¹³⁴ *Id.* (noting one Justice in the *Chisholm* majority distinguished immunity in state and federal court).

the Eleventh Amendment suggesting that states lack immunity in their own courts;¹³⁵ a rejected draft of the Eleventh Amendment that would have limited its scope to instances in which state courts provided a remedy;¹³⁶ contemporaneous congressional practice;¹³⁷ the theory and reasoning of prior Court decisions;¹³⁸ and the structure of the Constitution.¹³⁹ Based on these historical inquiries, the Court concluded:

In light of the historical record it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the Federal Government a power to subject nonconsenting States to private suits in these fora.¹⁴⁰

No matter what one thinks of the holding in *Alden*, its significance for war powers abrogation lies in its insistence on a historical analysis. As is discussed below, the history of the Constitution makes it very difficult—if not outright impossible—to believe that it would have been ratified had it been understood to give states the ability to thwart federal war powers with claims of sovereign immunity. Moreover, *Alden*'s historical analysis made clear that *Seminole Tribe*'s Article I dictum was no longer valid.¹⁴¹ It is the “history, practice, precedent, and the structure of the Constitution” that resolves abrogation questions, not whether a constitutional power was ratified before or after the Eleventh Amendment.¹⁴²

Despite *Alden*, *Seminole Tribe*'s Article I dictum lives on, serving as the basis for several courts' rejection of war powers abrogation claims.¹⁴³ These courts ignore the fact that *Alden* actually *supports* war powers abrogation. The shift from the chronological to the historical analysis means that congressional powers that predate the Eleventh

¹³⁵ *Id.* at 742–43.

¹³⁶ *Id.* at 743.

¹³⁷ *Id.* at 743–45 (noting lack of federal statutes permitting private suits against states in state or federal court).

¹³⁸ *Id.* at 745–48.

¹³⁹ *Id.* at 748–53 (noting treatment of states as sovereigns, federal government's immunity in federal court, importance of immunity to state solvency at the time of the Convention, threat to states' ability to govern, and separation of powers).

¹⁴⁰ *Id.* at 743. *But see id.* at 764–808 (Souter, J., dissenting) (countering majority's historical analysis).

¹⁴¹ *See* Hirsch, *supra* note 5, at 1019–21.

¹⁴² *Alden*, 527 U.S. at 741–54.

¹⁴³ *See infra* Part III; *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 288 (5th Cir. 2000) (Indian Nonintercourse Act); *Palmatier v. Mich. Dep't of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997) (USERRA); *Larkins v. Dep't of Mental Health & Mental Retardation*, 806 So. 2d 358, 362–63 (Ala. 2001) (USERRA).

Amendment may provide the authority to abrogate.¹⁴⁴ Ultimately, this possibility moved from mere theory to reality when the Court held that an Article I power—bankruptcy—permits Congress to subject nonconsenting states to suits by individuals. Thus, the question of whether Congress can use its war powers to abrogate state immunity—or whether there is even immunity that needs to be abrogated—is not answered by those powers’ location in Article I, but by whether the plan of the Constitution was to provide states immunity in the face of federal war powers actions.¹⁴⁵ Given the importance that the Founders and ratifying states placed on the need to centralize responsibility for the nation’s security within the federal government,¹⁴⁶ there is perhaps no constitutional authority more incompatible with state immunity than the war powers.

D. *The Post-Alden Historical Analysis: Disregarding the Dangerous Dictum*

Alden presented a conundrum for courts, at least superficially. On the one hand, the Court had previously stated in dictum that Article I cannot abrogate state sovereign immunity. On the other, *Alden* made clear that the proper analysis for abrogation required a historical examination of the Constitutional Convention, which in theory permits some form of Article I abrogation. As might be expected, lower courts tended to hew to the language of Supreme Court decisions, even if dictum.¹⁴⁷ The Court itself, however, has increasingly demonstrated that this Article I dictum cannot be taken literally.

Initial cracks in the Article I dictum came to light in various Court decisions that began to describe the limitation only in terms of Congress’s commerce powers.¹⁴⁸ This linguistic nuance ultimately led to a direct engagement with the scope of Article I abrogation as applied to the Bankruptcy Clause.

¹⁴⁴ See Hirsch, *supra* note 5, at 1021.

¹⁴⁵ See *infra* Section I.D; Althouse, *supra* note 102, at 644–45 n.62 (raising possibility that *Alden* validates war powers abrogation); Lieutenant Colonel Conrad, *USERRA Note: The 1998 USERRA Amendments*, 1999 ARMY LAW. 52, 53 n.97 (1999) (suggesting that war power abrogation may be exception to *Seminole Tribe*); cf. Susan Bandes, *Treaties, Sovereign Immunity, and “The Plan of the Convention,”* 42 VA. J. INT’L L. 743, 747–48 (2002) (arguing that *Alden* validates Article I treaty abrogation). But see Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT’L L. 713, 726 n.69 (2002) (suggesting that war powers abrogation is unconstitutional).

¹⁴⁶ See *infra* Section II.A.

¹⁴⁷ See cases cited *supra* note 143.

¹⁴⁸ See, e.g., *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (“Congress may not abrogate the States’ sovereign immunity pursuant to its Article I power over commerce.”).

In the aftermath of *Seminole Tribe*, most appellate courts held that the Bankruptcy Clause did not provide Congress the power to abrogate state immunity.¹⁴⁹ In 2002, however, the Sixth Circuit disagreed, holding in *Hood v. Tennessee Student Assistance Corp.*¹⁵⁰ that Congress validly abrogated state immunity in bankruptcy proceedings.¹⁵¹ Ignoring the chronological analysis and Article I dictum, the court in *Hood* appropriately employed a historical analysis of the federal bankruptcy powers, holding that they provide the authority to abrogate.¹⁵² The Supreme Court granted certiorari in *Hood*, but avoided the abrogation issue presented by holding that a bankruptcy court's discharge of student loan debt did not implicate state sovereign immunity.¹⁵³ The primary reason for that avoidance was that the case involved bankruptcy in rem jurisdiction, which did not seriously threaten state sovereignty.¹⁵⁴ The Court, therefore, declined to address whether other bankruptcy proceedings, particularly those involving personal jurisdiction over the state, would be constitutional.¹⁵⁵ Two years later, in *Central Virginia Community College v. Katz*,¹⁵⁶ the Court answered this question.

Katz involved a suit brought by the trustee of a bankrupt business estate against state higher education institutions; the trustee was attempting to set aside preferential payments made by the insolvent debtor-business to those institutions.¹⁵⁷ The institutions argued that the court lacked jurisdiction because Congress's clear abrogation of state sovereign immunity under the Bankruptcy Act was invalid.¹⁵⁸ The Supreme Court disagreed, but technically not on the abrogation

¹⁴⁹ See, e.g., *Nelson v. La Crosse Cnty. Dist. Att'y (In re Nelson)*, 301 F.3d 820, 832–34 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1120–21 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Dep't of Pub. Welfare (In re Sacred Heart Hosp.)*, 133 F.3d 237, 242–43 (3d Cir. 1998); *Fernandez v. PNL Asset Mgmt. Co. (In re Fernandez)*, 123 F.3d 241, 243–45 (5th Cir. 1997), amended by 130 F.3d 1138, 1138–39 (5th Cir. 1997); *Creative Goldsmiths of Wash., D.C., Inc. v. Maryland (In re Creative Goldsmiths)*, 119 F.3d 1140, 1145–46 (4th Cir. 1997).

¹⁵⁰ 319 F.3d 756 (6th Cir. 2003), *aff'd and remanded*, 541 U.S. 440 (2004).

¹⁵¹ *Id.* at 761–62.

¹⁵² *Id.* at 763–67.

¹⁵³ 541 U.S. at 447–54 (emphasizing that claimant sought only discharge of debt, over which bankruptcy court had in rem jurisdiction, not monetary or affirmative relief from the state creditor).

¹⁵⁴ *Id.* at 454.

¹⁵⁵ *Id.*

¹⁵⁶ 546 U.S. 356 (2006).

¹⁵⁷ *Id.* at 360.

¹⁵⁸ *Id.* at 361 (citing 11 U.S.C. § 106(a)).

question. Instead, the Court held that under the plan of the Constitution the states *never* possessed immunity from bankruptcy claims.¹⁵⁹

The manner in which the Court reached its holding in *Katz* reaffirmed *Alden*'s historical analysis. The Court did not ask whether bankruptcy was an exception to *Seminole Tribe*'s Article I dictum.¹⁶⁰ Instead, the Court expressly cited to the history, purpose, and practice of the Bankruptcy Clause to hold that the Constitution acted as a subordination of state sovereign immunity.¹⁶¹ Accordingly, *Katz* officially confirmed what *Alden* implied—that states may lack sovereign immunity against some Article I powers.¹⁶²

In applying the historical analysis, the Court emphasized several features of the Bankruptcy Clause indicating that the plan of the Convention was to limit state sovereign immunity. In addition to courts' ability to issue orders as part of *in rem* proceedings,¹⁶³ the Court stressed the problems associated with states' disparate treatment of debtors;¹⁶⁴ early congressional legislative action, including the first Bankruptcy Act's authorization of federal court habeas writs against state officials;¹⁶⁵ and Congress's Article I authority to create "uniform" bankruptcy laws.¹⁶⁶ As a result, even when bankruptcy courts invoke *in personam* jurisdiction over nonconsenting states—such as through habeas writs or ancillary enforcement orders of courts' *in rem* jurisdiction—"the States agreed in the plan of the Convention not to assert [sovereign] immunity."¹⁶⁷ In other words, when it comes to federal bankruptcy actions, states lack any immunity that needs to be abrogated.¹⁶⁸

¹⁵⁹ *Id.* at 362–63.

¹⁶⁰ *Katz* explicitly disavowed *Seminole Tribe*'s dictum assuming it prohibited bankruptcy abrogation. *Id.* at 363. Moreover, Justice Thomas's dissent objected to the majority's conflict with the Article I dictum, which he considered "settled doctrine" and a "long-established principle[]." *Id.* at 379, 381–82 (Thomas, J., dissenting).

¹⁶¹ *Id.* at 362–63 (majority opinion) ("The history of the Bankruptcy Clause . . . demonstrate[s] that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."); *see also id.* at 379 (Thomas, J., dissenting) (analyzing "text, structure, or history of our Constitution"); *Allen v. Cooper*, 140 S. Ct. 994 (2020).

¹⁶² *But see Allen*, 140 S. Ct. at 1003 (rejecting copyright abrogation and stating, *in dicta*, that *Katz* does not require a "clause-by-clause approach" to abrogation under Article I).

¹⁶³ *Katz*, 546 U.S. at 362, 369–70.

¹⁶⁴ *Id.* at 363 (noting that some states imprisoned debtors whose debts had been discharged by another state); *id.* at 365–69.

¹⁶⁵ *Id.* at 363, 373–75.

¹⁶⁶ *Id.* at 370.

¹⁶⁷ *Id.* at 373.

¹⁶⁸ *See Allen v. Cooper*, 140 S. Ct. 994, 1002–03 (2020).

As we shall see in the next Part, the “bankruptcy exceptionalism”¹⁶⁹ that deprives states of sovereign immunity that needs to be abrogated applies equally, if not more so, to the war powers. There are differences between the two powers, of course, particularly that “[b]ankruptcy jurisdiction, at its core, is *in rem*,” which implicates state sovereignty to a lesser degree than other forms of jurisdiction.¹⁷⁰ However, as explained in more detail below,¹⁷¹ *Katz* was in no way limited to *in rem* bankruptcy proceedings, as the Court expressly held that bankruptcy abrogation was valid even in cases involving *in personam* jurisdiction.¹⁷²

The Court recently reaffirmed the need to employ a historical analysis to state sovereign immunity claims in a 2019 decision, *Franchise Tax Board of California v. Hyatt*.¹⁷³ The issue in *Hyatt* was not congressional abrogation, but whether sovereign immunity bars individual suits against nonconsenting states in another state’s courts.¹⁷⁴ In overruling its own precedent allowing such suits, the Court firmly reiterated the need to use a historical analysis—while also noting that under the plan of the Convention, the states lacked war powers.¹⁷⁵

The entirety of *Hyatt*’s discussion of state sovereign immunity was an examination of the history of the Constitution.¹⁷⁶ Over and again, often while explicitly quoting *Alden*, the Court looked to sovereign immunity in other states’ courts through a historical prism;¹⁷⁷ the dissent also relied on history, albeit with a different interpretation.¹⁷⁸ Thus, despite drawing different conclusions, *all* members of the Court understood that its current jurisprudence requires an analysis of “con-

¹⁶⁹ *Id.* at 1002.

¹⁷⁰ *Katz*, 546 U.S. at 362.

¹⁷¹ *See infra* Section III.B.

¹⁷² *See Katz*, 546 U.S. at 361–62, 371–72 (“We granted certiorari to consider the question left open by our opinion in *Hood*: whether Congress’ attempt to abrogate state sovereign immunity in 11 U.S.C. § 106(a) is valid. As we shall explain, however, we are persuaded that the enactment of that provision was not necessary to authorize the Bankruptcy Court’s jurisdiction over these preference avoidance proceedings.” (footnote omitted) (citation omitted)). *But see Allen*, 140 S. Ct. at 1002 (describing, in dicta, that *Katz* represented “bankruptcy exceptionalism”).

¹⁷³ 139 S. Ct. 1485, 1492 (2019).

¹⁷⁴ *Id.* at 1490.

¹⁷⁵ *See infra* note 419.

¹⁷⁶ *See Hyatt*, 139 S. Ct. at 1492–99.

¹⁷⁷ *See id.*

¹⁷⁸ *See id.* at 1503–04 (Breyer, J. dissenting).

stitutional design” and the “plan of the Convention.”¹⁷⁹ Moreover, the Court not only cited to Hamilton’s oft-repeated discussion of state sovereign immunity in *The Federalist No. 81*,¹⁸⁰ it also emphasized the several instances in which the states gave up their sovereign immunity under the Constitution.¹⁸¹ In short, state sovereign immunity is to be judged in “light of [the Constitution’s] history and structure”¹⁸²

Given these developments, what is the current state of state sovereign immunity jurisprudence? Things have been fairly stable since *Katz*, after which there are three relevant and undeniable principles regarding Article I abrogation:

- (1) Most Article I powers, such as those related to commerce, do not provide Congress the power to abrogate state sovereign immunity.
- (2) The ability of the states to claim sovereign immunity against federal actions, including those taken pursuant to Article I, is determined by a historical analysis.
- (3) States lack immunity against federal actions under Article I’s Bankruptcy Clause.

These principles establish the path for war powers abrogation, despite the War Powers Clauses being part of Article I. That path leads to one question: whether a historical analysis shows that, in ratifying the Constitution, the states gave up or never possessed sovereign immunity against federal war powers actions. A comprehensive examination of the text, history, practice, and precedent of the Constitution demonstrates that, under the plan of the Convention, there is a “war powers exceptionalism” that deprives the states of sovereign immunity in the war powers arena.

II. STATES LACK SOVEREIGN IMMUNITY AGAINST FEDERAL WAR POWERS ACTIONS

The constitutionality of war powers abrogation currently faces judicial uncertainty. There is technically a federal circuit split on the constitutionality of USERRA’s war powers abrogation, with the First

¹⁷⁹ *See id.* at 1503 (quoting *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002)).

¹⁸⁰ *Id.* at 1493 (majority opinion). Notably, the Court never acknowledges, when quoting Hamilton, that he was discussing federal *diversity* jurisdiction over suits seeking payment of state debts.

¹⁸¹ *Id.* at 1495 (noting Article III’s provision for a neutral federal forum for state disputes and the federal government’s ability to sue states).

¹⁸² *Id.* at 1496 (quoting *Alden v. Maine*, 527 U.S. 706, 723–24 (1999)).

Circuit upholding abrogation¹⁸³ and the Seventh Circuit rejecting it.¹⁸⁴ But both of these cases are outdated, as they were issued after the Supreme Court overturned its approach to Article I abrogation in *Seminole Tribe*, but prior to the subsequent shifts in *Alden* and *Katz*. Moreover, because USERRA now appears to exclude federal jurisdiction over claims against state employers, the federal courts have largely sat on the sidelines. In their place are several state court decisions which, for a variety of reasons, have largely followed the Seventh Circuit's approach.¹⁸⁵ However, none of those cases engaged in any serious analysis of whether war powers abrogation would be valid pursuant to the Court's current jurisprudence.

Under the current, historical analysis of *Alden* and *Katz*, courts must turn to the "history, practice, precedent, and the structure of the Constitution" to determine whether states possess sovereign immunity in a given area.¹⁸⁶ This history is intended to reveal whether states believed that their ratification of the Constitution excepted their sovereign immunity in a relevant area. The lack of this immunity is typically referred to as "abrogation," but this can be something of a misnomer. For instance, in *Katz*, the Court emphasized that it was not discussing Congress's abrogation of state sovereign immunity because when it comes to bankruptcy, states lack any immunity for Congress to abrogate.¹⁸⁷ As we shall see, the constitutional war powers have an ever-greater claim to being devoid of any state sovereign immunity. Although this Article will use the term *war powers abrogation* as a convenient shorthand, what it demonstrates is that the states understood that under the Constitution they lacked sovereign immunity when it comes to issues of war and the nation's defense.

A. *History and Structure of the Constitution*

The central focus of the historical analysis is the "plan of the Convention," i.e., whether the states, when ratifying the Constitution, thought that they would have the power to assert sovereign immunity

¹⁸³ *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996).

¹⁸⁴ *Velasquez v. Frapwell (Velasquez I)*, 160 F.3d 389 (7th Cir. 1998). This decision was vacated in relevant part after the court realized that USERRA was amended to provide for state court jurisdiction over claims against state employers. *Velasquez v. Frapwell (Velasquez II)*, 165 F.3d 593, 594 (7th Cir. 1999); see Hirsch, *supra* note 5, at 1046–47 (discussing *Velasquez I* and *II*). However, state courts have still relied upon the *Velasquez I* decision. See, e.g., *Clark v. Va. Dep't of State Police*, 793 S.E.2d 1, 6 n.6 (Va. 2016).

¹⁸⁵ See *infra* Part III.

¹⁸⁶ See, e.g., *Alden*, 527 U.S. at 741.

¹⁸⁷ See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

to avoid private lawsuits filed pursuant to federal war powers legislation. As the Court has noted, because of the relatively anemic state of the law at the time, the idea of individual, federal question lawsuits against states was not an issue during the Convention period.¹⁸⁸ Thus, the historical record serves primarily as an implicit or indirect reference to the states' thoughts regarding their immunity against private lawsuits brought against them under federal law.

This indirect record is extraordinarily robust when it comes to war powers authority under the Constitution. Although lawsuits arising from federal war powers legislation were not contemplated at the time, the division of war powers among the state and federal governments very much was. The constitutional history demonstrates that there was no dispute that states were completely subservient to the federal government when it came to war powers.¹⁸⁹ Indeed, the only real point of contention was whether states had *any* role to play at all with regard to war powers, not whether states could trump federal war powers actions.¹⁹⁰ Both proponents and opponents of the Constitution were crystal clear on this latter point: states lacked any power to thwart, obstruct, or arrogate the federal government's war power authority.¹⁹¹ In short, the constitutional history reveals that the federal government's power vis-à-vis the states is at its zenith with regard to war powers.

This history points to two possible conclusions regarding war powers abrogation. First, like the bankruptcy power, states *never* possessed immunity against federal war power actions. Second, even if states did retain some war powers immunity, Congress could validly use its war powers to abrogate it. The stronger interpretation of the historical record is that states never possessed war powers immunity; however, the record also supports the view that, even if the states retained a default immunity, the plan of the Convention did not anticipate that states could thwart federal war powers legislation that explicitly abrogated this immunity.¹⁹² This is especially true for statutes like the SCRA and USERRA, which are an important part of the country's security.¹⁹³

188 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69–70 (1996).

189 *See infra* Section II.A.

190 *See infra* notes 309, 319.

191 *See infra* Section II.A.4.a.

192 *See infra* Sections II.A.4.b–.B.

193 *See infra* Part III.

Because of the lack of war powers-related individual lawsuits at the time, the historical analysis focuses on states' authority to exercise war powers vis-à-vis the federal government.¹⁹⁴ If the plan of the Convention suggests that states had the war powers capabilities of a sovereign—such as retained commerce powers—then the argument for war powers abrogation is weakened. On the other hand, a lack of state war powers authority suggests that states lack sovereign immunity in the war powers arena. The case for war powers abrogation is made still stronger by evidence that, like the Fourteenth Amendment, the Constitution both takes away war powers from the states and gives them to the federal government.

What follows is a thorough historical examination of the Confederation period, the Constitutional Convention, and the Ratification period, which points to one conclusion—when it came to war powers, states were not sovereigns. Instead, whatever war powers they may have had initially were extremely limited, if they existed at all, and completely under the control of the federal government.

1. *Confederation War Powers*

If there was one time period in which the states¹⁹⁵ had the strongest claim to war powers authority, it would be the Confederation period. This was the time of the Revolutionary War, during which the states—recently self-declared as independent from England—joined together in a confederation. The name alone suggests a union of sovereigns. To a large extent, that is what they were. Indeed, much of the support for the later Constitution was based on concerns that confederacies were weak and threatened the newly liberated nation.¹⁹⁶ However, even during the Confederation period, there was at least one major exception to this state of affairs: war powers.

The governing document of that period, the Articles of Confederacy, aptly demonstrate the federal government's supremacy over war powers, despite its weakness in most other areas. The Articles of Confederation made clear that the new federal Congress was the source of war powers, which the states lacked except in very limited circumstances. Moreover, whatever war powers the states did possess were controlled by the federal government. Article VI, in particular—foreshadowing the war powers subsequently enumerated in the Constitu-

¹⁹⁴ See *supra* notes 160, 168.

¹⁹⁵ Although the colonies did not officially become states until the Constitution was ratified, this Article will refer to the “states” of this period and later for purposes of simplification.

¹⁹⁶ See *infra* note 225.

tion¹⁹⁷—explicitly prohibited virtually all state war powers and placed whatever exceptions existed almost entirely under the direct control of the federal government:

- No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State¹⁹⁸
- No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue or until the United States in Congress assembled shall determine otherwise.¹⁹⁹
- All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled . . . shall be supplied by the several States, in proportion to the value of all land within each State²⁰⁰
- The taxes for paying [these costs] shall be laid and levied by the . . . several States within the time agreed upon by the United States in Congress assembled.²⁰¹

197 See *supra* notes 242–54.

198 ARTICLES OF CONFEDERATION of 1777, art. VI.

199 *Id.*

200 *Id.* art. VIII.

201 *Id.*

- The United States in Congress assembled, shall have the sole and exclusive right and power . . . of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated²⁰²
- The United States in Congress assembled, shall have the sole and exclusive right and power . . . of granting letters of marque and reprisal in times of peace²⁰³
- The United States in Congress assembled, shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures²⁰⁴
- The United States in Congress assembled shall also have the sole and exclusive right and power of . . . appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States²⁰⁵
- The United States in Congress assembled shall also have the sole and exclusive right and power of . . . making rules for the government and regulation of the said land and naval forces, and directing their operations.²⁰⁶
- The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article²⁰⁷

The sheer number of explicit grants of federal war powers and equally clear prohibitions against state war powers speaks volumes.

States did possess a limited military role under the Articles of Confederation. For instance, under Article VI, states were required to “keep up a well regulated and disciplined militia, sufficiently armed and accoutered” and to maintain a proper amount of arms and equipment.²⁰⁸ Additionally, under Article VII, states could appoint lower-ranked officers when raising land forces for the national defense.²⁰⁹

202 *Id.* art. IX.

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.* art. VI.

209 *Id.* art. VII.

Moreover, Article IX imposed a supermajority requirement for certain actions, requiring that at least nine states “assent” to a variety of federal actions including engaging in war; granting letters of marque and reprisal; setting the number of naval vessels and armed forces; and appointing commanders in chief.²¹⁰ However, the rest of Article IX makes clear that state militias and military equipment were only to be used for war under the federal government’s orders or in the event of an imminent invasion. Indeed, Article IX’s statement that “[t]he United States in Congress assembled, shall have the *sole and exclusive* right and power of determining on peace and war” could not have made this division more clear.²¹¹ Other than a few enumerated exceptions, in which states could act pursuant to an emergency or congressional permission, it is the federal government that had exclusive war powers. For that reason, contemporary statements on war powers pointed to Congress as the sole authority in that arena.²¹²

Given the weakness of the federal government during the Confederation period,²¹³ this subservience is remarkable, albeit not surprising. The country was barely surviving a war against the greatest military power of the day and, although ultimately victorious, was hobbled and in debt. There was a real and palpable fear that the new country would not be a country for long.²¹⁴ This military vulnerability was the backdrop against which the Framers considered how to divide war powers between the states and federal government.

2. *Plan of the Constitutional Convention*

Despite the enormity of its Revolutionary War victory, the country’s circumstances were far from rosy. Saddled with debt, fractured, and left with a tired and depleted military apparatus, there was a general understanding that fundamental reforms were necessary.²¹⁵ The result was the Constitutional Convention. Although not everyone thought the Convention would or should create a new governing document to replace the Articles of Confederation, that soon became the

210 *Id.* art. IX. This assent requirement was not included in the subsequent Constitution.

211 *Id.* (emphasis added).

212 *See, e.g.*, 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 106 (Jonathan Elliot ed., 2d ed., 1836) (statement, in 1782 letter responding to Rhode Island’s objections to import duties, by committee of Alexander Hamilton, James Madison, and Thomas Fitzsimmons that “[t]he conduct of the war is intrusted to Congress”).

213 *See infra* notes 285–89.

214 *See infra* note 295.

215 *See infra* note 221.

goal. Among the primary rationales for such a fundamental change was the anemic state of the new nation's defenses. Despite its victory over England, the Continental Army and colonial militias were made up almost entirely of farmers and other non-professional soldiers who were anxious to get back to their lives, especially given that most of them had not been paid what they were owed for their wartime service.²¹⁶ Similarly, ill feelings remained over the disparity in wartime financial contributions from various states.

During the Convention, the Framers sought to strengthen—not weaken—the federal government's already clear preeminence over war powers during the Confederation period.²¹⁷ This was not an incidental or overlooked aspect of the Constitution. To the contrary, the risks involved with giving war powers to the states were among the most discussed aspects of the Constitution, particularly during the subsequent ratification debates, and there was no question that the new document made the federal war powers paramount. Most participants in these debates approved of federal supremacy over the states in this area, while a minority opposed the Constitution in no small part because it deprived the states of such powers.²¹⁸ There was no disagreement among either proponents or opponents of the Constitution that it left the states with little to no independent war powers.

Even the earliest drafts of the Constitution laid bare the fact that the federal government was to retain almost sole authority over war powers and that to the extent that states retained any such powers, they were completely subservient to the federal government. For instance, the August 6, 1787 draft included a version of what eventually became the federal war powers.²¹⁹ This early draft provided Congress and the President with a wide range of war powers, but its subsequent amendment is most telling. In addition to these far-reaching war powers, the Framers added language, ultimately ratified, that explicitly constrained states' war powers authority and gave Congress direct control over those powers.²²⁰ These amendments intentionally addressed the well-understood inadequacies of the Confederation government's war powers and its inability to sufficiently protect the new country. Edmund Randolph—who objected to the Constitution's final

²¹⁶ CHERNOW, *supra* note 51, at 176–77.

²¹⁷ *See supra* Section II.A.1.

²¹⁸ *See infra* Sections II.A.2, II.A.4.

²¹⁹ *See* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 226, 228.

²²⁰ *See id.* at 229, 254; *infra* notes 248, 252–53.

draft during the Convention, but ultimately urged Virginia's ratification—noted that “[t]he bravery of our troops is degraded by the weakness of our government . . . Originally, our Confederation was founded on the weakness of each state to repel a foreign enemy; and we have found that the powers granted to Congress are insufficient.”²²¹

A focal point in the Convention's war powers debate was the alternate New Jersey Plan, which would have replaced the draft Constitution with a more federalist system that gave smaller states more power. Many Framers derided the plan for proposing a weak confederacy of states that threatened the nation's safety from foreign governments. For instance, after criticizing the Confederation government's weak war powers,²²² Alexander Hamilton asserted that the national executive must have the power to make war and have “sole direction of all military operations.”²²³ James Madison similarly emphasized that wayward states should not be able to engage in war powers, citing as an example Georgia's violation of the Articles of Confederation through its unauthorized foreign and war powers actions.²²⁴ The key Framers, and others, also noted the failures of both historic and contemporary confederations, which they attributed to the lack of strong, national war powers authority.²²⁵ John Jay similarly warned that if the Constitution's centralized war powers were rejected, among the states “would arise mutual restrictions and fears, mutual garrisons and standing armies, and all those dreadful evils which for so many ages plagued England, Scotland, Wales, and Ireland, while they continued disunited, and were played off against each other.”²²⁶

221 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 416 (noting also Congress's prior inability to use Confederation troops to quell a Massachusetts rebellion).

222 *Id.* at 420 (“[I]t is evident [the Confederation] can raise no troops, nor equip vessels, before war is actually declared. They cannot, therefore, take any preparatory measure before an enemy is at your door. How unwise and inadequate their powers!”).

223 *Id.* at 423.

224 *Id.* at 424.

225 *See id.* at 419 (Hamilton stating that confederation governing bodies in Greece, Germany, and Switzerland had “their decrees [] disregarded,” were “weak and distracted,” and could not “prevent the wars and confusions which the respective electors carry on against each other[]”). Several others made similarly negative comparisons to these and other foreign confederations. *See, e.g., id.* at 424 (Madison); 2 *id.* at 422 (James Wilson); *id.* at 214 (Robert Livingston); *id.* at 187–88 (Oliver Ellsworth); 3 *id.* at 242–43 (George Nicholas); THE FEDERALIST NOS. 18–20 (Alexander Hamilton & James Madison). *But see* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra*, at 224 (John Smith); 3 *id.* at 62 (Patrick Henry arguing that these foreign confederations were successful).

226 1 *id.* at 502.

These comments demonstrate that the plan of the Convention was to make the states completely subordinate to the federal government when it came to the war powers. And that is exactly what the Framers believed that they achieved in the final version of the Constitution. Rufus King stated that “[n]one of the states, individually or collectively, but in Congress, have the rights of *peace* or *war*.”²²⁷ Likewise, James Wilson declared that “[t]he power of war, peace, alliances, and trade, are declared to be vested in Congress,” with which Hamilton agreed.²²⁸ It seems impossible to read the Framers’ debates and conclude that they would have thought that a state could rely on sovereign immunity, or anything else, to thwart congressional attempts to maintain the armed forces or to engage in any other federal war powers actions.

To be sure, some Framers objected to subordinating states under the federal war powers.²²⁹ But those objections were in the minority and overruled during the Convention and states’ ratification.²³⁰ Luther Martin, for example, lamented the rejection of one of his proposed amendments that would have prevented state action against the federal government from being considered treason; instead, Martin would have had a state’s levying of war against the federal government be “regulated by the laws of wars and of nations.”²³¹ He acknowledged that his amendment failed because it was “too much opposed to the great object of many of the leading members of the Convention.”²³² The conclusion was that the federal government’s expansive war powers were not merely slipped into the Constitution unnoticed. Rather, they were a central component of the plan of the

²²⁷ *Id.* at 426. King also argued that the Confederation-era states lacked sovereignty, which, while in conflict with the Court’s modern state sovereign immunity jurisprudence, was not an unusual view among the Framers. *See, e.g., id.* at 461 (James Madison asserting at Convention that “[s]ome contend that states are sovereign, when in fact they are only political societies The states never possessed the essential rights of sovereignty. These were always vested in Congress.”).

²²⁸ *Id.* at 427.

²²⁹ *See id.* at 378–79 (Luther Martin noting his overruled objections to President serving as commander-in-chief of the armed forces and appointing military, as well as civil, officials); *id.* at 425 (noting the vote to reject the New Jersey Plan, with seven states for the motion, three against, and one state divided).

²³⁰ *See, e.g., id.* at 370–72, 378–79 (Martin objecting to federal control of state militias without the consent of states—including the ability to send militia from one state into another and subjecting citizens to military law—and the rejection of his amendment to limit these powers).

²³¹ *Id.* at 382–83 (Martin stating that states should retain “recourse to the sword” to fight repressive federal government).

²³² *Id.* at 383 (describing that object as “by all means to leave the states at the mercy of the *general government*, since they could not succeed in their immediate and entire abolition”).

Convention, heavily debated and discussed, with the resulting federal war powers representing the reasoned view of the majority of Framers.

3. *Text and Structure of the Constitution*

The final draft of the Constitution reflected the inadequacies of its predecessor, the Articles of Confederation, and the Convention debates. Thus, final war powers text shifted the balance of power even more to the federal government,²³³ making it the supreme, and possibly exclusive, holder of the nation's war powers.²³⁴ To the extent that states had any role to play, it was an extremely limited one that was explicitly subordinate to the federal government.

One of the key differences between the Articles of Confederation and the Constitution was closely tied to war powers: the federal government's new power to levy an income tax.²³⁵ As was discussed extensively in the ratification debates, the Framers understood that an income tax was essential to the federal government's ability to ensure the nation's security.²³⁶ Without the authority to raise revenue via taxes, the Framers feared that the federal war powers would be woefully insufficient—understandably so, given some states' unwillingness to contribute financially to the Revolutionary War effort.²³⁷

The Constitution's text provides strong support for war powers abrogation. Although the Court has stressed that the federal government's exclusive power over an area is not enough, on its own, to abrogate state sovereign immunity,²³⁸ the federal war powers are far more robust than other Article I powers, if not *any* other power in the Constitution. Even superficially, the sheer number of enumerated federal war powers suggests their importance.²³⁹ More significantly, however, their substance reveals an explicit centralization of war powers in the federal government, as well as prohibitions against state war powers activity. In the limited instances in which states retain a role,

²³³ For instance, under the Articles of Confederation, states could issue letters of marque during wartime, but were expressly prohibited from doing so by the Constitution. *THE FEDERALIST* No. 44 (James Madison) (explaining the change). *Compare supra* note 199, *with infra* note 251.

²³⁴ *See THE FEDERALIST* No. 45 (James Madison) (stating that the Constitution better effectuated the administration of war powers than the Articles of Confederation).

²³⁵ *See CHERNOW, supra* note 51, at 297.

²³⁶ *See infra* notes 261, 271.

²³⁷ *See CHERNOW, supra* note 51, at 321–23.

²³⁸ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

²³⁹ *See, e.g., infra* notes 242–48.

their activity is exclusively under the control of the federal government.

Take, for instance, the President's war powers. Under Article II, the President is "Commander in Chief of the Army and Navy of the United States, *and of the Militia of the several States*, when called into the actual Service of the United States" ²⁴⁰ Thus, the President is not only in charge of the federal armed forces, but also of the state armed forces when called into service. The President also has sole authority to call these state soldiers into service. ²⁴¹ Under Article II, therefore, the states allowed the head of the federal executive branch to take full control over their armed forces—a remarkable relinquishment of power that is not indicative of a sovereign.

Congress's war powers are even more extensive than the President's. Article I explicitly lists a wide range of war powers, giving Congress alone the authority to:

- "provide for the common Defence;" ²⁴²
- "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;" ²⁴³
- "raise and support Armies;" ²⁴⁴
- "provide and maintain a Navy;" ²⁴⁵
- "make Rules for the Government and Regulation of the land and naval Forces;" ²⁴⁶
- "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;" ²⁴⁷ and
- "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress" ²⁴⁸

This latter power is significant; although states have the power to appoint military officers and authorize the training of militias, they can do the latter only "according to the discipline prescribed by Con-

²⁴⁰ U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

²⁴¹ See *infra* note 370 and accompanying text.

²⁴² U.S. CONST. art. I, § 8, cl. 1.

²⁴³ *Id.* cl. 11.

²⁴⁴ *Id.* cl. 12.

²⁴⁵ *Id.* cl. 13.

²⁴⁶ *Id.* cl. 14.

²⁴⁷ *Id.* cl. 15.

²⁴⁸ *Id.* cl. 16.

gress.”²⁴⁹ This is merely one example of the federal subjugation of state war powers.

The War Powers Clauses not only confer upon Congress the authority to engage in a wide range of war activities, but unlike other Article I powers, also explicitly prohibit state action.²⁵⁰ Under Article I, section 10:

- “[n]o State shall . . . grant Letters of Marque and Reprisal;”²⁵¹
- “[n]o State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . . ;”²⁵² and
- “[n]o State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”²⁵³

Moreover, Article IV makes clear that the federal government has the ultimate duty to protect the nation and each of its states: “The United States . . . shall protect each [state] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”²⁵⁴

These provisions, with their strikingly expansive grant of power to the federal government and express limitations on state power, provide a sharp contrast to much of the other Article I powers. As a result, the constitutional war powers substantiate abrogation of state immunity as much as, or more than, both the Bankruptcy Clause and Fourteenth Amendment. Like with bankruptcy, the Constitution stresses the need for highly centralized war powers, with little to no role for the states. In addition, the War Powers Clauses share a critical commonality with the Fourteenth Amendment: both give the federal government express power to enact legislation that subjugates state

²⁴⁹ *Id.*

²⁵⁰ See John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 UNIV. COLO. L. REV. 1169, 1176 (1999) (“What the Constitution gives to the [federal] political branches, it explicitly takes from the states.”); Peter J. Spiro, *Foreign Relations Federalism*, 70 UNIV. COLO. L. REV. 1223, 1228 (1999) (arguing that constitutional structure establishes federal exclusivity over foreign affairs, “on the one hand granting expansive foreign relations power to the federal government, on the other denying them to the states.” (footnote omitted)).

²⁵¹ U.S. CONST. art. I, § 10, cl. 1.

²⁵² *Id.* cl. 3.

²⁵³ *Id.*; see also W. Taylor Reveley, III, *War Powers*, 83 COLUM. L. REV. 2117, 2121 (1983) (reviewing EDWARD KEYNES, *UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER* (1982)) (suggesting that “the Framers expected the states to bear the major burden of defense against sudden attack until Congress could act”).

²⁵⁴ U.S. CONST. art. IV, § 4.

action.²⁵⁵ This power of legislative subjugation was an essential factor in *Fitzpatrick's* approval of Fourteenth Amendment abrogation and its holding that no state can “deny to the general government the right to exercise all its granted powers.”²⁵⁶ Moreover, the Fourteenth Amendment provides states with relatively greater freedom to act than the war powers. The Fourteenth Amendment allows state action except in ways that violate individuals’ rights under that Amendment and its enforcing legislation, while the war powers explicitly prohibit various categories of state action and provide states the power to engage in a limited set of actions *only* where Congress allows it or in extreme emergencies. This is a remarkable apportionment of power that is wholly at odds with the idea of state sovereignty.²⁵⁷ Accordingly, if Congress can enact legislation under the Fourteenth Amendment giving individuals the ability to enforce their rights by suing states, then Congress should be able to do the same under the War Powers Clauses.²⁵⁸

That the Constitution’s text commands such an explicit subordination of states to the federal war powers does not come as a surprise. The history of the Constitution itself is built in large part upon the failure of the Articles of Confederation to adequately provide for the national defense. Accordingly, George Washington’s official letter of transmittal of the Constitution to Congress made clear that a primary objective of the Convention was to centralize war powers with the federal government.²⁵⁹ Many other Framers echoed this view.²⁶⁰ As

²⁵⁵ See *infra* Section III.C (discussing Article I’s Necessary and Proper Clause).

²⁵⁶ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454–55 (1976) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)); *Alden v. Maine*, 527 U.S. 706, 756 (1999) (“By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the [Fourteenth] Amendment ‘fundamentally altered the balance of state and federal power’” (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996))).

²⁵⁷ See *Alden*, 527 U.S. at 756 (“When Congress enacts appropriate legislation to enforce [the Fourteenth] Amendment, federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution.” (citation omitted)).

²⁵⁸ See *Harner*, *supra* note 5, at 199 (arguing that USERRA plaintiffs represent not only themselves but also interests of federal government).

²⁵⁹ 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 305–06.

²⁶⁰ See, e.g., *id.* at 483–89 (Edmund Randolph, objecting to Constitution, describing failures of Confederation, including inability to raise federal troops or engage in other war-related activities); 2 *id.* at 217 (John Lansing criticizing Articles of Confederation: “First, it affords no defence against foreign assault; second, no security to domestic tranquility.”); 2 *id.* at 522 (Wilson stating: “How powerful and respectable must the body of militia appear under general and uniform regulations! How disjointed, weak, and inefficient are they at present!”); 2 *id.* at 526 (Wilson arguing that Confederation was unable to properly defend itself against the likely prospect of

Professor Jack Goldsmith has noted, “One of the primary and least controversial purposes of the Constitutional Convention was to strengthen the foreign relations powers of the federal government vis-à-vis the states.”²⁶¹

In sum, the text of the Constitution demonstrates a federal-state balance of power that does not reflect a relationship between two sovereigns. It clearly provides the federal government almost the entirety of the nation’s war powers, in addition to the authority to control the limited number of permitted state actions. It is under this authority that the SCRA and USERRA were enacted. Congress deemed it necessary to hold states liable for violations of servicemembers’ rights under this legislation because of their importance to maintaining our volunteer military forces. Additionally, the Constitution’s text indicates that it was the Framers’ intent not to allow states to undermine this federal war powers policy through sovereign immunity claims or other means.

4. *Ratification Debates*

Although most modern commentary on the war powers focuses on the balance of power between the President and Congress,²⁶² this was at best a minor issue during the Convention and ratification debates. Instead, the major war powers question—indeed, one of the most discussed constitutional issues generally—was the respective roles of states and the federal government when it came to the nation’s defenses. This debate was unsurprising given that the nation’s security was foremost in the minds of the Framers and the public at the time.²⁶³

war). *But see 3 id.* at 46 (Patrick Henry, opposing Virginia’s ratification, arguing that the Confederation “carried us through a long and dangerous war; it rendered us victorious in that bloody conflict with a powerful nation”).

²⁶¹ Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1643 (1997); *see also Alden*, 527 U.S. at 776 n.16 (Souter, J., dissenting); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* 3, 64–65 (1981) (arguing that Framers intended “Congress . . . to control most American decisions about war and peace,” but recognized the need for a “single command” (the President) while at war); 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, *supra* note 212, at 226–27 (John Marshall arguing that the aim of the new national government was to “protect the United States, and to promote the general welfare. Protection, in time of war, is one of its principal objects.” States “cannot do these things” and it was given “[b]y the national government only. . . . It is, then, necessary to give the government that power, in time of peace, which the necessity of war will render indispensable, or else we shall be attacked unprepared.”).

²⁶² *See generally, e.g., REVELEY, supra* note 261.

²⁶³ *THE FEDERALIST* NO. 3, at 13–14 (John Jay) (Jacob E. Cooke ed., 1961) (“Among the

The state ratification conventions spent considerable time discussing the new federal government's almost exclusive control over war powers, particularly in combination with the federal taxation power that was to finance the nation's defenses. These debates clearly demonstrate that the states were well aware that ratification of the Constitution meant that they had little role in military affairs, and what authority they did have was entirely under the control of the federal government. This extreme imbalance leads to the inevitable conclusion that the states also understood that they lacked the power to thwart or otherwise contradict federal war powers actions, including via claims of sovereign immunity.

This Article comprehensively examined two primary sources to illustrate the states' understanding when ratifying the Constitution: Jonathan Elliot's *Convention Debates* and *The Federalist Papers*. Because of war powers' prominence during ratification, there are a multitude of relevant discussions from that time, many of which made similar points. What follows, therefore, is merely a representative sample of those discussions, highlighted based on factors such as clarity, relevance, diversity of view, and identity of the speaker. The sheer volume of examples underscores two facts: (1) the balance of war powers between the states and federal government was a central issue in the ratification debates, not a mere afterthought or overlooked topic; and (2) the ratifying states were crystal clear in their understanding that the Constitution housed the war powers almost exclusively with the federal government.

a. Balance of War Powers

While contemplating ratification of the Constitution, the states were under no illusion regarding their subordination to the federal government when it came to war powers. Both proponents and opponents of the Constitution stated explicitly that under the plan of the Convention the war powers were the near-exclusive province of the federal government. The war powers were not an ancillary topic. To the contrary, along with the related tax power, the federal war powers—particularly control over state militias—were one of the primary matters of discussion.

Alexander Hamilton spoke at length about the federal war powers vis-à-vis the states and, given his central role in drafting the Constitution and getting it ratified, as well as the modern Supreme Court's

many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first.”).

reliance on his views,²⁶⁴ his perspective may be the most persuasive of any Founder. For instance, during New York's ratification debates, Hamilton was unequivocal that the constitutional war powers resided solely within the federal sphere:

The great leading objects of the federal government, in which revenue is concerned, are to maintain domestic peace, and provide for the common defence. In these are comprehended the regulation of commerce,—that is, the whole system of foreign intercourse,—the support of armies and navies, and of the civil administration. . . . This principle assented to, let us inquire what are the objects of the state governments. Have they to provide against foreign invasion? Have they to maintain fleets and armies? Have they any concern in the regulation of commerce, the procuring alliances, or forming treaties of peace? No. Their objects are merely civil and domestic²⁶⁵

According to Hamilton, federal control of military matters was unconstrained, as there was “no limitation of that authority . . . to provide for the defence and protection of the community,” especially “any matter essential to the *formation, direction, or support* of the *national forces*.”²⁶⁶

Hamilton stressed not only that the federal government was solely responsible for the nation's defense and foreign relations, but also that the states were subservient to the federal war powers. He emphasized that when Congress exercises its authority to raise troops, call for supplies, and borrow money, “states are bound by the solemn ties of honor, of justice, of religion, to comply without reserve.”²⁶⁷ Thus, Hamilton affirmed, Congress has “an unlimited discretion to make requisitions of men and money—to govern the army and navy—to direct their operations” and Congress's requisitions are “made constitutionally binding upon the States, who are in fact under the most solemn obligations to furnish the supplies required of them” by the federal government.²⁶⁸

²⁶⁴ See *infra* note 328.

²⁶⁵ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 350 (arguing further that states cannot be permitted to interfere with federal revenue collection, lest they interfere with national defense).

²⁶⁶ THE FEDERALIST NO. 23, at 148 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

²⁶⁷ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 352. Hamilton acknowledged the legitimacy of state governments and their connection to individuals' liberty, but argued that there cannot be two supreme powers. *Id.* at 352–53.

²⁶⁸ THE FEDERALIST NO. 23, at 148 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stat-

Hamilton's linkage of the federal taxation and war powers was not coincidental. The Constitution's proponents explicitly and repeatedly connected the federal government's need for revenue to the nation's security.²⁶⁹ According to this view, without the power to tax, the government would be unable to secure the nation's defenses.²⁷⁰ Opponents stressed this linkage as well, albeit to lament the states' limited powers.²⁷¹ The former view, of course, prevailed, as the ratifying states agreed that the nation's survival depended on federal authority to use tax revenue to defend the nation as a whole, free from state interference.

It is unsurprising that Hamilton would stress the importance of finance to war powers given his experience in both areas.²⁷² But he was far from alone. In the New York ratification debates, Robert Livingston stressed that states did not need the power of the purse, for they "have not to pay the civil list, to maintain the army or navy."²⁷³ Moreover, Livingston continued, the states should not claim war powers from the federal government because the states were ill-suited to defend the nation—emphasizing his point by describing a political cartoon in which thirteen hands awkwardly hold a sword that cannot be moved without cutting off one of the hands.²⁷⁴ In *The Federalist No. 3*, future-Chief Justice John Jay described at great length why federal control over military matters would keep the country safer than giving the several states such power.²⁷⁵ Oliver Ellsworth defended the federal government's power to tax and its importance to federal war powers, noting that "[t]he state debt, which now lies heavy upon us, arose

ing also that "the United States should command whatever resources" from the states that it "judged requisite to 'the 'common defence and general welfare'").

²⁶⁹ See, e.g., 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 386 (Livingston stating that "[i]f it be necessary to trust our defence to the Union, it is necessary that we should trust it with the sword to defend us, and the purse to give the sword effect.").

²⁷⁰ *Id.* at 468 (Wilson arguing that Congress needs the power of taxation to fulfill duty to "keep up standing armies, and command the militia"); 3 *id.* at 393–94 (Madison, arguing for federal power of both sword and purse, divided between the President and Congress).

²⁷¹ 3 *id.* at 395 (Patrick Henry opposing Constitution: "Where are the purse and sword of Virginia? They must go to Congress.").

²⁷² THE FEDERALIST NO. 23 (Alexander Hamilton).

²⁷³ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 385–86 ("How is Congress to defend us without a sword?").

²⁷⁴ *Id.* at 386.

²⁷⁵ THE FEDERALIST NO. 3 (John Jay) (noting advantages including prevention of a state's problems from spreading to others, avoiding intentional or accidental violations of treaties, the most capable representatives will be recommended to serve in federal government, and that war often results from "passions and interests of a part than of the whole").

from the want of powers in the federal system.”²⁷⁶ The federal government, not the states, would assume financial responsibility for security, for “[i]t will lie upon the national government to defend all the states, to defend all its members, from hostile attacks. *The United States will bear the whole burden of war.*”²⁷⁷

Ratification debates in other states echoed these sentiments. In Pennsylvania, future-Justice James Wilson emphasized that the federal taxation power was vital to national security, otherwise a strong foreign navy could shut off import duties and Congress would be unable to raise funds from unwilling states.²⁷⁸ He then turned to objections against Congress’s power to raise and maintain standing armies. Declaring himself “surprised” that this objection was ever made, Wilson noted that all governments have this power: “A government without the power of defence! [I]t is a solecism.”²⁷⁹ He also defended the constitutional balance of war powers, under which states had the power to train militias that would be firmly under the control of the federal government, as necessary because “uniformity of arms, accoutrements, and discipline” was vital to the nation’s defense.²⁸⁰ Thomas McKean reiterated this division of power, emphasizing that while states could name officers and train the militia under Congress’s direction, the federal government was to “organize, arm, and discipline the militia[s]” and “have also the power of calling them forth for the purpose of executing the laws of the Union, suppressing insurrections, and repelling invasions.”²⁸¹

276 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 191.

277 *Id.* (emphasis added).

278 *Id.* at 501–02 (noting also that states did not have sovereignty, the people did).

279 *Id.* at 520 (stressing the value of peacetime standing armies, particularly federal ones).

280 *Id.* at 521–22 (arguing that without uniformity, a militia is “no more than a mob in a camp” and that he expected that Militia Clauses “would have received plaudits instead of censures”); *see also* 3 *id.* at 389–91 (George Nicholas supporting federal war powers as necessary for national security, especially the power to call up nonconsenting state militias).

281 2 *id.* at 537 (responding to an objection that militia members could be called to another state or against their conscience by stressing that Congress had this power, but would not normally use it); *see also id.* at 384 (Livingston sarcastically asking “Have the state governments the power of war and peace, of raising troops, and making treaties?” and noting that states only have limited power to regulate militias); *A Native of Virginia: Observations upon the Proposed Plan of Federal Government*, in 9 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA (2), at 677–78 (John P. Kaminski et al. eds., 1990) (anonymous letter arguing that constitutional war powers confirmed antecedent principles that states had “already yielded to the present Congress”); *Cassius III: To Richard Henry Lee*, in 9 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA (2), *supra*, at 749 (similar argument from opponent of Constitution).

In Virginia, Edmund Randolph, who opposed the Constitution during the Convention but supported it during ratification, was explicit in his understanding that “Congress had power to make peace and war under the old Confederation,” and the “*exclusive* power of war”²⁸² James Madison, one of the primary authors of the Constitution, was equally clear about the need for exclusive federal war powers, especially in light of state militias’ weakness, which the Revolutionary War exposed:

Ought it to be known to foreign nations that the general government of the United States of America has no power to raise and support an army, even in the utmost danger, when attacked by external enemies? Would not their knowledge of such a circumstance stimulate them to fall upon us? If, sir, Congress be not invested with this power, any powerful nation, prompted by ambition or avarice, will be invited, by our weakness, to attack us; and such an attack, by disciplined veterans, would certainly be attended with success, when only opposed by irregular, undisciplined militia.²⁸³

The view of Madison and most others was that confederations in general,²⁸⁴ and the “rotten” Articles of Confederation in particular, were unable to adequately provide for the national defense.²⁸⁵ Interstate rivalries²⁸⁶ and the lack of a central government with authority to raise funds and control the military meant that the Confederation would fall apart.²⁸⁷ Decentralized control over the military would also leave the nation’s security at risk by states being individually “flat-

282 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 28–29 (emphasis added).

283 *Id.* at 91 (supporting standing federal army); *see also id.* at 112–13 (Francis Corbin, arguing that reliance on militias meant that “ignorance of arms and negligence of farming will ensue”).

284 *See supra* note 225.

285 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 233 (Hamilton asking: “Shall we take the old Confederation, as the basis of a new system? . . . Certainly not. Will any man, who entertains a wish for the safety of his country, trust the sword and the purse with a single assembly organized on principles so defective—so rotten?”); *see also id.* at 213–16 (Livingston noting that Constitution provided federal government many of the same powers, including raising troops, as Articles of Confederation intended but failed at because it gave states too much power); THE FEDERALIST NO. 45, at 308 (James Madison) (Jacob E. Cooke ed., 1961) (arguing that federal war powers was “essential[] to the security of the people of America against foreign danger”).

286 *See, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 132–33 (Madison describing failures of New England confederation).

287 *See id.* at 134–35 (Madison stressing that Confederation could not be credited with Revolutionary War success and would leave the country too weak to defend itself).

tered” or “seduced” into not assisting others by logistical questions regarding who had the authority to equip the military, provide orders, and make peace, and by foreign nations taking advantage of these weaknesses.²⁸⁸ Only by establishing a federal government that could raise funds from all states to ensure the nation’s security would the country survive.²⁸⁹

Based on the volume of comments during the ratification debates, the federal taxation power was among the most controversial elements of the Constitution. But to the majority supporting this power, it was absolutely necessary to the nation’s defense against external threats and internal strife.²⁹⁰ For example, if faced with an external threat and no ability to raise funds against recalcitrant states, the federal government would be compelled to demand payment through the use of force.²⁹¹

Opponents of ratification were no less clear on the federal government’s war powers. Indeed, one may not see a more forceful delineation of those powers than John Williams’s objections to the Constitution during the New York ratification debates. He criticized the Constitution as granting “indefinite” powers that would allow Congress, should it deem it appropriate for the common defense or general welfare, to “essentially destroy[]” state governments “without any check or impediment.”²⁹² Appointing senators was no safeguard for the states, for they lacked the “command of the purse and the sword” to “secure their rights.”²⁹³ In conclusion, he asked “[i]s not the power, both over taxation and the militia, *wrested from their hands by*

288 See THE FEDERALIST NOS. 4–5 (John Jay) (arguing that lack of strong national war powers would leave regions fighting amongst themselves, at risk of hostilities by foreign governments, and “formidable only to each other”); see also THE FEDERALIST NOS. 6–8, 25 (Alexander Hamilton) (similar).

289 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 132 (Samuel Adams arguing that limiting Congress’s taxation power to wartime would deprive federal government “the necessary means of providing for the public defence”).

290 See 3 *id.* at 82 (Randolph criticizing Confederation and urging that “[w]ithout adequate powers vested in Congress, America cannot be respectable in the eyes of other nations. Congress . . . ought to be fully vested with power to support the Union, protect the interests of the United States, . . . and defend them from external invasions and insults, and internal insurrections”).

291 See *infra* notes 305, 318.

292 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 338.

293 *Id.*

this Constitution, and bestowed upon the general government? Yes, sir, it is."²⁹⁴

Similarly, the antifederalists of Virginia—most notably Patrick Henry and George Mason—railed against the breadth of federal war powers during that state's ratification debates. Henry extolled the value of state-controlled militias, decrying what he viewed as the Constitution's oppressive control over them: "Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?"²⁹⁵ Perhaps even worse in Henry's mind was the prospect of a standing army under the control of a Congress that controlled the militias and could "execute the execrable commands of tyranny."²⁹⁶ With power over the militias "given up to Congress," Henry asked, "how are you to punish them? . . . What resistance could be made? The attempt would be madness. You will find all the strength of this country in the hands of your enemies" ²⁹⁷ Henry especially derided the Militia Clauses, under which Congress's "control over our last and best defence is unlimited."²⁹⁸

*If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither—this power being exclusively given to Congress. The power of appointing officers over men not disciplined or armed is ridiculous; so that this pretended little remains of power left to the states may, at the pleasure of Congress, be rendered nugatory.*²⁹⁹

²⁹⁴ *Id.* (emphasis added).

²⁹⁵ 3 *id.* at 48 (noting also the lack of current insurrections in Virginia and "no real danger from Europe"); *see also id.* at 214 (Monroe, opposing Virginia's ratification, arguing the same). The question whether war with a European power was looming was a major issue of the day. *See id.* at 132 (Madison warning of impending war if Constitution not ratified); *id.* at 227 (Marshall warning of future threats from Europe); THE FEDERALIST NO. 4 (John Jay) (same). Edmund Randolph responded to Henry by emphasizing that if the Confederation stood, Virginia would remain unable "to raise an army to protect her citizens from internal seditions and external attacks" or "to raise a navy to protect her trade and her coasts against descents and invasions." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 114.

²⁹⁶ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 51.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 52.

²⁹⁹ *Id.* (emphasis added); *see also id.* at 56 (decrying Virginia's lack of power under Constitution; the federal government has forts, garrisons, and arms, while states' power "is reduced to . . . nothing"); *see also id.* at 410–12 (objecting to "very alarming power" of Congress to raise and support standing armies, Congress's ability to "make militia laws" for states, and possible use of federal army to enforce laws). *But see id.* at 414–15 (Madison responding that all governments must use military force at times).

Henry—an avowed critic of the Constitution—laid bare the extent to which the states were completely subservient to the federal war powers.³⁰⁰ Of course, he was in the minority and unable to stop ratification of the Constitution which permitted the federal standing army that legislation like the SCRA and USERRA support.³⁰¹

To the extent states possessed any war powers, it was through their militias. By one account, at the end of the Revolutionary War the states combined had, under their nominal control, militias composed of approximately 330,000 members.³⁰² But they were hardly viewed as sufficient to protect the new nation; instead, it was widely acknowledged that they were temporary soldiers eager to return to their lives, typically as farmers.³⁰³ These militias were ultimately under Congress's authority, as required by both the Articles of Confederation and the Constitution.

Federal control over the militias illustrates the extent to which the plan of the Convention did not contemplate states' possession of independent war powers or the authority to thwart federal war powers actions. It was also foremost in the minds of the Constitution's opponents. For instance, Henry complained that the states' minor role in operating militias was fully under federal power: "The power of arming the militia, and the means of purchasing arms, are taken from the states by the paramount powers of Congress. If Congress will not arm them, they will not be armed at all."³⁰⁴ Hamilton, however, strongly defended this relationship, arguing that if the federal government is

300 See *id.* at 168 (Henry criticizing federal ability to build "fortifications and garrisons" in states whose "legislature[s] will have no power over them" and magazines "free from the control" of state legislatures: "Are we at last brought to such an humiliating and debasing degradation, that we cannot be trusted with arms for our own defence?"). George Mason was particularly concerned with the prospect of a federal standing army, which he viewed as a threat to liberty. *Id.* at 380.

301 See *supra* note 283; 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 536–37 (Thomas McKean arguing "[t]he power of raising and supporting armies is not only necessary" for national defense (as are taxes to pay for it), "but is enjoyed by the present Congress"); THE FEDERALIST NOS. 8, 11, 29 (Alexander Hamilton) (stressing necessity of standing army and navy); THE FEDERALIST NO. 25, at 162 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing not to "be the dupes of" suggestion that militias were sufficient to defend country; "regular and disciplined army" was needed).

302 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 76.

303 *Id.* at 77–80 (Randolph arguing that militias were insufficient to protect nation).

304 *Id.* at 169 ("Congress have an unlimited power over both [sword and purse]: they are entirely given up by us."). But see *id.* at 178 (Henry Lee III responding that states could still arm and discipline militias if Congress failed to do so but, noting as former member of militia, he thought them unreliable).

responsible for the nation's security, it should control the forces through which that security is attained.³⁰⁵ He emphasized as well the economies of scale in establishing training schemes for the militias which, if left to individual states, would be unnecessarily costly and ineffective.³⁰⁶

The power of Congress to “call forth” militias was also explicitly debated during the Virginia ratification debates, particularly in a dialogue between George Mason and James Madison. Mason warned that federal power over militias would, without additional limits, “produce dreadful oppressions.”³⁰⁷ Under the Constitution, Mason asserted, “Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them”³⁰⁸ Mason also complained to Thomas Jefferson about “the almost unlimited Authority over the Militia of the several States,” which would allow the federal government to disarm them or render them useless.³⁰⁹

Even Mason, despite being an avowed opponent of the Constitution and its grant of federal war powers, recognized the need for federal control over state militias—albeit with more limits. But these limits were not adopted, largely for reasons that Madison expressed in response to Mason. Although noting their shared concern with a standing army, Madison proposed to “render it unnecessary” by giving “the general government full power to call forth the militia, and to exert the whole natural strength of the Union, when necessary.”³¹⁰

Following this exchange, the Virginia ratification debates took on the appearance of a public relations campaign, with opponents expressing outrage at the prospect of federal tyranny and oppression of the

³⁰⁵ See THE FEDERALIST NO. 29 (Alexander Hamilton) (also noting economic costs of requiring too much of part-time soldiers and arguing that a federal government unable to control militias must resort to more extreme measures during emergencies).

³⁰⁶ See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 184.

³⁰⁷ *Id.* at 378 (“I conceive the general government ought to have power over the militia, but it ought to have some bounds” such as requiring state consent before another state’s militia entered its borders; in times of emergency, states would not withhold their consent); see also *id.* at 416 (“[S]tate governments ought to have the control of the militia, except when they were absolutely necessary for general purposes.”).

³⁰⁸ See *id.* at 379.

³⁰⁹ Excerpt of Letter from George Mason to Thomas Jefferson (May 26), in 9 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA (2), at 883 (John P. Kaminski et al. eds., 1990).

³¹⁰ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 381. Madison also emphasized that a national defense would be stronger than a fragmented, state military apparatus. See *id.* at 382.

states and proponents downplaying federal power. For instance, Madison said that the states and federal government would have concurrent authority over the militias.³¹¹ He envisioned that states normally would arm and discipline militias, although the federal government would have the authority to call upon the “aggregate strength of the Union” and take control of militias when necessary.³¹² Moreover, he attempted to assuage Henry³¹³ by stating that as long as they were not “in the actual service” of the federal government, “the state governments might do what they thought proper with the militia”³¹⁴ Henry was unmoved because the Militia Clauses “expressly vested the general government with power” to call forth militias and, therefore, the power to suppress insurrections and other actions were “*exclusively* given to Congress.”³¹⁵ In response, Madison described states’ normal ability to govern militias as a check on federal power, although he also stressed that ultimate control must be federal to ensure that the nation would be properly defended.³¹⁶ This need was especially pertinent if faced with a foreign invasion, which required the “safety of the Union and particular states” to be in the hands of the “general government[’s]” war powers.³¹⁷ And, as

³¹¹ *Id.*; *cf.* THE FEDERALIST NO. 28 (Alexander Hamilton) (arguing that militias could handle minor insurrections, but federal standing army was needed to control bigger problems). *But see* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 385–87 (Henry, disputing Madison’s notion that power over the militias was concurrent, arguing that if truly concurrent, states could arm and discipline militias).

³¹² 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 382–83 (noting also that both executive and legislature had war power roles and would therefore serve as checks on the other); *id.* at 416 (emphasizing that states would appoint militia officers and govern militias “except that part which was called into the actual service of the United States”).

³¹³ *Id.* at 416 (Henry asking “what authority the state governments had over the militia”).

³¹⁴ *Id.* (giving examples of suppressing insurrections, quelling riots, and aiding other states). Madison also viewed states’ ability to appoint militia officers as providing local influence in military affairs. *See* THE FEDERALIST NO. 46 (James Madison); *see also* THE FEDERALIST NO. 29 (Alexander Hamilton) (noting that states had influence over militias through appointment of officers).

³¹⁵ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 416–17; *see also id.* at 422 (arguing “states had no right to call forth the militia to suppress insurrections, [etc.]”); *id.* at 423 (asserting that prohibition against states engaging in war except when invaded means that states “cannot suppress insurrections” or other domestic violence); *id.* (stating that “Congress, and *Congress only*, can call forth the militia”).

³¹⁶ *Id.* at 424 (arguing that states cannot defend the nation and that limits on states’ ability to suppress insurrections were necessary because “a whole state may be in insurrection against the Union”).

³¹⁷ *Id.* at 424–25.

Madison stressed in *The Federalist No. 45*, increasing the federal government's authority over the national defense lowers the risk of dangers requiring it to invoke its "ascendency" over the states.³¹⁸

In sum, the sole substantive question regarding states' war powers is whether states have *any* such powers, not whether those powers are completely subservient to the federal government. Both supporters and opponents of the Constitution at the time of its ratification declared that states had no war powers at all. Others, in turn, acknowledged some role of states in operating militias, albeit under the control of Congress.³¹⁹ The latter, more nuanced view, seems most supported by the record. Those claiming no state role whatsoever appear to have been speaking either in more general terms³²⁰ or exaggerating in an attempt to prevent ratification.³²¹ In contrast, the text of the Articles of Confederation, the text of the Constitution, and facts on the ground all recognize a limited role for states, under the federal government's ultimate control.

In the end, however, disagreements about whether states had *any* war powers are immaterial. There was unanimity on the more important factor regarding war powers abrogation: that whatever war powers authority states possessed was exceptionally limited and entirely under the control of the federal government. The federal power to take over state militias—a power that none of the Framers disputed—is key to validating war powers abrogation. Just as the Fourteenth Amendment's grant of federal control over states was integral to its abrogation, the subordination of state war powers to the federal government demonstrates the lack of state sovereign immunity in this arena.³²² That is, states were not and are not *sovereigns* when it comes to war powers. It is simply inconceivable that the Founders—whether supporters or opponents of the Constitution—would have thought

³¹⁸ THE FEDERALIST NO. 45 (James Madison).

³¹⁹ Many delegates also referred to states' ability to arm or discipline the militias if Congress failed to do so and to engage in war during imminent danger. See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 206 (Randolph); *id.* at 419–21 (Marshall); *id.* at 427–29 (George Nicholas); *id.* at 440 (Edmund Pendleton); *id.* at 645 (James Johnson).

³²⁰ See, e.g., 2 *id.* at 165 (Samuel Stillman contrasting states' limited duties to federal government's "great, numerous, and extensive" objects, such as "war and peace"); 3 *id.* at 38 (Pendleton stating that during Confederation, "Congress was empowered to make war and peace").

³²¹ 3 *id.* at 379–80 (Mason arguing that "[s]hould the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army" and "[t]he general government ought . . . to have some such power. But we need not give them power to abolish our militia"); *supra* note 308.

³²² See *infra* Section II.A.4.b.

that states could overrule a federal war powers decision.³²³ This is particularly true with regard to the federal government’s ability to maintain its armed forces,³²⁴ which is the aim of both the SCRA and USERRA.³²⁵ Barring states ability to interfere with the nation’s defense was one of the key goals of the Constitution, and arguments that the same Constitution provides states immunity when they violate the federal war powers rights of servicemembers directly conflicts with that purpose.³²⁶

b. State Immunity under the Constitution

The Constitution’s text and contemporaneous interpretations are replete with descriptions of the federal government’s near-exclusive war powers, yet there was far less discussion of state sovereign immunity against private lawsuits. This is true, despite the fact that the potential for individuals—primarily creditors—suing states for money was a known issue.³²⁷ This concern was directly addressed by Alexander Hamilton in *The Federalist Papers*, which the modern Supreme Court has consistently relied upon as the central historical explanation of the Founders’ approach to state immunity.³²⁸

Hamilton’s explanation of state sovereign immunity begins with *The Federalist No. 81*’s statement that “[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its*

³²³ See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 407 (Clay, opposing Virginia’s ratification, stating that “although the militia officers were appointed by the state governments, . . . they were sworn to obey the superior power of Congress”); *id.* at 417–18 (William Grayson opposing Virginia’s ratification and criticizing argument that Constitution’s republican government clause gave states concurrent power over militias, because “Congress had the exclusive direction and control of [militias]”).

³²⁴ See 2 *id.* at 66–67 (Christopher Gore arguing that federal government was needed to provide for common defense, maintain standing armies and navies, and declare war to properly defend country); *id.* at 68 (William Phillips arguing that federal government needed power to maintain standing army); *id.* at 96–97 (Theodore Sedgwick supporting Congress’s ability to maintain standing armies for two years).

³²⁵ See *supra* notes 21, 25.

³²⁶ See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 278–79 (Livingston arguing that even under Confederation, Congress had war powers that states were bound to follow).

³²⁷ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 105 n.4 (1996) (Souter, J., dissenting).

³²⁸ See *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002); *Alden v. Maine*, 527 U.S. 706, 716–17 (1999); *Fla. Prepaid Post-secondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 634 (1999); *Seminole Tribe*, 517 U.S. at 54, 70 n.13; *Hans v. Louisiana*, 134 U.S. 1, 12–13 (1890). Justice Souter, citing disparate views on state immunity in the ratification debates, cast doubt upon the Court’s historical analysis. See *Alden*, 527 U.S. at 775–81, 792 (Souter, J., dissenting).

consent. . . . Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states”³²⁹ Although the Court has frequently relied upon this statement,³³⁰ it has conspicuously ignored Hamilton’s next sentence, which emphasizes that there are exceptions: “The circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here.”³³¹ The discussion of these exceptions, or “alienations,” is found in *The Federalist No. 32*, where Hamilton stated:

[A]s the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.³³²

Thus, according to Hamilton, there are three categories of exceptions to state sovereign immunity. The historical record reveals that federal war powers satisfies all three.

The first exception applies to areas in which the Constitution “in express terms granted an exclusive authority to the Union.”³³³ As described above, the Constitution’s text could not be more clear as to the federal government’s exclusive authority over war powers.³³⁴

³²⁹ THE FEDERALIST NO. 81, at 548–49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

³³⁰ See cases cited *supra* note 328; *Alden*, 527 U.S. at 773 n.13 (Souter, J., dissenting) (arguing that Hamilton was referring only to immunity “with respect to diversity cases applying state contract law”).

³³¹ THE FEDERALIST NO. 81, at 549 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see *Seminole Tribe*, 517 U.S. at 145–46 (Souter, J., dissenting) (noting “difficulties that accrue to the majority from reliance on *The Federalist No. 81*”).

³³² THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also *Hood v. Tenn. Student Assistance Corp.*, 319 F.3d 756 (6th Cir. 2003), *aff’d and remanded*, 541 U.S. 440 (2004) (holding that bankruptcy abrogation falls under Hamilton’s “alienations”).

³³³ THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

³³⁴ See *supra* Section II.A.4.a; Goldsmith, *supra* note 261, at 1714 (stating that in “traditional foreign relations contexts, federal exclusivity is effectively assured by Article I, Section 10 and by extant federal enactments”); cf. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 236 (1996) (“The drafters of the Articles vested all war powers in the Continental Congress.”); *id.* at 182 (noting

Moreover, the Framers and ratifying states were unanimous in the understanding that the Constitution granted the federal government exclusive war powers authority.³³⁵ At most, states retained the ability to name officers and train militias, but that authority was entirely subservient to the federal government, which sets forth the rules for training militias and has the authority to call them into federal service at any time.³³⁶ Hamilton stressed this reality both in the ratification debates³³⁷ and *The Federalist Papers*, where he emphasized that the federal government's war powers "ought to exist without limitation."³³⁸ This included federal demands for state military resources, which "were made *constitutionally binding* upon the States."³³⁹

The strongest historical argument for war powers abrogation may be its fulfillment of Hamilton's second exception: where the Constitution "granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority."³⁴⁰ This is the same type of exception that the *Fitzpatrick* Court found persuasive under the Fourteenth Amendment.³⁴¹ The case for war powers is as strong, if not stronger, for the Constitution's text repeatedly and explicitly grants federal war powers authority while at the same time prohibiting state war powers.³⁴²

Finally, Hamilton's third exception applies where the Constitution "granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."³⁴³ The Founders' repeated warnings about the dangers of state interference with the federal government's responsibility for the national defense³⁴⁴ show that war powers may be the paradigm for Hamilton's exceptions to state sovereign immunity. USERRA is an illustrative example. The statute's purpose is to ensure a sufficient number of volunteer servicemembers to defend the nation by encour-

John Marshall's statement that President was "the sole organ of the nation in its external relations").

³³⁵ See *supra* Section II.A.4.a.

³³⁶ See *supra* note 248; *infra* notes 369–70; see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1495–1500 (1987).

³³⁷ See *supra* notes 265–68, 305–06.

³³⁸ *THE FEDERALIST* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

³³⁹ *Id.* at 148 (emphasis added).

³⁴⁰ *THE FEDERALIST* No. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

³⁴¹ See *supra* notes 64–72.

³⁴² See *supra* Section II.A.3.

³⁴³ *THE FEDERALIST* No. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

³⁴⁴ See *supra* notes 267–68, 308–09.

aging service through various employment protections.³⁴⁵ Allowing state employers to assert sovereign immunity directly undermines USERRA's national security goal by eliminating these protections for state employees and applicants. Thus, the idea that states could ignore and contradict a federal war powers action like USERRA is "totally contradictory and repugnant" to the text and history of the Constitution, under which states are subordinate to the federal government in the war powers arena.³⁴⁶

Hamilton's framework also helps to differentiate war powers abrogation from commerce abrogation. Many commentators during the ratification debates discussed federal power over the "sword"³⁴⁷ and the "purse," which typically referred to the federal taxation power.³⁴⁸ According to Hamilton, federal taxation is an alienation against which states are unable to assert immunity.³⁴⁹ As a result, the federal war powers are aligned more with areas like taxation and foreign affairs, which do not permit state sovereign immunity claims, than the commerce powers.³⁵⁰

In sum, history shows that the states ratified the Constitution knowing full well that it provided the federal government almost total

³⁴⁵ See *supra* notes 23–30.

³⁴⁶ THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see *Jennings v. Ill. Off. of Educ.*, 589 F.2d 935, 942 (7th Cir. 1979) (holding, pre-*Seminole Tribe*, that USERRA's abrogation was "an exercise of power delegated to it 'in the plan of the convention,' which includes the power to make the states amenable to damage actions in federal courts"); Goldsmith, *supra* note 261, at 1619–20 (emphasizing that the Constitution's foreign power provisions "give the federal political branches comprehensive power to conduct foreign relations without interference or limitation by the states").

³⁴⁷ "Sword" could refer either to military matters or a government's enforcement of laws. See, e.g., 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 349 (Hamilton, discussing separation of powers between executive's "sword" of enforcing laws and legislature's control of the "purse").

³⁴⁸ See *supra* notes 265–73.

³⁴⁹ THE FEDERALIST NO. 32 (Alexander Hamilton).

³⁵⁰ See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 227 (Marshall arguing that federal power to tax was necessary to raise armies and protect nation); *Cantwell v. County of San Mateo*, 631 F.2d 631, 636 (9th Cir. 1980) (holding that war powers are distinguishable from commerce powers); *Schell v. Ohio State Highway Patrol*, 107 L.R.R.M. (BNA) 3263, 1981 WL 2289, at *2–3 (S.D. Ohio June 1, 1981) (holding, pre-*Seminole Tribe*, that "responsibility of the national government to raise and support the military places the national government in a special position vis a vis the states," and therefore "[d]ifferent policy considerations are raised by the Commerce and the War Powers Clauses . . . [and] our system of federalism requires greater deference to federal interests where the War Powers are involved"); see also Goldsmith, *supra* note 261, at 1677 (asserting that concurrent federal-state military authority likely is harmful to the country's foreign relations interests); Althouse, *supra* note 102, at 644 n.62 (arguing that, unlike commerce power, there is little value in diverse state war powers solutions).

control over war powers. Moreover, according to the Supreme Court's favored commentary—Hamilton's *Federalist No. 81*—the states' subservience to federal war powers includes an exception to state sovereign immunity. In other words, the plan of the Convention leads to only one reasonable conclusion: states do not have the power to assert immunity against private rights of action created pursuant to the federal government's war powers.

B. *Practice and Precedent Following Constitution*

Legal precedents and practices of the Constitution do not provide a direct answer to war powers abrogation because the Supreme Court has never addressed the issue directly. That dearth of evidence, however, is telling. Only after the Court's *Seminole Tribe* decision does it appear that states began claiming sovereign immunity against war powers abrogation in earnest.³⁵¹ Until then, it appears that states did not think they had the ability to assert sovereign immunity against war powers legislation. That understanding is supported not only by the history and structure of the Constitution, but also by the practice of Congress and the President, whose near-exclusive war powers authority, including their ability to limit state interference with those powers, has been consistently upheld by the Supreme Court.

Federal attempts to exercise the constitutional war powers began as early as 1792, soon after ratification, when Congress enacted a statute establishing a "Uniform Militia" throughout the country.³⁵² The statute's requirement that able-bodied men of a certain age be enrolled in the militia and self-equipped largely was ignored and the statute eventually was repealed in 1901, when President Theodore Roosevelt determined that the militia system at the time was an abject failure.³⁵³ In response, Congress established two militias made up of all able-bodied males between 18 and 45 years old.³⁵⁴ The "organized militia" consisted of servicemen in what was named the "National Guard" of each state, while all other servicemen were members of the "reserve" or "unorganized" militia.³⁵⁵ Thus, from the earliest days of the Constitution, the federal government exercised its war powers authority over states.

³⁵¹ There were a few pre-*Seminole Tribe* cases involving state sovereign immunity claims, most of which were consistently rejected. *See, e.g., Jennings*, 589 F.2d at 938.

³⁵² *See Perpich v. Dep't of Def.*, 496 U.S. 334, 341 (1990) (citing 1 Stat. 271 (1792)).

³⁵³ *Id.* at 341–42.

³⁵⁴ *Id.* at 342–43 (citing The Dick Act, 32 Stat. 775 (1903)).

³⁵⁵ *Id.* at 342.

Early Court decisions also recognized the power of the federal government's war powers over the states, including state sovereignty. In *McCulloch v. Maryland*,³⁵⁶ Chief Justice Marshall, writing for the Court, held that under the Constitution “the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.”³⁵⁷ And, of course, in *Chisholm v. Georgia*, the Court concluded that the Constitution permitted private rights of action against nonconsenting states.³⁵⁸ Although the decision was subsequently repudiated, it was decided entirely by Founders³⁵⁹ less than five years after the Constitution's ratification and, therefore, provides important insights into the original understanding of the Constitution.³⁶⁰ Moreover, the Eleventh Amendment did not disturb *Chisholm's* view on war powers. Justice Cushing, who had been Vice President of Massachusetts's ratification convention, emphasized in *Chisholm* that “[o]ne design of the general Government was for managing the great affairs of peace and war and the general defence; which were impossible to be conducted, with safety, by the States *separately*.”³⁶¹ In addition, Chief Justice Jay—a member of the Continental Congress, delegate to the New York ratification convention, and one of the authors of *The Federalist Papers*—explained that:

³⁵⁶ 17 U.S. (4 Wheat.) 316 (1819).

³⁵⁷ *Id.* at 410.

³⁵⁸ 2 U.S. (2 Dall.) 419, 420 (1793).

³⁵⁹ The majority opinions were authored by: Chief Justice John Jay, who was a delegate to New York's ratification convention and authored some of *The Federalist Papers*; Justice John Blair, who was a delegate to both the Constitutional Convention and Virginia's ratification convention; Justice James Wilson, who was a delegate to both the Constitutional Convention and Virginia's ratification convention; and Justice William Cushing, who was not a delegate to the Constitutional Convention, but was Vice President of the Massachusetts ratification convention. *See id.* at 450, 453, 466, 469; *see also* 1 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, *supra* note 212, at 16, 496; 2 *id.*, *supra*, at 2; 3 *id.*, *supra*, at 654. Dissenting Justice James Iredell was not a delegate to the Constitutional Convention, but was a delegate to North Carolina's initial ratification convention, which neither ratified nor rejected the Constitution; Iredell was not present at the subsequent convention that voted to ratify. *See Chisholm*, 2 U.S. (2 Dall.) at 429 (Iredell, J., dissenting); *see also* 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, *supra* note 212, at 1.

³⁶⁰ The Court has repeatedly stressed the importance of early Supreme Court decisions when determining the intent behind constitutional provisions. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 745–46 (1999). Moreover, *Chisholm's* subsequent repudiation does not mean that the Founders on the Court got the history wrong; the Eleventh Amendment may be explained as a political alteration of the Constitution's original intent.

³⁶¹ 2 U.S. at 467.

Whatever power is deposited with the Union by the people for their own necessary security, is so far a curtailing of the power and prerogatives of States. This is, as it were, a self-evident proposition; at least it cannot be contested. Thus the power of declaring war, making peace, raising and supporting armies for public defence . . . are lodged in Congress; and *are a most essential abridgement of State sovereignty.*³⁶²

Chief Justice Jay's statement that the federal war powers are a "most essential abridgement of State sovereignty" is unambiguous and bears repeating.³⁶³ One of the foremost Founders declared in a Supreme Court decision that it is a "self-evident proposition" that the Constitution did not permit state sovereignty to interfere with federal war powers.³⁶⁴ Nothing in the Court's subsequent history or modern sovereign immunity jurisprudence negates this understanding.

Following the nation's next armed conflict, the War of 1812, the Court was called upon to specifically address the federal government's control of state militia members. In *Martin v. Mott*,³⁶⁵ a member of the New York state militia challenged his court martial for refusing to report for federal military service.³⁶⁶ Per the President's war orders, the Governor of New York detailed parts of the state militia "to do military duty in the service of the United States"; Mott failed to report for duty and, pursuant to a 1795 federal statute, was court martialed and fined.³⁶⁷

In upholding Mott's court martial, the Court clarified the federal government's authority over state militias. It upheld the 1795 act as "within the constitutional authority of Congress" over the militia, even though it allowed the federal government to court martial a state militia member who was never in federal military service.³⁶⁸ Moreover, the Court held that the President's authority to determine "whether the exigencies contemplated in the Constitution of the United States" and the 1795 act, "in which the President has authority to call forth the militia . . . is exclusively vested in the President, and his decision is conclusive upon all other persons."³⁶⁹ The President, the

³⁶² *Id.* at 468 (emphasis added).

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ 25 U.S. (12 Wheat.) 19 (1827).

³⁶⁶ *Id.* at 19.

³⁶⁷ *Id.* at 21–22.

³⁶⁸ *Id.* at 29, 33.

³⁶⁹ *Id.* at 19 (quoting the President's authority "to execute the laws of the Union, suppress insurrections, and repel invasions").

Court emphasized, is the “exclusive judge” as to whether such an exigency has occurred, and “[i]t is not necessary . . . that the particular exigency actually existed. It is sufficient that the President has determined it, and all other persons are bound by his decision.”³⁷⁰ This is a remarkable level of control over a nominally state institution. According to the Court, the President can call state militias into federal service without showing the existence of an actual exigency and without review by any other official or institution. Additionally, state militia service members can be court martialed for failing to follow the President’s order. The decision, therefore, provides a near-contemporaneous understanding of federal war powers, which permits the federal government to fully take control of state militias and their members, without review or recourse.

Later, in the 1871 *Tarble’s Case*,³⁷¹ the Court addressed whether a state court had the power to issue a writ of habeas corpus to discharge an individual held by the U.S. military.³⁷² The Court held that state courts lacked this power because matters left to the federal government—particularly the war powers—are beyond the reach of state jurisdiction.³⁷³ According to the Court:

[The federal government’s] control over the [war powers] is plenary and exclusive. It can determine, *without question from any State authority*, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. *No interference* with the execution of this power of the National government in the formation, organization, and government of its armies *by any State officials* could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. . . . It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and

³⁷⁰ *Id.* at 28–29, 32.

³⁷¹ 80 U.S. (13 Wall.) 397 (1871).

³⁷² *Id.* at 402.

³⁷³ *Id.* at 406.

controlled for any period by officers or tribunals of another sovereignty.³⁷⁴

The Court's concern with the federal government's ability to raise armies, including one made up of volunteers, is directly comparable to abrogation under USERRA. If federal war powers exist "without question from any State authority" and should suffer "[n]o interference . . . by any State officials,"³⁷⁵ then state employers should not be permitted to assert immunity to avoid responsibility for violating servicemembers' USERRA rights.

During World War II, the Court reiterated the federal government's constitutional authority to engage in war powers acts free from state constraint or opposition. In the Soldiers' and Sailors' Civil Relief Act of 1940 ("SSCRA"), precursor to the SCRA, Congress used its war powers to abrogate states' ability to tax servicemembers. The Court upheld this abrogation as an appropriate exercise of the federal government's war powers.³⁷⁶ Moreover, in *Case v. Bowles*,³⁷⁷ the wartime Office of Price Administration ("OPA") attempted to enjoin a 1943 timber sale by the State of Washington because it exceeded the federal agency's price ceiling under the Emergency Price Control Act of 1942.³⁷⁸ Both the Washington State Supreme Court³⁷⁹ and federal district court³⁸⁰ ruled that the OPA lacked the authority to enjoin a state's sale of timber, but the Supreme Court held otherwise. The Court acknowledged that Washington had exclusive ownership of the land and that the timber sale complied with state law, but upheld the statutory restrictions on such sales.³⁸¹ In a conflict between a state's legitimate exercise of its powers³⁸² and the federal government's war powers, the latter wins:

³⁷⁴ *Id.* at 408–09 (emphasis added).

³⁷⁵ *Id.*

³⁷⁶ See *Dameron v. Brodhead*, 345 U.S. 322, 325 (1953) (upholding SCRA's preemption of state law by requiring, for purposes of state taxes, servicemembers' domicile to remain unchanged by federal military assignments); see also Major Adam W. Kersey, *Ticket to Ride: Standardizing Licensure Portability for Military Spouses*, 218 MIL. L. REV. 115, 156 (2013).

³⁷⁷ 327 U.S. 92 (1946).

³⁷⁸ Pub. L. No. 77-421, 56 Stat. 23; *Bowles*, 327 U.S. at 95–96. Washington argued that Emergency Price Control Act violated state sovereignty under the Fifth and Tenth Amendments. *Id.*

³⁷⁹ See *Soundview Pulp Co. v. Taylor*, 150 P.2d 839, 844 (Wash. 1944).

³⁸⁰ See *Bowles v. Case*, 149 F.2d 777, 779 (9th Cir. 1945) (reversing unpublished district court order).

³⁸¹ See *Bowles*, 327 U.S. at 100–02.

³⁸² Washington was selling the timber to fund land-grant education. See *id.* at 101.

[O]ur only question is whether the State's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. . . . [A]n absence of federal power to fix maximum prices for state sales or to control rents charged by a State might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would *impair a prime purpose of the Federal Government's establishment*.³⁸³

In *Bowles*, therefore, the Court reaffirmed the original understanding of the Constitution that even core state functions must take a backseat to the federal war powers.³⁸⁴

The Court has consistently held that the federal government alone has the power to make war and engage in other foreign relations, and the Constitution prohibits states from interfering with these actions or even engaging in similar acts without the federal government's consent.³⁸⁵ One particularly apt, and more recent, example is *Pepich v. Department of Defense*,³⁸⁶ which directly addressed the federal government's constitutional authority over state militias. In a unanimous decision, the Court held that the President, acting pursuant to authority provided by Congress, can order state National Guard members into active federal military duty during peacetime, despite a governor's objection.³⁸⁷

Because *Pepich* directly implicates the federal government's war powers authority over states, it is worth considering the case in detail. In 1918, the Court upheld the constitutionality of a statute requiring all National Guard members to take a dual oath to both their state and the nation, and to permit the President to draft them into federal

³⁸³ *Id.* at 102 (emphasis added).

³⁸⁴ See *Bowles*, 149 F.2d at 779. In *National League of Cities v. Usery*, which struck down the FLSA's application to traditional state activities as violating the Tenth Amendment, the Court distinguished *Bowles*, emphasizing that "[n]othing we say in [*Usery*] addresses the scope of Congress'[s] authority under its war power." 426 U.S. 833, 854 n.18 (1976), *overruled on diff. grounds* by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

³⁸⁵ See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 325 (1821); *Louisiana v. Texas*, 176 U.S. 1, 16–17 (1900); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); see also Goldsmith, *supra* note 261, at 1645 (arguing that Constitution "ensured state compliance with the political branches' foreign relations enactments" and left "determination of when the national foreign relations interest would be best served by the exclusion of state power largely to the discretion of the federal political branches").

³⁸⁶ 496 U.S. 334 (1990).

³⁸⁷ *Id.* at 353–55.

military service.³⁸⁸ Beginning in 1933, state National Guard members have been required to also enlist in the federal National Guard;³⁸⁹ they remain state National Guard members until they are called into federal duty, during which service they would not be considered part of the state armed forces.³⁹⁰ In 1952, Congress limited this federal power by requiring a governor's consent before National Guard members could be called to active federal military duty.³⁹¹ For many years, this system worked well, with governors routinely providing consent upon the President's request.³⁹² But in 1985, the Governors of California and Maine refused to consent to training missions in Honduras for their National Guard members, which prompted Congress in the next year to eliminate the consent requirement.³⁹³ In *Perpich*, Minnesota's governor challenged this change as a violation of the Constitution's Militia Clauses, which the Governor claimed allowed the federal government to call up state National Guard members only for domestic emergencies, not foreign service or nonemergency situations.³⁹⁴

The Court rejected the Governor's claim, holding that the Militia Clauses did not limit the federal government's ability to take over state National Guards only when an exigency or extraordinary need existed.³⁹⁵ Acknowledging the tension faced by the Framers between concerns over a federal standing army and the inadequacies of the state militias,³⁹⁶ the Court emphasized that the Militia Clauses included a compromise that gave states the authority to maintain militias, but gave Congress the power both to create a standing army and to organize and call up state militias.³⁹⁷ Thus, the actions of state militia "are performed pursuant to 'the Authority of training the Militia according to the discipline prescribed by Congress'"³⁹⁸

³⁸⁸ National Defense Act of 1916, Pub. L. No. 64-85, 39 Stat. 166; *Cox v. Wood*, 247 U.S. 3, 6 (1918); *Selective Draft Law Cases*, 245 U.S. 366, 372-73 (1918).

³⁸⁹ See National Defense Act Amendments of 1933, Pub. L. No. 73-64, § 18, 48 Stat. 153, 160-61 (1933).

³⁹⁰ After being relieved from active federal duty, servicemembers would return to the state National Guard. *Id.*

³⁹¹ 10 U.S.C. § 672(b), (d) (1952).

³⁹² *Perpich*, 496 U.S. at 346.

³⁹³ See *id.* at 336-37, 346 (discussing "Montgomery Amendment").

³⁹⁴ See *id.* at 347. The Governor did not challenge the dual-enlistment system. *Id.*

³⁹⁵ See *id.* 351-52.

³⁹⁶ *Id.* at 340 n.6 (noting Hamilton's explanation of superiority of a "regular and disciplined army" over militias which, though valorous, would "have lost us our independence" if they alone had fought the British, and were insufficient to defend the country (quoting THE FEDERALIST No. 25 (Alexander Hamilton))).

³⁹⁷ See *id.* at 340.

³⁹⁸ *Id.* at 348 (quoting U.S. CONST. art. I, § 8, cl. 16).

The federal government's authority to call up state militia members over a governor's objection was, the Court held, "presupposed" by its 1918 *Selective Draft Law Cases*.³⁹⁹ There, the Court upheld the federal draft on the grounds that "the Militia Clauses do not constrain the powers of Congress 'to provide for the common Defence'" and to exercise other war powers; "far from being a limitation on those powers, the Militia Clauses are—as the constitutional text plainly indicates—additional grants of power to Congress."⁴⁰⁰ Minnesota's Governor argued that this interpretation had "the practical effect of nullifying an important state power that is expressly reserved in the Constitution," but the Court disagreed, emphasizing that the Militia Clauses recognized "the supremacy of federal power in the area of military affairs" and that Congress had done nothing to deprive states of their "constitutional entitlement" to have their own militias.⁴⁰¹

Perpich provides a strong confirmation of the states' understanding of the constitutional war powers by concluding that states are authorized to establish their own militias, but only under the control of the federal government.⁴⁰² The allowance of state militias is a limited exception to the otherwise "exclusive control of the National Government" over matters of foreign policy and military affairs.⁴⁰³ In particular, although the Constitution gave "rise to a presumption that federal control over the Armed Forces was exclusive,"⁴⁰⁴ the Militia Clauses permitted organized state militias while also "subjecting state militia to express federal limitations."⁴⁰⁵ As Hamilton emphasized in *The Federalist No. 74*, those limitations included the President's authority over the militias once called into federal service, which is an "essential part" of executive authority because "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."⁴⁰⁶

The inability of states to interfere with federal war powers is also supported by a class of cases involving the broader foreign relations

³⁹⁹ 245 U.S. 366 (1918); see *Perpich*, 496 U.S. at 349.

⁴⁰⁰ *Perpich*, 496 U.S. at 349–50 (quoting *Selective Draft Law Cases*, 245 U.S. at 375, 377, 381–84) (noting power to call forth militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions," which supplemented federal government's "broad[] power to raise armies," to provide for nation's defense, and numerous other powers over militias).

⁴⁰¹ *Id.* at 351–52 (stressing also that federal government provided "virtually all of the funding, the materiel [sic], and the leadership for the State Guard units").

⁴⁰² See *supra* Section II.A.4.

⁴⁰³ *Perpich*, 496 U.S. at 353–54.

⁴⁰⁴ *Id.* at 353 (citing *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871)).

⁴⁰⁵ *Id.* at 354.

⁴⁰⁶ THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

powers. The Supreme Court has consistently held that the foreign relations powers, of which the war powers are part, to be exclusively federal.⁴⁰⁷ For instance, in *United States v. Curtiss-Wright Export Corp.*,⁴⁰⁸ the Court held that the states *never* possessed the power to engage in foreign relations, including acts of war.⁴⁰⁹ In *Curtiss-Wright*, several defendants challenged their conviction for violating a presidential proclamation and congressional joint resolution prohibiting arms sales to Bolivia by arguing that the joint resolution was an unlawful delegation of congressional powers to the President.⁴¹⁰

In rejecting this argument, the Court first assumed that the joint resolution would be an invalid delegation unless an exception applied.⁴¹¹ The Court held that an exception did apply because the joint resolution involved foreign affairs,⁴¹² which are “fundamental[ly]” different from domestic affairs because of the federal government’s exclusive control over external matters:⁴¹³

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such

⁴⁰⁷ See *infra* notes 408, 417 and accompanying text. Even in the earlier Confederation period, states’ ability to engage in acts of foreign affairs was limited. ARTICLES OF CONFEDERATION of 1777, art. VI, para. 1 (“No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state”); see THE FEDERALIST No. 11 (Alexander Hamilton) (Hamilton describing restrictions on states’ foreign affairs authority).

⁴⁰⁸ 299 U.S. 304 (1936).

⁴⁰⁹ *Id.* at 316, 318 (describing foreign relations “powers to declare and wage war, to conclude peace, to make treaties, [and] to maintain diplomatic relations with other sovereignties” and noting that “since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers”).

⁴¹⁰ See *id.* at 311, 314–15 (delegating determination whether to make arms sales illegal).

⁴¹¹ *Id.* at 315.

⁴¹² *Id.* at 329.

⁴¹³ *Id.* at 315, 319. The Court also approved of a series of statutes from 1794–1806 in which Congress delegated foreign affairs powers to the President, including several involving war powers. *Id.* at 322–24.

powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.⁴¹⁴

The Court in *Curtiss-Wright* did not merely hold that federal foreign relations power was superior to the states' authority—it held that individual states utterly lacked such power either prior to the Constitution or after its ratification.⁴¹⁵ Given states' role in operating militias, one should not take this holding too far when it comes to the war powers. Yet the limited and subservient state militia authority does not detract from the broader conclusion that when it comes to the national defense and other external concerns, states play no meaningful role under the Constitution.⁴¹⁶ Instead, when war and other external powers are at play, the plan of the Convention was to give the federal government authority unfettered by state interference, including claims of state sovereign immunity.⁴¹⁷ The Court has confirmed this federal foreign relations exclusivity in numerous other cases, including ones upholding federal preemption of state action.⁴¹⁸ Even as

⁴¹⁴ *Id.* at 315–16 (citation omitted) (holding further that “[d]uring the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, ‘the Representatives of the United States of America’ declared the United (not the several) Colonies to be free and independent states, and as such to have ‘full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do’”).

⁴¹⁵ *Id.* at 316 (noting that the colonies *collectively*, through the Continental Congress, exercised war powers); see also 9 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA (2), *supra* note 281, at 849 (“Having made the United States the sovereign arbiters of war and peace, given them the right” to engage in war and foreign powers, “there seemed to be little left of external policy to the individual states”).

⁴¹⁶ See *supra* note 414; *United States v. Belmont*, 301 U.S. 324, 331–32 (1937) (“[The] complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states . . . [a]s to such purposes the State . . . does not exist.” (citation omitted)); Goldsmith, *supra* note 261, at 1670 (“[T]he functional case for a self-executing prohibition on subnational foreign relations activity is strongest under [the] traditional concept[]” of foreign relations power, including military issues).

⁴¹⁷ See *Curtiss-Wright*, 299 U.S. at 317 (“The Framers’ Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.”).

⁴¹⁸ See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424–25 (2003) (finding federal executive order preempted state law requiring disclosure about Holocaust-era insurance policies); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) (striking down state law restricting trade with Burma due to interference with objectives of federal law); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (invalidating state law limiting claims by nonresident because it “is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress”); *United States v. Pink*, 315 U.S. 203, 233 (1942) (striking down state court decisions that conflicted with decree between federal government and foreign country because “[p]ower over external affairs is not shared by the States; it is vested in the national government

recently as 2019, the Court in *Hyatt* stressed the significant difference between the federal government's expansive war powers and the states' subordinated role: "Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. . . . [T]he Constitution deprives them of the independent power . . . to wage war."⁴¹⁹ *Hyatt* and myriad other cases demonstrate that under the practice and precedent of the Constitution, states lack sovereign immunity in the face of federal war powers actions, including those that provide individuals the ability to enforce their federal rights against the states.⁴²⁰

III. OBJECTIONS TO WAR POWERS ABROGATION

Despite the overwhelming historical evidence, several post-*Alden* state courts—all addressing USERRA claims against state employers—have consistently ruled against war powers abrogation. Although these courts have provided several rationales, none provide a credible basis for rejecting war powers abrogation.⁴²¹

Most arguments against war powers abrogation rely on the Article I dictum and *Alden*, while distinguishing *Katz*. As described below, these cases tend to conflate two key aspects of *Katz*: its holding that at least one Article I power—bankruptcy—is not burdened by state immunity claims, and the unique aspects of federal bankruptcy power. The problem is that no matter how unique bankruptcy may or may

exclusively"); *Hines v. Davidowitz*, 312 U.S. 52, 64–65, 68 (1941) (striking down state alien registration act because states cannot alter treaties); *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (rejecting state's Tenth Amendment claim because treaties "may override" states' typical powers); *The Chinese Exclusion Case*, 130 U.S. 581, 605 (1889) (holding federal government is "invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the state governments"). See generally G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999) (describing supreme federal foreign relations power and the virtual elimination of a state role).

⁴¹⁹ *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019). The Court stated that the colonies held themselves out as full sovereigns under the Declaration of Independence, but the plan of the Convention stripped states of these powers and gave them to the federal government. *Id.* at 1493, 1497. Although this view conflicts with *Curtiss-Wright's* holding that the colonies only held war powers collectively, see *supra* note 415, both cases confirm the Constitution's near-exclusive grant of war powers to the federal government. See 299 U.S. at 316.

⁴²⁰ Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159–60 (1963) (emphasizing "powers of Congress to require military service for the common defense are broad and far-reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact" (footnote omitted)); *supra* note 266.

⁴²¹ One case does not directly discuss abrogation at all, seemingly holding that USERRA permits claims against state employers only if the state expressly agreed to such suits. See *Smith v. Tenn. Nat'l Guard*, 387 S.W.3d 570, 576 (Tenn. Ct. App. 2012).

not be, *Katz* without a doubt stands for the proposition that the “no Article I” dictum no longer applies.⁴²² The current rule may be “*almost*-no Article I” abrogation, but at least with regard to bankruptcy, there is an exception. Thus, the question is whether war powers represent another example of valid Article I abrogation. State courts thus far have not engaged in the required historical analysis to answer this question, relying instead on specious reasoning to ignore the strong historical case for war powers abrogation.

A. *Article I Dictum*

Every court rejecting USERRA abrogation has relied heavily on the *Seminole Tribe*-era, Article I dictum.⁴²³ Although there was a short period of time during which the law seemed to be that no Article I powers could abrogate state sovereignty, *Alden*’s reasoning ended that era and confirmed that history, rather than where congressional power is located in the Constitution, is the key to determining whether abrogation is valid.⁴²⁴ Thus, state court decisions relying on this dictum without also examining the history of the Constitution are unmistakably wrong.⁴²⁵ Even if *Alden* was not clear on this point, *Katz* left no doubt that some Article I power is sufficient to permit individuals to sue nonconsenting states.⁴²⁶

More troubling are courts that inexplicably do nothing but repeat the Article I dictum without mentioning *Katz* at all.⁴²⁷ *Katz* reaffirmed *Alden*’s requirement that a historical analysis determine whether

⁴²² See *Ramirez v. N.M. Child., Youth & Fams. Dep’t*, 2016-NMSC-016, 372 P.3d 497, 503 (N.M. 2016) (stating that “*Katz* opened the door to arguments that constitutional history and structure show that Congress, by acting pursuant to other Article I powers, may subject the states to private suits absent their consent”).

⁴²³ See, e.g., *Risner v. Ohio Dep’t of Rehab. & Corr.*, 577 F. Supp. 2d 953, 960 (N.D. Ohio 2008). But see *Breaker v. Bemidji State Univ.*, 899 N.W.2d 515, 522 n.12 (Minn. Ct. App. 2017) (“Since *Alden*, the Supreme Court and the lower courts . . . have unambiguously stated that Congress’s only recognized source of abrogation power is the Fourteenth Amendment.”).

⁴²⁴ See *supra* Section I.C.

⁴²⁵ See *Larkins v. Dep’t of Mental Health & Mental Retardation*, 806 So. 2d 358, 361 (Ala. 2001) (relying on *Alden* to differentiate Article I and Fourteenth Amendment abrogation).

⁴²⁶ See *supra* Section I.D.

⁴²⁷ See *Janowski v. Div. of State Police*, 981 A.2d 1166, 1170 (Del. 2009); *Anstadt v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 2004-RCCV-1012, 2009 WL 8702987, at *7 (Ga. State Ct. Mar. 16, 2009), *affirmed*, 693 S.E.2d 868 (Ga. Ct. App. 2010). One state court rejected war powers abrogation without mentioning *Katz*, but did cite to another decision that rejected an application of *Katz* for procedural reasons. See *Smith v. Tenn. Nat’l Guard*, 387 S.W.3d 570, 576 (Tenn. Ct. App. 2012) (citing *Anstadt* 693 S.E.2d at 871) (holding that plaintiff raised *Katz* first time on appeal, even though abrogation issue was litigated at trial). The author of this Article coauthored the petitioner’s appellate brief in *Anstadt*.

states are immune from individual suits brought under federal law. Thus, rejecting war powers abrogation simply based on Article I dictum, without any historical examination of the war powers, is flatly insufficient.

B. *Distinguishing Katz*

Most courts addressing war powers abrogation for the first time acknowledge *Katz* and, to varying degrees, grapple with its holding that the Article I Bankruptcy Clause permits abrogation. These courts have distinguished *Katz* on various grounds, especially two unusual aspects of bankruptcy: the typically (but not exclusively) in rem nature of bankruptcy jurisdiction and the Bankruptcy Clause's explicit emphasis on uniformity.⁴²⁸ Moreover, the Supreme Court, in a case involving copyright abrogation, recently cited these aspects of *Katz*, stating in dicta that it is a "good-for-one-clause-only holding."⁴²⁹

While these characteristics do set bankruptcy apart from most other Article I war powers, neither is sufficient to reject war powers abrogation. Indeed, courts distinguishing *Katz* use these two factors as a one-way ratchet—they examine ways in which the bankruptcy power supports abrogation more than the war powers but fail to explore ways in which the war powers abrogation claim is stronger.

Despite the Supreme Court's clarity on the need to engage in a historical analysis, no state court has done so in more than a cursory way, and most not at all.⁴³⁰ But *Katz* makes clear that Article I might allow for abrogation of state sovereign immunity if supported by the plan of the Convention. Indeed, the Court took pains to explain that the Bankruptcy Clause's placement in Article I does not mean it should be lumped in with the Article I commerce powers when it comes to state sovereign immunity.⁴³¹ Any attempt to distinguish *Katz*

⁴²⁸ See *infra* Section III.B.

⁴²⁹ *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020).

⁴³⁰ See, e.g., *Clark v. Va. Dep't of State Police*, 793 S.E.2d 1, 7 n.7 (Va. 2016) ("Given the breadth of the holding in *Alden* and the narrowness of the exception recognized in *Katz*, we need not address in any detail Clark's historical argument about the breadth of the congressional war powers.").

⁴³¹ *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369 n.9 (2006) ("Of course, the Bankruptcy Clause, located as it is in Article I, is 'intimately connected' . . . with the Commerce Clause. That does not mean, however, that the state sovereign immunity implications of the Bankruptcy Clause necessarily mirror those of the Commerce Clause. Indeed, the Bankruptcy Clause's unique history, combined with the singular nature of bankruptcy courts' jurisdiction . . . have persuaded us that the ratification of the Bankruptcy Clause does represent a surrender by the States of their sovereign immunity in certain federal proceedings." (citations omitted) (quoting *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982))).

therefore must do so by asking whether differences between the bankruptcy and war powers are sufficient *as a historical matter* to justify state interference with the latter but not the former. This is a difficult task, as the historical record strongly suggests that state sovereignty is nonexistent in the war powers arena. In other words, if *Katz* recognized the existence of “bankruptcy exceptionalism,”⁴³² there is a very strong argument as well for “war powers exceptionalism.” Courts’ unwillingness to grapple with this history is compounded by the fact that they place far more reliance on the distinguishing features of bankruptcy than is deserved.

1. *The (Mostly) In Rem Nature of Bankruptcy Jurisdiction*

The most common ground that courts use to distinguish *Katz* is the typically in rem nature of bankruptcy jurisdiction.⁴³³ This characteristic has some salience, but only up to a point. It is true that bankruptcy jurisdiction is usually in rem,⁴³⁴ which the Court has stressed does not implicate state sovereignty to the same degree as in personam jurisdiction.⁴³⁵ The entire purpose of *Katz*, however, was to address whether bankruptcy abrogation was constitutional when applied to in personam cases.⁴³⁶ In *Katz*, the Court held that it was.⁴³⁷

In the earlier *Hood* case, the Court granted certiorari to address the Sixth Circuit’s holding that the Article I bankruptcy power generally permitted abrogation of state immunity.⁴³⁸ But instead, the Court held only that the claim at issue did not threaten state sovereignty because it did not seek money or any affirmative action from the state creditor.⁴³⁹ Thus, the *Hood* Court addressed only in rem bankruptcy proceedings that do not seriously implicate state sovereignty, waiting

⁴³² *Allen*, 140 S. Ct. at 1002.

⁴³³ See *Risner v. Ohio Dep’t of Rehab. & Corr.*, 577 F. Supp. 2d 953, 962 n.1 (N.D. Ohio 2008); *Clark*, 793 S.E.2d at 5–7; *Breaker v. Bemidji State Univ.*, 899 N.W.2d 515, 524 (Minn. Ct. App. 2017); *Tex. Dep’t of Pub. Safety v. Torres*, 583 S.W.3d 221, 228–29 (Tex. App. 2018); *Anstadt v. Bd. of Regents of the Univ. Sys. of Ga.*, 693 S.E.2d 868, 871 n.14 (Ga. Ct. App. 2010); *Ramirez v. New Mexico ex rel. Child., Youth & Fams. Dep’t*, 2014-NMCA-057, 326 P.3d 474, 480 (N.M. Ct. App. 2014).

⁴³⁴ See *Katz*, 546 U.S. at 362 (stating “[b]ankruptcy jurisdiction, at its core, is *in rem*”).

⁴³⁵ *Id.*; see *Allen*, 140 S. Ct. at 1002.

⁴³⁶ See *supra* notes 150–56.

⁴³⁷ See *Katz*, 546 U.S. at 371.

⁴³⁸ See *Hood v. Tenn. Student Assistance Corp.*, 319 F.3d 756, 761–62 (6th Cir. 2003) (using historical analysis to uphold bankruptcy abrogation), *aff’d*, 541 U.S. 440 (2004).

⁴³⁹ *Hood*, 541 U.S. at 446–47 (comparing discharge of debt, in which bankruptcy courts have exclusive jurisdiction of debtor’s property, to an in rem admiralty action).

until later to address bankruptcy proceedings that did so.⁴⁴⁰ The answer to this question came in *Katz*.

In *Katz*, the Court reaffirmed that the exercise of federal bankruptcy jurisdiction “does not, *in the usual case*, interfere with state sovereignty even when States’ interests are affected.”⁴⁴¹ The reference to “the usual case” necessarily means that although bankruptcy cases do not typically implicate state sovereign immunity, sometimes they do.⁴⁴² The Court made this conclusion explicit when explaining why constitutional history supported Congress’s ability to subject nonconsenting states to bankruptcy suits, a history showing that “[t]he Framers would have understood that laws ‘on the subject of Bankruptcies’ included laws providing, in certain limited respects, for *more than simple adjudications of rights in the res*.”⁴⁴³ In addition, the Court noted that among the Bankruptcy Clause’s main purposes was to give federal courts the power to issue habeas writs against states, which are in personam in nature.⁴⁴⁴ Indeed, *Katz* itself arguably invoked the bankruptcy court’s in personam processes,⁴⁴⁵ which “operate[] free and clear of the State’s claim of sovereign immunity.”⁴⁴⁶ This means that, contrary to the position of some state courts,⁴⁴⁷ *Katz* leaves the door

⁴⁴⁰ See *id.* at 452–53; *id.* at 455–64 (Thomas, J., dissenting) (arguing that bankruptcy abrogation was invalid, even for in rem cases).

⁴⁴¹ *Katz*, 546 U.S. at 370 (emphasis added); see also *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020) (“In part, *Katz* rested on the ‘singular nature’ of bankruptcy jurisdiction. . . . [that was] ‘principally *in rem*’” (citation omitted)).

⁴⁴² *Katz*, 546 U.S. at 370.

⁴⁴³ *Id.* (emphasis added); see also *id.* at 372 (“A court order mandating turnover of the property, although ancillary to and in furtherance of the court’s *in rem* jurisdiction, might itself involve *in personam* process.”).

⁴⁴⁴ *Id.* at 371.

⁴⁴⁵ See *id.* at 372 n.10. Moreover, the *Katz* dissent explicitly disclaimed any relevance of in rem jurisdiction:

The fact that certain aspects of the bankruptcy power may be characterized as *in rem*, however, does not determine whether or not the States enjoy sovereign immunity against such *in rem* suits. And it certainly does not answer the question presented in this case: whether the Bankruptcy Clause subjects the States to transfer recovery proceedings—proceedings the majority describes as ‘ancillary to and in furtherance of the court’s *in rem* jurisdiction,’ though not necessarily themselves *in rem*

Id. at 391 (Thomas, J., dissenting).

⁴⁴⁶ *Id.* at 373 (majority opinion).

⁴⁴⁷ See, e.g., *Clark v. Va. Dep’t of State Police*, 793 S.E.2d 1, 7 (Va. 2016) (“The *Katz* qualification, applicable only to claims arising within a federal bankruptcy court’s *in rem* jurisdiction over a bankruptcy estate, does not apply to Clark’s state-court claim for *in personam* damages.”).

open for other in personam claims against nonconsenting states filed pursuant to Article I powers.⁴⁴⁸

To be sure, the generally in rem nature of bankruptcy jurisdiction was an important part of the historical evidence surrounding bankruptcy abrogation,⁴⁴⁹ a characteristic that war powers legislation does not share. That does not mean that other aspects of the federal war powers cannot support the abrogation of state sovereignty. In other words, merely stating “in rem” is not enough to distinguish *Katz*. Courts must consider the historical evidence to determine whether the war powers constitute an additional source of Article I abrogation.

2. *The Bankruptcy Clause’s “Uniform Laws” Policy*

In addition to the in rem nature of most bankruptcy actions, the Bankruptcy Clause differs from other Article I provisions in its specific grant of authority to Congress “[t]o establish . . . uniform [l]aws . . . throughout the United States”⁴⁵⁰ Some courts have pointed to this stress on uniformity to distinguish bankruptcy and war powers abrogation.⁴⁵¹

In *Katz*, the Court noted the Bankruptcy Clause’s “uniform laws” language, stating that its purpose was to eliminate the disparate treatment of debtors across states, in particular to allow federal courts to ensure that the discharge of debt or the release of a debtor from prison in one state would be respected in another.⁴⁵² However, the Court also expressly stated that its holding “does not rest on the peculiar text of the Bankruptcy Clause as compared to other Clauses of Article I”⁴⁵³ That said, it is clearly helpful that the Bankruptcy Clause states the need for uniformity across the country.⁴⁵⁴ But does the lack of a reference to “uniform laws” equally undermine war powers abrogation?

⁴⁴⁸ See *Katz*, 546 U.S. at 378.

⁴⁴⁹ See *id.*

⁴⁵⁰ U.S. CONST., art. I, § 8, cl. 4.

⁴⁵¹ See *Risner v. Ohio Dep’t of Rehab. & Corr.*, 577 F. Supp. 2d 953, 963 (N.D. Ohio 2008); *Clark*, 793 S.E.2d at 7; *Ramirez v. New Mexico ex rel. Child., Youth & Fams. Dep’t*, 2014-NMCA-057, 326 P.3d 474, 480 (N.M. Ct. App. 2014); *Anstadt v. Bd. of Regents of the Univ. Sys. of Ga.*, 693 S.E.2d 868, 871 (Ga. Ct. App. 2010).

⁴⁵² See *Katz*, 546 U.S. at 368–69; see also *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020). (noting that the Bankruptcy Clause “emerged from a felt need to curb the States’ authority” and “in that project, the Framers intended federal courts to play a leading role”).

⁴⁵³ *Katz*, 546 U.S. at 376 n.13, 377 (holding that “text aside, the Framers, in adopting the Bankruptcy Clause, plainly intended to give Congress the power to redress the rampant injustice resulting from States’ refusal to respect one another’s discharge orders”).

⁴⁵⁴ *Id.* at 376 n.13.

Although the constitutional war powers do not state the magic words “uniform laws,” their text and history endorse an equally—if not more powerful—need for exclusive and uniform federal control of the nation’s defenses. Recall that many war powers provisions give the federal government sole authority over the military, while simultaneously prohibiting state action except for limited authority over militias, pursuant to congressional control.⁴⁵⁵ The plan of the Convention, ratification debates, and subsequent cases and statutes reaffirm the understanding of James Madison, who asserted that “Congress ought to have the power to establish a uniform discipline throughout the states”⁴⁵⁶ Accordingly, just as the Bankruptcy Clause’s uniformity goal supports federal subordination of state sovereign immunity, so does the War Powers Clauses’.

3. *The Application of Katz in State Court*

Some state court decisions distinguish *Katz* by noting that it involved federal court jurisdiction and, therefore, the result in *Alden* should apply to war powers cases in state court.⁴⁵⁷ Although it is true that *Katz* involved federal jurisdiction, these courts get the significance of that fact, if there is any, entirely backwards. If there is any jurisdictional difference with regard to state sovereign immunity, it is that such immunity has a stronger claim when federal jurisdiction is involved, especially when the suit involves claims by one of the state’s own citizens.

In *Alden*, the Court admitted that it was extending the breadth of state sovereign immunity beyond the text of the Eleventh Amendment and long-standing precedent by applying the doctrine to state court.⁴⁵⁸ Previously, the assumption was that the Eleventh Amendment had no impact in state courts at all.⁴⁵⁹ Thus, if there is any jurisdictional difference, state immunity claims should be weaker in state court.

⁴⁵⁵ See *supra* notes 242–54 and accompanying text.

⁴⁵⁶ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 212, at 90; see also *supra* notes 259, 280, 352 and accompanying text; THE FEDERALIST NO. 29, at 181 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority.”).

⁴⁵⁷ *Clark v. Va. Dep’t of State Police*, 793 S.E.2d 1, 6–7 (Va. 2016); *Breaker v. Bemidji State Univ.*, 899 N.W.2d 515, 523 (Minn. Ct. App. 2017).

⁴⁵⁸ *Alden v. Maine*, 527 U.S. 706, 713 (1999).

⁴⁵⁹ See *Velasquez v. Frapwell*, 160 F.3d 389, 394 (7th Cir. 1998); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996).

C. *The Necessary and Proper Clause*

A limited number of courts rejecting war powers abrogation have argued that, in enacting laws like USERRA, Congress attempted to abrogate *solely* pursuant to Article I's Necessary and Proper Clause, rather than the War Powers Clauses.⁴⁶⁰ This argument, to put it bluntly, is nonsensical.

First, the assertion that “the regulation of non-military employment discrimination against members of the armed forces is not among” the enumerated war powers⁴⁶¹ is contradicted by the history of the war powers, judicial precedent, and Congress. As described above, the plan of the Convention was to provide the federal government broad and near-exclusive war powers to ensure the nation's defense.⁴⁶² Courts have consistently recognized that Congress expressly used these war powers to enact USERRA,⁴⁶³ the purpose of which is to ensure an adequate number of trained military personnel for the nation's security.

Second, this line of reasoning conflicts with a vast number of cases, such as *Katz*, that involved legislation enacted pursuant to various congressional powers—cases that focused on the Article I power at issue, not the Necessary and Proper Clause.⁴⁶⁴ Moreover, the argument makes no sense logically. The Necessary and Proper Clause only gives Congress the authority to make laws “carrying into Execution” Article I powers.⁴⁶⁵ It is not a standalone power.⁴⁶⁶

Finally, the Court has stated that empowering provisions like the Necessary and Proper Clause can provide Congress with a valid basis for abrogation. In *Fitzpatrick*, for instance, the Court upheld Fourteenth Amendment abrogation enacted pursuant to Section 5's “by

⁴⁶⁰ *Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 962 (N.D. Ohio 2008); *Tex. Dep't of Pub. Safety v. Torres*, 583 S.W.3d 221, 228 (Tex. App. 2018).

⁴⁶¹ *Torres*, 583 S.W.3d at 228 n.4.

⁴⁶² *See supra* Section II.A.

⁴⁶³ *See supra* note 24.

⁴⁶⁴ *See supra* note 328; *infra* note 466.

⁴⁶⁵ U.S. CONST. art. I, § 8, cl. 18; *see also* Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1351 (2015) (arguing that the Necessary and Proper Clause can “authorize extreme measures in extreme times”).

⁴⁶⁶ *See Dameron v. Brodhead*, 345 U.S. 322, 325 (1953) (upholding abrogation under SCRA and describing Necessary and Proper Clause as “supplementary power” to war powers). The court in *Torres* may have been led astray by a statement in *Alden* that the Necessary and Proper Clause does not provide Congress *separate* authority to abrogate state sovereignty. *Torres*, 583 S.W.3d at 228 (citing *Alden v. Maine*, 527 U.S. 706, 732 (1999)). However, the Court emphasized that the central issue is whether the underlying constitutional power, not the Necessary and Proper Clause, permitted abrogation. *Alden*, 527 U.S. at 732–33.

appropriate legislation” provision.⁴⁶⁷ In short, the Necessary and Proper Clause merely gives Congress the power to enact legislation pursuant to its war powers, and those powers provide the authority to subject nonconsenting states to suit.

D. States Will Comply with Federal Law Despite Sovereign Immunity

At times, courts have sided with state sovereign claims by downplaying the harm that immunity imposes on claimants. For instance, in *Alden* the Court stated that state immunity “does not confer upon the State a concomitant right to disregard the Constitution or valid federal law” and that it was “unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.”⁴⁶⁸ This faith in state compliance, however, is hard to square with reality.

The most obvious problem with this claim is that it was made in a case in which a state was alleged to have refused to follow federal law. And not just any law, but one of the most established and broadly known federal employment requirements: providing overtime compensation.⁴⁶⁹ This argument also mistakenly presupposes that ill intent is required. Even a state employer acting in good faith can violate USERRA or other laws through carelessness, misunderstandings, rogue officials, or other means. Simply assuming away these instances does not make them disappear. Indeed, the Court was well aware that many states had been engaging in a prolonged effort to claim immunity against federal statutes, and it is hard to believe that they were not doing so, at least in part, to avoid compliance with those laws.⁴⁷⁰

These concerns are particularly relevant when it comes to USERRA. We can gauge states’ intent to comply with that law through a proxy: states’ willingness to waive their sovereign immunity against USERRA claims or against their own USERRA-like laws. In 2004, I comprehensively analyzed which states permitted monetary claims against state employers for USERRA-type claims, finding that

⁴⁶⁷ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (“We think that Congress may, in determining what is ‘appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”); U.S. CONST. amend. XIV, § 5.

⁴⁶⁸ *Alden*, 527 U.S. at 754–55.

⁴⁶⁹ See *Brown v. L & P Indus., LLC*, No. 5:04CV0379JLH, 2005 WL 3503637, at *12 (E.D. Ark. Dec. 21, 2005).

⁴⁷⁰ See Brief of Maryland et al. as Amici Curiae in Support of Respondent, *Alden*, 527 U.S. 706 (No. 98-436), 1999 WL 73806 (brief of 36 states in support of Maine’s immunity claim).

only thirteen arguably waived their immunity for reemployment or leave claims and only four did so for discrimination claims.⁴⁷¹ In the intervening years, despite litigation involving state immunity in USERRA cases, it does not appear that any additional states have waived their immunity.⁴⁷² That just a small minority of the states are willing to subject themselves fully to USERRA undermines claims that sovereign immunity will not be used as a bar to the enforcement of this important statute.

CONCLUSION

The ability of states to cite sovereign immunity to avoid individual suits under federal war powers legislation comes down to history. Did the Framers and ratifying states believe that, under the Constitution, states were sovereign in the war powers arena? Was the plan of the Convention to give states the authority to thwart federal efforts to strengthen the nation's defenses—based on states' concern with having forced to pay monetary damages to individuals? The importance of unfettered federal war powers to this nation's founding points to one answer: no.

The Supreme Court's current state sovereign immunity jurisprudence requires an analysis of the text, history, practice, and precedent of the Constitution to determine whether immunity exists in a given area. Although the Court has resisted abrogation under many Article I powers, its historical analysis keeps the door open to others, such as its validation of bankruptcy abrogation. The unanswered question is whether war powers is another instance in which states are unable to use sovereign immunity to avoid complying with federal legislation.

As this Article shows, the history of the War Powers Clauses reveals that one of the central goals of the plan of the Convention was for the nation's war powers to lie with a centralized federal government. So important was this aim, that what little military authority states possessed was completely subordinated to the federal war powers. The near-exclusive centralization of power and subordination of states are exactly the sort of characteristics that the Court—relying upon Founders like Alexander Hamilton—has pointed to in finding exceptions to states' ability to claim sovereign immunity. Permitting

⁴⁷¹ Hirsch, *supra* note 5, at 1039–41.

⁴⁷² Moreover, it does not appear that the federal government has much interest or ability in prosecuting cases against state employers on behalf of employees. *See id.* at 1034–36 (describing federal government's ability to sue states under USERRA without triggering sovereign immunity).

abrogation under the war powers acknowledges the practical effects of state sovereignty as well. It is difficult to imagine that the ratifying states thought the Constitution gave them the ability to use claims of sovereignty to obstruct federal war powers legislation by, for instance, refusing to give federally mandated leave to servicemembers who are engaged in military training or active duty.

The history of our Constitution reveals that, when it comes to war powers, states simply are not considered sovereigns. Attempts to argue otherwise conflict not only with history, but also the reality that state immunity claims could threaten the safety of the nation. Unless we are willing to abide the possibility that the Constitution is a “suicide pact,”⁴⁷³ war powers abrogation should be lawful.

⁴⁷³ See *supra* note 420.