FEDERAL SUPREMACY AND STATE SOVEREIGNTY: THE SUPREME COURT'S EARLY JURISPRUDENCE

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INTRODUCTION

Here we are, over 200 years after the Constitution was promulgated, faced with debate among the Justices over whether the States are subject to enforcement of federal law in the federal courts, or even in their own courts.[1] The issue is not new. It has its roots in the early political, economic and social history of the nation. The national government was fragile when John Marshall was nominated as Chief Justice of the Supreme Court on January 20, 1801 by President John Adams, a Federalist who spearheaded the movement for a strong national government. President Adams was succeeded a few days later by President Thomas Jefferson, a Republican who believed that the Constitution preserved the sovereignty of the States and vested them with broad powers.

During the Constitutional convention, the States maintained that they should retain the sovereignty they enjoyed under the Articles of Confederation as fully independent States operating without federal controls.[2] Nevertheless, a large measure of the States' sovereignty was ceded under the Constitution to the federal government by virtue of the Supremacy Clause in Article VI, which declared that all laws of the United States "shall be the supreme Law of the Land. "The Constitution, however, did not explicitly set forth the extent to which the States would continue to enjoy sovereignty. From the outset, the States had trouble accepting the notion that the source of the Constitution's authority was derived from the people at the state ratifying conventions, rather than the States themselves, which underpinned the notion of federal supremacy.[3] All of the States argued then,

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[1] *See* Alden v. Maine, 527 U.S. 706, 753 (1999) where the court held States have immunity even in their own courts from suits grounded on federal statutes. This principle, when combined with Eleventh Amendment immunity, could leave injured parties without any remedy, contrary to the pronouncement in *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 163 (1803), "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

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

[3] *See* Richard Lieb, *State Sovereign Immunity: Bankruptcy is Special*, 14 AM. BANKR. INST. L. REV. 201, 205–15 (2006) (discussing *Hood* and *Katz*).

as they argue now, that they are sovereign states and immune from the enforcement of federal law in the federal courts.[4]

The States did not prevail in the first cases to come before the Supreme Court that arose from their conflict with the Federalists on issues over federal supremacy and states' rights and sovereignty. In the early days of the Court—its golden age under Chief Justice John Marshall—its opinions molded the shape of our federal system and firmly established the principle that federal power prevails over state sovereignty. Indeed, its 1819 decision in *McCulloch v. Maryland*,[5] upholding a Congressional act creating a national bank, and its 1824 decision in *Gibbons v. Ogden*,[6] overturning a State's statute regulating steamboat traffic, are pillars of constitutional nationalism that established the superiority of Congress' powers under Article I of the Constitution above states' rights and sovereignty. But almost 200 years later, the Court abruptly reversed course in 1996 by its five to four decision in *Seminole Tribe*.[7] Under the Court's current jurisprudence, federal supremacy is subordinated to states' rights and sovereignty.

Revisiting the Court's early decisions reflecting its original federalism jurisprudence may help to point the way to an expansive application of its "ancillary power" theory in the Court's decision last year in *Central Virginia Community College v. Katz*,[8] which rejected a State's assertion of sovereign immunity in a bankruptcy court suit to void and recover a preferential transfer. The question that remains to be decided after *Katz*, is whether the States will be amenable to suits in bankruptcy courts on *any* claim arising under a provision of the Bankruptcy Code or necessary to implement one of its provisions.

I. THE COURT'S FEDERALISM JURISPRUDENCE UNDER ITS RECENT DECISIONS

The exercise of Congressional powers and federal court jurisdiction over the states has been in sharp focus and the subject of heated debate among the Justices of the Supreme Court in recent years. The Court, in its 1996 decision in *Seminole Tribe*, which announced its new state sovereign immunity jurisprudence and overruled *Pennsylvania v. Union Gas*,[9] held that Congress did not have the power under Article I of the Constitution to abrogate the States' sovereign immunity from federal court suits. This highpoint for state sovereignty set the tone for a string of five to four decisions by the Court over the next several years in which it held that

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[4] *See* Brief for the State of Ohio et al. as Amici Curiae Supporting Petitioner at 4–5, Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) (No. 02-1606), 2003 WL 22873082. Forty-eight states and the Commonwealth of Puerto Rico joined in the amicus brief filed by the State of Ohio.

[5] 17 U.S. (4 Wheat.) 316, 427 (1819).

[6] 22 U.S. (9 Wheat.) 1, 221 (1824).

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

[8] 546 U.S. 356, 126 S. Ct. 990 (2006).

[9] 491 U.S. 1 (1989).

the states were immunized from suits in the federal courts that were brought for the enforcement of a variety of federal statutes.[10]

The Court's new federalism jurisprudence did not auger well for the enforcement of bankruptcy statutes and bankruptcy claims in the federal courts. *Seminole Tribe* stated in *dicta* that the Indian Commerce Clause ruling in that case would apply to all Article I enactments, and thus permit state sovereign immunity to defeat the enforcement of the bankruptcy law in the federal courts. Nevertheless, in a surprise decision, the Court found a way to rule in 2004, seven to two in *Hood*, based on its long-established view of bankruptcy as an *in rem* proceeding, that States are bound by a debtor's discharge under the Bankruptcy Code. An even greater surprise by an even more divided court was its decision last year in *Katz*, holding, five to four, that a State was not immune from a bankruptcy court suit to void and recover a preferential transfer under provisions of the Bankruptcy Code because such action historically constituted the exercise of a power that is "ancillary to the bankruptcy courts' *in rem* jurisdiction."[11]

These recent decisions on constitutional law issues that arose in the bankruptcy context are not indicative of a departure by the Court from its *Seminole Tribe* jurisprudence strongly favoring state sovereignty. Rather, the Court treated bankruptcy as special. The result in *Hood* recognized that the discharge of debtors from debt is an essential element of a bankruptcy law. The Court invoked its long-standing characterization of a bankruptcy case as an *in rem* proceeding as a basis for ruling that there was no suit against the State and thus nothing from which it needed immunity. In *Hood*, federal supremacy prevailed over state immunity, at least for the purpose of the bankruptcy discharge statute.

Katz went further than *Hood* by permitting a federal court suit for the recovery of money from a State. But perhaps *Katz* can be explained as the fruit of Justice Stevens' continuing effort, after his dissent in *Seminole Tribe*, to restore the principle of *Union Gas* allowing Congress to abrogate state immunity by an Article I enactment. Justice Stevens was thus able in *Katz* to gain the votes of four other Justices to allow a preference suit for the recovery of a money judgment against a State. With a change in the composition of the Court after *Katz*, however, it remains to be seen whether *Katz* will survive if the issue comes before the Court again, and, if it does, whether other bankruptcy court suits against States grounded on the Bankruptcy Code will be sustained as an exercise of power ancillary to the bankruptcy courts' *in rem* jurisdiction, which is not subject to pleas of state sovereign immunity.

The debate over state sovereignty will no doubt continue, as it has ever since the Constitution was promulgated in 1789.

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[10] *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 364 (2001); Kimmel v. Florida, 528 U.S. 62, 67 (2000); Alden v. Maine, 527 U.S. 706, 732 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999); City of Boerne v. Flores, 521 U.S. 507, 527 (1997).

[11] *Katz*, 126 S.Ct. at 1002.

II. THE WATERSHED DECISIONS OF THE MARSHALL COURT ON FEDERALISM AND STATES' RIGHTS

A. The Four Watershed Decisions

Early in his tenure, Justice Marshall was faced with a confrontation between the Federalists and Republicans that erupted in *Marbury v. Madison*,[12] best known for its ruling that the courts have the power to adjudicate the constitutionality of legislation.[13] In that case he fended off efforts by the Republicans to curtail the power of the federal courts and the Supreme Court in particular, by means of a statute that repealed the Judiciary Act of 1801, which provided a new circuit court system and extended federal jurisdiction in place of the prior inefficient system. *Marbury v. Madison* arose at a time of deep division between the Federalists and Republicans over the shape of the constitutional powers of Congress. The question before the Court was whether it would order President Jefferson (a Republican) to deliver a commission to a judge appointed by the previous President (Adams was a Federalist), which could have resulted in a constitutional crisis if President Jefferson refused to comply with an order requiring the delivery of the document at issue. Justice Marshall, himself a Federalist, avoided causing a crisis by ruling that the duty to deliver the commission was merely ministerial, and that the judicial branch of the government should not intrude into whether the executive branch properly exercised its discretion.[14] He then addressed the constitutionality of the Judiciary Act of 1789 empowering the Court to issue writs of mandamus, and upheld its constitutionality in an exposition for which the case is remembered—the people established the Constitution as the supreme law of the land and declared that enforcement of federal powers is essential to the paramount position of the law. Although Justice Marshall believed that the Constitution divided power between the national government and the States, his opinion left no doubt about the supremacy of federal law over state sovereignty.[15]

The paramount position of federal law, as underscored in *Marbury v. Madison*, served as a foundation for its later pronouncements of federal supremacy in its fundamental constitutional law decisions issued during its 1819 and 1824 terms. In its 1819 term, the Court heard two cases that were to shape its federalism jurisprudence under which federal power prevails over state sovereignty—the *Dartmouth College* case,[16] and *McCulloch v. Maryland*,[17]—and during its 1824

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[12] 5 U.S. (1 Cranch) 137 (1803).

[13] *See* Michael W. McConnell, *The Story of* Marbury v. Madison*: Making Defeat Look Like Victory*, included as chapter 1 in CONSTITUTIONAL LAW STORIES 13, 19 (Michael C. Dorf ed., 2004).

[14] See analysis in JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 321 (Holt 1996).

[15] See discussion in R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 324, 344–45, 366–68 (Louisiana State University Press 2001).

[16] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

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

term, in which the Court decided *Gibbons v. Ogden*,[18] each of which furthered the fundamental notion of federal supremacy over states' rights.

B. The Dartmouth College *Case*

Dartmouth College received a royal charter from a colonial governor to operate a school under the control of a self-perpetuating Board of Trustees. After some years of operations, in 1816 the New Hampshire legislature enacted a statute that revised the College's charter, which was resisted by the Trustees, whose political sympathies were with the Federalists. The State's authorities, aligned with the Republicans and pressing its sovereign right to control the College, enacted additional laws that essentially changed the College into a state institution.[19] The dispute reached the Supreme Court in its 1819 term. In *Dartmouth College v. Woodward*, the Court ruled that the Contract Clause of the Constitution—which prohibits a State from impairing the obligations of a contract—should be broadly construed, and that, so construed, the school's royal charter was a contract and unconstitutionally impaired by the state legislation.[20] The States' authorities were bitter over the decision. They expressed the belief that it was politically dangerous to the rights of the States, and the Governor "repeated the familiar warning that the Supreme Court was consolidating national power at the expense of the states."[21]

C. McCulloch v. Maryland

Chief Justice Marshall issued his opinion for the Court in the *Dartmouth College* case on February 2, 1819. Scarcely a month later, on March 7, 1819, Justice Marshall issued his celebrated opinion for the Court in *McCulloch v. Maryland*. A State's right to tax a bank created by Congress ran head on into the Commerce Clause of the Constitution in that case. In 1816, Congress passed a statute creating a national bank that was essentially privately capitalized and performed usual banking functions, as well as serving as a depository of the federal government's funds. Local interests feared competition from branches of the new national bank and were concerned that it could require the state banks to redeem their paper and thus make them insolvent. Advocates of the national bank viewed it as a source of funds for the government in the event of war, and as an essential tool for economic expansion of the nation if its economy were to grow.[22] The Republicans, led by President Jefferson, argued that banking power resided with the States under the Tenth Amendment, and that Congress lacked the power under the

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[18] 22 U.S. (9 Wheat.) 1 (1824).
[19] *See generally* MAURICE G. BAXTER, DANIEL WEBSTER & THE SUPREME COURT 65–71 (1966).
[20] *Dartmouth College*, 17 U.S. at 643, 651–52.
[21] BAXTER, *supra* note 19, at 102.
[22] *See* BAXTER, *supra* note 19, at 69; FARBER, *The Story of* McCulloch*: Banking on National Power*, included as chapter 2 in CONSTITUTIONAL LAW STORIES 33, 35 (Michael C. Dorf ed., 2004) ("A bank would . . . provide a ready source of funds in the event of war.").

Commerce Clause to create a national bank. In particular, it was contended that the bank created by Congress was not within any of Congress' Article I or other powers because the bank could not levy a tax, was not obligated to lend money to the government, and that issuing bills and notes did not engage in activity in interstate commerce. The Federalists on the other hand considered a national bank to be essential to the development of the country's economy.

In order to test the legality of the bank, Maryland imposed a stamp tax and imposed a fine on a bank cashier who circulated a bank note that did not have a tax stamp affixed. Maryland's action to collect such fine from the cashier of the bank's branch in Maryland reached the Supreme Court. The positions of the two sides split on a very basic issue—what was the nature of the federal union established by the Constitution. The Federalist side supporting Congress' power to create a national bank and the bank's freedom from state taxation, was predicated on the notion that the Constitution was derived from action of the people at the state ratifying conventions, rather from the States themselves. The State argued, conversely, that the Constitution is "a compact between the states, and all the powers which are not expressly relinquished by it, are reserved to the States."[23] They urged that the States retained broad powers, and contended that Congress lacked the express power to establish a national bank and that such a power could not be implied from the "necessary and proper" provision in the final paragraph of Article I, section 8 of the Constitution.

Although only two of the seven Justices were Federalists, and the balance were Jeffersonians, Justice Marshall was able to persuade all of them to join in a unanimous opinion upholding Congress' power to create the bank and to deny the State's right to tax it. Sovereignty was at the heart of the opinion. Justice Marshall began his opinion by tilting to his Republican colleagues on the Court, perhaps to gain their votes. He thus stated that it was important to consider the Constitution "not as emanating from the people, but as the act of sovereign and independent states," as a result of which the powers of the national government were "delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme domination."[24] But his opinion went on to state that the States did not create the national government, and that the power of the Constitution emanated from the state ratifying conventions and the people thereat.[25] As a consequence, as Justice Marshall concluded, the national government was necessarily "supreme within its sphere of action."[26]

The Court's decision through Justice Marshall thus strongly supports the superiority of federal bankruptcy law and a narrow construction of the states' immunity from suits in federal courts. In a resounding statement of federal

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[23] *McCulloch*, 17 U.S. (4 Wheat.) at 363.
[24] *Id.* at 402.
[25] *See id.* at 403 ("From these Conventions the constitution derives its whole authority.").
[26] *Id.* at 405.

supremacy (made after the Eleventh Amendment was promulgated), Justice Marshall pronounced that

> [T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.[27]

The significance of *McCulloch v. Maryland* as a hallmark of the superiority of federal rights above state sovereignty is evident from the strong attacks on the Court's opinion right after its issuance, which charged that it would "endanger the very existence of state rights."[28] *McCulloch v. Maryland* clearly calls for the superiority of federal power over states' rights in any case requiring interpretation of the scope or extent of state sovereignty.

McCulloch v. Maryland has been viewed by scholars as the most important decision of the Supreme Court.[29] The decision went to the heart of the relationship between the national government and the States, and firmly established that states' rights and powers are subordinate to the federal powers conferred on Congress by the Constitution.

D. Gibbons v. Ogden

Gibbons v. Ogden[30] further advances federal superiority over state sovereignty. It arose out of the steamboat coming of age as a means of transportation on the internal waterways of the country. New York enacted legislation granting to Robert Fulton, of steamboat fame, and to Robert Livingston, an exclusive right to operate steamboats on the waterways in New York State. In state court litigation, it was held that New York had concurrent power with Congress to regulate commerce in New York, and that its law was not in conflict with any federal acts. But a competing group held a license under a federal act to operate steamboats in New York. The Supreme Court ruled for the competing group in an opinion by Justice Marshall. Although there is scholarly debate as to how far the opinion goes, it has often been viewed as one of the strongest authorities "upholding exclusive national authority over interstate commerce" and broadly interpreting what constitutes interstate commerce.[31] Of more general import, however, the opinion made clear that federal statutes are supreme, and that state law "must yield to it."[32]

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[27] *Id.* at 436.

[28] FARBER, *supra* note 22, at 59 (quoting *A Virginian's "Amphictyon" Essays*, Rich. Enquirer, Mar. 30–Apr. 2, 1819).

[29] *See* SMITH, *supra* note 14, at 441 ("*McCulloch v. Maryland* may be the most important case in the history of the Supreme Court.").

[30] 22 U.S. (9 Wheat.) 1. Note Justice Marshall's opinion in *Ogden* begins at page 186.

[31] BAXTER, *supra* note 19, at 203.

[32] *Gibbons*, 22 U.S. at 211.

Justice Marshall's concluding paragraph in *Gibbons v. Ogden* leaves no doubt that it calls for a broad interpretation of federal powers:

> Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.[33]

Gibbons v. Ogden, like *McCulloch v. Maryland*, is a pillar of constitutional nationalism. Under their basic theory, the powers of the national government are to be broadly construed and not narrowed in favor of states' rights.

E. Chisholm v. Georgia *and* Sturges v. Crowninshield

A discussion of early Supreme Court case law on the relative rights of the national government and the states would not be complete without mention of the earliest opinion of the Court addressing state sovereign immunity, *Chisholm v. Georgia*,[34] decided in 1793, and the Court's decisions in *Sturges v. Crowninshield* (1819)[35] and *Ogden v. Saunders* (1827).[36] *Chisholm*, a four to one decision of the Supreme Court held that the State of Georgia could be sued in a federal court by a citizen of another State. With only one dissent, the Court held that the federal court had subject matter jurisdiction over the action against the State under the plain text of Article III of the Constitution. Although the States were outraged and made short shrift of the decision by gaining the promulgation of the Eleventh Amendment, the majority decision is indicative of the intent of the Framers of the Constitution to grant broad powers to the national government.[37]

The pro-Federalist approach of *Chisholm*, however, was tempered by Justice Marshall in his decision in 1819 in *Sturges v. Crowninshield*, the first major case that arose in the bankruptcy context to come before the Court. His brand of federalism, which recognized a substantial measure of state legislative sovereignty, but subject to federal superiority, was clear in *Sturges*, as it was in his decision two months before in *McCullough v. Maryland* (the national bank case) and in his 1824 decision in *Gibbons v. Ogden* (the steamboat monopoly case).

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[33] *Id.* at 222.
[34] 2 U.S. (2 Dall.) 419 (1793).
[35] 17 U.S. (4 Wheat.) 122 (1819).
[36] 25 U.S. (12 Wheat.) 213 (1827).
[37] CHEMERINSKY, *supra* note 3, at 394–96.

In *Sturges*, a creditor challenged the constitutionality of a New York statute under which the defendant's debt was discharged. Although no federal bankruptcy act was then in force, a creditor argued that the mere existence of Congress' constitutional power under the Bankruptcy Clause occupied the field and thus precluded the States from enacting bankruptcy discharge laws. There were strongly competing considerations—Federalists argued for exclusive federal power even in the absence of Congress' exercise of its power, whereas an economic depression at the time and the imprisonment of thousands of debtors for unpaid debt, were strong reasons to uphold state bankruptcy statutes in the absence of legislation providing for federal relief. Although *Sturges* invalidated the New York statute for impairment of the contract (a promissory note) that predated its enactment, as a violation of Article I, section 10 of the Constitution, Justice Marshall's opinion indicted that the States might well have reserved power to enact prospective bankruptcy laws so long as no federal bankruptcy law was in effect. In short, under *Sturges*, Congress' bankruptcy power was not exclusive and the States could legislate in the field if Congress did not. But if Congress acts, *Sturges* makes clear that the federal bankruptcy law is supreme.

Some scholars see Justice Marshall's decision as having been "a surprising concession to states' rights,"[38] but might better be viewed as his pragmatic response to the crying need for relief for thousands of imprisoned debtors.[39] In any event, Justice Marshall's opinion in *Sturges* leaves no doubt that the governing principle recognizes federal supremacy and the limited recognition of states' rights. Moreover, understanding Justice Marshall's recognition of states' rights in *Sturges* as a response to the economic needs of the time and the plight of imprisoned debtors, gains force from his decision a few days before in *McCulloch v. Maryland* and five years later in *Gibbons v. Ogden*, both subordinating state sovereignty to federal supremacy.[40]

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[38] BAXTER, *supra* note 19, at 111.

[39] Although *Ogden v. Saunders* sustained state laws discharging debtors from debt, and thus provided a basis for their discharge from debtors prisons, under a second ruling in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 358 (1827), a discharge under the law of one state was held not to be binding on a creditor in another state. This demonstrated the need for a federal bankruptcy statute, but except for brief periods of a few years when the federal Bankruptcy Acts of 1841 and 1867 were in effect, there was no permanent federal bankruptcy law until 1898.

[40] Further insight into Justice Marshall's view of federal superiority can also be gained from his pro-federal dissenting opinion in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) at 358 (1827), holding that, in the absence of a federal bankruptcy statute, the States may enact bankruptcy laws discharging a debtor from liability on an obligation that arises after enactment of the state statute. The Court's decision in that case removed any doubt that may have been left by *Sturges* on that point. In his dissent, Justice Marshall argued, however, that the Constitutional provision in Article I, section 10 prohibiting a State from impairing the obligation of a contract applied not only to contracts made before enactment of a state discharge statute, but also to those made thereafter as well. He argued for a broad interpretation of the Constitution and federal supremacy.

CONCLUSION

The Supreme Court's early federalism jurisprudence and the opinions of Justice Marshall in particular, support extending *Katz*' "ancillary power" theory to *every* type of claim that arises under a provision of the Bankruptcy Code, and to *any* order that is necessary to implement a provision of the Bankruptcy Code.