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SAVING ARTICLE I FROM *SEMINOLE* *TRIBE*: A VIEW FROM *THE FEDERALIST PAPERS*

Paul E. McGreal*

INTRODUCTION

ELEVENTH Amendment scholarship has reached a point of rapidly diminishing marginal returns, with the incremental payoff in knowledge or insight barely exceeding the scholarly effort expended. This problem is most acute with so-called grand theory articles, where the author synthesizes the various historical, textual, doctrinal, and other sources in constructing a unified view of the subject. With most of these sources well worked over, there is increasingly less worth saying. Consequently, this Article offers a more limited project: An extended examination of a specific historical source relied on in the Court's recent Eleventh Amendment decisions.¹ Before launching into the analysis, let me introduce the project more completely.²

It is old sport for historians to bash lawyers for their use, or abuse, of history.³ This criticism is voiced loudest and most often regarding legal writing on the Constitution.⁴ In response, constitutional lawyers and their fellow travelers have thinned small continents debating the utility or

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1. With a co-author, I have previously made a similarly limited venture into the Eleventh Amendment thicket. See Paul E. McGreal & DeeDee Baba, *Applying Coase to Qui Tam Actions Against the States*, 77 NOTRE DAME L. REV. 87 (2001) (using Ronald Coase's theory of the firm to argue that *qui tam* actions should be considered lawsuits by the United States that overcome state immunity); see also Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1345 (1989) (an essay that "works within the framework of the current debate about the eleventh amendment").

2. For those interested in a comprehensive discussion of the Eleventh Amendment and state immunity, see generally William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997). For a collection of works on the Supreme Court's recent state immunity cases, see Symposium: *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 1115 (2001).

3. See, e.g., Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

4. *Id.* at 525 ("constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers").

making use of history in constitutional interpretation. The reader may breathe a sigh of relief as this Article is not one such effort. Rather, I take as a starting point that the Supreme Court often uses history in its constitutional analyses. Of particular relevance here, the Court is fond of quoting Alexander Hamilton's *Federalist No. 81* in its Eleventh Amendment decisions. Regardless of the propriety of doing so, this Article examines the implications of Hamilton's logic for Eleventh Amendment doctrine. For, if its citation to Hamilton is more than mere window-dressing,⁵ the Court will find that his writings articulate a comprehensive view of state immunity.

Eleventh Amendment issues arise when a private litigant files a damages suit against a state.⁶ The state inevitably moves to dismiss the suit, arguing that the Eleventh Amendment cloaks the state with immunity. While the text of the Amendment is limited to diversity suits filed in federal court,⁷ the Supreme Court has held that the Amendment merely confirmed a much broader constitutional principle of state sovereignty.⁸ This broader principle of sovereignty has many components, including a bar against federal commandeering of state legislatures and law enforcement officials.⁹ For our purposes, the most relevant portion of that sovereignty is a state's immunity from private damages suits in either federal courts or the state's own courts.¹⁰

Two aspects of the states' immunity from private damages suits are central to this Article. First, state immunity pre-existed ratification of the

5. This may of course turn out to be the case. The United States Reports, as well as the nation's law reviews, are filled with strategic use of historical sources. That the legal profession does such "lawyer's history" should not be surprising, because it is populated with lawyers, not historians. See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155-58 (discussing the differences in the way lawyers and historians treat historical materials). That makes "lawyer's history" neither better nor worse than that done by historians, only different.

6. The Court has held that states are not immune from suits brought by the United States, *United States v. Texas*, 143 U.S. 621 (1892), and that private litigants may sue state officials for prospective relief. See *Ex parte Young*, 209 U.S. 123, 159 (1908); see also 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-27, at 556 (3d ed. 2000) (Eleventh Amendment "does not ordinarily prevent federal courts, even in the absence of express congressional authorization, from requiring states, through their officers, to comply with prospective federal injunctions."). Further, state immunity does not extend to suits in federal court by another state, *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904); but does cover suits by other sovereigns, such as foreign nations and Indian tribes. See *Blatchford v. Village of Noatok*, 501 U.S. 775, 782 (1991) (states immune from federal court suits by Indian tribes); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (states immune from federal court suits by foreign sovereigns).

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

8. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

9. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (commandeering of state law enforcement officials is unconstitutional); see *New York v. United States*, 505 U.S. 144, 177-80 (1992) (commandeering of state legislatures is unconstitutional).

10. See *Alden v. Maine*, 527 U.S. 706, 754 (1999) (states' constitutional immunity from private damages actions extends to suits brought in a state's own courts); *Seminole Tribe*, 517 U.S. at 54 (state immunity from private damages suit in federal court).

Constitution.¹¹ The Court has repeatedly cited Hamilton's *Federalist No. 81* in support of this proposition.¹² Second, that state immunity pre-existed the Constitution raises the inevitable question whether the Constitution altered or eliminated all or part of that immunity. The Court's answer to this question is still evolving, treating the issue largely on a case-by-case basis. This piecemeal approach is odd given that Hamilton's *Federalist No. 81* offers an integrated framework for analyzing the issue.¹³ This Article describes that framework and explains its implications for future state immunity cases.

This Article has two parts, one historical and the other doctrinal. Part I turns to history, examining the view of state immunity set forth in Hamilton's *Federalist No. 32* and *Federalist No. 81*. In doing so, I place Hamilton's arguments in the context of the Federalist/Anti-Federalist debate over ratification. The Anti-Federalists warned that the proposed Constitution stripped states of precious aspects of their sovereignty, leaving them vulnerable to abuse by the new national government. Hamilton responded with assurances that the proposed Constitution disturbed very little of the states' sovereignty.

It is in the Federalist/Anti-Federalist debate that Hamilton set forth his view on the nature and scope of state immunity. His view consisted of three main propositions. First, state immunity from private damages suits pre-existed the Constitution.¹⁴ Second, states retained that immunity after ratification of the Constitution, except where the Constitution eliminated that immunity.¹⁵ Third, three general types of constitutional provisions eliminate portions of that state immunity.¹⁶ After locating these three propositions in Hamilton's writings, Part I concludes by identifying specific constitutional provisions that, under Hamilton's view, eliminate state immunity.

Part II turns to doctrine, arguing that the Court's recent Eleventh Amendment cases leave room for the Hamiltonian analysis. The Court's Eleventh Amendment decisions repeatedly cite and quote Hamilton for his first two propositions: that state immunity pre-existed the Constitution, and that state immunity survives the Constitution except where specifically eliminated.¹⁷ The Court, however, has yet to expressly embrace Hamilton's third proposition, that three types of constitutional provisions eliminate state immunity. Part II reviews the Court's recent state immunity decisions, asking whether they allow resort to Hamilton's third proposition. Part II concludes that all of those cases are consistent with Hamilton's third proposition, clearing the way for future adoption of that approach to abrogation of state immunity.

11. *See Alden*, 527 U.S. at 730-31; *Seminole Tribe*, 517 U.S. at 68.

12. *See* sources collected *infra* note 54.

13. *See* sources collected *infra* note 54.

14. *See infra* notes 54-56 and accompanying text.

15. *See infra* notes 54-57 and accompanying text.

16. *See infra* notes 58-76 and accompanying text.

17. *See infra* notes 54, 135-85.

I. *FEDERALIST NO. 32 AND FEDERALIST NO. 81:*
THE SCOPE OF STATE SOVEREIGNTY

This Part briefly sketches the historical context of Hamilton's *Federalist Papers* on state immunity. Section A describes how state war debts precipitated concern over states being sued in the proposed federal courts. Section B explains how the Anti-Federalists used this concern to attack the proposed Constitution. Section C summarizes Hamilton's response to the Anti-Federalists' charges. Finally, section D explains how Hamilton's state immunity approach applies to Article I of the Constitution.

A. STATE WAR DEBTS AND THE PROPOSED CONSTITUTION

State Revolutionary War debts bedeviled the nation from the days of the Continental Congress to the waning days of the Washington administration.¹⁸ In exchange for various goods and services, states had issued debt instruments that promised future payment of a specified face value.¹⁹ In the difficult economic times following the Revolutionary War, there was considerable doubt when, if ever, states would make good on these war debts.²⁰ This uncertainty reduced the value of the state debts to as low as fifteen percent of face value.²¹ For bond-holders who needed cash to provide for their everyday needs, this meant selling their bonds at well below face value.²² And there was a ready market for the bonds, with speculators paying drastically reduced prices on the hope that states would someday pay their debts at or near face value.²³

This state of state debt-holding generated regional conflict. Specifically, problems arose from who held the state debts. Debts were originally issued to a state's citizens.²⁴ But, needing liquidity, many local citizens sold their bonds to out-of-state speculators.²⁵ And, in many instances, citizens of southern states had sold their bonds to speculators operating out of northern financial centers.²⁶ At the time of these distress sales, out-of-state speculators had no greater means of obtaining payment than the original bondholders. But the speculators hoped that

18. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 138 (1993).

19. 1 SAMUEL ELIOT MORISON, HENRY STEELE COMMAGER & WILLIAM E. LEUCHTENBURG, *THE GROWTH OF THE AMERICAN REPUBLIC* 291 (6th ed. 1969); Marshall, *supra* note 1, at 1365.

20. Marshall, *supra* note 1, at 1365.

21. ELKINS & MCKITRICK, *supra* note 18, at 138.

22. MORISON ET AL., *supra* note 19, at 291 ("Farmers, discharged soldiers, petty shopkeepers, and the like who held government securities representing services rendered, goods supplied, or money advanced during the war, had been forced to part with them at a ruinous discount during the hard times that followed."); Marshall, *supra* note 1, at 1365.

23. ELKINS & MCKITRICK, *supra* note 18, at 140; Marshall, *supra* note 1, at 1366.

24. Marshall, *supra* note 1, at 1365.

25. ELKINS & MCKITRICK, *supra* note 18, at 138 ("Seventy-two percent of the North Carolina debt . . . was held by a group small enough to meet in one room.")

26. MORISON ET AL., *supra* note 19, at 291 ("By 1789 the bulk of the public debt was in the hands of the 'right people' at Philadelphia, New York, Charleston, and Boston."); Marshall, *supra* note 1, at 1366.

some aspect of the new Constitution would improve their situation.²⁷ Thus, a major concern of many southern states was that the proposed federal Constitution might somehow reward out-of-state, largely northern speculators who had practically stolen state debts (at depressed prices) from in-state bond-holders.

When the proposed Constitution was circulated, southerners saw two main ways in which the new federal government might reward speculators. First, the new federal government might assume the obligation to pay all outstanding state debts at or near face value.²⁸ Under this plan, the federal government would impose a national tax and use the proceeds to pay the state debts. The southern states objected to this possibility because it would effectively tax southern states to pay northern speculators. The southern states had issued debt to their own citizens, and circumstances beyond those citizens' control forced them to sell their debts at depressed prices to northern speculators. Now, with ratification of the new Constitution, Congress could reward northern speculators—by paying at face value for state bonds purchased at depressed prices—by taxing southern citizens.²⁹ The possibility of such strategic behavior appalled southern citizens.³⁰

Second, the proposed Constitution granted the new federal courts power to hear cases between “a State and Citizens of another State.”³¹ This provision raised the alarming possibility that an out-of-state speculator might bring a federal court lawsuit to force a state to pay its debt at

27. ELKINS & MCKITRICK, *supra* note 18, at 140 (Speculation was “affected by only one gross factor, the question of whether eventually there would or would not be a government competent to honor its engagements.”); Marshall, *supra* note 1, at 1365-66.

28. ELKINS & MCKITRICK, *supra* note 18, at 140.

29. MORISON ET AL., *supra* note 19, at 292 (Under Hamilton's plan for assumption of state war debts “the nation was taxed to pay at par, for securities purchased at a tremendous discount.”).

30. *Id.* at 292-93. This fear turned out to be well founded. As the first Secretary of the Treasury, Alexander Hamilton believed strongly that payment of all outstanding public debts at face value was essential to the establishment and maintenance of the new nation's financial health and standing. ELKINS & MCKITRICK, *supra* note 18, at 116-19. Consequently, he proposed that the United States assume all state debts. *Id.* at 118. Not surprisingly, southerners, such as Virginia's James Madison, objected to such a plan because it would reward out-of-state speculators. *Id.* at 136-42. Madison even proposed that the United States only assume payment at face value for state debts still in the hands of their original holders, paying all other debt-holders less than face value. *Id.* at 137. In doing so, Madison hoped to avoid rewarding the speculators who had purchased state debts at depressed prices. *Id.* Hamilton objected to this plan because it both presented insurmountable administrative problems (there were few good records showing the original holders of state debts) and, by paying some debt at less than face value, threatened to undermine Hamilton's plan to bolster confidence in the United States' financial system. *Id.* at 144 (“As a matter of practicability, tracing the original holders would have been very complicated but not impossible, since records did exist. As to whether such an operation would have injured the public credit, there are no precise technical terms in which such a question can be answered. But in all probability it would have.”). Congress ultimately passed, and President Washington signed, a bill more consistent with Hamilton's approach, which assumed a significant portion of the state debts. See Clyde E. Jacobs, *Prelude to Amendment: The States Before the Court*, 12 AM J. LEGAL HIST. 19, 23 (1968).

31. U.S. CONST., art. III, § 2.

face value.³² Before the Constitution, the speculator was left to sue in the courts of the state that issued the debt. Even Alexander Hamilton, the ardent nationalist, noted that states had discretion whether to honor such payment requests: "State governments [have] the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."³³ But if speculators could bring suit in federal courts, states feared that the new national government, itself a sovereign entity granted supreme, albeit limited, power over the states,³⁴ might force states to pay their debts at face value.³⁵

As with federal assumption of state debts, federal court jurisdiction over states meant that the new national government could reward northern speculators at the expense of southern states. Northern speculators who purchased state bonds at depressed value could sue in federal court for payment at face value. Southern states would then be forced to tax their citizens to pay federal court judgments owed to northern speculators. In doing so, states would tax the very same people who first held the state debts. Southern states bristled at this possibility.

B. THE ANTI-FEDERALISTS ON THE WAR DEBT PROBLEM

The southern states' concern over their war debts found voice in the writings of the Anti-Federalists, who opposed ratification of the proposed Constitution. One example is the commentator Brutus,³⁶ reputed to have

32. States were also concerned that this aspect of federal diversity jurisdiction would allow out-of-state citizens to sue states over land ownership. Marshall, *supra* note 1, at 1362-64. For example, in one instance the Indiana Land Company purchased from an Indian tribe land located west of Virginia. Virginia refused the Company's repeated requests to recognize the validity of the land claims, which would have required the state to remove settlers from the disputed land. *Id.* at 1362-63; *see also* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 529 (2d ed. 1888) (George Mason, delegate to the Virginia ratifying convention, warned that Virginia's western lands "will be claimed, and probably recovered in the federal court, from the present possessors, by those companies who have a title to them. These lands have been sold to a great number of people."). Other states faced similar disputes. Marshall, *supra* note 1, at 1363 (such land disputes "greatly concerned states embroiled in land disputes with speculators and out-of-state investors."). These states feared that out-of-state land speculators might bring suit in federal court to force the states to recognize the validity of their land claims. *Id.* at 1363-64; *see Jacobs, supra* note 30, at 31 ("a fear was expressed that successful litigation by the Indiana claimants would revive old questions concerning the state's disposition of other land claims"). This fear was ultimately realized when the Indiana Land Company brought suit against Virginia, and the Supreme Court took jurisdiction over the case. *See* 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, at 216 (Maeva Marcus & James R. Perry eds., 1985) (Bill in Equity for the case *Grayson v. Virginia*); *see also Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

33. THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

34. *See* U.S. Const. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

35. Marshall, *supra* note 1, at 1365-66.

36. Historian Forrest McDonald explains the logic behind the Anti-Federalists' choice of pseudonyms:

been Robert Yates,³⁷ who railed against the document in a series of editorials targeted at the New York ratification convention. In his Letter No. 13, Brutus made three arguments against federal diversity jurisdiction over states; we consider each in turn.

First, Brutus argued that federal power to hear private suits against the sovereign states offended their dignity: "This is humiliating and degrading to a government, and, what I believe, the supreme authority of no State ever submitted to."³⁸ Here, Brutus makes two important points. First, immunity from a private damages suit is inherent in the nature of sovereignty, with such a suit inflicting a "humiliating and degrading" insult on those sovereigns. Second, the states retain this immunity unless they voluntarily "submit[] to" such suits.

Second, Brutus specifically addressed the problem of state debts held by out-of-state speculators. He warned of an unjustifiable windfall if the Constitution allowed private damages suits against the states: "The states are now subject to no such actions. All contracts entered into by individuals with states, *were made upon the faith and credit of the states*; and the individuals never had in contemplation any compulsory mode of obliging the government to fulfill its engagements."³⁹ Those who had previously purchased state debts took a risk whether the state would later pay the debt, and that risk affected the consideration paid for the debt. With no way to compel states to pay, the debt was worth less than it would otherwise be. By authorizing suit against a state in federal court, the proposed Constitution added a valuable right to that pre-existing debt: The right to have a neutral tribunal compel state performance. If such a right existed at the time of contracting, the state debt would have commanded a higher

Writers of political tracts for the newspapers conventionally signed their articles with pseudonyms, often taken from Plutarch, and they could assume that their readers would understand something of their message from their choice of pen name. For example, in the debates over the Constitution, two anti-Federalists used the pseudonym Cato; one used Cato Uticensis (Cato of Utica, that is, Cato the Younger); two, Brutus; one, Brutus, Jr.; and one, Cassius. All of these were thereby identifying themselves with defenders of the late Roman republic and thus suggesting that the Constitution was antirepublican.

FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 68 (1985).

37. SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 315 (1993) ("Brutus [was] a noted Anti-Federalist writer usually thought to have been Robert Yates, a delegate from New York to the Philadelphia Convention"). Yates was a New York delegate to the federal drafting convention, but left the convention to protest the strongly national direction he believed the drafters were taking. McDONALD, *supra* note 36, at 185 n.1 ("Yates left the convention after about six weeks and opposed ratification of the Constitution."). Yates was also a "faithful lieutenant[]" of New York's Anti-Federalist Governor George Clinton. JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 135 (1996).

38. "Brutus" XIII, *The Judicial Power: Can an Individual Sue a State?*, *NEW YORK J.*, Feb. 21, 1788, reprinted in 2 *THE DEBATE ON THE CONSTITUTION* 223 (Bernard Bailyn ed., 1993) [hereinafter "Brutus XIII"].

39. *Id.*

price. Thus, federal diversity jurisdiction over states would award current debt holders (who were largely out of state) a windfall.

Third, Brutus argued that private damages suits would mean financial ruin for the states. Given its relevance to the present discussion, it is worth considering his words in full. He begins by setting forth the states' dilemma, described in the preceding section, regarding outstanding war debts:

The evil consequences that will flow from the exercise of this power [of federal diversity jurisdiction over the states], will best appear by tracing it in its operation. . . . An individual of one state will then have a legal remedy against a state for any demand he may have against a state to which he does not belong. Every state in the union is largely indebted to individuals. For the payment of these debts they have given notes payable to the bearer. At least this is the case in this state. Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government; and I cannot see any way in which he can be prevented from recovering.⁴⁰

And, the grant of diversity jurisdiction creates an incentive that exacerbates the states' problem: "It is easy to see, that when this once happens, the notes of the state will pass rapidly from the hands of citizens of the state to those of other states."⁴¹

Next, Brutus notes that suits against states will inevitably lead to judgments against states.⁴² Sounding a particularly pessimistic note, Brutus hypothesizes that these judgments could total "the whole amount of the state debt."⁴³ He fears that such a sizable debt would take decades to retire: "[T]he state, with the utmost exertions it can make, will not be able to discharge the debt she owes, under a considerable number of years, perhaps with the best management, it will require twenty or thirty years to discharge it."⁴⁴ And, repayment would be further hampered by Congress' power to tax individuals as well as imports and exports.⁴⁵ As Brutus had argued elsewhere, Congress' power to tax would crowd out the states' ability to tax the same items,⁴⁶ thereby shrinking state revenues and further delaying state repayment.

In Brutus' view, the proposed Constitution hit the states with a "deplorable" double blow: Diversity jurisdiction in federal courts would

40. *Id.* at 223-24.

41. *Id.* at 224.

42. *Id.* ("And when the citizens of other states possess them, they may bring suits against the state for them, and by this means, judgments and executions may be obtained against the state . . .").

43. *Id.*

44. *Id.*

45. *Id.* ("This new system will protract the time in which the ability of the state will enable them to pay off their debt, because all the funds of the state will be transferred to the general government, except those which arise from internal taxes.").

46. *Id.* ("[T]he general government will possess an exclusive command of the most productive funds, from which the states can derive money, and a command of every other source of revenue paramount to the authority of any state.").

make states subject to judgments for the outstanding state debt, while Congress' power to tax would cripple the states' ability to raise the revenue needed to pay these judgments.⁴⁷ As a consequence, the proposed Constitution confronted states with two unpalatable alternate futures. On the one hand, Congress might authorize federal courts to execute their judgments on state property. Brutus described the following doomsday scenario:

Execution may be levied on any property of the state, either real or personal. The treasury may be seized by the officers of the general government, or any lands the property of the state, may be made subject to seizure and sale to satisfy any judgment against it. Whether the estate of any individual citizen may not be made answerable for the discharge of judgments against the state, may be worth consideration. In some corporations this is the case.⁴⁸

On the other hand, if Congress did not allow execution on state property, states would bear the ongoing obligation to pay off the federal court judgments. In effect, states would become semi-permanent debtors, continually scraping together revenue to pay off judgment creditors. In either case, federal court diversity jurisdiction would "crush the states beneath its weight."⁴⁹

C. THE FEDERALIST RESPONSE

While Brutus' writings certainly contained some hyperbole, that is to be expected from what was essentially propaganda intended to sway public opinion against ratification. *The Federalist Papers* played the same role for the pro-ratification forces in New York.⁵⁰ Precisely because Brutus' writings were aimed at public opinion, the authors of *The Federalist*

47. *Id.* ("By this system, [the states] will surrender to the general government, all the means of raising money, and at the same time, will subject themselves to suits at law, for the recovery of the debts they have contracted in effecting the revolution.")

48. *Id.* at 225-26.

49. *Id.* at 226. As we will see below, Hamilton denies that federal courts would be authorized to hear such suits. See *infra* notes 51-59 and accompanying text. To support this view, he argues that a judgment from such a suit would be practically unenforceable:

To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

THE FEDERALIST NO. 81, *supra* note 33, at 488.

50. See James W. Ducayet, *Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821, 821-23 (1993); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 682 (1990) ("The Federalist Papers were, after all, propaganda documents"); Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 765 n.25 (1994) ("For all the deference paid to The Federalist Papers in two centuries of constitutional interpretation, it is easy to forget that the essays were hardly a neutral exposition, but constituted, in effect, a brief in favor of ratification."); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1316 (1990) ("[T]he Federalist papers were not even official statements of the framers. Rather, they were written as much to persuade as to explain").

Papers often responded to specific arguments in Brutus' Letters. The next two sections outline *The Federalist Papers'* response, authored by Alexander Hamilton, to the arguments described in the preceding section.

1. *Federalist No. 81*

In *Federalist No. 81*, Alexander Hamilton responded to Brutus' objection to federal court jurisdiction over the states.⁵¹ Hamilton described the problem in the following terms:

I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities⁵²

Hamilton then explains that this "suggestion" is "without foundation."⁵³ The specific arguments form the core of his view of state immunity.

Hamilton begins his discussion with a general statement regarding sovereign immunity, which the Supreme Court has quoted repeatedly in over a century of state immunity cases:⁵⁴

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the

51. THE FEDERALIST NO. 81, *supra* note 33, at 487. Most of that paper discusses other aspects of the proposed federal judiciary, such as the need for a Supreme Court as well as inferior federal courts. *Id.* at 481-87. Indeed, Hamilton describes his discussion of federal judicial power over state debts as a "digression." *Id.* at 487.

52. *Id.* at 487.

53. *Id.*

54. *Id.* The Court has quoted the "inherent in the nature of sovereignty not to be amenable to the suit" portion of the quote in the following cases: *Alden v. Maine*, 527 U.S. 706, 716 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 634 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 780 (1991); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 310 (1990); *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 480 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 275 (1985); *Patsy v. Bd. of Regents*, 457 U.S. 496, 527 (1982); *Nevada v. Hall*, 440 U.S. 410, 436 (1979); *Edelman v. Jordan*, 415 U.S. 651, 662 n.9 (1974); *Employees of Dep't of Pub. Health & Welfare, Mo. v. Dep't of Pub. Health & Welfare, Mo.*, 411 U.S. 279, 317 (1973); *Glidden Co. v. Zdanok*, 370 U.S. 530, 564 (1962); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 324 (1934); *United States v. Texas*, 143 U.S. 621, 645-46 (1892); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). The Court has quoted the "surrender of this immunity in the plan of the convention" portion of the quote in the following cases: *Alden*, 527 U.S. at 729; *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997); *Seminole Tribe*, 517 U.S. at 143; *Blatchford*, 501 U.S. at 781; *Port Auth. Trans-Hudson Corp.*, 495 U.S. at 311 n.4; *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989); *Welch*, 483 U.S. at 512; *Atascadero*, 473 U.S. at 276; *Penhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 140 n.18 (1984); *Hall*, 440 U.S. at 440; *Edelman*, 415 U.S. at 662 n.9; *Dep't of Pub. Health & Welfare*, 411 U.S. at 317; *Glidden Co.*, 370 U.S. at 563; *Principality of Monaco*, 292 U.S. at 322-23; *Williams v. United States*, 289 U.S. 553, 576 (1933); *Hans*, 134 U.S. at 13.

States, and the danger intimated must be merely ideal.⁵⁵

This passage sets forth the first two principles that compose Hamilton's view of state immunity. First, state immunity from private damages actions pre-existed the Constitution. Such immunity was "the general practice of mankind" and, while ratification of the Constitution was pending, was "now enjoyed by the government of every State in the Union."⁵⁶ Second, after ratifying the Constitution, the states would *retain* this immunity "[u]nless . . . there is a surrender of this immunity in the plan of the convention."⁵⁷

These two principles lead inexorably to a question, Hamilton's answer to which yields his third principle of state immunity. The question is how we identify those aspects of the "plan of the convention" that strip states of their immunity from private damages suits? Hamilton answers as follows:

The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will.⁵⁸

Hamilton promises that we will learn "[t]he circumstances which are necessary to produce an alienation of" state immunity if we look back to a prior *Federalist Paper* that "consider[ed] the article of taxation."⁵⁹ While Hamilton does not give us more specific guidance, it is accepted that the reference is to *Federalist No. 32*.⁶⁰ Thus, in the next section, we review *Federalist No. 32's* approach to identifying those parts of the Constitution that eliminate state immunity.

2. *Federalist No. 32*

Federalist No. 32 is part of Hamilton's larger discussion of Congress' proposed power to tax.⁶¹ Anti-Federalist writers had objected that Congress' "Power to lay and collect Taxes"⁶² would effectively eliminate the states' concurrent power to do the same. One version of this argument

55. THE FEDERALIST NO. 81, *supra* note 33, at 487-88.

56. *Id.*

57. *Id.*

58. *Id.* at 488.

59. *Id.*

60. See *Seminole Tribe*, 517 U.S. at 146 (Souter, J., dissenting) ("The reference is to The Federalist No. 32, also by Hamilton").

61. See also THE FEDERALIST NOS. 30-36, at 188 *et seq.* (Alexander Hamilton) (Clinton Rossiter ed., 1961).

62. U.S. CONST. art. I, § 8, cl. 1.

was that federal power to tax, being supreme, would pre-empt state power over the same subject.⁶³ Another version of the argument was that the Necessary and Proper Clause granted Congress power to direct and control how and when the states levied and collected taxes.⁶⁴ Yet a third version was that federal taxes would be high enough to leave little, if any, room for states to levy additional taxes.⁶⁵ In each guise, the Anti-Federalists made the same point: The proposed Constitution would effectively destroy the states' ability to raise revenues.⁶⁶

In *Federalist No. 32*, Hamilton responded to the specific argument that Congress' power to tax pre-empted the states' power to do so. He explained that the Constitution abrogated the states' sovereignty in only three limited types of instances, and that the taxing power was not one of those instances:

[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: [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 absolutely and totally *contradictory* and *repugnant*.⁶⁷

Outside of these three types of instances, states would retain their sovereignty, including immunity from private damages suits. The next question is which provisions of the Constitution Hamilton included in these three categories.

Fortunately, Hamilton offers concrete examples that illustrate his three categories of abrogation. The first category is where the Constitution *expressly* grants the federal government "exclusive" power. Note that Hamilton specifically requires that the exclusivity of Congress' power be set forth "in express terms" in the Constitution's text.⁶⁸ As an example of

63. "Brutus" V, *On the "Necessary and Proper" and the "General Welfare" Clauses, and on Congress's Power to Tax: The States Will be Destroyed*, NEW YORK J., Dec. 13, 1787, reprinted in 2 THE DEBATE ON THE CONSTITUTION 499, 504 (Bernard Bailyn ed., 1993) [hereinafter "Brutus V"]; *Dissent of the Minority of the Pennsylvania Convention*, Pennsylvania Packet (Philadelphia), Dec. 18, 1787, reprinted in 2 The Debate on the Constitution 526, 538 (Bernard Bailyn ed., 1993) ("Congress may monopolise every source of revenue, and thus indirectly demolish the state governments, for without funds they could not exist, the taxes, duties and excises imposed by Congress may be so high as to render it impracticable to levy further sums on the same articles") [hereinafter "Pennsylvania Dissent"].

64. Brutus V, *supra* note 63, at 503-04.

65. Pennsylvania Dissent, *supra* note 63, at 537.

66. Brutus made the further point that destroying a sovereign's ability to raise revenue effectively destroyed the sovereign itself. See Brutus V, *supra* note 62, at 503-04.

67. THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

68. *Id.*

this category, Hamilton points to Congress' power to legislate for what would become the District of Columbia:⁶⁹ "The last clause but one in the eighth section of the first article provides expressly that Congress shall exercise '*exclusive legislation*' over the district to be appropriated as the seat of government. This answers to the first case."⁷⁰ This example highlights that category one includes only those grants of power including the word "exclusive" or some such modifier.

By limiting the first category to provisions that expressly make federal power exclusive, Hamilton excludes grants of federal power that the Supreme Court has held are implicitly exclusive. For example, the Constitution grants Congress power over trade with Indian tribes, but does not expressly make Congress' power exclusive. The Supreme Court, however, has held that this grant of federal power *implicitly* limits state power over the same subject.⁷¹ Because this limit on state power is inferred from, not expressly stated in, the Constitution, it does not fall within Hamilton's first category of abrogation.⁷²

The second category includes instances where the Constitution both grants a federal power and prohibits concurrent state power. Hamilton explains that the subject of imposts and duties on imports and exports fits this category:

The first clause of the [eighth] section empowers Congress "to lay and collect taxes, duties, imposts and excises"; and the second clause of the tenth section of the same article declares that, "*No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except for the purpose of executing its inspection laws.*" Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned; but this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification, it now only extends to the *duties on imports*. This answers to the second case.⁷³

The next section examines other candidates for inclusion in this second category.

The third category is less precise than the first two, applying to grants of federal power where concurrent state power "would be absolutely and totally *contradictory and repugnant*."⁷⁴ Hamilton explains that this cate-

69. U.S. CONST. art. I, § 8, cl. 17 ("Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States").

70. THE FEDERALIST NO. 32, *supra* note 67.

71. See *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234 (1985) (commerce with Indian tribes is "the exclusive province of federal law.").

72. Hamilton makes a related argument concerning Congress' power to lay and collect taxes. He states that this power does not fall within the first category of abrogation because "[t]here is plainly no expression in the granting clause which makes that power *exclusive* in the Union." THE FEDERALIST NO. 32, *supra* note 67, at 199.

73. *Id.*

74. *Id.*

gory is to be distinguished

from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority.⁷⁵

Hamilton illustrates this distinction by comparing Congress' power over naturalization to its power to tax. Regarding Congress' power "to establish a *uniform rule* of naturalization throughout the United States,"⁷⁶ Hamilton explains: "This must necessarily be exclusive; because if each State had power to prescribe a *distinct rule*, there could not be a *uniform rule*."⁷⁷ Conversely, regarding Congress' power to lay and collect taxes, Hamilton explained that no such repugnancy existed:

As to a supposition of repugnancy between the power of taxation in the States and in the Union, it cannot be supported in that sense which would be requisite to work an exclusion of the States. It is, indeed, possible that a tax might be laid on a particular article by a State which might render it *inexpedient* that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances. It is not, however a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty.⁷⁸

Hamilton, then, distinguishes cases where concurrent power is *by definition impossible* (e.g., power to create *uniform* laws is logically inconsistent with *diverse* state laws) from cases where concurrent power is *practically inconvenient* (e.g., two sovereigns taxing the same items may become impractical).⁷⁹

3. Coda

One observation is important before proceeding. Note that under Hamilton's view the Constitution itself abrogates state immunity. Consequently, it is improper to say that Congress has power to abrogate state immunity. For example, if a state were sued in federal court by a private litigant under the immigration or naturalization laws, Hamilton's view provides that the state would not be immune from the suit. This is so because the *Constitution*, and *not* the immigration and naturalization stat-

75. *Id.*

76. U.S. Const. art. I, § 8, cl. 4.

77. THE FEDERALIST NO. 32, *supra* note 67, at 199.

78. *Id.*

79. *See id.*

ute, strips away state sovereignty over that subject, including that aspect of sovereignty that cloaks states with immunity from private suits. Thus, it is an error to speak of *Congress* abrogating state immunity; the Constitution has not granted Congress power to do so. Rather, the Constitution itself abrogates portions of the states' immunity, with the *consequence* that an act of Congress may now be invoked against the states.

The distinction between congressional and constitutional abrogation is essential to properly understanding the Supreme Court's state immunity cases. The Court repeatedly states that Congress may not use its Article I powers to abrogate state immunity from private damages suits.⁸⁰ As the Hamiltonian view makes clear, this is correct. Instead, various provisions of the Constitution abrogate state sovereignty, with the consequence that state immunity will not bar private damages claims arising out of federal laws enacted under those provisions. Where, however, the Constitution does not abrogate state sovereignty over a subject, Congress may not do so, and states retain their immunity.

D. A TOUR OF ARTICLE I

The preceding section articulated three principles that constitute Hamilton's view of state immunity. First, state immunity from private damages suits pre-existed the Constitution. Second, state immunity survived ratification of the Constitution unless withdrawn by the "plan of the convention." Third, three categories of constitutional provisions eliminate state immunity: (1) grants of federal power that are expressly "exclusive," (2) grants of federal power paired with prohibitions on concurrent state power, and (3) grants of federal power with which concurrent state power would be contradictory and repugnant. As we saw, Hamilton provided an example of each category. This section seeks other candidates for inclusion.

1. *Category One*

In this first category, state immunity is eliminated when the Constitution expressly provides that federal power is exclusive. As discussed above, Congress' power over what became the District of Columbia is one instance where the Constitution so states. Only one other clause, set forth immediately after Congress' power over the future federal district, speaks in the same terms: "Congress shall have Power . . . to exercise *like Authority* over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."⁸¹ The provision for "like Authority" refers back to the immediately preceding language that grants Congress the power "to exercise exclusive Legislation" over the new federal District. So, state sovereignty, including state immunity, is

80. See *infra* notes 90-182 and accompanying text.

81. U.S. CONST. art. I, § 8, cl. 17 (emphasis added).

abrogated regarding certain federal lands.⁸² As the Constitution nowhere else states that federal power is exclusive, Hamilton's first category consists of only these two powers.

2. Category Two

The second category consists of those constitutional provisions that grant a federal power and prohibit concurrent state power. Article I, section 10 of the Constitution, which sets forth a series of restrictions on state power, is the most logical candidate for inclusion in Hamilton's second category. Table 1 sets forth pairs of constitutional provisions, listing grants of federal power that match the restrictions on state power set forth in Article I, section 10.

Table 1

Grant of Federal Power	Article I, Section 10—"No State shall . . ."
Article I, section 8—Congress' power over imposts and duties on imports and exports	"lay any Imposts or Duties on Imports or Exports"
Article II, section 2—Treaty power in President and Senate	"enter any Treaty, Alliance, or Confederation"
Article I, section 8—Congress' power "To coin Money."	"coin money"
Article I, section 8—Congress' power "To raise and support Armies."	"keep Troops, or Ships of War, in time of Peace."
Article I, section 8—Congress' power "To grant Letters of Marque and Reprisal"	"grant Letters of Marque and Reprisal"

The first pair listed is Hamilton's example of the second category. The remaining pairs are of the same form. The subjects covered in Table 1 fit Hamilton's second category of abrogation, and state sovereignty (including state immunity) is abrogated on each subject.

3. Category Three

The third category includes grants of federal power with which concurrent state power would be contradictory or repugnant. Recall that by "contradictory or repugnant" Hamilton meant that concurrent federal and state power was *by definition impossible*. His example was Congress' power to make "uniform" laws of naturalization. By definition, for laws of naturalization to be "uniform," there must be a *single* set of such laws. Allowing concurrent federal-state regulation would allow for *more than*

82. While the Clause sets forth specific uses for land ceded to the federal government, the Court has not limited congressional regulation to such lands. See *Collins v. Yosemite Park Co.*, 304 U.S. 518, 530 (1938) (upholding exclusive federal jurisdiction, with specific reservations of state power, over national park).

one set of such laws, thereby destroying uniformity.⁸³ Thus, the grant of federal power to make uniform laws on a subject implicitly abrogates the states' sovereign power over that subject. The only other constitutional provision that grants Congress power to make uniform laws is the Bankruptcy Clause, which is paired with the Naturalization Clause: "Congress shall have Power . . . To establish . . . *uniform Laws* on the subject of Bankruptcies throughout the United States."⁸⁴ Thus, the Naturalization and Bankruptcy Clauses constitute category three.⁸⁵

4. Summary and Implications

Table 2 summarizes the discussion from section D, identifying the various constitutional provisions that fall within Hamilton's three categories.

83. American experience with the Uniform Commercial Code illustrates how even a concerted attempt at uniformity among state laws still yields significant diversity. For example, some states have modified the UCC in enacting it, and state judges sometimes apply differing interpretations of specific provisions.

84. U.S. CONST. art. I, § 8 (emphasis added).

85. It is worth noting two important aspects of the Bankruptcy Clause's uniformity requirement, as the Court's understanding of that requirement will presumably determine the scope of abrogation of state sovereignty. First, "[u]niformity does not imply the absence of state legislation; the grant of congressional power does not by itself deprive the states of power to act." TRIBE, *supra* note 6, § 5-8, at 847 n.2. Rather, once Congress enacts bankruptcy laws, state laws are preempted if they disturb the uniformity of those laws. See *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 469 (1982) ("uniformity does not require the elimination of any differences among the States in their laws governing commercial transactions"); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 196 (1819):

If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.

Second, the Bankruptcy Clause requires only geographic uniformity. See *Gibbons*, 455 U.S. at 473 ("To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors."). One commentator has described the geographic uniformity requirement as follows:

[A] federal bankruptcy law need not cover all debtors and creditors, and it may "define classes of debtors and . . . structure relief accordingly," but it may not be written so as to apply to only one identified debtor in the manner of a private bill and may not discriminate among the debtors and creditors covered on the basis of location.

Tribe, *supra* note 6, § 5-8, at 847.

Table 2

Hamilton's Abrogation Category	Constitutional Provision
Category One —Express grant of exclusive federal power	1. Congress' power to legislate for the District of Columbia (art. I, § 8, cl. 17). 2. Congress' power to regulate certain federal land (art. I, § 8, cl.17).
Category Two —Simultaneous grant of federal power and limitation on state power	See Table 1
Category Three —Concurrent state power would be contradictory and repugnant	1. Congress' power to enact uniform laws of naturalization (art. I, § 8, cl.). 2. Congress' power to enact uniform laws of bankruptcy (art. I, § 8, cl.).

As discussed above, each of the nine constitutional provisions listed in the second column is an instance where the "plan of the convention" abrogates state sovereignty. This is the lesson of *Federalist No. 32*. Further, as Hamilton explains in *Federalist No. 81*, abrogation of state sovereignty in the plan of the convention necessarily entails a corresponding abrogation of state immunity from private suits. Thus, states may not invoke their sovereign immunity to bar a private lawsuit arising out of one of the constitutional provisions listed in Table 2.

The following example illustrates how the Hamiltonian view might affect a state immunity scenario that has arisen in bankruptcy cases. A bankruptcy debtor previously incurred a debt to a state, such as a fine imposed for a civil violation. The debtor subsequently files for bankruptcy, seeking discharge of her debts, including the debt owed to the state.⁸⁶ The state is properly notified, does not file a proof of claim in the federal bankruptcy proceeding,⁸⁷ and the Bankruptcy Court enters an order discharging, among others, the debt to the state. Under bankruptcy law, the discharge is a complete bar to future enforcement of the debts covered by the court's order.⁸⁸

Subsequently, the state tries to enforce the discharged debt against the debtor.⁸⁹ To avoid enforcement, the debtor brings an adversary proceed-

86. Bankruptcy proceedings are governed by 11 U.S.C.A. §§ 101 *et seq.* (West 1993 & Supp. 2001).

87. Section 106(b) of the Bankruptcy Code specifically provides that a state waives its immunity by filing a proof of claim in a bankruptcy proceeding. 11 U.S.C.A. § 106(b) (West Supp. 2001). Several lower federal courts have upheld this waiver provision. *See, e.g.,* Arecibo Cmty. Health Care, Inc. v. Puerto Rico, 270 F.3d 17 (1st Cir. 2001); *In re Straight*, 143 F.3d 1387, 1392 (11th Cir. 1998); *In re Creative Goldsmiths, Inc.*, 119 F.3d 1140, 1148 (4th Cir. 1997).

88. *See* 11 U.S.C. § 1328 (West 1993 & Supp. 2001). The discharge bars states and state agencies who were creditors. *See* *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933). Courts of appeals have held that this rule survives the Supreme Court's recent overhaul of state immunity. *See In re Ellett*, 254 F.3d 1135, 1139-41 (9th Cir. 2001); *In re Collins*, 173 F.3d 924, 928-31 (4th Cir. 1999); *Texas v. Walker*, 142 F.3d 813, 822-23 (5th Cir. 1998).

89. For example, *In re Ellett*, 254 F.3d 1135 (9th Cir. 2001), involved a state taxing authority that attempted to collect outstanding personal income tax that was discharged in

ing against the state in Bankruptcy Court.⁹⁰ The state asserts its immunity to suit in federal court, and the Bankruptcy Court must decide whether to dismiss the suit. Under the Hamiltonian view, the debtor's response is clear: The Bankruptcy Clause abrogates state sovereignty on all bankruptcy matters. Because state immunity is part of the sovereignty abrogated by that Clause, the state may not assert immunity in a bankruptcy proceeding. Consequently, the state is not immune, and the Bankruptcy Court may properly exercise jurisdiction over the state in the adversary proceeding.

Alas, lower federal courts have not entertained this relatively straightforward Hamiltonian conclusion.⁹¹ Those courts have been misled by language in *Seminole Tribe* and later cases. As noted above, the Court's recent state immunity cases state that Congress may not use its Article I powers to abrogate state immunity.⁹² Lower federal courts read this language as holding that state immunity remains intact on all subjects covered by Article I, including bankruptcy.⁹³ These courts assume that either Congress abrogates state immunity, or there is no abrogation. But, these lower courts ignore another possibility: The Constitution *itself* may abrogate state sovereignty. As discussed above, this is Hamilton's view.⁹⁴

In sum, the lower federal courts that have addressed the bankruptcy issue ignore the distinction between congressional and constitutional abrogation. Those courts take *Seminole Tribe's* statement that Congress may not abrogate state immunity as ending the analysis—states are still immune. To Hamilton, *Seminole Tribe* would merely state the obvious: Only the Constitution, not Congress, abrogates state immunity. The true challenge is to identify those instances where the Constitution has done so, which Section D attempted. If the lower courts accept this challenge, they will find that the Bankruptcy Clause has abrogated state immunity, with the consequence that states are subject to suit in that area.

II. SEMINOLE TRIBE AND ITS PROGENY

Part II is divided into three sections. Section A offers a brief overview of pre-*Seminole Tribe* developments in state immunity law. This section is merely background for Sections B and C, venturing no critique or unnecessary elaboration.

a federal bankruptcy proceeding. The court held that the debtor could pursue injunctive relief against a specific state official, there the Director of the state's Franchise Tax Board, under *Ex parte Young*, 209 U.S. 123 (1908). *In re Ellett*, 254 F.3d at 1142-47.

90. FED. R. BANKR. P. 7001 (describing the types of matters that may be raised in an adversary proceeding).

91. See, e.g., *In re Mitchell*, 209 F.3d 1111, 1116-17 (9th Cir. 2000); *In re NVR, LP*, 189 F.3d 442, 448-54 (4th Cir. 1999); *Sacred Heart Hosp. of Norristown v. Pennsylvania*, 133 F.3d 237, 243-45 (3d Cir. 1998); *In re Fernandez*, 123 F.3d 241, 244-46 (5th Cir. 1997), *amended by*, 130 F.3d 1138 (5th Cir. 1997).

92. See *supra* note 80 and accompanying text.

93. See, e.g., *In re Mitchell*, 209 F.3d at 1118-19; *In re NVR, LP*, 189 F.3d at 449-50; *Sacred Heart Hosp. of Norristown*, 133 F.3d at 243; *In re Fernandez*, 123 F.3d at 243-44.

94. See *supra* note 80 and accompanying text.

Section B offers a close reading of *Seminole Tribe* that performs two main tasks. First, the Section will identify the role that Hamilton's view played in the Court's analysis. Second, it will assess whether the opinion forecloses resort to Hamilton in future state immunity cases. Section C then performs the same two tasks for the post-*Seminole Tribe* cases.

A. STATE IMMUNITY PRE-*SEMINOLE TRIBE*

As originally framed and ratified, the Constitution places no express limit on federal court jurisdiction over private lawsuits against the states. While, as discussed above, debates over the Constitution addressed this issue,⁹⁵ the document's text is silent. Consequently, one could read Article III to grant federal courts jurisdiction over private damages cases "between a State and Citizens of another State."⁹⁶ And, within its first five years of operation, that is precisely the interpretation the Supreme Court applied to Article III. The case was *Chisholm v. Georgia*,⁹⁷ where a citizen of South Carolina sued the State of Georgia in an original action before the Supreme Court. The South Carolina citizen sued to recover property that Georgia had confiscated because the owner had allegedly opposed the American war effort.⁹⁸ Objecting to jurisdiction, "Georgia refused, in a written protest, to enter an appearance."⁹⁹ Georgia believed that no federal court could hear a case against an unconsenting state.¹⁰⁰ The Court took jurisdiction, reading the bare text¹⁰¹ of Article III to grant jurisdiction over any suit between a state and a citizen of another state.¹⁰²

95. See *supra* notes 36-79 and accompanying text.

96. U.S. CONST., art. III, § 2.

97. 2 U.S. (2 Dall.) 419 (1793).

98. I rely here on a description of the facts, which is much more concise than that set forth by the Court, provided in Jacobs, *supra* note 30, at 27-30.

99. *Id.* at 28; see also *Chisholm*, 2 U.S. (2 Dall.) at 419.

100. *Chisholm*, 2 U.S. (2 Dall.) at 419 ("And now Ingersoll, and Dallas, presented to the Court a written remonstrance and protestation on behalf of the State, against the exercise of jurisdiction in the cause").

101. By "bare text," I should not be read to mean the "plain meaning" or "literal meaning" of Article III's grant of diversity jurisdiction. Rather, I mean that the Court *claimed* to apply text alone, unadorned by any historical or other arguments. Yet, as I have argued elsewhere, text is meaningless unless it is read against the background of some context. See Paul E. McGreal, *There Is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 *FORDHAM L. REV.* 2393, 2445-47 (2001). Every reading of a text necessarily entails a context within which that reading makes sense. *Id.* For example, *Chisholm*'s interpretation makes sense within a context where there is no background understanding or assumption that private lawsuits against states are anathema. But, if one assumes that suits by private litigants against states are verboten, then one might read Article III differently, as allowing federal court suits only by a state against a private citizen, and not vice versa. Text alone cannot answer the question which context, and thus which interpretation, should be used to understand the text.

102. *Chisholm*, 2 U.S. (2 Dall.) at 419 *et seq.* When *Chisholm* was decided, the Court had yet to adopt its present practice of having a single Justice write an "Opinion of the Court." That practice was instituted several years later by Chief Justice John Marshall. See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 1-2 (1996). Instead, each Justice wrote an opinion, and the Court's holding was gleaned from the several opinions of the Justices in the majority. *Id.* In *Chisholm*, four Justices were in the majority, with one

Chisholm instantly instigated a movement to overturn the decision by constitutional amendment.¹⁰³ Two days after the decision, Congress saw the first proposed amendment;¹⁰⁴ the necessary number of states ratified within one year.¹⁰⁵ Commentators debate the true meaning of this constitutional moment. On the one hand, some, including a majority of the current Supreme Court, argue that *Chisholm* was wrongly decided and the Eleventh Amendment merely restored the Constitution to its original state.¹⁰⁶ On this view, sewn into the original Constitution's fabric was a design of state sovereign immunity, which protected states from private lawsuits without their consent. *Chisholm* tore this fabric, allowing such suits under Article III's grant of diversity jurisdiction. The Eleventh Amendment merely repaired this breach, by correcting the Court's mistaken interpretation of Article III, and returning the Constitution to its original state. Thus, the Amendment merely confirmed and reflected a larger, implied principle of state immunity that underlay and limited the jurisdictional grants in Article III.

On the other hand, some, including a minority on the current Court, argue that *Chisholm* was correctly decided and that the Eleventh Amendment subsequently worked a material change to the constitutional fabric.¹⁰⁷ *Chisholm* correctly interpreted Article III to extend federal diversity jurisdiction to cases by private litigants against states. Article III's text allows this interpretation, and no unwritten principles of state immunity implicitly limit this expansive text. The Eleventh Amendment, then, was a reaction against the original Constitution, altering and restricting the scope of the federal judicial power originally granted in Article III.

The main division between these two camps is their belief as to which constitutional event, *Chisholm* or the Eleventh Amendment, better reflects the meaning of the original Constitution. The former camp, which views the Eleventh Amendment as correct, is more consistent with the Hamiltonian view. Recall that Hamilton acknowledges that principles of

in dissent. See *Chisholm*, 2 U.S. (2 Dall.) at 429 (Iredell, J.) (Supreme Court did not have jurisdiction); *id.* at 450 (Blair, J.) (Supreme Court did have jurisdiction); *id.* at 453 (Wilson, J.) (same); *id.* at 466 (Cushing, J.) (same); *id.* at 469 (Jay, C.J.) (same). For our purposes, it is sufficient to follow the lead of the modern Supreme Court, which has described the four opinions of the majority Justices: "The common theme . . . was that the case fell within the literal text of Article III." *Alden*, 527 U.S. at 719.

103. *Alden*, 527 U.S. at 720-21.

104. Jacobs, *supra* note 30, at 22. This first proposal was made during the Second Congress, which adjourned without proposing the amendment to the states. *Id.* The Third Congress, meeting in 1794, then proposed the amendment that later became the Eleventh Amendment. *Id.*

105. *Id.* at 19 ("The state legislatures responded with extraordinary alacrity: in less than a year after submission of the amendment, the requisite number of state legislatures voted approval, although official certification of this action was in some cases delayed and, for this reason, the amendment was not recognized as having been ratified until January, 1798.")

106. *Alden*, 527 U.S. at 722 ("The text and history of the Eleventh Amendment . . . suggest that Congress acted not to change but to restore the original constitutional design.")

107. *Seminole Tribe*, 517 U.S. at 106 (Souter, J., dissenting) (*Chisholm*'s interpretation of Article III was "reasonable (although not compelled)").

state immunity pre-existed and limited Article III's grant of the judicial power. This immunity prevents private suits against states "[u]nless . . . there is a surrender of this immunity in the plan of the convention."¹⁰⁸ Hamilton further explains the three categories of constitutional provisions that strip states of their immunity. These are the constitutional provisions described in Part I.D above.¹⁰⁹ Thus, like the camp that takes the Eleventh Amendment as correct, Hamilton recognizes a form of constitutional state immunity that limits the judicial power.

Many subsequent Eleventh Amendment battles have been fought over this very ground. For our purposes, the relevant state immunity cases begin in 1989 with *Pennsylvania v. Union Gas Co.*,¹¹⁰ where a plurality of the Court adopted part of Hamilton's view.¹¹¹ In that case, the question was whether a private litigant could sue a state in federal court on a claim under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹¹² First, as a matter of statutory construction, a five-person majority concluded that CERCLA itself authorized such lawsuits.¹¹³ The question then became whether the states' Eleventh Amendment immunity nonetheless barred the suit. In a plurality opinion joined by three other justices, Justice William Brennan held that while states do have immunity from suit in federal court, CERCLA validly abrogated that immunity.¹¹⁴ Justice Brennan's reasoning is worth examining because he starts down a Hamiltonian path but then veers off course at the end.

After discussing prior Eleventh Amendment cases,¹¹⁵ Justice Brennan explained his understanding of state immunity under the original Consti-

108. THE FEDERALIST NO. 81, *supra* note 33, at 487.

109. *See supra* notes 81-85 and accompanying text.

110. 491 U.S. 1 (1989). Justice William Brennan wrote an opinion joined by only three other members of the Court. Justice White concurred in Justice Brennan's "conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although [he did] not agree with much of his reasoning." *Id.* at 57 (White, J., concurring in the judgment in part and dissenting in part).

111. Of course, the Court decided many significant state immunity cases prior to 1989. *See, e.g.,* *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Nevada v. Hall*, 440 U.S. 410 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees of Dep't of Pub. Health & Welfare, Mo. v. Dep't of Pub. Health & Welfare, Mo.*, 411 U.S. 279 (1973); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Williams v. United States*, 289 U.S. 553 (1933); *Hans v. Louisiana*, 134 U.S. 1 (1890). But, for present purposes, the relevant developments begin with *Union Gas*, which is the decision overruled in *Seminole Tribe*.

112. *See* 42 U.S.C. §§ 9601 *et seq.* (West 1995 & Supp. 2001).

113. *See Union Gas*, 491 U.S. at 7-13 (Brennan, J., announcing the judgment of the Court). The Court has held that a state may not be sued under a federal statute unless the statute clearly states that such suits are allowed. *See Raygor v. Regents of the Univ. of Minnesota*, 122 S. Ct. 999, 1006 (2002) (federal supplemental jurisdiction statute would not extend time for suit against a state in its own courts unless Congress had clearly stated its intent to do so). This clear statement rule protects states from inadvertent or unthinking extension of federal liability to the sovereign states. *Id.*

114. *See Union Gas*, 491 U.S. at 7-13.

115. *Id.* at 14-17.

tution.¹¹⁶ First, he acknowledged that a principle of state immunity pre-existed the Constitution,¹¹⁷ and that this principle implicitly limits the Article III grants of federal judicial power.¹¹⁸ Second, this “unsurprising conclusion does not begin to address the question whether other congressional enactments, not designed simply to implement Article III’s grants of jurisdiction, may override States’ immunity.”¹¹⁹ Third, quoting Hamilton, he argues that “States enjoy no immunity where there has been ‘a surrender of this immunity in the plan of the convention.’”¹²⁰ Thus, the Constitution in some instances abrogates state immunity from suit in federal court. So far, Justice Brennan has followed Hamilton’s lead.

In answering the next question, however, Justice Brennan departed company with Hamilton. Once one accepts both that states have immunity from federal lawsuits and that *some* (but not all) portions of the Constitution abrogate that immunity, the question becomes which portions of the Constitution do so. In *Union Gas*, the specific question was whether the Commerce Clause, under which Congress enacted CERCLA, abrogated state immunity.¹²¹ Hamilton would answer this question in the negative. As we saw in Part I.C, Hamilton’s *Federalist No. 32* enumerated three categories of constitutional provisions that abrogate state immunity: provisions that expressly make federal power exclusive; provisions that expressly grant federal power and prohibit concurrent state power; and provisions that grant federal power with which concurrent state power would be contradictory or repugnant. The Commerce Clause does not fit any of these categories.¹²² The Clause does not expressly make Congress’ power exclusive, and, while the Court interprets the Commerce Clause to implicitly limit state power,¹²³ the Constitution contains no express limitation on concurrent state power.¹²⁴ And, while concurrent state and federal regulation of interstate commerce may be inconvenient at times, such concurrent power is not “repugnant” in the sense that Hamilton described.¹²⁵ Thus, under Hamilton’s view, the Commerce Clause does not abrogate state immunity from suit in federal court.

116. Justice Brennan’s arguments in this part of his opinion are largely made in response to Justice Scalia’s dissent. Thus, much of Justice Brennan’s view must be inferred from these responsive arguments.

117. *Union Gas*, 491 U.S. at 18 (“[I]t is not the Commerce Clause that came first, but ‘the principle embodied in the Eleventh Amendment’ that did so.”).

118. *Id.* at 19 (acknowledging the “unsurprising conclusion” that “Article III did not ‘automatically eliminate’ sovereign immunity”).

119. *Id.*

120. *Id.*

121. *Id.*

122. See *supra* notes 68-79 and accompanying text.

123. And even this implicit limitation on federal power has come under attack by three members of the current Court. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (“The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.”).

124. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce . . . among the several states.”).

125. See *supra* notes 74-79 and accompanying text.

Justice Brennan ignores Hamilton's arguments in *Federalist No. 32*, instead offering his own view of what portions of the Constitution imply a surrender of state immunity.¹²⁶ He holds that the Commerce Clause is one such provision, offering two reasons for this conclusion. First, he argues that:

The Commerce Clause, we long have held, displaces state authority even where Congress has chosen not to act, and it sometimes precludes state regulation even though existing federal law does not preempt it. Since the States may not legislate at all in these last two situations, a conclusion that Congress may not create a cause of action for money damages against the States would mean that no one could do so. And in many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause.¹²⁷

Depending on which part of this passage one emphasizes, Justice Brennan's argument is either incorrect or beside the point. First, if we focus on the Dormant Commerce Clause aspect, the passage is inaccurate. The Court has interpreted the Commerce Clause to have two components, one express and the other implied: The Commerce Clause is an express grant of federal power, and an implied restriction on concurrent state power.¹²⁸ The implied restriction goes under the name Dormant Commerce Clause, because the Clause limits state power even when Congress' power lies dormant, *i.e.*, Congress has not acted. Thus, there will be areas of interstate commerce where Congress is the only body allowed to regulate. For example, Congress may pass a law that regulates the size of tractor trailers, but states may not do so because differing state regulations on this subject would unduly burden interstate commerce.¹²⁹

Justice Brennan argues that the Dormant Commerce Clause doctrine and state immunity combine to make states completely unregulated in certain areas of interstate commerce. On the one hand, the Dormant Commerce Clause prohibits states from regulating those portions of interstate commerce. On the other hand, state immunity prohibits lawsuits grounded on federal regulations of interstate commerce. Consequently, there is a regulatory gap, where neither state nor federal law can hold states accountable. Portions of interstate commerce become a law-free zone for the states.

Justice Brennan's argument misses two crucial points of state immunity law. First, states are not immune from damages actions brought by the United States.¹³⁰ Second, States may always consent to jurisdiction in a

126. See *Union Gas*, 491 U.S. at 19-20.

127. *Id.* (citations omitted).

128. See Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1192 (1998).

129. See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981).

130. See *Seminole Tribe*, 517 U.S. at 71 n.14 (noting "other methods of ensuring the States' compliance with federal law," including that "[t]he Federal Government can bring suit in federal court against a State").

private damages suit.¹³¹ For example, assume that Congress enacts a regulation of interstate commerce, and a private litigant sues a state under that federal law. While state immunity would bar that suit, the state may nonetheless *consent* to jurisdiction. State immunity is not an absolute bar to judicial power over a state, but rather a right that the sovereign may invoke at its discretion.¹³² So, Justice Brennan errs in claiming that the Dormant Commerce Clause plus state immunity equals no regulation of states.

Of course, one may object that whether a state waives its immunity is solely within that state's discretion, which significantly reduces the ability to hold states accountable.¹³³ But, the same is true of *any* area of law where states enjoy immunity from private suit. When a state is immune from suit under federal law and has not consented to suit, the state will only be liable if the state enacts a statute or other law that provides for state liability. The state is in the same position as in Justice Brennan's Dormant Commerce Clause scenario. In both cases, the state is not liable unless it acts, whether that action be consent to suit under federal law or enacting a law that provides for state liability.

Second, if Justice Brennan's focus in the quoted paragraph above is on the lack of state liability, he simply begs the question. State Eleventh Amendment immunity by definition protects states from private lawsuits for money damages. To simply re-state this point does not explain *why* such immunity is inappropriate in the Commerce Clause context, as opposed to some other Article I power. Indeed, if this argument were sufficient, state immunity would be at an end.¹³⁴

Justice Brennan's second attempt to support abrogation under the Commerce Clause fares no better, again begging the question. He explains that "in approving the commerce power [by ratifying the Constitution], the States consented to suits against them based on congressionally created causes of action."¹³⁵ Again, this argument fails to distinguish between the Commerce Clause and all other portions of the Constitution, effectively erasing state immunity. But, the challenge of the Hamiltonian view is to determine *which* portions of the Constitution overcome state immunity. By failing to distinguish among constitutional clauses, Justice Brennan again fails to meet Hamilton's challenge.

131. *Alden*, 527 U.S. at 755; *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883).

132. In this important respect, state immunity differs from subject matter jurisdiction. Whereas a state may waive its immunity, no party may waive an objection to lack of subject matter jurisdiction. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) ("Neither party has questioned [subject matter] jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded.").

133. The Court, however, has noted that "[m]any States, on their own initiative, have enacted statutes consenting to a wide variety of suits." *Alden*, 527 U.S. at 755.

134. See *Union Gas*, 491 U.S. at 42 (Scalia, J., concurring in part and dissenting in part) ("An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable.").

135. *Id.* at 22.

This is where the law stood when the Court granted certiorari in *Seminole Tribe*.¹³⁶ The *Union Gas* plurality took a half-Hamiltonian view of state immunity. Consistent with Hamilton, the plurality accepted that state immunity pre-existed and limits Article III judicial power.¹³⁷ Also consistent with Hamilton, the plurality held that specific portions of the Constitution abrogate this immunity.¹³⁸ The plurality, however, stumbled in taking the next Hamiltonian step. Whereas Hamilton's *Federalist No. 32* offered an account of which provisions abrogate state immunity, the plurality offered no coherent standard. Indeed, the plurality's holding that the Commerce Clause abrogates state immunity contradicts the best reading of Hamilton's *Federalist No. 32*. So, as *Seminole Tribe* came before the Court, states were subject to private damages suits in federal court, and the case law placed no logical limit on this result.¹³⁹

B. *Seminole Tribe*

Seminole Tribe involved an Indian Tribe's federal court lawsuit against Florida under the Indian Gaming Regulation Act (IGRA).¹⁴⁰ The state argued that Eleventh Amendment immunity barred the suit. Citing *Union Gas*, the Tribe countered that the Constitution abrogated Florida's immunity on the subject covered by the IGRA.¹⁴¹ The Tribe stood on firm ground, as *Union Gas* held that the Commerce Clause abrogates state immunity, and the IGRA had been enacted under the closely related Indian Commerce Clause.¹⁴² As the Court saw no principled difference between Congress' Commerce Clause and Indian Commerce Clause powers, *Union Gas* dictated that Florida's immunity was lost.¹⁴³

Anticipating this application of *Union Gas*, Florida argued that the Court should overrule that case's holding that the Commerce Clause and other similar provisions abrogate state immunity. The Court agreed, marshalling a variety of arguments against *Union Gas*.¹⁴⁴ For our pur-

136. 513 U.S. 1125 (1995).

137. *Union Gas*, 491 U.S. at 19-20.

138. *Id.*

139. The Court had also held that Congress' power to enforce the Fourteenth Amendment abrogates state immunity. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); U.S. Const. amend. XIV, § 5. The Court's rationale was that the Fourteenth Amendment both directly limited state sovereignty and granted Congress power to enforce those limits. *Fitzpatrick*, 427 U.S. at 454. As the Fourteenth Amendment post-dates the Eleventh Amendment, the Fourteenth Amendment's abrogation of state sovereignty limits the state immunity acknowledged in the Eleventh Amendment. *Id.* Neither *Seminole Tribe* nor subsequent cases have disturbed this holding. See, e.g., *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savs. Bank*, 527 U.S. 627, 636-37 (1999); *Seminole Tribe*, 517 U.S. at 59, 65-66.

140. *Seminole Tribe*, 517 U.S. at 51.

141. *Id.*

142. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes").

143. *Seminole Tribe*, 517 U.S. at 63 ("[T]he plurality opinion in *Union Gas* allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause.")

144. *Id.* at 63-73.

poses, the relevant questions are, first, whether the Court took a Hamiltonian view, and if so, second, whether the Court left room for congressional abrogation of state immunity by Article I. The remainder of this section addresses those questions.

Several passages from *Seminole Tribe* indicate that the Court took a Hamiltonian view of state immunity. First, the Court quoted at length from its prior decision in *Principality of Monaco v. Mississippi*,¹⁴⁵ which the Court characterized as setting forth “the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment”:¹⁴⁶

Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provision are postulates which limit and control. There is the essential postulate that . . . States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a “surrender of this immunity in the plan of the convention.”¹⁴⁷

This quote acknowledges many aspects of the Hamiltonian view. First, it recognizes that principles or “postulates” of state immunity both pre-existed and “limit and control” the federal judicial power. Second, the states did “surrender” a portion of this immunity by ratifying the Constitution. Third, we may identify the portion surrendered by examining “the plan of the convention”; this is a quote from Hamilton’s *Federalist No. 81*. This Hamiltonian logic points us to *Federalist No. 32*, which identifies the three categories of constitutional provisions that eliminate state immunity.¹⁴⁸

Seminole Tribe itself twice cites Hamilton’s *Federalist No. 81*. First, in explaining that state immunity pre-dates and underlies the Constitution, the Court quotes Hamilton’s statement that such immunity “is the general sense and the general practice of mankind.”¹⁴⁹ Second, the Court quotes Hamilton’s language regarding when the Constitution pierces the states’ immunity from suit: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal.”¹⁵⁰ Again, these sources direct us to *Federalist No. 32*, which sets forth the three categories of constitutional provisions that bear such a design.

145. 292 U.S. 313 (1934).

146. *Seminole Tribe*, 517 U.S. at 67.

147. *Principality of Monaco*, 292 U.S. at 322-23 (quoted in *Seminole Tribe*, 517 U.S. at 68).

148. See *supra* notes 58-79 and accompanying text.

149. *Seminole Tribe*, 517 U.S. at 69 (quoting THE FEDERALIST NO. 81, at 487).

150. *Id.* at 70 n.13 (quoting THE FEDERALIST NO. 81, at 487-88).

Seminole Tribe and *Union Gas*, then, share some common ground, but differ in a crucial respect. Both cases recognize that state immunity pre-existed and limits the Constitution's grant of federal judicial power. Further, both cases accept that the Constitution stripped away aspects of that immunity. They differ, however, on how one identifies which aspects of that immunity are eliminated. *Union Gas* offered no logical standard, implying that state immunity was virtually non-existent.¹⁵¹ *Seminole Tribe*, however, suggests that Hamilton's view controls this inquiry, directing us to *Federalist No. 32* to identify those aspects of "the plan of the convention" that eliminate state immunity.¹⁵²

Given its consistency with Hamilton's view, it is no surprise that the Court both overruled *Union Gas* and held that the Indian Commerce Clause did not eliminate state immunity. Recall Hamilton's three categories of constitutional provisions that abrogate state immunity: provisions that grant federal power that is expressly exclusive; provisions that expressly grant federal power and prohibit concurrent state power; and grants of federal power with which concurrent state power would be contradictory and repugnant. Neither the Commerce Clause, involved in *Union Gas*, nor the Indian Commerce Clause, involved in *Seminole Tribe*, fall in these categories. Neither Clause either expressly grants Congress exclusive power or expressly limits state power.¹⁵³ Additionally, as explained above, state power over commerce is not absolutely repugnant to concurrent federal power over the same subject.¹⁵⁴ Thus, state immunity is unaffected by both grants of federal power.

The unmistakable Hamiltonian implication of *Seminole Tribe* is that state immunity is vulnerable to attack under the three types of constitutional provisions described in *Federalist No. 32*. On this reading, *Seminole Tribe* spoke narrowly to the congressional powers before it—the Indian Commerce Clause and, by overruling *Union Gas*, the Commerce Clause. Beyond those two Clauses, *Seminole Tribe* leaves us free to follow Hamilton's lead. The next section reviews the post-*Seminole Tribe* state immunity decisions to determine whether the Court has subsequently foreclosed resort to the Hamiltonian view.

151. Justice Souter's dissent made a similar misstep. *Seminole Tribe*, 517 U.S. at 143-49 (Souter, J., dissenting). Unlike the *Union Gas* plurality, Justice Souter discusses both FEDERALIST NOS. 81 and 32. *Id.* Further, he recognizes both that FEDERALIST NO. 32 sets forth three instances where the Constitution abrogates state immunity and that the Indian Commerce Clause is not within one of the listed instances. *Id.* at 147-49. From these propositions, this author concludes above that such a Clause does *not* abrogate state immunity. See *supra* notes 68-79 and accompanying text. Justice Souter, however, concludes that Hamilton has nothing to say one way or the other about the Indian Commerce Clause, thus leaving Justice Souter free to reject state immunity on other grounds. *Seminole Tribe*, 517 U.S. at 149.

152. *Seminole Tribe*, 517 U.S. at 144-45.

153. As discussed above, the fact that each Clause *implicitly* limits state power does not place it in Hamilton's first category. See *supra* notes 71-72 and accompanying text. Hamilton referred only to those constitutional provisions that *expressly* made Congress' power exclusive. See THE FEDERALIST NO. 32, *supra* note 67.

154. See *supra* notes 71-76 and accompanying text.

C. THE POST-SEMINOLE TRIBE CASES

None of the Court's recent state immunity cases reject Hamilton's promise that aspects of the "plan of the convention" limit state immunity. Further, none of these cases are inconsistent with this proposition. This section defends these two propositions by carefully examining the holding of each case.

The last day of the Court's October 1998 Term was a big day for state immunity devotees. The Court handed down a trilogy of state immunity decisions, none of which deviated from the Hamiltonian model. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,¹⁵⁵ a private bank sued a state agency in federal court claiming unfair competition under the Lanham Act.¹⁵⁶ Predictably, the state agency asserted state immunity, and the bank responded that the Constitution abrogated that immunity on the subject covered by the Lanham Act. The question then became whether the constitutional provision under which Congress enacted the Lanham Act eliminated state immunity.

The Court's abrogation discussion broke no new ground beyond *Seminole Tribe*.¹⁵⁷ One source of congressional authority for the Lanham Act is the Commerce Clause.¹⁵⁸ The Court quickly dismissed abrogation under this Clause, simply restating the holding of *Seminole Tribe*: "Our decision three Terms ago in *Seminole Tribe* held that the power 'to regulate Commerce' conferred by Article I of the Constitution gives Congress no authority to abrogate state sovereign immunity."¹⁵⁹ This description of *Seminole Tribe* is consistent with the Hamiltonian view.

In the companion case *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,¹⁶⁰ the bank brought a patent infringement claim against the state agency. Again, the state agency argued that it was immune from suit, and the bank argued that the Constitution had abrogated state immunity.¹⁶¹ This time, in addition to the Commerce

155. 527 U.S. 666 (1999).

156. The Lanham Act is the federal statute that protects trademarks. See 15 U.S.C.A. §§ 1051 *et seq.* (West 1997 & Supp. 2001).

157. The bank also argued that the Lanham Act was enacted under Congress' power to enforce the Fourteenth Amendment. The Court rejected that argument, holding that the Lanham Act did not protect a constitutional property interest within the meaning of the Fourteenth Amendment. *Coll. Savings Bank*, 527 U.S. at 675.

158. The bank also argued that Congress enacted the Lanham Act under its power to enforce the provisions of the Fourteenth Amendment. *Id.* at 672. Specifically, it was argued, the Lanham Act protected the author's copyrighted material, which constitutes a property interest protected by the Fourteenth Amendment's Due Process Clause. *Id.* If this was so, the state agency could not raise immunity because the Fourteenth Amendment abrogates state sovereignty. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The Court held that the author's interest in her copyrighted work did not constitute a property interest within the meaning of the Due Process Clause, and thus the Lanham Act was not proper legislation to enforce that Clause. *Coll. Savings Bank*, 527 U.S. at 673-75.

159. *Coll. Savings Bank*, 527 U.S. at 672.

160. 527 U.S. 627 (1999).

161. See Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(h), 296(a) (2001).

Clause, the bank argued that the Patent Clause¹⁶² was the source of abrogation. The Court's brief treatment of this argument, while not crystal clear, remains faithful to the Hamiltonian view: "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause."¹⁶³ This single sentence packs two Hamiltonian ideas into its sparse language. First, the Court expressly makes the point that Congress has no power to abrogate state immunity. Rather, only the Constitution can eliminate state immunity. If the case does not involve a constitutional provision that eliminates state immunity (*i.e.*, a provision that falls within one of Hamilton's three categories), Congress itself cannot independently abrogate state immunity. Thus, even if the Patent Remedy Act purported to abrogate state immunity, it cannot do so. The proper question, then, is whether the Patent Clause itself eliminated state immunity.¹⁶⁴ If so, the Clause would clear the way for a private suit against a state under the Patent Remedy Act.

Second, by holding that the state was immune from suit, the Court implicitly held that the Patent Clause does not eliminate state immunity. This holding is consistent with Hamilton's view, as the Patent Clause does not fit within any of his three categories. First, the Patent Clause does not expressly make Congress' power exclusive.¹⁶⁵ Second, neither the Patent Clause nor any corresponding clause in Article I expressly limits state power over patents. Third, there is no suggestion that state patent regulation is absolutely repugnant to federal regulation of the same subject. Unlike the Bankruptcy and Naturalization Clauses, the Patent Clause does not specifically grant congress power to make *uniform* regulations. Indeed, many states have intellectual property protections that parallel the federal patent laws.¹⁶⁶ Thus, the Court's holding that the Patent Clause does not eliminate state immunity is consistent with the Hamiltonian view.

The last trilogy case is *Alden v. Maine*,¹⁶⁷ where the Court addressed whether states were immune from federal claims litigated in the state's own courts. As a textual matter, the Eleventh Amendment has nothing to say about this question, as it speaks only to federal judicial power.¹⁶⁸

162. U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

163. *Florida Prepaid*, 527 U.S. at 636.

164. The Patent Remedy Act was also enacted under the Commerce Clause. *Id.* at 635. As discussed above, however, both *Seminole Tribe* and the Hamiltonian view reject abrogation of state immunity by that Clause. *See supra* notes 117-20 and accompanying text.

165. For the text of the Patent Clause, *see supra* note 162.

166. *Cf. Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999) (discussing rules for determining when federal patent and trademark law preempts state law). Further, the Court noted that some states have specific laws providing compensation for patent infringement by the state. *Florida Prepaid*, 527 U.S. at 643-45.

167. 527 U.S. 706 (1999).

168. U.S. CONST. amend. XI (referring to the "Judicial power of the United States").

However, recall that the Hamiltonian view is that the Eleventh Amendment did not create state immunity. Rather, state immunity pre-existed the Constitution, and the Eleventh Amendment merely re-confirmed this principle after the Supreme Court had mistakenly neglected it in *Chisholm v. Georgia*.¹⁶⁹ *Alden* explained that this background principle of state immunity protected states from private damages suits in their own courts.¹⁷⁰ And, as with the state immunity applied in federal courts, Congress did not have power to abrogate that immunity.¹⁷¹

As one might expect, the private litigants argued that the specific constitutional provision involved in *Alden* abrogated the state's immunity. In addressing this contention, the Court struck a truly Hamiltonian note. The Court began with several nods to Hamilton's *Federalist No. 81*. In the first part of its opinion, which summarized background federalism principles, the Court quoted at length from *Federalist No. 81* regarding the existence and scope of state immunity.¹⁷² The quote included his familiar twin principles that, first, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*," and, second, that state immunity is lost only where "there is a surrender of this immunity in the plan of the convention."¹⁷³ Then, further into its discussion, the Court re-affirmed its commitment to these two principles:

While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States, this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, "[t]here is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution. In exercising its Article I powers Congress *may subject the States to private suits in their own courts only if there is "compelling evidence" that the States were required to surrender this power to Congress pursuant to the constitutional design*.¹⁷⁴

This passage restates much of the Hamiltonian view. First, state immunity pre-existed and underlies the Constitution. Second, aspects of the Constitution limit state immunity. Third, a direct reference to *Federalist No. 81*, state's "surrender" their immunity only where indicated by the Constitution's "design" or, as Hamilton would say, the "plan of the convention."

Alden next addressed whether state immunity applied to the claims in that case. The private litigants argued abrogation under two constitu-

169. 2 U.S. (2 Dall.) 419 (1793).

170. *Alden*, 527 U.S. at 754.

171. *Id.* at 712.

172. *Id.* at 716-17.

173. *Id.* (quoting THE FEDERALIST NO. 81, *supra* note 33, at 487-88).

174. *Id.* at 730-31 (emphasis added) (citations omitted).

tional provisions: the Supremacy Clause and the Necessary and Proper Clause.¹⁷⁵ First, consider the Supremacy Clause: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹⁷⁶ According to the private litigants, a federal statute is supreme over, and thus "by necessity overrides," all conflicting aspects of state law.¹⁷⁷ Further, state immunity, which is a creature of state law, directly conflicts with federal statutes that provide for state liability.¹⁷⁸ Consequently, when a federal statute provides for private damages lawsuits against states, that federal statute overrides conflicting state immunity from such lawsuits.

This Supremacy Clause argument erroneously treats state immunity as a creature of state law. As discussed above, state immunity from private damages suits is a background *constitutional* principle, not simply a principle of state law.¹⁷⁹ Consequently, the Supremacy Clause's command that federal law trumps *state law* says absolutely nothing about whether federal law trumps the *constitutional principle* of state immunity. Rather, citing the Supremacy Clause simply begs the question: The Clause grants supremacy to only those federal laws "made in Pursuance" of the Constitution, and the very question in *Alden* was whether the private damages suit under the FLSA violated the Constitution. So, resorting to the Supremacy Clause simply stated the question in a different way.¹⁸⁰

Second, consider the Necessary and Proper Clause: "The Congress shall have Power . . . To make all Laws 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, or in any Department or Officer thereof."¹⁸¹ Like the Supremacy Clause, resort to this Clause merely begs the question. As its name implies, the Necessary and Proper Clause only allows Congress to pass such laws that are "proper." For a federal law to be a "proper" exercise of federal power it must be consistent with the Constitution's express and implied limitations on federal power.¹⁸² One such limitation is the constitutional principle that states are immune from private damages lawsuits.¹⁸³ Thus, we have yet another way of asking the question presented

175. The private litigants had sued under the Fair Labor Standards Act, which was enacted under the Commerce Clause. *Id.* at 712. Given that *Seminole Tribe* foreclosed abrogation by the Commerce Clause, that Clause was not specifically considered as a source of abrogation. *Id.* at 731-35.

176. U.S. CONST. art. VI.

177. *Alden*, 527 U.S. at 731.

178. *Id.*

179. See *supra* note 80 and accompanying text. Of course, a state law may waive that immunity, but the Constitution protects that immunity until the state does so.

180. *Alden*, 527 U.S. at 731 ("Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power.").

181. U.S. CONST. art. I, § 8, cl. 18.

182. See *Printz v. United States*, 521 U.S. 898, 923-24 (1997).

183. *Alden*, 527 U.S. at 732-33.

in *Alden*: Was the FLSA's private damages action a constitutionally "proper" exercise of federal power? Like the Supremacy Clause, the Necessary and Proper Clause cannot answer that question.

That neither the Supremacy Clause nor the Necessary and Proper Clause abrogated state immunity should not surprise devotees of Hamilton's view, as neither clause fits one of his three categories. First, neither Clause expressly makes Congress' powers exclusive. While the Supremacy Clause does provide that state law must give way to conflicting federal law, it does not make Congress the exclusive regulator. Second, neither Clause expressly limits concurrent state power. Third, neither Clause grants a federal power with which a concurrent state power would be repugnant. The Supremacy Clause is not a grant of federal power, and the Necessary and Proper Clause merely supplements other grants of federal power, most of which Congress exercises concurrently with the states. In the end, *Alden* too fits the Hamiltonian mold.

The year after its state immunity trilogy, the Court returned to the issue in *Kimel v. Florida Board of Regents*.¹⁸⁴ *Kimel* involved a private damages suit against a state agency under the Age Discrimination in Employment Act (ADEA). For our purposes, *Kimel* is of limited significance because Congress had enacted the ADEA under the Commerce Clause and section 5 of the Fourteenth Amendment. *Seminole Tribe* foreclosed abrogation by the Commerce Clause, and abrogation by the Fourteenth Amendment is beyond the scope of the present discussion. *Kimel*'s only relevance lies in the Court's description of *Seminole Tribe*: "In *Seminole Tribe*, we held that Congress lacks power under Article I to abrogate the States' sovereign immunity."¹⁸⁵ As noted above, this statement is consistent with the Hamiltonian view. Certain aspects of the Constitution limit state immunity to private damages suits. Where the Constitution does so, states are not immune from private damages suits. But, when the Constitution does not limit state immunity, as the Commerce Clause does not, Congress may not itself abrogate that immunity.

The Court's most recent state immunity case, *Board of Trustees of the University of Alabama v. Garrett*,¹⁸⁶ made the same point. *Garrett* involved a private damages suit against a public university under the Americans with Disabilities Act (ADA).¹⁸⁷ Congress enacted the ADA under the Commerce Clause and section 5 of the Fourteenth Amendment, and *Seminole Tribe* rejected abrogation by the Commerce Clause.¹⁸⁸ The Court's description of *Seminole Tribe* was unremarkable: "Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."¹⁸⁹ The Commerce

184. 528 U.S. 62 (2000).

185. *Id.* at 78.

186. 531 U.S. 356 (2001).

187. 42 U.S.C.A. § 12112(a) (West 1995 & Supp. 2001).

188. *Garrett*, 531 U.S. at 364-65.

189. *Id.* at 365.

Clause did not abrogate state immunity, so Congress could not do so by resort to its Article I powers. The Hamiltonian view remains intact.

CONCLUSION

This Article makes three modest points. First, the Supreme Court has repeatedly cited and quoted Alexander Hamilton's view in its state immunity decisions. This use of Hamilton suggests that members of the Court find his thinking relevant to their state immunity decisions. Thus, to the extent those justices take Hamilton seriously, their future decisions should further articulate and apply his view of state immunity.

Second, Hamilton's view of state immunity consists of three principles: (1) state immunity from private damages suits pre-existed the Constitution;¹⁹⁰ (2) states retained that immunity after ratifying the Constitution, except where portions of the Constitution eliminated that immunity;¹⁹¹ and (3) three categories of constitutional provisions eliminate state immunity.¹⁹² Part I concluded by identifying specific constitutional provisions that fit within Hamilton's three categories.

Third, none of the Court's recent state immunity decisions disavow Hamilton's view. All of the cases discussed in Parts II.B and C are consistent with his three principles. First, all recognize that state immunity pre-existed the Constitution. Second, all accept that states retain that immunity except where the Constitution eliminated it. Third, the specific holding of each case is consistent with Hamilton's three categories of abrogation. As none of the cases decided thus far have involved a constitutional provision from one of Hamilton's three categories, the Court has not found abrogation. Consequently, the Court has not been pushed to flesh out the full implications of Hamilton's view. Yet, when such a case arises, Hamilton's three categories of abrogation, as explained in this Article, stand ready to guide the analysis.

190. See *infra* notes 54-56 and accompanying text.

191. See *infra* notes 54-57 and accompanying text.

192. See *infra* notes 58-79 and accompanying text.