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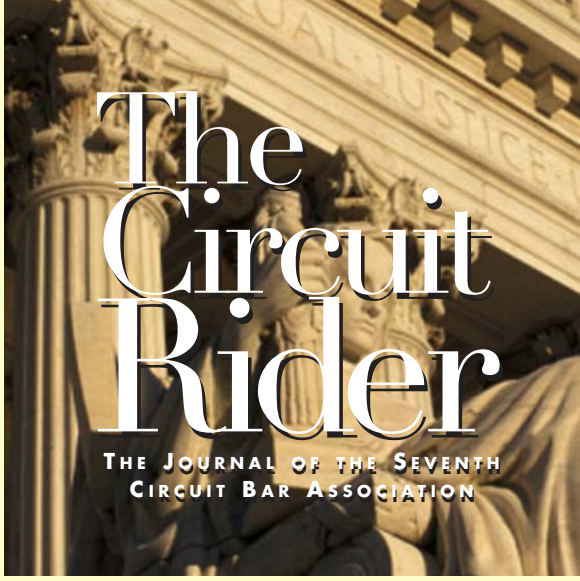
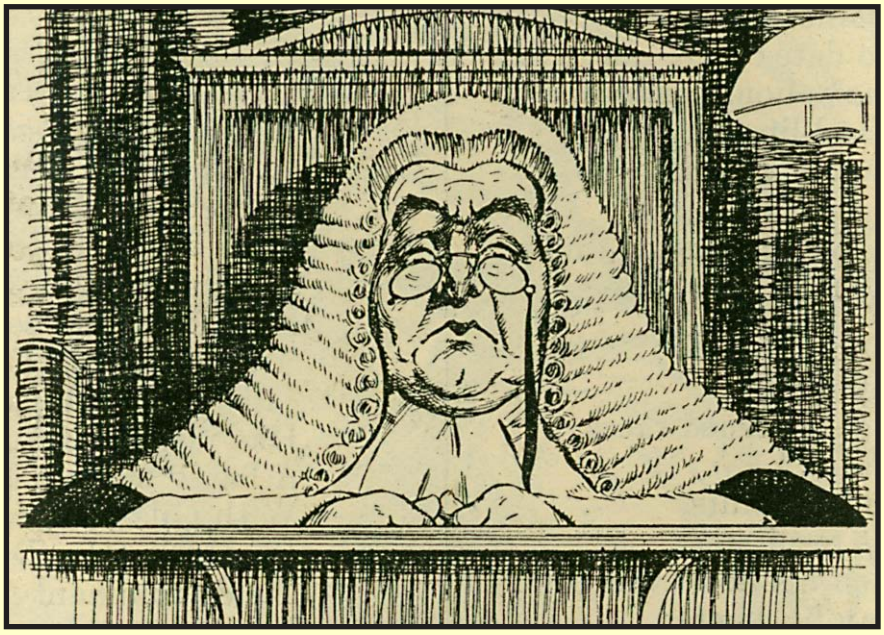


Featured In This Issue

Problems & Remedies



The Circuit Rider

In This Issue

Alexander Hamilton *and the* Seventh Circuit

*By Alexandra L. Newman and Linda X. Shi**

How do you write like you're
Running out of time?
Write day and night like you're
Running out of time?[1]

Are you one of the lucky theatergoers who scored tickets to the hit Broadway musical HAMILTON? The show — which received the 2016 Pulitzer Prize for Drama and won 11 Tony awards including Best Musical, among other accolades — opened in Chicago on September 27.[2] Featuring music, lyrics, and a book by Lin-Manuel Miranda, the show is billed as the story of America's Founding Father Alexander Hamilton, "an immigrant from the West Indies who became George Washington's right-hand man during the Revolutionary War and was the new nation's first Treasury Secretary. Featuring a score that blends hip-hop, jazz, blues, rap, R&B, and Broadway, HAMILTON is the story of America then, told by America now."[3] The musical, in turn, is based on the award-winning 2004 biography of Hamilton by historian Ron Chernow.

Before enjoying this recent popularity, Hamilton did not attract much attention in American popular culture apart from his presence on the $10 bill and his depiction in an obscure 1931 film.[4] In fact,

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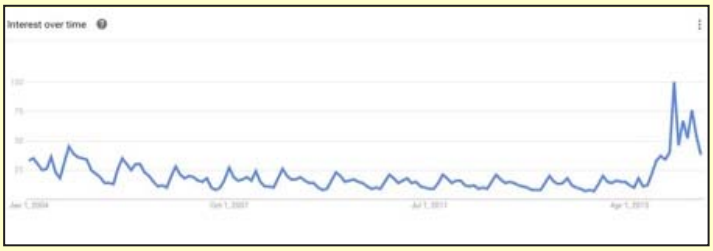
a search for the name "Alexander Hamilton" on Google Trends reflects the tremendous surge of interest in Hamilton beginning after 2015, when the musical first premiered in an off-Broadway production:



Although Hamilton may have been somewhat ignored in popular culture until recently, he is no stranger to American lawyers, who typically study *The Federalist* papers as part of their constitutional law curricula in law school. *The Federalist* is a collection of 85 essays promoting the ratification of the Constitution. The essays were written between October 1787 and May 1788 by Hamilton, James Madison, and John Jay under the collective pseudonym "Publius."

Historians have disputed who authored each of the essays in *The Federalist*.[6] Today, however, it is widely concluded that Hamilton wrote the majority at fifty-one essays; Madison wrote fifteen; Jay wrote five; Hamilton and Madison together wrote three; and either Hamilton or Madison wrote the remaining eleven.[7] The song "Non-Stop" in the musical HAMILTON describes the authors' frenetic experience of writing *The Federalist* papers:

Alexander joins forces with James Madison and John Jay to
write a series of essays
Defending the new United States constitution
Entitled The Federalist papers
The plan was to write a total of twenty-five essays
The work divided evenly among the three men
In the end, they wrote eighty-five essays, in the span of six months
John Jay got sick after writing five
James Madison wrote twenty-nine
Hamilton wrote the other fifty-one
How do you write like you're
Running out of time?
Write day and night like you're
Running out of time?[8]

Hamilton and Madison — who were both delegates to the Constitutional Convention — published *The Federalist* papers along with Jay in various New York state newspapers to urge New Yorkers to ratify the proposed Constitution, which had been drafted in the summer of 1787 in Philadelphia.[9] As Judge Easterbrook has noted, the authors chose to publish *The Federalist* papers anonymously because "anonymity promotes a focus on the strength of the argument rather than the identity of the speaker."[10] Because the essays sought to lobby for adoption of the Constitution over the existing Articles of Confederation, the essays explained in detail various provisions of the Constitution.[11] Today, the essays are considered "one of the most important sources for interpreting and understanding the original intent of the Constitution."[12]

Given the significance of the constitutional ideas set forth in *The Federalist* papers, it is not surprising that federal courts cite frequently to these essays when interpreting the Constitution in order to obtain a contemporary account of the intentions of the framers. Indeed, an ongoing law review study keeps a running tally of every occasion on which the Supreme Court has quoted or cited one or more of the essays from *The Federalist.*[13] This study reveals that, between 1789 and 2006, the justices have continuously increased the frequency of their citations to the essays; therefore, scholars conclude that "the essays will, in all likelihood, continue indefinitely to play a role in the Court's opinions."[14] It is worth noting, however, that, as one scholar observed, the authors of *The Federalist* papers "were addressing the people at large and their aim was to influence public opinion, not to formulate principles for the guidance of courts. No one foresaw the possibility that what they were writing would some day be cited in the law reports along with Blackstone and Kent."[15]

There is ongoing and vigorous scholarly debate about how courts actually rely upon *The Federalist* papers as an empirical matter. For example, some scholars observe that courts cite *The Federalist* papers as binding or persuasive authority to determine the outcomes of cases.[16] Other scholars note that

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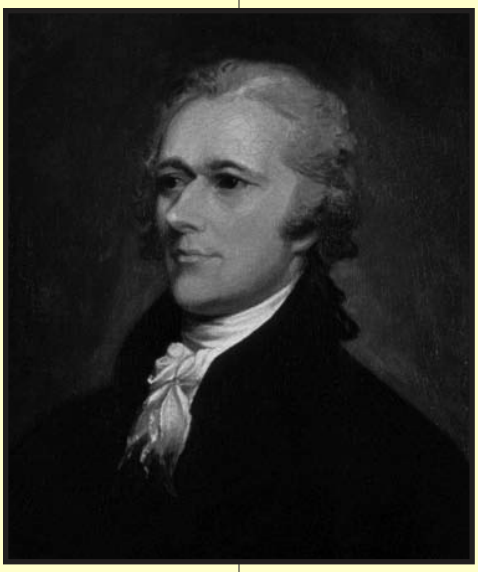
courts invoke the essays to buttress conclusions that they have already reached and to "clothe their decisions with an air of credibility."[17] One scholar has posited that, when relying on *The Federalist* papers as a source of authority for its opinions, the Supreme Court uses the papers as (1) "learned commentary" (*i.e.,* "a source of wisdom that might enlighten the Court on how to interpret the Constitution in a particular case"); (2) a form of reasoning that is "essentially a reliance-based contract theory" (*i.e.,* the Court cites *The Federalist* "on the theory that the delegates to the various state ratifying conventions read the essays and relied on their explanations of the Constitution in voting to ratify"); and (3) writings that, "like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood."[18] Still another scholar has analyzed the phenomenon in which different Supreme Court justices have cited to *The Federalist* papers to "support divergent or opposing historical interpretations of legal meaning."[19]



Another scholarly debate concerns whether courts *should* rely upon *The Federalist* essays in judicial opinions. Chief Justice John Marshall, in fact, considered this issue in 1819 when he wrote, in *McCulloch v. Maryland,* that "the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained."[20] Another scholar, focusing specifically on the Supreme Court's citations to Hamilton's essays, has argued that "judges who wish to invoke the personal authority of historical persons have an obligation to treat those persons candidly and to take them as a whole. Reducing persons such as Alexander Hamilton to sound bites carved to fit a particular case is confusing at best, misleading at worst, and unfair to the persons whose history the Court uses."[21] This scholar maintains that "for most of the arguments in which the Court refers to *The Federalist,* the Court should consider not just the words of the particular essay, but the character of its author as well."[22]

In any event, "the widespread citation of *The Federalist* means that litigants need to be careful in how they read and use the essays."[23] Indeed, for litigants, "studying what the Court has to say about them is at least as important as studying *The Federalist*'s actual words," and because "[d]ifferent Courts and different justices have used *The Federalist* in different ways," that is "all the more reason for litigants to understand the various spins that the Court may put on a particular *Federalist* essay."[24]

Accordingly, in light of Hamilton's recently renewed popularity specifically and the influence of *The Federalist* papers on federal courts generally, an astute Seventh Circuit practitioner might ask the question that is the subject of the remainder of this article: how have courts within the Seventh Circuit interpreted and relied upon *The Federalist* papers that were authored by Hamilton?

The answer is that Hamilton's writings from *The Federalist* have influenced courts at all levels within the Seventh Circuit, including in the bankruptcy, district, and appellate courts. In fact, courts within the Seventh Circuit have cited to at least ten of the essays that are attributed solely to Hamilton (Nos. 21, 32, 36, 59, 78, 80, 81, 82, 83, and 84) on the topics of commerce power, elections, judicial power, sovereign immunity, and more. Courts within the Seventh Circuit have relied upon Hamilton's essays to provide historical context for the interpretation of specific Constitutional text, to provide factual conclusions about the nature of government, and to provide support for assertions of political philosophy, among other uses. The following summary of case references can assist Seventh Circuit practitioners who want to understand the various analyses that the Seventh Circuit has applied to *The Federalist* essays authored by Hamilton.

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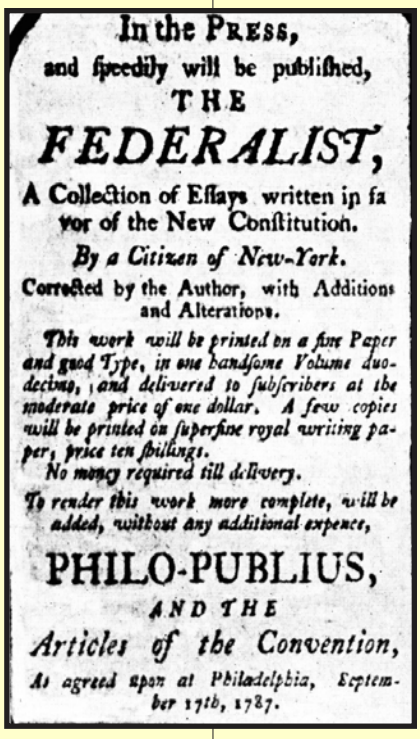
Federalist No. 21 ("Other Defects of the Present Confederation")

The Seventh Circuit invoked Federalist No. 21 in *DeKalb County v. Federal Housing Finance Agency* to provide authority for its interpretation of a federal statute on taxation.[25] In that case, which arose after the 2008 recession and the related subprime mortgage crisis, states and local subdivisions sought to impose real-estate transfer taxes on sales of foreclosed properties by government-sponsored enterprises (*e.g.,* Fannie Mae and Freddie Mac), despite federal statutory language that made these enterprises exempt from "all taxation . . . except" real property taxation.[26] Affirming the judgment of the district court, the Seventh Circuit asserted that the statute made these enterprises exempt from "all taxation . . . except" real property taxation, such that states and local subdivisions cannot levy a tax on sales of real property by these enterprises.[27]


In the PRESS,
and speedily will be published,
THE
FEDERALIST,
A Collection of Eſſays written in fa vor of the New Conſtitution.
By a Citizen of New-York.
Corrected by the Author, with Additions and Alterations.
This work will be printed on a fine Paper and good Type, in one handſome Volume duodecimo, and delivered to ſubſcribers at the moderate price of one dollar. A few copies will be printed on ſuperfine royal writing paper, price ten ſhillings.
No money required till delivery.
To render this work more complete, will be added, without any additional expence,
PHILO-PUBLIUS,
AND THE
Articles of the Convention,
As agreed upon at Philadelphia, September 17th, 1787.

In so concluding, the court distinguished between a tax on property itself (for which the government-sponsored enterprises would not be exempt) and a tax on the *transfer* of property (for which the enterprises would be exempt).[28] This distinction, the court noted, is part of the historical distinction found in the Constitution between "direct" and "indirect" taxes.[29] Direct taxes, the court explained, embrace "taxes per head" (such as a poll tax) and "taxes on real and personal property," whereas indirect taxes concern "all other taxes."[30] Further addressing this distinction, the court attributed the theory behind non-apportionment of indirect taxes to Hamilton's argument in Federalist No. 21:

> Article I, § 9, cl. 4 of the Constitution requires that direct taxes be apportioned among the states according to population. Indirect taxes — various forms of excise tax, including sale or transfer or inheritance taxes — were thought not to require apportionment because, as Hamilton argued in *The Federalist* No. 21, the market could be relied on to prevent excessive excise taxation, as excise taxes add to the price of goods and services. (The Sixteenth Amendment removed income taxes from the class of taxes that require apportionment.) The "direct"-"indirect" terminology relates to Hamilton's point. A sales tax is "indirect" because the tax is imposed on the seller, and he will try and usually succeed in passing on a portion, sometimes the entirety, of the tax to his customers by folding the tax into the price of the good sold. The result is that the "real" taxpayer is, at least to a large extent, not the nominal taxpayer (the seller), but the nominal taxpayer's customer.[31]

The upshot of this Hamiltonian distinction, the court concluded, was that the statutory phrase "all taxation . . . except" taxes on real property meant that Congress, "having carved an express exception for one type of tax," could be "expected to make an express exception for any other type of tax that it wanted state and local governments to be permitted to levy on" the government-sponsored enterprises.[32] Because the statute did not make an express exception for taxes on the *sale* of real property, the states and local subdivisions could not levy such taxes on the government-sponsored enterprises for their sales of foreclosed properties to homebuyers.[33]

Federalist No. 32 ("The Same Subject Continued: Concerning the General Power of Taxation")

Federalist No. 32 — which addresses the limited exceptions to state sovereignty — was analyzed by a bankruptcy court in *In re Claxton*.[34] The analysis of Federalist No. 32 in this case is significant because the bankruptcy court considered Hamilton's likely position that the states ceded their sovereignty over bankruptcy law when they formed the union, but ultimately the court concluded that the general rationale of Federalist No. 32 was not outcome determinative in the case and that the states retained that sovereignty in light of other controlling Supreme Court jurisprudence.[35]

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In *In re Claxton,* the plaintiff filed an adversary complaint in bankruptcy against the State of Illinois asserting that taxes due to it were discharged because they were outside the exceptions to the general discharge under 11 U.S.C. § 727 of taxes specified in 11 U.S.C. § 523(a)(1)(A) and (B).[36] The state moved to dismiss the claim on the ground that it had sovereign immunity under the Eleventh Amendment of the Constitution.[37] The plaintiff countered that Congress effected a valid abrogation of all state immunity under §106(a) of the Bankruptcy Code, 11 U.S.C. § 106(a), and, alternatively, if § 106(a) were found to be invalid then the plaintiff's complaint should be treated as a request for injunction.[38] The court determined that the "meaning of jurisprudence under the Eleventh Amendment as to federal court cases against the State of Illinois" would need to be resolved.[39]

In ruling that § 106(a) of the Bankruptcy Code is unconstitutional as applied to the state, the bankruptcy court addressed the question: "Did the Framers only intend for states to surrender their legislative sovereignty in substantive bankruptcy law to the federal government, not their judicial sovereignty over enforcement of rights under bankruptcy law"?[40] In answering this question, the court considered Federalist No. 32 and noted that "[g]iven the disparate bankruptcy laws among the states before adoption of the Constitution [. . .], [there was a] basis to reason that the Framers not only intended to empower the national government to create a national bankruptcy system, but also to empower federal courts to enforce rights under that system."[41] This view was "buttressed," the court explained, "by reasoning in Hamilton's Federalist No. 32 which supports the view that the states ceded their immunity in areas where the retention of immunity would be inimical to the power of the federal government over the same area."[42]

Ultimately, despite Hamilton's arguments in Federalist No. 32 that may have supported the plaintiff's assertion that Illinois and other states ceded their sovereign immunity in matters of bankruptcy law through adoption of the Constitution, the bankruptcy court sided with the state's argument that Congressional power over bankruptcy matters is limited to legislative authority to define rights, not the power to subject states to private suits in federal courts.[43] Accordingly, the court concluded that § 106(a) of the Bankruptcy Code is unconstitutional.[44] In doing so, the court remarked that the Supreme Court decisions that lead to this "sharp change in jurisprudence may have also lead a change in the theory and nature of our federal Union" as envisioned in Federalist No. 32.[45]

Nonetheless, the court noted that "the rule of law and respect for *stare decisis* compels lower federal judges to follow where they have lead so long as that view prevails."[46] (The Seventh Circuit later also determined in *Nelson v. La Crosse County* that § 106(a) of the Bankruptcy Code is unconstitutional (discussed below under Federalist No. 81)[47]; the Supreme Court ultimately resolved the issue in *Central Virginia Community College v. Katz,* concluding that it need not consider whether Congress' attempt to abrogate state sovereign immunity in § 106(a) was valid because abrogation was not the "relevant question," and Congress' determination that States should be amenable to preferential transfer proceedings was within the scope of its power to enact "Laws on the subject of Bankruptcies."[48])

Federalist No. 36 ("The Same Subject Continued: Concerning the General Power of Taxation")

In *DeKalb County,* discussed above under Federalist No. 21, the Seventh Circuit also referenced Federalist No. 36 to make a factual assertion:

> Moreover, had states wanted to be permitted to tax property sales by Fannie, why wouldn't Congress have included an express exception from the exemption for such taxation in the 1968 statute? *After all, members of Congress are well attuned to the financial interests of the states and localities they represent.* See, e.g., *The Federalist* No. 36 (Hamilton). They may have felt that their constituents would be disserved by allowing state taxation of Fannie, because by increasing Fannie's costs it would reduce its ability to purchase mortgages, to the detriment of the state's home buyers.[49]

This factual assertion about congressional knowledge appears to be derived from a series of rhetorical questions asked by Hamilton in Federalist No. 36 in response to the concern that a national legislature will suffer from "the want of a sufficient knowledge of local circumstances." That concern, Hamilton noted, "seems to be entirely destitute of foundation" because,

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he questioned, "cannot the [ ] knowledge be obtained in the national legislature from the representatives of each State? And is it not to be presumed that the men who will generally be sent will be possessed of the necessary degree of intelligence to be able to communicate that information?" In citing Federalist No. 36 in *DeKalb County,* the Seventh Circuit implicitly answered these questions affirmatively.

Federalist No. 59 ("Concerning the Power of Congress to Regulate the Election of Members")

The two occasions on which the Seventh Circuit has addressed Federalist No. 59 are noteworthy in that both opinions have a connection to President Barack Obama. In the 1995 case *Association of Community Organizations for Reform Now (ACORN) v. Edgar,* Obama served as an attorney for the plaintiffs[50]; in the 2010 case *Judge v. Quinn,* the dispute concerned the procedure for filling the U.S. Senate seat for Illinois that was left vacant after Obama was elected president.[51] The court's references to Federalist No. 59 in these cases reflect both a willingness to depart from Hamilton's rationale as well as an embrace of the historical and interpretive guidance offered by the essay.

In *ACORN v. Edgar,* the United States and various public interest organizations sued Illinois and state officials for the State's failure to comply with provisions of the National Voter Registration Act of 1993.[52] That Act required Illinois to take a variety of actions to make it easier to register to vote in federal elections.[53] Illinois responded that the Act imposed without the State's consent new federal responsibilities that would require changes in State laws governing voter registration; imposed heavy unreimbursed costs on the State; and would make it more difficult for the State to fight vote fraud.[54] Illinois further argued that Congress could not force State governments to administer federal programs such as a program for facilitating the registration of voters in federal elections.[55]

The district court held the Act constitutional and enjoined the State from violating the Act, and the Seventh Circuit affirmed.[56] In doing so, the court of appeals considered the jurisprudence surrounding the "Manner" of holding federal elections as set forth in Article I, § 4, of the Constitution.[57] The court noted that the "Manner" of holding elections has been broadly construed by courts to embrace the system for registering voters and to extend to party primaries.[58] In making this observation, the court referenced the arguments in Federalist No. 59 concerning the national legislature's authority to regulate the election of its own members:

> Most of the regulations that have been promulgated under the authority of Article I section 4 are remote from the original rationale of the provision as stated by Hamilton in *Federalist No. 59* — that "every government ought to contain in itself the means of its own preservation." But laws frequently outrun their rationales. The provision is broadly worded and has been broadly interpreted. *Nor is it certain that its rationale is as limited as Hamilton suggested.* One of the unquestioned regulations enacted under the authority of Article I section 4 is the fixing of a uniform date for federal elections. 2 U.S.C. § 7. Such a regulation is not necessary to preserve the government of the United States or even to prevent an abuse of power by state governments. It is merely a sensible regulation of federal elections, and evidently Article I section 4 authorizes such regulations. The uniform date is authorized by the part of the section concerning the "Times" rather than the "Manner" of elections, but we cannot see what difference that makes.[59]

The court's references to Federalist No. 59 are significant insofar as the court concluded that the essay's arguments have and should be construed liberally, not strictly. The court's assessment of Federalist No. 59 suggests that the court views *The Federalist* papers not as rigid gospel with regard to constitutional interpretation, but rather as materials offering flexible guidance that can be interpreted pragmatically in light of evolving circumstances.

In *Judge v. Quinn,* the Seventh Circuit was tasked with deciding whether the system that Illinois was using to fill a "famous vacancy in one of its senate slots"— the Illinois senate vacancy created by Obama's election to the presidency — had "strayed so far from the mark that a preliminary injunction should have been entered by the district court."[60] In ruling that the district court did not abuse its discretion in refusing the preliminary injunction requested by voters, the court analyzed the original Constitution's

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"cautious approach toward the election of public officials" and the "fundamental change in the legislative branch of government" that occurred when, in 1913, the Seventeenth Amendment was enacted to provide for the direct election of senators.[61] The court observed that the Seventeenth Amendment also changed the rules for filling vacancies in a state's senatorial delegation.[62]

In a vast scholarly opinion that considered the text and history of the Seventeenth Amendment, the court cited Federalist No. 59 to reconcile the amendment's "principal clause" ("[w]hen vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies") with its "proviso" ("[*p*]*rovided,* that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct").[63] Invoking Federalist No. 59, the court noted that "[t]he balance between the states' power and that of Congress to regulate congressional elections was a substantial issue when the Constitution was being drafted," and "it remained a contentious topic more than a century later as the Seventeenth Amendment worked its way through Congress."[64] Indeed, "whether the states should control senatorial elections exclusively or Congress should retain a role" was a "hotly debated" issue.[65] But historical sources showed that "no member of Congress ever expressed doubt that state legislatures were the central actors when it came to passing laws that governed the election of senators."[66] The court concluded from its analysis — including its examination of Federalist No. 59 — that the Seventeenth Amendment "sets up a system under which the principal clause and proviso assign complementary roles to the state's executive and legislative authorities in the process of filling senate vacancies. Nothing about the state legislature's power to direct the election to fill a vacancy qualifies or nullifies the executive's duty to issue writs of election."[67]

Federalist No. 78 ("The Judiciary Department")

Federalist No. 78 is one of *The Federalist* papers that is most frequently cited by the Supreme Court.[68] And among Hamilton's papers, Federalist No. 78 is the essay that is most often cited by courts in the Seventh Circuit. Federalist No. 78 is the first in a series of six essays discussing the powers and limitations of the judicial branch. In Federalist No. 78, Hamilton discusses the power of judicial review and argues that the federal courts have the duty to determine whether acts of Congress are constitutional.

The Seventh Circuit has cited Federalist No. 78 in two opinions for the court.[69] In *Prater v. U.S. Parole Commission,* the Parole Commission applied the Parole Commission and Reorganization Act of 1976 to the petitioner's case and denied his request for parole, ruling that "release at this time would depreciate the severity of [his] offense behavior," even though the petitioner had committed the crime before 1976.[70] The petitioner sought a writ of habeas corpus, contending that the ground on which his request for parole had been denied had come into the law after he had committed his crime and therefore could not be used to deny him parole without violating the ex post facto clause in Article I, § 9, of the Constitution.[71] The court held that "[t]he constitutional prohibition against ex post facto laws . . . is directed to the legislative branch of government rather than to the other branches," noting that Hamilton wrote in Federalist No. 78, "By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass . . . no *ex-post-facto* laws."[72] The Seventh Circuit, sitting *en banc,* affirmed the district court's dismissal of the petition and held that the petitioner was not subjected to ex post facto punishment.

In *TPO, Inc. v. McMillen,* the petitioner sought a writ of mandamus to nullify the assignment of its case in the district court to a magistrate judge for ruling on its motion to dismiss.[73] In issuing the writ, the Seventh Circuit held that under the 1968 United States Magistrates Act, magistrate judges have no power to decide motions to dismiss or motions for summary

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judgment — both of which involve ultimate decision making — and the district courts have no power to delegate such duties to magistrate judges. The court cited the legislative history of the Act, including concerns that expanding the jurisdiction of magistrate judges might violate the dual constitutional concepts that Article III of the Constitution vests the judicial power of the United States in judges possessing life tenure and undiminishable salaries, and that due process of law encompasses the right of litigants to have cases or controversies determined by Article III judges.[74] The court cited Federalist No. 78, in which "Hamilton urged that 'complete independence of the courts of justice is particularly essential' and that independence be assured by life tenure."

Federalist No. 78 has also been frequently cited by district courts within the Seventh Circuit. In *United States v. Linder,* a federal grand jury indicted a Deputy United States Marshal, charging that he violated others' civil rights by using excessive force against them and then attempted to conceal or prevent information regarding those incidents to be presented in the course of the subsequent investigations.[75] The marshal moved to dismiss the indictment, alleging that the prosecution violated his Fifth and Sixth Amendment rights. After an evidentiary hearing, the court dismissed the indictment and ruled that the prosecution "substantially interfered with Defendant's access to victims, exercised an overly aggressive approach to witnesses by threatening them with prosecution, and violated the Defendant's constitutional rights."[76] Citing Federalist Paper No. 78, the court noted that "[n]otwithstanding the proposition that the federal courts are counseled not to interfere with the United States Attorneys' discretion in their authority over federal criminal prosecutions, the judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government."[77]

In *Falls v. Town of Dyer, Ind.,* the court assessed whether a town's portable sign ordinance or its enforcement of the ordinance violated the constitutional prohibition against bills of attainder.[78] The court noted that the Constitution prohibits a state from passing any bill of attainder, and that Hamilton wrote in Federalist No. 78:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[79]

The court concluded that the Constitution "preclude[s] trial by legislature, which would be a violation of the separation of powers concept," and that Article I of the Constitution "prohibits all legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."[80] In granting summary judgment to the town, the court ruled that the ordinance and its enforcement did not amount to a bill of attainder because the plaintiff could not "say in absolute terms that th[e] ordinance was enforced only against him."[81]

Federalist No. 78 has also been referenced to determine the scope of the bankruptcy courts' jurisdiction. In *In re Repair and Maintenance Parts Corp.,* a bankruptcy trustee sued for damages for alleged violations of antitrust laws.[82] The defendant moved to dismiss the complaint on the ground that the bankruptcy court lacked subject matter jurisdiction, arguing that Congress may not grant subject matter jurisdiction to bankruptcy judges to try cases which are otherwise assigned under the Constitution to Article III judges. The court disagreed, holding that "[t]he Constitution does not require that all federal cases be litigated in a forum providing Article III protections."[83] In reaching its conclusion, the court cited Federalist No. 78 at length:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion

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> dangerous innovations in the government, and serious oppressions of the minor party in the community. . . . But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.[84]

The court held that Congress has properly granted the bankruptcy court its pervasive jurisdiction because "Article III tenure and compensation protections were intended to give independence to those federal judges primarily charged with reviewing the constitutionality of laws passed by Congress or dealing with issues affecting fundamental rights of persons asserting unpopular causes."[85]

Federalist No. 80 ("The Powers of the Judiciary")

Federalist No. 80 describes five areas of federal jurisdiction: cases that (1) arise out of the laws of the United States; (2) arise out of provisions of the Constitution; (3) include the United States as a party; (4) involve "the peace of the confederacy"; and (5) originate on the high seas. Included in the fourth category of federal jurisdiction are "cases between a State and the citizens thereof, and foreign States, citizens, or subjects."

The Seventh Circuit has cited Federalist No. 80 in cases involving alienage jurisdiction, which is the district court's jurisdiction over civil actions between state citizens and citizens of foreign states.[86] In *Tango Music, LLC v. DeadQuick Music, Inc.,* the court considered whether having citizens from the same foreign country on both sides of the case destroys diversity jurisdiction.[87] In holding that diversity jurisdiction is not destroyed in this scenario, the court cited Federalist No. 80 for the reinforcing consideration of "the desirability of promoting international harmony . . . in justification of the alienage jurisdiction"; "[B]y giving foreigners access to the national court system, where they are less likely to encounter provincial prejudices when litigating against U.S. citizens."[88]

In *Sadat v. Mertes,* the plaintiff was a naturalized American citizen who was also an Egyptian citizen.[89] The plaintiff argued that the district court had alienage jurisdiction pursuant to 28 U.S.C. § 1332(a)(2) because he was a citizen of a foreign state. In discussing the purposes of alienage jurisdiction, the Seventh Circuit noted that "alienage jurisdiction was intended to provide the federal courts with a form of protective jurisdiction over matters implicating international relations where the national interest was paramount" and cited Federalist No. 80, which states that "The peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty for preventing it."[90] In other words, one of the dominant considerations that prompted the provision of alienage jurisdiction is the "[a]pprehension of entanglements with other sovereigns that might ensue from failure to treat the legal controversies of aliens on a national level."[91] The Seventh Circuit affirmed the dismissal of the case for lack of subject matter jurisdiction, and it determined that although the plaintiff was an Egyptian citizen whose citizenship was recognized by Egypt, the plaintiff's dominant nationality was American because he voluntarily became a naturalized American citizen. His subsequent actions (including registering with the U.S. embassy during his stays in Lebanon and Egypt, voting in American elections by absentee ballot while living abroad, and insistence during his international travels that he was an American citizen) manifested his "continued, voluntary association with the United States and his intent to remain an American."[92]

The district courts have also referenced Federalist No. 80 in cases involving alienage jurisdiction. In *McHugh v. Westpac Banking Corp.,* a defendant bank challenged the court's alienage jurisdiction, arguing that while it was an Australian corporation with its principal place of business in Sydney, Australia, it also operated a branch office in Chicago.[93] The defendant argued that because of its license to operate a federal branch of a foreign bank, its citizenship must be determined by 28 U.S.C. § 1348, which states that "[a]ll national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the state in which they are respectively located." Because the defendant bank maintained a branch in Chicago at the time that the plaintiff filed his complaint, the defendant argued that complete diversity did not exist and the court lacked subject matter jurisdiction.

The court held that "Congress would not have wanted § 1348 to limit foreign banks' access to federal courts to the same extent as national and state banks" because Congress might have concluded

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that "limiting foreign banks' access to federal courts would have produced a greater risk of bias than limiting national banks' access to federal courts."[94] The court cited to *Sadat* and Federalist No. 80 that "the dominant concerns which prompted the provision of alienage jurisdiction were the failure of individual states to give protection to foreigners under treaties and the fear of disputes with foreign countries which might result from a failure to treat legal controversies on a national level." Given these concerns, the absence of statutory language extending § 1348 to foreign banks could not be considered an oversight.

Federalist No. 81 ("The Judiciary Continued, and the Distribution of Judicial Authority")

Federalist No. 81 discusses the separation of judicial authority among the different types of courts and the relationship between those courts. In this essay, Hamilton examines Article III, § 1, of the Constitution, which states, "The judicial power of the United States is to be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." The Seventh Circuit has quoted the following passage from Federalist No. 81 in several cases involving sovereign immunity:

> 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 convention, it will remain with the states, and the Danger intimated must be merely ideal.[95]

In particular, in *Nelson v. La Crosse County,* the plaintiff argued that Congress abrogated the States' sovereign immunity in bankruptcy cases by enacting § 106(a) of the Bankruptcy Code, and that the States had already surrendered their sovereign immunity in the bankruptcy context through the "plan of the Convention"— that is, that the States waived sovereign immunity in bankruptcy by ratifying the Constitution. The Seventh Circuit rejected this argument, holding that "the States, by ceding certain enumerated legislative powers, did not relinquish their immunity from suit in those areas"[96] As the bankruptcy court did in *In re Claxton* (discussed above under Federalist No. 32), the Seventh Circuit also concluded that Congress lacked authority under Article I of the Constitution to abrogate state sovereign immunity by enacting § 106(a) of the Bankruptcy Code and determined that § 106(a) was unconstitutional.[97] (The Supreme Court resolved this issue in *Central Virginia Community College v. Katz.*[98])

Federalist No. 82 ("The Judiciary Continued")

In Federalist No. 82, Hamilton addresses concerns that the proposed constitution would deprive state judicial systems of their authority. He concludes that the state and federal courts are "parts of ONE WHOLE," and that "State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

In *Donnelly v. Yellow Freight System, Inc.,* in holding that the state court had concurrent jurisdiction with the federal court over federal employment discrimination actions, the Seventh Circuit noted that the presumption that "state courts . . . share jurisdiction concurrently with the federal courts over a federal cause of action" "[u]nless Congress includes in the statute an explicit statement vesting jurisdiction exclusively in federal court" is "deeply imbedded in the history of our federal system."[99] And in *People of State of Illinois v. Kerr-McGee Chemical Corp.,*— a case involving federal preemption of the Atomic Energy Act — the Seventh Circuit examined the principles of federal preemption as outlined in Federalist No. 82.[100] Quoting Federalist No. 82, the court noted that the exclusive delegation of federal jurisdiction can exist in only three cases: "where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a

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similar authority in the Sates would be utterly incompatible."[101]

In *Hess v. Great Atlantic & Pacific Tea Co.,* the district court cited Federalist No. 82 in discussing whether joinder of all defendants is required in a removal petition in federal question cases.[102] The court noted "the legislative and judicial policy"—including the discussion of concurrent jurisdiction in Federalist No. 82 — "that state courts are considered as competent as federal courts to hear federal questions that Congress has not committed to exclusively federal jurisdiction."[103]

Federalist No. 83 ("The Judiciary Continued in Relation to Trial by Jury")

Courts within the Seventh Circuit have invoked Federalist No. 83 for that essay's praise of the role of the jury in our society. Indeed, in *In re Enke,* the district court cited Hamilton's elevation of the role of the jury as "the very palladium of free government" and a "valuable safeguard to liberty" in finding that a sworn juror in a criminal trial failed to establish good cause for his absence from jury service during a trial.[104] In addition, Federalist No. 83 observes that the "trial by jury in civil cases" provides "security against corruption" and "discourages attempts to seduce the integrity" of either the court or the jury. Quoting this same passage from Federalist No. 83, another district court, in evaluating a party's right to a jury trial in a civil case, noted that Hamilton "proclaimed one of the benefits of a jury when he wrote, 'The temptations to prostitution [*i.e.,* corruption], which the judges might have to surmount, must certainly be much fewer while the co-operation of a jury is necessary, than they might be if they had themselves the exclusive determination of all causes.'"[105] That court further explained that "Mr. Hamilton also sought to reassure the 'People of New York' that their right to a civil jury trial was secure when he argued that the Constitution's failure to expressly provide for civil jury trials did not by implication abolish civil jury trials."[106]

Federalist No. 84 ("Certain General and Miscellaneous Objections to the Constitution Considered and Answered")

The district court in *Falls v. Town of Dyer, Ind.,* in addition to invoking Federalist No. 78 (discussed above), cited Federalist No. 84 in ruling that a plaintiff failed to show that a town's portable sign ordinance violated the bill-of-attainder prohibition applicable to States that is contained in Article I, § 10, of the Constitution.[107] The court noted that in Federalist No. 84 "Hamilton prepared a laundry list of liberties, including the aforesaid provisions regarding bill of attainder, to argue that there were indeed specified rights contained in the original Constitution of the United States."[108] From this source and others, the court concluded that "[t]he bill of attainder provisions in both of the aforesaid clauses in Article I of the Constitution have been interpreted literally with the designs of the Framers in mind, so as to preclude trial by legislature, which would be a violation of the separation of powers concept."[109]

* * *

As this article illustrates, courts within the Seventh Circuit have relied upon Hamilton's essays in *The Federalist* in a variety of contexts and have used a variety of interpretive methods. Consequently, attorneys practicing within the Seventh Circuit should become familiar with the ways in which courts have invoked *The Federalist* papers generally and the scholarly debates that inform courts throughout the federal judiciary. Lawyers can also take inspiration from Hamilton's reliance on the strength of one's writing to effect change:

I wrote my way out of hell
I wrote my way to revolution
I was louder than the crack in the bell
I wrote Eliza love letters until she fell
I wrote about The Constitution and defended it well
And in the face of ignorance and resistance
I wrote financial systems into existence
And when my prayers to God were met with indifference
I picked up a pen, I wrote my own deliverance[110]

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Notes:

[1] Lyrics to "Non-Stop" from HAMILTON by Lin-Manuel Miranda, http://atlanticrecords.com/HamiltonMusic/ (last visited Sept. 23, 2016).

[2] Broadway in Chicago, Hamilton, http://www.broadwayinchicago.com/show/hamilton/ (last visited Sept. 22, 2016).

[3] Broadway in Chicago, Hamilton, http://www.broadwayinchicago.com/show/hamilton/#sthash.tRyM9Y73.dpuf (last visited Aug. 23, 2016).

[4] Wikipedia, Alexander Hamilton, https://en.wikipedia.org/wiki/Alexander_Hamilton#cite_note-292 (last visited Aug. 23, 2016).

[5] Google Trends, Alexander Hamilton (Founding Father of the United States), https://www.google.com/trends/explore?date=all&q=%2Fm%2F0b3pq (last visited Aug. 23, 2016).

[6] *E.g.,* Dan T. Coenen, *Fifteen Curious Facts About* The Federalist Papers (Fall 2007/Winter 2008), *available at* http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1188&context=advocate (last visited Sept. 22, 2016).

[7] Congress.gov, The Federalist Papers, https://www.congress.gov/resources/display/content/The+Federalist+Papers (last visited Aug. 24, 2016).

[8] Lyrics to "Non-Stop," *supra* n.1 (attributing all of the jointly written or ambiguously authored essays to Madison).

[9] Congress.gov, About the Federalist Papers, https://www.congress.gov/resources/display/content/About+the+Federalist+Papers (last visited Aug. 24, 2016).

[10] *Majors v. Abell,* 361 F.3d 349, 357 (7th Cir. 2004) (Easterbrook, J., dubitante). For example, Madison, "[i]nstead of having to persuade New Yorkers that his roots in Virginia should be overlooked," could "present the arguments and let the reader evaluate them on merit." *Id.*

[11] Congress.gov, About the Federalist Papers, *supra* n.9.

[12] Library of Congress, The Federalist Papers, https://www.loc.gov/rr/program/bib/ourdocs/federalist.html (last visited Aug. 23, 2016).

[13] *See* Buckner F. Melton, Jr. & Carol Willcox Melton, *The Supreme Court and* The Federalist: *A Supplement, 2001-2006,* 95 KY. L.J. 749 (2007); Buckner F. Melton & Jennifer J. Miller, *The Supreme Court and* The Federalist: *A Supplement, 1996-2001,* 90 KY. L.J. 415 (2002); Buckner F. Melton, Jr., *The Supreme Court and* The Federalist: *A Citation List and Analysis, 1789-1996,* 85 KY. L.J. 243 (1997).

[14] Melton & Melton, *supra* n.13, at 752.

[15] Charles W. Pierson, The Federalist *in the Supreme Court,* 33 YALE L.J. 728 (1924) (describing the Supreme Court's historical treatment of *The Federalist*).

[16] Matthew J. Festa, *Dueling Federalists: Supreme Court Decisions with Multiple Opinions citing* The Federalist, 31 Seattle U. L. Rev. 75, 75 (2007); Melvyn R. Durchslag, *The Supreme Court and* The Federalist Papers: *Is there Less here than Meets the Eye?,* 14 Wm. & Mary Bill RTS. J. 243 (2005).

[17] Melton & Melton, *supra n.*13, at 750-52.

[18] David McGowan, *Ethos in Law and History: Alexander Hamilton,* The Federalist, *and the Supreme Court,* 85 Minn. L. Rev. 755, 755-58 (Feb. 2001); *see also* William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but not Statutory Legislative History?,* 66 Geo. Wash. L. Rev. 1301 (1998) (arguing that it is appropriate to eschew reliance on contemporary legislative materials for statutory interpretation while relying on *The Federalist* to interpret the Constitution).

[19] Festa, *Dueling Federalists, supra* n.16, at 75-76.

[20] 17 U.S. (4 Wheat.) 316 (1819).

[21] McGowan, *Ethos in Law and History, supra* n.18, at 758.

[22] *Id.* For additional scholarship, *see* J. Christopher Jennings, *Madison's New Audience: The Supreme Court and the Tenth Federalist Visited,* 82 B.U. L. Rev. 817, 817 n.2 (2002) (collecting citations to scholarly studies that have examined the Supreme Court's use of *The Federalist* in general as a constitutional expository tool).

[23] Melton &Miller, *supra* n.13, at 418.

[24] *Id.* at 418-19.

[25] 741 F.3d 795 (7th Cir. 2013) (Posner, J.).

[26] *Id.* at 797 (citing 12 U.S.C. § 1723a(c)(2)).

[27] *Id.*

[28] *Id.* at 799.

[29] *Id.*

[30] *DeKalb Cty. v. Fed. Housing Fin. Agency DeKalb Cty.,* 741 F.3d 795, 799 (7th Cir. 2013).

[31] *Id.* (citations omitted).

[32] *Id.* (citing 12 U.S.C. § 1723a(c)(2)).

[33] *Id.*

[34] 273 B.R. 174 (N.D. Ill. Bankr. 2002) (Schmetterer, Bankr. J.).

[35] *Id.* at 177-83.

[36] *Id.* at 176.

[37] *Id.*

[38] *Id.* (citing *Ex Parte Young,* 209 U.S. 123, 155-56 (1908)).

[39] *In re Claxton,* 273 B.R. 174, 177 (N.D. Ill. Bankr. 2002).

[40] *Id.* at 182.

[41] *Id.* (citation omitted).

[42] *Id.* (citations omitted).

[43] *Id.*

[44] *In re Claxton,* 273 B.R. 174, 182 (N.D. Ill. Bankr. 2002).

[45] *Id.* at 182.

[46] *Id.* at 182-83.

[47] 301 F.3d 820 (7th Cir. 2002).

[48] *See Cent. Va. Cmty. Coll. v. Katz,* 546 U.S. 356, 378-79 (2006) ("The relevant question is not whether Congress has 'abrogated' States' immunity in proceedings to recover preferential transfers. *See* 11 U.S.C. § 106(a). The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.' We think it beyond peradventure that it is." (footnote omitted)). Before deciding *Katz,* the Supreme Court had previously granted a writ of certiorari on the question of whether the Bankruptcy Clause authorized Congress, notwithstanding the Eleventh Amendment, to abrogate state sovereign immunity in bankruptcy matters; ultimately, however, the court did not reach that issue in its opinion. *Tenn. Student Assistance Corp. v. Hood,* 541 U.S. 440 (2004). The Court had granted a writ of certiorari in *Hood* because of the circuit split the previously raged among lower courts on whether rights clearly legislated under the Bankruptcy Clause could be enforced under § 106(a) of the Bankruptcy Code in federal court against state governments in light of the Eleventh Amendment (constitutionalizing state sovereign immunity) and case law thereunder. *Compare Hood v. Tenn. Student Assistance Corp.,* 319 F.3d 755, 761-68 (6th Cir.) (holding that the Bankruptcy Clause authorized Congress, notwithstanding the Eleventh Amendment, to abrogate state sovereign immunity in in bankruptcy matters), *cert. granted,*

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539 U.S. 986 (2003), *with Nelson v. La Crosse Cty. Dist. Attorney,* 301 F.3d 820 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd.,* 209 F.3d 1111 (9th Cir. 2000); *Sacred Heart Hosp. v. Pennsylvania,* 133 F.3d 237 (3d Cir. 1998); *Dep't of Transp. and Dev. v. PNL Asset Mgmt. Co.,* 123 F.3d 241 (5th Cir.), amended by 130 F.3d 1138 (5th Cir. 1997); *Schlossberg v. Maryland,* 119 F.3d 1140 (4th Cir. 1997) (all holding that the Eleventh Amendment prevents Congress from abrogating state sovereign immunity in bankruptcy matters).

[49] *DeKalb Cty. v. Fed. Housing Fin. Agency DeKalb Cty.,* 741 F.3d 795, 799 (7th Cir. 2013) (emphasis added) (citations omitted).

[50] 56 F.3d 791 (7th Cir. 1995) (Posner, J.).

[51] 612 F.3d 537 (7th Cir.) (Wood., J.), *op. am. on denial of reh'g,* 387 F. App'x 629 (7th Cir. 2010).

[52] *ACORN v. Edgar,* 56 F.3d at 792-93 (citing 42 U.S.C. §§ 1973gg *et seq.*).

[53] *Id.*

[54] *Id.* at 793.

[55] *Id.*

[56] *Id.* at 798.

[57] *ACORN v. Edgar,* 56 F.3d 791, 794 (7th Cir. 1995).

[58] *Id.*

[59] *Id.* (emphasis added).

[60] *Judge v. Quinn,* 612 F.3d 537, 541 (7th Cir.), *op. am. on denial of reh'g,* 387 F. App'x 629 (7th Cir. 2010).

[61] *Id.* at 541.

[62] *Id.*

[63] *Id.* at 551-54.

[64] *Judge v. Quinn,* 612 F.3d 537, 553 (7th Cir.), *op. am. on denial of reh'g,* 387 F. App'x 629 (7th Cir. 2010).

[65] *Id.* (footnote omitted).

[66] *Id.*

[67] *Id.* at 554.

[68] *See* Ira C. Lupu, *The Most-Cited Federalist Papers,* 15 CONST. COMMENT. 403, 407 (1998); Coenen, *Fifteen Curious Facts, supra* n.6.

[69] The Seventh Circuit judges have also cited Federalist No. 78 in concurring and dissenting opinions. *See Matter of Udell,* 18 F.3d 403, 412 ("[L]oose invocation of the absurd result cannon of statutory construction creates too great a risk that the court is exercising its own WILL instead of JUDGMENT, with the consequence of substituting its own pleasure to that of the legislative body.") (Flaum, J., concurring); *Geras v. Lafayette Display Fixtures, Inc.,* 742 F.2d 1037, 1046 (7th Cir. 1984) ("Hamilton wrote in The Federalist No. 78 that 'the standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government.... [I]t is the best expedient that can be devised in any government to secure a steady, upright, and impartial administration of the laws.' Experience in the two centuries since he wrote has not contradicted his view.") (Posner, J., dissenting).

[70] 802 F.2d 948, 949 (7th Cir. 1986) (Posner, J.).

[71] *Id.* at 949-50.

[72] *Id.* at 951-52.

[73] 460 F.2d 348 (7th Cir. 1972) (Sprecher, J.).

[74] *Id.* at 352-53.

[75] 2013 WL 812382 (N.D. Ill. Mar. 5, 2013) (Kendall, J.).

[76] *Id.* at *1.

[77] *Id.* at *4.

[78] 756 F. Supp. 384, 388 (N.D. Ind. 1990) (Sharp, Chief J.).

[79] *Id.* at 385-86.

[80] *Id.* at 386.

[81] *Id.* at 388.

[82] 19 B.R. 575 (N.D. Ill. Bankr. 1982) (James, Bankr. J.).

[83] *Id.* at 576.

[84] *Id.* at 577.

[85] *Id.*

[86] *See* 28 U.S.C. § 1332(a)(2).

[87] 348 F.3d 244 (7th Cir. 2003) (Posner, J.).

[88] *Id.* at 246.

[89] 615 F.2d 1176, 1177 (7th Cir. 1980) (per curiam).

[90] *Id.* at 1182.

[91] *Id.* (citing Federalist No. 80).

[92] *Id.* 1188.

[93] 1995 WL 243339 (N.D. Ill. Apr. 24, 1995) (Nordberg, J.).

[94] *Id.* at *4.

[95] *See Bd. of Regents of Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc.,* 653 F.3d 448, 473 (7th Cir. 2011) (Wood, J.) (concluding that University of Wisconsin waived sovereign immunity when it filed suit in federal court); *Nelson v. La Crosse Cty. Dist. Atty. (State of Wis.),* 301 F.3d 820, 833 n.14, 834 (7th Cir. 2002) (Manion, J.) (determining that "the Bankruptcy Clause of Article I is not a valid source of authority for Congress to abrogate a State's sovereign immunity and that States did not surrender their immunity from suit in bankruptcy under the 'plan of the Convention'").

[96] 301 F.3d at 833.

[97] *Id.* at 838.

[98] *See supra* n.48; *see Cent. Va. Cmty. Coll. v. Katz,* 546 U.S. 356, 378-79 (2006).

[99] 874 F.2d 402, 405 (7th Cir. 1989) (Bauer, Chief J.).

[100] 677 F.2d 571, 579 n.14 (7th Cir. 1982) (Sprecher, J.).

[101] *Id.*

[102] 520 F. Supp. 373 (N.D. Ill. 1981).

[103] *Id.* at 375.

[104] No. 12 MC 130, 2012 WL 1899436, at *4 (N.D. Ill. May 23, 2012) (Holderman, Chief J.). *But see Bracy v. Gramley,* 81 F.3d 684, 701 (7th Cir. 1996) (Rovner, J., dissenting) ("Jurors have minds of their own; they can and do defy the expectations of the judge. That is but one reason that the jury has been viewed by some as 'the very palladium of free government.' [citing Federalist No. 83.] But we cannot ignore the influence that the judge retains even in a jury trial."), *rev'd,* 520 U.S. 899, 117 S. Ct. 1793 (1997), *and cert. granted, judgment vacated sub nom. Collins v. Welborn,* 520 U.S. 1272 (1997).

[105] *Berman v. Am. Nat. Red Cross,* 834 F.Supp. 286, 289 (N.D. Ind. 1993) (Sharp, Chief J.).

[106] *Id.*

[107] *Falls v. Town of Dyer, Ind.,* 756 F.Supp. 384 (N.D. Ind. 1990) (Sharp, Chief J.).

[108] *Id.* at 386.

[109] *Id.*

[110] Lyrics to "Hurricane," *supra* n.1. Hamilton's extraordinary gift for the written word is vividly recounted in page after page of Chernow's 731 page biography of Hamilton.