

STRUCTURAL WAIVERS AND CONGRESS’S AUTHORITY TO COIN MONEY: DIGITAL CURRENCY AND STATE SOVEREIGN IMMUNITY IN THE NEW ERA

Emanuele S. Putrino*

INTRODUCTION.....	356
I. A HISTORY OF CENTRAL BANK DIGITAL CURRENCY AND SOVEREIGN IMMUNITY	359
A. Central Bank Digital Currency	359
1. The Benefits	361
2. The Drawbacks.....	363
B. State Sovereign Immunity.....	364
1. Congressional Abrogation of State Sovereign Immunity	366
2. Structural Implied Waivers	368
II. STATE SOVEREIGN IMMUNITY AS THE ABSURDITY DOCTRINE.....	370
A. Sovereign Immunity Is the “Absurdity On its Face”	371
B. The Crossroad of CBDC and Sovereign Immunity	374
III. EXTENDING THE <i>PENNEAST</i> AND <i>TORRES</i> TEST TO THE ARTICLE I COINAGE CLAUSE	376
A. States Have Waived Sovereign Immunity for Congress’s Power to Coin Money: A Power “Complete in Itself”	377
1. Constitutional Text.....	377
2. History of Article I Section 8 Clause 5	378
3. Precedent	381
B. Counterarguments to Extending Structural Implied Waivers	385
1. Sovereign Immunity as Good Law.....	386
2. Returning New Purposivism to Old Purposivism	388
3. The Law of Nations.....	389
4. The Torres Dissent	394
CONCLUSION	397

*Law Clerk to the Honorable David S. Leibowitz, United States District Court for the Southern District of Florida; J.D., 2024, Maurice A. Deane School of Law at Hofstra University; B.S., Criminal Justice and Sociology, 2021, Adelphi University. For this piece, I thank Professor James Sample for sparking my interest in sovereign immunity from our federal courts course at Hofstra. I am also indebted to Professor Eric M. Freedman for very helpful comments and insight. The views and arguments expressed in this Article are solely my own.

INTRODUCTION

The end of paper currency is increasingly becoming a reality rather than a fantasy. For the first time in over 70 years, the United States money supply is shrinking and the demand for cash and deposits is declining.¹ According to Goldman Sachs and the Federal Reserve, cash was used in only 18% of financial transactions in 2022, compared with 31% of transactions in 2016.² On the other hand, the swipe of a card or the use of digital payments is becoming more and more commonplace.

Central banks across the globe have already begun experimenting with a new form of exchange: central bank digital currency (CBDC). These are virtual currencies that operate similarly to Bitcoin, but differ because governmental entities back them.³ As of June 2024, 134 countries were piloting and exploring the potential use of CBDC for their economies.⁴ Countries such as China, Japan, Sweden, the Bahamas, and England have all conducted trials with this new form of currency.⁵ China's pilot CBDC, the digital yuan or e-CNY, has already been in use for five years, with July 2023 total transactions reaching a cumulative value of 1.8 trillion yuan, roughly \$249.9 billion.⁶ Implementing e-CNY may soon transcend the international trade scene where it could undermine the value and dominance of the U.S. dollar.

Meanwhile, the United States has not made such significant strides. In 2022, President Joe Biden signed an executive order directing the Office of Science and Technology Policy to investigate the potential use of CBDC in the United States; President Donald Trump recently revoked the order.⁷

1. *Why the US Money Supply Is Shrinking for the First Time in 74 Years*, GOLDMAN SACHS (Aug. 28, 2023), <https://www.goldmansachs.com/insights/articles/why-the-us-money-supply-is-shrinking>.

2. *Id.*

3. Eswar Prasad, *Cash Will Soon Be Obsolete. Will America Be Ready?*, N.Y. TIMES (July 22, 2021), <https://www.nytimes.com/2021/07/22/opinion/cash-digital-currency-central-bank.html> (explaining the difference between this currency and other virtual currency like Bitcoin, which operates privately and is decentralized).

4. Tobi Opeyemi Amure, *What Will a U.S. Central Bank Digital Currency Look Like?*, INVESTOPEDIA (June 8, 2024), <https://www.investopedia.com/us-cbdc-6740586>.

5. Prasad, *supra* note 3.

6. Mia Nulimaimaiti, *What's the State of China's Digital Yuan in 2023?*, S. CHINA MORNING POST (Oct. 10, 2023), <https://www.scmp.com/economy/china-economy/article/3237317/whats-state-chinas-digital-yuan-2023>.

7. Exec. Order No. 14,067, 87 Fed. Reg. 49 (Mar. 9, 2022). This was revoked by Trump's Executive Order, stating that all federal agencies "are hereby prohibited from undertaking any action to establish, issue, or promote CBDCs within the jurisdiction of the United States or abroad." *Strengthening American Leadership in Digital Financial Technology*, THE WHITE HOUSE (Jan. 23,

Bipartisan congressional approval for CBDC has also been lacking.⁸ In 2023, Congressman Mooney Alexander (R-WV) introduced a bill prohibiting the Federal Reserve from approving or executing a pilot program to test CBDC.⁹ The Federal Reserve published a paper in 2022 analyzing the use and potential benefits of CBDC currency,¹⁰ so congressional support for CBDC in the future is still a possibility despite the current gridlock.

As is often the case, the state and federal governments have different systems and operations. At least 11 states have proposed legislation blocking CBDC efforts and others have already passed such laws.¹¹ Florida Governor Ron DeSantis signed the first anti-CBDC bill into law, which preemptively excludes CBDC from the definition of money within the state's Uniform Commercial Code should Congress adopt the currency.¹²

Assuming the federal government makes the transition into CBDC, several federalism issues quickly come to mind regarding states' refusal to adopt CBDC as a form of money currency. This Article, however, does not wholly focus on the separation of power between states and the federal government but rather the dynamic between private individuals and the states. Instead, this Article focuses on sovereign immunity and whether private individuals could sue states when there is a dispute over currency.

Under the Eleventh Amendment of the Constitution, private citizens cannot sue a state government for money damages.¹³ The doctrine of sovereign immunity predates the Constitution and is implicit in the

2025), <https://www.whitehouse.gov/presidential-actions/2025/01/strengthening-american-leadership-in-digital-financial-technology>.

8. *Trump Vows to Block a CBDC*, LEDGER INSIGHTS (Jan. 18, 2024), <https://www.ledgerinsights.com/trump-vows-to-block-a-cbdc>.

9. Digital Dollar Pilot Prevention Act, H.R. 3712, 118th Cong. (2023). Recently, Senator Mike Lee (R-Utah) co-sponsored a bill with other Republicans to prevent a CBDC in the United States after Trump's Executive Order. *Lee Introduces Bill Making Trump Ban on Central Bank Digital Currency Permanent*, MIKE LEE (Feb. 6, 2025), <https://www.lee.senate.gov/2025/2/lee-introduces-bill-making-trump-ban-on-central-bank-digital-currency-permanent>.

10. BD. OF GOVERNORS OF THE FED. RESRV. SYS., MONEY AND PAYMENTS: THE U.S. DOLLAR IN THE AGE OF DIGITAL INFORMATION 14–16 (2022) [hereinafter THE U.S. DOLLAR].

11. *11 States Have Pending Anti-CBDC Legislation*, LEDGER INSIGHTS (Feb. 2, 2024), <https://www.ledgerinsights.com/11-states-have-pending-anti-cbdc-legislation-south-dakota-votes-in-favor>.

12. *Governor Ron DeSantis Signs First-in-the-Nation Legislation to Protect Against Government Surveillance of Personal Finances*, EXEC. OFF. OF THE GOVERNOR RON DESANTIS 46TH GOVERNOR OF FLA. (May 12, 2023), <https://www.flgov.com/eog/news/press/2023/governor-ron-desantis-signs-first-nation-legislation-protect-against-government>. [hereinafter *DeSantis Legislation*].

13. *Alden v. Maine*, 527 U.S. 706, 712–13 (1999) (discussing the Eleventh Amendment of the U.S. Constitution).

document's design.¹⁴ States can only be subject to suit if they consent to being sued or Congress validly abrogates their immunity pursuant to the Fourteenth Amendment's enforcement clause.¹⁵

However, the Supreme Court recently broadened the importance of the Constitution's design to extend implied consent to suit via structural waivers of immunity.¹⁶ In *PennEast Pipeline Co. v. New Jersey*, the Court held that a state may implicitly consent to suit as part of the "plan of the Convention" or "structure of the original Constitution itself."¹⁷ One year later in *Torres v. Texas Department of Public Safety*, the Court expanded *PennEast*, ruling that a state implicitly consents to suit in a dispute involving Congress's Article I power "[t]o raise and support Armies" and "[t]o provide and maintain a Navy" as part of the "plan of the Convention."¹⁸

Since the Court had foreclosed Congress's ability to abrogate state sovereign immunity via its Article I Commerce Power in the late 20th century,¹⁹ courts should extend the *PennEast* and *Torres* framework to incorporate implied structural waivers under Congress's power to coin money. With the possible federal adoption of CBDC, private litigation against states is foreseeable if they refuse to accept such currency. In fact, several individuals recently sued the National Park Service for refusing to accept cash as a form of payment for entry fees.²⁰ An analogous scenario could play out in the future between individuals and states not recognizing CBDC in their respective commercial codes. States should not be able to defend on sovereign immunity grounds because Congress's authority to establish CBDC as a form of money is one that is "complete in itself."²¹

This Article begins with a background on CBDC and its progressive implementation around the globe.²² Then, a doctrinal discussion of sovereign immunity will follow.²³ Part II reviews and critiques the Court's

14. *Id.* at 727–29.

15. *Sossamon v. Texas*, 563 U.S. 277, 284–85 (2011); *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 587 (2022); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

16. *See, e.g., PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 500 (2021).

17. *Id.*

18. *Torres*, 597 U.S. at 584; U.S. CONST. art. I, § 8, cls. 12–13.

19. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47, 72 (1996).

20. Summer Lin, *The National Park Service Will Only Take Plastic at Its Parks. Three Visitors Are Suing to Use Cash*, L.A. TIMES (Mar. 20, 2024), <https://www.latimes.com/california/story/2024-03-20/the-national-park-service-will-only-take-plastic-at-its-parks-three-visitors-are-suing-to-use-cash>.

21. *Torres*, 597 U.S. at 594. To note, this solution's application is broad and not limited to the CBDC context. This Article encourages the widespread adoption of structural waivers of immunity in any dispute involving Congress's authority to coin money and regulate currency.

22. *See infra* Part I.A.

23. *See infra* Part I.B.

longstanding expansion of the sovereign immunity defense.²⁴ It also presents one of many possible fact patterns where this issue intersects with CBDC.²⁵ Part III proposes to extend the Court's holdings in *PennEast* and *Torres* to Congress's power to coin money under the Coinage Clause. This will ultimately give individuals the ability to sue a sovereign for money damages.²⁶ In doing so, Part III closely scrutinizes the constitutional text and history of the Coinage Clause as well as the relevant precedent to confirm that the states yielded to Congress's authority under this power, forfeiting their sovereign immunity rights.²⁷ This Article recognizes and addresses counterarguments to its solution, confirming that broadening structural waivers is consistent with the constitutional design and will not swallow up the sovereign immunity defense entirely.²⁸ This Article concludes by arguing that this is the proper course for the Court to follow given its recent decisions and the rise of new currency around the world.²⁹

I. A HISTORY OF CENTRAL BANK DIGITAL CURRENCY AND SOVEREIGN IMMUNITY

Countries are beginning to phase out paper currency and transition into new forms of digital currency, such as central bank digital currency (CBDC). The new adoption of currency will surely breed many problems and disputes, domestically and abroad. This Article explores how CBDC overlaps with state sovereign immunity issues as states progressively ban its adoption. Subpart A discusses the origins of CBDC and its introduction to global economies, including its effects and potential federal adoption in the future.³⁰ Subpart B provides a history of the state sovereign immunity doctrine and how it has developed up until the *Torres* decision.³¹

A. Central Bank Digital Currency

CBDC is a form of digital currency that is tokenized through blockchain technology similar to cryptocurrencies.³² This currency,

24. *See infra* Part II.A.

25. *See infra* Part II.B.

26. *See infra* Part III.A.

27. *See infra* Part III.A.

28. *See infra* Part III.B.

29. *See infra* CONCLUSION.

30. *See infra* Part I.A.

31. *See infra* Part I.B.

32. Amure, *supra* note 4. Blockchain technology is outside the scope of this Article, but for a general overview see John J. Healy, Note, *Veto the Black-Box Politics: How Implementing Blockchain*

however, would be regulated by the Federal Reserve and secured by the federal government.³³ Individuals could use this digital currency in lieu of physical cash without the volatility associated with cryptocurrencies. According to the International Monetary Fund, there are at least 100 CBDCs in the research or trial stages worldwide.³⁴

Finland pioneered this type of digital currency in the late 20th century. In 1993, the Bank of Finland adopted an electronic form of fiat currency, the Avant smart card.³⁵ The card proved to be an efficient method for ordinary merchant purchases and users remained anonymous; data from transactions was neither recorded nor stored for user identification and tracking.³⁶ The Avant card was introduced in several phases. Once fully introduced, the card was expected to replace 50% of coins and small-denomination fiat cash.³⁷ These cards were preferred options for low-value purchases and did not carry fees or limits associated with debit or credit cards.³⁸ The Avant card was eventually discontinued after fees were later leveraged on consumers and debit cards had gained wider acceptance after improved security measures.³⁹

Out of the 134 countries that have researched or tested the use of CBDC, 11 countries, such as the Bahamas, Jamaica, and Nigeria, have successfully implemented it as a supplement to traditional fiat currency.⁴⁰ The Bahamas adopted the first retail CBDC, the Sand Dollar, allowing use of digital wallets for financial transactions via phone application or physical card.⁴¹ This trend is continuing to grow.⁴²

Other countries have only conducted trial runs and pilot programs, most notably China. Its pilot program, the e-CNY, began in 2019 with over

Technology into the United States Voting System Will Give Our World the Transparency We Deserve, 52 HOFSTRA L. REV. 131, 135–43 (2023).

33. Amure, *supra* note 4.

34. Andrew Stanley, *The Ascent of CBDCs*, INT'L MONETARY FUND: FIN. & DEV. MAG. (Sept. 2022), <https://www.imf.org/en/Publications/fandd/issues/2022/09/Picture-this-The-ascent-of-CBDCs>.

35. *Id.*

36. Aleksi Gryn, *Lessons Learned from the World's First CBDC*, 8 BOF ECON. REV. 1, 3–4 (2020).

37. *Id.* at 5.

38. *Id.* at 8. Avant cards also used encryption, while other payment cards used some form of magnetic stripe technology. *See id.*

39. *Id.* at 17.

40. Amure, *supra* note 4. The others include Antigua and Barbuda, Anguilla, St. Kitts and Nevis, Montserrat, Dominica, Saint Lucia, Saint Vincent and the Grenadines, and Grenada. *Id.*

41. Raphael Auer et al., *Central Bank Digital Currencies: Motives, Economic Implications and the Research Frontier* 5 (Bank for Int'l Settlements, Working Paper No. 976 2021).

42. Amure, *supra* note 4 (noting the increasing level of interest in experimenting with CBDC across the globe).

20 cities as test sites and over five million registered users as of 2022.⁴³ By the end of 2023, 120 million digital wallets were created and domestic transactions totaled 1.8 trillion yuan, almost 250 billion U.S. dollars.⁴⁴ The use of e-CNY has extended outside the mainland. Hong Kong residents can now open digital wallets and engage in digital transactions.⁴⁵

While CBDC is still relatively new and research is underway, it is a modern medium of exchange with great potential. The speculative nature of cryptocurrencies and the development of new technology and business models have procured interest in a new type of legal tender—so much so that President Biden signed an executive order calling on the Office of Science and Technology Policy and myriad agencies to study and report on the use and risks of CBDC in America.⁴⁶ With advanced economies like China's successful use of CBDC thus far, it is no surprise that President Biden advocated for “reinforc[ing] United States leadership in the global financial system,” recognizing the importance and value of the U.S. dollar.⁴⁷

The following discussions summarize the implications of CBDC adoption in the United States. There are ample advantages to CBDC use in America, yet several disadvantages serve as counterweights to its unanimous approval and acceptance. Nonetheless, the United States may one day formally incorporate the digital wallet as a medium of exchange. A plethora of issues would then surface and this Article covers those percolating in the sovereign immunity field.

1. The Benefits

CBDC could positively impact the nature of financial transactions in the United States. Prior to President Biden's executive order, the Federal Reserve released a paper in January 2022 summarizing research conducted regarding CBDC's potential benefits and risks.⁴⁸ The paper highlights that CBDC's introduction would provide a safe and efficient payment method,

43. Nulimaimaiti, *supra* note 6.

44. Selena Li, *Hong Kong Allows China's Digital Yuan to Be Used in Local Shops*, REUTERS (May 17, 2024), <https://www.reuters.com/markets/currencies/hong-kong-allows-chinas-digital-yuan-be-used-local-shops-2024-05-17>.

45. *Id.*

46. Exec. Order No. 14,067, 87 Fed. Reg. 14143 (Mar. 9, 2022) (“Advances in digital and distributed ledger technology for financial services have led to dramatic growth in markets for digital assets . . .”).

47. *Id.* at 14144.

48. *See generally* THE U.S. DOLLAR, *supra* note 10 (providing background information and policy implications of digital currency in the United States).

making it easier to execute online transactions involving very small sums of money where delivery of payment could be programmed at specific times.⁴⁹ This efficiency would transcend outside American borders; digital wallet holders could make transactions through different jurisdictional channels instantly and cheaper than current methods of payment.⁵⁰ Other mediums of exchange, especially cash or wire transfers, lack the design capabilities to carry out such transactions efficiently.⁵¹

Another advantage of having CBDC in the United States is strengthening the role of the U.S. dollar. Now that China has been experimenting with CBDC and is beginning to use it outside its borders, the U.S. dollar's value and dominance may be at risk.⁵² Undermining its value could increase transaction and borrowing costs for consumers and businesses.⁵³

Government-backed digital currency may also promote financial equity and inclusion. Giving every individual access to a digital wallet provides increased options for the “underbanked” who traditionally do not have a bank account.⁵⁴ Lower-income households would benefit from reduced transaction costs and fees accompanying consumer bank deposit accounts.⁵⁵

CBDC would foster financial stability and increase financial activity amongst the public and private sectors by reducing speculation and credit or liquidity risks.⁵⁶ Since the Federal Reserve would fully secure it, it would be required to protect against anti-money laundering and counterfeiting

49. *Id.* at 14–15.

50. *Id.* at 15. The use of Automated Clearing House or wire transfers cross-border can take several days to clear and transactions can result in fees up to 10%. U.S. DEP'T OF THE TREASURY, THE FUTURE OF MONEY AND PAYMENTS: REPORT PURSUANT TO SECTION 4(B) OF EXECUTIVE ORDER 14067 6 (2022) [hereinafter THE FUTURE OF MONEY AND PAYMENTS]. At least a quarter of a sample size of 50 central banks would incorporate interoperable features for CBDC to allow frictionless and less costly cross-border payments. Auer et al., *supra* note 41, at 21.

51. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 5–6, 20.

52. Nulimaimaiti, *supra* note 6; Rajesh Bansal & Somya Singh, *China's Digital Yuan: An Alternative to the Dollar-Dominated Financial System* 3, 21 (Carnegie Endowment for Int'l Peace, Working Paper 2021); Exec. Order No. 14067, 87 Fed. Reg. 49, 14144 (Mar. 9, 2022). This Executive Order states:

The United States has an interest in ensuring that it remains at the forefront of responsible development and design of digital assets The United States derives significant economic and national security benefits from the central role that the United States dollar and United States financial institutions and markets play in the global financial system.

Id.

53. THE U.S. DOLLAR, *supra* note 10, at 15; Amure, *supra* note 4.

54. THE U.S. DOLLAR, *supra* note 10, at 16; THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 24.

55. Amure, *supra* note 4.

56. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 4.

risks.⁵⁷ The central bank would monitor consumer transactions and subsequently protect against suspicious activity. However, greater access to private transaction information and data may present more problems.

2. The Drawbacks

Perhaps the leading concern behind CBDC is the government's unchecked access to one's private information and data. In the 13 states that have enacted or have pending anti-CBDC legislation, most of the concern resides with privacy risks.⁵⁸ Florida spearheaded the anti-CBDC trend when Governor Ron DeSantis signed the first piece of legislation in 2023.⁵⁹ The short three-to-four-page law omits the term "central bank digital currency" from its state commercial code.⁶⁰ Jimmy Patronis, Florida's Chief Financial Officer, stated that congressional adoption of CBDC is "another way for Floridians to have their vital financial information surveilled and controlled by the federal government."⁶¹ Indeed, a U.S. Department of the Treasury report drafted pursuant to President Biden's executive order confirmed that "CBDC ledger[s] could collect significant amounts of information" and "user information could be pseudonymously recorded on the ledger" leading to decreased user privacy and increased vulnerability to cyberattacks.⁶²

Holders of digital wallets are also subject to privacy exploitation by private parties. A robust CBDC system in the United States would require heightened operational safeguards against cybersecurity threats.⁶³ Otherwise, criminals may abuse the digital nature of the currency to steal information, money, or even engage in schemes for personal gain.⁶⁴ There would need to be a proper monitoring and supervisory system to assess and mitigate any possible risks. The United States would also need to work closely with other countries to ensure that jurisdictions with lax anti-money laundering or counterfeiting regulatory frameworks adjust accordingly so that bad actors do not exploit loopholes in the system to undermine user privacy.⁶⁵

57. *Id.* at 23.

58. *11 States Have Pending Anti-CBDC Legislation*, *supra* note 11.

59. *DeSantis Legislation*, *supra* note 12.

60. S.B. 7054, 2023 Leg., Reg. Sess. (Fla. 2023); FLA. STAT. § 671.201(25) (2023) ("Money . . . does not include a central bank digital currency.")

61. *DeSantis Legislation*, *supra* note 12.

62. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 22.

63. THE U.S. DOLLAR, *supra* note 10, at 20.

64. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 25, 42–43.

65. *See id.* at 43.

On the commercial side, uniform implementation of CBDC in the United States could harm private industries and businesses. With CBDC substituting bank funds, overall bank deposits will decrease.⁶⁶ This will result in less credit available for loans and higher credit costs and expenses for businesses and credit applicants.⁶⁷ Chartered financial institutions could also be subject to runs if there is a sudden transition to CBDC.⁶⁸ Additionally, long-term CBDC acceptance over time could negatively influence the country's monetary policy; the Federal Reserve might need to increase the levels of reserves, leading to higher interest rates and inflation.⁶⁹

B. State Sovereign Immunity

The issue of whether states enjoy sovereign immunity from private suits has been a controversial topic for over 200 years.⁷⁰ As with other common law doctrines, it is no surprise that sovereign immunity principles derived from England and the British Crown; the King of England was not subject to suit by a private entity unless he consented.⁷¹ A plaintiff's only recourse against the King was to sue "in the respectful form of a petition, and [the King] never fails to comply with the judgment of his court."⁷² As noted by Dean Erwin Chemerinsky, one interpretation of the English maxim, "the [K]ing can do no wrong," suggests that the sovereign cannot be sued without consent.⁷³

Sovereign immunity jurisprudence began with the adoption of the Constitution at the Grand Convention in 1787. At that time, Alexander Hamilton authored *The Federalist No. 81*, where he reasoned

66. THE U.S. DOLLAR, *supra* note 10, at 17.

67. *Id.*

68. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 17. A bank "run" is when customers withdraw their deposits rapidly out of fear of insolvency. Adam Hayes, *What Is a Bank Run? Definition, Examples, and How it Works*, INVESTOPEDIA, <https://www.investopedia.com/terms/b/bankrun.asp> (last updated Dec. 22, 2023).

69. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 18–20.

70. See Pfander, *infra* note 87, at 1271 ("[S]cholars and judges disagree about what, if anything, the history of the Amendment can tell us about its proper interpretation some two hundred years later.").

71. *United States v. Lee*, 106 U.S. 196, 205 (1882); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001).

72. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 440 (1793).

73. 3 WILLIAM BLACKSTONE, COMMENTARIES *140 (1768); Chemerinsky, *supra* note 71, at 1201 & n.1. However, Professor Eric Freedman pointed out that this maxim really means that the King could not command another to do something "legally wrong" and thus no wrongs could be committed on his behalf. ERIC. M. FREEDMAN, MAKING HABEAS WORK: A LEGAL HISTORY 80 (2018).

that authorizing suits against states in federal court would breed coercion upon the states and war.⁷⁴ The original enabling provision that arguably provided federal jurisdiction over suits by private citizens against states was in Article III. Article III, Section 2 states that “[t]he judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State”⁷⁵ The Supreme Court interpreted this provision to foreclose state sovereign immunity in *Chisolm v. Georgia*, a case involving an out-of-state citizen suing the state of Georgia for repayment on a debt.⁷⁶ Furious by the *Chisolm* decision, the states subsequently ratified the Eleventh Amendment to the Constitution to overrule the Supreme Court.⁷⁷

The Eleventh Amendment reads that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”⁷⁸ According to Professor James Sample and Dean Chemerinsky, the text of the Eleventh Amendment is clear on its face: only an out-of-state citizen is prohibited from suing a sovereign and the immunity applies only under federal court jurisdiction.⁷⁹ Yet, the Supreme Court held in *Hans v. Louisiana* that an in-state citizen is barred from suing the sovereign⁸⁰ and the Court extended this immunity to state courts in *Alden v. Maine*.⁸¹

Scholars have labeled this method of interpretation as purposivist construction: developing precedent not through the plain text of the amendment, but rather through its underlying purpose.⁸² William Blackstone believed that “the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by

74. THE FEDERALIST NO. 81 (Alexander Hamilton) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent* [T]o ascribe to the federal courts [the power for a citizen to sue a State] . . . would be altogether forced and unwarrantable.”) (emphasis in original). This is, however, not the case when “there is a surrender of this immunity *in the plan of the convention*” *Id.* (emphasis added).

75. U.S. CONST. art. III, § 2, cl. 1.

76. 2 U.S. (2 Dall.) at 466–67.

77. James Sample, *Textual Rights, Living Immunities*, 41 S. ILL. U. L.J. 1, 7 (2017).

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

79. Chemerinsky, *supra* note 71, at 1205–06; Sample, *supra* note 77, at 7.

80. 134 U.S. 1, 13–15 (1890).

81. 527 U.S. 706, 754 (1999).

82. See, e.g., Sample, *supra* note 77, at 10 (“Strong purposivists . . . believe, however, that even the clearest statutory language will sometimes contradict a statute’s apparent ‘purpose’”) (quoting John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 10 (2001)). See generally Anthony J. Bellia, Jr. & Bradford R. Clark, *State Sovereign Immunity and the New Purposivism*, 65 WM. & MARY L. REV. 485 (2024) [hereinafter Bellia & Clark, *New Purposivism*] (discussing the Supreme Court’s new purposivism approach with implied structural waivers of immunity).

considering the reason and spirit of it; or the cause which moved the legislator to enact it.”⁸³ According to the Court in *Hans*, despite the language of the Eleventh Amendment, there was essentially no way the states would have adopted it had it meant that they were only protected from suits prosecuted by out-of-state citizens.⁸⁴ Justice Bradley and the majority believed that such a supposition would be “an absurdity on its face.”⁸⁵ The principle of sovereign immunity was more inherent in the constitutional design.⁸⁶ The Amendment was ratified merely to correct an erroneous construction of the only enabling provision of the Constitution that arguably abrogated state sovereign immunity.⁸⁷ The Amendment’s underlying purpose at the time of the Founding—to shield the individual states and protect their sovereignty—prevailed.

In the next two segments, this Article provides background with exceptions the Court has created regarding the sovereign immunity defense.⁸⁸ The first segment discusses how Congress can abrogate state sovereign immunity pursuant to its enforcement authority via Section Five of the Fourteenth Amendment.⁸⁹ Then, the second segment details how a state can consent to suit.⁹⁰ While traditionally this waiver was strictly construed, the Court has recently expanded the principle of implied structural waivers, making it easier to sue a state when an Article I power “complete in itself” is at issue.⁹¹

1. Congressional Abrogation of State Sovereign Immunity

Section Five of the Fourteenth Amendment states “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”⁹² In 1976, the Supreme Court established the rule in *Fitzpatrick v.*

83. WILLIAM BLACKSTONE, SEC. 2 OF INTRODUCTION TO COMMENTARIES ON THE LAWS OF ENGLAND 61 (1758).

84. *Hans*, 134 U.S. at 15.

85. *Id.*

86. Bellia & Clark, *New Purposivism*, *supra* note 82, at 556 (“[T]he source of the States’ immunity was the rule, inextricably woven into the Constitution itself . . .”).

87. *Id.* at 527. The Eleventh Amendment is said to have been an “explanatory” amendment to clarify an ambiguity or erroneous judicial interpretation. *Id.* (quoting James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1314–15 (1998)).

88. *See infra* Part I.B.1.–2.

89. *See infra* Part I.B.1.

90. *See infra* Part I.B.2.

91. Bellia & Clark, *New Purposivism*, *supra* note 82, at 493.

92. U.S. CONST. amend. XIV, § 5.

Bitzer that Congress may abrogate or nullify a state's sovereign immunity,⁹³ provided that Congress's intent to do so is "unmistakably clear" from the statutory language and Congress has acted "pursuant to a valid exercise of power," such as through Section Five.⁹⁴ This new limit on state sovereign immunity, however, was short-lived in its application.

The Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* weakened Congress's power to abrogate immunity via Section Five of the Fourteenth Amendment, holding that: (1) there must be a "pattern" of existing constitutional violations since Congress's enforcement power is "remedial" in nature; and (2) the legislation must be "congruent and proportional" between the injury to be prevented or remedied and the means adopted to that end.⁹⁵ There, the Patent Remedy Act could not abrogate sovereign immunity because there was no pattern of patent infringement nor constitutional violations by the states.⁹⁶ Immediately following *Florida Prepaid*, the Court refused to abrogate sovereign immunity pursuant to Section Five involving cases of employment discrimination because they lacked a pattern of constitutional violations by the state.⁹⁷

Aside from the enforcement provision of the Fourteenth Amendment, litigants asserted that Congress's Article I Commerce Clause authority was sufficient to abrogate state sovereign immunity. The Court, in a plurality decision, embraced the argument in *Pennsylvania v. Union Gas Co.*, holding that a federal law authorizing suits against a state for monetary damages enacted pursuant to Congress's Commerce Clause authority was sufficient to abrogate state sovereign immunity.⁹⁸ Not long after, the Court overturned *Union Gas* in the landmark case, *Seminole Tribe of Florida v. Florida*, holding that Congress can only abrogate sovereign immunity pursuant to Section Five of the Fourteenth Amendment.⁹⁹

93. 427 U.S. 445, 456–57 (1976).

94. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); *see also Quern v. Jordan*, 440 U.S. 332, 343 (1979) ("Our cases consistently have required a clear[] showing of congressional purpose to abrogate Eleventh Amendment immunity . . ."); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57–58 (1996).

95. 527 U.S. 627, 638–39 (1999) (applying the test established in *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997)).

96. *Fla. Prepaid*, 527 U.S. at 640, 647.

97. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). *Cf. Tennessee v. Lane*, 541 U.S. 509, 528–30 (2004) (holding that the Americans with Disabilities Act abrogated state sovereign immunity because there was a pattern of the state blocking access to courthouses).

98. 491 U.S. 1, 5, 23 (1989) (plurality opinion).

99. 517 U.S. 44, 66, 72–73 (1996).

The significance of Article I in the sovereign immunity arena, however, has not disappeared. As will be discussed in the next segment, Congress's Article I authority plays a role when a state consents to suit. Prior cases alluded to this new type of consent, and two recent Supreme Court decisions have paved the way for its future broad application.

2. Structural Implied Waivers

The Eleventh Amendment does not bar an action by a private citizen against a state if the state waives the immunity and consents to suit.¹⁰⁰ Initially, the Court recognized only an express waiver that had to be unequivocal or one implied solely by the statute's text.¹⁰¹ Then, the Court began recognizing implied consent as part of the states acquiescing to the "plan of the Convention."¹⁰² Not until recently did the Court openly embrace this test and suggest a new turn in sovereign immunity jurisprudence: implied waivers when Congress is acting pursuant to federal power that is "complete in itself."¹⁰³

Alexander Hamilton championed the phrase "plan of the Convention" at the time of the Founding.¹⁰⁴ In *The Federalist No. 81*, Hamilton described that while it is "inherent" in a sovereign that it retains immunity from suit, a state may surrender its immunity in the "plan of the [C]onvention."¹⁰⁵ Justice William Brennan trailblazed its adoption by the Court in several dissenting and concurring opinions.¹⁰⁶ The test gained traction in *Union Gas*'s plurality involving Congress's Commerce Clause powers. There, Justice Brennan wrote that "[b]ecause the Commerce Clause withholds power from the States at the same time as it confers it on Congress . . . [the States] gave their consent all at once, in ratifying the

100. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

101. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

102. *See, e.g., Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377 (2006) (holding states waived immunity to suit by a bankruptcy trustee to set aside preferential transfers as part of the "plan of the Convention" for Congress to regulate bankruptcy law).

103. *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 508 (2021); *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 589 (2022).

104. *See THE FEDERALIST NO. 81* (Alexander Hamilton).

105. *Id.* at 487 (Clinton Rossiter ed., 1961).

106. *See, e.g., Port Auth. Trans-Hudson Corp v. Feeney*, 495 U.S. 299, 310–11 (1990) (Brennan, J., concurring) ("States surrendered that immunity, insofar as challenges under federal statutes are concerned, 'in the plan of the Convention' when they agreed to form a union and granted Congress specifically enumerated powers."); *Edelman*, 415 U.S. at 687 (Brennan, J., dissenting); *Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 317–22 (1973). This phrase was also referenced by the *Hans* Court. *Hans v. Louisiana*, 134 U.S. 1, 12–13 (1890).

Constitution containing the Commerce Clause, rather than on a case-by-case basis.”¹⁰⁷ After *Union Gas* was overruled, this test lost importance until the *Central Virginia Community College v. Katz* decision in 2006.¹⁰⁸

Katz involved a Chapter 11 trustee seeking to avoid and recover preferential payments made by the debtor to several Virginia universities.¹⁰⁹ The colleges moved to dismiss on sovereign immunity grounds.¹¹⁰ In a bare 5-4 majority, the Court held that the states had implicitly waived their immunity since they agreed “in the plan of the Convention” that Congress ultimately creates uniform bankruptcy law under its Article I authority.¹¹¹ To be clear, the Court expressly stated that “the relevant question is not whether Congress has ‘abrogated’ States’ immunity”¹¹² Thus, after *Seminole Tribe*, *Katz* set the ball rolling for the Court to solidify a new framework limiting the sovereign immunity defense, notwithstanding the abrogation doctrine. That shift took place 15 years later.

In 2021, the Supreme Court was presented with the question of whether private pipeline companies, given the eminent domain power by federal statute, could initiate condemnation proceedings against states.¹¹³ *PennEast* revived the test advocated by Justice Brennan and embraced by *Katz*, answering in the affirmative.¹¹⁴ With another 5-4 decision not split along party lines, the Court ruled that the “States consented in the plan of the Convention to the exercise of federal eminent domain power” and could not use the sovereign immunity defense.¹¹⁵ In other words, when the states ratified the Constitution, they yielded to the federal government’s eminent domain authority—a power “complete in itself.”¹¹⁶

The Supreme Court decided *Torres* the following term.¹¹⁷ Petitioner *Torres*, an Army Reserves veteran, sued Texas in state court alleging the state violated federal law by refusing to employ him, though he had a service-related disability.¹¹⁸ Congress enacted the Uniform Services Employment and Reemployment Rights Act of 1994, the federal law in question, pursuant to Congress’s Article I army and navy authority. The law

107. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989) (plurality opinion).

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

109. *Id.* at 360.

110. *Id.*

111. *Id.* at 377; *see* U.S. CONST. art. I, § 8, cl. 4.

112. *Katz*, 546 U.S. at 379.

113. *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 488 (2021).

114. *Id.* at 482.

115. *Id.* at 501.

116. *Id.* at 502, 508.

117. *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580 (2022).

118. *Id.* at 585–86.

authorized private suits against noncomplying state employers.¹¹⁹ Texas moved to dismiss, arguing that sovereign immunity barred the suit.¹²⁰

Reaffirming *PennEast*, the *Torres* Court held that sovereign immunity did not bar the suit because states consented to Congress exercising sole authority to “raise and support Armies” and “provide and maintain a Navy” as part of the “plan of the Convention.”¹²¹ Citing Alexander Hamilton, the Court stated that a structural waiver under this test is appropriate in three contexts: (1) “where the Constitution in express terms granted an exclusive authority to the Union”; (2) “where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority”; and (3) “where it granted an authority to the Union, to which a similar authority in the States would be totally contradictory and repugnant.”¹²² By reviewing the Constitution’s text, history, and Supreme Court precedent, *Torres* concluded that Congress’s Article I power to build and maintain an army and navy is “complete in itself” and the states could not thwart such federal objectives.¹²³

Importantly, the *Torres* decision helped create another pathway for Article I to limit the sovereign immunity defense. The *Torres* decision recognized that Congress could still not abrogate sovereign immunity under Article I, but relied on *PennEast* and *Katz* to create structural waivers when Article I powers “complete in [themselves]” are implicated.¹²⁴ The Court now stands on the reverse side of *Hans*: structural waivers are not grounded in textualism, but rather the constitutional design itself.

II. STATE SOVEREIGN IMMUNITY AS THE ABSURDITY DOCTRINE

Since the *Chisolm* decision, sovereign immunity has expanded too far in protecting state governments and officials.¹²⁵ After the adoption of the Eleventh Amendment, the Supreme Court took an active role immunizing states for over 200 years.¹²⁶ Only recently has the Court begun to finally

119. 38 U.S.C. § 4323(a)(3) (“A person may commence an action for relief with respect to a complaint against a State (as an employer) . . .”).

120. *Torres*, 597 U.S. at 586.

121. *Id.* at 590, 594; U.S. CONST. art. I, § 8, cls. 12–13.

122. *Torres*, 597 U.S. at 587–88 (emphasis removed) (quoting THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (J. Cooke ed. 1961)).

123. *Id.* at 590–94.

124. *Id.* at 595–96.

125. See *infra* Part II.A.

126. Bellia & Clark, *New Purposivism*, *supra* note 82, at 519 (explaining since the Eleventh Amendment’s passage until 2021, the Supreme Court consistently recognized state sovereign immunity).

chip away at sovereign immunity's powerful standing in American jurisprudence.¹²⁷ The Court should continue this trend. With the possible implementation of central bank digital currency (CBDC) in the United States, there will be yet another opportunity to expand structural implied waivers of immunity.

Subpart A reviews previous scholarship on sovereign immunity, detailing and arguing that the doctrine is unsound and should not be as commanding as it has been.¹²⁸ Here, other real-life and practical consequences resulting from sovereign immunity's reign will be discussed.¹²⁹ Subpart B connects both issues of CBDC and sovereign immunity and demystifies how they will intersect should CBDC be federally adopted in the United States.¹³⁰

A. Sovereign Immunity Is the "Absurdity On its Face"

Dean Chemerinsky put it perfectly: why would the United States hold so dear a doctrine derived from the British Crown when the 13 colonies formed the Union to reject these ideas—especially a doctrine with an unclear foundation?¹³¹ Chief Justice John Jay, the first Chief Justice of the Court, brilliantly observed that sovereignties in England existed on feudal principles where the Prince was the sovereign and the people were merely subjects that swore allegiance to him.¹³² He wrote that “[n]o such ideas obtain[ed] here [in the United States]” and that the people are the sovereigns of the country who possess the right to govern.¹³³ If the people are on equal footing, it follows that one citizen may freely sue another or one citizen may freely sue a state comprised of thousands of citizens.¹³⁴ Since it is “undeniable” that any state may sue another state,¹³⁵ it follows that a state may be sued by any one citizen if that same state could be sued by another state made up of thousands of citizens.¹³⁶

127. *Id.* (“In the last two Terms, however, the Supreme Court dispensed with this established framework.”).

128. *See infra* Part II.A.

129. *See infra* Part II.A.

130. *See infra* Part II.B.

131. Chemerinsky, *supra* note 71, at 1202; *see infra* note 161 and accompanying text (discussing conflicting origins of sovereign immunity between William Blackstone and Sir Edward Coke).

132. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793).

133. *Id.* at 471–72.

134. *See id.* at 472.

135. *Id.* at 473; U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases . . . [and] Controversies between two or more States . . .”).

136. *See Chisolm*, 2 U.S. (2 Dall.), at 473.

Yet still, a judge-made doctrine based on feudalistic principles has superseded the Constitution and Article III, in direct contravention of the Supremacy Clause.¹³⁷ Article III provides that “[t]he judicial Power *shall* extend to *all* Cases . . . [and] Controversies . . . between a State and Citizens of another State.”¹³⁸ Such words are “express, positive, [and] free from ambiguity,” leaving no other conclusion that if a controversy exists, there is jurisdiction to hear the case.¹³⁹ Alternatively, if a federal statute provides a right of action against a state, the Supremacy Clause presumably confers jurisdiction.¹⁴⁰ Not so. A common law defense reigns supreme over federal law granting citizens redress for their injuries. This adherence renders many laws toothless as “where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”¹⁴¹ Such a doctrine has rigged the judiciary to “assure that defendants win and plaintiffs lose.”¹⁴²

There is also dubious supporting evidence that the text of the Constitution grants states immunity.¹⁴³ The Constitution, except for the Eleventh Amendment, makes no mention or reference to general governmental immunity.¹⁴⁴ Even if its words granted immunity to a state government, its words allude to immunity *only* in federal, not state tribunals.¹⁴⁵ The *Alden* Court nonetheless extended the immunity to a suit against a state in its own courts.¹⁴⁶ And as already mentioned, the Amendment by its terms restricts only diversity suits against states, but *Hans* barred prosecution even when a state was sued by its own citizen.¹⁴⁷

137. *Id.*; U.S. CONST. art. VI (“The Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . .”).

138. U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

139. *Chisolm*, 2 U.S. (2 Dall.), at 476–77. There was, however, debate during the Founding on whether the provision “between a State and Citizens of another State” meant that federal courts had power to hear only cases *by* a state against a citizen rather than a case *by* a citizen *against* a state. Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1822–23 (2010).

140. See Chemerinsky, *supra* note 71, at 1211.

141. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also Chemerinsky, *supra* note 71, at 1213 (quoting the Court’s emphasis on accountability in *Marbury*); Sample, *supra* note 77, at 12.

142. FREEDMAN, *supra* note 73, at 65.

143. See Chemerinsky, *supra* note 71, at 1205.

144. *Id.*

145. *Id.*; U.S. CONST. amend. XI (“The Judicial Power of the United States . . .”) (emphasis added).

146. *Alden v. Maine*, 527 U.S. 706, 754 (1999).

147. U.S. CONST. amend XI (“[T]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States *by citizens of another State* . . .”) (emphasis added); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

Sovereign immunity and its progeny have had damaging consequences. Scholars from various ideological backgrounds agree that the doctrine has created a “disaster area.”¹⁴⁸ Not only have states been immune to suits and answering for their faults, but also state officials enjoy immunity when acting pursuant to their official duties. Professor Eric Freedman remarked that these claims have been “narrowed to the point of invisibility” to shield officials.¹⁴⁹ No matter how meritorious their claims may be, litigants forfeit damages suits involving abhorrent government conduct.¹⁵⁰ In *Edelman v. Jordan*, the Supreme Court also ruled that the Eleventh Amendment barred actions against state officials for *retroactive* monetary damages.¹⁵¹ While plaintiffs have a cause of action under 42 U.S.C. § 1983 against state officials in their *personal* capacity, remedies have been limited due to the Court’s qualified immunity jurisprudence.¹⁵² On another extreme, *private* individuals have successfully used the defense to bar suits for monetary damages based on “derivative immunity.”¹⁵³

Oftentimes, people of color and disadvantaged groups bear the brunt of wrongful acts by the state or its officials.¹⁵⁴ Law enforcement seldom executes the law fairly and equitably across racial and socioeconomic lines 100% of the time. Much of the same can be said about state employers. As seen in *Kimel v. Florida Board of Regents* and analogous cases, aggrieved plaintiffs suffering from age discrimination or the like are powerless despite an act of Congress authorizing such suits for recovery.¹⁵⁵ The “congruence and proportionality” and “pattern of discrimination” restrictions on Congress’s abrogation power have made many claims unsuccessful.¹⁵⁶ The

148. FREEDMAN, *supra* note 73, at 65.

149. *Id.*

150. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (1984).

151. 415 U.S. 651, 677 (1974). The minor exception is when a plaintiff seeks prospective injunctive relief when challenging the constitutionality of a state official’s action. See *Ex Parte Young*, 209 U.S. 123, 157–60 (1908).

152. See *Reconciling State Sovereign Immunity with the Fourteenth Amendment*, 129 HARV. L. REV. 1068, 1068 n.10 (2016); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

153. Katherine Florey, *Sovereign Immunity’s Penumbra: Common Law, “Accident,” and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 800 (2009). Private contractors hired by the government have dodged liability using this doctrine. See, e.g., *Yearsley v. W.A. Ross. Constr. Co.*, 309 U.S. 18, 20–21 (1940).

154. Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1752 (2022).

155. See generally 528 U.S. 62 (2000).

156. See, e.g., *id.* at 81–82, 87–92 (foreclosing an age discrimination action under the Age Discrimination in Employment Act).

remedial nature of Section Five of the Fourteenth Amendment demands that Congress bear the burden of showing substantial evidence documenting the violations it is trying to remedy.¹⁵⁷ This implies that many individual cases of egregious government conduct go unchecked, rendering the principle of government accountability hollow.¹⁵⁸ The overseers enjoy the license to discriminate—and that is conduct sanctioned by the judiciary based on a common law rule. This is oxymoronic because the Supreme Court building entrance reads “Equal Justice Under Law.”¹⁵⁹

If the Supreme Court chooses to abide by an ancient doctrine from England, it would be reasonable for it to similarly consider other doctrines from England. Take, for instance, the Magna Carta’s principle that “no man is above the law, not even a king.”¹⁶⁰ Why should the former control over the latter? Further, during Anglo-Saxon England, as informed by Sir Edward Coke, the King’s Court was open to plaintiffs who could seek remedial writs “against the King or against the Queen.”¹⁶¹ Therefore, even the foundation that sovereign immunity is built on is a shaky one. Drawing from the words of Justice Bradley: sovereign immunity is the “absurdity on its face.”¹⁶²

B. The Crossroad of CBDC and Sovereign Immunity

It may be difficult to imagine how sovereign immunity is possibly related to CBDC or how the two points can ever intersect. This Subpart clears the obscurity and connects the two issues, providing a hypothetical scenario on how this situation may present itself before a court. A recent case study involving the National Park Service (NPS) provides a great reference.

In March 2024, three park visitors sued the NPS for refusing to accept cash at various parks, historic sites, and monuments in Arizona, New York, and Georgia.¹⁶³ The short ten-page complaint alleges that the NPS violated 31 U.S.C. § 5013, which states that “United States coins and currency (including Federal Reserve Notes and circulating notes of Federal Reserve

157. *Kimel*, 528 U.S. at 81–82.

158. See Chemerinsky, *supra* note 71, at 1213.

159. FREEDMAN, *supra* note 73, at 65.

160. *Magna Carta: Muse and Mentor*, LIBR. CONG., <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/executive-power.html#text=ThemediaevaljuristHenryde,oneisabovethelaw> (last visited Apr. 9, 2025).

161. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 460 (1793) (rebutting William Blackstone’s contention that no suit could be brought against the King of England).

162. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

163. Lin, *supra* note 20.

Banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts.”¹⁶⁴ As the facts allege, the plaintiffs were denied entry because the locations accepted only credit or debit payment, not cash.¹⁶⁵ The plaintiffs contend that the refusal violated federal law. By not accepting cash for “public charges,” the no-cash policy contravenes Congress’s authorized regulation of currency.¹⁶⁶ The plaintiffs seek declaratory relief and attorneys’ fees and costs.¹⁶⁷

The government moved to dismiss, arguing that: (1) plaintiffs lack standing to sue under Article III because they were not personally injured by choosing not to utilize non-cash payment options; and (2) the federal law at issue does not require entities to accept payment in cash, only for taxes owed to the government or for debts owed to a creditor.¹⁶⁸

Many disputes come to mind with the introduction of a possible CBDC, but this Article introduces one akin to the NPS case to conceptualize the issue. Assume for argument’s sake that Congress passes a CBDC law authorizing its use as currency, but some state governments refuse to adopt its acceptance, such as Florida.¹⁶⁹ And assume it is settled law that the federal CBDC statute does not preempt the anti-CBDC legislation. A hypothetical student attends a state university in Florida and does not take out student loans to pay for tuition. Tuition is roughly \$10,000 a year after the student’s merit scholarship is applied. Each semester, the student is to pay the amount of tuition due per the credits enrolled, approximately \$5,000. Right before the semester is to begin, the student wants to use CBDC to pay for the tuition. The student does not have another form of payment: she does not carry cash nor does she have a credit card, debit card, or bank account. In fact, she replaced those methods of exchange for a digital wallet after hearing the news that she could apply for one as allowed by the federal government. The university responds that

164. Complaint at 5, 8–9, *Van der Werf v. Nat’l Park Serv.*, No. 24-cv-00639-TJK (D.D.C. filed Mar. 6, 2024) (citing 31 U.S.C. § 5013) [hereinafter NPS Complaint].

165. *Id.* at 7.

166. *Id.* at 8; U.S. CONST. art. I, § 8, cl. 5 (stating Congress has power “[t]o coin Money, [and] regulate the Value thereof”).

167. NPS Complaint, *supra* note 164, at 10.

168. Mot. to Dismiss at 4–8, *Van der Werf v. Nat’l Park Serv.*, No. 24-cv-00639-TJK (D.D.C. filed June 6, 2024); Defs. Reply in Supp. of Mot. to Dismiss at 5–7, *Van der Werf v. Nat’l Park Serv.*, No. 24-cv-00639-TJK (D.D.C. filed July 10, 2024). The court recently granted NPS’s motion to dismiss for lack of standing, *Van der Werf v. Nat’l Park Serv.*, No. 24-cv-00639-TJK, 2025 WL 579704, at *2–3 (D.D.C. Feb. 21, 2025), and the plaintiffs have filed an amended complaint to cure the deficiencies. *See* Amended Complaint, *Stover v. Nat’l Park Serv.*, No. 24-cv-00639-TJK (D.D.C. filed Mar. 5, 2025).

169. *DeSantis Legislation*, *supra* note 12.

CBDC is not a form of currency in the state and refuses to accept the student's digital wallet payment; the university only accepts credit card payments or checks. As a result, the student misses the deadline and is forced to pay a late fee. This university charges a \$200 late fee, plus 5% of the outstanding balance after the second month. The disgruntled student wants to assert her right to use CBDC and insists that the university accept it, but to no avail. Another month goes by and the student—who refuses to apply for a credit card or re-open a bank account—incurs another \$500 in late fees.

The student seeks the advice of an attorney. The attorney informs her that the university's decision is due to the Florida legislature passing a law banning CBDC as a form of money. With her attorney's advice, the student decides to bring suit against the state university to recover the late payments incurred, as well as future late payments. She argues that the federal law officially recognizing CBDC as currency compels the university to accept it as a form of payment. The state university responds and moves to dismiss on state sovereign immunity grounds.

Based on the current law of the land, the student is out of luck and her lawsuit is dismissed. However, her attorney decides to appeal her case with a novel argument.

III. EXTENDING THE *PENNEAST* AND *TORRES* TEST TO THE ARTICLE I COINAGE CLAUSE

There is a great chance that central bank digital currency (CBDC) becomes the future medium of exchange in the United States, as it has already made tremendous strides abroad.¹⁷⁰ As states pass their own laws prohibiting CBDC as acceptable currency, a new federalism issue materializes, should Congress authorize its use. Beyond that, as seen from the hypothetical illustrated above, private individuals may sue a state (or state entity) for rejecting CBDC where then the state will presumably plead sovereign immunity. This Article is the first to argue that Congress's power to coin and regulate money is "complete in itself" sufficient for a structural waiver of immunity. Courts should hold accordingly, continuing the trend from the *PennEast* and *Torres* cases. Doing so affirms the Court's purposivism approach based on the Constitution's structure and design. This time, however, purposivism tips the scale in favor of weakening the sovereign immunity defense.

170. Amure, *supra* note 4 (recognizing that as of June 2024, over 130 countries have explored CBDC initiatives).

First, this Part makes the argument that states have implicitly waived their sovereign immunity defense when faced against Congress's power to coin and regulate money.¹⁷¹ The Constitution's text, history, and legal precedent make this clear.¹⁷² Second, this Part considers recent scholarship criticizing the Court's test in *PennEast* and *Torres*.¹⁷³ It addresses counterarguments proposed by this scholarship and the dissenting opinion in *Torres*, ultimately concluding that extending this exception is consistent with the constitutional structure as evaluated by the Court and will not swallow up the sovereign immunity defense in its entirety.¹⁷⁴

A. States Have Waived Sovereign Immunity for Congress's Power to Coin Money: A Power "Complete in Itself"

The Supreme Court in *PennEast* and *Torres* unearthed the power of implied structural waivers to supersede state sovereign immunity.¹⁷⁵ As long as Congress's power is one that states yielded to "in the plan of the Convention" that is "complete in itself," states have surrendered their sovereign immunity defense.¹⁷⁶ This Subpart follows the Court's analysis in *Torres*—finding that there was a structural waiver for Congress's power to raise an army and navy—to suggest the same for Congress's power to coin money. The text and history of the Constitution, as well as Supreme Court and lower court precedent regarding the Coinage Clause, support the conclusion that such a structural waiver of immunity exists.

1. Constitutional Text

For one, the Constitution's text spanning several provisions confirms that the states yielded to Congress's control over currency and money. Similar to the Army and Navy clauses, the Constitution cites to the coinage power in more than a single provision.¹⁷⁷ The Framers went even further and inserted clear language divesting the states of sharing that power.

Article I provides that Congress "shall have Power . . . [t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the

171. See *infra* Part III.A.

172. See *infra* Part III.A.

173. See *infra* Part III.B.

174. See *infra* Part III.B.

175. See Bellia & Clark, *New Purposivism*, *supra* note 82, at 536–42.

176. *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 589 (2022) (discussing *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 501, 503 (2021)).

177. See *Torres*, 597 U.S. at 590.

Standard of Weights and Measures.”¹⁷⁸ This clause does not stand alone in the abstract, however. Other provisions in the Constitution affirm Congress’s command in the field of money and currency. Congress has the power to “lay and collect Taxes,” “borrow Money on the credit of the United States,” “regulate Commerce with foreign Nations, and among the several States,” and, most notably, the power to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States.”¹⁷⁹

In finding the Army and Navy Power “complete in itself,” the *Torres* Court acknowledged that the Constitution divested states of like power.¹⁸⁰ The same inures to the currency power. Article I Section 10, the so-called “Powers Denied States” provision, reads that “No State shall . . . coin Money . . . make any Thing but gold and silver Coin a Tender in Payment of Debts.”¹⁸¹ Notably, this prohibition on the states is much stricter than the limitation on the Army and Navy Power. Article I Section 10 Clause 3 gives the states certain war powers *with the consent of Congress*, but conversely, the coinage power denied to the states is completely restricted; there is no possible way for the states to coin money, even with Congress’s consent.¹⁸² This “substantial limitation” on the states coupled with the broad vesting of authority in the federal government indicates that the states are estopped from “frustrating national objectives in this field.”¹⁸³

2. History of Article I Section 8 Clause 5

History leads us to the same conclusion. Being that sovereign immunity jurisprudence is founded on ideals that predate the Constitution during the era of the British Crown, it is appropriate to begin there. In 1604, the Privy Council decided the *Case of Mixed Money*, a seminal decision on

178. U.S. CONST. art. I, § 8, cl. 5.

179. U.S. CONST. art. I, § 8, cls. 1–3, 6.

180. *Torres*, 597 U.S. at 590 (“States may not ‘engage in War, unless actually invaded,’ ‘enter into any Treaty,’ or ‘keep Troops, or Ships of War in time of Peace.’”) (quoting U.S. CONST. art. I, § 10, cls. 1, 3).

181. U.S. CONST. art. I, § 10, cl. 1 (emphasis added). I refer to Article I Section 10 as the “Powers Denied States” provision throughout this Article as it is labeled in other scholarship pieces. See, e.g., M. Henry Ishitani & Alexandra Fay, *Revising the Indian Plenary Power Doctrine*, 29 MICH. J. RACE & L. 1, 7 (2024).

182. Compare U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . keep Troops, or Ships of War . . .”), with *id.* § 10, cl. 1 (“No State shall . . . coin Money . . .”).

183. *Torres*, 597 U.S. at 590.

the currency power.¹⁸⁴ There, an Irish merchant purchased goods from a London merchant, promising to pay £200 in “sterling, current and lawful money of England.”¹⁸⁵ Before tendering payment, Queen Elizabeth ordered that “mixed money” was the new currency, and the London merchant refused to accept it.¹⁸⁶ The Privy Council ruled that the Crown had exclusive authority over the power to coin money and regulate currency, stating, “[j]us cudendae monetae ad solum principem, hoc est, imperatorem, de jure pertinent.”¹⁸⁷ Therefore, if English principles are to guide sovereign immunity as they have been (they should not), Anglo-American law provides strong evidence that Congress’s power to coin and regulate money is one that is “complete in itself.”¹⁸⁸

Much more important is the history of the Founding and the lessons it teaches. The Articles of Confederation read in pertinent part that Congress “shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states - fixing the standard of weights and measures throughout the united states.”¹⁸⁹ Notwithstanding this grant of power, the Confederate Congress did not exercise it, as it was not given a general power over commerce.¹⁹⁰ It had delegated this power to the states who issued and printed their own currency.¹⁹¹

At least ten states issued paper money throughout the seven-year period of the Articles of Confederation.¹⁹² Strikingly, Rhode Island stalled participation in the Grand Convention for “the express purpose” of retaining the power to issue their own currency.¹⁹³ This resulted in extreme

184. See Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017, 1030 (2008) (detailing how the Legal Tender Cases holding remains consistent with the Coinage Clause). As this source and others confirm, most available versions of this case are entirely in Law-French or Latin. *Id.* at 1030 n.65.

185. *Id.* (citing *Case of Mixed Money*, 80 Eng. Rep. 507, 507 (1604)).

186. *Id.* at 1030–31 (citing *Case of Mixed Money*, 80 Eng. Rep. at 507).

187. *Id.* at 1032 n.71 (translating to “[b]y law, the right of striking money extends only to the prince, that is, the emperor”).

188. See *supra* notes 184–86 and accompanying text (showing the power to coin money was exclusively the national sovereign’s prerogative).

189. ARTICLES OF CONFEDERATION OF 1777, art. IX.

190. Natelson, *supra* note 184, at 1052.

191. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 16 (1833); Natelson, *supra* note 184, at 1050.

192. Natelson, *supra* note 184, at 1051.

193. Joseph M. Cormack, *The Legal Tender Cases—A Drama of American Legal and Financial History*, 16 VA. L. REV. 132, 145 (1929); 2 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES WITH NOTICES OF ITS PRINCIPAL FRAMERS 329 (1858).

cases of inflation, depreciation, and even fraud.¹⁹⁴ Indeed, one of the main reasons that Congress was given this power was to prevent “the frauds and injustice perpetrated by the States in their issues of paper money.”¹⁹⁵ This would explain why Rhode Island proposed an amendment to clarify “eliminat[ing] *any suit* by any person against a state in federal court.”¹⁹⁶ In addition, states passed discriminatory laws against one another to block the payment of debts, and many individuals feared interstate trade wars.¹⁹⁷ This paved the way for the “plan of the Convention” where powers were divided between the governments and where states, like Rhode Island, whose proposed amendment did not make it in the Constitution, surrendered and yielded their sovereign rights to issue currency to the federal government.¹⁹⁸

James Madison adamantly believed that the power to coin and regulate money should reside with the federal government. In his view, foreign nations would not respect a league of states each with their own system of currency.¹⁹⁹ Some went further and suggested that having 13 types of currencies at the time would be “embarrassing.”²⁰⁰ Others, such as James Wilson of Pennsylvania, warned of the “impropriety of admitting the interference of state governments” in regulating currency and commerce.²⁰¹ Certain powers must vest in the federal government, detached from the influence and historical injustice committed by state governments. That is why James Wilson advocated for members of Congress to be elected by electors chosen by the people, not by state legislatures.²⁰²

While the Convention records were not clear on whether the delegates approved of the federal government’s power to issue *paper* money,²⁰³ one thing was clear: the “one who strikes money also has the power to set its value.”²⁰⁴ The power to “coin Money, [and] regulate the Value thereof” is

194. See Natelson, *supra* note 184, at 1050–51.

195. CURTIS, *supra* note 193, at 329.

196. Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 495 (2001) (emphasis added).

197. See Natelson, *supra* note 184, at 1051.

198. *Id.* (“Such struggles between states later became fodder for the ratification debates.”); see also *infra* text accompanying note 220.

199. See Natelson, *supra* note 184 at 1052 n.224 (citing 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341 (Max Farrand ed., 1911) [hereinafter FARRAND, RECORDS OF THE CONVENTION VOLUME 1]).

200. Natelson, *supra* note 184, at 1074 (discussing the words of Federalist David Ramsay).

201. FARRAND, RECORDS OF THE CONVENTION VOLUME 1, *supra* note 199, at 318.

202. See *id.*

203. See Natelson, *supra* note 184, at 1053–60.

204. *Id.* at 1060.

also not restricted to metallic coins as we understand the word *coin*.²⁰⁵ Professor Robert G. Natelson posits that coin in the Coinage Clause includes currency “made of substances other than gold and silver,” as evidenced by the original meaning of the word at the time of the Founding.²⁰⁶ Consistent with the history of the Coinage Clause, coin should be interpreted broadly, covering the issuance and regulation of CBDC. That issuance cannot be thwarted by the actions of state governments, even those involving private individuals. The history of the constitutional design after the states’ actions during the period of the Articles of Confederation corroborates the idea that states forfeited sovereign rights so that certain federal policy is efficiently carried out without interference.

3. Precedent

Torres concluded that “[a]n unbroken line of precedents” proves that Congress’s Army and Navy Power is one “complete in itself.”²⁰⁷ In so holding, the Court found a structural waiver of sovereign immunity.²⁰⁸ A review of Supreme Court and lower court precedent confirms the same regarding the Coinage Clause.

The story begins with the *Legal Tender Cases*, a collection of seminal decisions from the 19th century upholding Congress’s power to issue currency under Article I.²⁰⁹ In these cases, disputes arose over the conversion of sheep and the sale of land, and what form of currency would be used to settle them.²¹⁰ During this time, Congress passed a law authorizing the issuance of government notes or *greenbacks*—the first paper currency in the United States—for the payment of debts.²¹¹ The issue presented in both cases was: (1) whether the paper currency authorized for use by the act of Congress could be accepted to pay debts and (2) whether

205. *See id.* at 1061–67.

206. *Id.* at 1063–66. For support, Professor Natelson considers the words of Chief Justice John Marshall who stated that the absence of modifiers, such as the words “gold” and “silver,” suggests a wider meaning of the word coin. *Id.* at 1066 (discussing *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 387–88 (1819)).

207. *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 592–94 (2022) (citing cases since the 19th century).

208. *Id.* at 594.

209. *See Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870). As mentioned in his article, Professor Natelson refers to these cases as a combination of eight decisions decided in the 1800s. Natelson, *supra* note 184, at 1019 n.3. However, the real *Legal Tender Cases* is a decision composed of two cases, *Knox v. Lee* and *Parker v. Davis*.

210. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 457–58, 462.

211. *Id.* at 458.

the act itself was a constitutional exercise of Congress's power "[t]o coin Money, [and] regulate the Value thereof."²¹²

The Supreme Court answered in the affirmative to both questions. Rather than holding the new congressional statute constitutional solely under the Coinage Clause, however, the Court gave weight to Congress's authority under the Necessary and Proper Clause.²¹³ Authorizing the use of paper currency was indeed necessary at the time, as the Civil War ruined the economy.²¹⁴ The public treasury was drained, the army was unpaid, and the "entire amount of coin in the country, including that in private hands, as well as that in banking institutions, was insufficient to supply the need of the government."²¹⁵ In so noting, the Court ruled that the legal tender provision accepting treasury notes as currency was not "an inappropriate means for carrying into execution the legitimate powers of the government" nor was it "forbidden by the letter or spirit of the Constitution."²¹⁶

In more ways than simply affirming Congress's power to strike currency, the *Legal Tender Cases* prove significant. The opinion alludes to several textual and historical underpinnings of Congress's power to regulate currency that is wholly applicable to finding such power "complete in itself" sufficient for a structural waiver of state sovereign immunity.²¹⁷ Additionally, the opinion eliminates any doubt as to whether the Coinage Clause extends to forms of currency other than metallic coins.²¹⁸ This provides ample support that the clause similarly authorizes Congress to issue and regulate CBDC.

The Court recognized the withdrawal of this power from the states based on the text of the Constitution: "They gave to Congress express powers on the subject of money. They laid Congress under no express restrictions on the subject of money. *The only restrictions which they imposed in this matter were upon the States.*"²¹⁹ Indeed, the Framers were aware of how states made their own notes legal tender which came "with

212. *Id.* at 462–63.

213. *Id.* at 521–22, 533–34. The Necessary and Proper Clause states that Congress may enact legislation "which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States" U.S. CONST. art. I, § 8, cl. 18.

214. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 540.

215. *Id.*

216. *Id.* at 544.

217. *Id.* at 540–545.

218. *Id.* at 544.

219. *Id.* at 518 (emphasis added). This portion of the opinion refers to the Powers Denied States provision. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; [or] make any Thing but gold and silver Coin a Tender in Payment of Debts . . .").

results that disgusted the people.”²²⁰ Holding that the issuance of paper money is consistent with “the letter or the spirit of the Constitution,”²²¹ the Court—in perhaps the most important part of the opinion for purposes of structural waivers—explained:

It was for this reason the power to coin money and regulate its value was conferred upon the Federal government, while the same power as well as the power to emit bills of credit *was withdrawn from the States*. The States can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. *If the power to declare what is money is not in Congress, it is annihilated. . . .* [I]t might be argued, we say, that the gift of power to coin money and regulate the value thereof, was understood as conveying general power over the currency, *the power which had belonged to the States, and which they surrendered*.²²²

Breaking down this quoted material, it is analogous to the Court’s reasoning in *Torres*. The Court noted that the power to raise an army and navy was specifically withdrawn from the states in Article I Section 10.²²³ Further, the *Torres* Court insisted that the states could not qualify or limit this power because doing so would annihilate the power to wage war successfully.²²⁴ And both *PennEast* and *Torres* teach that states surrendered certain powers to the federal government and thereby forfeited their immunity.²²⁵ In fact, there may be even a better argument for structural waivers under the currency power than under the army and navy powers because “[i]nsurrection could not be suppressed, armies could not be raised and supported, and a navy could not be provided and maintained, without a currency.”²²⁶

220. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 497.

221. *Id.* at 552.

222. *Id.* at 545–46 (emphasis added).

223. *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 590 (2022). Relatedly, this withdrawal of state authority to coin money was noted by the *Chisolm* court. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 468 (1793).

224. *Torres*, 597 U.S. at 594.

225. *Compare PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 488 (2021) (“Although nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution.”), *with Torres*, 597 U.S. at 584 (“Upon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military.”).

226. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 523–24.

The final important takeaway from the *Legal Tender Cases* is the contours of the Coinage Clause in what type of currency can be regulated. As suggested by Professor Natelson, the Court in these cases refused to narrow Congress's currency power to the mere issuance and regulation of metallic coins.²²⁷ Here, the Court stated that "[t]he Constitution nowhere declares that nothing shall be money unless made of metal."²²⁸ Rather, the Coinage Clause ought to be interpreted not as a limiting principle, but rather of an "enlarging" character to incorporate more than just metallic coins.²²⁹ This provides strong support that Congress can validly pass a law under the Coinage Clause authorizing the use of CBDC in the United States. Any objection overlooks the idea that "[i]t is not given to man, when framing a constitution, to foresee all the cases to which the conferred powers will properly extend."²³⁰

Decisions following the *Legal Tender Cases* have endorsed many of these principles. One of the first being *Juilliard v. Greenman*, which upheld Congress's power to issue paper currency during times of peace, not just war, as it was in the original two *Legal Tender Cases*.²³¹ Paper currency could now be used for all public and private debts, whether retrospective or prospective.²³² And unlike the original *Legal Tender Cases*, the *Juilliard* Court more definitively relied on Congress's enumerated currency power, among others, to find that the issuance of paper money is constitutional.²³³

The same is true in the lower courts. For example, the Eighth Circuit Court of Appeals relied on the Coinage Clause to affirm a defendant's conviction for altering currency with intent to defraud under 18 U.S.C. § 472.²³⁴ Indeed, it stated that Congress's power to criminalize counterfeit and altered U.S. currency is part of its broader currency power "to protect and to preserve in its purity this constitutional currency for the benefit of the nation."²³⁵ The Second Circuit Court of Appeals recognized Congress's power to delegate this authority and how Congress has delegated this broad power to the Federal Reserve to help with the nation's monetary policy.²³⁶ Bringing it back full circle, a Ninth Circuit Court of Appeals decision

227. See *supra* Part III.A.2.

228. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 520.

229. *Id.* at 545.

230. *Id.* at 527.

231. 110 U.S. 421, 450 (1884).

232. *Id.* at 449–50; see also Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3, 22 (2019).

233. *Juilliard*, 110 U.S. at 439–40, 447.

234. *United States v. Gayekpar*, 211 F. App'x 533, 534 (8th Cir. 2007) (per curiam).

235. *Id.* (quoting *United States v. Marigold*, 50 U.S. (9 How.) 560, 568 (1850)).

236. *United States v. Wells Fargo & Co.*, 943 F.3d 588, 603 (2d Cir. 2019).

reiterated that “[t]he states *cannot declare what shall be money, or regulate its value*. Whatever power there is over the currency is *vested in the Congress*.”²³⁷

B. Counterarguments to Extending Structural Implied Waivers

The debate over the Eleventh Amendment and state sovereign immunity has been ongoing for over 200 years since the Founding.²³⁸ With that being true, it would be naïve to suggest that proponents of retaining sovereign immunity present meritless arguments. Rather, this Article seeks to challenge the premise of state sovereign immunity being grounded in English common law. As previously discussed, it is peculiar that we still adhere to a doctrine so rooted in English monarchism—an ideology that forced us into a seven-year war with Great Britain and one that is repugnant to the foundation of the United States and the Constitution.²³⁹ This Article further highlights this error and defends its ultimate proposal of expanding structural waivers of immunity.

Scholars and the Court since *Hans* contend that state sovereign immunity is supported by purposivist ideals.²⁴⁰ The text of the Eleventh Amendment is not the sole authority backing state sovereign immunity. The argument goes; it is the underlying purpose behind the Amendment that justifies immunizing states from citizen suits.²⁴¹ That is, the so-called “nature of the Union” during the Framers’ constitutional drafting presumed the legitimacy of state sovereign immunity.²⁴² If anything, the Eleventh Amendment merely closed the Article III state-citizen diversity provision loophole that arguably authorized such suits, which was blessed by the *Chisolm* Court.²⁴³ Now, the same adherents to this purposivist approach admonish the *PennEast* and *Torres* Court for embracing purposivist principles to expand structural waivers of immunity.²⁴⁴ This time, however, the Court—referencing the “plan of the Convention”—has used purposivist

237. *Laycock v. Kenney*, 270 F.2d 580, 590 (9th Cir. 1959) (emphasis added).

238. See Bellia & Clark, *New Purposivism*, *supra* note 82, at 485; Pfander, *supra* note 87, at 1271.

239. See *supra* Part III.A.2.

240. E.g., Clark, *supra* note 139, at 1826–30 (discussing adherence to the theory that sovereign immunity is regarded not as a principle merely supported by the text of the Eleventh Amendment but rather supported by the underlying purpose of the constitutional structure).

241. Sample, *supra* note 77, at 4 (“Purposivists attempt to determine what purpose the drafter(s) of the relevant legal text sought to accomplish.”).

242. Clark, *supra* note 139, at 1837.

243. *Id.* at 1838.

244. See generally Bellia & Clark, *New Purposivism*, *supra* note 82 (criticizing the Court’s new purposivism analysis).

interpretation to retract rather than to expand state sovereign immunity.²⁴⁵ This was the right call.

This Subpart begins by briefly refuting general principles surrounding state sovereign immunity.²⁴⁶ Then, this Subpart will keenly focus on recent scholarship and the *Torres* dissent that criticize the Court's *PennEast* and *Torres* framework.²⁴⁷ Here, this Article addresses the arguments undermining the expansion of implied structural waivers and subsequently attempts to rebut them.²⁴⁸

1. Sovereign Immunity as Good Law

This Article has already mentioned general counterarguments to state sovereign immunity,²⁴⁹ so for the sake of brevity this segment will give a high-level overview of these arguments and others favoring the absurdity doctrine. One serious gripe with sovereign immunity is that it has roots in the British Crown.²⁵⁰ Scholars though, have suggested that this conceptualization (or idea) of sovereign immunity is “seriously skewed” and that the United States derived it independently, as other countries like Italy and Japan did.²⁵¹ This argument is contrary to *Chisolm*'s detailed analysis, a decision from the Court authored less than ten years after the Founding. There, the Court made clear that state sovereignty is “derived from a feudal source” where there was no superior power over the king and it “exclude[s] all others from jurisdiction over him.”²⁵² In addition, as Justice Souter wrote in *Seminole Tribe*, “[t]here is and could be no dispute that the doctrine of sovereign immunity . . . ‘derived from the laws and practices of our English ancestors’”²⁵³

Being that we adopted common law principles from England in other respects, some would say that it makes sense to embrace sovereign immunity as a common law doctrine with roots in England. But again, there is no good reason to hold as gospel a principle that is the antithesis of our

245. *Id.* at 536–42 (explaining that *PennEast* and *Torres* expanded structural waivers, which has limited the sovereign immunity defense).

246. *See infra* Part III.B.1.

247. *See infra* Part III.B.2.

248. *See infra* Part III.B.2.

249. *See supra* Part II.A.

250. *See supra* Part II.A.

251. *E.g.*, Hill, *supra* note 196, at 489 (stating that “[t]here is probably not a country in the world that permits itself to be sued except on terms satisfactory to it”).

252. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 457–58 (1793) (discussing William Blackstone and the English feudal system's influence over state sovereignty).

253. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 130 (1996) (Souter, J., dissenting) (quoting *United States v. Lee*, 106 U.S. 196, 205 (1882)).

republican system of government. This adherence also makes little sense given that following the American Revolution the “intelligent as well as unintelligent laymen” felt “prejudice against the system of English Common Law”²⁵⁴ The Constitution was specifically drafted to abrogate many features of English common law.²⁵⁵

Justice Thomas would have us believe that it would be “difficult to conceive that the Constitution would have been adopted” had the states been stripped of their immunity from suit.²⁵⁶ Presumably, one would think then that if English common law—specifically the sovereign immunity doctrine—was so obviously legitimate, the Framers would have written it into the Constitution. Ironically, there is mention of the common law habeas corpus doctrine, but nothing on immunizing governments from suit.²⁵⁷ In fact, James Madison went so far as to say to George Washington that the “[c]ommon law is not secured by the new Constitution” and “is nothing more than the unwritten law” that is subject to legislative preemption.²⁵⁸

Another argument is that sovereign immunity is not a common law doctrine and carries “none of the significant incidents of [it].”²⁵⁹ The underlying theory is that if a sovereign cannot be sued without its consent, the consent must be *of the sovereign*, requiring a waiver enumerated in legislation rather than offered by judicial interpretation.²⁶⁰ Proponents of this argument suggest that if sovereign immunity is truly a product of the common law, then the judiciary can consent for the sovereign in essentially *all cases*.²⁶¹

To be clear, state sovereign immunity is “such a common law rule” and deserves that label.²⁶² If anything less, it is a common law rule that has a

254. *Id.* at 135 (Souter, J., dissenting); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 224–25 (1911); *see also* FREEDMAN, *supra* note 73, at 83–85.

255. *See, e.g.*, Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 41–44 (1992) (discussing how the Impeachment Clause of the Constitution overruled the English common law practice of simultaneous removal of public officials and the imposition of criminal punishment).

256. *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 601 (2022) (quoting *Alden v. Maine*, 527 U.S. 706, 743 (1999)).

257. *See Seminole Tribe*, 517 U.S. at 137–38 (Souter, J., dissenting) (citing U.S. CONST. art. I, § 9, cl. 2).

258. 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 205 (Max Farrand ed., 1911) [hereinafter FARRAND, RECORDS OF THE CONVENTION VOLUME 3].

259. Hill, *supra* note 196, at 523.

260. *See id.* at 524.

261. *Id.*

262. William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 8 (2017).

“backdrop” in constitutional law since Congress cannot abrogate state sovereign immunity without regard to certain constitutional limitations.²⁶³ *Alden* recognized that sovereign immunity derives from the common law tradition that exists in a broader constitutional design.²⁶⁴ If nothing more, it can be regarded as federal common law that is not subject to alteration by a state legislature or state courts.²⁶⁵ Under this approach, the judiciary could waive a sovereign’s immunity—which it has done in *Katz*, *PennEast*, and *Torres*—but can only do so in federal court, which is consistent with the textual restriction of the Eleventh Amendment regarding the “[j]udicial power of the United States”²⁶⁶ As Dean Chemerinsky and others contend, sovereign immunity is a core common law rule that predated the Constitution and was borrowed from the British Crown.²⁶⁷ Being a common law principle, it is wrong for sovereign immunity to “reign supreme over the Constitution and federal law” in direct violation of the Supremacy Clause.²⁶⁸

2. Returning New Purposivism to Old Purposivism

Hans and subsequent decisions were guided by purposivism principles in that they construed the Eleventh Amendment based on the spirit and underlying purpose of the Constitution rather than the plain text of the law.²⁶⁹ Constitutional law scholars have praised and accepted the original meaning and design of the Constitution at the time of the Founding.²⁷⁰ These same scholars denounce the *PennEast* and *Torres* decisions as employing “novel” purposivism that misinterprets the Constitution and its design, and places no limit on the stretch of structural waivers reaching beyond the Army and Navy Clauses.²⁷¹ Justice Thomas and the dissent in *Torres* speak on some of these points and similarly criticize the expansion of structural waivers of immunity.²⁷² While many of these are strong arguments on subject matter that has been controversial for over 200 years,

263. *Id.* at 8, 13; Sample, *supra* note 77, at 24.

264. *Alden v. Maine*, 527 U.S. 706, 733 (1999).

265. Baude, *supra* note 262, at 28 n.155 (citing Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 SUP. CT. REV. 249, 266 n.59).

266. U.S. CONST. amend. XI.

267. Chemerinsky, *supra* note 71, at 1202; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and States Sovereign Immunity*, 98 YALE L.J. 1, 80 (1988).

268. Chemerinsky, *supra* note 71, at 1211.

269. See Sample, *supra* note 77, at 10.

270. See Bellia & Clark, *New Purposivism*, *supra* note 82, at 529–30.

271. *Id.* at 493, 542.

272. *Torres v. Dep’t of Pub. Safety*, 597 U.S. 580, 601–28 (2022) (Thomas, J., dissenting).

this Article attempts to undermine them to expand acceptance of structural waivers.

3. The Law of Nations

Professors Anthony J. Bellia, Jr. and Bradford R. Clark, two prominent constitutional law scholars, insist that the *Law of Nations*, an authority on the affairs of sovereigns predating the Constitution, governs the background constitutional interpretive rules since immunity adjusts the rights and powers between sovereigns.²⁷³ It teaches that sovereign states enjoy a right not to be commandeered by another sovereign, and accordingly, that the “plan of the Convention” did not give Congress the authority to requisition the states directly.²⁷⁴ Under the *Law of Nations*, a legal instrument could not alienate these sovereign rights, such as immunity rights, unless the instrument did so “clearly and expressly or by unavoidable implication.”²⁷⁵ To alienate a sovereign right by “unavoidable implication,” according to Professors Bellia and Clark, the instrument “must grant ‘an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.’”²⁷⁶ Applying these rules, Professors Bellia and Clark contend that *PennEast* and *Torres* were wrongly decided because the Constitution did not give Congress the ability to commandeer the states—whose sovereign rights were not alienated expressly or by implication—and thereby could not subject the states to suits by private individuals based on a supposed Article I power that is “complete in itself.”²⁷⁷

First, we assume that the *Law of Nations* guides the analysis as suggested by Professors Bellia and Clark. According to the *Law of Nations*, a sovereign retains the right not to be commandeered by another.²⁷⁸ To requisition is to threaten war between sovereigns.²⁷⁹ On the one hand, this “concern” of war is unconvincing because the Civil War occurred *without*

273. *Id.* at 494–95; Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 523–24 (2022) [hereinafter Bellia & Clark, *The Constitutional Law of Interpretation*].

274. Bellia & Clark, *New Purposivism*, *supra* note 82, at 564–65.

275. *Id.* at 494; Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 273, at 530.

276. Bellia & Clark, *New Purposivism*, *supra* note 82, at 494 n.31 (emphasis in original) (quoting THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

277. Bellia & Clark, *New Purposivism*, *supra* note 82, at 544–45.

278. *Id.* at 505, 564.

279. *Id.* at 509–10, 513.

Congress requisitioning the states.²⁸⁰ Indeed, Congress's *inability* to requisition the states ultimately led to the rise and power of the Confederacy.²⁸¹ It was only until after this oversight that the Reconstruction Amendments were passed, which finally allowed congressional supervision by appropriate legislation.²⁸² On the other hand, the people in the states represent and act as the sovereign state.²⁸³ Professors Bellia and Clark concede this point, but contend that regardless of whether "the States" or "the People" of the states adopted the Constitution, the *Law of Nations* governs the final ratified document that affected sovereign rights.²⁸⁴ But it seems unpersuasive that the mere strokes of a pen renders this distinction insignificant. While the anti-commandeering principle and the Tenth Amendment remain foundational law, "the framers of the [C]onstitution did not intend that the exercise of all the powers of the national government should depend upon the discretion of the [s]tate governments."²⁸⁵ It was in fact in *McCulloch v. Maryland* where the Supreme Court held that the federal government could at least requisition the states from not taxing its entities.²⁸⁶ The "unavoidable consequence" is that the Supremacy Clause of the Constitution renders state action invalid if it conflicts with applicable federal law.²⁸⁷

Even assuming that Congress has absolutely no power to requisition the states, structural waivers do not implicate any coercion. The Court recognized that the states entered the Union with their sovereignty and immunity rights "intact."²⁸⁸ But there is no coercive alienation of these

280. While it is known that the Kansas-Nebraska Act was a cause of the Civil War, it did not force or commandeer the southern states to refrain from expanding slavery in the new territories. *The Kansas-Nebraska Act*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Kansas_Nebraska_Act.htm (last visited Mar. 30, 2025). It merely allowed the states to decide themselves whether or not to allow slavery. *Id.*

281. See G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 477–78 (2011) (discussing how Congress was precluded from abolishing slavery and the matter was left to the states).

282. See Bellia & Clark, *New Purposivism*, *supra* note 82, at 521–22; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) ("The legislation considered in each case was grounded on the expansion of Congress' powers with the corresponding diminution of state sovereignty found to be intended by the Framers and made part of the Constitution upon the States' ratification of th[e] [Reconstruction] Amendments . . .").

283. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 470–71 (1793).

284. Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 272, at 547.

285. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 362 (1819).

286. *Id.* at 432–36.

287. *Id.* at 436; U.S. CONST. art. VI; see, e.g., *supra* Part III.A. (using the Coinage Clause as an example of federal preemption over state action).

288. *Torres v. Dep't of Pub. Safety*, 597 U.S. 580, 587 (2022) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

rights when states consent to suit.²⁸⁹ That is especially true if the states consented to certain actions “at the [F]ounding.”²⁹⁰

Moreover, the Constitution, under either the “clear[] and express[]” or “unavoidable implication” tests, alienates the states’ sovereign immunity regarding the Coinage Clause.²⁹¹ Professors Bellia and Clark stress that nothing in the text of Article I imposes clear and express prohibitions on the states.²⁹² And, unlike Article I, the Reconstruction Amendments facially impose such limits.²⁹³ Yet, Article I Section 10 “clearly and expressly” prohibits the states from coining money.²⁹⁴ The same *limiting terms* found in the Reconstruction Amendments appear in the Powers Denied States provision.²⁹⁵ It is immaterial that this limiting language in the Reconstruction Amendments has only been relevant to Congress’s enforcement power because, as the Court in *Torres* stated, “congressional abrogation is not the only means of subjecting States to suit. . . . States can also be sued if they have consented to suit in the plan of the Convention.”²⁹⁶ Professors Bellia and Clark do not address Article I Section 10 and how it divests state authority other than that it says nothing about impacting sovereign immunity.²⁹⁷ But, as the *Torres* Court detailed, this divestiture is “strong evidence” that the constitutional structure prevents states from undermining federal objectives.²⁹⁸ Relatedly, Section 5 of the Fourteenth Amendment says nothing about abrogating sovereign immunity either.²⁹⁹ Nonetheless, *Fitzpatrick* and *Seminole Tribe* interpreted it to alienate sovereign rights because its text placed express prohibitions on the states due to their rebellious actions during the Antebellum Era.³⁰⁰ This is similar to Article I Section 10’s express prohibition in response to the states’ actions with currency during the Articles of Confederation period.³⁰¹ Pre-

289. *See id.*

290. *Id.* (quoting *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 509 (2021)).

291. *See infra* notes 294–316 and accompanying text.

292. Bellia & Clark, *New Purposivism*, *supra* note 82, at 548.

293. *Id.*

294. *See supra* Parts III.A.1., III.B.3. (discussing the Coinage Clause and *The Law of Nations*); U.S. CONST. art. I, § 10, cl. 1.

295. Compare U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law . . .”), with *id.* art. I, § 10, cl. 1 (“No State shall . . . coin Money . . .”) (emphasis added).

296. *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 595 (2022) (quoting *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 502 (2021)).

297. Bellia & Clark, *New Purposivism*, *supra* note 82, at 561.

298. *Torres*, 597 U.S. at 590.

299. *See* U.S. CONST. amend. XIV, § 5.

300. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 455–56 (1976); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996).

301. *See* U.S. CONST. art. I, § 10, cl. 1.

Founding, because different state currencies led to massive inflation, fraud, and trade difficulties, the states implicitly consented to Congress's exclusive coinage authority "in the plan of the Convention," subjecting them to suit for thwarting this policy.³⁰²

What transpired during the Civil War helps conceptualize this point. During that time, the Union was powerless to stop the Confederacy from issuing their own currency. The Confederate currency was "poorly regulated," led to high inflation, forgery, and "[in]consistency in payment methods."³⁰³ The southern states' attempt to raise money for the war backfired on many Southerners. When the war ended, the currency was worthless and many Southerners lost a good deal of money after their states ran the printing presses.³⁰⁴ Should the states act in contravention of this prohibition as they did during the Civil War but Congress cannot commandeer them in this fashion, this issue "c[ould] not be corrected without a suit against the State."³⁰⁵

There has also been an alienation of immunity by "unavoidable implication" because the power to strike and regulate currency inheres to the Union, and that same authority given to the states would be "totally contradictory and repugnant."³⁰⁶ Congress commands the field of currency enumerated in not just one, but several provisions of Article I.³⁰⁷ One even calls for Congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States"³⁰⁸ The states, on the other hand, are prohibited from coining money under the Powers Denied States provision.³⁰⁹ It would be contradictory having different forms of currency or to say that a state could coin money without Congress being able to exercise its other Article I power in punishing counterfeit or duplicate currency. This would not be "a mere possibility of inconvenience in the exercise of powers,"³¹⁰ but rather an "insecure basis to trade" that will "defeat, yet very much retard and confuse the collection of Federal

302. See *supra* Part III.A.2.

303. *Cornerstone Contributions: Paying for Rebellion: Confederate Currency in the Lee Cornerstone Box*, DEP'T OF HISTORIC RES. (Jan. 31, 2022), <https://www.dhr.virginia.gov/blog-posts/cornerstone-contributions-paying-for-rebellion-confederate-currency-in-the-lee-cornerstone-box>.

304. See *id.*

305. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 422 (1793) (discussing the currency power).

306. THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis removed); Bellia & Clark, *New Purposivism*, *supra* note 82, at 571.

307. U.S. CONST. art. I, § 8, cls. 1–3, 5–6.

308. *Id.* art. I, § 8, cl. 6.

309. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . coin Money . . .").

310. Bellia & Clark, *New Purposivism*, *supra* note 82, at 571 (quoting THE FEDERALIST NO. 32, at 202 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

Revenues” and allow the “injustice perpetrated by the States [to occur]”³¹¹ Drawing from the words of Chief Justice John Marshall who remarked on *The Federalist No. 32*:

[F]ixing the value of any species of coin, necessarily disposes of the whole power as to that species. They are both instances in which, when Congress has acted at all, *there immediately arises that entire and absolute repugnancy*, and that utter incompatibility, which exclude the States from all power over the subject.³¹²

On another point made by Professors Bellia and Clark, there is no erroneous conflation between “merely” giving Congress power to coin money and alienating the states’ sovereignty rights, such as immunity from suit.³¹³ Had that been true, there would be no reason to specifically prohibit the states from coining money in another provision. Assuming that the federal government could not commandeer state governments at all, then there would be no other way to enforce vesting coinage power in Congress and divesting it from the states than to alienate sovereign immunity and allow private suits against noncompliant sovereigns.

Second, the *Law of Nations* should not be the ultimate framework that shapes constitutional interpretation and determines the outcome of sovereignty issues. Professors David M. Golove and Daniel J. Hulsebosch noted that Professors Bellia and Clark agree that “the Constitution, as originally ratified, *did not adopt any part of the law of nations* as the national law of the United States, and *therefore the Constitution did not charge judges, or indeed permit them, to apply it as such.*”³¹⁴ Having the *Law of Nations* dictate outcomes violates the *Marbury* principle: “It is emphatically the province and duty of the judicial department to say what the law is.”³¹⁵ Instead of the Court interpreting the Constitution the way it decides to, the *Law of Nations* ought to command the Court to determine

311. CURTIS, *supra* note 193, at 310, 329; FARRAND, RECORDS OF THE CONVENTION VOLUME 3, *supra* note 258, at 192.

312. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 40 (1824) (emphasis added). Here, Chief Justice Marshall speaks to concurrent powers of the federal and state governments, and insisted that a power that is granted in exclusive terms to Congress and that same power is prohibited in express terms to the states fits the test of “contradictory and repugnant.” *Id.* at 37–39.

313. See Bellia & Clark, *New Purposivism*, *supra* note 82, at 555.

314. David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593, 1601 (2018) (discussing ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* (2017)) (emphasis added).

315. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

the contours of sovereign rights. To be sure, the *Law of Nations* can be persuasive authority to help the Court interpret the Constitution, as a canon of construction, but it should not strip the judiciary of its authority to say what the law ultimately means.

Additionally, Professors Bellia and Clark seem to acquiesce in the *Katz* decision that recognized an implied waiver based on the “plan of the Convention,” so it is peculiar to critique the *PennEast* and *Torres* decisions that rested on the same reasoning.³¹⁶ If nothing in the words of the Bankruptcy Clause “clearly and expressly” alienated sovereign rights and there was marginal support in the *Katz* decision evincing “unavoidable implication” that immunity was waived, the *Law of Nations* should not control the analysis.³¹⁷

4. The Torres Dissent

To conclude this Part, this Article addresses Justice Thomas’s dissenting opinion in *Torres*, which Professors Bellia and Clark also find persuasive. First, it is said that this new structural waiver test “includes no clear limits” and that all of Congress’s Article I powers fit this test forcing the exception to swallow the entirety of the sovereign immunity defense.³¹⁸ Indeed, Justice Thomas wrote that the “complete in itself” test has roots in the landmark *Gibbons v. Ogden* case, where Chief Justice Marshall concluded that *every* power vested in Congress is “complete in itself.”³¹⁹ However, Chief Justice Marshall also recognized that the commerce power is a concurrent power as it is not expressly prohibited from the states.³²⁰ The Powers Denied States provision makes no reference to restricting the states’ ability to regulate commerce.³²¹ While the Court has longstanding precedent characterizing Congress’s commerce authority as “plenary,”³²² this has not prevented the states from regulating interstate commerce when such regulations do not either unduly burden nor discriminate against interstate commerce. The Supreme Court’s jurisprudence on the Dormant

316. See Bellia & Clark, *New Purposivism*, *supra* note 82, at 535–36 (noting that the Court “embarked on a dramatic change of course” beginning with *PennEast*, but not *Katz*).

317. See *id.* at 535–36 (discussing *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 376 (2006)).

318. Bellia & Clark, *New Purposivism*, *supra* note 82, at 540, 560, 575–76; *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 624–25 (2022) (Thomas, J., dissenting).

319. *Torres*, 597 U.S. at 624–25 (Thomas, J., dissenting); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

320. *Gibbons*, 22 U.S. (9 Wheat.) at 18–19, 60–61.

321. See U.S. CONST. art. I, § 10, cl. 1.

322. *Torres*, 597 U.S. at 626 (Thomas, J., dissenting) (citing *Armour & Co. v. Virginia*, 246 U.S. 1, 6 (1918)).

Commerce Clause has confirmed that much.³²³ Despite Chief Justice Marshall's words in *Gibbons*, since the states may regulate interstate commerce in some instances, this "feature . . . arguably makes the federal regulatory power less than 'complete.'"³²⁴ The interstate commerce power, among others, is not expressly denied to the states nor essential to the Union as contemplated in the "plan of the Convention."³²⁵ Although more can be said, it is clear that *PennEast* and *Torres* cannot necessarily extend to every Article I power.³²⁶

Justice Thomas also writes that *Alden* foreclosed the Court's holding in *Torres*.³²⁷ Justice Thomas stated that *Alden*'s holding was broad in that it held that Article I powers were insufficient for Congress to subject "nonconsenting States" to private suits.³²⁸ While that is the case, Article I powers are sufficient involving cases of *consenting* states, explicitly or implicitly in the "plan of the Convention."³²⁹ *Alden* was not presented with the question of whether the states could implicitly consent when addressing certain complete Article I powers. And, in fact, *Alden* involved the Fair Labor Standards Act (FLSA), a federal statute passed pursuant to the commerce power, a power that is "less than complete."³³⁰ Thus, *Alden* is inapposite.

Then, Justice Thomas takes issue with the test itself for a "plan of the Convention" waiver, arguing that there is no "compelling evidence" suggesting implied consent in the structure of the constitutional design.³³¹ He begins with undermining the idea that a plenary Article I power is insufficient to find a structural waiver.³³² To lend support for his argument, Justice Thomas argues that the majority's reasoning is inconsistent with

323. See, e.g., *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)) ("[A]bsent discrimination, 'a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to' the interests of its citizens.").

324. *Torres*, 597 U.S. at 596.

325. See *id.*

326. See *supra* text accompanying notes 319–25 (explaining structural waivers cannot be extended to the Article I commerce power).

327. *Torres*, 597 U.S. at 607 (Thomas, J., dissenting).

328. *Id.* at 608 (citing *Alden v. Maine*, 527 U.S. 706, 712 (1999)).

329. See, e.g., *Torres*, 597 U.S. at 596–97 (majority opinion) (explaining *Alden* does not apply where states consent to suit, such as through structural implied waivers).

330. *Id.* at 596 (internal quotations omitted). Justice Thomas conceded that the *Alden* Court did not even mention which Article I power authorized the FLSA and passively brushed this off stating that "[i]t did not matter," which is unpersuasive. *Id.* at 608 (Thomas, J., dissenting). It does matter. Since *Katz*, the specific Article I power at issue was wholly relevant to whether a structural waiver of immunity was appropriate.

331. *Id.* at 610.

332. *Id.* at 611.

Seminole Tribe, which concluded that although Congress had plenary and exclusive authority with respect to Indian Tribes and the Constitution divested states of like power, that was insufficient to abrogate sovereign immunity.³³³ Three points here: (1) there is no express prohibition in the Constitution on the states over Indian matters;³³⁴ (2) some states have criminal jurisdiction over Indian reservations within their borders;³³⁵ and (3) *Seminole Tribe* was an abrogation case and the Court has made a clear distinction between abrogation and structural waiver cases.³³⁶ Justice Thomas also insists that the constitutional structure cuts against inferring a waiver of immunity because of the “coercive” nature subjecting the states to suit, the burden on the sovereign fisc, and the jeopardization of political accountability.³³⁷ Quite the opposite; structural waivers are inherently uncoercive as the states consent in the “plan of the Convention.” There is little evidence to support that subjecting state governments to suit would burden the government fisc when state officials are already subject to § 1983 suits as well as local municipalities, and the retention of sovereign immunity has done nothing but undermine government accountability.³³⁸

Finally, Justice Thomas scorned the *Torres* majority for relying on the “complete in itself” language from *PennEast* as “a single phrase, made in passing” without explanation as insufficient to “rework or erase” centuries-old sovereign immunity doctrine.³³⁹ There are countless examples, but several Supreme Court decisions rested on single phrases, some even creating new rights never circumscribed in the Constitution itself that have become binding on the states and upended prior precedent.³⁴⁰

333. *Id.* (discussing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 47 (1996)).

334. *See* U.S. CONST. art. I, § 10. Justice Thomas summarily dismisses the relevancy of an express prohibition. *Torres*, 597 U.S. at 612 (Thomas, J., dissenting).

335. U.S. DEP’T OF JUST., CRIM. RES. MANUAL. 688, <https://www.justice.gov/archives/jm/criminal-resource-manual-688-state-jurisdiction> (last visited Apr. 6, 2025); 18 U.S.C. § 1162(a).

336. *Torres*, 597 U.S. at 595.

337. *Id.* at 616 (Thomas, J., dissenting).

338. *See* Chemerinsky, *supra* note 71, at 1213, 1218.

339. *Torres*, 597 U.S. at 621, 628 (Thomas, J., dissenting).

340. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436 (1966) (creating the *Miranda* rights, made applicable to the states); *see also* Eugene R. Milhizer, *Miranda’s Near Death Experience: Reflections on the Occasion of Miranda’s Fiftieth Anniversary*, 66 CATH. U. L. REV. 577, 595–96 (2017) (discussing post-*Miranda* cases where Justices on the Court undermined the *Miranda* rights for being “Court-created, prophylactic rule[s] rather than a constitutional necessity”). *Miranda* was considered “destabilizing” and “threatening.” Milhizer, *supra* note 340, at 611. Justice White, a dissenting Justice, explained that *Miranda* had “no significant support in the history of the privilege or in the language [of] the Fifth Amendment.” *Id.* at 589 (citing *Miranda*, 384 U.S. at 526 (White, J., dissenting)). Justice Harlan believed that the Court-created *Miranda* warnings were unnecessary and that the holding

CONCLUSION

The Supreme Court in *Chisolm v. Georgia* framed the issue of central bank digital currency (CBDC) and sovereign immunity perfectly:

What, if a State should adulterate or coin money below the Congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What if a State should impair her own contracts? *These evils, and others which might be enumerated like them, cannot be corrected without a suit against the State.*³⁴¹

While CBDC has its flaws, there are many tradeoffs making it a possible future currency in the United States.³⁴² Countries abroad have already tested and adopted its use, potentially threatening the value of the U.S. dollar.³⁴³ Whereas in the United States, several states have already considered or passed laws excepting CBDC from the definition of money under their respective commercial codes.³⁴⁴ The National Park Service (NPS) case and the hypothetical presented in Part II.B illustrate just a few of the many examples where the Coinage Clause and sovereign immunity intersect.³⁴⁵ In order to prevent the injustices resulting from the expansion of the sovereign immunity defense, the Court should continue developing implied structural waivers.

Beginning with *Katz* and then further broadened in *PennEast* and *Torres*, the Supreme Court rightly pursued a purposivist path in recognizing instances where state governments consent to suit in the “plan of the Convention.”³⁴⁶ *Torres* laid the groundwork for Article I’s return to the sovereign immunity field after *Seminole Tribe* overturned *Union Gas*.³⁴⁷ Relying on the same three considerations (constitutional text, history, and precedent) from *Torres*, the coinage power under Article I is “complete in itself,” sufficient to imply a structural waiver of sovereign immunity.³⁴⁸ Although scholars and others suggest otherwise, the test in *PennEast* and

weakened the importance of the Due Process Clauses in dealing with confessions. *Id.* (citing *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting)).

341. 2 U.S. (2 Dall.) 419, 422 (1793) (emphasis added).

342. See *supra* Part I.A.

343. See *supra* Part I.A.

344. See *supra* Part I.A.2.

345. See *supra* Part II.B.

346. See *supra* Part I.B.

347. See *supra* Part I.B.

348. See *supra* Part III.A.

Torres is consistent with the constitutional design.³⁴⁹ Its further expansion is warranted to weaken the common law doctrine that has developed into a quasi-bulletproof vest for states and state officials that have committed serious transgressions.³⁵⁰

The *Hans* fact pattern arose because states defaulted on their public obligations.³⁵¹ The same will continue to happen, as it has been, if the Court does not extend structural waivers of immunity to the Coinage Clause. States like Florida will refuse to accept certain legal tender—as entities such as the NPS have already done³⁵²—like CBDC should Congress authorize its use. But should courts extend these waivers, individuals could push back. The hypothetical student referenced in Part II.B would have a road to redress against the state university to recover damages.³⁵³

“All of this is to say that our Government has long functioned under an accountability paradigm in which no one is above the law,”³⁵⁴ and thus, not even the states themselves—which surrendered several rights and powers in the “plan of the Convention” to the federal government for the sake of the “benefit of the nation”—can undermine that.³⁵⁵

349. *See supra* Part III.B.

350. *See supra* Part II.A.

351. *Clark*, *supra* note 139, at 1912.

352. *See supra* Part II.B.

353. *See supra* Part II.B.

354. *Trump v. United States*, 144 S. Ct. 2312, 2374 (2024) (Jackson, J., dissenting).

355. *United States v. Gayekpar*, 211 F. App'x 533, 534 (8th Cir. 2007) (per curiam) (quoting *United States v. Marigold*, 50 U.S. (9 How.) 560, 568 (1850)).

VERMONT LAW REVIEW

VOLUME 49 NUMBER 4

SUMMER 2025

ARTICLES

Just Say No to Sex:
How the *Dobbs* Decision to Protect Potential
Life Has Threatened and May Yet End a
Woman's—and a Man's—Right to Choose

Nancy L. Zisk

Free Exercise or Forced Establishment?
Why the Supreme Court Got *Carson v. Makin*
Wrong and What Vermont Can Do About It

Lindsey Wood

Prescribing Protection:
Leveraging a Comparative Synthesis
of Current Good Samaritan Overdose
Laws to Save Lives

Aly Richardson

Targeted Border Prosecutions of Muslims

Michael Neal



VERMONT LAW REVIEW

VOLUME 49 NUMBER 4

SUMMER 2025

ARTICLES

Just Say No to Sex:
How the *Dobbs* Decision to Protect Potential
Life Has Threatened and May Yet End a
Woman's—and a Man's—Right to Choose

Nancy L. Zisk

Free Exercise or Forced Establishment?
Why the Supreme Court Got *Carson v. Makin*
Wrong and What Vermont Can Do About It

Lindsey Wood

Prescribing Protection:
Leveraging a Comparative Synthesis
of Current Good Samaritan Overdose
Laws to Save Lives

Aly Richardson

Targeted Border Prosecutions of Muslims

Michael Neal

