EXPLAINING *KATZ*'S NEW BANKRUPTCY EXCEPTION TO STATE SOVEREIGN IMMUNITY: THE BANKRUPTCY POWER AS A FEDERAL FORUM POWER

RALPH BRUBAKER*

---

* Professor of Law and Associate Dean for Academic Affairs, University of Illinois College of Law. The author thanks Professors Ray Warner and Dick Lieb for the invitation to participate in the symposium at which this paper was presented, *Federalism and Bankruptcy*; thanks the participants at that symposium for their constructive dialogue and helpful comments; and even though he still can't pronounce her last name, thanks Hale Yazicioglu for her excellent work preparing this article for publication.

INTRODUCTION

The Supreme Court has now squarely addressed the effect of its monumental state sovereign immunity decisions of *Seminole Tribe of Florida v. Florida*[1] and *Alden v. Maine*[2] in the context of federal bankruptcy proceedings. *Seminole Tribe* held that Congress's Article I legislative powers could not be used to abrogate states' constitutional sovereign immunity from suit in *federal* court, creating considerable uncertainty regarding the extent to which states and state agencies could be bound by federal bankruptcy proceedings.[3]

In its 2004 *Tennessee Student Assistance Corp. v. Hood*[4] decision, the Court held that there is a bankruptcy exception to states' constitutional sovereign immunity.[5] By its terms, though, the *Hood* decision was limited to dischargeability and general discharge proceedings in federal bankruptcy court, and the *Hood* Court rested its decision upon the awkward and erroneous supposition that discharge and dischargeability proceedings are an exercise of *in rem* jurisdiction.[6]

In *Central Virginia Community College v. Katz*,[7] though, the Court abandoned *Hood*'s *in rem* rationale for a bankruptcy exception to states' constitutional sovereign immunity, and in the process, vastly expanded the scope of that exception.[8] In fact, *Katz* effectively eliminates states' *constitutional* sovereign immunity in federal bankruptcy proceedings. The Court ceded all determinations regarding whether states can be bound by federal bankruptcy proceedings to Congress, as long as "Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.'"[9] Under *Katz*'s bankruptcy exception to state sovereign immunity, then, "Congress may, at its option, either treat States in the same way as other creditors insofar as concerns 'Laws on the subject of Bankruptcies' or exempt them from operation of such laws."[10] Bankruptcy Code section 106,[11] therefore, will now determine the extent to which states are bound by federal bankruptcy proceedings, *not* constitutional sovereign immunity doctrine.

Those interested only in the "bottom line" need read no further. *Katz* delivers

---

[1] 517 U.S. 44 (1996).
[2] 527 U.S. 706 (1999).
[3] *Seminole Tribe*, 517 U.S. at 72–73.
[4] 541 U.S. 440 (2004).
[5] "[W]e hold that a bankruptcy court's discharge of a student loan debt [owing to a State] does not implicate a State's Eleventh Amendment immunity" from suit. *Id.* at 445.
[6] *See generally* Ralph Brubaker, *From Fictionalism to Functionalism in State Sovereign Immunity: The Bankruptcy Discharge as Statutory* Ex parte Young *Relief After* Hood, 13 AM. BANKR. INST. L. REV. 59, 74–98 (2005) [hereinafter Brubaker, *From Fictionalism to Functionalism*]; Ralph Brubaker, Hood*'s In Rem Exception to State Sovereign Immunity in Bankruptcy: A Personal Jurisdiction Time Warp*, 24 BANKR. L. LETTER No. 7, July 2004, at 1.
[7] 126 S. Ct. 990 (2006).
[8] *See id.* at 1004–05.
[9] *Id.* at 1005.
[10] *Id.*
[11] 11 U.S.C. § 106 (2006).

up the proverbial "silver bullet" that smites (what most considered) the state sovereign immunity vampire that had stalked the bankruptcy system since *Seminole*. Those concerned with the consistency and coherence of bankruptcy and constitutional jurisprudence, though, will find no comfort in the *Katz* decision. The *Katz* Court's rationale for its all-inclusive bankruptcy exception to state sovereign immunity is no more convincing than the exceedingly feeble *in rem* reasoning of *Hood*. The *Katz* majority does not credibly reconcile its holding with the state sovereign immunity framework of *Seminole Tribe* and *Alden*. Perhaps this is an indication that the *Seminole* framework is on the decline, or perhaps this is an indication that bankruptcy *is* somehow intrinsically different from Congress's other Article I powers.

Although the *Katz* Court itself provided no defensible basis for reaching the latter conclusion, this article will suggest a federal forum power theory for distinguishing the uniqueness of Congress's Article I Bankruptcy Power. Under this federal forum power theory of federal bankruptcy law, the *Katz* holding can be reconciled with the *Seminole-Alden* accommodation of state sovereignty. The federal forum power theory, however, has dramatic implications for a whole range of judicial federalism issues, warranting extreme skepticism of widespread (but troublesome) "bankruptcy is different" instincts.

I. *SEMINOLE TRIBE*: STATES' CONSTITUTIONAL SOVEREIGN IMMUNITY AND CONGRESSIONAL ABROGATION THEREOF

The extent of states' sovereign immunity in federal bankruptcy proceedings has been a particularly pressing issue ever since the Supreme Court's decision in *Seminole Tribe*. In *Seminole Tribe*, the Supreme Court held that Congress's Article I legislative powers could not be used to abrogate states' constitutional sovereign immunity from suit in federal court.[12] That case was decided in the context of Congress's Article I power "[t]o regulate Commerce . . . with the Indian tribes."[13] The *Seminole* Court nonetheless employed a more ecumenical rationale for its holding, to wit, that state sovereign immunity "restricts the [federal] judicial power under Article III, and Article I *cannot* be used to circumvent the constitutional limitations placed upon federal jurisdiction."[14] Thus, *Seminole* expressly repudiated and overruled the equally sweeping plurality decision in *Pennsylvania v. Union Gas Co.*,[15] "that Congress *has* the authority under Article I to abrogate the [sovereign] immunity of the States."[16]

The Court subsequently reinforced and elaborated upon its conception of states' constitutional sovereign immunity in *Alden*, which replicated the *Seminole* holding regarding a state's sovereign immunity from suit in *state* court: "In light of history,

---

[12] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996).
[13] U.S. CONST. art. I, § 8, cl. 3.
[14] *Seminole Tribe*, 517 U.S. at 72–73 (emphasis added).
[15] 491 U.S. 1 (1989).
[16] *Id.* at 57 (White, J., concurring in the judgment in part and dissenting in part) (emphasis added).

practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."[17]

In the hiatus between *Union Gas* and *Seminole Tribe*, Congress amended the Bankruptcy Code to expressly provide that states' "sovereign immunity is abrogated" with respect to a plethora of specified Code sections, that federal bankruptcy courts "may hear and determine any issue arising with respect to the application of such sections to" the states, and that federal bankruptcy courts "may issue against a [state] an[y] order, process, or judgment under such sections . . . including an order or judgment awarding a money recovery."[18] The *Seminole Tribe* holding that Congress's Article I powers *cannot* be used to abrogate states' constitutional sovereign immunity, of course, called into doubt the constitutionality of the Bankruptcy Code's purported "abrogation" of state sovereign immunity pursuant to Congress's Article I Bankruptcy Power. Indeed, before the Sixth Circuit decision in *Hood*, every other court of appeals decision to address the issue post-*Seminole* had held that section 106(a)'s attempt to abrogate states' sovereign immunity in federal bankruptcy proceedings was unconstitutional.[19]

II. *HOOD*: SOLIDIFICATION OF A BANKRUPTCY EXCEPTION TO STATE SOVEREIGN IMMUNITY

The prospect that Congress could not abrogate states' sovereign immunity caused considerable consternation to those most familiar with the workings of the federal bankruptcy system, who feared that states could simply ignore federal bankruptcy proceedings with impunity. Among the repeat players in the bankruptcy process (whose interests are implicated in case after case after case), states and state agencies are one of the most frequent. This is true not only because of debtors' liability for state tax debts, but also because states and state agencies can end up as creditors in lots of other ways (with the *Hood* case itself providing one of the most common examples: state-sponsored student loan programs). *Hood* gave heed to these concerns.

The Sixth Circuit's opinion in *Hood* reasoned that the Bankruptcy Power is fundamentally different from Congress's other Article I powers and, thus, that the *Seminole Tribe* decision cannot be considered controlling in the bankruptcy context.[20] Thus unburdened by the holding in *Seminole*, the Sixth Circuit upheld the

---

[17] Alden v. Maine, 527 U.S. 706, 754 (1999).

[18] 11 U.S.C. § 106(a)(1)–(3) (2006).

[19] *See* Nelson v. La Crosse County Dist. Att'y (*In re* Nelson), 301 F.3d 820, 826–34 (7th Cir. 2002); Mitchell v. Franchise Tax Bd., (*In re* Mitchell), 209 F.3d 1111, 1118–21 (9th Cir. 2000); Sacred Heart Hosp. of Norristown v. Pa. Dep't of Pub. Welfare (*In re* Sacred Heart Hosp. of Norristown), 133 F.3d 237, 243 (3d Cir. 1998); Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co., LLC (*In re* Estate of Fernandez), 123 F.3d 241, 242–45 (5th Cir. 1997); Schlossberg v. Maryland (*In re* Creative Goldsmiths of D.C., Inc.), 119 F.3d 1140, 1145–47 (4th Cir. 1997).

[20] Hood v. Tenn. Student Assistance Corp. (*In re* Hood), 319 F.3d 755, 763–64 (6th Cir. 2003), *aff'd on other grounds*, 541 U.S. 440 (2004).

constitutionality of Code section 106(a)'s abrogation of state sovereign immunity.[21] In light of the circuit split created by the Sixth Circuit's *Hood* decision, the Supreme Court "granted certiorari to determine whether th[e Bankruptcy] Clause grants Congress the authority to abrogate state sovereign immunity from private suits."[22] The Supreme Court, though, decided the *Hood* case on a much narrower basis than did the Sixth Circuit.

The Supreme Court's majority opinion in *Hood* did not even broach the abrogation issue on which the Sixth Circuit below had both rested its decision and parted company with its sister circuits. Rather, the *Hood* Court held that states have *no* constitutional sovereign immunity to abrogate in dischargeability (and by implication, general discharge) proceedings in federal bankruptcy court.[23]

That approach was much more constrained and cautious than the *Seminole Tribe* decision presaged. Indeed, the *Seminole Tribe* majority went out of its way to very clearly state that its *ratio decidendi* was fully applicable to federal bankruptcy proceedings.[24] Justice Thomas's dissent in *Hood* (joined by Justice Scalia) characterized the abrogation issue as an "easy question" that should not have been ducked, and the easy answer to the abrogation question, according to Justices Thomas and Scalia, was "Congress lacks authority to abrogate state sovereign immunity under the Bankruptcy Clause."[25]

Nonetheless, *Hood*'s holding that certain federal bankruptcy proceedings simply do not implicate states' constitutional sovereign immunity was consistent with the Court's cumulative jurisprudence of state sovereign immunity in bankruptcy (such as it was), which had already established that congressional abrogation of state sovereign immunity is not necessarily central to the ability to subject states to the force of federal bankruptcy proceedings.

A. Binding States to Federal Bankruptcy Proceedings in the Absence of Congressional Abrogation

In his separate dissent in *Seminole Tribe*, Justice Stevens warned that the majority's decision had untoward and unexplored ramifications for many areas of exclusive federal cognizance, including federal bankruptcy proceedings.[26] The *Seminole* majority was undeterred, however, and rather cavalier in addressing these concerns: "This Court never has awarded relief against a State under any of those

---

[21] *Id.* at 768.

[22] Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 443 (2004).

[23] "[W]e hold that a bankruptcy court's discharge of a student loan debt [owing to a State] does not implicate a State's Eleventh Amendment immunity" from suit. *Id.* at 445.

[24] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 & n.16 (1996); *see also id.* at 77 (Stevens, J., dissenting) (noting "majority's decision . . . prevents Congress from providing a federal forum for a broad range of actions against States [including] those concerning bankruptcy").

[25] *Hood*, 541 U.S. at 456 (Thomas, J., dissenting); *see also* Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 105 (1989) (O'Connor, J., concurring) ("I agree with Justice SCALIA that Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause.").

[26] *See Seminole Tribe*, 517 U.S. at 77 & n.1 (Stevens, J., dissenting).

statutory schemes," and "although the . . . bankruptcy laws have existed practically since our Nation's inception . . . , there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States."[27]

With respect to federal bankruptcy proceedings, however, both of those statements were demonstrably false. Even in the absence of any congressional abrogation, a smattering of Supreme Court decisions had held that states have *no* sovereign immunity with respect to various aspects of the federal bankruptcy process.[28] Moreover, both the Court itself and the lower courts had simply assumed that this is a necessary incident to a properly functioning federal bankruptcy system.

Indeed, the precise holding in *Hood*—that states have *no* constitutional sovereign immunity to abrogate in discharge and dischargeability proceedings—is one that the Court had long assumed (if not squarely decided before *Hood*).[29] The Court, however, had never fully articulated the basis for or scope of this assumed bankruptcy exception to state sovereign immunity.

B. An In Rem *Exception to State Sovereign Immunity in Bankruptcy?*

The *Hood* Court sought to explain the traditional bankruptcy exception to states' constitutional sovereign immunity in terms of principles of *in rem* jurisdiction. In particular, the Court reasoned "that a proceeding initiated by a debtor to determine the dischargeability of a student loan debt [owing to a State] *is not a suit against the State* for purposes of the Eleventh Amendment['s]"[30] embodiment of states' constitutional sovereign immunity from suit, because the bankruptcy "court has *in rem* jurisdiction over the matter."[31] Likewise, the Court opined that "States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors," as the "exercise of its *in rem* jurisdiction to discharge a debt does not infringe state sovereignty."[32]

According to the *Hood* Court, then, because an *in rem* proceeding does not require a federal bankruptcy court to exercise personal jurisdiction over a state, such

---

[27] *Id*. at 72 n.16.

[28] *See* New York v. Irving Trust Co., 288 U.S. 329, 331–33 (1933) (holding state is bound by claims bar order of federal bankruptcy court, which is not "incompatible with State sovereignty"); Van Huffel v. Harkelrode, 284 U.S. 225, 227–28 (1931) (holding federal bankruptcy court has "power to sell property of the bankrupt free from the existing lien for [state] taxes," because "[n]o good reason is suggested why liens for state taxes should be . . . excluded from the scope of this general power to sell free from encumbrances" and "legislation conferring it is obviously constitutional").

[29] *See* Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 102 (1989) (White, J., plurality opinion) (abrogation holding premised on assumption, even in absence of congressional abrogation of state sovereign immunity, "a State . . . would be bound, like other creditors, by discharge of debts in bankruptcy"); *cf.* United States v. Nordic Vill., Inc., 503 U.S. 30, 33, 36 (1992) (abrogation holding with respect to sovereign immunity of United States "rely[ing] on the reasoning of the plurality" opinion in *Hoffman* and assuming, even in absence of congressional abrogation, "bankruptcy court [could] determine the . . . dischargeability of . . . liability to the Government").

[30] *Hood*, 541 U.S. at 443 (emphasis added).

[31] *Id.* at 454.

[32] *Id.* at 448.

an *in rem* proceeding simply does not implicate the personal jurisdiction immunity accorded states through the background principle of state sovereign immunity implicit in the original Constitution and confirmed by the Eleventh Amendment. An *in rem* proceeding to discharge a debt owing to a state, therefore, "is not a suit against a state" in which the state can claim any sovereign immunity.[33]

The *Hood* Court's *in rem* reasoning can be justified only upon the assumption that the Founding generation understood state sovereign immunity as a doctrine of personal jurisdiction that would not limit courts' ability to indirectly bind states through an exercise of *in rem* jurisdiction. Whatever the validity of this originalist conception of state sovereign immunity, it cannot be used to rationalize an *in rem* exception to state sovereign immunity for bankruptcy discharge proceedings. The Founding generation most likely considered discharge in bankruptcy to be an *in personam* proceeding requiring an exercise of personal jurisdiction over the debtor's creditors. Indeed, the Constitution's Bankruptcy Clause was drafted upon and in reaction to this very premise. Inclusion of the Bankruptcy Clause in the Constitution was prompted by concerns regarding personal jurisdiction limitations on state courts' power to discharge debts. The Supreme Court's earliest case law, likewise, held that bankruptcy discharge proceedings were effective only insofar as the court decreeing discharge could obtain personal jurisdiction over a creditor whose debt was sought to be discharged.[34]

The *Hood* Court's *in rem* reasoning was not only entirely misplaced with respect to bankruptcy discharge proceedings, it was also woefully inadequate. The bankruptcy process "is inherently complex."[35] There are many aspects of this inherently complex process for which *in rem* analogies find ready application. *In rem* analogies, however, are clearly inapt with respect to some of the remedies most critical to preserving the compulsory essence of the federal bankruptcy process—in particular, the discharge injunction and the automatic stay, which clearly operate *in personam* by personally enjoining creditors' compliance with Congress's mandatory debt restructuring scheme. Indeed, the *Hood* Court itself implicitly acknowledged that a bankruptcy court's *in rem* jurisdiction cannot justify enforcement of the discharge injunction against a state.[36] As the history of discharge enforcement readily reveals, though, without an enforceable discharge injunction, the *Hood* decision was virtually meaningless.[37]

The other category of actions against a state that *Hood*'s *in rem* theory could not countenance was money damages actions, which also operate *in personam*. And, of course, money damages actions directly implicate one of the most important traditional functions of state sovereign immunity, that of protecting state treasuries

---

[33] *Id.* at 451.

[34] *See generally* Brubaker, *From Fictionalism to Functionalism*, *supra* note 6, at 84–90.

[35] John D. Ayer, *The Forms of Action in Bankruptcy Practice: An Exposition and a Critique*, 1985 ANN. SURV. BANKR. L. 307, 308 (1985).

[36] *See Hood*, 541 U.S. at 448 n.4 (noting "enforcement of such an injunction against the State by a federal court is not before us").

[37] *See generally* Brubaker, *From Fictionalism to Functionalism*, *supra* note 6, at 90–99.

from money judgments at the hands of the federal courts.[38]

> Indeed, as a practical matter, the history of state sovereign immunity is largely the history of a struggle to protect the public fisc of the states. Adoption of the Eleventh Amendment was motivated in no small part by concern about the burden of states' Revolutionary War debts. Moreover, Southern states' post-Civil War debt crisis loomed largely in the shadow of significant Supreme Court decisions on state sovereign immunity in the late nineteenth century.[39]

Lower courts espousing a bankruptcy exception to state sovereign immunity similar to that articulated in *Hood*, therefore, generally assumed that *Seminole Tribe* nonetheless compelled preservation of states' sovereign immunity in money damages actions in federal bankruptcy court.[40] Likewise, the *Hood* Court itself emphasized that "[a] debtor does not seek monetary damages . . . from a State by seeking to discharge a debt,"[41] and "[t]he case before us is thus unlike an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference."[42] *Katz*, though, involved just such a preference action against a state agency.

III. *KATZ*: CONSIDERING THE FRAMERS' INTENT WITH RESPECT TO THE ATTRIBUTES OF SOVEREIGNTY AND BANKRUPTCY EXCEPTIONALISM

The debtor in *Katz* was Wallace's Bookstores, Inc., which had operated a chain of college bookstores and which filed a chapter 11 petition in 2001 in the Eastern District of Kentucky.[43] Wallace's and its creditors' committee quickly concluded that the value of the estate would best be maximized by an expeditious sale of all of Wallace's assets, and the bankruptcy court approved sales to Barnes and Noble and Follet.[44] Subsequently, the bankruptcy court confirmed a liquidating plan, pursuant to which the bankruptcy court appointed Bernard Katz as the liquidating supervisor of Wallace's bankruptcy estate, with responsibilities equivalent to those of a chapter 7 trustee, including the power to bring avoidance actions.[45]

Prior to its bankruptcy filing, Wallace's had done business with Virginia

---

[38] *See* Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1724–30 (1997).

[39] Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex parte Young *Relief*, 76 AM. BANKR. L.J. 461, 496 n.148 (2002) (citations omitted) [hereinafter Brubaker, *Statutory* Ex parte Young *Relief*].

[40] *See, e.g.*, *In re* NVR, LP, 189 F.3d 442, 450–54 (4th Cir. 1999).

[41] *Hood*, 541 U.S. at 450.

[42] *Id.* at 454.

[43] Brief for the Respondent at 1, Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006) (No. 04-885).

[44] *Id.* at 3–4.

[45] *Id.* at 5.

Military Institute, Central Virginia Community College, New River Community College, and Blue Ridge Community College, and within the ninety days before its bankruptcy filing, Wallace's paid certain sums owing to each of these institutions.[46] Upon his appointment as liquidating supervisor, therefore, Katz sued each of these institutions to recover those payments as preferential transfers under Code section 547(b).[47] The defendants, Virginia institutions of higher education, are all "arms of the state" of Virginia entitled to assert the state's sovereign immunity, and thus, they moved to dismiss the actions as barred by the constitutional sovereign immunity of the State of Virginia.[48]

The bankruptcy court was bound by the Sixth Circuit decision in *Hood* (left undisturbed within that circuit by the Supreme Court's narrower basis for affirmance), which reasoned that "[a]t the Constitutional Convention, the states granted Congress the power to abrogate their sovereign immunity under [the Bankruptcy Clause of] Article I, section 8," clause 4, and in Bankruptcy Code "§ 106(a), Congress used that power."[49] Code section 106(a) provides that "sovereign immunity is abrogated" as to states with respect to (inter alia) section 547, that federal bankruptcy courts "may hear and determine any issue arising with respect to the application of such section[] to" the states, and that federal bankruptcy courts "may issue against a [state] an[y] order, process, or judgment under such section[] . . . including an order or judgment awarding a money recovery."[50]

Relying on the Sixth Circuit's *Hood* decision, therefore, the bankruptcy court in *Katz* denied the defendants' motion to dismiss, and both the district court and the Sixth Circuit affirmed.[51] The Supreme Court, likewise, affirmed, holding that "[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have"[52] and "agreed not to assert their sovereign immunity in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'"[53] And, of course, it is "beyond peradventure" that "Congress' determination that States should be amenable to [preference] proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.'"[54]

---

[46] *Id.* at 7.
[47] *See* Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 994 (2006).
[48] *See id.* at 994–95.
[49] Hood v. Tenn. Student Assistance Corp. *(In re* Hood), 319 F.3d 755, 768 (6th Cir. 2003), *aff'd on other grounds*, 541 U.S. 440 (2004).
[50] 11 U.S.C. § 106(a)(1)–(3) (2006).
[51] Katz v. Cent. Va. Cmty. Coll. (*In re* Wallace's Bookstores, Inc.), 106 F. App'x 341 (6th Cir. 2004), *aff'd*, 126 S. Ct. 990 (2006).
[52] Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1005 (2006).
[53] *Id.* at 1004 n.13.
[54] *Id.* at 1005.

IV. STATES' SURRENDER OF SOVEREIGN IMMUNITY IN BANKRUPTCY PROCEEDINGS PURSUANT TO THE PLAN OF THE CONVENTION

Articulation of an argument for such a sweeping bankruptcy exception to state sovereign immunity first appeared in a law review article by Leonard Gerson,[55] and Judge Haines's opinion in *In re Bliemeister*.[56] Judge Haines further expounded and refined the argument in a subsequent law review article,[57] upon which the *Katz* majority heavily relied. Such a bankruptcy exceptionalism theory ultimately hinges upon the Framers' intent, in drafting the original Constitution in 1787, "to exempt laws 'on the subject of Bankruptcies' from the operation of state sovereign immunity principles."[58]

The constitutional principle of state sovereign immunity recognized and articulated in *Seminole* and *Alden* is that the Framers implicitly accepted state sovereign immunity as an instinctive, innate characteristic of states' continuing sovereignty that, although nowhere confirmed in the text of the original Constitution, was nonetheless intrinsic to the structural foundations thereof. As Alexander Hamilton explained in *The Federalist* No. 81:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states . . . .[59]

Thus, the Eleventh Amendment (ratified in 1798) is not the source of states' constitutional sovereign immunity from suit; the Eleventh Amendment merely repudiated the Supreme Court's notorious decision in *Chisholm v. Georgia*.[60] *Chisholm* refused to recognize the State of Georgia's sovereign immunity from a suit in federal court by a private citizen,[61] and by overruling that decision, the Eleventh Amendment simply restored the Framers' original understanding of states' constitutionally protected sovereign immunity, "an immunity beyond the congressional power to abrogate by Article I legislation."[62] "In short, the principle

---

[55] Leonard H. Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the* Seminole Tribe *Doctrine*, 74 AM. BANKR. L.J. 1 (2000).

[56] Bliemeister v. Indus. Comm'n (*In re* Bliemeister) 251 B.R. 383 (Bankr. D. Ariz. 2000), *aff'd on other grounds*, 296 F.3d 858 (9th Cir. 2002).

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

[58] *Katz*, 126 S. Ct. at 1003 n.12.

[59] THE FEDERALIST NO. 81, at 548–49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[60] 2 U.S. (2 Dall.) 419 (1793).

[61] *See id.*

[62] Alden v. Maine, 527 U.S. 706, 754 (1999).

of sovereign immunity is a constitutional limitation on the judicial power of the federal courts established in Art. III"[63] such that the "entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given."[64]

This original intent perspective, of course, fully acknowledges that states may have effected "a surrender of this immunity in the plan of the convention."[65] As the *Alden* Court stated, "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself"[66] in that "the states' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . *except as altered by the plan of the Convention*."[67] And this is the toehold for *Katz*'s bankruptcy exceptionalism holding: "The ineluctable conclusion . . . is 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.'"[68]

A. Does the Framers' Authorization of "Uniform" Federal Bankruptcy Legislation Indicate an Intent to Abrogate States' Sovereign Immunity in Bankruptcy Proceedings? Not Really.

In *The Federalist* No. 81, Hamilton's statement about "a surrender of this immunity in the plan of the convention"[69] is followed by this cryptic cross-reference: "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."[70] In the article of taxation, *The Federalist* No. 32, Hamilton sought to assuage concerns that states might be deemed to relinquish their power of taxation should they ratify the Constitution:

> An intire consolidation of the States into one complete national sovereignty would imply an intire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as 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

---

[63] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 68 (1999) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984)).
[64] *Seminole Tribe*, 517 U.S. at 68 (quoting *Ex parte* New York, 256 U.S. 490, 497 (1921)).
[65] THE FEDERALIST NO. 81, *supra* note 59, at 549.
[66] *Alden*, 527 U.S. at 728.
[67] *Id.* at 713 (emphasis added).
[68] Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1004 (2006).
[69] THE FEDERALIST NO. 81, *supra* note 59, at 549.
[70] *Id.*

> 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*. I use these terms to distinguish the last case from another . . . where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the Federal Government may be exemplified by the following instances: The [Constitution's] 1st article provides expressly that Congress shall exercise "*exclusive legislation*" over the district to be appropriated as the seat of government. This answers the first case. The first clause of the same section empowers Congress "*to lay and collect taxes, duties, imposts and excises*" and the . . . same article declares that, "*no state shall*, without the consent of Congress, *lay any imposts or duties on imports or exports*" . . . . This answers the second case. The third will be found in that clause which declares that Congress shall have power "to establish an *uniform rule* of naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a *distinct rule*, there could not be a *uniform rule*.[71]

The *Katz* Court described the cross-reference between and conjunction of *The Federalist* Nos. 32 and 81, "pointing to the 'uniform[ity]' language in the Naturalization Clause, . . . as an example of an instance where the Framers contemplated a 'surrender of [States'] immunity in the plan of the convention.'"[72] Noting that the very same clause of Article I, section 8 of the Constitution in which Congress is granted the power "[t]o establish an *uniform* Rule of Naturalization" also contains Congress's authorization "[t]o establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States," the *Katz* Court thought this parallel reinforced its conclusion that "Congress has the power to enact bankruptcy laws the purpose and effect of which are to ensure uniformity in treatment of state and private creditors."[73] Similarly, previous proponents of bankruptcy exceptionalism posited that the constitutional authorization of "uniform" federal bankruptcy legislation is what distinguishes Congress's Bankruptcy Power from Congress's other Article I powers, such that while the *Seminole Tribe* holding

---

[71] THE FEDERALIST NO. 32, at 199–201 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
[72] *Katz*, 126 S. Ct. at 1004 n.13.
[73] *Id.*

prevents Congress from abrogating states' sovereign immunity pursuant to other Article I powers, the Bankruptcy Clause itself abrogated states' sovereign immunity pursuant to its authorization of uniform bankruptcy legislation.[74]

Relying upon Hamilton's cross-reference between *The Federalist* Nos. 81 and 32, in conjunction with the distinctive uniformity language of the Naturalization and Bankruptcy Clauses, to distinguish the Naturalization and Bankruptcy Powers from Congress's other Article I powers as regards state sovereign immunity is problematic and not fully convincing. As Hamilton acknowledged in *The Federalist* No. 81, sovereign immunity from suit is only "*one* of the attributes of sovereignty . . . enjoyed by the government of every state" that "remain with the states" in the absence of "a surrender . . . in the plan of the convention."[75] *The Federalist* No. 32, though, addresses an entirely *different* attribute of sovereignty, namely, legislative/regulatory power and an "exclusive delegation, or rather . . . alienation, of [this] State sovereignty," by being "*exclusively* delegated to the United States."[76] Hamilton's reference to *The Federalist* No. 32 in his discussion of state sovereign immunity, therefore, is somewhat stupefying. As Professor Jackson has observed:

> This oblique reference might be regarded as some indication that states would lose their sovereign immunity from suit only with respect to powers granted exclusively to the federal government. But Hamilton's coy cross-reference does not answer the critical question: Whether, having granted Congress a power to regulate certain activities (be it exclusive or concurrent), it would be, in the word of *The Federalist* No. 32, "repugnant" to the exercise of that national power for states to retain immunity from suit with respect to Congress's exercise of that power.[77]

Moreover, Hamilton's example regarding naturalization says nothing about that "critical question," not even implicitly. The states' ceding of power to the federal government to regulate naturalization *only* implicates regulatory sovereignty, because states themselves are *not* regulated by *nor* subjected to suits under federal naturalization laws; state sovereign immunity under federal naturalization laws is a nonissue.[78]

Moreover, there is another equally plausible explanation for Hamilton's (perhaps intentionally) vague cross-reference: at the time of the drafting and ratification of the Constitution, it was altogether unclear and entirely unsettled what effect Congress's legislative powers would have upon states' sovereign immunity.

---

[74] *See* Haines, *supra* note 57, at 158–74.

[75] THE FEDERALIST NO. 81, *supra* note 59, at 549 (emphasis added).

[76] THE FEDERALIST NO. 32, *supra* note 71, at 200.

[77] Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 67–68 n.81 (1990) (citation omitted).

[78] *See In re* Microage Corp., 288 B.R. 842, 846 (Bankr. D. Ariz. 2003).

Indeed, this issue has been such a persistent source of uncertainty that it was not unambiguously and definitively addressed by the Supreme Court until the *Seminole Tribe* decision in 1996.[79] Thus, whether one characterizes Hamilton's cross-reference as merely "coy"[80] or a "furtive attack on state sovereign immunity,"[81] Hamilton tread as lightly as possible when he approached the very thin ice surrounding this issue for the very simple reason that he did not wish to visibly broach or (even worse) breach it. Hamilton was an obvious supporter of the Constitution, and as subsequent events confirmed, state sovereign immunity was a hot-button issue of the day.[82] It is not at all surprising, therefore, that the politically savvy Hamilton would purposely evade an unnecessary over-stirring of the state sovereign immunity pot.

Ultimately, though, the *Katz* majority's "analysis d[id] not rest on the peculiar [uniformity language in the] text of the Bankruptcy Clause as compared to other Clauses of Article I."[83] Rather, the Court relied upon other evidence to conclude that the Framers considered state sovereign immunity "absolutely and totally *contradictory* and *repugnant*" to federal bankruptcy legislation.[84]

B. Does the Framers' Authorization of In Rem *Federal Bankruptcy Proceedings Indicate an Intent to Abrogate States' Sovereign Immunity in All Bankruptcy Proceedings? Not Really.*

The *Katz* majority purported to be "[r]elying in part on [the *in rem*] reasoning in *Hood*"[85] in concluding "that the Bankruptcy Clause of Article I . . . simply did not contravene the norms this Court has understood the Eleventh Amendment to exemplify."[86] Thus, the *Katz* majority emphasized that "[b]ankruptcy jurisdiction, at its core, is *in rem*;"[87] and "[t]hat was as true in the 18th century as it is today. Then, as now, the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the administration and

---

[79] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[80] Jackson, *supra* note 77, at 67–68 n.81.

[81] David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935, 948 (1997).

[82] The *Chisholm v. Georgia* decision, 2 U.S. (2 Dall.) 419 (1793), was handed down on February 18, 1793, and the first proposal to reverse that decision by constitutional amendment was introduced in the House of Representatives the very next day. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 196 (1997); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 101 (rev. ed. 1926). With all deliberate speed (by March 4, 1794), both houses of Congress approved what would become the Eleventh Amendment, which was ratified by the requisite number of state legislatures by February 7, 1795, less than two years after the *Chisholm* decision. (Because of delays in official certification of the ratifications, though, the Eleventh Amendment did not become effective until January 8, 1798.) *See* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 12, 19–20 (1987); CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 66–67 (1972); WARREN, *supra*, at 101 & n.2.

[83] Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1004 n.13 (2006).

[84] THE FEDERALIST NO. 32, *supra* note 71, at 200.

[85] *Katz*, 126 S. Ct. at 994.

[86] *Id.* at 1003.

[87] *Id.* at 995.

distribution of the res."[88] According to the *Katz* Court, "[b]ankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction."[89] Then the Court reasoned, "[a]s we noted in *Hood*, [*in rem* bankruptcy jurisdiction] does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction,"[90] and "[a]s such, its exercise does not, in the usual case, interfere with state sovereignty even when States' interests are affected."[91]

Of course, federal bankruptcy jurisdiction has *never* been exclusively *in rem* in nature, and is even less so today, given "the modern shift away from *in rem* as the jurisdictional paradigm."[92] *Hood*'s *in rem* reasoning, therefore, implies only a limited bankruptcy exception to state sovereign immunity for those bankruptcy proceedings properly characterized as *in rem*. At times, the *Katz* opinion, likewise, suggested that the bankruptcy exception contemplated by the Framers was a limited one:

> The scope of [states'] consent [in the plan of the Convention] was limited; the jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*—a narrow jurisdiction that does not implicate state sovereignty to the same degree as other kinds of jurisdiction. But while the principal focus of the bankruptcy proceedings is and was always the res, some exercises of bankruptcy courts' powers . . . unquestionably involved more than mere adjudication of rights in a res.[93]

An *in rem* bankruptcy exception to states' sovereign immunity, therefore, could not justify the preference actions for *in personam* money judgments against the state-agency defendants in *Katz*.[94] Indeed, the discharge and dischargeability proceedings at issue in *Hood* were much more properly characterized as *in personam*, rather than *in rem*, even according to the *Hood* Court's own criteria for making that determination.[95]

What's more, the *Katz* majority actually acknowledged that "it was at least arguable" that the dischargeability proceeding at issue in *Hood* "could have been

---

[88] *Id.* at 996.
[89] *Id.* at 1000.
[90] *Id.* at 995.
[91] *Id.* at 1000.
[92] Menk v. Lapaglia (*In re* Menk), 241 B.R. 896, 914–15 & n.8 (B.A.P. 9th Cir. 1999) (citing Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an* In Rem *Model of Bankruptcy Jurisdiction*, 15 EMORY BANKR. DEV. J. 261 (1999)).
[93] *Katz*, 126 S. Ct. at 1005; *see also id.* at 996 ("[T]he Bankruptcy Clause . . . was intended . . . to authorize limited subordination of state sovereign immunity in the bankruptcy arena."); *id.* at 1004 ("[T]he power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere.").
[94] The Court, though, made a feeble, half-hearted attempt to suggest otherwise, by noting that Katz's complaint had sought, "in the alternative, both return of the 'value' of the preference, see 11 U.S.C. § 550(a), and return of the actual 'property transferred,' *ibid.*" *Katz*, 126 S. Ct. at 1001 n.10.
[95] *See* Brubaker, *From Fictionalism to Functionalism*, *supra* note 6, at 84–98.

characterized as a suit against the State rather than a purely *in rem* proceeding."[96] *Katz*, therefore, offered a revised explanation for the *Hood* decision. Notwithstanding the fact that the dischargeabilty proceeding at issue was *in personam*, "because the proceeding was merely ancillary to the Bankruptcy Court's exercise of its *in rem* jurisdiction, we held that it did not implicate state sovereign immunity."[97] Thus, the *Katz* Court concluded that "it is not necessary to decide whether actions to recover preferential transfers . . . are themselves properly characterized as *in rem*."[98] As this author predicted after *Hood*, then, "the 'bankruptcy exception' to state sovereign immunity firmly solidified in *Hood* may, at the end of the day, have nothing at all to do with whether the particular bankruptcy proceeding at issue is properly characterized as *in rem* or *in personam* in some unknowable and (apparently) infinitely manipulable sense."[99]

Nonetheless, *Katz* suggests that the key to the bankruptcy exception to state sovereign immunity is the relationship between the proceeding at issue and some res within the bankruptcy court's control—an exception for "*in rem* adjudications and orders ancillary thereto."[100] Thus, the Court stated that "[i]nsofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction . . . implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity."[101] Further the Court hinted that the contemplated ancillary relationship necessarily was a rather close one: "In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings *necessary to effectuate* the *in rem* jurisdiction of the bankruptcy courts."[102] Additionally, the Court provided an example with respect to preference actions:

> The interplay between *in rem* adjudications and orders ancillary thereto is evident in the case before us. Respondent first seeks a determination under 11 U.S.C. § 547 that the various transfers made by the debtor to petitioners qualify as voidable preferences. The § 547 determination, standing alone, operates as a mere declaration of avoidance. That declaration may be all that the trustee wants; for example if the State has a claim against the bankrupt estate, the avoidance determination operates to bar that claim until the preference is turned over. *See* § 502(d). In some cases, though, the trustee, in order to marshal the entirety of the debtor's estate, will need to recover the subject of the transfer pursuant to § 550(a). A court order mandating turnover of the

---

[96] *Katz*, 126 S. Ct. at 1001.
[97] *Id.*
[98] *Id.*
[99] Brubaker, *From Fictionalism to Functionalism*, *supra* note 6, at 121.
[100] *Katz*, 126 S. Ct. at 1001.
[101] *Id.* at 1002.
[102] *Id.* at 1005 (emphasis added).

> property, although ancillary to and in furtherance of the court's *in rem* jurisdiction, might itself involve *in personam* process.[103]

This, of course, is similar to the reasoning famously employed in *Katchen v. Landy*[104] to permit an *in personam* money judgment on a preference cause of action (also interposed as an objection to the defendant's claim against the bankruptcy estate) through a summary proceeding (without any constitutional right to a jury trial) typically reserved only for *in rem* matters.[105] In *Katz*, though (and unlike *Katchen*), the Court did *not* require that such an ancillary relationship between the *in rem* claim objection and *in personam* preference action *actually exist* in order to negate a state's constitutional sovereign immunity from an *in personam* preference judgment. Indeed, the Court made no mention of whether the *Katz* defendants had (or had not) filed claims against the debtor's bankruptcy estate nor of whether the liquidation trustee had (or had not) filed a section 502(d) objection to any such claims (asserting receipt of preferential transfers).

Under the holding of *Katz*, then, whether an *in personam* bankruptcy proceeding against a state is actually "ancillary to and in furtherance of the court's *in rem* jurisdiction"[106] is quite irrelevant to whether the state has sovereign immunity in that *in personam* proceeding, despite the Court's elaborate exegesis thereon. Similarly, the *Hood* holding that states have no constitutional sovereign immunity in discharge and dischargeability proceedings, cannot be justified as merely permitting *in personam* orders ancillary to and in effectuation of *in rem* adjudications:

> In fact, in most bankruptcy cases, there is no *res* at all, as the vast majority of all bankruptcy cases are so-called "no asset" cases, in which the debtor has *no* nonexempt assets to be administered in bankruptcy proceedings. In such a case, it makes no sense whatsoever to speak of the *res* of an empty bankruptcy estate; the *only* issue at stake in a "no asset" case is discharge of the debtor's personal liability on debts.[107]

So how did the *Katz* Court deal with the fact that many federal bankruptcy proceedings are *not* ancillary to and in effectuation of any *in rem* adjudication (and there was nothing to indicate whether that was the case in *Katz* either)? The *Katz* majority simply asserted the following *ipse dixit*, illogical *non sequitur*: Because the Framers would not have intended states to retain sovereign immunity in *in rem* bankruptcy proceedings, they could not have intended states to retain sovereign immunity in *any and all in personam* bankruptcy proceedings! Thus, the *Katz*

---

[103] *Id.* at 1001.
[104] 382 U.S. 323 (1966).
[105] *See id.* at 333–40.
[106] *Katz*, 126 S. Ct. at 1001.
[107] Brubaker, *Statutory* Ex parte Young *Relief*, *supra* note 39, at 544.

majority reasoned that "[t]he Framers would have understood the laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the res."[108] And evidently all such *in personam* bankruptcy proceedings are "absolutely and totally *contradictory* and *repugnant*"[109] to state sovereign immunity, according to *Katz*, because "[t]he text of Article I, § 8, cl. 4 of the Constitution . . . encompasses the entire 'subject of Bankruptcies.' The power granted to Congress by that Clause is a unitary concept rather than an amalgam of discrete segments."[110] "Whatever the appropriate appellation [*in rem* or *in personam*], those who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover transferred property."[111] The conclusion to be drawn therefrom, according to *Katz*, is that this authority "operates free and clear of the State's claim of sovereign immunity."[112]

It simply does not follow, however, that because the Framers may have contemplated that states would have no sovereign immunity in certain bankruptcy proceedings (such as *in rem* proceedings) that the Framers must have contemplated that states would have no sovereign immunity in any and all bankruptcy proceedings. The only example the Court could offer in support of this extraordinary leap of logic is one that the Framers would *not* have considered to even implicate principles of state sovereign immunity.

C. Does the Framers' Authorization of a Federal Habeas Corpus Power to Discharge Imprisoned Debtors Indicate an Intent to Abrogate States' Sovereign Immunity in Bankruptcy Proceedings? Not Really.

The term "discharge," in reference to a debtor, originated in the discharge's initial historical function of discharging an imprisoned debtor from the custody of the gaolor—a form of relief that has waned with the gradual demise of the debtors' prison, but that is still implicit in the federal bankruptcy discharge. Historically, the practice of imprisonment of a debtor at the instance of an unpaid creditor was prominent and persistent in England beginning in the late thirteenth century[113] and

---

[108] *Katz*, 126 S. Ct. at 1000.
[109] THE FEDERALIST NO. 32, *supra* note 71, at 200.
[110] *Katz*, 126 S. Ct. at 1000.
[111] *Id.* at 1001–02.
[112] *Id.* at 1002.
[113] *See* 8 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 230–32 (1926); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 389 (5th ed. 1956); Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of the Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 154–55 (1982); Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 226–27 (1976); Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 7–8 (1919) [hereinafter Levinthal, *English Bankruptcy*]; Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 328 & n.15 (1991) [hereinafter Tabb, *Discharge History*]; Charles Jordan Tabb, *The History of Bankruptcy Law in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995) [hereinafter Tabb, *History of Bankruptcy*]. Personal slavery in satisfaction of debts existed even earlier, under Anglo-Saxon law, until the Conquest in 1066. *See* PLUCKNETT, *supra*, at 389; 2 SIR FREDERICK

continuing for over six hundred years until finally abolished in England in 1869.[114] English discharge legislation was first enacted by the Interregnum Parliament in 1649,[115] and the term "discharge" was used therein to connote "Discharge of the person of such Debtor" "of and from his or her Imprisonment."[116] Indeed, in discharge legislation throughout the remainder of the seventeenth century, "the effort of Parliament . . . had to do with discharge from custody of imprisoned debtors," but left creditors' other remedies against the discharged debtor intact, such that "a creditor might continue to seek collection from a debtor discharged from custody."[117] It was not until 1705 that Parliament enacted a "discharge" that functioned in the modern sense of discharging the debtor's liability on debts.[118] Discharge from the gaol, though, remained an essential feature of the English discharge.[119]

POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 596 (2d ed. 1898); Tabb, *Discharge History*, *supra*, at 332 n.41.

[114] *See* Debtor's Act of 1869, 32 & 33 Vict., ch. 62, § 4. Even then, though, there were enumerated exceptions to the ban that permitted imprisonment for up to one year for default in payment of certain debts. *See id.*; Cohen, *supra* note 113, at 164, 171 n.116; Tabb, *Discharge History*, *supra* note 113, at 332 n.41.

[115] *See* An Act for discharging Poor Prisoners unable to satisfy their creditors (Sept. 4, 1649), *reprinted in* 2 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 240–41 (C.S. Firth & R.S. Rait eds., 1911) [hereinafter Firth & Rait]; Cohen, *supra* note 113, at 158; Levinthal, *English Bankruptcy*, *supra* note 113, at 18–19; John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 177 & n.77 (1996) [hereinafter McCoid, *Discharge*].

[116] 2 Firth & Rait, *supra* note 115, at 241, 240. Discharge in this sense of discharging the debtor from imprisonment has ancestry in the Roman law of cession (*cessio bonorum*). *See* WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAW OF ENGLAND *473 (1765); 1 FRANK O. LOVELAND, A TREATISE ON THE LAW AND PROCEEDINGS IN BANKRUPTCY § 1 (4th ed. 1912); 1 HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 1, at 4–5 (James H. Henderson ed., 5th ed. 1950); Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 238 (1918) [hereinafter Levinthal, *Bankruptcy Law*]; James Olmstead, *Bankruptcy a Commercial Regulation*, 15 HARV. L. REV. 829, 832 (1902).

[117] McCoid, *Discharge*, *supra* note 115, at 178–79 (1996); *see* 8 HOLDSWORTH, *supra* note 113, at 234–36; Cohen, *supra* note 113, at 158–59; Ian P. H. Duffy, *English Bankrupts, 1571-1861*, 24 AM. J. LEGAL HIST. 283, 285–86 (1980). These statutes were generally referred to as "insolvency" laws to distinguish them from "bankruptcy" law, which was applicable only to "traders" from 1570 until 1861. *See* THOMAS K. FINLETTER, THE LAW OF BANKRUPTCY REORGANIZATION 21 (1939); 8 HOLDSWORTH, *supra* note 113, at 233; Cohen, *supra* note 113, at 159; Duffy, *supra*, at 283; Olmstead, *supra* note 116, at 832; Tabb, *Discharge History*, *supra* note 113, at 327 n.11, 334–35 n.59.

[118] *See* 4 Anne, ch. 17, § 7 (1705) (providing upon compliance with statute, "all and every person and persons so becoming bankrupt . . . shall be discharged from all debts by him, her, or them due and owing at the time that he, she, or they did become bankrupt"). The 1705 legislation, for the first time, incorporated a discharge as a feature of the "bankruptcy" law applicable to traders. *See* 1 LOVELAND, *supra* note 116, § 3, at 5; JAMES ANGELL MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY § 26, at 20–21 (1956); 1 REMINGTON, *supra* note 116, § 5, at 14; Vern C. Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1, 36 (1971) [hereinafter Countryman, *New Dischargeability Law*]; Levinthal, *English Bankruptcy*, *supra* note 116, at 18–20; Tabb, *Discharge History*, *supra* note 113, at 333. Thereafter, one of the important distinctions between the "bankruptcy" law and "insolvency" laws was that insolvency laws functioned only to discharge the nontrader debtor from imprisonment, whereas bankruptcy also discharged the trader bankrupt's personal liability on discharged debts. *See* Cohen, *supra* note 113, at 159; Olmstead, *supra* note 116, at 832; Tabb, *Discharge History*, *supra* note 113, at 327 n.11.

[119] *See* 4 Anne, ch. 17, §§ 7, 13; Duffy, *supra* note 117, at 287. In this regard, Daniel Defoe, a prominent commentator of the day who had himself spent time in debtors' prison, characterized the 1705 legislation as "one of the best Bills that ever was produc'd in Parliament, since the *Habeas Corpus* Act, for Securing the

Imprisonment for debt also became an accepted creditors' remedy in the American colonies[120] and post-Revolution states.[121] Thus, at the time of the Framing, "[i]mprisonment for debt, an institution inherited from the mother country, had become one of the great plagues of the time."[122] The American colonies and post-Revolution states adopted a variety of bankruptcy and insolvency systems providing for discharge of debtors from imprisonment and liability on their debts.[123]

Liberty of the Subject." 3 DANIEL DEFOE, A REVIEW OF THE STATE OF THE ENGLISH NATION No. 36 (Arthur Wellesley 2d ed., Columbia Univ. Press 1938) (Mar. 23, 1706); *see* McCoid, *Discharge*, *supra* note 115, at 169–73 (discussing Defoe's contemporary commentary); John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 EMORY BANKR. DEV. J. 361, 362–67 (1988) [hereinafter McCoid, *Origins*] (providing excellent account of Defoe's experience with, and influence upon, English bankruptcy law). The English bankruptcy law in effect throughout the period covering the American Revolution, the Constitutional Convention, and enactment of the first American bankruptcy statute in 1800, likewise, provided that "in case any such bankrupt shall afterwards be arrested [or] prosecuted . . . for any [discharged] debt . . . such bankrupt shall be discharged upon common bail . . . and the certificate of such bankrupt's [discharge] . . . shall be, and shall be allowed to be sufficient evidence of the . . . bankruptcy . . . and a verdict shall therefore pass for the defendant." 5 Geo. 2, ch. 30, § 7 (1732). Moreover, the statute went on to provide as follows:

> [I]f any bankrupt who shall have obtained his certificate [of discharge] . . . shall be taken in execution, or detained in prison, on account of any debts due or owing before he or she became bankrupt, by reason that judgment was obtained before such certificate was allowed and confirmed, it shall and may be lawful for one or more of the judges of the court, wherein judgment has been so obtained against such bankrupt, on such bankrupt's producing his or her certificate . . . to order any sheriff or sheriff's bailiff, or officer, gaoler or keeper of any prison who hath or shall have any such bankrupt in his custody, by virtue of any such execution, to discharge such bankrupt out of custody on such execution, without payment of any fee or reward . . .

Id. § 13; *see* Tabb, *Discharge History*, *supra* note 113, at 340–41, 342, 344.

[120] "By the end of the seventeenth century the debtors' prison had become an established colonial institution," such that "lenders on both sides of the Atlantic had come to believe that the power to imprison a defaulter was a 'right,' and that it had existed since time immemorial." PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900, at 249, 247 (1974).

[121] Because of adoption of debtor relief measures in many of the colonies and new states, "it is clear that by the Revolution creditors had lost, or were in the process of losing, their absolute power of confinement." COLEMAN, *supra* note 120, at 254; *see* F. REGIS NOEL, HISTORY OF THE BANKRUPTCY LAW ch. 3 (1919); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 6–7 (1972); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 54–56 (1986); McCoid, *Origins*, *supra* note 119, at 367–71; Tabb, *History of Bankruptcy*, *supra* note 113, at 12–13; Tabb, *Discharge History*, *supra* note 113, at 345. "Nevertheless, the high incidence of default in the generation after the Revolution made the debtors' prison a visibly obnoxious feature of American life." COLEMAN, *supra* note 120, at 254; *see* WARREN, *supra*, at 10–13; Countryman, *New Dischargeability Law*, *supra* note 118, at 28; Tabb, *Discharge History*, *supra* note 113, at 344.

[122] Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 223–24 (1957).

[123] *See generally* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 44–77, 177–80 (2002); sources cited *supra* notes 120–121. The most widespread form of relief was based on the oldest form of discharge legislation—a so-called insolvency law—a "concept borrowed from England—the idea that prisoners who were genuinely impoverished or who were willing to assign all of their property for the benefit of their creditors should be released from prison." COLEMAN, *supra* note 120, at 252. Moreover, "a few colonies permitted the outright discharge of debts through

The Framers' perceived need for bankruptcy legislation at the federal level nonetheless, is likely explained by inadequacies in enforcement of state discharge legislation.[124]

Because release of imprisoned debtors is one of the primary historical functions of a bankruptcy discharge, there can be little doubt that the Framers of the Constitution contemplated that Congress's power under the Bankruptcy Clause "[t]o establish . . . uniform Laws on the subject of Bankruptcies" included a federal discharge power that would operate directly upon state officials. Likewise, "[t]he judicial function in bankruptcy was certainly clear to the Framers of the Constitution."[125] Thus, the earliest federal bankruptcy legislation, the Bankruptcy Act of 1800,[126] expressly provided that a debtor was immune from imprisonment on a discharged debt[127] and expressly provided a federal habeas corpus remedy for enforcement of the federal bankruptcy discharge.[128] Pursuant thereto, "[t]he order

---

bankruptcy proceedings." *Id*. at 10. "Giving a colonial twist to the general assignment concept, . . . they discharged broken defaulters from their debts as well as from prison," and "more [of these] discharge laws were enacted just before, during, and immediately after the Revolution than in the entire colonial period." *Id*. at 270, 272.

[124] *See generally* Brubaker, *From Fictionalism to Functionalism*, *supra* note 6, at 84–85.

[125] Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 808 n.234 (2000) [hereinafter Brubaker, *A Theory of Federal Bankruptcy Jurisdiction*].

[126] Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (amended 1801, 1802 and repealed 1803) [as amended, hereinafter Bankruptcy Act of 1800], *reprinted in* 10 COLLIER ON BANKRUPTCY 1721-37 (James Wm. Moore et al. eds., 14th ed. 1978) [hereinafter COLLIER (14th ed.)].

[127] In language nearly identical to the English bankruptcy statute then in force (*see supra* note 119), the 1800 Act provided that "in case any such bankrupt shall afterwards be arrested [or] prosecuted . . . for or on account of any of the said [discharged] debts, such bankrupt may appear without bail . . . . And the certificate of such bankrupt's [discharge] . . . shall be, and shall be allowed to be, sufficient evidence, *prima facie*, of the party's being a bankrupt . . . and a verdict shall thereupon pass for the defendant." *See* Bankruptcy Act of 1800, *supra* note 126, § 34.

[128] The 1800 Act adopted, but modified the language of the English bankruptcy statute then in force (*see supra* note 119) as follows:

> [I]f any bankrupt, who shall have obtained his certificate [of discharge], shall be taken in execution or detained in prison, on account of any debts owing before he became a bankrupt, by reason that judgment was obtained before such certificate was allowed, it shall be lawful for any of the judges of the court wherein judgment was so obtained, *or for any court, judge, or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of habeas corpus*, on such bankrupt producing his certificate . . . to order any sheriff or gaoler who shall have such bankrupt in custody, to discharge such bankrupt without fee or charge . . . .

Bankruptcy Act of 1800, *supra* note 126, § 38 (emphasis added); *see* THOMAS COOPER, THE BANKRUPT LAW OF AMERICA COMPARED WITH THE BANKRUPT LAW OF ENGLAND 361 (Fred B. Rothman & Co. 1992) (1801) ("Bankrupt may be discharged on motion, if he hath obtained his certificate . . . before *any* judge having power to issue *hab. corpus*." (emphasis added)). The 1800 Act also provided a mechanism for interim discharge from imprisonment of the bankrupt during the pendency of the proceedings, "*Provided*, that . . . such discharge shall be no bar to another execution, if a certificate shall be refused to such bankrupt." Bankruptcy Act of 1800, *supra* note 126, § 60. Indeed, although imprisonment for debt was largely abolished by the end of the nineteenth century, even the Bankruptcy Act of 1898 (effective until 1978)

for the discharge [wa]s directed to the officer or person holding the bankrupt under arrest," and "[a]n officer of the State court, notwithstanding he holds a valid warrant, [wa]s obliged to release the bankrupt when so ordered by the bankruptcy court," because "[d]isobedience to the order [wa]s punishable as a contempt."[129]

Thus, the one circumstance the Framers undoubtedly had in mind in which it would be absolutely necessary for a federal bankruptcy court to issue an order running directly against a state or its official agents was the writ of habeas corpus to compel release of debtors imprisoned by states upon debts to be discharged in federal bankruptcy proceedings. For the *Katz* Court, this (and this alone) indicates that the Framers must have intended the Bankruptcy Clause to abrogate any sovereign immunity the states might otherwise enjoy in federal bankruptcy proceedings.

> [T]he provision of the 1800 Act granting that [habeas corpus] power was considered and adopted during a period when state sovereign immunity could hardly have been more prominent among the Nation's concerns. *Chisholm v. Georgia*, the case that had so "shock[ed]" the country in its lack of regard to state sovereign immunity, was decided in 1793. The ensuing five years that culminated in adoption of the Eleventh Amendment were rife with discussions 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.
>
> . . . .
>
> The ineluctable conclusion, then, is 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."[130]

The habeas corpus power of the federal courts to order the release of state prisoners on the authority of state law, however, is not one that even implicates states' sovereign immunity against suit. As the Supreme Court acknowledged in the monumental *Ex parte Young*[131] decision, "[t]he right to so discharge has not been

---

contained express provision protecting debtors from arrest and confinement upon dischargeable debts, enforceable by write of habeas corpus from a federal district court sitting in bankruptcy. Moreover, the original Bankruptcy Reform Act of 1978 expressly granted habeas corpus powers to the newly created bankruptcy courts, and despite subsequent repeal of that particular provision in 1984, federal habeas corpus relief is still recognized as the appropriate remedy to secure a debtor's release from imprisonment in contravention of a federal bankruptcy discharge. *See generally* Brubaker, *Statutory* Ex parte Young *Relief*, *supra* note 39, at 508–09.

[129] WM. MILLER COLLIER, THE LAW OF BANKRUPTCY AND THE NATIONAL BANKRUPTCY ACT OF 1898, at 96 (1899).

[130] Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1003–04 (2006) (citations omitted).

[131] 209 U.S. 123 (1908).

doubted by this court, and it has *never* been supposed that there was any suit against the state [barred by sovereign immunity] by reason of serving the writ upon one of the officers of the state in whose custody the person was found."[132]

In a footnote, the *Katz* majority acknowledged, but summarily dismissed this obvious problem with its heavy reliance on the habeas corpus power implicit in the Constitution's Bankruptcy Clause:

> One might object that the writ of habeas corpus was no infringement on state sovereignty, and would not have been understood as such, because that writ, being in the nature of an injunction against a state official, does not commence or constitute a suit against the State. While that objection would be supported by precedent today, it would not have been apparent to the Framers. The *Ex parte Young* doctrine was not finally settled until over a century after the Framing and the enactment of the first bankruptcy statute.[133]

This, however, is a distortion of the historical pedigree of the habeas corpus power vis-à-vis the immunity of the sovereign against suit. In England, *habeas corpus ad subjiciendum*, the "Great Writ" of freedom, was one of the so-called "high prerogative" writs of the King's Bench by which "English law provided the individual subject with remedies against the King's officers," and "individuals were entitled to bring petitions for . . . the 'high prerogative writs'" without the consent of the King.[134] Consequently, these writs "were not thought to involve the doctrine of sovereign immunity,"[135] and the Supreme Court's early case law "domesticated these concepts in the face of the eleventh amendment" through what eventually coalesced into the *Ex parte Young* doctrine.[136]

Hence, the *Katz* dissenters (in an opinion authored by Justice Thomas) rightly pointed out that "[t]he availability of habeas relief in bankruptcy [contemplated at the Founding] does not support respondent's effort to obtain monetary relief in bankruptcy against state agencies today."[137]

> The habeas writ was well established by the time of the Framing, and consistent with then-prevailing notions of sovereignty. In *Ex parte Young*, this Court held that a petition for the writ is a suit against a state official, not a suit against a State, and thus does not

---

[132] *Id.* at 168 (emphasis added).

[133] *Katz*, 126 S. Ct. at 1005 n.14 (2006) (citations omitted); *accord* Haines, *supra* note 57, at 187–92.

[134] James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 917–18 (1997).

[135] Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963).

[136] *Id.* at 28. *See generally* Brubaker, *Statutory* Ex parte Young *Relief*, *supra* note 39, at 484–86.

[137] *Katz*, 126 S. Ct. at 1011 (Thomas, J., dissenting).

> offend the Eleventh Amendment.
>
> . . . .
>
> This Court has reaffirmed *Young* repeatedly—including in *Seminole Tribe*. Although the majority observes that *Young* was not issued "until over a century after the Framing and the enactment of the first bankruptcy statute," this observation does nothing to reconcile the majority's analysis with *Young*, as the majority does not purport to question the historical underpinnings of *Young*'s holding. The availability of federal habeas relief to debtors in state prisons thus has no bearing whatsoever on whether the Bankruptcy Clause authorizes suits against the States for money damages.[138]

Judge Haines (on whom the *Katz* majority relied) makes much of the fact that the general *Ex parte Young* doctrine "and its historical evolution was so long and tortured that it is impossible to conclude the Framers would have been content to rely upon this sort of thinking to achieve their fundamental purpose, to provide a uniform federal rule for the discharge of debtors from state prisons."[139] The Framers, however, did not need to rely upon a more *generalized* notion permitting state-officer suits (such as that set forth in *Ex parte Young*) in order to achieve their fundamental purpose of providing for a federal habeas corpus power under federal bankruptcy legislation; that *specific* remedy (habeas corpus) was already firmly established, and it did *not* implicate sovereign immunity. The fact that a more generalized framework permitting state-officer suits was not fully developed and refined at the time of the Founding does nothing to cast uncertainty on the unquestioned availability of the specific remedy of habeas corpus. As Justice Thomas's dissent pointed out, "habeas relief simply d[id] not offend the Framers' view of state sovereign immunity."[140]

The historical antecedents of the *Ex parte Young* doctrine, as understood at the time of the Framing, fully accommodate the Framers' obvious designs for a habeas corpus power in federal bankruptcy courts against which the states would enjoy no sovereign immunity. The historical record, though, provides no similar clarity regarding the Framers' collective intentions for states' sovereign immunity with respect to any other orders of a federal bankruptcy court. Thus, the fact that the new federal Bankruptcy Power would necessarily involve a federal habeas corpus power says *nothing* about whether the states understood that they were surrendering their sovereign immunity with respect to any and all bankruptcy causes of action to which Congress might ever choose to subject them, simply because they were ratifying a federal habeas corpus power in bankruptcy.

---

[138] *Id.* (citations omitted).
[139] Haines, *supra* note 57, at 188.
[140] *Katz*, 126 S. Ct. at 1011 n.6 (Thomas, J., dissenting).

D. Does the Constitution's Grant of Exclusive Federal Power Over Bankruptcy Indicate an Intent to Abrogate States' Sovereign Immunity in Bankruptcy Proceedings? Evidently So.

Once we've dispensed with (1) the ambiguous cross-reference between *The Federalist* Nos. 81 and 32, (2) the federal bankruptcy courts' *in rem* jurisdiction, and (3) the federal habeas corpus power to discharge imprisoned debtors, as altogether insufficient to justify the holding in *Katz*, we are left with the *Katz* Court's conclusion that "the Bankruptcy Clause . . . reflects the States' acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law sovereign immunity defenses that might have been asserted in bankruptcy proceedings."[141] Thus, the majority opinion in *Katz* recounted the inadequacies in the bankruptcy and insolvency systems of the American colonies and post-Revolution states that led to the insertion of the Bankruptcy Clause in the Constitution, authorizing federal preemption of state laws with uniform national bankruptcy legislation.[142]

Indeed, the most basic function of the Bankruptcy Clause is the one described by Hamilton in *The Federalist* No. 32 as essentially a constitutional preemption of state laws—that uniform national bankruptcy laws are "incompatible with state legislation, on that part of the subject to which the acts of congress may extend."[143] From this "history of the Bankruptcy Clause [and] the reasons it was inserted in the Constitution," the *Katz* Court concluded that the Bankruptcy Clause "was intended not just as a grant of legislative authority to Congress, but also to authorize . . . subordination of state sovereign immunity in the bankruptcy arena."[144] The *Katz* Court reasoned that Congress's "power to do so arises from the Bankruptcy Clause itself," and "the relevant 'abrogation' is the one effected in the plan of the Convention."[145]

Had *Seminole Tribe* never been decided, this might be a perfectly sensible reconciliation of federal legislative power with states' sovereign immunity. The entire thrust and significance of the *Seminole Tribe* decision, though, was in its absolute decoupling of any previously suggested linkage between federal legislative/regulatory powers and states' surrender of sovereign immunity. Indeed, Justice Brennan's plurality opinion in *Union Gas* (subsequently overruled by *Seminole Tribe*) premised Congress's power to abrogate state sovereign immunity under the Commerce Clause upon precisely such a constitutional preemption theory:

> Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the

---

[141] *Katz*, 126 S. Ct. at 996.
[142] *See id.* at 997–98.
[143] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 194 (1819) (Marshall, C.J.).
[144] *Katz*, 126 S. Ct. at 996.
[145] *Id.* at 1005.

> 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 . . . gave their consent all at once, in ratifying the Constitution containing the Commerce Clause . . . .[146]

By emphasizing the preemptive effect of the so-called dormant Commerce Clause in prohibiting the states from certain regulatory activities, Justice Brennan asserted that with respect to state sovereign immunity "it is constitutionally significant whether a grant of power to Congress of its own force restricts the states."[147]

In overruling *Union Gas*, though, the *Seminole Tribe* Court specifically rejected this aspect of Justice Brennan's plurality opinion in *Union Gas*:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embedded in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.[148]

As the dissenters in *Katz* pointed out, then, it is extremely difficult to reconcile the *Katz* decision with the theory of state sovereign immunity underlying *Seminole Tribe*:

> The Framers undoubtedly wanted to give Congress the authority to enact a national law of bankruptcy, as the text of the Bankruptcy Clause confirms. But the majority goes further, contending that the Framers found it intolerable that bankruptcy laws could vary from State to State, and demanded the enactment of a single, uniform national body of bankruptcy law. The majority then concludes that, to achieve a uniform national bankruptcy law, the Framers must have intended to waive the States' sovereign immunity against suit . . . .
>
> In contending that the States waived their immunity from suit by adopting the Bankruptcy Clause, the majority conflates two distinct

---

[146] Pennsylvania. v. Union Gas Co., 491 U.S. 1, 19–20 (1989) (Brennan, J., plurality opinion).
[147] Jackson, *supra* note 77, at 66.
[148] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996).

> attributes of sovereignty: the authority of a sovereign to enact legislation regulating its own citizens, and sovereign immunity against suit by private citizens. Nothing in the history of the Bankruptcy Clause suggests that, by including that clause in Article I, the founding generation intended to waive the latter aspect of sovereignty. These two attributes of sovereignty often do not run together—and for purposes of enacting a uniform law of bankruptcy, they need not run together.[149]

Indeed, the Court's previous decision in *Hoffman* held that in the absence of a valid congressional abrogation of state sovereign immunity, states *do* have constitutional sovereign immunity in at least some federal bankruptcy proceedings, including a trustee's suit in that case to recover pre-petition preferential transfers to a state.[150] Thus, although the *Katz* majority nowhere acknowledges this, the *Katz* holding effectively overrules *Hoffman*.[151]

Katz, then, might be taken as simply disagreement with (and an erosion of) the state sovereign immunity framework constructed in *Seminole Tribe* and *Alden*, and that is the accusation leveled by the *Katz* dissenters.[152] With respect to the four justices in the *Katz* majority who dissented in both *Seminole Tribe* and *Alden* (Stevens, Souter, Ginsburg, and Breyer), there may well be a grain of truth in this accusation. They obviously think *Seminole Tribe* was wrongly decided, may well seize any opportunity to lessen its impact, and may well care little about the coherency and consistency of the post-*Seminole* jurisprudence of state sovereign immunity. The swing vote of Justice O'Connor, though, is harder to explain on this basis.

---

[149] *Katz*, 126 S. Ct. at 1008 (Thomas, J., dissenting) (citations omitted).

[150] *See* Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 100 (1989) (four-justice plurality opinion) (holding trustee's preference action was "barred by the Eleventh Amendment" because former version of Code "§ 106(c) . . . did not unequivocally abrogate Eleventh Amendment immunity" of state in action); *id.* at 105 (Scalia, J., concurring in judgment) (reiterating his *Union Gas* dissent, which subsequently prevailed in *Seminole Tribe*, that Congress has no power to abrogate states' sovereign immunity with Article I legislation). *See generally* Brubaker, *From Fictionalism to Functionalism*, *supra* note 6, at 72 & nn.53–54.

[151] Justice Thomas's dissent, though, correctly noted that "[t]he majority's departure from this Court's precedents is not limited to th[e] general [*Seminole Tribe*] framework; the majority also overrules *sub silentio* this Court's holding in *Hoffman*." *Katz*, 126 S. Ct. at 1007 (Thomas, J., dissenting).

[152] "It is difficult to discern an intention to abrogate state sovereign immunity through the Bankruptcy Clause when no such intention has been found in any of the other clauses of Article I." *Id.* at 1007 (Thomas, J., dissenting). The dissent further stated:

> 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. Nothing in the text, structure, or history of the Constitution indicates that the Bankruptcy Clause, in contrast to all of the other provisions of Article I, manifests the States' consent to be sued by private citizens.

Id. at 1014 (Thomas, J., dissenting).

Justice O'Connor, who provided the fifth and deciding vote for the majority in *Katz*, joined the majority opinions in both *Alden* and *Seminole Tribe*.[153] Furthermore, to join the majority in *Katz*, Justice O'Connor essentially repudiated her previously announced position "that Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause."[154] Justice O'Connor's vote with the *Katz* majority indicates that she was convinced that there *is* something different about the Bankruptcy Clause, as compared to Congress's other Article I legislative powers, that makes state sovereign immunity "absolutely and totally *contradictory* and *repugnant*"[155] to federal bankruptcy legislation. Can one legitimately reconcile *Katz* with the theory of *Seminole Tribe*? Perhaps so, but not on the rationales proffered by the *Katz* Court itself.

V. STATE SOVEREIGN IMMUNITY'S INTRACTABLE TRANSLATION PROBLEM AND THE NATURE OF THE FEDERAL BANKRUPTCY POWER

The ancient doctrine of sovereign immunity that the Supreme Court reinvigorated through its *Seminole Tribe* and *Alden* decisions finds its ancestry in the English common law of the Middle Ages, which recognized as "settled doctrine that the King could not be sued *eo nomine* in his own courts."[156] And it was from this firmly embedded principle that Hamilton, in *The Federalist* No. 81, could announce the general understanding of the Framers that "[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without* [*the sovereign's*] *consent*."[157] But English common law is, in a very real sense, unhelpful and irrelevant to questions of state sovereign immunity in a complex federalist system such as our own, in which the laws of two co-sovereigns are simultaneously administered in two parallel court systems.

The Constitution itself gave birth to a dramatic transformation in fundamental precepts regarding the inherent nature of sovereignty. The omnipotent unitary sovereign of the English Crown was abandoned in favor of a unique federalism conception of dual sovereigns, state and federal. Thus, Hamilton's seemingly uncomplicated, straightforward proposition that a sovereign's traditional immunity from suit, "as one of the attributes of sovereignty . . . now enjoyed by the government of every state in the union . . . will remain with the states,"[158] was anything but uncomplicated. A sovereign's traditional immunity from suit did not readily translate into the shared sovereignty of our federalism. The American

---

[153] *See* Alden v. Maine, 527 U.S. 706, 710 (1999); *Seminole Tribe*, 517 U.S. at 44. One suspects that had Justice Alito succeeded to Justice O'Connor's seat in time to hear the *Katz* case, the result might well have been just the opposite.

[154] *Hoffman*, 492 U.S. at 105 (O'Connor, J., concurring).

[155] THE FEDERALIST NO. 32, *supra* note 71, at 199–200.

[156] Jaffe, *supra* note 135, at 2.

[157] THE FEDERALIST NO. 81, *supra* note 59, at 548 (emphasis added).

[158] *Id.* at 549.

invention of federalism, with dual sovereigns, introduced sovereign immunity issues that were unknown to the unitary English sovereign.

The established sovereign prerogative to be free from suit in *its own* courts did not directly speak to the extent of states' immunity from suit in the *federal* courts of its co-sovereign. "Under the English common law, the question of immunity in a system of layered sovereignty simply could not have arisen."[159] Moreover, through consent the English Crown could freely waive its immunity, and this is the source of Hamilton's statement in *The Federalist* No. 81 raising the possibility that states might effect "a surrender of this immunity in the plan of the convention."[160] In that regard, there were very conspicuous concerns at the time about the effect that Article III's unqualified grants of federal judicial power would have on states' immunity from suit in federal court,[161] concerns that prompted Hamilton's one-paragraph response in *The Federalist* No. 81.

Exploring the novel dimensions of state sovereign immunity created by dual sovereignty reveals that Hamilton, in *The Federalist* No. 81, directly addressed only the most obvious and pressing issue of state sovereign immunity in our new federalist system (directly implicating the states' heavy Revolutionary War debts), while obscuring the more subtle and difficult issues in his unhelpful cross-reference. And since the original Constitution itself, as drafted in 1787 and subsequently ratified, did not expressly address states' sovereign immunity, the ensuing translation process has been (perhaps inevitably) extremely protracted and uneven.

A. States' Surrender of Sovereign Immunity Through the Citizen-State Diversity Clause of Article III?

One of the earliest, and certainly the most prominent road marker for the progression of state sovereign immunity is the one appended to the text of the original Constitution as the Eleventh Amendment:

> 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.[162]

The Eleventh Amendment itself, however, was only a partial, incomplete solution to state sovereign immunity's translation difficulties.

The Eleventh Amendment, by repudiating the Supreme Court's *Chisholm*

---

[159] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 157 (1996) (Souter, J., dissenting).

[160] THE FEDERALIST NO. 81, *supra* note 59, at 549.

[161] *See* Alden v. Maine, 527 U.S. 706, 715–19, 741–43 (1999); *id.* at 768–81 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 104–06, 142–46 (Souter, J., dissenting); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 17–20 (1985).

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

decision,[163] simply made clear that states did not relinquish their sovereign immunity through Article III of the Constitution, in particular, the citizen-state diversity clause of Article III at issue in the *Chisholm* case. *Chisholm* involved a federal court suit on a state contract debt, and the jurisdictional head at issue was the constitutional provision that "[t]he judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State."[164] The *Chisholm* Court held that this grant of federal judicial power superseded any sovereign immunity the State of Georgia enjoyed before ratification of the Constitution. In direct response to the holding of *Chisholm*, though, the Eleventh Amendment provides, "[t]he 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."[165]

Thus, the text of the Eleventh Amendment was narrowly tailored to directly address the *Chisholm* holding, and in fact, this was also precisely the situation Hamilton had directly addressed in *The Federalist* No. 81:

> Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds: It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.[166]

In addressing this concern, immediately after acknowledging that states might effect a surrender of their sovereign immunity in the plan of the convention, Hamilton continued, however, as follows:

> [T]here is no colour to pretend that the state governments, would by adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligation of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorise suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal

---

[163] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
[164] U.S. CONST. art. III, § 2, cl. 1.
[165] U.S. CONST. amend. XI (emphasis added).
[166] THE FEDERALIST NO. 81, *supra* note 59, at 548.

> courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.[167]

The Eleventh Amendment, then, definitively resolved *only* the question of whether states forfeited their sovereign immunity under the citizen-state diversity clause of Article III. Whether the states otherwise surrendered their sovereign immunity by the compact of the Constitution, however, remained unresolved and the subject of extensive debate for another 200 years.[168]

B. States' Surrender of Sovereign Immunity Through Congress's Article I Legislative Powers?

The text of the Eleventh Amendment itself would appear to assure the states immunity from suit "only when the *sole basis* of federal jurisdiction is the diversity of citizenship that it describes."[169] This presented the possibility that the states relinquished their sovereign immunity by the Constitution's grants of Article I legislative powers to Congress.

The logic of this proposed translation of state sovereign immunity was that Congress could impose obligations upon the states pursuant to its Article I legislative powers, and the federal courts could entertain suits against the states founded upon such congressionally-created obligations through the co-extensive judicial power over "all Cases, in Law and Equity, arising under . . . the Laws of the United States."[170] This is the issue that Hamilton, at best, only hinted at in passing in his controversial cross-reference in *The Federalist* No. 81 to *The Federalist* No. 32, containing a discussion devoted entirely to *legislative* sovereignty. Hamilton's oblique suggestion thereby that exclusive legislative powers may carry a correlative power to abrogate states' sovereign immunity, though, obviously has not been considered the definitive word on the issue. And the ensuing process of actually transposing English concepts of sovereign immunity into the dual sovereignty of our American federalism has been a tentative, awkward, and protracted endeavor.

It was not until over 200 years later in the *Seminole Tribe* decision that the 5-4 majority rejected such an Article I "abrogation" theory, holding that Congress cannot abrogate the states' immunity from suit in federal court by legislation enacted pursuant to Article I. The *Seminole Tribe* majority interpreted the Eleventh Amendment as merely confirming a background principle of state sovereign immunity implicit in the structure of the original Constitution and much broader than the literal terms of the Eleventh Amendment itself—that the judicial power of

---

[167] *Id.* at 549.

[168] *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.3 (4th ed. 2003) (concisely summarizing competing theories).

[169] Pennsylvania v. Union Gas Co., 491 U.S. 1, 31 (1989) (Scalia, J., concurring in part and dissenting in part).

[170] U.S. CONST. art. III, § 2, cl. 1.

the United States was never intended to reach a private-party suit against a state without its consent.

In *Alden*, the same 5-4 majority further expounded upon the constitutional principle of state sovereign immunity recognized in *Seminole Tribe*, holding that the states also "retain immunity from private suit in their own courts"[171] and that this state-court immunity is also "an immunity beyond the congressional power to abrogate by Article I legislation" that would subject the states to suit on federal causes of action.[172] At the same time, though, the *Alden* Court acknowledged that Congress *can* directly regulate a state via its Article I legislative powers:[173] "The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design,"[174] pursuant to which the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[175]

Of course, the concurrent propositions of states' sovereign immunity *and* Congress's plenary legislative powers are at cross-purposes with one another. Congress's Article I power to regulate the conduct of the states is inevitably undermined to the extent the states retain an immunity from suits to enforce valid federal laws. So while both the federal legislative and judicial capacities are limited by the constitutional principle of state sovereign immunity elucidated in *Seminole Tribe* and *Alden*, "certain limits are [also] implicit in the constitutional principle of state sovereign immunity,"[176] which "does not bar *all* judicial review of state compliance with the Constitution and valid federal law."[177]

The internal tension thus created between state sovereign immunity and the role of the federal courts in enforcing the supremacy of federal law is nowhere more evident than with respect to federal bankruptcy laws, which by their very nature exist as a federal judicial process.

C. States' Surrender of Sovereign Immunity Through Congress's Article I Bankruptcy Power: The Bankruptcy Power as a Federal Forum Power?

State sovereign immunity's characteristic translation problem, engendered by our federalism, is presented in especially sharp relief in the context of Congress's power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[178] Indeed, there is a fundamental friction between state sovereign immunity and the intrinsic character of the federal bankruptcy process. The essence

---

[171] Alden v. Maine, 527 U.S. 706, 736 (1999).
[172] *Id.* at 754.
[173] *See generally* Reno v. Condon, 528 U.S. 141 (2000); Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); South Carolina v. Baker, 485 U.S. 505 (1988); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
[174] *Alden*, 527 U.S. at 755
[175] U.S. CONST. art. VI, cl. 2.
[176] *Alden*, 527 U.S. at 755.
[177] *Id.* (emphasis added).
[178] U.S. CONST. art. I, § 8, cl. 4.

and effectiveness of bankruptcy has always been premised upon its basic nature as a collective, comprehensive, and *compulsory* process—binding upon *all* creditors. As Professor Radin put it:

> If we follow the course of bankruptcy from the earliest statute—that of Henry VIII in 1542 . . . we shall find that whatever else was present or absent, there was always some method by which *all* the creditors were compelled to accept some arrangement or some disposition of their claims against the bankrupt's property, whether they all agreed to it or not.
> Everything else is clearly incidental . . . .
> . . . . Whoever initiates the process and however it is done, the important thing is that the bankruptcy court . . . rounds up the creditors and compels them to adjust or discharge their claims in a particular way . . . .
> . . . . Whatever purposes bankruptcy attempts to carry out, it does by working on the creditors primarily, by compelling them to reorganize their relations to the debtor or to each other in regard to the debtor's property. No extension of the bankruptcy power has in fact attempted anything else, whatever the words used may have been.[179]

Thus, bankruptcy is just as much an *inter*-creditor regulatory scheme as it is a debtor-creditor regulation. And especially as an inter-creditor regulation, whatever comprehensive restructuring of debts Congress provides must be binding upon *all* creditors in order to function effectively. At the same time, "[e]very bankrupt or insolvent system in the world must partake of the character of a judicial investigation."[180] Thus, in the entirety of our Anglo-American experience, bankruptcy has been conducted as a judicial process.[181]

Taken, in combination, then, these two defining characteristics of bankruptcy indicate that the Bankruptcy Clause of the Constitution, in authorizing Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies"[182] was authorizing a *federal judicial* process for binding *all* of a debtor's creditors to a comprehensive debt restructuring scheme. Affording the states as creditors immutable immunity from the effects of federal bankruptcy proceedings, therefore, could seriously undermine the efficacy of federal bankruptcy law, which by its nature is a judicial process administered in the federal courts. Indeed, one can argue persuasively (consistent with a bankruptcy exceptionalism theory) that federal bankruptcy law itself must be considered among the "limits . . . implicit in the constitutional principle of state sovereign immunity,"[183] because the very nature of bankruptcy "laws" is more procedural than substantive.

---

[179] Max Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1, 3–4, 9 (1940).
[180] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 366 (1827).
[181] *See* Brubaker, *A Theory of Federal Bankruptcy Jurisdiction*, *supra* note 125, at 807–08.
[182] U.S. CONST. art I, § 8, cl. 4.
[183] Alden v. Maine, 527 U.S. 706, 755 (1999).

> [B]ankruptcy "law," for the most part, functions not to create distinct federal grounds for recovery or relief, but to create an alternative means for enforcing existing substantive rights, most of which are grounded in state law. The historical role of bankruptcy has been to provide a centralized mechanism for collection of a debtor's assets and distribution of those assets among all of the debtor's creditors, and in our Anglo-American experience, bankruptcy's centralized collection-distribution function has been administered as a judicial process. Thus, it is perfectly logical to conclude that congressional power to enact uniform national bankruptcy "laws" necessarily, and even primarily, envisions the power to place adjudication of all disputes incident to administering bankruptcy estates in federal court.[184]

In fact, given what we know about the impetus for inclusion of the Bankruptcy Clause in the Constitution, the "uniformity" aspect of that power was most likely alluding to the judicial nature of bankruptcy.

Provision for a uniform federal bankruptcy power was in response to concerns regarding the extraterritorial effect of state-court discharge orders under state bankruptcy and insolvency legislation. At the time of the Convention, "[t]he great question remained whether [discharge] in one state could protect the debtor if he ventured into another state,"[185] and this issue was being litigated under the full faith and credit clause of the Articles of Confederation.[186] At the Constitutional Convention, then, it was discussion of full faith and credit for state-court judgments that prompted a motion to include in the Constitution what would become the Bankruptcy Clause.[187] The authorization for Congress to enact "*uniform* Laws on

---

[184] Brubaker, *A Theory of Federal Bankruptcy Jurisdiction*, *supra* note 125, at 807–08 (footnotes omitted).

[185] Nadelmann, *supra* note 122, at 224.

[186] *See, e.g.*, James v. Allan, 1 U.S. (1 Dall.) 188, 191–92 (Pa. C.P. 1786). *See generally* Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction—A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pt. 1), 14 CREIGHTON L. REV. 499, 537–39 (1981). At that time, full faith and credit questions were the vehicle to raise what we would today characterize as personal jurisdiction issues. *See* LARRY L. TEPLEY & RALPH U. WHITTEN, CIVIL PROCEDURE 181–91 (3d ed. 2004). Another Pennsylvania case raising this issue, *Millar v. Hall*, 1 U.S. (1 Dall.) 229 (1788), was pending but not yet decided by the time of the Constitutional Convention. Jared Ingersoll—counsel for the creditor in *James v. Allan* and for the debtor in *Millar v. Hall*—was a member of the Pennsylvania delegation to the Convention. *See* MANN, *supra* note 123, at 184–85; Nadelmann, *supra* note 122, at 224–25.

[187] *See* WARREN, *supra* note 121, at 4–5; Frank R. Kennedy, *Bankruptcy and the Constitution*, 33 U. MICH. L. QUADRANGLE 40, 40 (Spring 1989); Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 35 (1983); Nadelmann, *supra* note 122, at 216–21, 225–27; Olmstead, *supra* note 116, at 831. "The lawyers and judges in the two Pennsylvania cases," discussed *supra* note 186, "and through them some of the key delegates to the convention, clearly recognized the problems inherent in applying state insolvency and bankruptcy rules to debtors and creditors who lived in different states." MANN, *supra* note 123, at 185. The historical evidence, therefore, points to "a finding that [the] motion for a bankruptcy power was in

the subject of Bankruptcies *throughout the United States*,"[188] therefore, assured that a debtor's bankruptcy discharge order from a *federal* court acting under a *federal* statute would have nationwide effect.[189] Thus, the constitutional provision for a uniform federal bankruptcy power was authorizing a uniform *federal judicial* process.[190]

If federal bankruptcy "law," in its essence, is creation of a federal judicial process, then Congress's acknowledged power to directly regulate states, and thus subject the states to the force of supreme federal bankruptcy "laws,"[191] implies that Congress has the power to subject states to the bankruptcy jurisdiction of federal courts and bind states to that uniform *federal judicial* process, because that's what federal bankruptcy "law" is. The peculiar accommodation of state sovereignty embodied in the *Seminole-Alden* framework simply does not work for bankruptcy "law." It is totally contradictory and nonsensical to say that states are bound by federal bankruptcy "law," but that their constitutional sovereign immunity exempts them from being subjected to the jurisdiction of federal bankruptcy courts, if that federal judicial process *is* federal bankruptcy "law." On this reasoning, then, bankruptcy *is* simply an *exception* to state sovereign immunity.

Conceptualizing Congress's Bankruptcy Power as a federal forum power, therefore, has precisely the dramatic and far-reaching implications for state sovereign immunity brought to fruition by the *Katz* decision. Moreover, unlike the preemptive, exclusive-federal-power dimension of the Bankruptcy Clause (which *Seminole Tribe* expressly declared insufficient to overcome state sovereign immunity), a federal-forum-power dimension to the Bankruptcy Clause *does* provide a basis for distinguishing the Bankruptcy Power from Congress's other Article I powers (that was neither addressed in nor foreclosed by the *Seminole Tribe* decision). As one bankruptcy court stated, "the power of this 'uniform' forum will be greatly impaired by a doctrine that allows states to avoid its jurisdiction."[192]

---

consequence of a discussion of interstate conflicts problems in the field of insolvency." Nadelmann, *supra* note 122, at 227.

[188] U.S. CONST. art I, § 8, cl. 4 (emphasis added).

[189] "*Federal* courts acting under uniform *federal* bankruptcy legislation, of course, would not necessarily be (and are not) subject to the same geographic restrictions on personal jurisdiction as are state courts—thus, the utility in granting Congress the Bankruptcy Power." Brubaker, *From Fictionalism to Functionalism*, *supra* note 6, at 89–90 (footnotes omitted).

[190] "The Constitutional requirement of uniformity is a requirement of geographic uniformity. It is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country regardless of the State in which the bankruptcy court sits." Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 172 (1946) (Frankfurter, J., dissenting); *see also* Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 S. CT. REV. 25, 32 (noting "uniformity requirement was intended to ensure that Congress enacted laws that were applicable across jurisdictions").

[191] *See* Brubaker, *Statutory* Ex parte Young *Relief*, *supra* note 39, at 478 & n.65.

[192] Nelson v. La Crosse County Dist. Att'y (*In re* Nelson), 254 B.R. 436, 444 n.10 (Bankr. W.D. Wis. 2000), *rev'd*, 258 B.R. 374 (W.D. Wis. 2001), *aff'd*, 301 F.3d 820 (7th Cir. 2002); *cf.* NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 895, 899, 914 (1997), *available at* http://govinfo.library.unt.edu/nbrc/report/20semino.pdf. ("By providing a single forum governed by a single set of procedural rules, the bankruptcy process ensures uniform procedural treatment for every type of

VI. THE BANKRUPTCY POWER AS A FEDERAL FORUM POWER AND THE LIMITS OF ORIGINALISM

A coherent theoretical justification for *Katz*, therefore, lies in general principles of constitutional meaning and *not* in the very particularized attribution of intent to the Framers asserted by the *Katz* majority. Indeed, because of the novel translation problems state sovereign immunity presented—issues with which the Framing generation had no direct experience and many of which the Framers likely did not or could not even anticipate—it really should come as no surprise when we are unable to find a readily discernible, clear intent of the Framers on these extremely difficult, complex translation issues surrounding state sovereign immunity.

This is especially true with respect to bankruptcy law, "[a]s it is completely consistent with our English ancestry, from which our ideas of both state sovereign immunity and bankruptcy are derived, for the sovereign to be wholly immune from the coercive effects of bankruptcy legislation,"[193] simply as a matter of a traditional and longstanding legislative restraint. Thus, for example:

> The English bankruptcy discharge that prevailed until the framing of the Constitution did not bind the King as creditor *only* because Parliament did *not* provide for discharge of debts owing the King. Subsequently, though, [beginning in 1914] Parliament *has* subjected debts owing to the Crown to discharge in bankruptcy.[194]

Likewise in America, it was not until the Bankruptcy Act of 1898 that Congress provided for any federal bankruptcy discharge of debts owing to a state.[195]

If we make a very particularized originalist inquiry, then, concerning state sovereign immunity and bankruptcy discharge of debts owing to a state, we are likely to find nothing at all bearing on that question: With respect to discharge of debts owing to a state, pursuant to the discharge order of a federal court acting under a federal bankruptcy law, what was the Framers' understanding about whether the states would/should retain sovereign immunity from the effects of such a federal discharge order? It is, of course, very hard to say anything about that question with any confidence at all, because at the time of the Founding, it would have been a purely hypothetical, speculative exercise to try to anticipate that state sovereign immunity issue—an issue raised by a legislative innovation the would not arrive for

---

claimant," and "[a] 'uniform' system of bankruptcy may be unattainable if bankruptcy courts no longer provide a single forum for the resolution of claims by and against a bankruptcy estate."); Jonathon C. Lipson, *Fighting Fiction with Fiction: The New Federalism in (a Tobacco Company) Bankruptcy*, 78 WASH. U. L.Q. 1271, 1333–36 (2000) (arguing for bankruptcy exception to state sovereign immunity grounded in uniformity requirement and Bankruptcy Power as federal forum power).

[193] Brubaker, *Statutory* Ex parte Young *Relief*, *supra* note 39, at 481.

[194] *Id.* at 482 (footnotes omitted).

[195] *See id.* at 501–03.

another century.

> Because bankruptcy legislation had never purported to impair the rights of the sovereign as creditor of a bankrupt debtor, . . . likely . . . this is not an issue to which [the Framers] gave a second (or even first) thought. Thus, premising a bankruptcy exception to state sovereign immunity upon the Framers' intent seems somewhat fanciful.[196]

Conceptualizing the Bankruptcy Power as a federal forum power, however, is also extremely troublesome.

CONCLUSION: THE CONCEPTUAL EXPANSE OF THE BANKRUPTCY POWER AS A FEDERAL FORUM POWER

Having articulated the federal forum power theory of the Bankruptcy Power as a principled theoretical defense of the *Katz* holding, I must now confess that this is a theory to which I do not ascribe. The implications of conceptualizing the Bankruptcy Power as a federal forum power are not confined to state sovereign immunity. A federal forum power theory of the Bankruptcy Clause speaks to nearly any issue of judicial federalism in bankruptcy,[197] and in each instance, is an invitation to accord Congress practically unlimited power, with the potential to "undermine any intended checks against endless encroachments of the federal judicial power into a protected sphere of state autonomy."[198] And, of course, "therein lies the ultimate predicament presented by" the federal forum power theory; it "inevitably lead[s] to a confounding quest for meaningful, workable limits."[199] *Katz* provides yet another illustration of this phenomenon, as the primary challenge remaining for *Katz*'s bankruptcy exception to state sovereign immunity is one of defining its limit.

Indeed, in all of the various arguments for a bankruptcy exception to state sovereign immunity, there has been little to no discussion of a limiting principle for such a bankruptcy exception. The only limit the *Katz* opinion places upon its bankruptcy exception to states' sovereign immunity is that "Congress's determination that States should be amenable to [bankruptcy] proceedings [must be] within the scope of its power to enact 'Laws on the subject of Bankruptcies.'"[200] This presents the possibility of rather startling intrusions upon state sovereignty via

---

[196] Ralph Brubaker, *Abrogation of State Sovereign Immunity Through Congress's Bankruptcy Power: Considering the Framers' Intent with Respect to the Attributes of Sovereignty, Uniformity, and Bankruptcy Exceptionalism*, 23 BANKR. L. LETTER No. 3, Mar. 2003, at 1, 10.

[197] *See generally* Brubaker, *A Theory of Federal Bankruptcy Jurisdiction*, *supra* note 125, at 807–13 (expounding and rejecting purely Article I-based theory of federal bankruptcy jurisdiction, grounded in Bankruptcy Power as federal forum power).

[198] *Id.* at 810.

[199] *Id*.

[200] Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1005 (2006).

Congress's Bankruptcy Power.

Consider, for example, a *Marathon*[201] cause of action: a debtor's prebankruptcy state-law cause of action to which the debtor's federal bankruptcy estate succeeds as property of the estate, for the benefit of the debtor's creditors, under section 541(a)(1) of the Bankruptcy Code.[202] Pursuant to Congress's Bankruptcy Power, in conjunction with its Article III powers, a federal bankruptcy estate can assert such a state-law cause of action in federal court, without regard to diversity of citizenship, as a constitutional federal question.[203] Now imagine that the debtor's state-law cause of action is against a state that would otherwise enjoy sovereign immunity on the action outside of bankruptcy, in the absence of a state waiver.

Reason suggests that the state should also retain its sovereign immunity on this state-law cause of action when it is asserted in federal court in the course of federal bankruptcy proceedings, and to date, Congress has agreed.[204] In fact, contrary reasoning in a very similar context in the *Chisholm* case[205] is what prompted adoption of the Eleventh Amendment.[206] Nonetheless, *Katz*'s bankruptcy exception to state sovereign immunity would seem to suggest that a debtor's bankruptcy filing enables Congress, through its Bankruptcy Power, to not only place adjudication of this state-law cause of action in federal court as part of the debtor's federal bankruptcy proceedings, but also to eliminate the state's sovereign immunity on this cause of action in the hands of the debtor's federal bankruptcy estate. Indeed, Congress's express creation of an affirmative exception for *Marathon* actions in its "abrogation" of state sovereign immunity in Code section 106(a)(1) & (5) is an indication that the bankruptcy exception to states' constitutional sovereign immunity could well encompass *Marathon* actions should Congress choose to do so.[207]

---

[201] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[202] 11 U.S.C. § 541(a)(1) (2006) (providing "commencement of a [bankruptcy] case . . . creates an estate . . . comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case"); *see* S. Rep. No. 95-989, at 82 (1978) (noting "this paragraph will include choses in action and claims by the debtor against others"), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868; H.R. Rep. No. 95-595, at 367 (1977) (same), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323.

[203] *See* Brubaker, *A Theory of Federal Bankruptcy Jurisdiction*, *supra* note 125, at 813–31.

[204] *See* 11 U.S.C. § 106(a)(1) & (5) (2006) (excluding section 541 from enumerated Bankruptcy Code provisions as to which "sovereign immunity is abrogated," and providing "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under [the Bankruptcy Code], the Federal Rules of Bankruptcy Procedure, or nonbankruptcy [state] law"); 140 CONG. REC. H10, 766 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks) (noting Congress's purported abrogation "specifically excludes causes of action belonging to the debtor that become property of the estate under section 541").

[205] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

[206] *See supra* notes 162–68 and accompanying text. Likewise from a bankruptcy policy perspective, "there is no reason, other than a desire for augmentation of the bankruptcy estate, to allow a recovery that would otherwise be barred on immunity grounds outside of bankruptcy." S. Elizabeth Gibson, *Congressional Response to* Hoffman *and* Nordic Village: *Amended Section 106 and Sovereign Immunity*, 69 AM. BANKR. L.J. 311, 330 (1995).

[207] *See* Gibson, *supra* note 206, at 329–30 (characterizing statutory carve-out for *Marathon* actions as "selective abrogation of immunity" and congressional "decision to limit its abrogation"). What's more, at its apex Congress's federal forum power in bankruptcy extends to purely supplemental state-law claims involving *neither* the bankruptcy debtor *nor* the bankruptcy estate that are merely "related to" a debtor's bankruptcy case. *See* 28 U.S.C.A. § 1334(b) (2006); Brubaker, *A Theory of Federal Bankruptcy Jurisdiction*,

The *Katz* Court, in apparent recognition of this problem, dropped a cryptic footnote stating, "[w]e do not mean to suggest that every law labeled a 'bankruptcy' law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity."[208] Perhaps this means that the law must, in fact, be a "bankruptcy" law for the state sovereign immunity exception to attach. The Court has indicated that there is some basis on which to distinguish "bankruptcy" laws from those passed pursuant to Congress's other Article I powers (such as the Commerce Clause). Yet, "[d]istinguishing a congressional exercise of power under the Commerce Clause from an exercise under the Bankruptcy Clause is admittedly not an easy task, for the two Clauses are closely related."[209] The differential treatment of state sovereign immunity *Katz* creates as between those two exercises of congressional power may prompt Congress to push that envelope more aggressively.

Alternatively, the *Katz* Court's cryptic footnote may be an indication that not all "bankruptcy" laws will be considered an exception to states' constitutional sovereign immunity, especially given that the outer limits of Congress's Bankruptcy Power are not well defined.[210] This would, to some extent, undercut the seeming simplicity of the *Katz* holding, but in the end, may be inevitable should Congress choose to more aggressively invoke its Bankruptcy Power in subjecting states to monetary liability in federal court.[211]

Beyond the challenge in articulating the limits of a federal forum power conception of Congress's Bankruptcy Power, I am ultimately unpersuaded that the federal bankruptcy process is fundamentally different than other federal judicial processes. It is very common for judges, lawyers, and academics to generally view bankruptcy jurisdiction and procedure as *sui generis*. Moreover, as *Katz* illustrates, the Supreme Court also tends to view bankruptcy as somehow different than other brands of federal jurisdiction, such that first principles of federal jurisdiction and procedure simply do not apply to bankruptcy. As a result, first principles of federal bankruptcy jurisdiction and procedure are still extremely contested and unsettled, over 200 years after enactment of the first federal bankruptcy statute.

Having pursued an agenda of comprehensively and systematically finding and articulating first principles of federal bankruptcy jurisdiction and procedure, though, I have discovered time and time again that bankruptcy is not *sui generis*. Although the bankruptcy process is inherently more complex than most general civil litigation, breaking down that complex process into its constituent elements consistently reveals that the federal bankruptcy process is best understood and

---

supra note 125, at 831–52. Yet, in *Pennhurst* the Supreme Court held that states fully retain their sovereign immunity in federal court with respect to such supplemental claims. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 117–21 (1984).

[208] Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1005 n.15 (2006).

[209] Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 465 (1982).

[210] *See* Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513 (1938) ("The subject of bankruptcies is incapable of final definition.").

[211] *See generally* William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001).

explained in the same fashion as all other aspects of federal jurisdiction and procedure, using conventional federal jurisdiction theory. Thus, the limits on federal bankruptcy jurisdiction should also come from the limits generally applicable to the federal courts. If those limits come from nowhere other than the constitutional limits of the Bankruptcy Power itself, there is good reason to fear that there are no meaningful limits on federal bankruptcy jurisdiction. As Professor Kennedy once astutely observed, "[t]he argument that focus on the scope of the bankruptcy power is preferable to a concern with the limitations on its exercise" residing in other constitutional provisions and principles "is a plea for according nearly conclusive effect to Congressional enactments on the subject of bankruptcy."[212]

[212] Kennedy, *supra* note 187, at 43.