No. 02-42

IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nevada

Brief *Amicus Curiae* of Multistate Tax Commission in Support of Petitioner

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BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members and sixteen States are associate members.[2] The Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), including its authority to conduct multistate audits outside the territorial jurisdiction of its member States on their behalf. [3]

The genesis of the Commission was the threat that Congress would limit States' sovereignty to

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[1]No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its members States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. Finally, this brief is filed pursuant to the consent of the parties.

[2] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, West Virginia and Wisconsin.

[3] Congress has recognized the Commission's role in simplifying state taxation of interstate commerce. Mobile Telecommunications Sourcing Act, Pub. L. No. 106-252, 114 STAT. 626, 628-629 (2000), codified at 4 U.S.C. §§ 119(a)(2)(C) and 120(b)(1).

impose tax on multistate businesses.[4] To forestall that threat States joined into the Multistate Tax Compact to simplify and make more uniform their tax laws so as not to unduly burden interstate commerce. The prime motivation was to preserve to States the sovereignty—a cooperative sovereignty—that underlies our "cooperative federalism."[5] The Court's recent federalism jurisprudence reflects that same core value of the "dignity" of state sovereignty.

The Commission's work inevitably must balance the desirability of uniformity with the right of each State to decide its own tax policy. The trump card in the Multistate Tax Compact among coequal States is always a State's sovereignty.[6] Cooperative federalism requires the same primacy of a State's sovereignty when state statutes conflict and the Court is called on to fulfill its constitutional obligation under the Full Faith and Credit Clause to define the choice of law.

SUMMARY OF ARGUMENT

The Full Faith and Credit Clause transformed conflict-of-laws principles from a matter of comity into a constitutional mandate. The Clause requires that forum States give full faith and credit to the judgments *and* statutes of other States. Forum States routinely do so for judgments, but rarely for statutes. The Court has permitted a fo-

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[4] *See* Pub. L. No. 86-272, 73 Stat. 555. Title II provided for congressional studies of state taxation of interstate commerce.

[5] *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979).

[6] Uncoordinated exercise of state sovereignty can produce state tax systems of sufficient diversity that they unduly burden interstate commerce, prompting *federal* commerce clause limitation on the authority of States to impose tax. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

rum State with sufficient due process contacts virtually unfettered discretion in choice-of-law decisions.

It is unreasonable, however, to interpret the Clause to relieve forum States of *all* obligation to give faith and credit to any statute of other States. That would erase the words "public Acts" from the Constitution. This case presents the one clear instance that requires controlling credit be to given statutes of another State. *Alden v. Maine*, 527 U.S. 706 (1999), affirmed States' enduring sovereign immunity. Under the same analysis, a State's immunity likewise endures in the courts of sister States. Thus, statutes setting forth a State's sovereign immunity are *always* more important than other interests of the forum State. Cooperative federalism compels this respect for the primary sovereignty interests of sister States over a forum State's other legitimate policy interests.

Nevada v. Hall, 440 U.S. 410 (1979), is inconsistent with any meaningful application of the Full Faith and Credit Clause in accordance with this Court's current sovereign immunity jurisprudence and should be overruled.

ARGUMENT

THE FULL FAITH AND CREDIT CLAUSE PRESERVES TO THE STATES THE IMMUNITY THEY ENJOYED IN THE COURTS OF OTHER STATES UPON ENTERING THE UNION.

At issue here is whether California and its "ministers" retain sovereign immunity from private lawsuits when they travel into sister States. Is California's statutory sovereign immunity—sufficient to withstand federal abrogation under

Alden v. Maine—also sufficient to withstand abrogation by a sister State acting as forum for a private suit? In that choice-of-law decision lies the irreducible nub of any effective implementation of the Full Faith and Credit Clause to the "public Acts" of a sister State.

A. States Retain Immunity from Private Suit.

This Court's recent opinions revitalizing its federalism jurisprudence afford prolific and finely honed articulations of the sources and extent of state sovereign immunity. What began as a gloss of the Eleventh Amendment has become a much more nuanced explication of the historical and enduring immunity of sovereign States as distilled in the "plan of convention."

Beginning with *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court has recognized that the extent of State sovereign immunity is not limited to the explicit terms of the Eleventh Amendment.

> Rather, as the Constitution's structure, and 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 (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Alden, 527 U.S. at 713. The Court concluded in *Alden* that States retain sovereign immunity from private suits in their own courts, even suits au-

thorized by Congress. At issue here is whether that immunity holds in the courts of a sister State, even from suits authorized by that State.

The Court's sovereign immunity analysis in *Alden* instructs us first to look to the degree of immunity that the States enjoyed in courts of foreign States before giving up their independence to become part of the union and then to whether that immunity was altered by the plan of convention or by subsequent constitutional amendment.

B. Prior to the Plan of Convention, States and their Ministers Enjoyed Immunity from Private Suit in Courts of Foreign States as a Matter of Comity.

At the time of the Constitution, sovereign States unquestionably enjoyed immunity for their ministers in the courts of foreign States.[7] In *Schooner Exchange v. McFaddon*, 7 Cranch (11 U.S.) 116 (1812), the Court recognized that sovereign States had *territorial* jurisdiction over foreign sovereigns and their ministers, but mutually waived that jurisdiction in furtherance of their mutual interest and intercourse.

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave [sic] the exercise of

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[7] *See* Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 Nw. U. L. Rev. 819, 821 (1999) ("In 1789, the word 'State' denoted an independent country that possessed complete or a significant degree of sovereignty.").

> a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137; *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country").

Specifically with regard to ministers representing a Sovereign in a foreign State, the Court meticulously delineated the reasons for their immunity.

> The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission.

Schooner Exchange, 11 U.S. at 138-139.

California has similar concerns for "allegiance" and "competence" from its tax auditors whose activities are at issue here. While tax auditors may not be the "ministers" Chief Justice Marshall was envisioning in *Schooner Exchange*, they are specifically included under the umbrella of California's statutory sovereign immunity. California Government Code § 860.2.

How, then, did the plan of convention change this historic immunity States enjoyed in the courts of foreign States?

C. The Full Faith and Credit Clause Transformed the Respect that a Forum State Must Show the Sovereignty Interests of Other States from a Matter of Comity into a Constitutional Mandate.

A specific provision of the Constitution speaks to whether a forum State must honor the sovereignty interests of other States. The Full Faith and Credit Clause[8] altered the basis under which forum States had waived their absolute *territorial* jurisdiction over the sovereignty interests of other States, requiring respect both for their "public Acts" and "judicial proceedings." The Clause set in constitutional stone their mutual commitment to treat each other as coequals in a cooperative federal system. That mutual commitment transformed the obligation to give full faith and credit from a matter of comity into a constitutional imperative.

Justice Scalia emphasized that with the Full Faith and Credit Clause a constitutional mandate had replaced the comity formerly granted under international practice:

> JUSTICE BRENNAN's concurrence, post, at 740, misunderstands the famous statement from Milwaukee County v. M. E. White Co., 296 U.S. 268, 276-277 (1935), that "[t]he very purpose of the full faith and credit clause was to alter the status of the several states as independ-

[8] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Art IV, § 1.

> ent foreign sovereignties." This statement is true, as the context of the statement in Milwaukee County makes clear, not because the Clause itself radically changed the principles of conflicts law but because *it made conflicts principles enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity.* See Estin v. Estin, 344 U.S. 541, 546 (1948) (the Full Faith and Credit Clause "substituted a command for the earlier principles of comity and *thus* basically altered the status of the States as independent sovereigns") (emphasis added).

Sun Oil Co. v. Wortman, 486 U.S. 717, 723-724 n.1 (1988) (first emphasis added).

In applying the Clause, however, the Court has accorded judgments and statutes markedly different degrees of faith and credit. "Regarding judgments, however, the full faith and credit obligation is exacting." *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998). Statutes have been treated with substantially less deference. *Id.* Although the Clause expressly mandates *full* faith and credit, the Court has become increasingly less inclined to require a forum State to give *any* appreciable faith or credit to the statutes of sister States.[9] *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Carroll v. Lanza*, 349 US. 408

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[9] *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 296 (1992) ("The most important word in the Clause is 'full.' A state does not owe some credit, partial credit, or credit where it would be wholly unreasonable to deny credit, which seems to be the Supreme Court's current interpretation.").

(1955); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935). The Court initially required forum States to credit other States' laws based on territorialist choice-of-law principles.[10] It then moved to a balancing of interests test[11] which it subsequently abandoned[12] in favor of the current rule that allows the forum State the presumptive right to apply its own law as long as it had sufficient contacts with the case. *Allstate*, 449 U.S. at 313.

The only decision in many years in which the Court has required deference to another State's statutes turned entirely on the lack of significant *due process* connection between the forum State and the litigation. *Phillips Petroleum Co. v. Shutts*, 474 U.S. 797, 821-22 (1985] (Kansas lacked sufficient connection to nonresident class members litigating interest payments on out-of-state properties.) The Court described the standard thusly:

> [T]he Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law. These restrictions required "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts,

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[10] *See Bradford Electric Light & Power Co. v. Clapper*, 286 U.S. 145 (1932).

[11] *Alaska Packers* 294 U.S. at 547 ("the conflict is to be resolved . . . by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.").

[12] *Allstate*, 449 U.S. at 308 n.10 ("the Court has since abandoned the weighing-of-interests requirement.").

> creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."

Phillips Petroleum, 747 U.S. at 818 (quoting from *Allstate*, 449 U.S. at 312-313). These "modest restrictions" frame exclusively a due process test based entirely on having significant contacts to ensure that the choice of law of the forum State is not fundamentally unfair. This formulation gives no guidance in a real conflict of laws situation where both States have substantial contact and some choice of law must be made.[13]

Justice Stevens has described the clear conceptual distinction between choice-of-law considerations under the Due Process Clause and those under the Full Faith and Credit Clause.[14] The Due Process Clause asks whether the *forum* State has sufficient contacts such that the litigants have a justifiable expectation that the forum will fairly impose its own law.[15] The Full Faith and Credit

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[13] James R. Peilemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. Cal. L. Rev. 1299, 1323 (1987) ("no independent content has been given to the full faith and credit prong.").

[14] *Phillips Petroleum*, 474 U.S. at 824 (concurring and dissenting opinion) ("the potential impact of the Kansas choice on the interests of other sovereign States and the fairness of its decision to the litigants should be separately considered."); *Allstate*, 449 U.S. at 325 (concurring opinion).

[15] Contacts, justifiable expectations and fairness are archetypal due process concerns. "It is nevertheless possible for a State's choice of law to violate the Constitution because it is so 'totally arbitrary or . . . fundamentally unfair' to a litigant that it violates the Due Process Clause. [Citation omitted.] If the forum court has no connection to the lawsuit other than its jurisdiction over the parties, a decision to apply the forum State's law might so 'frustrat[e] the justifiable expectations of the parties' as to be unconstitutional." *Phillips Petroleum*, 474 U.S. at 837 (Stevens, J. concurring) (cit-

Clause, on the other hand, asks when the *other* State's sovereignty interests outweigh the forum State's interest, thus requiring the forum State to give controlling credit to the statutes of the sister State.[16] The Court's current jurisprudence asks only the first question.

By giving "minimal scrutiny"[17] to a forum's choice of its own law when two States have conflicting laws and both have sufficient contacts, the Court appears to have abjured any role as a constitutional choice-of-law arbiter. Perhaps Dean Prosser's "dismal swamp"[18] that has long mired choice-of-law scholars has also perplexed the Court with irreconcilable theories. Without a definitive choice-of-law doctrine, the Court has generally allowed the forum State to choose.

Some scholars lament what they perceive as the Court's retreat from an active choice-of-law role, concluding it demonstrates an abandonment of the Full Faith and Credit Clause. As Professor Laycock tersely observes:

> To simultaneously apply the conflicting law of two states is impossible; to require each state to apply the law of the

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ing *Allstate*, 449 U.S. at 326, 327).

[16] "The [full faith and credit] inquiry implicates the federal interest in ensuring that Minnesota respect the sovereignty of the State of Wisconsin." *Allstate*, 449 U.S. at 320 (concurring opinion).

[17] Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440 (1982).

[18] William L. Prosser, *Interstate Publications*, 51 MICH. L. REV. 959, 971 (1953) ("The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.").

> other is absurd; and to let each state apply its own law repeals the Clause.[19]

Laycock proposes the need for a comprehensive federal choice-of-law jurisprudence, acknowledging that the details would have to be worked out over time by the courts.[20]

Others argue that the use of the forum State law serves important policy interests, protecting tort plaintiffs and contract creditors.[21] Given the lack of any other clear answer and the burden that developing one would pose for this Court, they support allowing free reign to the forum.

D. The Full Faith and Credit Clause Requires that Forum States Respect Statutes of Sister States Defining Their Immunity.

Your *Amicus* does not pretend to have a way out of the dismal swamp. The instant case, however, does provide an island of fixed high ground.

Permitting the forum State to choose to give *no* faith or credit to any statute of other States cannot be a reasonable interpretation of the constitutional provision. The Clause mandates a single, explicit directive—to give "full faith and credit" to judgments *and* statutes. How can the "judicial

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[19] Laycock, *supra* note 9, at 297.

[20] Laycock, *supra* note 9, at 310 ("Congress or the federal courts should specify choice-of-law rules and that state courts should follow those rules, to the end that the same law will be applied no matter where a case is litigated."). *See also* Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 74 (1998) ("choice of law should be unconstitutional if a court chooses a state's law when another state has a *significantly* closer connection to the controversy.").

[21] Weinberg, *Minimal Scrutiny* at 462-70; Louise Weinberg, *Against Comity*, 80 Geo. L.J. 53, 66 ("forum law is indeed generally 'better.'").

Proceedings" portion include virtually all judgments while the "public Acts" portion not refer to a single statute? That would leave enforcement of conflicts principles *entirely* "to the vagaries of the forum's view of comity" rather than to a "constitutional command"—the very opposite of Justice Scalia's observation above. At least some statute of another State must deserve a constitutional nod in a choice-of-law decision. This case concerns that statute.

If any "public Acts" of a State are entitled to be given full faith and credit in the courts of a sister State, it must surely be those Acts that limn the degree of sovereign immunity to which the State and its agencies are entitled. Justice Stevens noted the centrality of avoiding infringement of other States' sovereignty under the Full Faith and Credit Clause.

> The Full Faith and Credit Clause implements this design [of our federalism] by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty.

Allstate, 449 U.S. at 322 (concurring opinion).

States can have no stronger "legitimate interest" than their sovereignty. States can suffer no greater "infringement upon their sovereignty" than denial of their explicit statutory sovereign immunity from suit. A State's sovereign immunity, by definition, trumps every private litigant's right to compensation. That is the very essence of what sovereign immunity means.

A State's sovereign immunity transcends as well any other forum State's "own legitimate public policy" to allow greater victim compensation by more narrowly limiting its own sovereign immunity. Nevada can surely waive its own sovereign immunity to allow greater recovery by private litigants from the Nevada fisc. But Nevada cannot waive California's sovereign immunity. Nevada's courts cannot infringe on California's sovereign immunity by allowing any greater recovery from California's fisc than California has chosen to permit. Any other rule would allow one State to limit the most central aspect of the sovereignty of another State. California's statutes setting forth the extent of its sovereign immunity define the very core of what being sovereign means.

Unlike other choice-of-law cases where various factors may be considered, here one factor—the sovereign immunity interests of California—is conclusive. Requiring full faith and credit for state sovereign immunity statutes provides a course by which to navigate between the contending academic theories. It gives concrete substance to the "public Acts" portion of the Clause without having to drain the entire swamp.

E. *Nevada v. Hall* is Inconsistent with Cooperative Federalism and the Most Minimal Enforcement of the Full Faith and Credit Clause.

And yet, the Court in *Nevada v. Hall* found no such full faith and credit requirement for the sovereign immunity statute of Nevada. In finding California's preference for its own policy sufficient there (as it would find Minnesota's preference sufficient in *Allstate*), the Court focused on assessing the forum's interests in compensating a personal

injury, as it has in many full faith and credit cases. But *Nevada v. Hall* was unlike other full faith and credit cases. Because the defendant was another State, its interest was not merely its own less generous policy on victim compensation. Nevada's interest was its very sovereignty itself as defined by its statutory sovereign immunity. Of course States have substantial interest in prescribing compensation rules for third parties in order to protect their citizenry. But such interests can never in our system of cooperative federalism outweigh another State's interest in its own sovereignty.

Nevada v. Hall was decided before the Court had fully developed the appreciation of the sources of state sovereign immunity evident in its current federalism jurisprudence. The Court in *Nevada v. Hall* did acknowledge that coming into the union States enjoyed sovereign immunity in the courts of foreign States. It aptly focused on whether the forum State is bound "by a federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. But the Court strayed from its current federalism analysis when it assumed that the "question whether one State might be subject to suit in the courts of another state was apparently not a matter of concern when the new constitution was being drafted and ratified." *Id.* That assumption was based on the lack of specific constitutional provision expressly preserving the immunity and the lack of discussion of the issue in the ratification process. All of the cases and all of the debate, the Court noted, concerned States' immunity in *federal* courts. *Id.* at 419.

Alden held that this crucial assumption was not well founded. "We believe, however, that the founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity." 527 U.S. at 741.[22] The Court further ruled in *Alden* that the States retained immunity from private suit even where Congress as the supreme sovereign authorized those suits. There is no basis for treating differently a State's immunity from private suit in the courts of sister States, also enjoyed prior to union. Otherwise the legislature of one State would have greater power to abrogate the sovereign immunity of a sister State than Congress does. The plan of convention can hardly have intended for California to be immune from suit by a Nevada resident in federal court, a neutral forum, and its own courts, but not immune in Nevada courts, where one would expect the greatest parochial bias against California. That is not cooperative federalism.

CONCLUSION

The Full Faith and Credit Clause converted the immunity that foreign States granted visiting sovereigns and their ministers from a matter of comity to a matter of constitutionally required respect

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[22] The Court's discussion in *Alden* of *Nevada v. Hall* focused on whether it provided any support for the argument that a State's immunity in its own courts from private suit was limited by the Constitution and could be abrogated by Congress. It did not subject *Nevada v. Hall* to the federalism analysis the Court was there undertaking. *See* Carlos Manuel Vázquez, *Sovereign Immunity, Due Process and the* Alden *Trilogy*, 109 YALE L.J. 1927, 1937 (2000), citing authorities relied upon in *Alden* that are seemingly inconsistent with the holding in *Nevada v. Hall.*

for the sovereignty of sister States under the co-operative federalism of the Constitution.

The historic durability of state sovereignty immunity explicated in this Court's recent federalism jurisprudence informs the content of the constitutionally mandated choice of law rules and gives force and meaning to the Full Faith and Credit Clause. What more paramount interest can a State have than its sovereignty? If the Full Faith and Credit Clause does not require at a minimum that a forum State give full faith and credit to those public Acts of a sister State that proclaim its sovereign immunity, the reference in the Clause to "public Acts" might as well be erased from the Constitution.

Respectfully submitted,

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