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Our Federalism Changes Course: The Supreme Court Limits State Sovereign Immunity in Bankruptcy Actions

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Our Federalism Changes Course: The Supreme Court Limits State Sovereign Immunity in Bankruptcy Actions

Central Virginia Community College v. Katz[1]

I. INTRODUCTION

Although sovereign immunity jurisprudence is not the most highly publicized topic of debate in the mainstream media, it has recently become a major source of contention on the Supreme Court.[2] The flurry of sovereign immunity litigation that has reached the high court in the last decade has yielded mostly 5-4 decisions that have expanded the state's ability to assert immunity as a defense.[3] Given this trend, few could have predicted the outcome of the court's decision in *Central Virginia Community College v. Katz*.[4] In *Katz*, the 5-4 decision broke the other direction, and the court held that states had waived their immunity with regard to certain actions that arise out of laws enacted pursuant to the Bankruptcy Clause.[5]

Katz was an interesting departure from recent sovereign immunity decisions, and it provides some insight regarding recent personnel changes on the high court. Decided only four months after Chief Justice Roberts was seated and on the day of Justice O'Connor's departure, *Katz* left a wake of substantial uncertainty regarding the future of state sovereign immunity. Some have predicted that if the opinion had been delayed by a few weeks, Justice O'Connor's replacement, Justice Alito, would have joined the dissenters.[6] Amidst this sort of speculation, it is likely that a sharply divided Supreme Court will revisit this issue in the near future, and its newest member may be called upon to decide whether *Katz* represents an emerging trend, a limited exception, or a dead letter.

This Note argues that *Katz* currently represents a limited exception to the general principles of state sovereign immunity. The lack of a clear directive to the lower bankruptcy courts is likely to result in an increase in litiga-

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

2. Posting of Stuart Benjamin to The Volokh Conspiracy, http://volokh.com (Jan. 23, 2006, 12:30) [hereinafter Benjamin].

3. See, e.g., Alden v. Maine, 527 U.S. 706 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). But see Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

4. Posting of Steve Vladeck to PrawfsBlawg, http://prawfsblawg.blogs.com (Jan. 23, 2006, 17:09).

5. *See Katz*, 126 S. Ct. at 1004-05.

6. Benjamin, *supra* note 2.

tion and non-uniform application, which should lead the Supreme Court to reconsider the decision in the near future. Combined with the recent change in the composition of the Court, *Katz* raises interesting questions regarding the sovereign immunity debate, but the long-term impact of *Katz* remains uncertain.

II. FACTS AND HOLDING

Wallace's Bookstores, Inc. ("Wallace's") operated a chain of campus bookstores, including stores located at Virginia Military Institute and three other Virginia colleges.[7] On February 28, 2001, Wallace's declared bankruptcy by filing a petition for relief in the United States Bankruptcy Court for the Eastern District of Kentucky.[8] Wallace's, however, continued to operate its bookstores as a debtor in possession.[9]

Over a year after the bankruptcy petition was filed, the court appointed the respondent, Bernard Katz, as liquidating supervisor of the bankrupt estate.[10] Katz was appointed to "serve as trustee of the estate and to represent the estate; to resolve claims against the estate; to collect uncollected assets; to liquidate the estate's property; and to distribute the proceeds equitably among creditors."[11] Pursuant to these responsibilities, Katz filed separate actions in the bankruptcy court against each of the four Virginia institutions named as petitioners in *Katz*.[12] Katz alleged that the colleges received preferential transfers from Wallace's, and sought to augment the estate by recovering those transfers.[13]

The colleges moved to dismiss Katz's suits on sovereign immunity grounds. They argued that, as "arm[s] of the state," they could not be subject to private lawsuits without their consent.[14] The bankruptcy court denied these motions to dismiss, and the colleges appealed the ruling to the district court.[15] The district court affirmed the bankruptcy court and denied the motions,[16]

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7. Brief for the Respondent at 1, Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006) (No. 04-885). The three other Virginia colleges are Central Virginia Community College, New River Community College, and Blue Ridge Community College. *Id.*

8. *Id*; *Katz*, 126 S. Ct. at 994.

9. Brief for the Respondent, *supra* note 5, at 3.

10. *Id.* at 5; *Katz*, 126 S. Ct. at 994.

11. Brief for the Respondent, *supra* note 5, at 5.

12. Brief for the Petitioners at 7, *Katz*, 126 S. Ct. 990 (No. 04-885).

13. Transcript of Oral Argument at 5-6, *Katz*, 126 S. Ct. 990 (No. 04-885).

14. *Katz*, 126 S. Ct. at 994-95 (alteration in original). *See, e.g.* Alden v. Maine, 527 U.S. 706, 756 (1999) ("[I]mmunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State.").

15. *Katz*, 126 S. Ct. at 994-95.

16. *See In re* Wallace's Bookstore, 106 Fed. Appx. 341, 341 (6th Cir. 2004).

relying on Sixth Circuit precedent which established that Congress had validly abrogated the states' sovereign immunity in the Bankruptcy Act.[17] On appeal, the Sixth Circuit agreed with the rationale of the district court and affirmed.[18]

The colleges then appealed to the Supreme Court, which granted certiorari to consider "whether Congress' attempt to abrogate sovereign immunity in 11 U.S.C. § 106(a) is valid."[19] The Court never reached this question, however, because it held that the statutory language was not the source of the abrogation. Instead, the court held that the "relevant 'abrogation'" was effected by the plan of the Constitutional Convention.[20] The Court declared that, "[i]n 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."[21]

III. LEGAL BACKGROUND

Black's Law Dictionary defines sovereign immunity as the "government's immunity from being sued in its own courts without its consent."[22] This basic concept originated in English common law, which did not allow suits brought against the king.[23] The current state of sovereign immunity jurisprudence, however, is not as simple as the concept suggests. As commentators have noted, "a tortuous line of Supreme Court cases"[24] regarding the doctrine of sovereign immunity has resulted in "a hodgepodge of confusing . . . judge-made law."[25]

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17. *See In re* Hood, 319 F.3d 755, 758 (6th Cir. 2003)'.

18. *Wallace's Bookstore*, 106 Fed. Appx. at 341.

19. *Katz*, 126 S. Ct. at 995 (footnote omitted).

20. *Id.* at 1005. The Court, relying on historical context, was primarily concerned with the framers' desire to create uniform federal bankruptcy laws. As a result, they found that a Congressional statement abrogating state immunity was not necessary because the states had effectively waived their right to assert an immunity defense by ratifying the Bankruptcy Clause as part of the Constitution. *Id.* at 995 ("[W]e are persuaded that the enactment of that provision was not necessary to authorize the Bankruptcy Court's jurisdiction over these preference avoidance proceedings"). *See* discussion *infra* Part IV.A.

21. *Katz*, 126 S.Ct. at 1005.

22. BLACK'S LAW DICTIONARY 766 (8th ed. 2004).

23. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 142 (1984) (Stevens, J., dissenting).

24. John R. Pagan, *Eleventh Amendment Analysis*, 39 ARK. L. REV. 447, 449 (1986).

25. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983).

A. *The Eleventh Amendment and* Hans v. Louisiana

The constitutional basis for state sovereign immunity is the Eleventh Amendment, which states: "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."[26] The Eleventh Amendment was adopted in the wake of a controversial Supreme Court decision that rejected the concept of sovereign immunity.[27] In *Chisholm v. Georgia*,[28] the court held that the grant of jurisdiction in Article III, Section 2 of the Constitution authorized suits against a state by citizens of another state.[29] Shortly after this decision, the Eleventh Amendment was adopted as a response to the Supreme Court's rejection of the sovereign immunity principle.[30]

While this amendment established a textual basis for the doctrine of sovereign immunity, it did not settle the debate over how the doctrine should be applied.[31] By its text, the Eleventh Amendment prohibits only those suits brought against a state by citizens of another state or foreign country.[32] The Supreme Court, however, rejected a literal reading of the amendment in *Hans v. Louisiana*, holding that the Eleventh Amendment also barred suits against a state by its own citizens.[33] The *Hans* court acknowledged that its decision

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26. U.S. CONST. amend. XI.

27. 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3524 (2d ed. 1987). The story behind the adoption of the Eleventh Amendment is "familiar history," and many texts are available on the subject. Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 218 (2006). *See, e.g.*, MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 27-37 (2002).

28. 2 U.S. (2 Dall.) 419 (1793).

29. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.2, at 401 (4th ed. 2003).

30. Choper & Yoo, *supra* note 27, at 218-19.

31. CHEMERINSKY, *supra* note 29, § 7.3, at 402 ("Although the Eleventh Amendment is almost 200 years old, there still is no agreement as to what it means or what it prohibits."). Two prominent interpretations of the Eleventh Amendment have emerged. According to Justice Stevens:

> It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment . . . . In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases like *Hans v. Louisiana*.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (citations omitted).

32. CHEMERINSKY, *supra* note 29, § 7.3, at 403-04.

33. *See* Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring) ("I concur with the court in holding that a suit directly against a state by one of its own citizens is not one to which the judicial power of the United States extends, unless the state itself consents to be sued.").

was based on a historical analysis of sovereign immunity, rather than the text of the amendment itself.[34] This broad interpretation was recently reaffirmed by the Supreme Court in *Alden v. Maine*, with the declaration that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."[35]

B. Congressional Abrogation of State Sovereign Immunity

Even under a broad interpretation of the Eleventh Amendment, the states' sovereign immunity is not absolute.[36] Although the Supreme Court has never overruled *Hans*, it has limited the states' ability to assert an immunity defense by holding that Congress may abrogate sovereign immunity under certain conditions.[37] In determining whether Congress has validly abrogated state immunity, the Court has employed a two part test: first, Congress must have unequivocally expressed its intent to abrogate the states' immunity, and second, Congress must have enacted the statute pursuant to a valid exercise of power.[38] The court has inconsistently applied the second prong of this test over the last twenty years, and a significant amount of litigation has been devoted to determining which Constitutional powers authorize Congress to abrogate state immunity.[39]

It is well established that Congress may abrogate state immunity pursuant to the enforcement power granted by Section 5 of the Fourteenth

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34. *See id.* at 10-11 (majority opinion). The court is amazingly candid about ignoring the strict language of the Eleventh Amendment:

> In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the eleventh amendment, inasmuch as that amendment only prohibits suits against a state which are brought by the citizens of another state, or by citizens or subjects of a foreign state. It is true the amendment does so read; and, if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that, in cases arising under the constitution or laws of the United States, a state may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other states, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts.

Id. at 10.

35. 527 U.S. 706, 713 (1999).

36. *See, e.g.*, Seminole Tribe of Fla. v. Florida., 11 F.3d 1016, 1021 (11th Cir. 1994) ("[S]tates are not immune from suit if the circumstances indicate consent, abrogation, or the fiction of *Ex parte Young*.").

37. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996).

38. *Id.*

39. 17 WRIGHT ET AL., *supra* note 27, § 3524, at 178 ("[I]t is still very much unsettled under which constitutional provisions Congress can limit state immunity even if there is an explicit intention to do so.").

Amendment.[40] In *Fitzpatrick v. Bitzer*, the Supreme Court found that Congress had plenary power under Section 5 to enforce the limitations on state authority found in substantive provisions of the Fourteenth Amendment.[41] Thus, the Fourteenth Amendment "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."[42] Because the states had shifted some of their own power to the federal government by ratifying the Fourteenth Amendment, they had also surrendered the power to assert immunity with regard to statutes enacted under that power.[43] The court, however, still plays an active role in determining whether a statute has been validly enacted pursuant to Section 5.[44]

The Supreme Court has diverged in determining whether Congress may abrogate state immunity pursuant to its Article I powers.[45] In 1989, a plurality decision of the Supreme Court held that Congress could abrogate state immunity by enacting legislation under the Commerce Clause.[46] In *Pennsylvania v. Union Gas Co.*, Justice Brennan reasoned that the Commerce Clause, like the Fourteenth Amendment, granted power to Congress at the expense of the states.[47] According to Brennan, the states effectively consented to be sued under Congressional enactments regulating commerce when they granted Congress plenary authority to regulate commerce by ratifying the Constitution.[48] This holding arguably overruled the broad interpretation of the Eleventh Amendment in *Hans*, although it did not directly do so.[49]

Less than a decade later, *Union Gas* was overruled by a 5-4 majority in *Seminole Tribe of Florida v. Florida*.[50] In *Seminole Tribe*, the court found that *Fitzpatrick* and *Union Gas* were the only two cases that had upheld con-

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40. *Id.* at 180 (Supp. 2005); *see* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

41. *Fitzpatrick*, 427 U.S. at 456.

42. *Seminole Tribe*, 517 U.S. 44, 65-66 (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)).

43. *See Fitzpatrick*, 427 U.S. at 455-56.

44. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) ("The ultimate interpretation of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."). In making this determination, the court evaluates the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*; *see also*, 17 WRIGHT ET AL., *supra* note 27, § 3524, at 174.

45. *Compare* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) *with Seminole Tribe*, 517 U.S. 44.

46. *See Union Gas*, 491 U.S. at 1.

47. *Id.* at 16-17.

48. *Id.* at 19-20.

49. Carlos Manuel Vasquez, *Sovereign Immunity, Due Process, and Thealden Trilogy*, 109 YALE L.J. 1927, 1931-32 (2000). *See also Seminole Tribe*, 517 U.S. at 64 ("The plurality's rationale [in *Union Gas*] . . . essentially eviscerated our decision in *Hans*.").

50. *Seminole Tribe*, 517 U.S. at 66.

gressional abrogation of state immunity.[51] Distinguishing the two cases, the majority reasoned that the Fourteenth Amendment abrogation in *Fitzpatrick* was valid because the Eleventh Amendment existed at the time the states had voted to limit their own power by adopting the Fourteenth Amendment.[52] The Court argued that *Fitzpatrick* could not be read "to justify 'limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution.'"[53] Based on this reasoning, *Seminole Tribe* specifically held that Congress could not abrogate state immunity by enacting laws pursuant to the Indian Commerce Clause.[54] Affirming the view of sovereign immunity adopted by the *Hans* court, however, the decision broadly declared that Congress could not use any of its Article I powers to abrogate sovereign immunity, thereby overruling the holding of *Union Gas*, which allowed for abrogation under the Interstate Commerce Clause.[55]

The Supreme Court affirmed the broad holding of *Seminole Tribe* in two cases that followed just three years later, both by a 5-4 majority.[56] In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the court held that the Patent Clause, an Article I power, did not authorize Congress to abrogate immunity.[57] And in *Alden v. Maine*, the court further expanded Eleventh Amendment interpretation by holding that Congress cannot act, under Article I, to abrogate the sovereign immunity of a state in its own state courts.[58] By the time these two cases were decided, it was "settled doctrine" that congressional abrogation under Article I powers was invalid.[59] The *Alden* court noted, however, that the states had consented to some suits pursuant to the plan of the convention, leaving plaintiffs a potential opening to pursue the rationale formerly adopted by the plurality in *Union Gas*.[60]

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51. *Id.* at 59-60.

52. *Id.* at 65-66.

53. *Id.* at 66 (quoting *Union Gas*, 491 U.S. at 42).

54. *Id.* at 57-73; U.S. CONST. art. I, § 8, cl. 3.

55. *Seminole Tribe*, 517 U.S. at 73.

56. *See* Alden v. Maine, 527 U.S. 706, 712 (1999); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627, 633-34 (1999).

57. 527 U.S. 627, 635-36 (1999).

58. *Alden*, 527 U.S. at 748-55.

> As it is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court, our decisions suggesting that the States retain an analogous constitutional immunity from private suits in their own courts support the conclusion that Congress lacks the Article I power to subject the States to private suits in those fora.

Id. at 748 (citation omitted).

59. *Id.*

60. *Id.* at 755.

C. *The Bankrupty Clause and* Tennessee Student Assistance Corp. v. Hood[61]

The opening left for the plaintiffs in *Alden* grew slightly larger in *Tennessee Student Assistance Corp. v. Hood.* The case was appealed from the Sixth Circuit, which found that the states had "ceded their immunity from private suits in bankruptcy in the Constitutional Convention," thereby holding that the Bankruptcy Clause,[62] an Article I power, granted Congress the power to abrogate state immunity.[63] The Supreme Court granted certiorari to determine whether Congress could abrogate pursuant to the Bankruptcy Clause, but the court never reached that question.[64] Instead, the court affirmed the Sixth Circuit, holding that the bankruptcy court's exercise of *in rem* jurisdiction did not infringe state sovereignty and was "not a suit against a State for purposes of the Eleventh Amendment."[65]

The majority in *Hood* found it significant that the bankruptcy court's jurisdiction was "premised on the res, not on the persona."[66] The court compared other decisions upholding *in rem* jurisdiction in the admiralty context, where the state claimed an interest in the property.[67] Noting the similarities between bankruptcy and admiralty, the court found "no reason why the exercise of the federal courts' *in rem* bankruptcy jurisdiction is more threatening to state sovereignty than the exercise of their *in rem* admiralty jurisdiction."[68] Thus, by focusing on the unique nature of the bankruptcy court's jurisdiction over the debtor and the estate, *Hood* created a small exception to the broad doctrine of sovereign immunity based on *in rem* jurisdiction in the bankruptcy context. The court did not address the Sixth Circuit's broad holding regarding the states' acquiescence to suit under the plan of the convention, but the stage had been set for the court to consider this argument in *Central Virginia Community College v. Katz.*

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61. 541 U.S. 440 (2004).

62. U.S. CONST. art. I, § 8, cl. 4.

63. *Hood*, 541 U.S. at 445 (citing Hood v. Tenn. Student Assistance Corp., (*In re* Hood), 319 F.3d 755, 767 (6th Cir. 2003)).

64. *Id.* at 443.

65. *Id.* at 451.

66. *Id.* at 450.

67. *Id.* at 450-51.

68. *Id.* at 451.

IV. INSTANT DECISION

A. The Majority Opinion

In *Central Virginia Community College v. Katz*,[69] the Supreme Court granted certiorari to consider "whether Congress' attempt to abrogate state sovereign immunity in 11 U.S.C. § 106(a) is valid."[70] Because this statute was enacted under the Bankruptcy Clause, this case presented essentially the same question that the court had avoided in *Tennessee Student Assistance Corp. v. Hood* just two years earlier: was congressional abrogation pursuant to the Bankruptcy Clause a valid exercise of power?[71] Writing for a five justice majority, Justice Stevens noted at the outset that the Court was partially relying on its decision in *Hood* to reject the sovereign immunity defense of the state colleges.[72] The opinion then picked up where *Hood* left off, asserting that the unique nature of the *in rem* jurisdiction in bankruptcy proceedings does not implicate States' sovereignty to the same degree as other types of jurisdiction.[73] Also evident early in the opinion is the Court's focus on the historical context of the Bankruptcy Clause at the time the Constitution was ratified.[74]

After this introduction, the court briefly turned to the issue of precedent, acknowledging that the statements from *Seminole Tribe of Florida v. Florida* assumed the applicability of the holding of that case to the Bankruptcy Clause.[75] Although it was assumed that these prior decisions applied to the Bankruptcy Clause, Justice Stevens was convinced that those statements were merely dicta and should not control the judgment announced in this case.[76]

Part II of the majority opinion addressed the history of discharges in bankruptcy proceedings.[77] Since debtors were generally imprisoned in the 18th century, the discharge "referred to both release of debts and release of the debtor from prison."[78] Due to widely varying laws in the states, however, the discharge did not function to protect the debtor the way that it did in England, where there was only one sovereign.[79] The court used two early cases to

69. 126 S. Ct. 990 (2006).

70. *Id.* at 995 (footnote omitted).

71. *See* discussion *infra* Part III.C.

72. 126 S. Ct. 994.

73. *Id.* at 995-96.

74. *Id.* at 996 ("It is appropriate to presume that the Framers of the Constitution were familiar with the contemporary legal context when they adopted the Bankruptcy Clause.").

75. *Id.* at 996.

76. *Id.*

77. *See id.* at 996-1000.

78. *Id.* at 997.

79. *Id.* at 997-98.

demonstrate how debtors were treated unfairly by the varying bankruptcy laws between the states.[80]

In the first case, *James v. Allen*,[81] a debtor just recently released from a New Jersey prison was arrested in Pennsylvania for not paying debts he still owed in that state.[82] The court held that the discharge of his debt by a New Jersey court was not valid in Pennsylvania.[83] In the second case, *Millar v. Hall*,[84] a debtor was again arrested in Pennsylvania, this time after he had been discharged by a court in Maryland.[85] The court, however, reversed its earlier ruling and held that a discharge in one state had a binding effect on the other states.[86] Comparing these two cases, Justice Stevens concluded that this unfair treatment led the Constitutional Convention to adopt the Bankruptcy Clause with little debate, due to the importance of establishing uniform laws on the subject.[87]

In Part III, the court discussed the nature of bankruptcy jurisdiction.[88] Justice Stevens noted that the bankruptcy clause "encompasses the entire 'subject of Bankruptcies.'"[89] This, he argued, is a unitary concept that the framers would have understood to include more than "simple adjudications of rights in the res."[90] According to the Court, bankruptcy courts have historically had the power to issue orders ancillary to the bankruptcy in order to enforce their power, including writs of habeas corpus directing States to release debtors from prison.[91] The majority did not decide whether an action to recover preferential transfers was properly characterized as *in rem* or *in personam*; however, they did determine that the Bankruptcy Clause gave "Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property."[92] This authority has been a "core aspect" of the administration of the bankrupt estate since the 18th century.[93] Thus, the court argued, even if a court order mandating the return of the preferential transfer required *in personam* process, it still operated free of sovereign immunity because it was a core proceeding ancillary to the bankruptcy court's *in rem* jurisdiction.[94]

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80. *Id.* at 998-99.
81. 1 U.S. (1 Dall.) 188 (1786).
82. *Katz*, 126 S. Ct. at 998.
83. *Id.*
84. 1 U.S. (1 Dall.) 229 (1788).
85. *Katz*, 126 S. Ct. at 998.
86. *Id.* at 999.
87. *Id.* at 999-1000.
88. *Id.* at 1000.
89. *Id.*
90. *Id.*
91. *Id.* at 1001.
92. *Id.* at 1001-02.
93. *Id.*
94. *Id.*

In Part IV, the majority concluded that, by ratifying the Bankruptcy Clause as a grant of authority in the Constitution, the states agreed in the plan of the convention not to assert sovereign immunity with regard to orders ancillary to the bankruptcy courts' *in rem* jurisdiction.[95] This conclusion was based on the history of the Bankruptcy Clause and the legislation enacted shortly after the Constitution was ratified.[96] Justice Stevens reasoned that the provision enacted by the Sixth Congress, which granted the federal courts' habeas corpus powers to release debtors from prison, meant that "the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere."[97] The majority thus held that, "[i]n 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."[98] Accordingly, the judgment of the Sixth Circuit was affirmed.[99]

B. The Dissent

Justice Thomas authored the only dissent, which was joined by Scalia, Kennedy, and Chief Justice Roberts.[100] Thomas began by arguing that the majority opinion "cannot be justified by the text, structure, or history of our Constitution."[101] The dissent identified two recent cases that contradicted the *Katz* holding.[102] In *Alden v. Maine*, the court stated that it was "settled doctrine that . . . attempted congressional abrogation under Article I" does not prohibit a state from asserting a sovereign immunity defense.[103] Prior to that, in *Seminole Tribe*, the court held that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[104] In fact, Thomas pointed out that Justice Stevens himself, dissenting in *Seminole Tribe*, stated that he saw no reason to distinguish between the Bankruptcy Clause and several other Article I powers for the purposes of limitations imposed by the Eleventh Amendment.[105]

Although Justice Stevens had claimed that the *Katz* holding merely ignored dicta, the dissent argued that the majority overruled the court's prior

95. *Id.* at 1002.
96. *Id.*
97. *Id.* at 1004.
98. *Id.* at 1005.
99. *Id.*
100. *Id.* (Thomas, J., dissenting).
101. *Id.* at 1006.
102. *Id.*
103. 527 U.S. 706, 748 (1999).
104. 517 U.S. 44, 72-73 (1996).
105. *Katz*, 126 S. Ct. at 1007 (Thomas, J., dissenting) (citing *Seminole Tribe*, 517 U.S. at 93-94 (Stevens, J., dissenting)).

decision in *Hoffman v. Connecticut Department of Income Maintenance*.[106] According to Justice Thomas, the plurality in *Hoffman* held that Eleventh Amendment immunity barred an action to avoid a preferential transfer brought against a state agency, similar to the action at issue in *Katz*.[107] Justice O'Connor, now joining the majority in *Katz*, had concurred in *Hoffman*, stating that "Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause."[108] The dissent reasoned that the *Hoffman* plurality required a clearer statutory abrogation, at the very least, before Congress could overcome state immunity under the Bankruptcy Clause.[109] Since the *Katz* majority required no congressional abrogation at all when acting pursuant to the Bankruptcy Clause, *Hoffman* could no longer stand as valid law.[110]

The dissent also compared the Bankruptcy Clause with the Patent Clause, another Article I power "motivated by the Framers' desire for nationally uniform legislation."[111] Justice Thomas argued that this need for uniformity in legislation was not sufficient to find a waiver of sovereign immunity under the Patent Clause, as the court held in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.[112] The dissent also argued that the majority exaggerated the "Framers' fervor to enact a national bankruptcy regime," noting that it was over a century after the adoption of the Bankruptcy Clause that Congress first enacted a permanent national bankruptcy law.[113]

Then, the dissent rebutted two observations that the majority had asserted in its historical argument supporting abrogation.[114] First, the dissent contended that the habeas corpus power available to release debtors from prison did not correlate with the *Katz* holding allowing for monetary relief against the state.[115] This was because the writ of habeas corpus was brought against a state official rather than the state itself, and thus did not offend the Eleventh Amendment.[116] Second, Justice Thomas argued that the majority's illustration regarding the inability of debtors to obtain discharge orders in multiple states required application of the Full Faith and Credit Clause[117] rather than abrogation of state immunity.[118] Although the problem of dis-

106. 492 U.S. 96 (1989); *Katz*, 126 S. Ct. at 1006-08 (Thomas, J., dissenting).
107. *Katz*, 126 S. Ct. at 1007 (Thomas, J., dissenting).
108. *Id.* at 1007-08 (quoting *Hoffman*, 492 U.S. at 105).
109. *Id.* at 1008.
110. *Id.*
111. *Id.*
112. *Id.* at 1009.
113. *Id.*
114. *Id.* at 1010.
115. *Id.* at 1011.
116. *Id.*; *see Ex parte* Young, 209 U.S. 123 (1908).
117. U.S. CONST. art. IV, § 1.
118. *Katz*, 126 S. Ct. at 1012.

charge between the states resulted in rampant injustice, the dissent noted that the proper redress "turned entirely on binding state courts to respect the discharge orders of their sister States under the Full Faith and Credit Clause, not on the authorization of private suits against the States."[119]

Finally, the dissent criticized the majority's reliance on *Hood* and its focus on the *in rem* jurisdiction of the bankruptcy courts. Although the transfer recovery proceedings at issue in *Katz* were described as "ancillary to and in furtherance of the court's *in rem* jurisdiction,"[120] the majority did not conclude that the proceeding was itself *in rem*.[121] In *Hood*, however, "the Court explicitly distinguished recovery of preferential transfers, noting that the debt discharge proceedings [at issue in *Hood*] were '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.'"[122] Justice Thomas concluded that, where money was the only property sought to be returned, there can be no *in rem* jurisdiction because there was no *res* to attach.[123] Thus, the majority should not have relied on its characterization of *in rem* jurisdiction because the distinction between *in rem* and proceedings "ancillary to and in furtherance of" required a different outcome based on *Hood*.[124]

V. COMMENT

Central Virginia Community College v. Katz[125] should prove to be a significant decision in two respects. First, the immediate effects of the decision will be felt primarily by the bankruptcy courts that are likely to struggle when interpreting this new law. Second, *Katz* revived a broader debate regarding the direction of the Supreme Court's sovereign immunity jurisprudence. The introduction of a new justice to an evenly split Supreme Court makes it difficult to predict how these two issues will eventually be resolved.

A. Katz *and the Bankruptcy Courts*

In a decision that further confused an already complex area of law, the Supreme Court failed to announce a clear rule that would allow lower courts to interpret the decision uniformly. *Katz* held that the states effectively waived their sovereign immunity when they ratified the Bankruptcy Clause,

119. *Id.*
120. *Id.* at 1001.
121. *Id.* at 1012.
122. *Id.* at 1013 (citing Tenn. Student Assistance Corp. v. Hood, 514 U.S. 440, 454 (2003)).
123. *Id.* at 1013 (citing United States v. Nordic Village, Inc., 503 U.S. 30, 38).
124. *See id.* at 1012-13.
125. 126 S. Ct. 990 (2006).

but only with respect to those "proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts."[126] The Court also pointed out that not every law validly enacted under the Bankruptcy Clause will defeat the states' sovereign immunity defense.[127] So *Katz* leaves an open question: what proceedings are necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts? The two obvious answers are those actions that were approved by the court in *Katz* and *Hood*; specifically, actions to recover preferential transfers and adjudications involving the discharge of student loan debt.[128] Beyond this, the "murky test" employed by the five-justice majority in *Katz* does not offer much guidance to the bankruptcy courts that will have to apply it.[129]

The ambiguity of *Katz*, which replaced the relative certainty established by *Seminole Tribe* and its progeny, seems likely to increase sovereign immunity litigation across the board. Within the bankruptcy context, plaintiffs are more likely to challenge state immunity with actions that arguably invoke the court's *in rem* jurisdiction. Given such little guidance from the Supreme Court on how to implement this decision, jurisdictions may differ in their decisions regarding what actions are free from an immunity defense because they constitute a "proceeding[] necessary to effectuate . . . *in rem* jurisdiction."[130] This result undermines *Katz*'s reliance on uniformity in the application of bankruptcy laws.[131]

Additionally, with the court reversing trends in its Eleventh Amendment jurisprudence, litigants may be inspired to challenge Congressional abrogation in areas other than bankruptcy.

B. The Sovereign Immunity Debate Continues

There is little doubt that four of the current justices of the Supreme Court favor the narrow "diversity interpretation" of the Eleventh Amendment. This interpretation suggests that the Eleventh Amendment "limits Article III's diversity grants of jurisdiction insofar as they confer jurisdiction in certain suits against states, but does not limit the grant of federal-question jurisdic-

126. *Id.* at 1005.

127. *Id.* at 1005 n.15.

128. *See id.* at 994.

129. Posting of Steve Jakubowski to The Bankruptcy Litigation Blog, http://www.bankruptcylitigationblog.com (Jan. 23, 2006). Jakubowski suggests that bankruptcy courts applying *Katz* may "frame the question in the more traditional manner in which they're used to speaking: that is, whether – for sovereign immunity purposes – the proceeding is 'core' or 'non-core.'" *Id.* This proposition has some support in the language of the majority opinion, which states that the authority to recover preferential transfers has been a "core aspect of the administration of bankrupt estates since at least the 18th century." *Katz*, 126 S. Ct. at 1001-02.

130. *Katz*, 126 S. Ct. at 1005.

131. *See supra* text accompanying notes 81-87.

tion."[132] Under this interpretation, the broad view of sovereign immunity adopted by the court in *Hans v. Louisiana* should be overturned.[133] Justice Brennan adhered to this view, and his opinion in *Union* Gas did overrule *Hans* for all practical purposes, although *Hans* has never been directly overruled by the court.[134]

In *Katz*, Justice O'Connor joined those four justices (Breyer, Ginsburg, Souter, and Stevens) to form the majority. The result in *Katz* was unpredictable for two reasons: first, because the *Seminole Tribe* line of cases was well-established precedent holding that Congress could not abrogate pursuant to its Article I powers, and second, because Justice O'Connor was expected to side with the other four justices as she had done prior to *Katz* in the *Seminole Tribe* line of cases. In dissent, Justice Thomas notes Justice O'Connor had previously stated "Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause."[135]

The result is particularly surprising because *Katz* was one of Justice O'Connor's last decisions before retiring from the court, and since she did not author an opinion, there is no clear explanation for her decision in this case.[136] Some have speculated that delaying the opinion by just a few weeks would have reversed the outcome of the case because Justice Alito would have joined the dissenters to shift the majority.[137] Others have argued that, due to the change in personnel on the court, *Katz* is unsettled and may be reversed in the near future.[138] It should be noted that *Katz* was also one of the first decisions for new Chief Justice Roberts, who replaced former Chief Justice Rehnquist. This change in the membership of the court probably did not have any impact on *Katz*, as it is likely that Rehnquist would have also been in dissent, conforming to his decisions in *Seminole Tribe* and its progeny.

Katz may signal new life for the narrow interpretation of the Eleventh Amendment that was seemingly laid to rest by *Seminole Tribe*, but the impact of this decision will remain uncertain until the Supreme Court revisits Congressional abrogation of sovereign immunity pursuant to an Article I power. If the Court remains sympathetic to the reasoning of *Katz*, it may find that the states waived their immunity by ratifying other Article I clauses that grant Congress plenary power to establish uniform laws on a particular subject, such as the Patent Clause.[139] On the contrary, the Court's new membership

132. Vasquez, *supra* note 49, at 1931.

133. *Id.*

134. *Id.*

135. *Katz*, 126 S. Ct. at 1007-08 (Thomas, J., dissenting) (citing *Hoffman*, 492 U.S. at 104).

136. Althouse, http://althouse.blogspot.com (Jan. 23, 2006, 10:39).

137. Benjamin, *supra* note 2.

138. Posting of Kevin Russell to SCOTUSBlog, http://www.scotusblog.com (Jan. 23, 2006, 13:40).

139. This would require the court to overrule Florida Prepaid Postsecondary Education Expense Board. v. College Savings Bank, 527 U.S. 627 (1999).

may reject *Katz*'s reasoning entirely by overruling the decision, restoring the broad interpretation over sovereign immunity espoused in *Seminole Tribe*. In the meantime, *Katz* represents a limited exception to state sovereign immunity under the Bankruptcy Clause with an uncertain future,

VI. CONCLUSION

Katz marked a surprising departure from the Supreme Court's recent trend in sovereign immunity jurisprudence. Although the case provides an interesting snapshot of the Supreme Court in transition, there is unfortunately little than can be predicted about the future of the sovereign immunity debate. As one of only two Supreme Court cases to specifically hold that Congress can limit state sovereign immunity pursuant to its Article I powers, *Katz* may prove to be momentous.[140] Perhaps the most intriguing aspect of *Katz* is the reliance upon a historical account of the plan of the convention to find that the states had consented to private suits, much like the holding in *Union Gas*.[141] Since *Katz* does not require explicit statutory abrogation by Congress, much of the decision-making in the hands of the bankruptcy courts that will apply *Katz* in the future.[142] The lack of uniformity that is likely to result should lead the Court to reconsider this decision in the near future.

The most likely scenario is that the recent change in personnel on the court will result in a reversal or a limitation of *Katz*. A sharply divided Supreme Court has shown very little willingness to compromise with regard to the Eleventh Amendment, and there is no indication that the Justices will attempt to simplify this complex and confusing area of the law. In the meantime, however, *Katz* is likely to spark future litigation challenging state sovereign immunity based on interesting historical arguments regarding the adoption of various provisions of the Constitution. The contention that has surfaced on the Court over this issue in recent history suggests that the only thing that is certain for the future of state sovereign immunity is uncertainty.

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140. *See also* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

141. Posting of Kevin Russell to SCOTUSBlog, http://www.scotusblog.com/ (Jan. 23, 2006, 13:40).