Article 1, Section 8 of the Constitution: A Private Right of Action for Citizens Seeking Equal Protection under U.S. Immigration Laws

*By Michael J. Brady & Tony Abdollahi**

Thousands of citizens in this country are confronted with an odd dilemma—they are unable to get public educational benefits that are available to illegal aliens. Ironically enough, this problem began when Congress decided to put American citizens on equal footing with illegal aliens in 1996, with 8 U.S.C. § 1623, which provided that if a state granted post-secondary educational benefits to illegal aliens, the same benefits must be awarded to American citizens.

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.[1]

By identifying a benefited class, however ("a citizen or national of the United States" denied a "postsecondary education benefit"), § 1623 created a private right of action. In turn, numerous states triggered claims under § 1623 by enacting legislation simultaneously granting tuition benefits to illegal aliens while denying them to American citizens.[2] In response to the ensuing lawsuits, states have invoked in defense sovereign immunity, as manifested by both the Eleventh Amendment and the "new federalism" of Supreme Court jurisprudence in the 1990s.

One obvious recourse for students confronted by this defense has been to sue under the Fourteenth Amendment. As one of the Civil War amendments, the Fourteenth Amendment is meant to redress discrimination and, for this reason, enjoys a primacy that vitiates sovereign immunity. However, states argue that there is no private right of action under the Fourteenth Amendment and, while relief is available under 42 U.S.C. § 1983, such an action (1) is allegedly subject to a state's sovereign immunity, and (2) only allows for a damages action against a "person," not the state. Accordingly, 8 U.S.C. § 1623—and any similar statute mandating equal protection for American citizens relative to illegal aliens—appears to be a right in need of a remedy.

But because § 1623 is an immigration statute, relief is available under the Constitution. Article I, Section 8 states that Congress has the power "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." As Alexander Hamilton wrote in the *Federalist*, Congress' power over naturalization is exclusive; the states waived their sovereign immunity relative thereto in 1789.

In the course of the past decade, numerous federal courts, including the Supreme Court, have grappled with the scope of the federal bankruptcy power *vis-à-vis* a state's sovereign immunity. Does a bankrupt entity's "dischargability" complaint or action for "transfers" pierce a state's sovereign immunity? The answer, the courts have found, is yes, and in reaching this result they have relied on Hamilton's conclusion that the primacy of the Naturalization Clause abrogates sovereign immunity in holding that the bankruptcy power (also based on Article I, Section 8, Clause 4) pierces sovereign immunity. Given that Hamilton's conclusion regarding the primacy of the naturalization power served as the predicate for a right of action under the bankruptcy provision, it follows that a private right of action exists under the naturalization provision as well.

A. How the New Federalism of the 1990s Resurrected Sovereign Immunity as a Defense

During the 1990s, the Supreme Court issued a series of decisions that came to be known as the "new federalism." Chief among these, for our purposes, were *Seminole Tribe of Florida v. Florida*[3] and *Alden v. Maine*.[4] Based on the Commerce Clause, they collectively held that (1) a federal right of action does not abrogate state sovereign immunity, and (2) that the application of sovereign immunity does not depend on whether the action is maintained in state or federal court. Purportedly, both also leave victims of state-sponsored discrimination without a forum to vindicate their federal rights.

Seminole Tribe may have been a reaction to a 1970s decision by the Court that acknowledged Congress' ability to create a federal right of action in accordance with Section 5 of the Fourteenth Amendment. In *Fitzpatrick v. Bitzer*,[5] the Court held that Congress has the power to abrogate the state's Eleventh Amendment sovereign immunity so long as it does so to enforce the guarantees of the Fourteenth Amendment.

> When Congress acts pursuant to Section 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. *We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.*[6]

The tension between *Seminole Tribe* and *Fitzpatrick* is a recent example of an issue that has troubled the Supreme Court since the inception of our Union—Congress' ability to create a federal claim versus the states' sovereign immunity. Just five years after the Constitution was adopted, the Court in *Chisholm v. Georgia*[7] held that Congress had the power to create a private cause of action against a state for a violation of a federal right.

> In swift reaction to the *Chisholm* decision, and out of fear that the decision would authorize an onslaught of suits against the States by private individuals seeking to recover on war debts, Congress proposed, and the States subsequently ratified, the Eleventh Amendment.[8]

** Michael J. Brady is a partner with Ropers, Majeski, Kohn & Bentley, in Redwood City (CA), and graduate of Harvard Law School. Tony Abdollahi is Of Counsel with Bishop, Barry, Howe, Haney & Ryder, in Emeryville (CA), and graduate of Boalt Hall School of Law, U.C. Berkeley.*

Two centuries later, the Court stated that *Chisholm*, and not the Eleventh Amendment, deviated from the original understanding of the Constitution, which was to preserve the states' traditional immunity from suit. "The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design."[9] Accordingly, "[t]he Eleventh Amendment and cases interpreting it generally prohibit citizens from suing a state without its consent."[10]

The revival of sovereign immunity was inaugurated by *Seminole Tribe*,[11] wherein the Court invoked the Eleventh Amendment to conclude that Congress lacks the power to abrogate the states' sovereign immunity. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[12] The Court's conclusion was buoyed by a "background principle" of immunity that extended beyond the Amendment.[13]

Three years after *Seminole Tribe*, the Court expanded on its holding and held that sovereign immunity applies regardless of whether the forum is a state or a federal court. In *Alden v. Maine*,[14] a group of probation officers filed suit in federal court against the State of Maine, alleging a violation of the Fair Labor Standards Act. While that action was pending, *Seminole Tribe* was decided, prompting the plaintiffs to dismiss the federal complaint and re-file in state court. Building upon the principle articulated in *Seminole Tribe*, the Court observed

> the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today…[15]

The court continued, "private suits against nonconsenting States … present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties, regardless of the forum."[16] The Court accordingly concluded that sovereign immunity bars suits in state courts just as it does in federal courts: "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."[17]

The new federalism manifested by *Seminole Tribe* and *Alden* had, to say the least, a chilling effect on the enforcement of federal rights. Of course, sovereign immunity under the Eleventh Amendment does not extend to a prospective action for injunctive relief.[18] However, a victim of state-sponsored discrimination seeking retrospective relief was left without a forum. This was exacerbated by the uncertain scope of these decisions at the time they were published. Although federal courts have clarified—and in some cases limited—the scope of *Seminole Tribe* and *Alden*, state institutions continue to cite these decisions in defense to federal civil rights actions to this day. However, the new federalism of *Seminole Tribe* and *Alden* does not afford the states with a defense to claims based on Section 5 of the Fourteenth Amendment or statutes promulgated under the immigration power of Congress.

B. 8 U.S.C. § 1623 Gives Citizens Equal Protection as to Educational Benefits

1. Section 1623 is an Equal Protection Statute and Part of Congress' Avowed Policy of Deterring Illegal Immigration

In August 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) to restrict immigration and the status of immigrants.[19] Title IV of the Act placed limits on the ability of immigrants, both legal and illegal, to obtain benefits from government agencies. One month later, in September 1996, Congress followed up with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[20]

The foregoing statutes reflected a clear intent by Congress to deny public benefits to illegal aliens, both as a matter of general policy and as specifically applied to educational benefits. "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits."[21] Congress mandated that aliens be self-sufficient rather than rely on public resources.[22]

As part of the IIRIRA, Congress also enacted 8 U.S.C. § 1623, which proscribes a state from providing postsecondary educational benefits to illegal aliens unless all American citizens are provided the same benefits.

> The more persuasive inference to draw from § 1623 is that public post-secondary institutions need not admit illegal aliens at all, but if they do, these aliens cannot receive in-state tuition unless out-of-state United States citizens receive this benefit.[23]

Accordingly, § 1623 creates a private right of action. As recognized by the Supreme Court, "[f]or a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'"[24] By requiring that a state grant a "postsecondary education benefit" to out-of-state American citizens in the same "amount, duration, and scope" as illegal aliens, § 1623 vests a private right of action to a benefited class—i.e., "a citizen or national of the United States."[25]

Moreover, § 1623 bears the indicia of an equal protection statute.[26] It presents two classes—illegal aliens and out-of-state American citizens—and mandates equal treatment between them. States must provide the same post-secondary educational benefits to American citizens as they do to illegal immigrants. However, the manner in which certain states render the educational benefits—e.g., allegedly based on high school attendance, rather than (according to these states) residence—results in out-of-state American citizens being denied equal benefits. As it seeks to redress this result, § 1623 is an equal protection statute under the Fourteenth Amendment.

"The Equal Protection Clause of the Fourteenth Amendment commands that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[27] In this regard, "[w]hen a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth

Amendment. Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose."[28]

Accordingly, by distributing education benefits based on whether a student is an illegal immigrant or an American citizen, states that grant tuition benefits to the former while denying them to the latter have implicated the Fourteenth Amendment.

2. Although an Equal Protection Statute under the 14th Amendment Pierces Sovereign Immunity, Remedies are Limited under 42 U.S.C. § 1983

Seminole Tribe and *Alden* addressed federal statutes enacted under the Commerce Clause. However, as an equal protection (and privileges and immunities) statute, § 1623 is based on Section 5 of the Fourteenth Amendment. While sovereign immunity arises from principles of federalism, the Fourteenth Amendment—enacted in response to the discrimination arising from the Civil War era—alters this relationship and supersedes traditional state immunity. Accordingly, the immunity manifested by *Seminole Tribe* and *Alden* is either inapplicable to or distinguishable from an action founded on an equal protection statute under the Fourteenth Amendment. There are, however, important limitations on a significant remedy—those under 42 U.S.C. § 1983—under the Fourteenth Amendment.

"Congress' enforcement authority is at its apex when fashioning remedies aimed at the core Fourteenth Amendment guarantee of Equal Protection."[29] The Supreme Court has noted that legislation based on Section 5 the Fourteenth Amendment is entitled to a dignity not accorded to legislation based on the Commerce Clause.

> Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce. *Seminole Tribe, supra.* Congress may, however, abrogate States' sovereign immunity through a valid exercise of its Section 5 power, for "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment."[30]

Thus, the "new federalism" attributed to *Seminole Tribe* is inapplicable to actions predicated on the Fourteenth Amendment.

> Although *Seminole Tribe* has closed the Article I abrogation avenue, Congress may still abrogate Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment, which provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[31]

Therefore, if a court decides that a statute such as § 1623 was intended to create a private right of action and that the statute was enacted under Congress' powers under Section 5 of the Fourteenth Amendment, then monetary relief directly against the state is appropriate.

The usual remedy sought for a violation of the Fourteenth Amendment is to invoke 42 U.S.C. § 1983, which authorizes an action for damages for violation of any law of the United States or of the Constitution. There is, however, a significant impediment to such an action—a claim under § 1983 is subject to sovereign immunity and damages are limited to a "person," not the State.

> Under 42 U.S.C. § 1983, an aggrieved individual may sue persons who, acting under color of state law, abridge rights, immunities, or privileges created by the Constitution or laws of the United States. It is settled beyond peradventure, however, that neither a state agency nor a state official acting in his official capacity may be sued for damages in a § 1983 action.[32]

Moreover, the Supreme Court has acknowledged that "42 U.S.C. § 1983 does not override States' Eleventh Amendment immunity."[33] Accordingly, while "[c]ourts have long recognized that 42 U.S.C. § 1983 was enacted pursuant to Congress' enforcement powers under the Fourteenth Amendment and creates a private cause of action… the Supreme Court has definitively stated that § 1983 does not abrogate a State's Eleventh Amendment sovereign immunity."[34]

Since monetary relief under § 1983 is limited to "persons" and not the State itself, another basis must be found for addressing the discrimination effected by denying the equal educational benefits to American citizens.

C. Private Right of Action under Article 1, Section 8

In dictating that states grant the same educational benefits to American citizens as illegal aliens, § 1623 identifies a benefited class and creates a private right of action enforceable under the Fourteenth Amendment. This brings us to the proposition that—separate and apart from the Fourteenth Amendment—because § 1623 is an immigration statute, a private right of action exists under Article I, Section 8 and the states cannot rely on sovereign immunity as a defense thereto.

In the wake of *Seminole Tribe* and *Alden*, federal courts have been confronted with the primacy of Congress' bankruptcy power *vis-à-vis* state sovereign immunity, an issue that arises where a bankrupt entity files a "dischargability" complaint or an action for "transfers" against the state directly. Federal courts have acknowledged the existence of this right of action under Article I, Section 8 of the Constitution.

Section 8 requires that Congress establish "uniform" rules regarding naturalization and bankruptcy. Alexander Hamilton reasoned that this mandate necessarily meant that Congress' power over naturalization was exclusive and, as a result, that states had waived their sovereign immunity. Since the bankruptcy provision is also founded on Article I, Section 8, recent federal decisions have relied on Hamilton's analysis to conclude that Congress has exclusive power over bankruptcy and, as a result, that sovereign immunity is unavailable as a defense.

Based on this conclusion, federal decisions have permitted a private right of action in bankruptcy claims against a state. Because the bankruptcy power and naturalization power are in the same constitutional provision and Hamilton found a waiver of sovereign immunity in the context of the bankruptcy power, it follows that a private right of action exempt from sovereign immunity also exists under the Article I, Section 8 naturalization power.

1. Congress has Plenary Control over Immigration Arising from the U.S. Constitution

The power over immigration is rooted in Section 8:

> [t]he Court recognizes the preeminent role of the United States Government with respect to the regulation of aliens within its borders. The sources of its authority include the Federal Government's power 'to establish a uniform Rule of Naturalization,' U.S. Const., Art. I, sec. 8, cl. 4, its power to 'regulate Commerce' with foreign Nations, cl. 3, and its broad authority over foreign affairs.[35]

Since it is predicated on the Constitution itself, the Supreme Court has long recognized that Congress has plenary control over immigration unmatched regarding any other subject matter.

> [T]he power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government… [o]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.[36]

In light of Congress' exclusive control over immigration, "*[t]he power over aliens is of a political character and therefore subject to only narrow judicial review*."[37]

That the power over immigration is based on the structure of the Constitution itself has special significance. Because it derives from—and, indeed, apparently transcends—the structure of the Constitution, the immigration power is "unmatched" relative to other matters. Similarly, the nature of its basis means that the immigration power is political and subject to narrow judicial review. Since 8 U.S.C. § 1623 is an immigration statute and Congress' immigration power under Article I, Section 8 of the Constitution is supreme, an action under § 1623 implicates political issues—i.e., Congress' avowed desire to disincentivize illegal immigration—and is subject to narrow judicial scrutiny. The clear import of this is that a court should have little leeway in proceedings involving equal protection actions brought under federal immigration statutes such as § 1623. If a state grants tuition benefits to illegal aliens, it must grant the same benefits to qualifying American citizens.

2. A Private Right of Action under the Bankruptcy Power Indicates a Similar Right under the Immigration Power

Analogizing the bankruptcy power to the immigration power, federal courts have applied Hamilton's analysis regarding the latter to hold that the former—also based on Article I, Section 8—abrogates state sovereign immunity. In concluding that states have no sovereign immunity regarding bankruptcy proceedings, federal courts were required to acknowledge the corresponding supremacy of the naturalization power. As the courts have found that there is a right of action against the states in a bankruptcy action, it follows that a similar right of action exists under the immigration power.

In *Central Virginia Community College v. Katz*,[38] the Supreme Court relied on Hamilton's thoughts in the *Federalist* to clarify that the holding in *Seminole Tribe* did not apply to the Bankruptcy Clause. "We acknowledge that statements in both the majority and the dissenting opinions in [*Seminole Tribe*] reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. [Citation]. Careful study and reflection have convinced us, however, that that assumption was erroneous."[39]

The Court noted that at the time the Constitution was drafted the colonies still maintained a policy of imprisoning debtors and had divergent rules regarding bankruptcy.[40] The Framers proposed "[t]o establish uniform laws upon the subject of bankruptcies," whereupon "[a] few days after this proposal was taken under advisement, the Committee of Detail reported that it had recommended adding the power 'to establish uniform laws upon the subject of bankruptcies' to the Naturalization Clause of what later became Article I."[41] Having thus bundled the Bankruptcy Clause with the Naturalization Clause, the Court held that sovereign immunity was compromised under the former. "[T]he Bankruptcy Clause's unique history, combined with the singular nature of bankruptcy courts' jurisdiction, discussed *infra*, have persuaded us that the ratification of the Bankruptcy Clause does represent a surrender by the States of their sovereign immunity in certain federal proceedings."[42]

In the wake of *Seminole Tribe* and *Alden*, two federal court decisions have been at the forefront in recognizing a private right of action under the Bankruptcy Clause of Section 8. In *Bliemeister v. Industrial Com.*,[43] a shop owner was sued by a hired worker for an injury arising in the course of employment. As the plaintiff did not have workers' compensation insurance, the state industrial commission paid the claim and brought an action for reimbursement. In response to the state's claim, the plaintiff filed for Chapter 7 bankruptcy and brought a "dischargeability complaint." The state argued that "a dischargeability complaint constitutes a 'suit' for Eleventh Amendment purposes,"[44] but the court disagreed. Distinguishing *Chisholm*, the court resolved that the issue of sovereign immunity must be addressed by examining the structure of the Constitution as aided by the *Federalist*:

> [T]o determine the scope of sovereign immunity, we must look not to the language of the Eleventh Amendment, but to the structure of the original Constitution and, even more importantly, the historical understanding at the time when the Constitution was originally adopted of those areas where state sovereignty was retained and where it was surrendered. The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence "that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution," *Seminole Tribe*, 517 U.S. at 69, and that the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in his dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution. And of those interpretative sources, probably the single most important is Hamilton's analyses in The Federalist Papers, the most significant and often quoted being Federalist No. 81.[45]

The court held that because the bankruptcy power was contained in the same provision as the naturalization power, Hamilton's reasoning applied with equal force to the bankruptcy power. "The bankruptcy power is granted to the federal government by the very same clause that Hamilton used to exemplify the third method by which the Constitution alienates

states' sovereignty, and contains the same word used to signify that limitation on states' sovereignty."[46] Having cited Section 8 as the common basis for both, the court concluded that the states surrendered sovereign immunity as to the naturalization power and the bankruptcy power. "[A]s Hamilton indicated, the framers had taken 'the most pointed care' to specify the states' surrender of their sovereignty on these very few, carefully selected subjects. *The states no more retained sovereign powers over bankruptcy laws than they did over naturalization*."[47]

In *In re Hood*,[48] the Sixth Circuit echoed *Bliemeister*, holding that a bankruptcy appellate panel correctly distinguished *Seminole Tribe* to conclude that the bankruptcy and naturalization powers dictate a surrender of state power over the respective subjects.

> Although the panel acknowledged that *Seminole Tribe of Florida v. Florida*, could be interpreted as precluding Congress from ever abrogating states' sovereign immunity under any of its Article I powers, *the panel interpreted The Federalist No. 81 and No. 32 to distinguish bankruptcy, along with naturalization, from the rest of the Article I powers*. The panel noted that, with respect to bankruptcy and naturalization, the Constitution granted Congress the power to establish 'uniform Laws,' U.S. Const. Art. I, sec. 8, cl. 4, not mere laws. According to the panel, *The Federalist* No. 32 shows that Congress' power to make uniform laws required states to surrender their own power to make such laws and thus an important degree of their sovereignty. Because limits on sovereignty are by their very nature limits on sovereign immunity, the panel concluded that Congress' power to make laws on bankruptcy carries with it the power to abrogate states' sovereign immunity.[49]

Together, *Bliemeister* and *Hood* are the seminal cases in support of the principle that Congress' immigration power under Article I, Section 8 serves as the analogical basis for its power under the bankruptcy provision. Accordingly, ensuing decisions have relied on *Bliemeister* and *Hood* to abrogate a State's sovereign immunity and find a private right of action in bankruptcy proceedings under Article I, Section 8.

A bankruptcy court in Vermont relied extensively on *Hood* to conclude that a debtor could maintain a dischargeability complaint against the State in derogation of sovereign immunity. In *In re Flores*,[50] a Chapter 7 debtor filed a complaint against Vermont seeking a determination of the dischargeability of a scholarship obligation. However, "[t]he State did not file an answer; instead, it asserted the defense of sovereign immunity in a Motion to Dismiss."[51] The court observed, "[t]he issue presented is whether the State's sovereign immunity protects it from having to defend an action that seeks a determination of the dischargeability of the scholarship obligation the Debtor owes to it before this Court."[52]

The court relied on *Hood* and its interpretation of the *Federalist* to clarify the scope of *Seminole Tribe* as it related to sovereign immunity.

> In its attempt to delineate the boundaries of Congress' powers, the Supreme Court may have painted its picture of sovereign immunity in the *Seminole Tribe* case with an overly broad brush. A careful analysis of Article I, and The Federalist Papers, that have been relied upon extensively to interpret the intentions of the Framers of the Constitution, persuades this Court that a finer brush is needed to circumscribe Congress' powers. This Court finds the Sixth Circuit has used just such a brush in its meticulously researched, well-reasoned, and very persuasive decision in [Hood]. This Court adopts the Hood court's analysis as to the proper scope of sovereign immunity abrogation in the context of bankruptcy, and its conclusion that the State may not avoid dischargeability proceedings by donning the cloak of a sovereign entity.[53]

Significantly, a Massachusetts district court has relied on *Federalist* Nos. 32 and 81, as interpreted by *Hood* and *Bliemeister*, to hold that sovereign immunity does not protect state universities from a bankruptcy action pursuant to Article I, Section 8 of the Constitution. In doing so, the Court expressly recognized a private right of action under the naturalization provision.

In *In re Dehon*,[54] a bankruptcy plan administrator filed suit against the University of Alaska, Florida State University, and the University of Texas, seeking to avoid and recover transfers regarding each defendant under §§ 547, 550 of the Bankruptcy Code. The court observed that since the actions "have the potential of requiring the Defendants to turn over funds to the Plan Administrator for distribution under the Bankruptcy Code, they clearly qualify as suits under the Eleventh Amendment."[55] The court accordingly observed, "the issue is thus: whether Congress may create private rights of action against the States when acting pursuant to Article I, section 8, clause 4 of the Constitution—the bankruptcy power."[56]

The court stated that the Eleventh Amendment abrogation analysis underlying *Seminole Tribe* was inapplicable to a private right of action based on the original plan of the Constitution.

> If, however, the States' sovereign immunity with respect to congressional action under a particular Article I power was altered by the original plan of the Constitution, Congress has the ability to create private causes of action in federal courts pursuant to that power and abrogation is unnecessary. This is so because if the Constitution itself contemplated the abrogation of sovereign immunity in a particular area, the Eleventh Amendment does not act to restore the states to their pre-ratification sovereign status.[57]

Relying on the interpretation accorded to *Federalist* Nos. 32 and 81 by *Hood* and *Bliemeister*, the court reiterated that Section 8 was identical in scope as to both the naturalization and bankruptcy power, and a private rights suit could be maintained against the state under either.

> [I]t is clear from The Federalist Nos. 32 and 81 that the Constitution's drafters intended the grant of power over naturalization to completely alienate the States' sovereign immunity with respect to naturalization matters. *Hood*, 319 F.3d at 766; *In re Bliemeister,* 251 B.R. at 389-90 … [g]iven the structure of the Constitution and the Framers' decision to use the word 'uniform' in both cases, it appears that the Framers intended to treat the powers given to Congress over naturalization and bankruptcy as identical in scope. *Hood*, 319 F.3d at 766; *In re Bliemeister*, 251 B.R. at 389-90. *Since the Framers' express intent was to alienate State sovereign immunity from suit when Congress exercises its power over naturalization,* it must be deduced that the Framers intended to alienate States' sovereign immunity with respect to the bankruptcy power as well.[58]

Significantly, it has been held that the analysis in *Hood* and *Bliemeister* regarding the basis and scope of Congressional power over immigration and bankruptcy under Article I, Section 8 of the Constitution is not inconsistent with the principles espoused by the Supreme Court.

> The analysis in *Hood* and *Bliemeister* of Hamilton's expositions in Federalist Nos. 81 and 32 leading to the conclusion in *Bliemeister* that sovereign immunity was surrendered in the plan of the convention with respect to Congress' power to enact uniform laws of naturalization and bankruptcy does not conflict with any Supreme Court decision on the subject of the Eleventh Amendment and sovereign immunity.[59]

Accordingly, the reasoning used to effectuate a private right of action under the bankruptcy power demonstrates an analogous right under the immigration power. This conclusion is consistent with the interpretation afforded to Section 8 by *Bliemeister* and *Hood* under the *Federalist*. According to Hamilton, the mandate under Section 8 to "establish an uniform Rule of Naturalization" means that Congress' power over immigration is exclusive. Accordingly, federal decisions have relied on the naturalization provision to effectuate a private right of action under the bankruptcy provision.

As Section 8 of the Constitution serves as the basis for both powers, the federal courts' acknowledgement of the *Federalist* as the implied justification regarding the bankruptcy power necessarily requires the recognition of the naturalization power as an equal justification. "Hamilton's reasoning with respect to naturalization can be applied with equal force to bankruptcy."[60] Thus, the unique constitutional mandate giving rise to a private right of action against the states in a bankruptcy action should apply with equal force to an action based on an immigration statute. Since the mandate to establish uniform laws is the basis for a private right of action under the bankruptcy power and the same mandate exists regarding the naturalization power, there must be a private right of action under federal immigration laws.

Akin to a complaint under the bankruptcy code, 8 U.S.C. § 1623 confers a similar right, giving American citizens equal educational benefits as those granted to illegal aliens. Since it is an immigration statute, § 1623 is based on the Naturalization Clause of Article I, Section 8 of the Constitution and is not subject to the abrogation analysis reflected in *Seminole Tribe*. Accordingly, a private right of action for equal educational benefits under § 1623 should proceed without interference from a state's sovereign immunity defense.

CONCLUSION

In enacting § 1623, Congress meant to deter illegal immigration and to discourage illegal aliens from staying in the United States. Instead of totally prohibiting the grant of in-state tuition to illegal aliens (which Congress could have done) it chose instead a more gentle approach, respectful of federalism, and decreed that if a state did grant in-state tuition to illegal aliens it must grant the same benefit to American citizens from another state.

But Congress did not anticipate the boldness of the states in flaunting its will. Numerous states have granted this significant benefit to illegal aliens, while denying it to out-of-state American citizen students. Presumably, these states believe that they are protected from significant exposure because of sovereign immunity. But these states ignore the fact that § 1623 is a Section 5 Fourteenth Amendment statute giving Congress the power to identify situations—e.g., illegal aliens versus out-of-state American students—and decree that equal protection will be required under those circumstances *and* that the same privileges granted to illegal aliens must be granted to out-of-state American students.

Perhaps even more importantly, because § 1623 is an immigration statute, Section 8 is a means by which American citizens can vindicate their equal protection rights *vis-à-vis* illegal aliens. As reflected by recent bankruptcy cases, Congress' plenary power over immigration means that sovereign immunity is no defense to an action for relief brought pursuant to an immigration statute or pursuant to Congress' immigration power. In giving hundreds of thousands of American citizens a private right of action for a violation of their equal protection rights, Section 8 makes state institutions financially responsible for the uneven distribution of public benefits afforded to illegal aliens.

Endnotes

1 8 U.S.C. § 1623 (parenthesis in original).

2 States adopting laws that grant tuition benefits to illegal aliens—usually in the form of an exemption from out-of-state tuition—include Texas, California, New York, Utah, Illinois, Washington, Nebraska, New Mexico, Oklahoma, and Kansas.

3 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

4 Alden v. Maine, 527 U.S. 706 (1999).

5 Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

6 *Id.* at 456 (emphasis added).

7 Chisholm v. Georgia, 2 U.S. 419 (1793).

8 In re Dehon, Inc., 327 B.R. 38, 45 n.12 (D.Mass. 2005).

9 *Alden, supra* note 4, at 722.

10 Minnesota v. United States, 102 F. Supp. 2d 1115, 1122-1123 (D.Minn. 2000), citing Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

11 *Seminole Tribe, supra* note 3, 517 U.S. 44.

12 *Id.* at 72.

13 *Id.*

14 *Alden, supra* note 4, at 706.

15 *Id.* at 713.

16 *Id.* at 749.

17 *Id.* at 712.

18 *See generally* Green v. Mansour, 474 U.S. 64, 68 (1985) ("The landmark case of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)… held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law.")

19 Pub. L. No. 104-193, 110 Stat. 2105 (1996).

20 Pub. L. No. 104-208, div. C, 110 Stat. 3009-546-3009-724 (1996).

21 8 U.S.C. § 1601(6).

22 8 U.S.C. § 1601(2).

23 Equal Access Educ. v. Merten, 305 F.Supp.2d 585, 606-607 (E.D.Va. 2004).

24 Gonzaga University v. Doe, 536 U.S. 273, 284 (2002); Cannon v. University of Chicago, 441 U.S. 677, 692, n. 13 (1979).

25 *See* Israeli Aircraft Indus. Ltd. v. Sanwa Bus. Credit Corp., 850 F.Supp. 686 (N.D.Ill. 1993) ("Plaintiff is correct in his assertion that courts have found an implied private right of action when a statute grants a right to a benefited class of persons or identifies a class of persons Congress meant to benefit.")

26 Section 1623 is not only an "equal protection" statute but also a statute under the Fourteenth Amendment's "privileges and immunities" clause. Illegal aliens have been granted the *privilege* of being exempt from non-resident tuition—i.e., paying resident tuition—and U. S. citizens from other states under §1623 must be granted the *same privilege*.

27 City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); Plyler v. Doe, 457 U.S. 202, 216 (1982).

28 Zobel v. Williams, 457 U.S. 55, 60 (1982).

29 Dare v. California, 191 F.3d 1167, 1174 (9th Cir. 1999).

30 Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721, 726-727 (2003).

31 Georgia Higher Educ. Assistance Corp. v. Crow, 394 F.3d 918, 922 (11th Cir. 2004); *see also* Oregon Short Line R.R. v. Dep't of Revenue Oregon, 139 F.3d 1259, 1268 (9th Cir. 1998).

32 Johnson v. Rodriguez, 943 F.2d 104, 108 (1st Cir.1991) (citation omitted), citing Will v. Mich. Dept. of State Police, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983.")

33 Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984), citing Quern v. Jordan, 440 U.S. 332, 342 (1979).

34 Clift by Clift v. Fincannon, 657 F.Supp. 1535, 1542 (E.D.Tex. 1987).

35 United States v. Chen De Yian, 905 F.Supp. 160, 166 (S.D.N.Y. 1995).

36 Kleindienst v. Mandel, 408 U.S. 753, 765-766 (1972); *see also* Kwon v. Comfort, 174 F.Supp.2d 1141, 1144-1145 (D.Colo. 2001) ("Congress' near-complete power over immigration transcends the specific grant of authority in Article 1, Section 8 of the Constitution, and derives from the inherent and inalienable right of every sovereign and independent nation to determine which aliens it will admit or expel.")

37 Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) (emphasis added); *see also,* Herrera-Inirio v. INS, 208 F.3d 299, 308 (1st Cir. 2000) ("Because Congress has plenary power to make policies and rules concerning the exclusion of aliens, see U.S. Const. art. I, § 8, cl. 4; the immigration process is, in the last analysis, frankly political in character. The courts' authority to scrutinize legislation in this field is correspondingly narrow.")

38 Central Virginia Cmty. Coll. v. Katz, 546 U.S. 356 (2006).

39 *Id*. at 363.

40 *See also* In re Mayes, 294 B.R. 145, 163 (10th Cir. 2003) ("The uniformity requirement of the bankruptcy clause arose in a specific historical context. Prior to the Constitution, states regulated bankruptcy. States could and did imprison debtors. The laws were different from state to state. The bankruptcy clause was meant to address this situation by bringing bankruptcy into the federal realm and creating a national uniform law.")

41 *Katz*, *supra* note 38, at 368-69.

42 *Id*. at 369, n.9.

43 Bliemeister v. Indus. Com., 251 B.R. 383 (D.Ariz. 2000).

44 *Id*. at 386.

45 *Id*. at 387.

46 *Id*. at 389.

47 *Id*. at 389-90 (emphasis added); *see also*, King v. State of Florida, 280 B.R. at 772 ("Like naturalization, the bankruptcy clause requires uniformity. Hence, Hamilton's reasoning with respect to naturalization can be applied with equal force to bankruptcy.")

48 In re Hood, 319 F.3d 755 (6th Cir. 2003), *aff'd*, Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

49 *Id*. at 759 (emphasis added); *see also* Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198, 1201 (9th Cir. 2005) ("There can be no doubt that federal bankruptcy law is 'pervasive' and involves a federal interest 'so dominant' as to 'preclude enforcement of state laws on the same subject'—much like many other areas of congressional power listed in Article I, Section 8, of the Constitution, such as patents, copyrights, currency, national defense and *immigration*.") (Emphasis added.)

50 In re Flores, 300 B.R. 599 (D.Vt. 2003).

51 *Id*. at 601.

52 *Id*.

53 *Id*. at 602.

54 In re Dehon, *supra* note 8, at 38.

55 *Id*. at 45.

56 *Id*. at 47.

57 *Id*. at 48.

58 *Id*. at 54-55 (emphasis added).

59 Metromedia Fiber Network, Inc. v. Various State & Local Taxing Auth., 299 B.R. 251, 268-269 (S.D.N.Y. 2003).

60 *King, supra* note 47, at 772.