BANKRUPTCY, SOVEREIGN IMMUNITY AND THE DILEMMA OF PRINCIPLED DECISION MAKING: THE CURIOUS CASE OF *CENTRAL VIRGINIA COMMUNITY COLLEGE V. KATZ*

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INTRODUCTION

Every war is comprised of a series of individual battles, each an attempt to secure an intermediary strategic advantage in the service of a greater purpose. Some ultimately prove to be relatively inconsequential. Others are transformational. In *Central Virginia Community College v. Katz*[1] a dramatic campaign for control of sovereign immunity law was waged on the battlefield of bankruptcy. The intermediate result was the Court's surprising holding, authored by Justice Stevens, that adversary proceedings brought by a bankruptcy trustee against state agencies to recover preferential transfers are not barred by the Eleventh Amendment or any other font of state sovereign immunity.[2] The larger war, of course, is the Court's more than two-century-long struggle to define the outer limits of the Eleventh Amendment and state sovereign immunity. We are compelled to defer to the wisdom of historians for an accurate analysis of the final consequence of the *Katz* skirmish—that is, whether it transforms the course of the war or is, ultimately, merely aberrational. It is not too soon, however, to examine this decision for evidence of the character of our most hallowed judicial institution and the generals currently in command.

The venerable concept of sovereign immunity was predicated, at least as commonly believed, on English notions of divine right, recognizing that the King could do no wrong and therefore could not be sued in his own courts without his consent.[3] This understanding survived the passage across the Atlantic with the Framers and was appropriated for use on these shores.[4] Not surprisingly, given the nature of our system of federalism with its two levels of sovereignty, the

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[1] 126 S. Ct. 990 (2006).

[2] *Id.* at 1005 (determining Congress acted within scope of its power saying states should be amenable to preferential transfer proceedings).

[3] *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 179 (1990) [hereinafter REDISH, TENSIONS] (stating while English concept of sovereign immunity developed from England, modern concept of sovereign immunity is "a substantial departure from its English origins."); Mayer G. Freed, *Suits to Remedy Discrimination in Government Employment—The Immunity Problem*, 5 COLUM. HUM. RTS. L. REV. 383, 385 (1973) (explaining "revered adage, 'the king can do no wrong' apparently meant, originally, not that the King was infallible, but rather that he was *obliged* to do justice.") (citation omitted); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963) (describing old English doctrine "that the King could not be sued *eo nominee* in his own courts").

[4] *See generally* REDISH, TENSIONS, *supra* note 3.

importation of the concept of sovereign immunity from the mother land has not been without complication.[5]

As evidenced by Alexander Hamilton's insistence that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT . . . ,"[6] it was recognized by the Framers that the states enjoyed at least some degree of sovereign immunity.[7] However, the precise extent of that immunity was not clarified prior to the ratification of the Constitution.[8] Indeed, not only did our founding document lack any express mention—much less protection—of state sovereign immunity, but Article III actually appeared (at least superficially) to disclaim any such doctrine through its extension of the federal judicial power to controversies between a state and citizens of another state.[9]

What may have been lost in translation resulted in obvious difficulties for a Supreme Court burdened with policing the division of power between the state and federal governments, a task totally unknown in England at the time. These complications erupted onto the national stage when the Court announced its controversial decision in *Chisholm v. Georgia*,[10] the case that, as legend has it, created a "shock of surprise throughout the country . . . ."[11] In that case the Court, to the nation's apparent displeasure, construed the Article III, section 2 citizen-state diversity clause to permit it to assume original jurisdiction of a suit brought against the state of Georgia by citizens of South Carolina in order to collect on a debt, absent the former's consent.[12] Fearful that *Chisholm* would open the floodgates to suits brought by creditors against the States for payment of Revolutionary War debts,[13] as the traditional story goes, an aroused Congress proposed and adopted,

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[5] *See generally* Ralph Brubaker, *Explaining* Katz*'s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 122 (2007) (explaining "traditional [concepts of] immunity from suit did not readily translate into the shared sovereignty of our federalism. The American invention of federalism, with dual sovereigns, introduced sovereign immunity issues that were unknown to the unitary English sovereign.").

[6] THE FEDERALIST NO. 81, at 511 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (emphasis added) [hereinafter Hamilton, THE FEDERALIST NO. 81].

[7] *See id.* (acknowledging immunity remains with states); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 527 (1978) [hereinafter Field, *Part One*] (quoting Madison as having once stated, "it is not in the power of any individuals to call any state into court").

[8] *See, e.g.*, REDISH, TENSIONS, *supra* note 3, at 179 (asserting while state governments did consider themselves immune from suit, extent and scope of immunity was unknown until ratification of Constitution).

[9] *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

[10] 2 U.S. (2 Dall.) 419 (1793).

[11] Hans v. Louisiana, 134 U.S. 1, 11 (1890).

[12] *See Chisholm*, 2 U.S. at 478–79 (holding one state can be sued by citizens of another state).

[13] *See generally* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (1922) (discussing state sovereignty and neutrality).

apparently without debate,[14] the Eleventh Amendment.[15] The amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[16]

By its terms the Eleventh Amendment appears to establish a well-defined jurisdictional bar prohibiting only those suits brought against states by *diverse* plaintiffs.[17] Nevertheless, the Court has consistently latched onto what it deemed to be the interstices of the text (sometimes of the Eleventh Amendment, sometimes of Article III) to extend state sovereign immunity to suit in federal court far beyond the express limits contained within the terms of the Amendment.[18]

The apparent susceptibility of the Eleventh Amendment to extra-textual interpretations has continued to make that provision particularly fertile ground on which to wage the battles of constitutional federalism.[19] This battle has led Justice and scholar alike to search for a coherent theory with which to explain the amendment's genesis and ideal function in a manner designed to champion their preferred construction of the provision.[20] But for very few short-lived or narrowly confined exceptions,[21] those Justices and scholars who believe in an expansive

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[14] *See* John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1436 (1975) [hereinafter, Nowak, *the History of the Eleventh and Fourteenth Amendments*] (indicating Congress passed eleventh amendment without any reported debate).

[15] *See* REDISH, TENSIONS, *supra* note 3, at 180 (remarking *Chisolm* decision directly led to quick passage and ratification of Eleventh Amendment in order to prevent suits against states for payment of Revolutionary War debt).

[16] U.S. CONST. amend. XI.

[17] *See* REDISH, TENSIONS, *supra* note 3, at 180 (noting Eleventh Amendment was intended to bar suit from citizens of one state against another state).

[18] *Id.*; *see* Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934) (holding Eleventh Amendment applicable to suits by foreign state against state, though once again, terms of amendment do not apply); *Ex parte* New York, 256 U.S. 490, 497 (1921) (holding Eleventh Amendment bars suits in admiralty, though by its terms, it applies only to suits in law and equity); Hans v. Louisiana, 134 U.S. 1, 10 (1890), discussed *infra* Part I (construing Eleventh Amendment to bar private suits against state brought by in-state plaintiffs, although by its terms, it refers only to diverse plaintiffs).

[19] *Compare* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66 (1996) (overruling *Union Gas* and holding Congress does *not* have authority to abrogate state sovereign immunity when legislating pursuant to Indian Commerce Clause), *with* Pennsylvania v. Union Gas Co., 491 U.S. 1, 19–20 (1989) (holding Congress has authority to abrogate state sovereign immunity when exercising its power to regulate interstate commerce).

[20] There are six commonly advocated theories of Eleventh Amendment interpretation: the total inclusion theory, the congressional abrogation theory, the plan of the convention theory, the diversity theory, the textualist theory, and what we term the *Hans doctrine*. *See* REDISH, TENSIONS, *supra* note 3, at 141–54, for a detailed description of the competing theories.

[21] *See, e.g.*, Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 451 (2004) (holding adversary proceeding brought against state for purpose of seeking hardship determination was not barred by Eleventh Amendment); *Union Gas Co.*, 491 U.S. at 23 (determining Congress, when legislating under Commerce Clause, was able to make State liable for monetary damages); *Ex parte* Young, 209 U.S. 123, 167 (1908) (introducing "fiction" and holding suit against state official is not suit against state for purposes of Eleventh Amendment).

doctrine of state sovereign immunity have emerged victorious.[22] The result has been that the Court has, almost without fail, interpreted the Eleventh Amendment generously, construing it to prohibit nearly all lawsuits brought by private citizens against unconsenting states.[23]

The most significant recent affirmation of a robust form of state sovereign immunity was delivered by the Court in *Seminole Tribe of Florida v. Florida*.[24] In that case the Court held that the Eleventh Amendment, and the principle of sovereign immunity embodied in it, prohibited Congress from using legislation passed pursuant to its Article I commerce power to abrogate state sovereign immunity.[25] At the time, at least, it appeared reasonable to infer from *Seminole Tribe* that there was a constitutional ban on the use of *any* Article I power to achieve this purpose. After all, the Court in *Seminole Tribe*—rightly or wrongly[26]—construed the Eleventh Amendment's protection of state sovereign immunity to restrict congressional power authorized in the body of the Constitution.[27] There appears to be no reason that the Eleventh Amendment would restrict one constitutionally authorized congressional power embodied in Article I but not another. By its terms, the Eleventh Amendment draws no distinction among different constitutional sources of congressional legislative power: it is, rather, what civil procedure scholars refer to as "transsubstantive"—it turns solely on the citizenship of the plaintiff, not the nature of the substantive claim. Thus, when applicable, the amendment supercedes *all* Article I powers.

The Court's announcement in *Katz* last term, that Congress's Article I bankruptcy power[28] constituted a partial abrogation of state sovereign immunity

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[22] *See, e.g.*, *Seminole Tribe*, 517 U.S. at 76 (finding "Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court"); Hans v. Louisiana, 134 U.S. 1, 16 (1890) (acknowledging state cannot be sued without its consent).

[23] *See Seminole Tribe*, 517 U.S. at 72–73 (explaining Eleventh Amendment prevents Congressional grants of authority for private parties to sue state); *Hans*, 134 U.S. at 14–15 (discussing strong reasons against allowing state to be sued by its citizens without its consent).

[24] 517 U.S. at 72–73, 76 (indicating Eleventh Amendment bars Congress from permitting private lawsuits against non-consenting state, even in areas where Congress has law making authority).

[25] *See id.* (construing Eleventh Amendment grant of state sovereign immunity to block Congress's ability to permit private suits against state under Commerce Clause).

[26] *See infra* Part I (examining holding and rationale of *Seminole Tribe*).

[27] The majority in *Seminole Tribe* stated:

> [T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

517 U.S. at 72–73.

[28] *See* U.S. CONST. art. I, § 8, cl. 4 (providing Congress has power "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States . . .").

therefore came as quite a surprise, and a curious one at that.[29] The Court now finds within the relatively confined Bankruptcy Clause an implicit abrogation of state sovereign immunity so powerful that it allows Congress effectively to circumvent the directives of a subsequently enacted constitutional amendment. Yet under *Seminole Tribe*—at least implicitly left intact by *Katz*—the Court found no such power derived from the Commerce Clause,[30] despite the Court's repeated recognition of both the unparalleled breadth of that clause's legislative reach and its obvious critical import in regulating virtually every aspect of the national economy.[31]

It is conceivable, perhaps, that the two clauses can be distinguished on the basis of their differing text or history. However, close analysis of the asserted basis for such a dramatic distinction among Congress's Article I powers reveals that no persuasive argument can be made to support it. More importantly, the fact that the constitutional guarantee of sovereign immunity comes in the form of a constitutional amendment should logically moot any such differences. When interpretation of an amendment is in play, differences between powers granted in the original document in terms of text, history or Framers' intent are rendered irrelevant. The issue is no longer what was intended in the original document, but rather what was intended when the amendment imposed the constitutional bar. And, as previously noted, there is absolutely nothing on the face of the Eleventh Amendment to suggest or imply a difference in the scope of sovereign immunity on the basis of the particular Article I power exercised by Congress.

Two potential responses to this rather straightforward statement of the constitutional pecking order might be fashioned. First, it could be argued that by its terms the Eleventh Amendment prohibits only suits brought against a state by citizens *from another state*.[32] Thus, in suits brought by *in-state* citizens, the argument proceeds, the Eleventh Amendment provides no bar to legislative action. Of course, to the extent this argument is valid (and, for the most part, we believe it is),[33] it would seem logically to apply equally to *both* the Bankruptcy *and* Commerce Clauses. Its acceptance therefore may well justify overruling, in part, *Seminole Tribe*, but it would certainly not logically support *Katz*'s holding

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[29] *See* Cent. Va. Cmty Coll. v. Katz, 126 S. Ct. 990, 1005 (reporting Congress's power to either treat states as typical creditors or exempt them "arises from the Bankruptcy Clause itself; the relevant 'abrogation' is the one effected in the plan of the Convention, not by statute").

[30] *See* U.S. CONST. art. I, § 8, cl. 3 (giving Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

[31] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 19 (2005) (holding Congress's Commerce Clause authority includes power to prohibit local cultivation and use of marijuana although expressly permitted by state legislation); Pennsylvania v. Union Gas Co., 491 U.S. 1, 20 (1989) (explaining "[i]t would be difficult to overstate the breadth and depth of the commerce power").

[32] *See* Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468, 497, 509–10 (1987) (Brennan, J., dissenting) (arguing Eleventh Amendment was limited to prohibiting lawsuits against state when brought by citizen of another state or citizen of foreign nation).

[33] *See* discussion *infra* at p. 38–40 (agreeing with perspective that Eleventh Amendment does not apply to action brought by citizen against own state).

concerning the Bankruptcy Clause's impact on sovereign immunity while leaving *Seminole Tribe* intact as to the Commerce Clause.

It might also be argued that the Eleventh Amendment, properly construed, imposes absolutely no bar to congressional authority to abrogate sovereign immunity pursuant to its legislative powers under Article I, even for suits by out-of-state residents. Under this approach, dubbed by friend and foe alike as the "diversity theory,"[34] the Eleventh Amendment accomplishes nothing more than a surgically circumscribed repeal of *Chisholm*. There, it should be recalled, the Court had construed the state diversity clause of Article III, section 2, which extends the judicial power to suits between a state and citizens of another state, to revoke whatever common law sovereign immunity the states may have possessed pre-constitutionally.[35] So construed, the Eleventh Amendment becomes wholly irrelevant to any suit against a state that arises under substantive federal law, whether brought by an in-state or out-of-state citizen. Its impact, rather, is confined to suits whose *only* basis of federal jurisdiction is diversity of citizenship—an extremely rare occurrence when the defendant is a state. Whatever one thinks of this theory, however (and it most definitely has been the subject of controversy), it would seem to provide absolutely no basis on which to justify the distinction, recognized in *Katz*, between suits brought pursuant to legislation grounded in the Commerce Clause on the one hand and those brought pursuant to legislation grounded in the Bankruptcy Clause, on the other.

When the dust settles, then, the *Katz* Court appears to have crossed the river half way. Through any mode of principled constitutional interpretation, the Court's asserted dichotomy between Bankruptcy Clause and Commerce Clause cases is unambiguously indefensible. The Court focused on asserted (though dubious) differences between the text and purposes of the two clauses, when the real constitutional issue should have been the scope and impact of the Eleventh Amendment—a provision that on its face is entirely agnostic to any conceivable differences between the bankruptcy and commerce powers.

It is difficult to believe that neither the author of the *Katz* decision, Justice Stevens, nor any of the concurring Justices could grasp what—quite frankly—is such a simple—and fatal—problem with the majority's analysis. Indeed, Justice Stevens himself had, in prior cases, openly advocated adoption of the diversity theory of the Eleventh Amendment with the goal of dramatically expanding congressional power to revoke sovereign immunity in *all* contexts.[36] It was largely

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[34] *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1429–37 (1987) [hereinafter Amar, *Of Sovereignty*] (finding support for diversity theory in historical analysis of dissimilar conceptions of sovereignty extant in England and United States pre-ratification). *But see* William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1393–94 (1989) (finding fault with Professor Amar's historical analysis).

[35] *See* Chisholm v. Georgia, 2 U.S. 419, 437 (1793) (rationalizing pre-existing state laws invalidated by Constitution).

[36] *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 24, 27–28 (1989) (Stevens, J., concurring) (agreeing Congress has authority to subject states to lawsuits brought in federal courts).

for that reason that he had dissented in *Seminole Tribe*, a case involving the Indian commerce power.[37] Why, then, did the *Katz* majority not simply acknowledge past errors and overrule *Seminole Tribe*? *Seminole Tribe* itself, after all, had expressly overruled a relatively recent Supreme Court decision to the contrary.[38] He who lives by the sword should not be surprised when the tables are turned (to mix metaphors).

The answer, quite probably, is that purely as a matter of internal Court politics, Justice Stevens was unable to cobble together a majority for overruling *Seminole Tribe*. The question then becomes whether Justice Stevens should have (reluctantly) accepted the logical implications of *Seminole Tribe* and held that the Eleventh Amendment and the sovereign immunity bar applies identically to Congress's commerce and bankruptcy powers, or instead chose to conduct a form of doctrinal guerilla warfare on the *Seminole Tribe* principle. Pursuant to this second strategy, Justice Stevens would carve out whatever exceptions he could manage to get away with, regardless of their logical force for purposes of sovereign immunity. We ultimately conclude that while Justice Stevens seems to have chosen the latter course, it is the former option that is dictated by the demands of principled constitutional decision making so essential to the Court's legitimacy in a democratic society.[39]

Part I of this Article examines the theories and jurisprudence of sovereign immunity and the Eleventh Amendment as they existed prior to the Court's decision in *Katz.* In this manner, we will be able to underscore the stark inconsistency between the *Katz* holding and the jurisprudential and constitutional "ether" surrounding sovereign immunity and the Eleventh Amendment. Part II of this Article provides a detailed explanation of *Katz* and its implications for the doctrine of state sovereign immunity and Eleventh Amendment construction. It also critiques the Court's claims of a principled distinction between the Bankruptcy Clause, on the one hand, and the remaining Article I powers conferred on Congress, on the other. We conclude that no such distinction can be justified by any means of principled constitutional analysis. In Part III we contrast the *Katz* Court's decision-making methodology with the methodology described by Professor Herbert Wechsler in his famed exegesis on principled decision making.[40] We ultimately conclude that because the Court's decision is predicated on the result desired rather than on a principled, consistently applied analysis of the Eleventh Amendment, it is unacceptable. This is so, regardless of one's sympathy for the ethos that spawned it.

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[37] *See* 517 U.S. 44, 93 (1996) (Stevens, J., dissenting) (concluding Congress is not constitutionally barred from making state subject to action in federal court).

[38] *See id.* at 66 (overruling *Union Gas*).

[39] *See infra* notes 80–88 and accompanying text (describing diversity theory and plan-of-the-Convention theory).

[40] *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) [hereinafter Wechsler, *Neutral Principles*] (discussing power of courts to decide constitutional cases).

I. SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT: PRE-*KATZ* THEORY AND DOCTRINE

The effort to define the contours of the states' sovereign immunity against private suit in federal court did not end with the ratification of the Eleventh Amendment and its rebuke of the *Chisholm* decision. The amendment, by its terms, appears at most to have insulated states from federal court suit by someone other than its own citizens.[41] Nevertheless, the Court has consistently extended the principle of state sovereign immunity far beyond the apparent confines imposed by the amendment's text.[42] For example, the Eleventh Amendment has been held by the Court to prohibit suits against states in admiralty, although the text of the Amendment expressly refers only to suits in law and equity.[43] The Court has also held that the Eleventh Amendment bars suits brought by a foreign state against a state although, again, this prohibition is not found within the text of the Amendment.[44]

The most dramatic expansion of state sovereign immunity was imposed by the Court late in the nineteenth century in *Hans v. Louisiana*,[45] where it construed the amendment to prohibit suits by in-state citizens, as well as those from out of state.[46] In that case, Hans, a citizen of Louisiana, brought suit against the state of Louisiana to recover coupons in the amount of $87,500 that were annexed to bonds issued by the State.[47] Although the suit arose under the United States Constitution and, therefore presumably could have been cognizable by the federal judiciary pursuant to its federal question jurisdiction, the Court nevertheless held that it was constitutionally precluded by sovereign immunity.[48] This was true even though, as previously noted, the Eleventh Amendment by its terms prohibits only those suits brought against a state by citizens of *another* state.[49] In reaching its decision, the *Hans* Court reasoned that had Congress, while drafting the Eleventh Amendment,

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

[42] *See* REDISH, TENSIONS, *supra* note 3, at 141 (arguing sovereign immunity has been extended beyond limitations in text of Eleventh Amendment).

[43] *See In re* New York, 256 U.S. 490, 500 (1921) (noting state immunity from suit *in personam* in admiralty suit brought by private person).

[44] *See* Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934) (indicating Eleventh Amendment bars suits brought against state by citizens of foreign state).

[45] 134 U.S. 1 (1890).

[46] *See id.* at 10 (noting state cannot be sued by citizen of another state or foreign state on "mere ground" of case arising under Constitution).

[47] *Id.* at 3.

[48] *See id.* at 20 (explaining suit could not be recognized by federal judiciary despite existence of constitutional question).

[49] *See* REDISH, TENSIONS, *supra* note 3, at 141 (discussing how *Hans* extended Eleventh Amendment to suits against states by in-state citizens).

included language stating that the Amendment did not bar a citizen from suing her own state, the Amendment would never have been adopted.[50]

This doctrinal susceptibility of the Eleventh Amendment to extra-textual interpretations has continued to render it the subject of much theorizing.[51] For our purposes it is necessary to describe five theories of Eleventh Amendment construction: the *Hans* doctrine, the congressional abrogation theory, the plan-of-the-Convention theory, the diversity theory, and the textualist theory.[52]

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[50] *See Hans*, 134 U.S. at 15 (pondering whether Eleventh Amendment would have passed with additional provision). Indeed, the *Hans* Court insisted that "[t]he supposition that it would [have been adopted with the offending clause] is almost an absurdity on its face." *Id.*

[51] *See* REDISH, TENSIONS, *supra* note 3, at 139 (providing commentary on state sovereign immunity and Eleventh Amendment). The leading commentaries include Amar, *Of Sovereignty*, *supra* note 34 (diversity theory, despite its inconsistency with text); Stewart A. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977) (examining tools and outcomes used in past to analyze Eleventh Amendment); Field, *Part One*, *supra* note 7 (suggesting sovereign immunity is common law doctrine rather than constitutionally compelled); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) (concluding adopters of Eleventh Amendment did not intend to ban federal question or admiralty jurisdiction over private suits against states); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983) (taking narrow view of Eleventh Amendment analysis); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 6–7 (1988) (arguing sovereign immunity is federal common law principle, limits remedies of federal courts, and effects reallocation of judicial power from federal to state court); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989) (addressing Eleventh Amendment theories); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989) (focusing on historical claims of diversity theorists); Nowak, *the History of the Eleventh and Fourteenth Amendments*, *supra* note 14 (advocating broad congressional power to police states, consistent with Eleventh Amendment); John R. Pagan, *Eleventh Amendment Analysis*, 39 ARK. L. REV. 447 (1986) (analyzing Eleventh Amendment issues with plaintiff's status, defendant's status and waiver of immunity by state or Congress); and Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976) [hereinafter Tribe, *Federalism*] (discussing differences between roles of Congress and judiciary in policing states). Justices Powell, Brennan, Stevens, Rehnquist and Souter have repeatedly considered the appropriate construction of the Eleventh Amendment, in particular, and the principle of state sovereign immunity, in general. *See, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1003–04 (2006) (Stevens, J.) (exploring historical implications of Bankruptcy Clause for state sovereign immunity); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446 (2004) (Rehnquist, C.J). (indicating Court has recognized sovereign immunity is not limited to literal terms of Eleventh Amendment); Seminole Tribe of Fl. v. Fla., 517 U.S. 44, 101–16 (1996) (Rehnquist, C.J.) (Souter, J., dissenting) (discussing intersection of Eleventh Amendment and sovereign immunity); Pennsylvania v. Union Gas Co., 491 U.S. 1, 7–13 (1989) (Brennan, J.) (explaining when Congress can override state immunity from monetary damages in federal court); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247–48 (1988) (Brennan, J., dissenting) (disagreeing with majority's Eleventh Amendment doctrine); Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 497 (1987) (Brennan, J., dissenting) (advocating adoption of diversity theory); *Welch*, 483 U.S. at 472–74 (Powell, J.) (stating Supreme Court's interpretation of Eleventh Amendment); Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 320–24 (1973) (Brennan, J., dissenting) (explaining traditionalist view of Eleventh Amendment derives from "traditional nonconstitutional principles of sovereign immunity").

[52] *See* REDISH, TENSIONS, *supra* note 3, at 139 (discussing various theories regarding interpretation of Eleventh Amendment). The other commonly accepted theory, the total inclusion theory, while widely discussed, is not relevant to our discussion and has, therefore, been omitted from our analysis. It should be noted that while each of the five theories discussed herein is susceptible to serious criticism, particularly on

Adoption of the *Hans* doctrine signaled the Court's almost universally broad construction of the Eleventh Amendment in particular and state sovereign immunity in general. Indeed, prior to *Katz*, the Court had almost always interpreted constitutional sovereign immunity broadly to prohibit nearly all law suits brought by private citizens against unconsenting states.[53] The rare exceptions to the *Hans* doctrine have, for the most part, been short-lived or narrowly confined.[54] The Court's most notable pre-*Katz* departures from the *Hans* doctrine came in two cases, *Pennsylvania v. Union Gas Co.*[55] and *Fitzpatrick v. Bitzer*.[56] In *Union Gas*, the Court held that the Eleventh Amendment did not prohibit Congress from abrogating state sovereign immunity when legislating pursuant to the Interstate Commerce Clause.[57] However, that decision was expressly overruled in relatively short order by *Seminole Tribe*.[58] The *Hans* doctrine can therefore be deemed to represent the Court's overall construction of the Eleventh Amendment, prior to *Katz*, with the narrow exception recognized in *Fitzpatrick*. There the Court held that Congress possesses legislative authority pursuant to section 5 of the Fourteenth Amendment to remedy state violations of the amendment's substantive provisions.[59] The decision's reach is confined to the section 5 context, however, because it was grounded in the premise that the Fourteenth Amendment supercedes the Eleventh, to the extent that the two conflict.[60] The same cannot be said, of course, of any of Congress's Article I powers.

The remaining four theories of Eleventh Amendment construction, each advocating broad congressional power to abrogate state immunity, have been soundly and, for the most part, consistently rejected by the majority of the Court.[61] This is so despite the fact that they have been frequently advocated by dissenting Justices and scholarly commentators.[62]

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textual grounds, space constraints prohibit the inclusion of such a discussion. The purpose of this Article, after all, is not to fight anew the battles of the Eleventh Amendment.

[53] *See supra* note 18 and accompanying text (discussing cases where court has extended state sovereign immunity beyond limits of Eleventh Amendment).

[54] *See supra* note 19 and accompanying text (citing continuing battle in U.S. Supreme Court on how to interpret Eleventh Amendment).

[55] 491 U.S. 1 (1989).

[56] 427 U.S. 445 (1976).

[57] *See Union Gas Co.*, 491 U.S. at 23 (concluding federal statute rendered states liable in money damages in federal court and Congress can render them so liable when legislating pursuant to Commerce Clause).

[58] *See* 517 U.S. 44, 45 (1996) (holding *Ex Parte Young* doctrine does not empower Congress to abrogate state sovereign immunity).

[59] *See Fitzpatrick*, 427 U.S. at 445–46.

[60] *See id*. at 456 ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.").

[61] *See, e.g., Seminole Tribe*, 517 U.S. at 58 (rejecting diversity and plan-of-the-Convention theories, thereby rendering congressional abrogation theory a virtual nullity).

[62] *See id*.at 158–59. (Stevens J., dissenting) ("[I]s it plausible to contend that the plan of the convention was meant to leave the National Government without any way to render individuals capable of enforcing their federal rights directly against an intransigent State?"). *See generally* Amar, *Of Sovereignty*, *supra* note 34 (discussing federalism and sovereignty in Constitution).

The congressional abrogation theory was first described by Professors Laurence Tribe and John Nowak in separate articles appearing in the 1970s.[63] They contended that the Eleventh Amendment was intended to cabin the authority of the *federal judiciary* to abrogate state sovereign immunity, but not to deprive *Congress* of that authority.[64] According to Professor Tribe, the Eleventh Amendment does not limit the power of Congress when "acting in accordance with its Article I powers as augmented by the necessary and proper clause [from] . . . effectuat[ing] the valid substantive purposes of federal law by compelling states to submit to adjudication in federal courts . . . ."[65] Thus, when faced with a private suit against an unconsenting state in federal court, both scholars argued, the judiciary's sole duty is to divine congressional intent. If the Court determines that Congress intended to revoke state sovereign immunity, the inquiry should be at an end and the suit allowed.[66]

The so-called "plan-of-the-Convention" theory, articulated most clearly by Justice Brennan in *Union Gas*,[67] and appropriated for use by Justice Stevens in *Katz* in the unique context of bankruptcy, is premised on the concept "that the States enjoy no immunity where there has been a surrender of this immunity in the plan of the [Constitutional] convention."[68] As one of us has previously described the theory,

> [According to Justice Brennan,] the limit on the power of the judiciary to hear suits by in-state citizens against a state does not derive from either the eleventh amendment or from any other constitutional provision, but rather from the non-constitutional, common-law doctrine of sovereign immunity. Justice Brennan thus identified two sources of sovereign immunity: the bar of the eleventh amendment against suits brought by out-of-staters and the common-law bar against suits by in-state citizens. The significant difference between the two, he argued, is that unlike the constitutional type of immunity, the common-law form of sovereign immunity was waived by the states at the time of the Constitution's ratification to the extent that Congress was given

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[63] Nowak, *Congressional Power*, *supra* note 14 (examining historical development of Eleventh Amendment); Tribe, *Federalism*, *supra* note 51 (analyzing Eleventh Amendment and federal judicial power).

[64] *See supra* note 63 and accompanying text (commenting on purposes of Eleventh Amendment).

[65] Tribe, *Federalism*, *supra* note 51, at 694.

[66] *See id.* at 713 (arguing "the law of eleventh amendment immunity and intergovernmental tax and regulatory immunity can be organized . . . by attention to separation of powers issues implicit in these questions of federalism").

[67] 491 U.S. 1, 19–20 (1989) ("Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.").

[68] *Id.* at 19 (quoting Hamilton, THE FEDERALIST NO. 81, *supra* note 6) (internal citations omitted).

> power to legislate under its enumerated powers in Article I. Thus, if Congress, in the exercise of one of its powers, renders the state subject to suit by in-state citizens, the common-law doctrine of sovereign immunity does not act as a bar.[69]

Yet another approach, referred to as the diversity theory, was introduced to the Court by Justice Brennan, writing in dissent in *Atascadero State Hospital v. Scanlon*.[70] This theory construes the Eleventh Amendment as a bar only to those suits brought against a state when jurisdiction is grounded solely on the diversity of the parties.[71] That is, the diversity theorists believe that the Eleventh Amendment was designed to do nothing more than overrule the narrow holding in *Chisholm*, which had construed the provision of Article III, section 2 extending the federal judicial power to suits between a state and citizens of another state to effect a revocation of pre-existing common law-based state sovereign immunity. Thus, the argument proceeds, the amendment does nothing more than repeal one basis for subject matter jurisdiction, namely the state diversity clause.[72] So construed, the amendment permits private suits against states in a federal forum by out-of-state citizens whenever a federal cause of action exists to provide an independent basis for jurisdiction. In these suits, the basis of subject matter jurisdiction is federal question, not the state diversity clause.[73]

The diversity theory works in tandem with the plan-of-the-Convention theory. Advocates of the diversity theory[74] acknowledge—if only for purposes of argument—that there existed at the time of the Constitutional Convention a generalized "ether" of state sovereign immunity, inherited from our English tradition. Unlike the Eleventh Amendment, this pre-Convention sovereign immunity was not confined to suits in which subject matter jurisdiction was grounded in the state diversity clause as dictated by the Eleventh Amendment.[75] But while its reach may have been broader, its legal source was by no means as

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[69] REDISH, TENSIONS, *supra* note 3, at 188. The plan-of-the-Convention theory of sovereign immunity is the focus of one prong of Justice Stevens' two-pronged attack on state sovereign immunity in *Katz*, discussed *infra*.

[70] 473 U.S. 234, 258–90 (1988) (arguing there is neither a constitutional principle of state sovereign immunity nor a constitutionally mandated policy of excluding from federal court suits against States) (Brennan, J., dissenting). The diversity theory of sovereign immunity is the focus of the second prong of Justice Stevens's two-pronged attack on state sovereign immunity in *Katz*, discussed *infra.*

[71] *See id*. at 289 ("[T]he [Eleventh] Amendment was intended to remedy an interpretation of the Constitution that would have had the state-citizen and state-alien diversity clauses of Article III abrogating the state law of sovereign immunity on state-law causes of action brought in federal courts.").

[72] *See id.* ("The original Constitution did not embody a principle of sovereign immunity as a limit on the federal judicial power. There is simply no reason to believe that the Eleventh Amendment established such a broad principle for the first time.").

[73] *See id*. at 286–87 (suggesting State could not be sued in federal court where basis of jurisdiction is diversity).

[74] *See generally* Amar, *Of Sovereignty*, *supra* note 34 (analyzing grants of diversity jurisdiction in Constitution and previous case law).

[75] *See id.* (discussing roots of diversity jurisdiction and state sovereign immunity).

powerful. Unlike the Eleventh Amendment, this pre-Convention sovereign immunity could of course not have been dictated by the Constitution, which did not exist at the time. Its legal source, then, must have been the common law, inherited originally from England. Under the plan-of-the-Convention theory, when the states ratified the Constitution they ceded whatever sovereign immunity they possessed by reason of the common law and political tradition to the extent the document vested power to legislate in Congress.[76] Since Article I, section 8 vests in Congress authority to legislate to regulate both interstate commerce and bankruptcies, whatever pre-constitutional immunity states may have possessed had been ceded in these areas pursuant to "the plan of the Convention."

The final theory of Eleventh Amendment construction we label the "textualist" approach, because it takes the amendment's text for what it says within its four corners—no more, no less. By its terms, the amendment prohibits the extension of federal jurisdiction to "any" suit brought by an out-of-state citizen against a state. Under this approach, use of the word, "any" invalidates the diversity theory, because even suits brought by out-of-staters that arise under federal law are prohibited. Construed in this manner, the Eleventh Amendment ignores the specific source of subject matter jurisdiction, because on its face it extends its jurisdictional bar to any suit in which the plaintiff of one state sues another state.

What the terms of the amendment do *not* prohibit, however, are suits of any kind brought by in-state citizens against a state.[77] The Constitution says nothing about such suits, and to the extent that there did exist some form of common law sovereign immunity prior to the Convention, surely such state protection must be trumped by the Constitution's grant of legislative power to Congress.[78]

The *Katz* Court's selective departure from the *Hans* doctrine is notable, not only because such a departure is virtually unprecedented, but because both the plan-of-the-Convention and the diversity theories were expressly rejected by the Court[79] in its most significant post-*Hans* Eleventh Amendment case—*Seminole Tribe of Florida v. Florida*.[80] In that case, the Seminole Tribe brought suit in federal court against the State of Florida for the state's refusal to enter into negotiations with the Tribe for the purposes of establishing casinos on tribal land.[81] The procedure

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[76] REDISH, TENSIONS, *supra* note 3, at 188.

[77] *See* U.S. CONST. amend. XI. (prohibiting suits against States by citizens of another state or of a foreign state).

[78] This theory is generally associated with Professor Lawrence Marshall. *See* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1343 (1989) ("[T]he congressional abrogation theory, asserts that the [Eleventh] [A]mendment restricts the authority of federal courts to adjudicate cases against states only in the absence of a congressional enactment allowing suits against states."). One of us has also written favorably of the approach. *See* REDISH, TENSIONS, *supra* note 3, at 191–93.

[79] The rejection of the diversity and plan-of-the-Convention theories renders the congressional abrogation theory a practical nullity.

[80] 517 U.S. 44 (1996).

[81] *See id.* at 51–52 (noting plaintiffs argued Florida violated 25 U.S.C. § 2710(d)(3), which required Florida to negotiate with plaintiffs in good faith).

providing for the cause of action was authorized by the Indian Gaming Regulatory Act,[82] which Congress had issued pursuant to the power conferred upon it by the Indian Commerce Clause.[83]

In determining that the Eleventh Amendment did, in fact, bar Congress from abrogating state sovereign immunity when legislating pursuant to the Commerce Clause, thereby overruling *Union Gas*,[84] the Court in *Seminole Tribe* relied principally on a reaffirmation of the *Hans* doctrine. Justice Rehnquist, writing for the majority, reasoned that while by the bare text of the Eleventh Amendment only the Article III diversity jurisdiction of the federal courts appears to be restricted, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms."[85] This presupposition, according to the Court, conforms with Alexander Hamilton's oft-repeated statement that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an

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[82] 25 U.S.C. § 2710 (2000).

[83] *See* U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with . . . the Indian Tribes . . . .")

[84] It is important to note that the Court's rejection in *Seminole Tribe* of *Union Gas* should have foreclosed at least much of the reasoning, if not the result reached, in *Katz*. Although it is unnecessary to consider *Union Gas* at length, two concepts in particular merit our attention as they form much of the basis of the Court's later opinion in *Katz* notwithstanding their explicit rejection in *Seminole Tribe*. The Court in *Union Gas* relies upon the following two concepts to reach its decision: First, relying on the Court's earlier decision in *Fitzpatrick v. Bitzer*, 427 U.S. 456 (1976), that Congress, when legislating pursuant to the enforcement provisions of the Fourteenth Amendment, was not prohibited by the Eleventh Amendment from abrogating state sovereign immunity because the Amendment announced a cession of power to the federal government by the states, the *Union Gas* Court finds that the same holds true for legislation enacted pursuant to the Commerce Clause, as it too represented a cession of power to the federal government by the States. Pennsylvania v. Union Gas Co., 491 U.S. 1, 15–17 (1989) (discussing Congress' ability to abrogate state sovereign immunity when legislating under Commerce Clause because, like Fourteenth Amendment, Commerce Clause represents cession of power to federal government by states). Second, the Court adopted the plan of the Convention argument:

> We have recognized that the States enjoy no immunity where there has been "a surrender of this immunity in the plan of the convention." Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not "unconsenting"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.

See id. at 19–20 (internal citations omitted). These reasons were explicitly rejected as insufficient to abrogate state sovereign immunity when legislating pursuant to an Article I power in *Seminole Tribe*, see discussion *infra*, and thus the Court's adoption of the same reasoning in *Katz* is surprising. *Compare Seminole Tribe*, 517 U.S. at 66 (rejecting holding in *Union Gas*), *with* Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1002 (2006) (holding states agreed in plan of Convention to relinquish sovereign immunity regarding federal bankruptcy and did so when Bankruptcy Clause was ratified).

[85] *Seminole Tribe*, 517 U.S. at 54 (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)). This statement is an explicit rejection of the diversity theory later adopted by the majority in *Katz*.

individual WITHOUT ITS CONSENT . . . ."[86] Moreover, it reaffirms the Court's century-old insistence "that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"[87]

In reaching its decision, the *Seminole Tribe* Court expressly rejected the contrary holding in *Union Gas*.[88] In that case, Justice Brennan, writing for a plurality, held that Congress was not barred by the Eleventh Amendment from authorizing a private suit in federal court against an unconsenting state when legislating pursuant to the Interstate Commerce Clause.[89] Relying on the plan-of-the-Convention theory, Justice Brennan reasoned that the states had agreed to permit Congress to abrogate their sovereign immunity when legislating pursuant to the Commerce Clause when the States ratified the Interstate Commerce Clause at the Constitutional Convention.[90] As further support for the holding, Justice Brennan relied on the Court's earlier holding in *Fitzpatrick* that Congress was not forbidden by the Eleventh Amendment from abrogating state sovereign immunity when legislating pursuant to the enforcement provisions of the Fourteenth Amendment as the Amendment represented a cession of power by the States to the federal government.[91] According to Justice Brennan, because the ratification of the Commerce Clause represented a similar cession of power by the states to the Federal Government, the Eleventh Amendment should not forbid congressional abrogation of state sovereign immunity when legislating pursuant to the Commerce Clause.[92]

In rejecting *Union Gas*, the Court in *Seminole Tribe* sought to answer three questions. The first was whether there exists a principled distinction between the Interstate Commerce Clause and the Indian Commerce Clause that could support a holding in *Seminole* at odds with the holding in *Union Gas.*[93] The Court answered that question by concluding that there is no way to distinguish the first clause from the second clause because both are "grant[s] of authority to the Federal Government at the expense of the States . . . [and if] anything, the Indian Commerce Clause accomplishes a greater transfer of power . . . than does the Interstate Commerce Clause."[94] The Court then proceeded to its second question: whether the Court's reasoning in *Union Gas*, first, that the states ceded their sovereign immunity when

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[86] *Id.* (quoting Hans v. Louisiana, 134 U.S. 1, 13 (1890) (quoting Hamilton, THE FEDERALIST NO. 81, *supra* note 6)).

[87] *Id.* (quoting *Hans*, 134 U.S. at 15).

[88] *Id.* at 66 (concluding *Union Gas* was wrongly decided and overruling it).

[89] *See Union Gas*, 491 U.S. at 19 (allowing private suit in federal court against unconsenting state when legislating under Commerce Clause).

[90] *See id.* at 19–20 (asserting states relinquished sovereign immunity as required by the Commerce Clause when they ratified U.S. Constitution).

[91] *See id.* at 15–17, 19 (relying on *Fitzpatrick*).

[92] *See id.* at 16–17 (discussing similarity between Fourteenth Amendment and Commerce Clause in that both represent cession of state power to federal government).

[93] *See Seminole Tribe*, 517 U.S. at 62.

[94] *Id.*

they ratified the Interstate Commerce Clause and second, that the *Fitzpatrick* reasoning is equally applicable to the Commerce Clause as well as to section 5 of the Fourteenth Amendment, was correct and thus must control the outcome in *Seminole Tribe*.[95] The *Seminole* Court delivered a resounding "no" to this question.[96] In rejecting *Union Gas* and the Seminole Tribe's suit, the Court stated, in language that is particularly relevant to our consideration of *Katz*, the following:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.[97]

Implicit in this statement is the Court's assumption that *no* Article I power—be it commerce, copyright, bankruptcy, or any other source of legislative authority—is sufficient to abrogate state sovereign immunity.

This dictate was peripherally addressed by the Court more recently in *Tennessee Student Assistance Corporation v. Hood*,[98] before it became the focus of the Court's decision in *Katz*. Thus, before providing a detailed examination of the Court's decision in *Katz*, it is necessary to consider *Hood*. In *Hood*, the Court held that a bankruptcy debtor's initiation of an adversary proceeding against a state in federal court for the purposes of securing a hardship determination, as required by the Bankruptcy Act,[99] was not barred by the Eleventh Amendment.[100] Although the result was somewhat surprising given that *Seminole Tribe* appeared to close the door to all attempts at congressional abrogation of state sovereign immunity through legislation issued pursuant to its Article I powers, the Court carved out a narrow exception for hardship determinations in bankruptcy cases.[101]

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[95] *Id.* at 44.

[96] *See id.* at 72–73 (upholding state sovereign immunity and overruling *Union Gas*).

[97] *Id.* at 72–73.

[98] 541 U.S. 440 (2004).

[99] *See* 11 U.S.C. § 106(a) (2006) (regulating waivers of sovereign immunity); § 523(a)(8) (providing exceptions to discharge).

[100] *See* 541 U.S. at 445 (holding "that a bankruptcy court's discharge of a student loan debt does not implicate a State's Eleventh Amendment immunity . . .").

[101] *See id.* at 451 (holding undue hardship determination does not implicate Eleventh Amendment or abrogate State sovereign immunity). As discussed, *infra*, the *Hood* Court expressly foreclosed the procedure at issue in *Katz*, suggesting that it would be an express violation of the Eleventh Amendment. *Id.* at 453–55 (drawing distinction between *in rem* and *in personam* jurisdiction and finding former did not violate

Petitioner, Tennessee Student Assistance Corporation [TSAC] was a state agency in charge of administering student loan programs.[102] Respondent, Hood, took out student loans that were guaranteed by TSAC, but subsequently filed for bankruptcy in federal bankruptcy court.[103] Pursuant to the procedure mandated by the Bankruptcy Act, student loans guaranteed by state and federal agencies are not included in a general debt discharge order unless the bankrupt seeks an undue hardship determination from the guarantor.[104] Hood therefore filed a complaint against TSAC, seeking a hardship determination that would serve to discharge her student loan.[105]

The *Hood* Court reasoned that the intricate procedure required by the Bankruptcy Act for the purpose of determining whether a student loan guarantee was dischargeable was not a suit against the state for purposes of the Eleventh Amendment.[106] The Court based this conclusion on its belief that the bankruptcy court's jurisdiction is *in rem*—premised on that court's control of the entire estate of the bankrupt (the *res*)—and thus an adversary proceeding for the purposes of making a hardship determination is not a suit against an unconsenting state for Eleventh Amendment purposes. It is, rather, merely the assertion of jurisdiction over the *res* – the estate of the bankrupt.[107]

Although the *Hood* Court's reasoning is subject to question,[108] it is important to note that the Court was careful to craft its decision as a narrow holding, explicitly confined to the particular procedure at issue.[109] Indeed, the *Hood* Court explicitly differentiated the procedure at issue from that considered subsequently by the *Katz* Court.[110] This is therefore an appropriate point at which to explore the holding and

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Eleventh Amendment). The *Katz* Court nevertheless rather craftily exploited the narrow opening left by the Court in *Hood* to grab a toehold from which it would issue its expansive and rather breathtaking ruling. Cent. Va. Cmty. Coll. v. Katz, 126 S.Ct. 990, 1002 (2006) (relying on ancillary jurisdiction to *in rem* proceedings for bankruptcy courts in holding state sovereign immunity was not abrogated).

[102] *See Hood*, 541 U.S. at 443.

[103] *See id.* at 444 (stating respondent, between July 1988 and February 1990, signed promissory notes for her loans, and her balance when she filed for bankruptcy was $4,169.31).

[104] *See id*. (referring to 11 U.S.C. § 528 (a)(8), and noting student loans guaranteed by government are not included in general discharge, unless bankruptcy court determines it would impose "undue hardship" on debtor).

[105] *See id.* at 444–45 (indicating Hood reopened her bankruptcy petition for "limited purpose of seeking a determination by the bankruptcy court that her student loans were dischargeable").

[106] *See id.* at 451 (concluding undue hardship determination sought by Hood not a suit against a State under Eleventh Amendment).

[107] *See id.* at 450 ("[B]ankrupty court's jurisdiction is premised on the res, not on the [person] . . . ."). It should be noted that one commentator is critical of the Court's determination that the proceeding at issue is *in rem* and thus does not violate the Eleventh Amendment. Brubaker, *supra* note 5, at 96 ("[T]he *Hood* Court rested its decision upon the awkward and erroneous supposition that discharge and dischargeability proceedings are an exercise of *in rem* jurisdiction.").

[108] *See supra* notes 91–92 and accompanying text (discussing Court's decision in *Fitzpatrick* and noting Fourteenth Amendment supersedes Eleventh to extent they conflict).

[109] *See Hood*, 541 U.S. at 451 (confining holding to facts of case).

[110] *Id.* at 454 ("Clearly dismissal of the complaint is not appropriate as the court has *in rem* jurisdiction over the matter, and the court here has not attempted to adjudicate any claims outside of that jurisdiction. The case before us is thus unlike an adversary proceeding by the bankruptcy trustee seeking to recover

reasoning of *Katz*, to understand the manner in which it went beyond the Court's prior holding in *Hood*.

II. *CENTRAL VIRGINIA COMMUNITY COLLEGE V. KATZ*: DECISION, CONSEQUENCES AND CRITIQUE

A. The Framework of the Katz *Decision*

The Bankruptcy Act provides in part that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . . The court may issue against a governmental unit an order, process, or judgment . . . including an order or judgment awarding a money recovery, but not including an award of punitive damages."[111] The term "governmental unit" is defined to include a "State," a "municipality," and a "department, agency or instrumentality of . . . a State."[112] The Supreme Court granted certiorari in *Katz* purportedly to answer the question it had chosen to evade in its 2004 decision in *Hood*,[113] namely whether Congress's decision to abrogate state sovereign immunity in the Bankruptcy Act was constitutional.[114] This time, the Court chose to reach the question, even though it had seemingly been foreclosed by the Court's decision in *Seminole Tribe*.[115]

Petitioners, Central Virginia Community College and its fellow colleges, were publicly funded Virginia institutions[116] of the sort generally entitled to state sovereign immunity under the Court's "arms-of-the-state" doctrine.[117] Respondent Katz was the court-appointed trustee of the bankrupt estate of Wallace's Bookstores, a Kentucky entity which had conducted business with Central Virginia Community College and other state institutions before filing for relief under the Bankruptcy Act.[118] After his appointment as trustee, Katz initiated proceedings in a Bankruptcy Court in the Eastern District of Kentucky,[119] pursuant to the Bankruptcy Act, to

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property in the hands of the State on the grounds that the transfer was a voidable preference. Even if we were to hold that Congress lacked the ability to abrogate state sovereign immunity under the Bankruptcy Clause, as TSAC urges us to do, the [b]ankruptcy [c]ourt would still have the authority to make the undue hardship determination sought by Hood.").

[111] 11 U.S.C. § 106(a)(3) (2006).

[112] 11 U.S.C. § 101(27) (2006) (defining "governmental unit").

[113] 541 U.S. 440 (2004).

[114] *See* Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 994 (2006) (noting Court granted certiorari to determine whether Article 1, section 8, clause 4 of Constitution "gives Congress the authority to abrogate States' immunity from private suits").

[115] *See* 517 U.S. 44, 45, 72–73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

[116] *See Katz*, 126 S. Ct. at 994 (describing identity of Petitioner as institutions of higher education).

[117] *See id.* (quoting Alden v. Maine, 527 U.S. 706, 756 (1999)) (indicating petitioners were Virginia institutions of higher education, and were "arm[s] of the State entitled to sovereign immunity").

[118] *See id*.

[119] *Id.* (stating respondent brought action in bankruptcy court "pursuant to §§ 547(b) and 550(a)").

recover allegedly preferential transfers[120] made by Wallace's Bookstores to Central Virginia Community College and other state institutions in violation of the established procedures provided for under the Bankruptcy Act.[121] Petitioners moved to dismiss Katz's claim on sovereign immunity grounds, but the relief they sought was denied by the bankruptcy court.[122] This denial was then affirmed by both the district court[123] and the Court of Appeals for the Sixth Circuit.[124]

Although the Court, as related above, purportedly granted certiorari to consider whether Congress's attempt to abrogate sovereign immunity in the Bankruptcy Act was acceptable, thereby rendering Katz's preference avoidance proceeding allowable, it once again failed to answer its own question. This time, the failure stemmed not from timidity, but from a perceived mootness that was the result of a masterful judicial slight-of-hand. For by the time Justice Stevens announced the Court's surprising opinion, the threshold question was no longer whether Congress had the ability to abrogate sovereign immunity when legislating pursuant to the Bankruptcy Clause, but rather whether the States had waived their sovereign immunity, to the extent necessitated by the Bankruptcy Clause, when they ratified the Constitution. Indeed, the Court found that for purposes of the decision "the relevant 'abrogation' [to consider] is the one effected in the plan of the Convention, not by statute."[125]

In its consideration of the refashioned threshold question, the Court relied upon the history of the Bankruptcy Clause, the legislation enacted in its wake, and the nature of the bankruptcy power, in order to conclude that the Bankruptcy Clause "was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."[126] The reason for pursuing this line of reasoning is clear. It should be recalled that the *Seminole Tribe* Court, in rejecting both the plan-of-the-Convention and congressional abrogation theories, had made clear its belief that neither the Interstate Commerce Clause nor the Indian Commerce Clause conferred upon Congress the ability to abrogate state sovereign immunity when legislating pursuant to those Article I powers.[127] Implicit within its holding was that no Article I power

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[120] *Id.* A preferential transfer is defined as "any transfer of an interest of the debtor in property . . . (5) that enables such creditor to receive more than such creditor would receive" during the normal course of chapter 11 proceedings. 11 U.S.C. § 547(b) (2006).

[121] *See Katz*, 126 S. Ct. at 994.

[122] *See id*. at 995 (reiterating bankruptcy court denied petitioner's motion because proceeding was barred by sovereign immunity).

[123] *See id.* at 992.

[124] *See id.*

[125] *See id.* (reasoning Court did not need to determine if Congress could abrogate immunity because Convention already abrogated state immunity).

[126] *Id.* at 996 (declaring historical analysis of Bankruptcy Clause demonstrates intention to limit states' powers in bankruptcy field).

[127] *See* 517 U.S. 44, 63 (1996) (explaining Indian Commerce Clause and Interstate Commerce Clause are indistinguishable, and therefore neither grant Congress power to abrogate state immunity).

was capable of achieving what the Commerce Clauses could not.[128] Thus, unless the *Katz* Court could somehow distinguish the Bankruptcy Clause from the other Article I grants of congressional authority, the decision would be controlled by *Seminole Tribe* and the suit precluded by the Eleventh Amendment. The Court believed that such a distinction could be justified—a dubious conclusion, to say the least.

B. The History of the Bankruptcy Clause

The majority's historical examination of "the backdrop against which the Bankruptcy Clause was adopted,"[129] reveals that the various American colonies, and subsequently the several states, each employed radically different mechanisms in the discharge of debtors and their debts.[130]

> [T]his patchwork of insolvency and bankruptcy laws were [sic] peculiar to the American experience. In England, where there was only one sovereign, a single discharge could protect the debtor from his jailer and his creditors . . . . [H]owever, the uncoordinated actions of multiple sovereigns, each laying claim to the debtor's body and effects according to different rules, rendered impossible so neat a solution on this side of the Atlantic.[131]

According to the majority, the problems posed by these disparate schemes were many and debilitating.[132] Not the least of them was the manifest unfairness to the debtor himself who might be discharged of his debt and from his prison in one state only to be seized and imprisoned by the bankruptcy wardens of another state.[133]

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[128] *See id.* at 62 (contending if abrogation power exists under Article I Commerce Clause power, all sections of Article I also grant abrogation of state sovereign immunity).

[129] *Katz*, 126 S. Ct. at 999.

[130] *See id.* at 997–98, 998 n.6 (noting lack of consistent debt laws among states) (citing PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900 (The State Historical Society of Wisconsin 1974) (1974)). The majority relies for support on Coleman's statement that

> At the time of the Revolution, only three of the thirteen colonies . . . had laws discharging insolvents of their debts. No two of these relief systems were alike in anything but spirit. In four of the other ten colonies, insolvency legislation was either never enacted or, if enacted, never went into effect, and in the remaining six colonies, full relief was available only for scattered, brief periods, usually on an *ad hoc* basis to named insolvents.

COLEMAN, *supra*, at 14.

[131] *Katz*, 126 S. Ct. at 998.

[132] *Id.* at 996–98 (enumerating problems with Colonial American bankruptcy laws such as debtors being imprisoned in one state after being discharged in another, unfair treatment of debtors compared to other prisoners, and different treatment of debtors in each state).

[133] *See id.* at 996 (discussing problems regarding imprisoned debtors).

This American problem required an American solution.[134] The founders responded to this apparently debilitating lack of uniformity with a command to the Committee of Detail both "to encompass legislative Acts, and insolvency laws in particular, within the coverage of the Full Faith and Credit Clause of the Constitution [and to] 'establish uniform laws upon the subject of bankruptcies . . . .'"[135] Almost immediately, the Committee of Detail called for "adding the power '[t]o establish uniform laws upon the subject of bankruptcies' to the Naturalization Clause of what later became Article I"[136] of the Constitution. Two days later, after minimal debate, the Constitutional Convention adopted the Committee of Detail's recommendation.[137]

According to the majority, this relatively swift course of events and "[t]he absence of extensive debate over the text of the Bankruptcy Clause or its insertion indicates that there was general agreement on the importance of authorizing a uniform federal response to the problems presented [by differing insolvency laws]."[138] The recognition of this importance, according to the majority, confirms that the founders intended to subordinate state sovereign immunity to the exigencies of the Bankruptcy Clause.[139] According to Judge Haines, on whose writing the *Katz* majority placed great reliance, this is evidence that "in adopting [the Bankruptcy Clause], the Framers were probably more concerned to achieve the uniformity that they regarded as essential to the nation's trade and commerce, than they were solicitous of the various niceties of states' sovereign immunity."[140]

The Court's historical analysis appears convincing, until one realizes that the problems facing the nation leading to the adoption of the Commerce Clause were of a far more dire nature than the problems intended to be addressed by the Bankruptcy Clause. Professors Nelson and Pushaw, for example, have persuasively explained that the Commerce Clause was adopted to "resolve a severe economic crisis" prompted by the nation's lack of a national commerce policy under the Articles of Confederation that encouraged states to engage in economic warfare as

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[134] It should be noted, as discussed *infra* text accompanying notes 141–44, that there is significant reason to doubt that the problems presented to the nation by the disparate bankruptcy schemes were any more severe than the problems presented by the lack of central control over the nation's economy pre-ratification.

[135] 126 S. Ct. at 999 (citing Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 216–17, 219 (1957)).

[136] *Id.*

[137] *See id.* (noting adoption of Committee's recommendation).

[138] *Id.* at 999–1000.

[139] *See id.* at 1000 n.9 ("[T]he Bankruptcy Clause's unique history, combined with the singular nature of bankruptcy courts' jurisdiction . . . 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."). There is reason to question the Court's contention that this course of events signaled the Founders' intention to subordinate state sovereign immunity. More likely is that they merely intended to subordinate the States' sovereignty to legislate to the national need. Perhaps more important to recognize, the Eleventh Amendment amends the Constitution and thus, if by the Amendment's terms, the action at issue in *Katz* is forbidden, the history of the Bankruptcy Clause, and the legislation adopted in its wake, is entirely irrelevant. This issue is discussed at length, *infra*.

[140] Hon. Randolph J. Haines, *The Uniformity Power: Why Bankruptcy is Different*, 77 AM. BANKR. L.J. 129, 157 (2003).

they competed for economic advantage with each other on both a domestic and international playing field.[141] Indeed, according to Nelson and Pushaw, the problems created by a decentralized economy were so acute that "America faced economic and political disintegration," unless a national regime was adopted.[142] This is not to suggest that the problems provoked by bankruptcy, and described by the majority, were not serious. It is, rather, merely to make clear that they were no worse, and indeed may have been far less severe, than the problems leading to the adoption of the Commerce Clause.

Even if the problems that beset the young nation by virtue of its disparate bankruptcy regimes were as substantial as the majority suggests, a solution was provided by Article IV's Full Faith and Credit Clause.[143] Sovereign immunity from suit therefore need not even have entered into the calculation. As Justice Thomas explained,

> the Framers "plainly intended to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders." But redress of that "rampant injustice" turned entirely on binding state courts to respect the discharge orders of their sister States under the Full Faith and Credit Clause, not on the authorization of private suits against the States.[144]

In the final calculus then, the majority failed to supply any valid reason for distinguishing the Bankruptcy Clause from any other Article I clause on the grounds of the history of its adoption and the exigencies responsible for its adoption. We must therefore look to other grounds in search of a principled distinction between the Bankruptcy Clause and the other Article I clauses.

C. Post-Ratification Legislation

The *Katz* Court also found to be significant the legislation considered and adopted soon after the Constitution's ratification.[145] Congress was presented with legislation establishing uniform federal laws of bankruptcy pursuant to the Bankruptcy Clause during the first and each subsequent Congress until the

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[141] Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 21–23 (1999) (discussing various severe problems created by absence of national regulation over commerce).

[142] *Id.* at 24; *see also* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 443–44 (1941) (noting overwhelming support for federal power to regulate commerce). *See generally* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935).

[143] U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.").

[144] *See Katz*, 126 S. Ct. at 1012 (Thomas, J., dissenting) (citations omitted).

[145] *See id.* at 1002.

Bankruptcy Act was passed in 1800.[146] This, according to the majority, came at a time in "which only the most necessary subjects of legislation were considered, [and] bankruptcy was one of those subjects . . . ."[147]

More significant to the Court than the willingness of the very earliest Congresses to consider the Bankruptcy Act was the Bankruptcy Act as adopted. Although modeled on then-extant English bankruptcy statutes, the American legislation was framed somewhat differently in response to the United States' distinctive system of multiple sovereigns as well as the concerns reflected by the Bankruptcy Clause itself.[148] Specifically, unlike the English bankruptcy statutes, the Bankruptcy Act of 1800 granted the federal courts the authority to issue writs of habeas corpus to compel the release of debtors from state prisons.[149]

The majority found this grant of habeas power "remarkable,"[150] because "the provision of the 1800 Act granting that power was considered and adopted during a period when state sovereign immunity could hardly have been more prominent among the Nation's concerns."[151] Indeed, according to the Court, *Chisholm v. Georgia*,[152] the case that "shock[ed]" the country, for its apparently startling disregard of state sovereign immunity, was followed by five years of contentious debate ending in the passage of the Eleventh Amendment.[153] Yet during the same period, there did not appear to be any objection, on sovereign immunity grounds, to the bankruptcy legislation and its grant of habeas power to the federal courts.[154]

The Court reasoned that while one may object that since the writ of habeas corpus was an injunction against a state official rather than against the state, and would therefore today not be considered an infringement on state sovereignty, the framers could not have viewed it as such.[155] Indeed, it was not until more than one hundred years after the framing and adoption of the first bankruptcy statute that the doctrine of *Ex parte Young* was announced by the Court.[156] According to the majority, then, the Bankruptcy Act, the font of congressional power to authorize

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[146] *See id.*

[147] *Id.* (quoting CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 10 (1935)).

[148] *See id.* (comparing and contrasting similarities and differences between Bankruptcy Act of 1800, and then-existing English bankruptcy law).

[149] *See id.* at 1002 (contrasting this power with English statute, which authorized "a judge sitting on a court where the debtor had obtained his discharge the power to order a sheriff . . . to release the [debtor from custody] if he were arrested subsequent to the discharge.").

[150] *Id.* at 1003.

[151] *Id.*

[152] 2 U.S. (2 Dall.) 419 (1793).

[153] *See Katz*, 126 S. Ct. at 1003 (discussing consequences of *Chisholm*).

[154] *See id.*

[155] *Id.* at 1005 n.14.

[156] *See id.* (remarking Supreme Court has recently "characterized the doctrine as an expedient 'fiction' necessary to ensure the supremacy of federal law").

this subjugation of states to suit in federal court, does not violate the Eleventh Amendment.[157] In sum, the Court found that

> [t]he history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena.[158]

Although the dissent challenged the majority's recounting of the post-ratification history,[159] there is no need to determine whose version of history is correct. Post-ratification history is inherently suspect as a basis on which to infer constitutional meaning or intent, because post-ratification congressional actions are invariably likely to be strategic and self-serving.[160] Moreover, to the extent the legislative history occurred prior to adoption of the Eleventh Amendment, it is largely irrelevant, at least as to sovereign immunity against suits brought by out-of-staters, the form of immunity expressly guaranteed by the amendment's text.

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[157] *See id.* at 1003 (concluding Bankruptcy Clause "did not contravene the norms this Court has understood the Eleventh Amendment to exemplify"). In support of this proposition, the Court looks to its earlier decision in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). *Katz*, 126 S. Ct. at 1003.

[158] *Katz*, 126 S. Ct. at 996.

[159] According to the dissent:

> The majority correctly notes that the practice of the early Congresses can provide valuable insight into the Framers' understanding of the Constitution. But early practice undermines, rather than supports, the majority's theory. For over a century after the Constitution, . . . the Bankruptcy Clause [authority] remained largely unexercised by Congress . . . . Thus, states were free to act in bankruptcy matters for all but 16 of the first 109 years after the Constitution was ratified. And when Congress did act, it did so only in response to a major financial disaster, and it repealed the legislation in each instance shortly thereafter. It was not until 1898, well over a century after the adoption of the Bankruptcy Clause, that Congress adopted the first permanent national bankruptcy law . . . . By contrast, the very first Congress enacted [legislation pursuant to the Patent and Copyright Clause.] . . . The historical record thus refutes, rather than supports, the majority's premise that the Framers placed paramount importance on the enactment of a nationally uniform bankruptcy law. In reality, for most of the first century of our Nation's history, the country survived without such a law, relying instead on the laws of the several States.

Id. at 1009–10 n.3 (Thomas, J., dissenting) (internal quotation marks and citations omitted).

[160] *See* Anthony J. Enright, Note, *The Originalist's Dilemma: Katz and the New Approach to the State Sovereign Immunity Defense*, 81 NOTRE DAME L. REV. 1553, 1574 (2006) (providing examples of post-ratification acts by early sessions of Congress which were found unconstitutional).

D. The Text of the Bankruptcy Clause

Beyond the history of both the Bankruptcy Clause and the Bankruptcy Act, the majority found that aspects of the nature of the bankruptcy power further distinguished it from the other Article I powers.[161] Unlike the text of the Commerce Clause, the Bankruptcy Clause explicitly grants Congress the power to enact "uniform" laws on the subject of bankruptcy, a term that the majority construed to expand Congress's legislative power over the field of bankruptcy.[162]

Reliance on the uniformity language contained in the Bankruptcy Clause enabled the Court to differentiate the Bankruptcy Clause from the other Article I powers.[163] The uniformity language is used for only two of Congress's Article I powers, the Naturalization and Bankruptcy Clauses.[164] "Although our analysis does not rest on the peculiar text of the Bankruptcy Clause as compared to other Clauses of Article I," Justice Stevens wrote, "we observe that . . . the mandate to enact 'uniform' laws supports the historical evidence showing that the States agreed not to assert their sovereign immunity in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'"[165] To support its contention, the majority relied on the Court's earlier opinions, *The Federalist* Nos. 32 and 81 and the writings of Judge Haines, each of which offers evidence and argument supporting its theory.[166]

Chief Justice Marshall addressed the issue in *Sturges v. Crowninshield*: "[t]he peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States."[167] Perhaps the most extensive exegesis on the subject, however, is contained within *The Federalist* Nos. 32 and 81. As Judge Haines, upon whom the Court heavily relied, points out, the Sixth Circuit considered *The Federalist* Nos. 32 and 81, extensively, and its analysis is worthy of consideration:[168]

> *The Federalist* suggests that the states shed their immunity from suit along with their power to legislate together when the states agreed to the Bankruptcy Clause's uniformity provision. Two passages are relevant. In *The Federalist No. 81*, Hamilton discussed sovereign immunity as follows.

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[161] *See* 126 S. Ct. at 1000 (analyzing text of Article I pertaining to bankruptcy).

[162] *See id.* (interpreting Congressional power to make laws regarding bankruptcy to be extensive, "more than simple adjudications of rights in the res").

[163] *See id.* at 1004 n. 13 (analyzing word "uniform" in Bankruptcy Clause).

[164] U.S. CONST. art. I, § 8, cl. 4 (vesting Congress with power "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States").

[165] 126 S. Ct. at 1004 n.13.

[166] *See id.* (relying on these sources to determine meaning of "uniform" as used in Bankruptcy Clause).

[167] *Id.* (quoting Sturges v. Crowninshield (4 Wheat.) 122, 193–94 (1819)) (emphasis deleted).

[168] *See* Haines, *supra* note 140, at 134 (quoting *Hood* court's reasoning, and its reliance on THE FEDERALIST NOS. 32 and 81). Hood I is the case, of course, considered by the Supreme Court in *Tennessee Student Association v. Hood*, ("Hood II") discussed *supra.*

> "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent* . . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states . . . . The circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here . . . ."
>
> The article on taxation, to which Hamilton refers . . . is *The Federalist No. 32*.
>
> "[A]s the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant* . . . ."
>
> Hamilton specifically offered naturalization as an example of this third alienation of sovereignty . . . the same reasoning applies to bankruptcy. The question is whether Hamilton's identification of the uniform powers as examples of categories in which states have ceded sovereignty includes the ceding of immunity from suit. We conclude that [it does].[169]

This analysis, as Judge Haines notes, has been the subject of significant criticism.[170] "Virtually all of this unfavorable comment ultimately turns," he writes, "on an assumption that the constitutional grant of power to adopt 'uniform' laws cannot have the significance Hamilton attributed to it and, in fact, is essentially irrelevant to sovereign immunity."[171] Specifically, the critics of this analysis argued that Hamilton in *The Federalist* Nos. 81 and 32 did not suggest that the "uniformity

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[169] Haines, *supra* note 140, 134–35 (citations omitted).

[170] *See id.* at 130 (offering examples of commentaries criticizing *Hood*'s interpretation of abrogation of sovereign immunity).

[171] *Id.*

power signaled an abrogation of sovereign immunity, but only an abrogation of states' sovereign powers to legislate in the area once Congress acted."[172]

The Court anticipates this line of criticism, but addresses it only circularly, noting that the petitioners' argument "that the word 'uniform' in the Bankruptcy Clause cannot be interpreted to confer upon Congress any greater authority to impinge upon state sovereign immunity than is conferred, for example, by the Commerce Clause . . . is not persuasive."[173] To rebut this argument, the majority supports its contention merely by referencing Chief Justice Marshall and *The Federalist* Nos. 32 and 81—the very authorities the critics attack.[174] This circular reasoning is striking, not least because the *Union Gas* opinion, later overruled by *Seminole Tribe*, had relied upon the very same *Federalist* papers to argue that if Congress had the power to legislate, it also had the power to abrogate state immunity.[175]

If, as we assert, the Bankruptcy Clause's inclusion of the word, "uniform" adds nothing to the scope of congressional power, one might reasonably wonder why the word was included in the first place. Purely as a linguistic matter, at least, its only conceivable impact is to *restrict*, rather than *expand*, congressional power. The word's inclusion confines congressional authority to the enactment of "uniform" laws.[176] In contrast, using its commerce power Congress could impose regulations regionally because its authority is not restricted to enactment of uniform laws.

Anticipating this line of criticism, the Court, again relying on Judge Haines' writing, suggests that the uniformity language is in reality an expansion, rather than a limitation of its power. "That Congress is constrained to enact laws that are uniform in application, whether geographically or otherwise, does not imply that it lacks power to enact bankruptcy legislation that is uniform in a more robust sense."[177]

Because the Court explicitly relied on Judges Haines' article for support, it is worth briefly considering his discussion of this issue. Judge Haines asserts that "[t]he text implies a power, not a restriction."[178] To support this contention, Judge Haines compares the construction of the Bankruptcy Clause to the construction of the Tax Clause, which according to the author was explicitly restricted by its requirement of uniformity.[179] The Tax Clause provides in relevant part: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United

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[172] *Id.* at 136 (emphasis omitted) (outlining one of three substantive criticisms of *Hood's* analysis); s*ee also* discussion of *Seminole Tribe*, *supra.*

[173] Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1004 n.13 (2006) (internal citations omitted) (rejecting petitioner's argument).

[174] *See id.* (referring to Court's prior decision in *Sturges*, and quoting THE FEDERALIST NOS. 32 and 81).

[175] *See generally* Pennsylvania v. Union Gas, 491 U.S. 1 (1989).

[176] *See* U.S. CONST. art. I, § 8, cl. 4 ("To establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States . . . .") (emphasis added).

[177] *Katz*, 126 S. Ct. at 1004 n.13 (internal citations omitted) (emphasis omitted).

[178] Haines, *supra* note 140, at 166 (arguing for expansive interpretation of "uniform").

[179] *See id.* (comparing restrictive construction of Tax Clause to Bankruptcy Clause).

States."[180] According to Haines, "[i]f the Framers had intended the uniformity provision of the Bankruptcy Clause to limit Congress' power, they presumably would have employed a similar structure . . . ."[181] The idea is that in the Tax Clause, the Framers granted power to Congress with an express limitation built in—any legislation issued pursuant to the Clause must be uniform. In contrast, in the Bankruptcy Clause, the Framers granted power to Congress with an express empowerment built in: the Congress is granted the power to legislate laws with a uniform sweep, though they are not prevented from legislating laws that have a lesser sweep—for instance merely issuing geographically uniform legislation. Thus, for the Tax Clause, Congress's hands are tied: any legislation the Congress issues must be uniform. But the Bankruptcy Clause gives Congress a free hand to issue uniform legislation or non-uniform legislation as it chooses.

Judge Haines found additional support for his contention that the uniform language within the Bankruptcy Clause empowers rather than restricts Congress in the structure of the Constitution:

> The structure of Article I also implies the uniformity provision in the Bankruptcy Clause was intended as the grant of a power, rather than a limitation. It appears in Section 8, entitled "Powers of Congress." It does not appear in Section 9, entitled "Prohibited Powers."[182]

Having suggested that the uniformity language contained within the Bankruptcy Clause grants, rather than limits, power, Judge Haines considered why it might have been important to grant Congress a more extensive power over the topic of bankruptcies than it was granted by the other Article I powers.[183] He acknowledged that

> Congress did not need any special constitutional language authorizing it to enact uniform bankruptcy laws if all that was intended by the Framers was that it be given the power to supersede any contrary state laws, or even to preclude states from legislating on the subject at all. A simple bankruptcy power, identical to any other Article I power, or even one similar to the Commerce Clause power placed in the immediately preceding clause, would have been sufficient to permit Congress to adopt uniform bankruptcy laws. By express statutory language, such laws could supersede

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[180] U.S. CONST. art. I, § 8, cl. 1.
[181] Haines, *supra* note 140, at 166.
[182] *See id.* at 167.
[183] *Id.* at 173 ("Congress almost promptly exercised its newly granted bankruptcy powers and did so with an entirely unique provision that directly impinged on state sovereign immunity—authorization for a federal writ of habeas corpus directed to state officials.").

> state laws, or even prohibit states from enacting such laws. The Supremacy Clause would ensure national uniformity.[184]

Thus, Judge Haines infers that the Framers must have intended something altogether different. "The intent must have been precisely to authorize something that Congress could not accomplish with an ordinary Article I power, such as the Commerce Clause power, when coupled with the Supremacy Clause. Abrogation of state sovereign immunity is the only possible reason for this drafting approach . . . ."[185]

Judge Haines' reasoning, like the *Katz* opinion which relied on it, is misguided. To attempt to link the Bankruptcy Clause's use of the word, "uniform" with the Constitution's selective revocation of state sovereign immunity amounts to a textual non-sequitur. As a textual matter, the uniformity language of the Bankruptcy Clause simply has no bearing on the consideration of state sovereign immunity.

Haines argues that while *Federalist* No. 32's discussion of sovereignty is concededly confined to the exercise of substantive legislative power, Hamilton's cross-reference to it in *Federalist* No. 81's explicit discussion of sovereign immunity incorporates that earlier discussion by reference.[186] This claim is correct in a concrete sense; Hamilton did, in fact, make such a cross-reference.[187] But this fact cannot alter the inescapable "apples-oranges" nature of the equation. In *Federalist* No. 32, Hamilton's analysis is completely confined to issues of legislative jurisdiction, and that analysis does not transfer smoothly to the question of sovereign immunity.[188] The competing balancing of interests is by no means necessarily identical, and to summarily equate the two is to ignore the political subtleties inherent in the structure of federalism. Whether or not Congress's legislative authority is exclusive—the sole issue considered by Hamilton in *Federalist* No. 32[189]—is irrelevant to questions about the extent of legislative power granted to Congress when it chooses to exercise that power. That the states might or might not legislate in the absence of congressional action, then, is irrelevant to the balance of constitutional federalism when Congress *does* act. Hamilton's summary cross-reference in *Federalist* No. 81 back to *Federalist* No. 32, then, must be deemed a deceptively facile attempt to placate state fears.[190] Thus, when Hamilton wrote in *Federalist* No. 32 that the use of the word, "uniform" in Article

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[184] *Id.*

[185] *Id.* at 174.

[186] *See* Haines, *supra* note 140, at 142 (dismissing argument that Hamilton's cross-reference was not designed to incorporate earlier discussion of sovereign immunity).

[187] *See* Hamilton, THE FEDERALIST NO. 81, *supra* note 6, at 422 ("The circumstances which are necessary to produce an alienation of state sovereignty, were *discussed in considering the article on taxation*, and need not be repeated here.") (emphasis added).

[188] THE FEDERALIST NO. 32, at 156 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (theorizing Tax Clause does not prevent states from passing their own tax legislation).

[189] *See id.* (arguing for non-restrictive interpretation of Tax Clause).

[190] *See* Hamilton, THE FEDERALIST NO. 81, *supra* note 6, at 421 (discussing whether it would be better for state to create new courts).

I's naturalization power automatically precludes state legislative jurisdiction,[191] it makes little sense to assume that as a result states lose their immunity to suit in only that area. A state's power to legislate substantively and a state's immunity from suit are very different issues.

In any event, regardless of Hamilton's thoughts, all that was included in the Constitution's text and subsequently ratified was the cryptic and selective use of the word, "uniform." Given the states' apparent assumption, at the time of the Convention, of a widespread inertia in favor of state immunity from suit, it is all but inconceivable as a political matter that overcoming that inertia could have been achieved by so circuitous and cryptic a route as the selective use of the word, "uniform." Either ratification of the far-reaching congressional legislative powers in Article I is to be deemed to overcome that political inertia, or it is not. From a political, as well as a textual perspective, it is preposterous to believe that so small a tail as the selective use of the word "uniform" could wag so large a dog as state sovereign immunity.

Judge Haines effectively concedes the tenuous nature of his reliance on Article I's selective use of the word "uniform" as a basis for abrogating immunity when he writes: "Abrogation of state sovereign immunity is the only possible reason for this drafting approach . . . ."[192] He thus appears to admit that it is only through the process of reasoning by default that one can construe the word "uniform" to have so dramatic—and selective—an impact on state sovereign immunity. A textual process of elimination hardly provides a basis for so politically significant and dramatic a change. If the very grant of power to Congress in Article I is not deemed to constitute a waiver of state sovereign immunity to the extent of that power, then it is hard to imagine that the cryptic and selective presence of the word "uniform" could be deemed to magically revoke that immunity.

Moreover, if, as both the Court and Judge Haines suggest, the Bankruptcy Clause was intended to confer upon Congress the ability to alleviate "the intractable problems, not to mention the injustice, created by one State's imprisoning of debtors who had been discharged (from prison and of their debts) in and by another State,"[193] no special revocation of state sovereign immunity was required in the text of the power-granting provision itself. Instead, Congress need merely establish, pursuant to its power under the Bankruptcy and Necessary and Proper Clauses, a uniform bankruptcy regime, detailing the procedure for distribution of the bankrupt's estate. This act, made the supreme law of the land by the dictates of Article VI[194] and functioning in conjunction with the Full Faith and Credit

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[191] *See* Hamilton, THE FEDERALIST NO. 32, *supra* note 188, at 198 (stating "uniform" must necessarily mean "exclusive").

[192] Haines, *supra* note 140, at 174.

[193] Cent. Va. Cmty Coll. v. Katz, 126 S. Ct. 990, 996 (2006).

[194] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

Clause,[195] would restore the health of creditors and debtors alike, prevent economy-wide ruin, and cure the injustice that was previously foisted upon the insolvent.

In the end, therefore, we must assume that the "uniform" power conferred upon Congress by the Bankruptcy Clause is no different from the inherent powers to impose uniform laws conferred by such provisions as the Commerce or Patent Clauses. To the extent the word "uniform" adds anything at all to the bankruptcy power, it must be a restriction, rather than expansion of congressional authority.[196] Thus, reliance upon the Bankruptcy Clause's uniformity language fails to provide any basis for a principled distinction between the clauses.[197]

E. The In Rem *Nature of Bankruptcy Proceedings*

The *Katz* Court also found distinguishing significance in the fundamental nature of the jurisdiction exercised in bankruptcy proceedings.[198] According to the majority, bankruptcy proceedings present less of a threat to state sovereign immunity than does legislation authorized by other Article I powers, because "[b]ankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction . . . . As such, its exercise does not, in the usual case, interfere with state sovereignty even when States' interests are affected."[199] Moreover, because the Bankruptcy Clause confers upon Congress the power to

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[195] *See* U.S. CONST. art. IV, § 1 (providing Full Faith and Credit Clause).

[196] Judge Haines' reliance on the fact that the use of "uniform" in the Bankruptcy Clause is expressly framed as a positive power, rather than a negative restriction is unpersuasive. Even when federal power is framed positively, the grant of authority is limited to what is granted. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803) (stating though extension of Supreme Court's original jurisdiction in Article III, section 2 is framed in positive terms, it does not prevent provision from operating as negative as to all cases not included in list of cases to which original jurisdiction is extended). The Bankruptcy Clause, it is true, affirmatively grants power to Congress but that authority is confined by its terms to the creation of *uniform* laws. That the uniformity limitation in the Tax Clause is imposed in a negative format cannot alter what is unambiguous on the face of the Bankruptcy Clause.

To point out, as Judge Haines does, that the word, "uniform" "appears in Section 8, entitled 'Powers of Congress' . . . [rather than] in Section 9, entitled 'Prohibited Powers,'" is to beg the question. Haines, *supra* note 140, at 167. For the fact remains that Congress possesses only those powers given to it, and if one of those powers is expressly confined to the establishment of *uniform* bankruptcy laws, then that word acts to confine the reach of congressional power. That the limited reach of a power granted to Congress in Article I, section 8 can simultaneously operate as a restraint is clearly demonstrated in modern Commerce Clause jurisprudence, when congressional efforts to exercise that power have been struck down when the legislation is not confined in its application to interstate commerce. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 551 (1995) (holding Gun-Free School Zones Act of 1990 unconstitutional because it does not constitute regulation of interstate commerce).

[197] Even if it were true that the selective use of the word, "uniform" in the Bankruptcy Clause somehow distinguished this power from other Article I powers for purposes of state sovereign immunity's viability at the time of the framing, that distinction would have been subsequently rendered irrelevant by adoption of the Eleventh Amendment, which draws absolutely no distinctions among Article I powers for purposes of the constitutionally dictated sovereign immunity restriction.

[198] *See* 126 S. Ct. at 995 (finding bankruptcy jurisdiction to be *in rem* and not implicating States' sovereignty in the same way as *in personam* jurisdiction).

[199] *Id.* at 1000.

establish "uniform" bankruptcy laws, this includes all aspects of bankruptcy.[200] Thus, according to the Court, "[t]he power granted to Congress by that Clause is a unitary concept rather than an amalgam of discrete segments."[201] As such, "[t]he Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the *res* . . . . [C]ourts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications."[202] Thus, according to the Court,

> it is not necessary to decide whether actions to recover preferential transfers pursuant to § 550(a) are themselves properly characterized as *in rem*. Whatever the appropriate appellation, those who crafted the Bankruptcy Clause would have understood it to rest in Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property.[203]

This authority, like the privilege of issuing writs of habeas corpus compelling the release of debtors from state prisons, according to the Court, operates independent of, and notwithstanding the State's plea of sovereign immunity.[204]

Careful examination of the so-called *in rem/in personam* distinction demonstrates its irrelevance to the sovereign immunity question. The Court examined the distinction between *in rem* and *in personam* jurisdiction previously.[205] In *Shaffer v. Heitner*,[206] a judgment in which Justice Stevens concurred, the Court recognized that the difference between the jurisdictional categories was a fiction. It agreed with "[t]he overwhelming majority of commentators [who] have also rejected [the] premise that a proceeding 'against' property is not a proceeding against the owners of that property."[207] The *Shaffer* Court ultimately decided that

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[200] *See id.* at 1005 (holding states are subject to Congressional laws regarding bankruptcy proceedings based on Congress' power to enact "Laws on the subject of Bankruptcies").

[201] *Id*. at 1000.

[202] *Id.*

[203] *Id*. at 1000–02.

[204] *See id.* at 1002 (relating two powers of Congress as operating free and clear of state sovereign immunity claims). This proposition, discussed *infra*, is dubious. By point of introduction here, it should be noted that the Court's earlier decision in *Shaffer v. Heitner* indicated that the *in rem*/*in personam* distinction is a "fiction." 433 U.S. 186, 212 (1977) ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification."). Further, even if there is a reason to stray from the dictates of Shaffer, it is highly doubtful that the proceedings at issue in *Katz*, are themselves properly characterized as *in rem. See, e.g.*, 126 S. Ct. at 1012 (Thomas J., dissenting) (stating although bankruptcy power may be *in rem*, it does not determine whether states have immunity from these *in rem* proceedings).

[205] *See Shaffer*, 433 U.S. at 207 (comparing *in rem* and *in personam* jurisdiction).

[206] *See id.* at 212 (characterizing any differences between *in rem* and *in personam* jurisdiction as "fiction").

[207] *Id.* at 205.

"'[a]ll proceedings, like all rights, are really against persons.'"[208] After *Shaffer*, therefore, it is difficult to discern the importance that the *Hood* and *Katz* majorities find in the supposed distinction between *in personam* and *in rem* proceedings.

It should be noted, however, that even if the argument proffered in *Hood* is sound, it has little relevance to a consideration of the issue in *Katz*, for the proceedings in *Hood* and *Katz* are quite different.[209] Indeed, the *Hood* Court went out of its way to cabin its holding, stating that the debtor in a discharge procedure "does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts."[210] Thus, in the normal course of events, "the court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State."[211] The type of proceeding involved in *Katz*, in contrast, was distinguished by the *Hood* Court as an example in which the Court's *in rem* jurisdiction was an affront to State sovereign immunity.[212]

Of seemingly even greater importance is, as Justice Thomas demonstrated in dissent, that the entire discussion of the *in rem*/*in personam* distinction is merely yet another exercise in irrelevancy:

> The fact that certain aspects of the bankruptcy power may be characterized as *in rem*, however . . . certainly does not answer the question presented in this case: whether the Bankruptcy Clause subjects the States to transfer recovery proceedings—proceedings the majority describes as 'ancillary to and in furtherance of the court's *in rem* jurisdiction,' though not necessarily themselves *in rem*.[213]

In sum, the *Katz* Court found a variety of what it deemed to be acceptable grounds for distinguishing between the congressional subjection of states to federal court suit pursuant to legislation based in the Bankruptcy Clause and legislation grounded in the Commerce Clause. The first ground is the unique textual structure of the Bankruptcy Clause, which exclusively authorizes a legislative power to enact "uniform" laws.[214] The second ground is the unique legislative history of the

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[208] *Id.* at 207 n.22 (quoting Tyler v. Court of Registration, 55 N.E. 812, 814 (Mass. 1900)); *see also* Mullane v. Centr. Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950) (recognizing distinctions between *in rem* and *in personam* actions as "ancient").

[209] *See supra* notes 25–30 and accompanying text (discussing state sovereign immunity with respect to enumerated Congressional powers).

[210] Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 450 (2004).

[211] *Id.* at 451 n5.

[212] *See* Richard Lieb, *State Sovereign Immunity: Bankruptcy is Specia*l, 14 AM. BANKR. INST. L. REV. 201, 206 (2006) (emphasizing Court in *Hood* "cautiously restricted the scope of its decision").

[213] Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1012 (2006) (Thomas, J., dissenting) (quoting *id.* at 1001).

[214] *See* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 527–28 (1996) (explaining historical significance behind textual structure of Bankruptcy Clause).

Bankruptcy Clause, which evinced the Framers' desire to trump state sovereign immunity when it might conflict with wide-ranging congressional authority to regulate bankruptcies.[215] Finally, the Court focused on the uniquely *in rem* nature of the bankruptcy power, which prevented suits impacting state rights from being suits directly against the state.[216] Not one of these asserted rationales, however, in any way justifies treating the Bankruptcy Clause differently from the Commerce Clause for purposes of sovereign immunity. Moreover, for reasons we are about to explore, the question is not even a close one.

F. Katz *and the Eleventh Amendment*

At various points in *Katz*, Justice Stevens goes out of his way to underscore the limited reach of the Court's holding. "[The Bankruptcy Clause was intended to] authorize *limited* subordination of state sovereign immunity in the bankruptcy arena," he wrote.[217] "The scope of this consent [to waive sovereign immunity] was limited; the jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*—a *narrow jurisdiction* that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction."[218] He acknowledged that "[o]f course, the Bankruptcy Clause, located as it is in Article I, is 'intimately connected' not just with the Full Faith and Credit Clause, which appears in Article IV of the Constitution, but also with the Commerce Clause."[219] But he added that

> [t]hat does not mean . . . that the state sovereign immunity implications of the Bankruptcy Clause *necessarily* mirror those of the Commerce Clause. Indeed, the Bankruptcy Clause's unique history, combined with the singular nature of bankruptcy courts' jurisdiction 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.[220]

The intended effect of the Court's lengthy historical, textual and jurisdictional analyses is to portray a situation in which only if the planets align, as they do in the bankruptcy arena with its peculiar history, text, jurisdictional nature and exigencies, will sovereign immunity be deemed revoked. In the prior section, we demonstrated why these bases of distinction are invalid on their face. Here we show why the

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[215] *See generally* Kids World of Am., Inc. v. State of Ga., Dep't of Early Care and Learning (*In re* Kids World of Am., Inc.), 349 B.R. 152, 165–66 (Bankr. W.D. Ky. 2006) (discussing *Katz*, bankruptcy laws, and state sovereign immunity).

[216] *See Katz*, 126 S. Ct. at 995 (concluding bankruptcy courts' *in rem* jurisdiction implicates states' sovereignty to lesser degree than other kinds of jurisdiction).

[217] *Id.* at 996 (emphasis added).

[218] *Id.* at 1005 (emphasis added).

[219] *Id.* at 1000 n.9 (Stevens, J. dissenting).

[220] *Id.* (citations omitted) (emphasis added). It is worth noting that this statement is rather obviously incomplete—there is no suggestion that the same reasoning could not apply to the Commerce Clause.

Court's textual and historical rationales make no difference, even were we to assume their accuracy.

The most obvious problem with most of *Katz*'s asserted bases of distinction is that, for the most part, they ignore the limits imposed by the Eleventh Amendment on Congress's legislative power embodied in Article I of the Constitution. On its face, that provision draws no distinction at all between congressional exercises of the commerce and bankruptcy powers. An amendment naturally supercedes anything to the contrary in the body of the document. Thus, for purposes of the Eleventh Amendment it is wholly irrelevant that one Article I provision employs the word "uniform" while the other does not, even if we are to assume that this linguistic difference matters for purposes of pre-Eleventh Amendment constitutional interpretation (a conclusion we reject in any event). As a result of the constitutional amendment, both powers are swept away, to the extent they authorize legislative action barred by the amendment's terms. No matter the truth of each of the limiting postulates put forth by the *Katz* majority; no matter the Framers' intentions in adopting the Article I power of bankruptcy; no matter the peculiar exigencies of the Bankruptcy Act, each is rendered irrelevant by the limitation imposed by the terms of the Eleventh Amendment. Katz was an out-of-state private citizen attempting to bring suit against an unconsenting state in federal court.[221] This course of action, though concededly authorized by the Bankruptcy Act, is unambiguously forbidden by the text of the Eleventh Amendment.

Despite its seemingly dispositive relevance, the Eleventh Amendment is given relatively little attention in *Katz*. The majority mentions the amendment on only three occasions.[222] On one occasion, the Court states:

> [t]he ensuing five years that culminated in adoption of the Eleventh Amendment were rife with discussion of States' sovereignty and their amenability to suit. Yet there appears to be no record of any objection to the bankruptcy legislation or its grant of habeas power to federal courts based on an infringement of sovereign immunity.[223]

The Court thereby amazingly shifts the burden of proof in constitutional interpretation to those who would rely on a provision's unambiguously unlimited text, to establish historically the Framers' intention to reach every conceivable situation already reached by the text. On the second occasion, it states: "[t]his history strongly supports the view that the Bankruptcy Clause of Article I, the source of Congress' authority to effect this intrusion upon state sovereignty, simply did not contravene the norms this Court has understood the Eleventh Amendment to

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[221] *Id.* at 995.

[222] *See infra* notes 224–26 and accompanying text (discussing consequences of majority's misinterpretations).

[223] *Katz*, 126 S. Ct. at 1003.

exemplify."[224] Hence, according to the *Katz* Court, instead of imposing a firm barrier to legislative action, the Eleventh Amendment does nothing more than give rise to "norms" which it "exemplif[ies]."[225] Such dilution of unambiguous and restrictive constitutional text dangerously dilutes the countermajoritarian force of constitutional directives. And finally, in what must be considered a masterful stroke, the majority reminded Justice Scalia of words which, upon reading the opinion, he must have regretted uttering: "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . . ."[226]

When the dust settled, the *Katz* majority had effectively rendered the text of the Eleventh Amendment irrelevant. Instead of adhering to unambiguous textual directives, which draw absolutely no distinctions among different Article I powers, the Court conveniently chose to focus on an apparent lack of contemporaneous outrage aimed specifically at the particular exercise of bankruptcy power. Yet where a constitutional provision's text draws no such distinction, it is difficult to understand how such a selective use of contemporaneous history can alter that directive.

The only conceivable textual basis for reaching the Court's conclusion is the adoption, *sub silentio*, of the diversity theory of Eleventh Amendment construction. As previously noted, the diversity theory posits that the Eleventh Amendment bars only those private suits against un-consenting states in federal court brought pursuant to the state diversity clause of Article III, section 2.[227] Stated as a positive proposition, the Eleventh Amendment, according to exponents of the diversity theory, permits suits by out-of-state plaintiffs against unconsenting states in federal court when jurisdiction is premised on a federal question as it was, for instance, in *Katz*. This is so, even if the suit is brought by an out-of-state citizen.[228]

The impact of the majority's decision is thus potentially far-reaching. The Court purports to confine the decision to the realm of legislation issued pursuant to the Bankruptcy Clause. However, unless the *Katz* Court ultimately is deemed to have adopted the diversity theory, it has no way around the unambiguous text of the Eleventh Amendment. This is so unless, of course, it decides simply to ignore the amendment, thereby engaging in a form of unprincipled "civil disobedience" to the Constitution.

By implicitly adopting the diversity theory, the Court necessarily removed the bar to suit by out-of-state plaintiffs against unconsenting states in federal court for *every* federally created cause of action, not merely those congressionally authorized pursuant to the Bankruptcy Clause. For when the Court effectively adopted the diversity theory, the particularities of the Article I power at issue are necessarily

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[224] *Id.*

[225] *Id.*

[226] *Id.* (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (Scalia, J.)).

[227] *See supra* notes 71–73 and accompanying text (discussing diversity theorists' interpretation of Eleventh Amendment).

[228] *See supra* note 19 and accompanying text (commenting on debate interpreting Eleventh Amendment).

rendered irrelevant. The threshold questions, under the diversity theory, instead are reduced to whether the plaintiff is a citizen of the defendant state and whether the cause of action is federal. If the answer to either question is "yes," then the Eleventh Amendment does not stand as a barrier to suit in federal court. Of course, since every suit that arises under legislation enacted pursuant to an Article I power gives rise to a federal question, the Eleventh Amendment after *Katz* should logically fail to bar suits against states, even those brought by diverse plaintiffs, arising under laws enacted pursuant to such Article I powers as the Commerce Clause, the Patents Clause, or the Indian Commerce Clause. It is, then, completely incoherent for the Court to endeavor to employ a substantively selective form of the diversity theory, as it appears to attempt in *Katz*. There simply can be no such thing.

If the diversity theory is adopted, then, sovereign immunity—at least sovereign immunity possessing an explicit constitutional source—does not exist, with the largely hypothetical exception of sovereign immunity predicated solely on the diversity of the parties. But if such immunity does not exist, then there is no basis for distinguishing between the bankruptcy power involved in *Katz* and the Indian Commerce Clause involved in *Seminole Tribe*. In *Seminole Tribe*, the Court expressly rejected the diversity theory—over the dissent of Justice Stevens, the author of the *Katz* decision.[229] If the diversity theory represents the proper construction of the amendment, as the *Katz* majority necessarily implies, then *Seminole Tribe* must be reversed, a conclusion expressly and vigorously resisted by Justice Stevens in *Katz*. If, as the Court in *Seminole Tribe* held, the diversity theory represents an invalid construction of the Eleventh Amendment,[230] then *Katz*'s detailed analysis of the supposed uniqueness of the text and history of the Bankruptcy Clause must be rendered irrelevant, at least as to suits brought by out-of-state citizens (as was the case in *Katz* itself). The clear textual prohibition against "any" suits in federal court against a state by citizens of another state inexorably trumps all of those pre-Eleventh Amendment considerations. In any event, from this perspective it appears that *Katz* and *Seminole Tribe* cannot coexist, despite the *Katz* Court's conclusion to the contrary.[231]

Of course, adoption of the diversity theory would still leave the states with whatever form of pre-constitutional common law sovereign immunity constitutionalized by the Court in *Hans.* The Court did not overlook this fact, and it is to this issue that our critique now turns.

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[229] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 43, 71 (1996) (rejecting Stevens' "new theory of state sovereign immunity" because it "develops its own vision of the political system created by the Framers . . .").

[230] *See id*. at 72–73 (clarifying "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction").

[231] *See Katz*, 126 S. Ct. at 996 (acknowledging majority and dissenting opinions in *Seminole Tribe* "reflected an assumption that the holding in that case would apply to the Bankruptcy Clause," while finding "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated").

G. The Katz *Court's Assault on Common Law Sovereign Immunity*

As already noted, if the purpose of the *Katz* opinion was merely to adopt the diversity theory, thereby opening up the federal courts to private suits arising under federal law against unconsenting states, its lengthy historical analysis of the Bankruptcy Clause, the adoption of the Bankruptcy Act, and the nature of the bankruptcy power was completely unnecessary. The problem for the *Katz* Court is that acceptance of the diversity theory—as complex and controversial as that issue is—does not automatically dispose of the common law sovereign immunity recognized in *Hans v. Louisiana*, an immunity reaching suits brought by in-state and out-of-state citizens alike.[232] The *Katz* Court's careful examination of the Bankruptcy Clause is, in fact, designed to address just this shortcoming and enables the Court to reach what is considered "[t]he ineluctable conclusion . . . that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'"[233] In other words, by concluding that the states had agreed to waive their common law sovereign immunity from suit when they ratified the Bankruptcy Clause, the Court finished the job of disposing of state sovereign immunity as far as bankruptcy is concerned.

In contrast with the analysis involved in the Court's attempt to circumvent the Eleventh Amendment's bar to federal court suits against states brought by out-of-staters, the Court's focus on the supposed uniqueness of the Bankruptcy Clause appears here to make sense. Unlike the Eleventh Amendment's form of constitutionally imposed sovereign immunity, the common law variety was pre-constitutional. It is at least conceivable, then, that certain portions of the Constitution revoked the pre-constitutional immunity while others did not. Therefore, as to suits brought by in-staters against states, which do not come within the Eleventh Amendment's express bar, it may have made sense for the Court to focus on the unique aspects of the Bankruptcy Clause. Because of these unique aspects, it is at least possible that the Bankruptcy Clause may have revoked pre-constitutional immunity, while the other Article I powers—for example, the Commerce Clause—did not. However, as already demonstrated in detail, there exist a number of significant logical and practical problems with reliance on the Bankruptcy Clause's supposed uniqueness among Congress's Article I powers that render the Court's approach untenable.

When the dust settles, then, the *Katz* Court has failed to rationalize the substantively selective revocation of any form of sovereign immunity, whether of the pre- or post-Convention varieties. If either form of immunity is deemed invalid, its invalidity cannot be confined to exercises of Congress's bankruptcy power.

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[232] *See supra* note 21 and accompanying text.
[233] *Katz*, 126 S. Ct. at 1004.

III. JUDICIAL DISOBEDIENCE THROUGH GUERILLA WARFARE: THE DILEMMA OF PRINCIPLED ANALYSIS

A. The Dilemma of Principled Decision Making

To this point, we have established that it is impossible to discern a principled distinction between the Bankruptcy Clause and the other Article I powers grounded in either the text of the Bankruptcy Clause, the history attendant its adoption, or the peculiarities of its nature that might demand a disparate fidelity to the Eleventh Amendment. Ultimately, the *Katz* Court's attempt to employ the plan-of-the-Convention theory to distinguish suits grounded in the Bankruptcy Clause from those grounded in the Commerce Clause for purposes of the in-state citizen suits covered by *Hans* fails completely. If one accepts the plan-of-the-Convention approach, it logically applies equally to the bankruptcy and commerce powers, whatever differences exist in the text of the two provisions. Absolutely nothing of consequence turns on the different text or histories of the two clauses. A Justice who rejects the foundational premises and assumptions of the plan-of-the-Convention theory will logically reject reliance upon it in both contexts. On the other hand, a Justice who finds the theory appealing will find it equally applicable in both contexts. Indeed, the very fact that the plan-of-the-Convention theory was originally developed in the context of the Commerce Clause, and is often associated with Justice Stevens, author of *Katz*,[234] underscores this view. The unavoidable conclusion, then, is that the decision in *Katz* was determined not by the use of principled judicial analysis, but by the outcome desired by the analyzers.

When viewed in isolation, *Katz* may appear to be an anomaly, or simply a doctrinally incorrect decision. But when viewed as a part of a continuum of similar cases, it could conceivably be seen as a necessary step in a natural jurisprudential evolution. Change can come slowly to the Court, hindered or saved, as one may choose to view it, by the great force of institutional inertia and the need for institutional legitimacy in the eyes of the populace. But in countless areas of constitutional law change does come eventually, far more often through a process of doctrinal *evolution* than *revolution*.[235] This slower pace of change may be explained on a number of bases. It tends to convey, far more than does more precipitant doctrinal change, an image of consistency in the rule of law. It provides a period

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[234] *See* Pennsylvania v. Union Gas Co., 491 U.S.1, 19 (1989) ("Our prior cases thus indicate that Congress has the authority to override States' immunity when legislating pursuant to the Commerce Clause. This conclusion is confirmed by a consideration of the special nature of the power conferred by that Clause.") (Brennan, J., with Stevens, J., concurring). Recall that Justice Brennan, writing for the majority, argued that the common law variety of sovereign immunity is not a bar to suits against a state brought by in-state citizens when the action is premised on legislation enacted pursuant to Congress' Article I commerce power because "[t]he States held liable under such a congressional enactment are thus not 'unconsenting'; *they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case–by–case basis.*" *Id.* at 20 (emphasis added).

[235] *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING, 1949 (describing doctrinal evolution of "imminently dangerous" category parity in tort law).

for adjustment prior to a doctrine's ultimate reversal.[236] It reduces the image of the Court as a nakedly political institution.

It is certainly conceivable, then, that in future times *Katz* could be employed as a passageway into the Commerce Clause sovereign immunity fortress constructed by the Court in *Seminole Tribe*. This is so, even though the *Katz* majority vigorously insisted that the two decisions could co-exist.

As a doctrinal strategy, the next step would be to remove the common law sovereign immunity bar to suit based on federal causes of action other than bankruptcy. To do so, the Court need only apply the historical analysis employed in *Katz* regarding the Bankruptcy Clause to the Commerce Clause. It is easy to imagine how this might be done. The Court need simply reason along these lines: *It is settled doctrine that the states waived their sovereign immunity from private suit arising under the Bankruptcy Clause. Obviously there is no cause to limit the reach of our prior case law to suits arising under the Bankruptcy Clause. The Bankruptcy Clause does not present a special case different from any other Article I power as Seminole Tribe made clear. Moreover, we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated*.[237] *Common sense therefore indicates that it is equally true that when the states waived their sovereign immunity from private in-state suit at the time they ratified the Bankruptcy Clause, the same waiver encompasses the Commerce Clause and every other Article I clause.*

Viewing *Katz* in this way, as merely one step in a doctrinal undermining of *Seminole Tribe,* makes the decision considerably more understandable than it seems to be when viewed standing alone. Indeed, when seen as a step in a subtle evolutionary process away from *Seminole Tribe*, *Katz* provides a far softer touch than did *Seminole Tribe*'s own sudden reversal of the relatively recent *Union Gas* decision.

It should be noted that purely on the merits, we believe that *Katz* makes considerably more sense than *Seminole Tribe* as a construction of constitutionally protected state sovereign immunity. By its express terms, the Eleventh Amendment

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[236] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 845–46 (1992) (reasoning in accordance with constitutional questions resolved in Court precedent, "principles of institutional integrity, and the rule of *stare decisis*" counsel in favor of accommodation when faced with questionable prior holdings, rather than outright overruling previous decision).

[237] It bears noting how casually the majority in *Katz* actually does dispatch with the prudential doctrine of *stare decisis*:

> 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 . . . . [W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.

126 S. Ct. at 996 (citations omitted).

has absolutely no relevance to suits brought by in–state citizens against a state.[238] To suggest that any other provision of the Constitution in any way shields states from in-state citizen suits amounts to nothing more than constitutional wishful thinking on the part of those who ideologically favor sovereign immunity purely as a normative matter. To the extent there may have existed some form of sovereign immunity floating in the political ether prior to the Constitutional Convention, surely it must have been trumped by the Constitution's grant of legislative power to Congress. This is as true of the Commerce Clause as it is of the Bankruptcy Clause.[239]

This does not mean that, purely as a matter of constitutional law, we unhesitatingly accept the version of sovereign immunity advocated by Justice Stevens in either his *Katz* opinion or his *Seminole Tribe* dissent. Unlike Justice Stevens, we cannot accept the diversity theory, because that is simply not what the Eleventh Amendment *says*. Rather, the provision un-ambiguously precludes federal jurisdiction in "any" suit brought by an out-of-state citizen against a state; it draws no distinction premised on the constitutional source of jurisdiction.

Nevertheless, assuming, for purposes of argument, that the *Katz* majority starts with a belief in the correctness of both the diversity theory and the plan-of-the-Convention theory, something of an ethical dilemma arises: Does the constitutional end justify the doctrinal means? What Justice Stevens did in *Katz* is indefensible on its face as a principled interpretation and application of pre-existing constitutional sovereign immunity doctrine. There is simply no principled basis on which to distinguish the Bankruptcy Clause from the Commerce Clause. From the perspective of principled decision making, then, Justice Stevens should have chosen between a reluctant acceptance of *Seminole Tribe* and its inescapable application to the Bankruptcy Clause on the one hand, or an open and candid reversal of that decision on the ground that it was bad constitutional law, on the other. He did neither, of course—the former because he obviously found such a result distasteful and wrong headed as a matter of sovereign immunity theory, and the latter, quite probably, because he simply was unable to amass a majority for such an action. Instead, he engaged in guerilla warfare against the robust form of sovereign immunity embodied in *Seminole Tribe*.

In this section, we explore this strategic choice, purely as a matter of legal process. In so doing, we seek to answer the question whether, for Justices unhappy with existing doctrine, the end justifies the means.

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

[239] *See supra* note 78 and accompanying text (discussing congressional abrogation theory).

B. Principled Decision Making and Wechsler's "Neutral Principles"

Any exploration of principled constitutional decision making should begin with Herbert Wechsler's famed "neutral principles" analysis.[240] In 1959, Professor Wechsler identified and expounded upon what he considered a vexing and critical problem facing a Supreme Court vested with the task of constitutional interpretation, namely that far too often we are content to "make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values [we] support."[241] In light of this obvious defect, Professor Wechsler posed the following question: what standards must Justices be obliged to follow in reaching judgment in order that the judiciary may exist, as was intended by the framers, as an independent and formidable bulwark against the despotic tendencies of the other branches, rather than "a naked power organ" different only in theory than the legislature or the executive?[242]
Professor Wechsler's familiar answer was that courts of law

> are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved . . . . The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it . . . .[243]

It is important to note that in employing the phrase, "neutral principles," Wechsler did not intend to imply that the principles of interpretation were *themselves* to be "neutral." There can be no such thing. The interpretive principles themselves, rather, will inevitably be normative. But Wechsler was wholly agnostic as to what those normative principles are, or even how one is to ascertain them. Instead, his focus was exclusively on what happens once those normative principles

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[240] *See generally* Wechsler, *Neutral Principles*, *supra* note 40.

[241] *Id.* at 11.

[242] *See id.* at 12 ("The man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them . . . as courts of law."). By way of distinction, Professor Wechsler rhetorically asked the following:

> Is there not, in short, a vital difference between legislative freedom to appraise the gains and losses in projected measures and the kind of principled appraisal, in respect of values that can reasonably be asserted to have constitutional dimension, that alone is in the province of the courts? Does not the difference yield a middle ground between a judicial House of Lords and the abandonment of any limitation on the other branches—a middle ground consisting of judicial action that embodies what are surely the main qualities of law, its generality and its neutrality?

Id. at 16.

[243] *See id.* at 19–20.

have been chosen.[244] Wechsler's insight was that once adopted, the principles must be applied "neutrally"—that is, consistently in comparable situations.[245] In other words, once the Court has chosen a generalizably applicable principle of interpretation for a particular constitutional provision, it may not selectively ignore that principle in a particular case, merely because it does not like the specific result in that case.

The entire point of our critique of Justice Stevens's opinion in *Katz* is that it fails the test of Wechslerian principled decision making. He ignores the text of the Eleventh Amendment; he implicitly adopts the diversity theory of Eleventh Amendment construction without acknowledging either that he is doing so, that its adoption cannot rationally be confined to exercises of congressional power under the Bankruptcy Clause, or that the theory had been categorically rejected in *Seminole Tribe*—a decision Stevens expressly declined to overrule; and finally, he purports to draw distinctions between Congress's power under the Bankruptcy and Commerce Clauses that lack support.

In defense of Justice Stevens, one might argue that his decision in *Katz* was merely an attempt to correct the sorely misguided Eleventh Amendment and state sovereign immunity decision making in which the Court had engaged in *Seminole Tribe*. But that fact underscores the essential problem with Stevens's analysis in *Katz*: He *refuses* to overrule *Seminole Tribe*, while simultaneously refusing to adhere to its logically inescapable implications.[246]

Perhaps the dispositive response to a Wechslerian critique of the *Katz* opinion is that the methodology employed by Justice Stevens is simply the way the doctrinal game is played by the Court, for reasons already explained.[247] However, it should be recalled that, as Hamilton noted, the Court possesses neither sword nor purse.[248] All it really has, then, is its legitimacy and institutional capital. Manipulation or irrationality in constitutional decision making—particularly when the interests of state governments are so intimately intertwined, as they are when sovereign immunity is at stake—hardly seems the most appropriate means of assuring the Court's legitimacy as protector of the rule of law.

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[244] *See id.* at 15 (stating courts normatively "decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply . . . .").

[245] *See id.* at 9–10 (noting Court has created "standards framed in neutral terms" for exercising its discretion, and "[o]nly the maintenance and the improvement of such standards and, of course, their faithful application can . . . protect the Court against the danger of the imputation of bias . . . .").

[246] *See* Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1014 (2006) (Thomas, J., dissenting) ("It would be one thing if the majority simply wanted to overrule *Seminole Tribe* altogether. That would be wrong, but at least the terms of our disagreement would be transparent. The majority's action today, by contrast, is difficult to comprehend.").

[247] *See supra* Part III.A.

[248] THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse . . . .").

There are, to be sure, some who would ridicule any attempt to measure Supreme Court decision making by means of a Wechslerian principled decision making frame of reference.[249] They would do so for one of two possible reasons, one epistemological and one normative. The epistemological argument is grounded in a premise of intellectual chaos: Anything can be argued, and no argument is inherently more logical or persuasive than another. Therefore all arguments purportedly grounded in logic or reason can be nothing more than a cynical front for underlying political agendas.[250] But this argument is of course nonsense: While many issues of legal doctrine may be debated plausibly, the simple fact is that many cannot. The normative argument is that there are certain political results that are to be preferred, and legal principle must be circumvented to achieve these normative ends. The problem with this reasoning is that *both* sides of the political spectrum may employ such cynical political strategy through the judicial process. As a result, the entire judicial process is reduced to a political state of nature, a war of all against all, where, as Hobbes warned, life is "nasty, brutish and short . . . ."[251] All we can say to those who believe in such strategizing through the judicial process: Be careful what you wish for.

CONCLUSION

Katz is an important decision, if not for its dramatic restriction of the states' sovereign immunity then for the illumination it casts on the Court's decision making methodology. We conclude that there is no principled way to distinguish the Bankruptcy Clause from any other Article I Clause. The decision reached in *Katz*, therefore, represents a form of judicial guerilla warfare on *Seminole Tribe* sovereign

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[249] *See, e.g.*, Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 805 (1983). Professor Tushnet, in his critique of Wechslerian decision making, argues that the theory of Neutral Principles

> requires that we develop an account of consistency of meaning—particularly of the meaning of rules or principles—within liberal society. Yet the atomistic premises of liberalism treat each of us as autonomous individuals whose choices and values are independent of those made and held by others. These premises make it exceedingly difficult to develop such an account of consistent meaning. The autonomous producer of choice and value is also an autonomous producer of meaning.

Id. at 825. That is, given that meaning is a subjective, personal concept, Professor Tushnet doubts the ability of the individuals who comprise the judiciary to collectively divine the discrete principle inherent in the resolution of a particular case, let alone apply this "principle" to a future case, with its own complex set of facts and hence continuum of possible meanings, in a neutral manner. *See id.* ("The theory of neutral principles requires that judges be able to rely on a shared conception of the proper role of judicial reasoning. The critiques have established that there are no determinate continuities derivable from history or legal principle. Rather, judges must choose which conceptions to rely on.").

[250] *See, e.g., id.* at 826 ("[C]ommunities of understanding are not defined by geographical boundaries or by allegiance to a single constitution. They are painstakingly created by people who enter into certain kinds of relations and share certain kinds of experiences.").

[251] THOMAS HOBBES, THE LEVIATHAN: OR THE MATTER, FORME, AND POWER OF COMMONWEALTH, ECCLESIASTICALL AND CIVIL 100 (Michael Oakeshott ed., Collier Macmillan Publishers 1962) (1651).

immunity and the Eleventh Amendment. As such, it is deserving of criticism. Smoke and mirrors, no matter the effect they achieve in the short run, damage the institution in the long run.