STATE SOVEREIGN IMMUNITY: BANKRUPTCY IS SPECIAL

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INTRODUCTION

Does the Eleventh Amendment[1] exempt the States from the jurisdiction of the bankruptcy courts? That question lit up the Supreme Court's radar screen three times during the past 10 years.[2] What the Court had to say in each case about

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[1] The Eleventh Amendment to the Constitution, promulgated in 1798, provides in full text:

> 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.

U.S. CONST. amend. XI.

[2] *See* Central Virginia Community College v. Katz, 126 S. Ct. 990 (2006) [hereinafter *Katz*]; Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2002) [hereinafter *Hood*]; Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) [hereinafter *Seminole Tribe*].

bankruptcy and its intersection with the States' Eleventh Amendment sovereign immunity from federal suits was a surprise to the bench and the bar.

I. A BIRD'S EYE VIEW OF *SEMINOLE TRIBE*, *HOOD*, AND *KATZ*

In its 1996 decision in *Seminole Tribe of Florida v. Florida*,[3] the Supreme Court charted a new course broadly extending the Eleventh Amendment sovereign immunity of the States from federal suits by holding that Congress did not have the power to abrogate state sovereign immunity by means of a statute enacted pursuant to Article I of the Constitution, which is the primary source of Congress' legislative powers. This decision, although not in a bankruptcy case, was particularly significant for bankruptcy because the Court indicated in *dicta* that its holding presumably applied to bankruptcy legislation.[4] Indeed, both the majority and dissenting opinions in that case assumed that the Court's broad holding would invalidate section 106(a) of the Bankruptcy Code, an Article I enactment which abrogated the States' Eleventh Amendment sovereign immunity from proceedings in bankruptcy courts.[5]

Six years later, the Court went in an entirely new direction for bankruptcy. In *Tennessee Student Assistance Corp. v. Hood*,[6] the Court held that a State did not have Eleventh Amendment sovereign immunity from a proceeding brought against it in a bankruptcy court to establish the debtor's discharge from her debt to the State. Its theory was that a discharge proceeding is *in rem* and thus not a "suit" in which compulsory process is issued against a State. Because the Eleventh Amendment, by its terms, immunizes the States only from "suits," *Hood* held that the State did not have immunity from the *in rem* discharge proceeding at issue. *Hood* thus did not rule on whether section 106(a) of the Bankruptcy Code unconstitutionally barred the States from asserting Eleventh Amendment immunity in proceedings under the Bankruptcy Code, the question for which it had granted *certiorari*.

Then, earlier this year, the Court went in yet another direction, by holding in *Central Virginia Community College v. Katz*,[7] contrary to its *dicta* in *Seminole Tribe*, that a State does not have Eleventh Amendment immunity from a suit in a bankruptcy court to void and recover a preferential transfer received by the State. *Katz* held that a State does not have immunity from a federal suit to recover a money judgment for a voidable preference, notwithstanding that a proceeding seeking a money judgment constitutes a "suit" within the meaning of the Eleventh Amendment and that States are subjected to *in personam* jurisdiction in the

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[3] 517 U.S. 44 (1996).
[4] *Id.* at 72 n.16.
[5] *Id.* at 72 nn.16–17; *see also id*. at 76 n.1 (Stevens, J., dissenting).
[6] 541 U.S. 440 (2002).
[7] 126 S.Ct. 990, 1002–05 (2006).

bankruptcy courts in such suits.[8] Because a suit for the recovery of a money judgment against a State requires the issuance of compulsory process against it, the Court in *Katz* had to develop a new theory as a basis to bar the State's immunity from the proceeding in suit. Under *Katz*' new theory, a proceeding to recover a money judgment for a preference is "ancillary" to *in rem* bankruptcy jurisdiction, and, as found by the Court in *Katz*, the immunity of the States was surrendered with respect to such "ancillary" proceedings under the Bankruptcy Clause in Article I, Section 8 of the Constitution.[9]

As analyzed in Section XIII, *Katz*' "ancillary order" theory is broad enough to preclude the States from asserting immunity as a defense to any proceeding grounded on a provision of the Bankruptcy Code or which affects property of the debtor estate. Under *Katz*, bankruptcy thus gained a unique exemption from the Eleventh Amendment.

II. THE SIGNIFICANCE OF *SEMINOLE TRIBE* TO BANKRUPTCY

Seminole Tribe, a five to four decision, held that the Congress did not have the power to abrogate state sovereign immunity from federal suits by a statute enacted pursuant to its powers under Article I of the Constitution, in that case the Indian Commerce Clause.[10] The decision was a surprise because the Court overruled its plurality opinion issued scarcely seven years earlier in *Pennsylvania v. Union Gas Co.*,[11] which upheld Congress' power to override state sovereign immunity under the Eleventh Amendment by an enactment pursuant to its Article I Commerce Clause power.

Indeed, prior to *Seminole Tribe*, the Supreme Court never held that the States' Eleventh Amendment sovereign immunity could not be overcome by a statute enacted by Congress pursuant to its Article I powers.[12] Although the Court's 1989 decision in *Hoffman v. Connecticut Dep't of Income Maintenance*[13] was not hospitable to section 106(a)'s abrogation of state sovereign immunity, the Court did not in that case reach the question whether section 106(a) of the Bankruptcy Code is unconstitutional, but only that Congress did not make its intent to abrogate state

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[8] *See* Cohens v. Virginia, 19 U.S. 264 (1821). That case provided the first definition by the Supreme Court of a "suit," as follows, "By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court . . . ." *Id.* at 408.

[9] The Bankruptcy Clause in Article I, Section 8, Clause 4 of the Constitution provides: "Section 8. The Congress shall have the Power . . . . To establish an uniform Rule on Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

[10] *Seminole Tribe*, 517 U.S. at 60.

[11] 491 U.S. 1, 15–18 (1989).

[12] But see discussion in note 56 *infra*.

[13] 492 U.S. 96 (1989).

sovereign immunity unmistakably clear in that statute.[14] The majority's "new federalism" jurisprudence in *Seminole Tribe* was the first decision of the Supreme Court to free the States from Congressional abrogation of their sovereign immunity by means of an Article I enactment and thereby to enable them to defeat the invocation of federal jurisdiction by a private party to enforce federal law against them. Both the majority and dissent in *Seminole Tribe* assumed that the Court's holding in that case would apply to bankruptcy.[15]

In taking the unusual step in *Seminole Tribe* of voiding a very recent decision of its own, the Court embarked on a new course in federal/state relations to immunize the States from federal suits by private parties for the enforcement of every type of federal legislation grounded on a provision of Article I of the Constitution. Moreover, shortly after *Seminole Tribe*, the Court went further by issuing a startling decision in *Alden v. Maine*,[16] holding that the States have immunity even in their own courts from suits on claims grounded on federal statutes.

Not only was *Seminole Tribe* of great import generally because of the sweeping scope of the opinion announced by a bare majority of the Justices, but also because it was of great significance for bankruptcy. In objecting to the majority's fatal blow to the enforcement against States of all types of Article I legislation, the *Seminole Tribe* dissent specifically cautioned that, as a result of the decision, "persons harmed by state violations of . . . bankruptcy . . . laws [will] have no remedy" against the State.[17] In rejecting that concern, the Court, by a bare majority, aimed its new federalism jurisprudence on all federal suits to enforce against the States every type of Article I-based federal legislation, including the bankruptcy laws. To

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[1414] In 1994, Congress amended the version section 106(a) that was before the Court in *Hoffman v. Connecticut Dep't of Income Maint*., 492 U.S. 96 (1989), so as to make it unmistakably clear that it intended to abrogate state sovereign immunity with respect to virtually all types of proceedings brought pursuant to a provision of the Bankruptcy Code. The 1994 version of section 106(a), which continues unchanged, reads in pertinent part:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
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> (1) Sections 105, 106, 107, 108,303, 346, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 728, 744, 749, 764,901 . . . 1107, 1141, 1142, 1143, 1146,1201 . . . 1301, 1303, 1305, and 1306 of this title.
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> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
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> (3) The court may issue against a governmental unit an order, processor judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order of judgment awarding a money recovery . . . .

11 U.S.C. § 106(a) (2006).

[15] *See Katz*, 126 S.Ct. at 996.

[16] 527 U.S. 706, 753 (1999).

[17] *Seminole Tribe*, 517 U.S. at 76 n.1.

downplay the impact on bankruptcy of its position, the Court suggested that there were a number of means other than by federal court suits to enforce federal legislation against the States, but none provided a realistic means to enforce federal law against them.[18]

III. *HOOD*'S DEPARTURE FROM *SEMINOLE TRIBE*

Seminole Tribe put bankruptcy at the end of a dead end road, that is until the Supreme Court once again surprised the bench and the bar six years later, this time by its pro-bankruptcy decision in *Hood*. There, an agency of the State of Tennessee, supported by 47 other States in an amicus brief in which they joined,[19] contended that *Seminole Tribe* barred debtors from hauling States into bankruptcy courts to defend proceedings brought to establish a bankruptcy discharge. In a full-court press, the *amici* States argued that because they are parties in interest in most of the roughly 1.5 million new bankruptcy cases filed each year, it would be onerous to force them to defend proceedings in bankruptcy courts all over the country.

The Court was not moved, however. By a seven to two vote, the Court, in an opinion for the majority written by then Chief Justice Rehnquist, held in *Hood* that a State did not have Eleventh Amendment immunity from a debtor's suit commenced by a summons and complaint in an adversary proceeding in a bankruptcy court to establish that she was discharged from her student loan debt. *Hood*'s theory was that a bankruptcy court exercises *in rem* jurisdiction when it determines the dischargability of a debtor's debt, [20] and that in adjudicating dischargability the bankruptcy court does not exercise *in personam* jurisdiction over the State. [21] Because, according to the Court, a State is not hauled into court by an exercise of *in rem* jurisdiction, such a proceeding is not an affront to the State's sovereignty, which the Eleventh Amendment is designed to avoid.[22] *Hood* concluded that if a proceeding does not require the exercise of *in personam* jurisdiction over a State, the proceeding does not constitute a "suit" against the State within the meaning of the Eleventh Amendment, which grants immunity only from "suits." [23] Because discharge proceedings are *in rem*, the Court thus held that States do not have immunity from them.

The Court also stated in *Hood* that because a discharge proceeding is not a "suit" against a State within the meaning of the Eleventh Amendment, it was unnecessary for it to reach the question for which it had granted *certiorari*—

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[18] *See infra* notes 85–88 and accompanying text; *see also Seminole Tribe*, 517 U.S. at n.16.

[19] *See* Brief of Ohio and 47 other States and Commonwealth of Puerto Rico as Amici Curiae in Support of Petitioner, 2003 WL 22873082 at 8, Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

[20] *Hood*, 541 U.S. at 447.

[21] *Id.* at 450–51.

[22] *Id*. at 452, 453.

[23] *Id*. at 443.

whether the Bankruptcy Clause of the Constitution gave Congress the power to enact section 106(a) of the Bankruptcy Code abrogating the States' Eleventh Amendment immunity from "suits" in bankruptcy courts.[24]

By invoking the *in rem* character of bankruptcy, the Court in *Hood* found a way to preserve its broad pro-State sovereign immunity jurisprudence announced a few years earlier in *Seminole Tribe*, while at the same time enabling bankruptcy courts to adjudicate discharge proceedings against States, a function which is at the core of bankruptcy. Because, as held in *Hood*, an *in rem* discharge proceeding does not constitute a "suit" against a State for Eleventh Amendment purposes, the *in rem* exception for bankruptcy was a basis for subjecting States to discharge proceedings in bankruptcy courts without reliance on section 106(a)'s abrogation of their immunity.

In order to ground its decision in *Hood* on the *in rem* theory, the Court had to explain away its statement in its 1933 decision in *Missouri v. Fiske*, that "The fact that a suit in a federal court is in rem, or quasi in rem, furnishes no ground for the issue of process against a nonconsenting state."[25] It did so by distinguishing *Missouri v. Fiske*. But the basis of its distinction carried a warning that the *in rem* theory might not support the recovery of affirmative relief against a State in a federal suit. *Hood* explained that *Fiske* could be understood to mean that an *in personam* injunction was not enforceable against a State, but that that issue was not posed by *Hood*.[26]

The Court in *Hood*, moreover, cautiously restricted the scope of its decision:

> This is not to say, "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity, . . ." as Justice Thomas characterizes our opinion, but rather that the Court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State. Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State. No such concerns are present here, and we do not address them.[27]

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[24] *Id.*

[25] Missouri v. Fiske, 290 U.S. 18, 28 (1933). In *Missouri v. Fiske*, the Court also stated, "This [proceeding] is not less a suit against the state because the bill [in equity] is ancillary or supplemental." 290 U.S. at 27.

[26] *Hood*, 541 U.S. at n.4. *Hood* also issued a cautionary note regarding the recovery of a money judgment against a State, by citing *Hoffman v. Connecticut Dept. of Income Maint.*, 492 U.S. 96, 102 (1989), for the notion that the Eleventh Amendment analysis in that case suggested that a bankruptcy court could not issue a money judgment against a non-consenting State. *Hood*, 541 U.S. at n.4. But that statement was *dicta* in *Hoffman* because the Court there held that the abrogation of immunity by the Bankruptcy Code's provision in section 106, as then in effect, was not unmistakably clear to accomplish abrogation of the State's immunity. In like *dicta*, the Court stated in *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), that "we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists." *Id*. at 38.

[27] *Hood*, 541 U.S. at 451 n.5.

Hood went on to underscore that generally, the exercise of *in personam* jurisdiction by the issuance of process against a State, as distinguished from *in rem* bankruptcy jurisdiction, constitutes an affront to States' sovereignty which the Eleventh Amendment is designed to avoid:

> The issuance of process, nonetheless, is normally an indignity to the sovereignty of a State because its purpose is to establish personal jurisdiction over the State. We noted in *Seminole Tribe*, "The Eleventh Amendment does not exist solely in order to prevent federal-court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties . . . ."[28]

The Court then concluded that a discharge proceeding did not require the exercise of personal jurisdiction over the State because all that the debtor wanted was "a determination of the dischargeability of her debt."[29]

Significantly, however, the Court pointedly restricted the scope of its decision in *Hood*. It specifically noted that it declined "to decide whether a bankruptcy court's exercise of personal jurisdiction over a State would be valid under the Eleventh Amendment."[30]

Moreover, the Court carefully pointed out that the proceeding in suit was not "an adversary proceeding by a bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference."[31] That observation by the Court in *Hood*, which suggested that the Court's view was that the States may have sovereign immunity from preference recovery suits, focused precisely on the very issue to come before the Court in *Katz* less than two years after *Hood*.

IV. *KATZ* GOES BEYOND *HOOD*

In *Katz*, the Court once again granted *certiorari*, as it did in *Hood*, to determine whether Congress had the power to enact section 106(a) of the Bankruptcy Code under the Bankruptcy Clause as a means to abrogate state sovereign immunity from bankruptcy court proceedings.[32] That was the issue which the Court sidestepped after granting *certiorari* on it in *Hood*. The Court decided *Katz* by a five to four

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[28] *Id*. at 453 (citing *Seminole Tribe*, 517 U.S. at 58).
[29] *Id.*
[30] *Id.* at 454.
[31] *Id.*
[32] *Katz*, 126 S.Ct at 995.

vote on January 23, 2006. It held that preference recovery orders are "ancillary" to *in rem* bankruptcy jurisdiction, and that the States' immunity from such ancillary proceedings was surrendered as to bankruptcy pursuant to the plan of the Constitutional convention.

Neither *Hood* nor *Katz* was the first time that the Supreme Court rescued bankruptcy from the Eleventh Amendment immunity of the States. Fifty years earlier, the States asserted in *Gardner v. New Jersey*[33] that, by filing a proof of claim in a bankruptcy case, a State did not forgo its Eleventh Amendment immunity from defenses asserted by the debtor or a bankruptcy trustee to the State's claim. In rejecting this contention, *Gardner* held that a proceeding in bankruptcy court to determine the disputed priority and amount of a State's claim did not constitute a "suit" against the State for Eleventh Amendment purposes because of the *in rem* character of the proceeding.

Years later, *Gardner*'s conclusion that "[t]he whole process of proof, allowance and distribution is, shortly speaking, an adjudication of interest in a res, " [34] became one of the foundational underpinnings of *Hood*, which extended *Gardner*'s *in rem* theory of bankruptcy to permit suits against States in the bankruptcy courts to establish a debtor's discharge.[35] *Katz*, in turn, relied in part on that ruling in *Hood* as a basis for barring a State from asserting immunity from a suit in a bankruptcy court for a money judgment predicated on a provision of the Bankruptcy Code.[36]

Katz, in which a proceeding was brought to void a preference and to recover the property from the State, like *Hood*, was a surprise. It was a big one in light of *Seminole Tribe*'s broad rejection of any limitation on the right of States to assert sovereign immunity by means of an Article I enactment, and the Court's later observation in *Hood* that the proceeding there in suit did not seek to recover property preferentially transferred to a State. *Katz* held that a State does not have Eleventh Amendment sovereign immunity from a preference suit in a bankruptcy court. The opinion for the five-Justice majority in *Katz* was authored by Justice Stevens, who also wrote the four-Justice dissenting opinion in *Seminole Tribe*, which argued for preserving the principle of *Union Gas*, which *Seminole Tribe* overruled, that State sovereign immunity could be abrogated by an Article I enactment.

Before *Katz* reached the Court, it had been firmly established by *Hood* that an *in rem* proceeding is not a "suit," and that a State thus lacks Eleventh Amendment immunity from an *in rem* bankruptcy proceeding. But *Katz*, relying on *Hood*,[37] went further than *Hood*. *Katz* extended *Hood*'s *in rem* theory by holding that the States do not have immunity from the bankruptcy courts' "ancillary orders enforcing

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[33] 329 U.S. 565 (1947).
[34] *Id.* at 574.
[35] *Hood*, 541 U.S. at 447.
[36] *Katz*, 126 S.Ct. at 1000.
[37] *Id.* at 994.

their *in rem* adjudications,"[38] even though an ancillary order granting a monetary recovery must be grounded on *in personam* jurisdiction and is not itself an exercise of *in rem* jurisdiction.

The Court first pointed out that even before the promulgation of the Constitution, in adjudicating disputes involving bankrupts' estates, courts exercised the power to issue "ancillary orders enforcing their *in rem* jurisdiction." [39] It was then concluded in *Katz* that because the Framers "would have understood"[40] the Bankruptcy Clause to authorize the issuance of ancillary orders implementing *in rem* bankruptcy adjudications involving "a core aspect of the administration of bankrupt estates,"[41] it can be inferred that the 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."[42] In essence, *Katz* held that by virtue of the Bankruptcy Clause of the Constitution the States surrendered their immunity with respect to suits for money judgments that are "ancillary" to *in rem* bankruptcy jurisdiction.

The Court did not ground its holding that the States could not assert immunity on the Bankruptcy Clause's unique textual requirement of "uniformity."[43] Instead the States were held not to have immunity because the history of the Bankruptcy Clause, as the majority saw it, demonstrated that "the States agreed in the plan of the Convention not to assert any sovereign immunity defense in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'"[44]

Katz extended its limitation on state sovereign immunity to proceedings it considered as involving core bankruptcy matters. *Katz*' premise was that "[b]ankruptcy jurisdiction, at its core, is *in rem*."[45] It then observed that the critical features of "every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts."[46] Under *Katz*' view of core bankruptcy matters, therefore, virtually every proceeding over which the bankruptcy courts have jurisdiction would be "ancillary" to *in rem* bankruptcy jurisdiction.

Because a suit to recover a money judgment is not predicated on *in rem* jurisdiction, however, *Hood*'s *in rem* bankruptcy theory was insufficient, at least by itself, as a basis to bar state sovereign immunity from defeating a suit for a money

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[38] *Id.* at 1000.
[39] *Id.*
[40] *Id.* at 1000, 1001–02.
[41] *Id.* at 1002.
[42] *Id.* at 1004.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 995.
[46] *Id.*.

judgment for the avoided preference. In order to exempt the *in personam* preference recovery proceeding in suit in *Katz* from the State's sovereign immunity, the Court had to add an additional theory to *Hood*'s *in rem* bankruptcy theory.[47]

Under the Court's new analysis in *Katz*, (1) a proceeding in a bankruptcy court to recover a money judgment for a voided preference is "ancillary" to its *in rem* bankruptcy jurisdiction, and (2) the States do not have immunity from such proceedings because the Framers of the Constitution "would have understood" the Bankruptcy Clause of the Constitution to have effected a surrender of immunity not only with respect to *in rem* proceedings for "simple adjudications of rights in the res,"[48] but also with respect to "ancillary" orders that implement *in rem* bankruptcy jurisdiction.[49] As explained by the Court:

> 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. [50]

Katz' analysis may be applied to preclude the States from asserting sovereign immunity in most bankruptcy proceedings. Virtually all proceedings under the Bankruptcy Code are at least as necessary to effectuate the bankruptcy courts' *in rem* jurisdiction as are proceedings to void and recover preferential transfers. *Katz* is indeed far reaching as applicable to all proceedings pursuant to the Bankruptcy Code.

The far reaching applicability of *Katz*' analysis to all proceedings pursuant to the Bankruptcy Code is evident:

> 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." [51]

Katz' conclusion thus can be understood to encompass any proceeding against a State grounded on any provision of the Bankruptcy Code or predicated on the court's *in rem* bankruptcy jurisdiction.

The majority in *Katz* also explained that abrogation of state immunity with respect to *in rem* bankruptcy suits resulted solely from the Constitution itself, by

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[47] In *Katz*, the Court noted that the dissent in *Hood* had observed that arguably, a discharge proceeding is more akin to an ancillary proceeding than an exercise of *in rem* jurisdiction. *Katz,* 126 S.Ct. at 1001.

[48] *Id.* at 1000.

[49] *See infra* notes 143-146 and accompanying text (quoting *Katz,* 126 S.Ct. at 1002).

[50] *Katz*, 126 S.Ct. at 1005.

[51] *Id.* at 1004.

means of the Bankruptcy Clause in Article I, Section 8, clause 4, not because of any Congressional enactment.[52] Stated otherwise, if Congress had not enacted section 106(a) of the Bankruptcy Code to abrogate State immunity, under the majority's theory, the States nevertheless would not have immunity with respect to orders ancillary to *in rem* bankruptcy jurisdiction because the abrogation of their immunity was effected by the Bankruptcy Clause of the Constitution, not by Congressional enactment. As stated in *Katz*:

> Neither our decision in *Hood*, which held that States could not assert sovereign immunity as a defense in adversary proceedings brought to adjudicate the dischargeability of student loans, nor the cases on which it relied [citing cases], rested on any statement Congress had made on the subject of state sovereign immunity. Nor does our decision today. The relevant question is not whether Congress has "abrogated" States' immunity in proceedings to recover preferential transfer. *See* 11 U.S.C. § 106(a). The question, rather, is whether Congress determination that States should be amenable to such proceedings is within the scope of its power to enact "Laws on the subject of Bankruptcies." We think it beyond peradventure that it is.[53]

Under this analysis, it was not necessary for the Court in *Katz* to rule on the constitutionality of the abrogation of state sovereign immunity by section 106(a) of the Bankruptcy Code, [54]an issue that is open for future resolution by the Court in a proceeding against a State that is within the bankruptcy court's jurisdiction under 28 U.S.C. § 1334, but is neither grounded on *in rem* jurisdiction nor ancillary thereto.

The basis of the Court's analysis in *Katz*—that the States' essentially surrendered under the Constitution their immunity from ancillary bankruptcy suits to recover money judgments—is significant for another reason. As construed by the Courts, the Eleventh Amendment merely restored whatever sovereign immunity the States had when the Constitution was promulgated,[55] and did not create any new rights for the States. As held in *Katz*, the States, by virtue of the Constitution itself, surrendered their immunity from the type of bankruptcy proceeding in suit in that

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[52] *Id.* at 1005.
[53] *Id.*
[54] *Id.* at 995, 1005.
[55] *See* Alden v. Maine, 527 U.S. 706, 728–29 (1999); Hans v. Louisiana, 134 U.S. 1, 12, 18 (1890). In its latest decision on state sovereign immunity, *Northern Insurance Company of New York v. Chatham County, Georgia*, No. 04-1618, slip op. (April 25, 2006), the Court again made it clear that state sovereign immunity, to the extent it exists, is "'neither derived from, nor is limited by, the terms of the Eleventh Amendment,'" but is dependant upon "'sovereignty which the States enjoyed before the ratification of the Constitution.'" *Id*. at 3 (quoting Alden v. Maine, 527 U.S. 706, 713 (1999)).

case. The States thus had no immunity for the Eleventh Amendment to restore with respect to that type of proceeding.

By holding in *Katz* that abrogation was effected by the Constitution itself, rather than by action of Congress pursuant to an Article I enactment, the Court found a means to permit the recovery of a money judgment against a State in a suit initiated by compulsory process issued against the State in a bankruptcy court, while at the same time not running head on into the doctrine of *Seminole Tribe* that the Congress cannot constitutionally use Article I to abrogate a State's Eleventh Amendment immunity.[56]

V. ISSUES NOT ADDRESSED BY *KATZ*

Katz is not the end of the story. A host of issues remain open, and the Court did not establish any standard to be applied by the bankruptcy and lower appellate courts to determine whether a particular proceeding is ancillary, as "necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts" within the meaning of its ruling.[57] The issues remaining unresolved after *Katz* include whether money judgments or orders for other types of affirmative relief may be obtained against States on a variety of claims arising under the Bankruptcy Code, for example, to enforce or extend the section 362(a) automatic stay; to recover damages under section 362(k); to obtain a declaratory judgment as to the applicability of the automatic stay or of the governmental enforcement exception thereto, to void a state-held mortgage or to establish its priority or amount; to determine the debtor's tax liability to a State, as authorized by section 505 of the Bankruptcy Code; or to

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[56] The late Justice Rehnquist authored the opinion for the Court in *Hood*, which limited state sovereign immunity. He also authored the opinion for the Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was the seminal "new federalism" opinion upholding state sovereign immunity as a defense to an action to require the States to comply with the federal wage and hour laws for their employees because those laws interfered with "integral governmental functions" of the States, *ie*. budgeting their salary expenses. *Id.* at 851. The Court, however, retreated from the doctrine limiting state sovereign immunity that it adopted in *Usery* by overruling *Usery* nine years later in *Garcia v. San Antonio Met Trans. Authority*, 469 U.S. 528, 557 (1985), in which it held that the federal wage and hour laws could be enforced against the States in the federal courts. In its 5 to 4 decision in *Garcia*, the Court held that Congress could, within limits the Court did not specify, use its Article I Commerce Clause power to bar sovereign immunity defenses by States. *Id*.. Justice O'Connor's dissent in *Garcia*, in which Justice Rehnquist joined, observed that under the Court's decision in that case Congress' Commerce Clause power "has come to displace" the constitutional basis for federalism. *Id*. at 582. It would take another 11 years before Justice Rehnquist mustered support from four more Justices for his "new federalism" jurisprudence precluding Congress' use of its Article I powers to abrogate state sovereign immunity, as he was able to do in *Seminole Tribe*. Despite the seemingly limitless scope of Justice Rehnquist's view that Article I cannot be a basis for such abrogation, he nevertheless authored the decision in *Hood* for the majority, which limited state sovereign immunity, but thereafter dissented in *Katz*. Moreover, although Justice O'Connor likewise favored broad state sovereign immunity in her dissent in *Garcia*, she voted with the majority in *Hood* and also in *Katz*, which further limited immunity.

[57] *Katz*, 126 S.Ct. at 1005.

order a turnover to the trustee pursuant to Bankruptcy Code section 542 of property in the possession of a State.

Such statutes clearly constitute Congress' exercise of its power under the Bankruptcy Clause. Because proceedings based on such bankruptcy statutes effectuate the *in rem* jurisdiction of the bankruptcy courts, they thus come within *Katz*' broad language barring the assertion of state sovereign immunity with respect to proceedings in bankruptcy courts based on statutes grounded on that provision of the Constitution. It remains to be determined by the courts whether the States have immunity from any of them.

Another significant, but more difficult, issue is whether *Katz*' theory bars a State's assertion of immunity from a suit to recover a money judgment against the State that is within the bankruptcy jurisdiction conferred by 28 U.S.C. § 1334(b) as "related to" the debtor's bankruptcy case, but does not "arise under" the Bankruptcy Code or "arise in" the bankruptcy case within the meaning of section 1334(b). "Related to" bankruptcy proceedings are constitutionally grounded on the Bankruptcy Clause, and because all bankruptcy jurisdiction is essentially *in rem*,[58] such proceedings arguably are not subject to state sovereign immunity under *Katz*' analysis.

Moreover, *Katz* points out that a critical feature of every bankruptcy proceeding is the exercise of exclusive jurisdiction over all property of the debtor's estate.[59] In that regard, the Court has held that a debtor's cause of action that is not a "core" proceeding under 28 U.S.C. § 157(b)(2), but one that is merely "related to" the debtor's bankruptcy case, constitutes property of the debtor's estate under section 541(a) of the Bankruptcy Code.[60] As such, it can be argued under *Katz*' analysis that an ancillary proceeding to bring property into a debtor's estate by the assertion of a "related to" proceeding against a State, such as a debtor's state law cause of action for the defendant's breach of contract, is ancillary to a core Bankruptcy Code function of maximizing the bankruptcy estate and thus not subject to state sovereign immunity.

It is not possible to predict how the Supreme Court will answer these questions, particularly because Justice O'Connor, who voted with the majority in *Katz*, has retired, and Justice Alito joined the Court after *Katz* was decided. It can also be expected that before the Supreme Court agrees to review any of these issues, a host of disparate case law will develop in the bankruptcy and lower appellate courts, just as it did before the Supreme Court decided the two issues resolved in *Hood* and *Katz*.

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[58] *See supra* notes 19–23; *infra* notes 122–125 and accompanying text.
[59] *Katz*, 126 S.Ct. at 996.
[60] Celotex Corp. v. Edwards, 514 U.S. 300, 308 n. 5 (1995).

It is not likely that *Hood* and *Katz* will end the States' attempt to establish their immunity from proceedings in the bankruptcy courts.[61] It can be expected that the States will either seek an early decision overruling *Katz* from the recently reconstituted Supreme Court's membership, or limiting *Katz* to avoidance proceedings. It can also be expected that the States will, as they have ever since the promulgation of the Constitution, continue to press for immunity from federal suits.

VII. THE EARLY HISTORY OF STATE SOVEREIGN IMMUNITY

An understanding of the Court's theories and how state sovereign immunity fared in the Supreme Court, beginning with the era of the Founders and over the 200 years thereafter, may illuminate the open issues that the bankruptcy and lower appellate courts will soon be required to address.

In *Katz*, the majority and dissent had a fundamental disagreement over whether the Framers of the Constitution intended to eliminate state sovereign immunity in bankruptcy proceedings. The majority found that the historical evidence strongly supported the conclusion that by virtue of the Bankruptcy Clause the States surrendered their sovereign immunity with respect to proceedings for orders that are ancillary to the courts' *in rem* powers with respect to the administration of bankruptcy estates.[62] Historians, upon whose writings the majority relied, point out that the bankruptcy power was first considered at the Constitutional convention as part of the Commerce Clause, but emerged as the separate Bankruptcy Clause in light of "the Framers' primary goal . . . to prevent competing sovereigns' interference with the debtor's discharge . . . ."[63] Based on early history,[64] the majority in *Katz* concluded that the Bankruptcy Clause was adopted as a source of authority for Congress to effect the intrusion by the Constitution itself on state sovereignty. As seen by the majority, the Bankruptcy Clause effected a unique limitation on state sovereign immunity.[65]

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[61] *See* Karen Cordry, *What Do States Want? What Did They Get in the New Bill?*, 15 J. BANKR. L. & PRAC. 57, 72–78 (2006); Karen Cordry, *Seminole Seven Years On,* 2003 ANNUAL SURVEY OF BANKR. LAW 383, 437–48 (William L. Norton, Jr. ed., 2003). Ms. Cordry serves as bankruptcy counsel for the National Association of Attorneys General.

[62] *Katz*, 126 S.Ct. at 1004.

[63] *Id.* at 999 (citing Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 527–28 (1996)).

[64] The Court in *Katz*, relied on historian Bruce Mann and cited his book REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 78–108 (2002). *Katz*, 126 S.Ct. at 997.

[65] The Court in *Katz* cited Randolph J. Haines, *The Uniformity Power: Why Bankruptcy is Different*, 77 AM. BANKR. L. J. 129, 179–81 (2003) [hereinafter *Haines*, *The Uniformity Power*]. Katz, 126 S.Ct. at 1003. Bankruptcy Judge Randolph J. Haines also authored the seminal decision in *In re Bliemeister*, 251 B.R. 383 (Bankr. D. Az. 2000), aff'd on other grounds 296 F.3d 858 (9th Cir. 2002), upholding the constitutionality of section 106(a). *See infra* note 102 and accompanying text.

The dissent in *Katz* not only did not buy into the majority's view of the historical evidence "of the Framers' fervor to enact a national bankruptcy regime,"[66] but also asserted a more basic contention. It pointed out that there are two independent attributes of sovereignty—one is the freedom of a sovereign to enact its own laws governing its citizens, and the other is the freedom of a sovereign from being subjected to private suits.[67] The dissent argued that the Bankruptcy Clause only effected a surrender by the States of their legislative power over bankruptcy, which the Bankruptcy Clause conferred on the national Congress, but that there was no historical evidence that the Framers intended by the Bankruptcy Clause to effect the States' surrender of their immunity from legal actions in the federal courts brought by private parties.

It is clear that the text of Constitution, as approved by the Framers, did not itself preclude the States from asserting sovereign immunity from private suits. Moreover, when the Constitution was considered at the state ratifying conventions, there was debate over whether the States could be sued in federal court without their consent.[68] Although the debate was inconclusive, there was a strongly held view at the time of ratification that the States retained their immunity.

Five years after ratification, the issue of state immunity first came before the Supreme Court in *Chisholm v. Georgia*,[69] in which a citizen of South Carolina sued the State of Georgia in the Supreme Court to recover the purchase price of uniforms he sold to the State for use by its soldiers who fought in the Revolutionary War. The defendant-State did not appear in the suit, having taken the position that the federal courts were without jurisdiction over a State unless it consented to be sued in the federal court. The plaintiff, represented by Edmond Randolph, Esq., an eminent counsel who had been a delegate to the Constitutional Convention, argued that the State did not have immunity because a State could be sued by a citizen of another State under the express provisions of Article III of the Constitution. As argued by the plaintiff, the plain text of Article III of the Constitution conferred judicial power on the federal courts over a suit "between a State and Citizens of another State." Four Justices ruled for the plaintiff and allowed a money judgment against the State based on the language of Article III. In a famous dissent by Justice Iredell in *Chisholm*, in which no other Justice joined, he argued that there was no language in the Constitution that was sufficiently clear to override the States' sovereign immunity from suit.

Chisholm produced an outcry from the States.[70] The States feared that they would, like Georgia, be subjected to large judgments, particularly for borrowings they incurred during the Revolutionary War and also in favor of property owners

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[66] *Katz*, 126 S.Ct. at 1009.
[67] *Id.* at 1008.
[68] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.2 at 399 (4th ed. 2003).
[69] 2 U.S. (2 Dall.) 419 (1793).
[70] The States' reaction to *Chisholm* is described in *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

for the value of properties the States took from them during that war. The States' reaction to *Chisholm*, moreover, was not only due to their concern for their treasuries. The States were outraged by the loss of their sovereign immunity, which they contended survived the promulgation of the Constitution. They wanted to retain the sovereignty they had enjoyed under the Articles of Confederation as fully independent States operating without any federal controls.[71] They chose to overlook the notion embedded in the Constitution that a large measure of their sovereignty was ceded to the federal government by the Constitution. The States had trouble accepting the notion that the source of the Constitution's power was the people at the ratifying conventions, rather than the States themselves.[72] The States in essence resented any federal court suit that could reach into their treasuries or subject them to the indignity of being hauled into a federal court by a private party.[73]

The States succeeded very quickly in overcoming the Court's 1793 decision in *Chisholm*. They were able to bring about the adoption of the Eleventh Amendment shortly after that case was decided. The language of the Amendment responded directly to the jurisdictional basis of Chrisholm's suit against Georgia. By its terms, the Eleventh Amendment prohibits the federal courts from exercising jurisdiction to adjudicate a suit against a State by a citizen of another State, [74] which was precisely the diversity jurisdictional basis of the suit in *Chisholm*.

As the years went by during the 1800s, little attention was paid in the courts to state sovereignty issues, as the country was concerned with problems leading up to the Civil War and those generated in its aftermath. There was also little activity on the federal level with bankruptcy law during the 1800s. Each of the three bankruptcy laws enacted by Congress during 1800, 1841 and 1867 was repealed after being in effect for a brief period of time.[75]

Then, after almost 100 years had passed since the Eleventh Amendment was promulgated in the aftermath of *Chisholm*, an important Eleventh Amendment issue came before the Supreme Court in *Hans v. Louisiana*. [76] In that case, the States argued for immunity beyond the plain language of the Eleventh Amendment. They contended that the Amendment immunized them not only from suits by citizens of other States, as provided by the plain text of the Amendment, but also from federal suits by their own citizens. The Supreme Court, in its 1890 decision in *Hans*, ruled in favor of the States, holding that the States had immunity under the Eleventh Amendment from suits by their own citizens, as well as by those of other States.

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[71] *See* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 5, 32–33 (Little, Brown and Co. 1986).

[72] *See* Haines, *The Uniformity Power*, *supra* note 65, at 149–150; *see also infra* note 104 and accompanying text.

[73] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.2, at 402 (4th ed. 2003).

[74] *See supra* note 1 and accompanying text (providing text of Eleventh Amendment).

[75] *See* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 19, 79, 105 (Harvard Univ. Press 1935).

[76] 134 U.S. 1 (1890).

In that pro-state immunity approach, the Court rejected the contention that the Eleventh Amendment was adopted for the limited purpose of granting immunity to States in suits grounded on diversity of citizenship, which was the jurisdictional basis of the *Chisholm* suit and precisely the language that was employed in the Amendment. Under the Court's jurisprudence in *Hans*, the Eleventh Amendment became an expanded principle of constitutional law under which the States have immunity from virtually all suits in federal courts, including those to enforce federal statutes brought on the basis of federal question jurisdiction. In essence, *Hans* created a presumption against the exercise of federal jurisdiction against a State and established state sovereign immunity as a broad principle of constitutional law. A century later, *Hans* became bedrock for the majority in *Seminole Tribe*. [77]

Shortly after its decision in *Hans*, the Supreme Court pulled back somewhat from the expanded scope of the Eleventh amendment under its decision in *Hans*, by holding in *Ex parte Young*[78] that the Eleventh Amendment does not bar a federal court from exercising jurisdiction to enjoin a state officer from an on-going violation of federal law. The decision has been criticized as having been grounded on the fiction that a state officer is different from the State itself,[79] and ignores that an injunction against a State officer may directly affect the State itself.

Because of the impact such injunctions against State officers may have on States and their treasuries, *Young* could be viewed as having been a retreat from *Hans*' pro-State expansion of the scope of the Eleventh Amendment. The facts in *Young*, however, suggest otherwise. In *Young*, a federal suit was brought by shareholders of a railroad against a State's officials, including its Attorney General, to enjoin enforcement of a State's statute that limited railroad rates on the ground that it was unconstitutional under the federal Constitution. After a preliminary injunction was issued by the federal court prohibiting the State's Attorney General from taking steps to enforce the State's statute, he disregarded the federal injunction by filing a state court mandamus proceeding against the railroad to require it to comply with the state statute. The Attorney General was then cited for contempt in the federal suit, and, upon being notified that he would be imprisoned until he withdrew his state court mandamus proceeding, he filed a petition for habeas corpus in the Supreme Court on the ground that the State's Eleventh Amendment immunity was a bar to the issuance of the federal preliminary injunction against him.

The Supreme Court ruled against the Attorney General on the ground that the injunction proceeding was not a suit against the State itself, but merely against its officer individually. Because, as the Court held, the injunction proceeding was not

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[77] Competing views of *Hans* are set forth in *Seminole Tribe*, 317 U.S. at 68–69 (sets forth the majority's view) and 317 U.S. at 85–90 (sets forth dissenters' views).

[78] 209 U.S. 123 (1908).

[79] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.2 at 421 (4th ed. 2003).

a suit against the State itself, the Eleventh Amendment was not applicable as a defense to the proceeding.

The Court must have been offended by the contemptuous conduct of the State's Attorney General, who thumbed his nose at the federal courts by proceeding to litigate the issue in his own state's court in the face of a federal injunction, instead of defending the federal action on the merits. No doubt the Court in *Young* saw the affront to the federal courts by a state officer as more objectionable than the affront to state sovereignty by the issuance of the federal injunction. Under the Court's analysis, when a state official is acting in violation of a federal law, "he is in that case stripped of his official or representative character," and "[t]he State has no power to impart to him any [Eleventh Amendment] immunity from responsibility to the supreme authority of the United States."[80]

Despite its seemingly restrictive view of the Eleventh Amendment, however, *Young* is a limited doctrine, which applies only if a federal right has been violated.[81] Moreover, *Young* supports injunctive relief only if a state officer is committing an on-going and continuing violation of federal law. It has thus been held that *Young* authorizes injunction suits for prospective relief from on-going violations of federal law by state officials, but not suits for compensatory or other retrospective relief, including a judgment that a state officer violated federal law in the past.[82]

VII. *SEMINOLE TRIBE* ENSURES THE STATES' SOVEREIGN IMMUNITY

In *Seminole Tribe*, decided over 100 years after *Hans*, the Court, while reaffirming the vitality of *Young* and its contraction of the Eleventh Amendment, applied *Hans*' expansive approach to the Eleventh Amendment by pushing the States' immunity to its outer limit.[83] By holding in *Seminole Tribe* that Congress cannot constitutionally abrogate state sovereign immunity by means of a statute enacted pursuant to its Article I powers, the majority made clear that under its jurisprudence there were to be virtually no limits on the States' Eleventh Amendment immunity. The decision in this regard was loud and clear because it

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[80] *Young*, 209 U.S. at 159–60.

[81] *See In re* Metromedia Fiber Network, Inc., 299 B.R. 251, 276 (Bankr. S.D.N.Y. 2005) (proceeding under Bankruptcy Code section 505 to determine the value of the debtors' properties for state tax purposes, held not to involve a federal right, thereby precluding the issuance of an *Ex parte Young* injunction against the state taxing authorities).

[82] *See Seminole Tribe*, 517 U.S. at 72 (finding an *Ex parte Young* injunction may be issued only if there is a "continuing violation of federal law"); Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 145–46 (1993); *see also In re* Mitchell, 209 F.3d 1111 (9th Cir. 2000) (holding, prior to *Hood*, that a State which did not file a proof of claim had sovereign immunity from a declaratory judgment proceeding brought by the debtors to determine the amount and dischargeability of their tax debt to the State). It appears that *Mitchell* is no longer good law in light of *Hood* and *Katz*.

[83] *Seminole Tribe*, 517 U.S. at 72.

expressly overruled *Union Gas*,[84] in which a plurality of the Court sanctioned abrogation by means of an Article I enactment.

Moreover, *Seminole Tribe*'s death-knell blow to Article I abrogation was not softened by the Court's later ruling in *City of Boerne v. Flores*,[85] in which it held that state sovereign immunity may be abrogated by a statute validly grounded on Section 5 of the Fourteenth Amendment.[86] Under the test formulated by the Court in *City of Boerne* to determine whether state sovereign immunity has been validly abrogated by Congress pursuant to the Fourteenth Amendment, it is for the courts, not Congress, to determine whether the statute at issue provides a remedy that is "proportionate" and "congruent" to the injury to be prevented and remedied. Under *City of Boerne*, therefore, a court, in deciding an immunity issue, is not bound by findings made by Congress regarding the need for the particular federal statute at issue, and is required to form its own judgment on the need for the statutory remedy.

In essence, a statute grounded on the Fourteenth Amendment cannot validly abrogate state sovereign immunity unless the court is satisfied that the statute has responded appropriately in the court's view to a violation of a provision of the Constitution. That stringent test is virtually impossible to pass. The Fourteenth amendment, moreover, is likely not a basis for a bankruptcy exemption from the Eleventh Amendment for still another reason. If the Bankruptcy Code were to be reenacted by Congress pursuant to the Fourteenth Amendment, it would undoubtedly not be viewed as properly grounded on that provision and would continued to be tested as if the Bankruptcy Clause were the source of Congress' authority to enact it.

Although *Seminole Tribe* was not a bankruptcy case, the Eleventh Amendment's impact on bankruptcy was discussed in *dicta* by both the majority and dissent. The bankruptcy issue was first brought to the fore in that case by Justice Stevens who, in his dissent, expressed alarm that, because of the sweeping language of the majority opinion to the effect that Article I was not a basis for abrogation of State immunity, "persons harmed by State violations of federal copyright, bankruptcy and antitrust laws have no remedy."[87] The majority's response to Justice Stevens' concern played down his worry by stating that it was "exaggerated both in the substance and in its significance."[88]

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[84] *Id.* at 64.

[85] 521 U.S. 507 (1997). In *Seminole Tribe*, the Court explained that "the Fourteenth Amendment contained prohibitions expressly directed at the States," and that section 5 of that Amendment authorized Congress to enforce its provisions. *Seminole Tribe*, 517 U.S. at 60.

[86] Section 5 of the Fourteenth Amendment to the Constitution provides in full text, "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV.

[87] *Seminole Tribe*, 517 U.S. at 77 n.1.

[88] *Id.* at72 n.16.

The majority's cure for Congress' inability to abrogate State immunity was that there were sufficient means for private parties to enforce the bankruptcy laws against the States without a right to haul them into federal court against their will. Specifically, the majority suggested that a private party could bring suit on a bankruptcy claim against a State in the State's own court, and then appeal to the State's highest court and petition the Supreme Court for a writ of certiorari if not satisfied with the decision below.[89] This, however, was an illusory remedy, not only because of the miniscule chance of obtaining *certiorari*, but also because, as held by the Supreme Court in *Alden v. Maine*[90] shortly after it decided *Seminole Tribe*, the States even enjoy sovereign immunity from suits brought against them in their own courts to enforce federal statutory claims. The majority also suggested that the bankruptcy laws could be enforced by means of *Ex parte Young* injunctions; but they may not be obtained under many circumstances.[91]

It is thus clear that *Seminole Tribe* foreshadowed the likelihood that the Court would give the States a virtually free pass from compliance with the bankruptcy laws. There, the Court essentially placed compliance by the States on a voluntary basis, under which a State would forgo immunity from federal court jurisdiction only if it intentionally and clearly waived its sovereign immunity from suit.[92]

VIII. PRE-*HOOD* SUPREME COURT DECISIONS EXTEND *SEMINOLE TRIBE*

The new federalism jurisprudential view of the Supreme Court's five-Justice majority reached its pinnacle and was put firmly in place by several follow-on decisions issued by the Court shortly after *Seminole Tribe*. The Court left no doubt, from a procession of its decisions that followed on the heels of *Seminole Tribe*, that it intended its new federalism doctrine to apply across the board to all federal statutes grounded on Article I.

In the next four years following *Seminole Tribe*, the Supreme Court, by closely divided votes of the Justices, issued six opinions holding that States had immunity in a wide variety of cases brought to enforce federal statutory claims against States in federal courts in reliance on Article I abrogation provisions. Three of them—*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[93] (involving abrogation pursuant to a patent statute), *Alden v. Maine*[94]

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[89] *Id.*

[90] 527 U.S. 706 (1999).

[91] *See supra* notes 80 and 81 and accompanying text.

[92] A State is held to have waived its Eleventh Amendment immunity if it uses language unequivocally expressing its intention to do so. *See, e.g.,* Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). The Court, however, stated in *Lapidus v. Board of Regents* that a State may not have Eleventh Amendment immunity in a particular case if it asserts its immunity to achieve a "tactical advantage." Lapidus v. Board of Regents, 535 U.S. 613, 621 (2002).

[93] 527 U.S. 627 (1999).

[94] 527 U.S. 706 (1999).

(involving abrogation by the Federal Fair Labor Standards Act), and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*[95] (involving a copyright statute)—were decided on June 23, 1999. The other three pro-State immunity decisions were *Bd. of Trustees of the Univ. of Alabama v. Garrett*[96] (abrogation by the Americans with Disabilities Act), *City of Boerne v. Flores*[97] (established the stringent standard for abrogation pursuant to the Fourteenth Amendment), and *Kimmel v. Florida Bd. of Regents*[98] (abrogation pursuant to the Age Discrimination in Employment Act). The majority's pro-State sovereign immunity jurisprudence was thus broadly applied by the Court to all types of federal legislation abrogating state sovereign immunity, including statutes designed to ensure enjoyment of a wide variety of personal rights and needs.

When the Justices orally announced three of the Court's pro-State sovereign immunity decisions from the bench on June 23, 1999, the intensity of the disagreement among the Justices spilled over from their written opinions into the courtroom. Their announcements were in a scene of extraordinary drama, as described in the New York Times on the following day.[99] After the author of the five-Justice majority opinion (on behalf of the Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy) in each of those cases summarized his reasoning and conclusions, one of the four dissenters (Justices Breyer, Souter, Stevens and Ginsberg) spoke in rebuttal. The dissenters' responses of unprecedented length consumed 45 minutes that morning and held the audience spellbound. Justice Stevens, using pungent language that was not set forth in his written dissent, accused the majority of constructing a doctrine of sovereign immunity "much like a mindless dragon that indiscriminately chews gaping holes in federal statutes," and said that the Court was returning to "the brief period of confusion and crisis when our nation was governed by the Articles of Confederation."[100]

During that pre-Constitution period, the States were essentially independent sovereigns which could do as they pleased.[101] The Articles of Confederation had no teeth, and the Confederation had no power to collect taxes or to bind the States in any way. The States, however, understood that they would have a fundamentally different relationship to a national government under the Constitution, which provided for federal supremacy.[102] Indeed, as held by the Court in *Katz*, "[i]nsofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction … implicate States'

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[95] 527 U.S. 666 (1999).
[96] 531 U.S. 356 (1999).
[97] 521 U.S. 507 (1999); *see also supra* note 81 and accompanying text.
[98] 528 U.S. 62 (2000).
[99] *See* Linda Greenhouse, *States Are Given New Legal Shield By Supreme Court*, N.Y. TIMES, June 24, 1999, at A1.
[100] *Id.*
[101] CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 5, 32–33 (Little, Brown and Co. 1986).
[102] U.S. CONST. art. VI, cl. 2.

sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity."[103] Although the States agreed under the Constitution that federal legislative power was paramount, they nevertheless continued to cling to the notion that they retained a large measure of sovereignty.

Soon after ratification, the States asserted their claim to sovereignty by seeking an amendment to the Constitution providing for state immunity, which became the Eleventh Amendment. They also pressed their notion of state sovereignty in *McCulloch v. Maryland*,[104] the landmark constitutional law decision that established the paramount character of federal law. That decision, which upheld the constitutionality of the statute creating the first national bank, set forth Chief Justice Marshall's basic thesis that, "[i]n ratifying the Constitution, . . . the people had created an indivisible nation which necessarily subordinated the states to federal authority."[105] Almost 50 years later, the States' rights were also significantly restricted by the promulgation of the Fourteenth Amendment. But they continued in later years to assert immunity from federal suits. The States never gave up, and ultimately succeeded in large measure under *Seminole Tribe*'s new federalism jurisprudence.

The Justices of the Supreme Court continued to debate issues over state sovereign immunity in six of their opinions that followed *Seminole Tribe* and preceded *Hood*.[106] In one of them, *Kimmel v. Florida Department of Revenue*, the majority accused the four dissenters of a "refusal to accept the validity and natural import of decisions . . . rendered over a full century ago, [which] makes it difficult to engage in meaningful debate on the place of state sovereign immunity in the Constitution."[107] It thus appeared to the five Justices in the pro-immunity majority group that they had fully prevailed on the issue, and they sought to end the discussion. In short, by 2000 it looked like the States had won, and it appeared to be bad for bankruptcy administration.

Prior to *Hood*, except for *Seminole Tribe*, little attention was paid in the Supreme Court to whether the States' immunity from bankruptcy court proceedings had been validly abrogated by Congress, although all indications were that the States would be immune from suits in the bankruptcy courts. Indeed, right after deciding *Seminole Tribe*, the Court granted *certiorari* to settle the issue in *Ohio Agriculture Commodity Depositors Fund v. Mahern*.[108] In that case, the Court

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[103] *Katz*, 126 S.Ct. at 1002. Technically, however, the State's surrender of immunity may not have resulted from the plan of the Convention, but, as observed by the Court in *Katz*, actually occurred by reason of ratification of the Constitution by the people at the ratifying conventions in the several States. *Id.* at 1000 n.9.

[104] 17 U.S. (4 Wheat.) 316 (1819).

[105] FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 134 (1981); *see also supra* note 70 and accompanying text.

[106] *See supra* notes 92–97 and accompanying text.

[107] Kimmel v. Florida Department of Revenue, 528 U.S. 62, 80 (2000).

[108] 517 U.S. 1130 (1996).

specifically undertook to review a pre-*Seminole Tribe* decision of the Seventh Circuit holding that Congress' abrogation of Eleventh Amendment immunity by section 106 of the Bankruptcy Code, premised on the Article I Bankruptcy Clause, was not unconstitutional. After granting *certiorari*, however, the Court vacated the decision of the Circuit Court and remanded the case with a specific direction that the Circuit Court consider whether the abrogation of a State's Eleventh Amendment immunity by means of section 106 of the Bankruptcy Code was constitutional.[109] The issue was not resolved by the Circuit Court in *Mahern*, however, because the parties settled their dispute and the issue was thus mooted. The issue whether there is a bankruptcy exemption from the Eleventh Amendment thus eluded review by the Supreme Court at that time, and the issue did not reach the Supreme Court again for several years, until the Court granted *certiorari* in *Hood* to review the section 106(a) abrogation issue. As stated earlier, the Court sidestepped that issue in *Hood* and again in *Katz*, leaving it unresolved[110]

IX. AFTER *SEMINOLE TRIBE*, CIRCUITS REJECT A BANKRUPTCY EXEMPTION

Before the section 106(a) abrogation issue was accepted for review by the Supreme Court in *Hood*, a number of cases reached the Circuit Courts after *Seminole Tribe* which addressed whether state sovereign immunity was constitutionally abrogated by section 106(a) of the Bankruptcy Code. All of the indications from the Supreme Court strongly supported the conclusion that section 106, as an Article I enactment, was unconstitutional. It was thus not surprising that, with the exception of the Sixth Circuit's decision in *In re Hood*,[111] each of the five other Circuits that addressed the issue held, relying on *Seminole Tribe*'s broad language, that Congress lacked the power to abrogate state sovereign immunity by means of a provision of the Bankruptcy Code. These Circuits ruled that *Seminole Tribe*'s broad theory left no room for an exception for bankruptcy, as the Supreme Court itself indicated in its *Seminole Tribe dicta*.

On those appeals to the Circuits, the States prevailed on a number of grounds, principally that the courts should follow *Seminole Tribe*'s *dicta* that the bankruptcy law is not enforceable against the States in federal court, and also that the States' surrender of immunity under the Constitution related only to the power of Congress to enact bankruptcy laws, but did not surrender their immunity from suits in federal courts.

Significantly, however, *Seminole Tribe* did not address whether the States surrendered their immunity under the Bankruptcy Clause itself, or whether the Bankruptcy Clause was intended to authorize Congress to abrogate state sovereign immunity as part of a bankruptcy law. The Bankruptcy Clause was not mentioned

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[109] *Id.*
[110] *See supra* text accompanying notes 31 and 53.
[111] 319 F.3d 755 (6th Cir. 2003), *aff'd*, 541 U.S. 440 (2004).

in *Seminole Tribe*, and bankruptcy was just lumped together with all of the many legislative powers conferred on Congress by Article I. Nor did any of the five Circuit Courts which invalidated section 106(a) address the impact of the Bankruptcy Clause. They treated *Seminole Tribe* as dispositive.

The Sixth Circuit's decision in *Hood* was alone, among the six Circuits to consider the constitutionality of section 106(a), in holding that the Bankruptcy Clause empowered Congress to enact a bankruptcy statute abrogating state sovereign immunity. That Circuit found that the plan of the convention's Bankruptcy Clause was the source of Congress' authority to abrogate state sovereign immunity, and it thus upheld the constitutionality of section 106(a) of the Bankruptcy Code.

X. *IN RE BLIEMEISTER* BROKE NEW GROUND

Before the Sixth Circuit's decision upholding the Bankruptcy Code's abrogation provision was rendered, a bankruptcy court addressed the section 106(a) abrogation issue in depth in *In re Bliemeister*.[112] The bankruptcy court held in *Bliemeister* that Congress had the authority under the Bankruptcy Clause to abrogate the State's immunity from suits in bankruptcy courts. In so holding, the court found that the plan of the convention, in its Bankruptcy Clause, authorized Congress to abrogate state sovereign immunity in a bankruptcy statute. The court concluded that the Framers must have intended that Congress have such authority because, without the authority to enforce the law against all parties including the States, the Bankruptcy Clause's special requirement of uniformity could not be satisfied.[113] The court relied heavily on Alexander Hamilton's views in Federalist No. 81[114] that a measure of state sovereign immunity had been surrendered by the States under the plan of the convention:

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[112] 251 B.R. 383 (Bankr. D. Az 2000), *aff'd on other grounds*, 296 F.3d 858 (9th Cir. 2002). The Bankruptcy Court in *Bliemeister* cited Leonard H. Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine*, 74 AMER. BANKR. L.J. 1, 11 (2000).

[113] *See* Haines, *The Uniformity Power*, *supra* note 65. In Haines, *The Uniformity Power,* Bankruptcy Judge Randolph J. Haines, who authored the opinion in *Bliemeister*, stated the following as a commentator after the Sixth Circuit rendered its decision in *In re Hood*:

> This history reveals that the Framers well understood that the bankruptcy power had to be "different" from the other Article I powers if it was to accomplish its intended purpose, and that such "difference" entailed a necessary limitation on states' sovereign immunity . . . . So to prevent sovereign immunity from frustrating the basic purpose of federal bankruptcy law, the Framers expressly abrogated that immunity in the Bankruptcy Clause, exactly as Hamilton stated in The Federalist .

Haines, *The Uniformity Power*, *supra* note 65, at 131.

[114] The Supreme Court has relied on the Federalist Papers as a prime authority for determining whether the States surrendered any of their sovereign immunity in the plan of the convention. *See* Goldstein v. California, 412 U.S. 546, 552 and n.8 (1973).

> 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, and the danger intimated must be merely ideal. 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.[115]

The phrase "plan of the convention" first appeared in Hamilton's discussion of state sovereign immunity in Federalist Nos. 32 and 81, and through the years, the Supreme Court has looked to the "plan of the Convention" in determining whether the States or the federal government surrendered any of their sovereign immunity.[116]

Hamilton's Federalist No. 81 referred to his piece on taxation in Federalist No. 32, which, upon analysis, serves as a basis for finding that the plan of the convention contemplated that the States would not have immunity from bankruptcy claims. In Federalist 32, Hamilton explained:

> [A]s the plan of the convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States. This exclusive delegation or rather this alienation of State Sovereignty would only exist in three cases . . . The third [case] will be found in that clause, which declares that Congress shall have power "to establish an uniform rule on naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a distinct rule there would be no uniform rule.[117]

Because the naturalization and bankruptcy powers are both worded identically in Article I, Section 8, Clause 4 to empower Congress "to establish an uniform rule" with respect to each of those subjects, the court in *Bliemeister* reasoned that

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[115] THE FEDERALIST NO. 81, at 242 (Alexander Hamilton, The Johns Hopkins Univ Press, 2d ed.).

[116] *See* Alden v. Maine, 527 U.S. 706, 713 (1999); *Seminole Tribe*, 517 U.S. at n.13; Principality of Monaco v. Mississippi, 292 U.S. 313, 323 (1934); Hans v. Louisiana, 134 U.S. 1, 13 (1890); Cohens v. Virginia, 19 U.S. 264, 418 (1821).

[117] THE FEDERALIST NO. 32, at 79 (Alexander Hamilton, The Johns Hopkins Univ Press, 2d ed.).

Hamilton's conclusion in Federalist No. 32 that the States did not retain sovereignty with respect to naturalization applies equally to bankruptcy. It thus concluded that under the plan of the Convention, and specifically by reason of the Bankruptcy Clause, the States surrendered their sovereign immunity with respect to bankruptcy.[118] As stated in *Bliemeister*, "The people and the states agreed in the original plan of the convention that if Congress should elect to act on the subject of bankruptcies, the states surrendered their sovereign powers on the subject."[119]

Under this analysis, the Bankruptcy Clause was a source of power for Congress to abrogate state sovereign immunity under section 106(a) of the Bankruptcy Code, as held in *Bliemeister* and by the Sixth Circuit in *Hood*. That is precisely the issue which the Supreme Court agreed to review by its order granting *certiorari* in *Hood*.

XI. THE THEORY OF *HOOD* AND IT'S SCOPE

The States were outraged by the Sixth Circuit's decision in *Hood*, perhaps as much as they were by the Supreme Court's decision in *Chisholm* over 200 years before. Tennessee petitioned for *certiorari*, which the Supreme Court granted in order "to determine whether this [Bankruptcy] Clause grants Congress the authority to abrogate state sovereign immunity from private suits."[120] As noted earlier, Tennessee's position garnered virtually unanimous support from all of the other States. Forty six States and the Commonwealth of Puerto Rico filed an *amicus* brief in support of Tennessee.[121] The position of Tennessee and its *amici* States was straight forward. First, that *Seminole Tribe* established that State immunity could not be abrogated by an Article I enactment, and that the Eleventh Amendment applied to bankruptcy under *Seminole Tribe*'s *dicta*; and second, that the sole purpose of the Bankruptcy Clause's uniformity requirement was to require bankruptcy legislation to be uniform, not to empower Congress to abrogate the States' immunity from suit.

The argument presented to the Supreme Court in *Hood* by the debtor and the *amici* professors who supported her,[122] urged that the proceeding at issue to establish the debtor's discharge, although commenced by a summons and complaint in an adversary proceeding in the bankruptcy court, was an *in rem* proceeding. As such, they contended that the proceeding was not dependant on an exercise of *in personam* jurisdiction against the State, and that it thus did not constitute a "suit"

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[118] *See supra* notes 50–51; *infra* notes 140–141 and accompanying text. In *Katz*, the Court stated that the agreement by the States in the plan of the Convention not to assert their sovereign immunity from suit is broad enough to cover "orders ancillary to the bankruptcy courts' *in rem* jurisdiction." *Katz*, 126 S.Ct. at 1002.

[119] *Bliemeister*, 251 B. R. at 389–90.

[120] *Hood*, 541 U.S. at 443.

[121] *See supra* note 18 and accompanying text.

[122] The author co-authored the professors' *amicus* brief filed in *Hood* in support of the debtor. *See supra* note *. That *amicus* brief appears at 2003 WL 23112946.

against the State within the meaning of the Eleventh Amendment. In short, if not a "suit" against the State for Eleventh Amendment purposes, the State could not assert immunity. The Supreme Court adopted that analysis as the sole basis for its decision in *Hood*. This narrow basis of decision made it unnecessary for the Court in *Hood* to consider whether immunity was surrendered in the plan of the convention or the constitutionality of section 106(a), the issue on which it granted *certiorari*.

The predicate for Court's *in rem* bankruptcy analysis in *Hood* was its analogous 1998 ruling in an *in rem* admiralty case, *California v. Deep Sea Research, Inc.*[123] The Court held in *Deep Sea* that the Eleventh Amendment did not bar a federal *in rem* admiralty suit against a State, where the State did not possess the *res*. That holding was applied by the Court to the bankruptcy proceeding before it in *Hood* because of the long-established principle that a bankruptcy court proceeding to discharge a debt, like an admiralty proceeding, is an *in rem* proceeding. As stated by the Court, "[t]he discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding."[124]

In support of the applicability of an *in rem* analysis to bankruptcy, the Court in *Hood* also placed importance on the fact that under 28 U.S.C. § 1334(e), a bankruptcy jurisdictional grant, the bankruptcy courts are given exclusive jurisdiction over the debtor's property.[125] *Hood* explained that the exercise of jurisdiction over issues relating to the debtor's property is an exercise of *in rem* jurisdiction against all claims held by everyone, whether or not named in the action. Under that analysis, States are not sued, but are nevertheless bound by a discharge order, whether or not they choose to participate in the discharge proceeding. The Court concluded that the Eleventh Amendment does not apply to a discharge proceeding because it does not assert a "suit" against the State.

Although *Hood* may be broadly read, some portions of the opinion in that case may have called for a narrow reading. For example, the Court observed that it was not ruling on whether a State would have immunity from an *in personam* proceeding for an injunction to enforce a discharge order against a State, [126] and also that by seeking a discharge, the debtor "does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts." [127] The Court was even more specific in qualifying its ruling, by stating, "[n]or is there any dispute that, if the Bankruptcy Court had to exercise

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[123] *See Hood*, 541 U.S. at 446 (analyzing applicability of *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) to *Hood*).

[124] The Court cited several cases for that proposition, including *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) and *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 192 (1902). See *Hood*, 541 U.S. at 447.

[125] The Court observed in *Hood* that, "Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate. 28 U.S.C. § 1334(e)." *Hood*, 541 U.S. at 447.

[126] *Hood*, 541 U.S. at 449 n.4.

[127] *Id.* at 450.

personal jurisdiction over [the State], such an adjudication would implicate the Eleventh amendment,"[128] and then stated more directly that "[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."[129]

The Court clearly was looking for a way to hold in *Hood* that States are bound by bankruptcy discharge proceedings without having to backtrack from *Seminole Tribe*. Its *in rem* theory provided the way to uphold a discharge proceeding against a State, while at the same time holding that it did not trigger state sovereign immunity because it did not constitute a "suit" within the meaning of the Eleventh Amendment. Moreover, the Court was not troubled by the requirement of the Federal Rules of Bankruptcy Procedure that the creditor-State be served with process to commence a proceeding to discharge a student loan debt. It reasoned that Congress could have provided for a discharge of a student loan debt without requiring any proceeding at all, and provided for such proceeding only as a benefit to the States by limiting the debtor's right to discharge such debt only to those cases in which undue hardship is established by the debtor.

The States may have gained a great deal of comfort in what they perceived to be the limited scope of *Hood*. Indeed, they may have read *Hood* as not going beyond their concession at oral argument "that the States are bound by a bankruptcy court's discharge order."[130] However limited *Hood* might be read, *Katz* would soon cover new ground that substantially diminishes state sovereign immunity.

XII. THE THEORY OF *KATZ*

In *Katz*, the Supreme Court granted *certiorari* to consider the question left open in *Hood*, "whether Congress' attempt to abrogate state sovereign immunity in 11 U.S.C. § 106(a) is valid."[131] *Hood* never reached that question because it held that an *in rem* discharge proceeding was not a "suit" against a State within the meaning of the Eleventh Amendment. This time, in *Katz*, the Court once again decided the appeal without ruling on whether section 106(a) is constitutional,[132] leaving that question still open.

It was candidly acknowledged by the majority in *Katz* that both the majority and dissenting opinions in *Seminole Tribe* "reflected an assumption that the holding in that case would apply to the Bankruptcy Clause," but that "[c]areful" study and reflection have convinced us, however, that that assumption was erroneous."[133]

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[128] *Id.* at 452–53.
[129] *Id.* at 454.
[130] *Id.* at 449 (citing page 17 of the transcript of the oral argument, at 2004 WL 524927).
[131] *Katz*, 126 S.Ct. at 995.
[132] *Id*. at 995, 1005.
[133] *Id*. at 996.

The Court began its analysis by reaffirming the bedrock principles followed in *Hood*, that "[b]ankruptcy jurisdiction, at its core, is *in rem*;" that Congress' bankruptcy power, because of its uniformity requirement, is different than its other Article I powers; and that "[c]ritical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property."[134] These principles, however, were insufficient, by themselves, as a basis for a bankruptcy court to grant a money judgment against a non-consenting State in a voidable preference suit, because preference recovery actions, unlike discharge proceedings, require an exercise of personal jurisdiction over a State.

The Court in *Katz* thus needed to find another theory, not articulated in *Hood*, to preclude a State from defeating a preference recovery by asserting sovereign immunity. The Court was able to do so under its "ancillary order" theory of bankruptcy jurisdiction, which precludes States from asserting immunity despite the need to exercise *in personam* jurisdiction as a basis for issuing an "ancillary" money judgment against a State.[135]

As found in *Katz*, "courts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications."[136] In that regard, the Court observed that in the 18th century, "as now, the jurisdiction of courts adjudicating rights in the bankruptcy estate included the power to issue compulsory orders to facilitate the administration and distribution of the res."[137] The Court then concluded that the Framers "would have understood"[138] the Bankruptcy Clause to authorize Congress to enact provisions for the recovery of preferences, observing that preference recovery proceedings are "a core aspect of the administration of bankrupt estates since at least the 18th century."[139] The *Katz* "ancillary order" theory for bankruptcy, moreover, is supported by the Court's ruling in *Edelman v. Jordan*,[140] which, in another context, ruled that the Eleventh Amendment does not preclude the issuance of a judgment for "ancillary" relief against a State's treasury.

To buttress its holding in *Katz*, the Court took another look at what it did in *Hood*. It pointed to the contention of the dissent in *Hood*, which argued that the discharge proceeding in suit in *Hood* "could have been characterized as a suit

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[134] *Id*.

[135] The "ancillary order" theory for bankruptcy was suggested by Justice Stevens during the oral argument in *Katz*. *See* transcript of oral argument, 2005 WL 3036313, at 48, *Katz*, 126 S.Ct. 990 (2006).

[136] *Katz*, 126 S.Ct. at 1000. *See also*, Local Loan Co. v. Hunt, 292 U.S. 234, 239 ((1934) (A party can invoke "jurisdiction of the bankruptcy court in the present case [because it] is in substance and effect a supplemental and ancillary bill in equity, in aid of and to effectuate the adjudication and order made by the same court.").

[137] *Id.* at 997.

[138] *Id.* at 1000, 1001–02.

[139] *Id.* at 1002.

[140] Edelman v. Jordan, 415 U.S. 651, 667 (1974); *accord* Milliken v. Bradley, 433 U.S. 267, 289–90 (1977) (ruling that a State may be required to spend funds from its own treasury if it is ancillary to the State's compliance with prospective relief ordered by the court).

against the State rather than a purely *in rem* proceeding."[141] Then, in retrospect, the Court in *Katz* suggested that the discharge proceeding was not a pure *in rem* proceeding, but "was merely ancillary to the Bankruptcy Court's exercise of its *in rem* jurisdiction."[142] With *Hood* recast by *Katz* as an "ancillary order" proceeding, the Court in *Katz* concluded that preference actions also come within the "ancillary order" doctrine.

Because the Bankruptcy Clause itself provided the basis to exempt from the Eleventh Amendment the ancillary *in personam* preference proceeding in suit, the Court concluded that "it is not necessary to decide whether actions to recover preferential transfers pursuant to § 550(a) are themselves properly characterized as *in rem*."[143]

The crucial underpinning of *Katz* was that in crafting the Bankruptcy Clause, the Framers "would have understood [that Clause] to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property."[144] *Katz*' predicate for imparting that understanding to the Framers was that the courts had entertained preference suits "since at least the 18th century," citing cases that preceded the promulgation of the Constitution.[145]

XIII. THE BROAD SCOPE OF *KATZ*

Many proceedings ancillary to bankruptcy jurisdiction have essentially the same asset-generating or preservational attributes as preference proceedings, as well as historical underpinning. As stated by the Court in *Katz*:

> More generally, courts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their in rem adjudications. *See, e. g.*, 2 W. Blackstone, Commentaries on the Law of England 486 (1766) (noting that the Assignees of the bankrupt's property—the 18th-century counterparts to today's bankruptcy trustees—could "pursue any legal method of recovering [the debtor's] property so vested in them," and could pursue methods in equity with the consent of the creditors) . . . .[146]

In determining disputes affecting estate property, a bankruptcy court essentially exercises historically grounded *in rem* jurisdiction. Indeed, the majority in *Katz* understood its "ancillary order" theory, based on pervasive *in rem* jurisdiction, to abrogate state sovereign immunity with respect to all types of proceedings affecting

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[141] *Katz*, 126 S.Ct at 1001.
[142] *Id.*
[143] *Id*. at 1001–02.
[144] *Id*. at 1002.
[145] *Id.*
[146] *Id*. at 1000.

estate property, not only those that are ancillary to transfer recovery proceedings. As stated by the Court, "Insofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the Plan of the Convention not to assert that immunity. . . ."[147]

Katz should thus be understood to mean that the Bankruptcy Clause effected the surrender of immunity by the States with respect to all types of proceedings ancillary to *in rem* bankruptcy jurisdiction that are brought for the recovery or preservation of property of the estate or otherwise affect estate property.

In holding that the States could not assert their sovereign immunity to defeat federal preference recovery proceedings, the Court in *Katz*, unlike *Hood*, did not limit its decision by singling out any other specific types of ancillary bankruptcy proceedings that may remain subject to the States' Eleventh Amendment immunity.[148]

In common parlance, "ancillary" means "supplementary,"[149] which in turn means "supplying something additional."[150] Under this broad definition, virtually every proceeding brought to implement or enforce a provision of the Bankruptcy Code, or affecting estate property, would be "ancillary" to the *in rem* jurisdiction of the bankruptcy court.

Moreover, even under the restrictive doctrine of ancillary jurisdiction applied by the Supreme Court in some cases, a controversy is regarded as ancillary if "it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit."[151] Many proceedings predicated on *in rem* bankruptcy jurisdiction are "ancillary" to the bankruptcy courts' *in rem* jurisdiction because they have a direct relation to property or assets in the actual or constructive possession of the bankruptcy court.[152] Such proceedings clearly fall within *Katz*' concept of "ancillary" orders.

Proceedings to avoid and recover preferences pursuant to the Bankruptcy Code were held by *Katz* to be ancillary to bankruptcy court jurisdiction in recognition of their important core function in bankruptcy administration.[153] Other rights and remedies provided by the Bankruptcy Code are of equal, if not greater, importance in the administration of a debtor estate. For example, the bankruptcy law goals of providing a breathing spell for debtors and equality of distribution for creditors, could not be achieved if States had immunity from proceedings to enforce the

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[147] *Id.* at 1002.

[148] *See Hood*, 541 U.S. at 453–54.

[149] BLACK'S LAW DICTIONARY 95 (8th ed. 2004).

[150] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2297 (unabridged).

[151] *See* Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 379 (1994) (quoting Fulton Nat. Bank of Atlanta v. Hozier, 267 U.S. 276, 280 (1925)). *See also supra* note 125 and accompanying text.

[152] Possession of property is central to bankruptcy estates. Exclusive jurisdiction of property of the estate is conferred on the bankruptcy courts by 28 U.S.C. § 1334(e) (2006).

[153] *Katz*, 126 S.Ct. at 1001–02.

Bankruptcy Code's automatic stay. Nor could the goal of maximizing the estate for the benefit of creditors be realized if States had immunity from proceedings for the turnover of property of the estate. Moreover, if States were to be accorded immunity from reorganization proceedings, the core bankruptcy function of "restructuring of debtor-creditor relations" could not be fully accomplished.[154] Close scrutiny of *Katz*, therefore, leads to the conclusion that all proceedings grounded upon, or which implement, a provision of the Bankruptcy Code, or which affect estate property, are "ancillary" to the *in rem* jurisdiction of the bankruptcy courts and, under *Katz*, are not subject to the States' Eleventh Amendment immunity.

It may also be argued under *Katz* that proceedings within the bankruptcy courts' jurisdiction conferred by 28 U.S.C. § 1334(b) as "related to" the debtor's bankruptcy case, are "ancillary" to *in rem* bankruptcy jurisdiction and thus not subject to state sovereign immunity, even if they do not implement a specific provision of the Bankruptcy Code. A proceeding to recover on a debtor's claim, although it is merely "related to" the debtor's estate, nevertheless will, if successful, augment the bankruptcy estate for the benefit of the creditors. The debtor estate is the bankruptcy *res*, and proceedings that may increase the res are ancillary to the *in rem* bankruptcy estate.

Indeed, in *Katz*, the State expressly argued that a suit against a State for a money judgment is more like a state-law contract claim than an *in rem* proceeding to determine the distribution of the bankruptcy res among creditors, and that the latter should not define the perimeter of the doctrine barring immunity.[155] The Court, however, was not persuaded. By not adopting the State's approach in this regard, *Katz* can be understood to mean that a proceeding in a bankruptcy court designed to augment the bankruptcy estate is not subject to the State's sovereign immunity even if it is not grounded on a provision of the Bankruptcy Code and is merely "related to" the bankruptcy case.

It is arguable, therefore, that even proceedings merely "related to" a debtor's bankruptcy case are not subject to state sovereign immunity.

CONCLUSION

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[154] *See* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982); *see also* 28 U.S.C. § 157(b)(2)(O) (2006) (defining "core" proceedings in bankruptcy courts as including "proceedings affecting . . . the adjustment of the debtor-creditor or the equity security holder relationship . . . .").

[155] *See* Appellate Brief of the Appellant State, 2005 WL 2381088, at 16, *Katz*, 126 S.Ct. 990 (2006). In its brief in Katz, the State argued:

> A suit to recover a preferential transfer does not seek a determination as to the debtor's status as a bankrupt, see [*Hood*, 541 U.S. at 453], but seeks to recover money. Indeed, preference actions, along with fraudulent conveyance actions, "are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to the pro rata share of the bankruptcy res." Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 (1989)).

It is unclear just how far the Supreme Court intended to go in *Katz*, and clarification by the Supreme Court could be years away. The Court may not grant *certiorari* to consider any of the issues that remain open after *Katz* until the Circuit Courts have had a chance to deal with them. In the interim, in the absence of specific guidance from *Katz* for the bankruptcy and lower appellate courts to follow, they will have to wrestle with whether particular proceedings grounded on *in personam* jurisdiction against a State are exempt from Eleventh Amendment immunity pursuant to *Katz*' "ancillary" order theory. It remains to be seen whether the lower courts will apply *Katz*, as logically required, to all ancillary bankruptcy proceedings, or will restrict it to avoidance proceedings brought pursuant to the Bankruptcy Code. It can be expected that they will reach conflicting results.