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Should It Stay or Should It Go? *Seminole Tribe* in the Post-Katz Era

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Should It Stay or Should It Go? *Seminole Tribe* in the Post-Katz Era

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I. INTRODUCTION

In early 2006, the Supreme Court announced its decision in *Central Virginia Community College v. Katz*¹ and once again changed the framework for state sovereign immunity that has been evolving since early in this country's history. In *Katz*, the Court held that some bankruptcy actions involving state agencies are not barred by state sovereign immunity.² This was a landmark decision in the realm of state sovereign immunity because the Court essentially turned its back on its *Seminole Tribe of Florida v. Florida* decision from just ten years earlier.³ In *Seminole Tribe*, the Court held that Congress could not abrogate state sovereign immunity under the Indian Commerce Clause or any other Article I, Section 8 power.⁴ Moreover, the Court indicated that its holding applied

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1. 546 U.S. 356 (2006).

2. *Id.* at 359.

3. *Id.* at 363 ("We acknowledge that statements in both the majority and the dissenting opinions in [*Seminole Tribe*], reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. Careful study and reflection have convinced us, however, that that assumption was erroneous.") (citations omitted).

4. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996).

to bankruptcy, antitrust, and copyright suits.⁵ While sticking to its holding for suits implicating the Patent Clause,⁶ the Court, in *Katz*, found that the Bankruptcy Clause somehow differs from the other Article I, Section 8 legislative powers.⁷

The history of state sovereign immunity shows that the doctrine is complicated and ever-evolving. In the process of trying to develop a coherent doctrine, the Court has looked to many sources, including the Tenth Amendment, the Eleventh Amendment, the Constitution as a whole, and the framework of understanding under which all of these texts were written. With each new case, the Court seems to consider a slightly different set of factors to guide its decision. *Katz* is just the latest in a long series of cases that may illuminate or complicate the state sovereign-immunity doctrine.

This Article attempts to determine the soundness of the *Katz* holding by analyzing the history of state sovereign immunity and the recent *Katz* opinion. It also attempts to show that *Seminole Tribe* and *Katz* cannot co-exist. Part II gives a brief history of the Supreme Court cases through which state sovereign-immunity jurisprudence developed: *Chisholm v. Georgia*,⁸ *Hans v. Louisiana*,⁹ *Alden v. Maine*,¹⁰ and *Federal Maritime Commission v. South Carolina State Ports Authority*.¹¹ Part III examines three crucial recent cases to this state sovereign-immunity analysis: *Seminole Tribe of Florida v. Florida*,¹² *Tennessee Student Assistance Corp. v. Hood*,¹³ and *Central Virginia Community College v. Katz*.¹⁴ Part IV examines the foundations of the state sovereign-immunity doctrine from the perspective of English law and the U.S. Constitution. Part V details the history of the Bankruptcy Clause, and looks for clues as to the Framers' intent. It then compares bankruptcy law with both patent law and with the Patent Clause to see whether bankruptcy really should qualify as an exception to the Court's sovereign-immunity doctrine.

The most pressing question in this analysis is whether bankruptcy

5. *Id.* at 72 n.16 ("It has not been widely thought that the federal antitrust, bankruptcy, or copyright states abrogated the States' immunity.").

6. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (stating that *Seminole Tribe* makes it clear that Congress may not abrogate state sovereign immunity under the Patent Clause).

7. *Katz*, 546 U.S. at 362–63.

8. 2 U.S. (2 Dall.) 419 (1793).

9. 134 U.S. 1 (1890).

10. 527 U.S. 706 (1999).

11. 535 U.S. 743 (2002).

12. 517 U.S. 44 (1996).

13. 541 U.S. 440 (2004).

14. 546 U.S. 356 (2006).

is so different from other Article I powers that the Court had to make an exception to an already complicated doctrine. If bankruptcy is different and if the *Katz* opinion is well reasoned, then the result may stand. This result, however, means the downfall of the Court's seminal state sovereign-immunity decision—*Seminole Tribe*. This also means that courts must completely re-think the nexus between Article I and state sovereign immunity.

II. A BRIEF HISTORY OF SOVEREIGN IMMUNITY IN THE UNITED STATES

A. *Chisholm v. Georgia*

Any historical account of the state sovereign-immunity doctrine starts in 1793 with the Court's first major state sovereign-immunity decision, *Chisholm v. Georgia*.¹⁵ In a 4–1 decision, the Supreme Court allowed a citizen of South Carolina to sue the State of Georgia and recover a money judgment.¹⁶ The Court relied on Article III, Section 2 of the Constitution to support its holding.¹⁷ The relevant part of that clause states that “[t]he judicial power [of the United States] shall extend . . . to controversies . . . between a State and Citizens of another state.”¹⁸ The Court did not interpret this expression of federal jurisdiction as limited to cases where the State was the plaintiff, asking:

[W]hat shall we do with the immediate preceding clause; ‘controversies between two or more States,’ where a State must of necessity be Defendant? If it was not the intent, in the very next clause also, that a State might be made Defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made if one was intended?¹⁹

So, just over five years after ratification of the Constitution, the Supreme Court interpreted the federal judicial power as abrogating state sovereign immunity. The States, however, were outraged with the holding in *Chisholm*. The States believed that they were entitled to the same sovereign immunity that they enjoyed before ratification.²⁰ Less than

15. 2 U.S. (2 Dall.) 419 (1793).

16. *Id.* at 452–53, 466, 469, 479.

17. *Id.* at 466.

18. U.S. CONST. art. III, § 2, cl. 1.

19. *Chisholm*, 2 U.S. (2 Dall.) at 467 (Cushing, J., concurring).

20. See Richard Lieb, *State Sovereign Immunity: Bankruptcy Is Special*, 14 AM. BANKR. INST. L. REV. 201, 215–16 (2006). The States were afraid of an onslaught of lawsuits by citizens to recover debts incurred during the Revolutionary War. See *id.* The fact that the States responded so quickly and adamantly to *Chisholm* seems to indicate a clear consensus on state sovereign immunity at the time of ratification. See *id.* at 216. Historical evidence, however, shows that this was not the case. See *infra* Part III.

two years later, the States ratified the Eleventh Amendment:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.²¹

This text is fairly specific in refuting the Court's decision in *Chisholm*, but it does not go much further.²² As will be discussed, the Eleventh Amendment does not fully explain the state sovereign-immunity doctrine as it exists today.

Justice Iredell wrote the lone dissent in *Chisholm*.²³ He quoted from Section 14 of the Judiciary Act of 1789:

All the before mentioned Courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.²⁴

Justice Iredell determined that the "principles and usages of law" must be derived from the common law of the several States.²⁵ He further argued that neither Georgia nor any other State in the Union, at the time of ratification of the Constitution and at the time the Judiciary Act was passed, authorized suits to recover money judgments against a State.²⁶ As it turned out, the States agreed with Justice Iredell's interpretation of state sovereign immunity.

B. *Hans v. Louisiana*

For nearly one hundred years following the *Chisholm* decision, state sovereign immunity and the Eleventh Amendment were not seriously questioned.²⁷ Then, in 1890, the Court handed down its second major state sovereign-immunity decision in *Hans v. Louisiana*.²⁸ In *Hans*, a citizen of Louisiana sued the State of Louisiana to collect interest on a bond issued to him under a legislative act of that State.²⁹ Rather

21. U.S. CONST. amend. XI.

22. See Bless Young & Kurt Gurka, *An Overview of State Sovereign Immunity in the Federal System*, UTAH B.J., Oct. 2004, at 22, 22 (stating that the text of the Eleventh Amendment is "easily understood as the constitutional overturning of [*Chisholm*]" but that it "offers little assistance in determining the true scope of State sovereign immunity").

23. *Chisholm*, 2 U.S. (2 Dall.) at 429–50 (Iredell, J., dissenting).

24. *Id.* at 433–34 (emphasis omitted) (quoting Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (codified as amended at 28 U.S.C. § 2241(a) (2000))).

25. *Id.* at 435.

26. *Id.* at 434–35.

27. See Lieb, *supra* note 20, at 216.

28. 134 U.S. 1 (1890).

29. *Id.* at 1.

than adhering to a strictly textual interpretation of the Eleventh Amendment, the Court ruled that States are immune from suits filed by citizens of *any* State.³⁰ It reasoned that state sovereign immunity was so widely recognized at the time of ratification of the Constitution that it was “hardly necessary to be formally asserted” in either the Constitution or in the Eleventh Amendment.³¹

To support its holding, the Court relied on, and quoted the statements of, some of the Framers regarding state sovereign immunity at the time of ratification.³² Looking specifically at language from Alexander Hamilton, James Madison, and John Marshall, the Court concluded that the Framers never thought it possible that a citizen could bring suit against a State without its consent.³³ In very clear words, the Court stated that “[t]he suability of a state, without its consent, was a thing unknown to the law.”³⁴ Writing for the majority, Justice Bradley also found Justice Iredell’s examination of sovereign immunity in his dissent to *Chisholm* to be helpful.³⁵ He even wrote that Justice Iredell “conclusively showed” that subjecting sovereign States to suits by individuals was “never done before.”³⁶ The Court’s decision in *Hans* was the first big step toward the contemporary conception of state sovereign immunity.

C. Alden v. Maine

More than a century later, the Court faced another important question regarding state sovereign immunity: Can Congress abrogate state sovereign immunity in state courts? In *Alden v. Maine*, employees of the State of Maine brought suit against the State in state court for violation of the Fair Labor Standards Act of 1938.³⁷ The Court held that Congress cannot subject non-consenting States to suit in their own

30. *Id.* at 20–21.

31. *Id.* at 15–16.

32. *Id.* at 12–14.

33. *Id.* The Supreme Court often relies heavily on Alexander Hamilton’s Federalist No. 81 and No. 82 to support its views on the history of state sovereign immunity. See, e.g., Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 752 (2002); *Alden v. Maine*, 527 U.S. 706, 716–17 (1999); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 28 n.10 (1990); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 275–76 (1985); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 352, 418–20 (1821).

34. *Hans*, 134 U.S. at 16.

35. *Id.* at 12.

36. *Id.* Part III will show that this statement is not completely correct in light of historical records.

37. 527 U.S. 706, 711–12 (1999). Petitioners originally filed suit in federal court, but it was dismissed after the decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Petitioners then brought the same suit in state court. *Alden*, 527 U.S. at 712.

courts under Article I of the U.S. Constitution.³⁸ Reaffirming its rationale in *Hans*, the Court asserted that state sovereign immunity “neither derives from nor is limited by the terms of the Eleventh Amendment.”³⁹

Instead of the Eleventh Amendment, the Court purported to rely on “the Constitution’s structure, and its history, and the authoritative interpretations of [the Supreme Court]” to justify its decision.⁴⁰ In fact, the Court seemed to be asserting a somewhat novel idea: that state sovereign immunity is somehow embodied in the Tenth Amendment.⁴¹ According to this theory, the Tenth Amendment removed any doubt about the States’ immunity as sovereigns by reserving to the States any powers not specifically delegated to the federal government or prohibited to the States.⁴² Once again, the Eleventh Amendment was merely a way of correcting the Court’s misunderstanding in *Chisholm*. State sovereign immunity existed before, and it existed after, the Amendment was written.

D. Federal Maritime Commission v. South Carolina State Ports Authority

In 2002, the Court finally made a somewhat surprising decision in *Federal Maritime Commission v. South Carolina State Ports Authority*.⁴³ This case presented the question whether States are immune from private suits in front of administrative agencies.⁴⁴ The Court decided in the affirmative, reasserting two major aspects of the state sovereign-immunity doctrine: (1) state sovereign immunity existed before, and continued after, ratification of the Constitution,⁴⁵ and (2) state sovereign immunity extends beyond the text of the Eleventh Amendment.⁴⁶ The Court based its holding, in part, on the “overwhelming” similarities between the administrative proceedings in question and civil-judicial proceedings, in which the Court previously held that States are immune

38. *Alden*, 527 U.S. at 712.

39. *Id.* at 713 (“We have . . . sometimes referred to the States’ immunity from suit as ‘Eleventh Amendment immunity.’ The phrase is convenient shorthand but something of a misnomer . . .”).

40. *Id.* The Court asserted that, at the time of ratification of the Constitution, the English doctrine of state sovereign immunity was “universal” in the States. *Id.* at 715–16.

41. *Id.* at 713–14.

42. *Id.* (“Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which . . . was enacted to allay lingering concerns about the extent of the national power.”). This begs the question why the Eleventh Amendment was even necessary. If the Tenth Amendment confirmed state sovereign immunity, why did Congress enact another constitutional amendment?

43. 535 U.S. 743 (2002).

44. *Id.* at 747.

45. *Id.* at 751–52.

46. *Id.* at 753–54.

from suit.⁴⁷ *Federal Maritime Commission* left open the question whether its holding would apply to administrative proceedings that are significantly different from judicial proceedings.

Chisholm, *Hans, Alden*, and *Federal Maritime Commission* show the historical progression of sovereign immunity in the United States, from ratification through the present. It is evident that the Court believes that state sovereign immunity transcends the Eleventh Amendment and maybe even the Constitution itself. This framework guided the Court in nearly all of its state sovereign-immunity decisions. And this framework elucidates the inconsistencies of the Court's rationale in *Central Virginia Community College v. Katz*.

III. THE DOCTRINE BECOMES MORE COMPLICATED

A. Seminole Tribe of Florida v. Florida

In 1996, the Supreme Court issued perhaps its most sweeping endorsement of state sovereign immunity in *Seminole Tribe of Florida v. Florida*.⁴⁸ The question presented was relatively narrow: whether Congress had validly abrogated state sovereign immunity under the Indian Commerce Clause.⁴⁹ At issue was the Indian Gaming Regulatory Act, which governed Indian gaming activities.⁵⁰ The Act, among other things, allows gaming activities in states in which a valid compact exists between the Indian tribe and the State.⁵¹ It mandates that States negotiate with Indian tribes in good faith, and allows Indian tribes to bring suit against a State if the State did not comply with the requirements of the Act.⁵²

The Court determined that Congress clearly intended to abrogate state sovereign immunity by passing the Indian Gaming Regulatory Act.⁵³ But the Court struck down the Act on the ground that Congress did not have the constitutional power to unilaterally abrogate state sovereign immunity.⁵⁴ It reached this conclusion based on a lengthy discussion of the judicial history of state sovereign immunity.⁵⁵ Once again,

47. *Id.* at 759.

48. 517 U.S. 44 (1996).

49. *Id.* at 47, 55. Contained in Article I, Section 8 of the Constitution, the Indian Commerce Clause is part of the Commerce Clause, which gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

50. *Seminole Tribe*, 517 U.S. at 47.

51. 25 U.S.C. § 2710(d)(1)(C) (1988), *invalidated* by *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

52. § 2710(d)(7)(A).

53. *Seminole Tribe*, 517 U.S. at 56–57 (calling Congress's intent "indubitable").

54. *Id.* at 72.

55. *Id.* at 64–73.

the Court stuck to its old adage: A textual interpretation of the Eleventh Amendment does not describe the full scope of sovereign immunity inherent in the Constitution.⁵⁶

The way the Supreme Court invalidated the Indian Gaming Regulatory Act had a profound effect on state sovereign-immunity jurisprudence. Instead of simply ruling on congressional power to abrogate under the Indian Commerce Clause, the Court unequivocally held that Congress cannot abrogate state sovereign immunity under any of its Article I powers.⁵⁷ Chief Justice Rehnquist, writing for the majority, stated that “[t]he *Eleventh Amendment* restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”⁵⁸ The Court grouped all Article I, Section 8 congressional powers together, implying that they are all the same when it comes to state sovereign-immunity analysis.

The breadth of this statement shocked the dissenters. In a somewhat prophetic moment, Justice Stevens pointed out that the Court’s holding “prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.”⁵⁹ The majority responded in footnote sixteen that “it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States’ sovereign immunity. This Court has never awarded relief against a State under any of those statutory schemes”⁶⁰ As it turns out, this exchange caused a great deal of confusion for courts applying the *Seminole Tribe* holding.

This was the high point for state sovereign immunity; for a few years after *Seminole Tribe*, the States seemingly had almost unlimited immunity from private suits.⁶¹ But the Court soon made an exception to its clear-cut rule.

B. Hood: *Bankruptcy Rears Its Ugly Head*

After *Seminole Tribe*, it seemed as if there was very little Congress could do to allow for private suits against States.⁶² In 2004, the first

56. *Id.* at 69–70.

57. *Id.* at 72–73. In making its ruling, the Court overturned its decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which held that Congress had the power to abrogate state sovereign immunity under the Interstate Commerce Clause. *Seminole Tribe*, 517 U.S. at 66.

58. *Id.* at 72–73 (emphasis added).

59. *Id.* at 77 (Stevens, J., dissenting); see also Leonard H. Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine*, 74 AM. BANKR. L.J. 1, 3 (2000).

60. *Seminole Tribe*, 517 U.S. at 72 n.16.

61. See Lieb, *supra* note 20, at 218–19.

62. There were two avenues to bring suit against a State, but only in limited circumstances.

sign of change came with the Court's ruling in *Tennessee Student Assistance Corp. v. Hood*.⁶³ There, a Chapter 7 debtor brought an action to discharge a student loan that she owed to the Tennessee Student Assistance Corporation, a state agency.⁶⁴

The Supreme Court granted certiorari to answer the question whether Congress may abrogate state sovereign immunity under its Article I bankruptcy power.⁶⁵ It specifically focused on the constitutionality of 11 U.S.C. § 106(a), a provision in the Bankruptcy Code that Congress amended to make clear its intent to abrogate state sovereign immunity.⁶⁶ But the Court never reached the important question it set out to answer. It ruled that this particular action did not even implicate a State's sovereign immunity because the action focused on the res (the debtor's estate), and not on the persona (the state).⁶⁷ The Court reasoned that, because of the in rem nature of this suit, it did not involve the affront to state dignity that sovereign immunity was meant to prevent.⁶⁸ The Court pointed out that "States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors."⁶⁹ In essence, the Court held that the States are no different from other creditors when it comes to bankruptcy proceedings. This foreshadowed what was to come in *Katz*.

Important to the *Hood* decision was the fact that the plaintiff did not seek monetary damages or affirmative relief from the State, only a

The *Ex parte Young* doctrine allows private suits against state officials seeking to enjoin ongoing constitutional violations. 209 U.S. 123, 162 (1908). The Court also allows for suits under the Fourteenth Amendment on the theory that the Amendment shifted the federal-state balance of power in favor of the Congress. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

63. 541 U.S. 440 (2004).

64. *Id.* at 443–44.

65. *Id.* at 443.

66. See 11 U.S.C. § 106(a) (2000) ("Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . ."); see also Janet A. Flaccus, *The Eleventh Amendment and Bankruptcy Jurisdiction over States*, 10 J. BANKR. L. & PRAC. 207, 207 (2001) ("Section 106 of the Bankruptcy Code was amended to make it clear that Congress was waiving States' sovereign immunity from bankruptcy suit . . .").

67. *Hood*, 541 U.S. at 450 ("No matter how difficult Congress has decided to make the discharge of student loan debt, the bankruptcy court's jurisdiction is premised on the res, not on the persona . . .").

68. *Id.* at 451; cf. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) ("[I]f the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency . . ."). The Court partially relied on its decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), to support its holding in this case. *Hood*, 541 at 446–47. In *Deep Sea Research*, the Court held that the Eleventh Amendment did not bar a federal in rem admiralty suit against a State where the State did not possess the res. 523 U.S. at 507–08.

69. *Hood*, 541 U.S. at 448.

discharge of debts.⁷⁰ Although the Court does not explain its statement on this issue, one can hypothesize that a suit seeking damages from a State might involve an “affront to state dignity” and therefore merit a different result.

The narrow decision in *Hood* allowed the Court to avoid contradicting its decision in *Seminole Tribe* for a short time. But the important questions left open after *Hood* did not stay unanswered for long.

C. *The Katz Analysis Contradicts Seminole Tribe*

In January 2006, in a 5–4 decision (with Justice O’Connor providing the swing vote), the Supreme Court set out to answer the heated question left open after *Hood*: Does Congress have the power to abrogate state sovereign immunity under the Bankruptcy Clause?⁷¹ This suit was initiated by a bankruptcy trustee to set aside preferential transfers to state agencies.⁷² In a landmark decision, the Court held that Congress does have the power to abrogate state sovereign immunity for actions ancillary to in rem bankruptcy actions.⁷³ Although recognizing that this ruling directly contradicted its language in *Seminole Tribe*, the Court made the decision anyway.⁷⁴ Just ten years after *Seminole Tribe*, the Court seemed to be rethinking its framework for state sovereign immunity.

The Court attempts to explain its change of heart through a detailed evaluation of the history of bankruptcy and the Bankruptcy Clause. The *Katz* opinion is replete with references to the Framers’ intent and understanding.⁷⁵ The majority attempted to distinguish the Bankruptcy Clause from other Article I, Section 8 legislative powers—something the Court had explicitly rejected in *Seminole Tribe*. Justice Thomas, in his dissent, questioned this distinction.⁷⁶ To him, “[n]othing in the text, structure, or history of the Constitution indicates that the Bankruptcy Clause, in contrast to all of the other provisions of Article I, manifests

70. *Id.* at 450.

71. *Cent. Va. Cmty. Coll. v. Katz*, 540 U.S. 356, 361 (2006).

72. *Id.* at 359.

73. *Id.* at 372–73. “Under [the broad definition of ‘ancillary’], virtually every proceeding brought to implement or enforce a provision of the Bankruptcy Code . . . would be ‘ancillary’ to the *in rem* jurisdiction of the bankruptcy court.” Lieb, *supra* note 20, at 231. Exactly what the Court meant by “ancillary” is a question left unanswered in *Katz*.

74. *Katz*, 546 U.S. at 363 (“We acknowledge that statements in both the majority and dissenting opinions in [*Seminole Tribe*] reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. Careful study and reflection have convinced us, however, that that assumption was erroneous.”) (citations omitted).

75. *Id.* at 369, 370, 373 (using phrases such as, “[b]ankruptcy jurisdiction, as understood today and at the time of the framing,” “[t]he Framers would have understood,” and “the Framers’ primary goal was to prevent competing sovereigns’ interference with the debtor’s discharge”).

76. *Id.* at 393 (Thomas, J., dissenting).

the States' consent to be sued by private citizens."⁷⁷

In a relatively short opinion, the Court revealed a lot about its understanding of state sovereign immunity and bankruptcy law. The holding in *Katz* essentially depends on the Court's conclusion that the Bankruptcy Clause was written into the Constitution with the understanding that it destroyed some immunity that the States enjoyed pre-ratification.⁷⁸ According to the majority, the Framers understood that the States' divergent bankruptcy laws would cause huge problems, especially because debtors (at the time of ratification) were often imprisoned.⁷⁹ The only way to create a uniform system of bankruptcy laws was for the States to cede some of their immunity from suit. And the States voluntarily did so upon ratification of the Constitution, which included Congress's Article I bankruptcy power. Under this theory, the States never had sovereign immunity from suits ancillary to in rem bankruptcy actions.

IV. THE FOUNDATIONS OF STATE SOVEREIGN IMMUNITY: WHAT DOES HISTORY REALLY SAY?

A. *The Fundamentals: English History*

Most discussions of state sovereign immunity in the United States begin with an examination of its historical roots. English law laid the groundwork for early American sovereign-immunity doctrine.⁸⁰ Common belief is that the King of England was absolutely immune from private suit, as he was supreme over the judiciary.⁸¹ This belief, however, is not completely accurate.

In fact, the English crown was not entirely immune from suit.⁸² In eighteenth century England, a procedure was available that allowed all

77. *Id.*

78. *Id.* at 373 (majority opinion) ("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.").

79. *Id.* at 363; see also Brian Hermann & Penny Dearborn, *Supreme Court 2006: The Supremes Expand Bankruptcy Court Jurisdiction*, AM. BANKR. INST. J., July–Aug. 2006, at 48, 49.

80. See Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 HASTINGS CONST. L.Q. 721, 727 (2002).

81. See *id.*

82. See Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 29 (2002) ("Case law from at least a generation before publication of Blackstone's Commentaries demonstrates that actions were prosecuted against the King without his consent."). For discussions on misconstruction of English law and sovereign immunity, see James E. Pfander, *Sovereign Immunity and the Right To Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 906–26 (1997). For further discussion on the irrelevance of English law to the Framers' conception of sovereign immunity, see Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 544–45 (2006).

subjects to pursue judicial remedies for government wrongdoings.⁸³ The procedure involved petitioning the Crown for permission to pursue an action against the King.⁸⁴ Over time, the Crown's consent to pursue these actions became something of a formality.⁸⁵ "Blackstone acknowledged that the King had a constitutional duty to right wrongs and, further, that the King must and always did so"⁸⁶ He wrote:

[T]he law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to know of an injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to justice to the party aggrieved.⁸⁷

Blackstone's own writings, while proclaiming that the King can do no wrong, also show that sovereign immunity was not absolute.⁸⁸

One of the central arguments for implicit sovereign immunity within the structure of the Constitution is the idea that absolute sovereign immunity, stemming from English law, existed before ratification. In *Alden v. Maine*, Justice Kennedy wrote, "[w]hen the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts."⁸⁹ Yet accounts of English history do not show this to be an unequivocal truth.

B. *Sovereign Immunity and the Constitution: History and Text*

Because English history of sovereign immunity remains unclear, it is necessary to turn to American history. Although most scholars agree that some form of sovereign immunity existed for the thirteen original states, not all agree that it was immutable.⁹⁰ While the Framers certainly discussed the suability of the States in connection with Article III, there was no specific state sovereign-immunity discussion at the Constitutional Convention.⁹¹ And the Framers failed to even mention state sovereign immunity in the text of the Constitution. This makes it difficult

83. See Pfander, *supra* note 82, at 906–08.

84. *Id.*; see also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 442 (1793).

85. See Pfander, *supra* note 82, at 921–26; Randall, *supra* note 82, at 28–29. Justice Wilson recognized the English practice of petitions in *Chisholm*: "True it is, that now in England the King must be sued in his Courts by Petition; but even now, the difference is only in the form, not in the thing." *Chisholm*, 2 U.S. (2 Dall.) at 460 (Wilson, J., concurring).

86. Randall, *supra* note 82, at 28–29.

87. Pfander, *supra* note 82, at 901 n.6 (emphasis omitted) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *254–55 (St. George Tucker ed., 1803)).

88. See Pfander, *supra* note 82, at 926; Randall, *supra* note 82, at 28–29.

89. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (citing *Chisholm*, 2 U.S. (2 Dall.) at 437–46).

90. See Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443–44 (2005).

91. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1206 (2001).

to determine what, if anything, the Constitution and the Eleventh Amendment actually did to the immunity that existed before ratification.

Ratification of the Constitution necessarily involved some relinquishment of power by the States. And the States understood this was necessary to form a working union. The Articles of Confederation had not created a strong enough federal power, so some things had to change.⁹²

There were four primary tasks involved in the Constitutional Convention: "creating a strong but limited central government, protecting individual rights against the states, dividing power within the central government, and dividing power between local and central officials."⁹³ The Constitution therefore created a framework in which the States retained some powers but also gave up many others.

In *Alden v. Maine*, Justice Kennedy relied on Federalist No. 81, written by Alexander Hamilton, to support his conclusion that state sovereign immunity existed before ratification and that the States retained their immunity implicitly under the Constitution.⁹⁴ Federalist 81 states:

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.⁹⁵

This statement is telling of the intentions of at least one very influential framer, and others probably shared the sentiment. Despite the strong language, however, it does not provide as much insight as it seems to at first glance. First, there is a surrender of state sovereignty in the plan of the Convention. In creating a federalist system from one where States were the primary sovereigns, there must be some surrender of control. On the other hand, there is no specific mention of sovereign immunity in the Constitution. While the Constitution divides up power between the federal and state governments and between the three branches of federal government, it requires a study of historical records and some educated

Most of the discussion at the Convention regarding suits against States concerned States' fears about being judicially required to pay substantial Revolutionary War debts. *Id.* at 1206–07.

92. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1448–49 (1987).

93. *Id.* at 1439.

94. *Alden*, 527 U.S. 706, 716–17 (1999). In describing the history of state sovereign immunity in the United States, Justice Kennedy wrote, "[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Id.* at 715–16.

95. THE FEDERALIST NO. 81, at 397 (Alexander Hamilton) (Terence Ball ed., 2003).

guessing to determine how, if at all, the Constitution affected the state-federal balance of power.

Article I of the Constitution governs the legislative branch of the federal government. Section 8 lays out the scope of legislative power in a very particular way. After all, the federal government was supposed to be made up of specific enumerated powers, with everything else reserved to the States and to the people. Article I, Section 8 powers include the power to regulate commerce between the States, the power to establish uniform bankruptcy laws, the power to coin money, and the power to collect taxes.⁹⁶ These powers are listed in no discernable order and are not distinguished from each other in any way. Section 9 sets limitations on congressional power.⁹⁷ But Section 9 does not state that state sovereign immunity limits Congress's exercise of its Section 8 powers. Moreover, Article I does not describe the state of sovereign immunity and provides no clear clues to the Framers' intent.

Article III of the Constitution frames the federal judicial power. Section 2 delineates the scope of that power. Two important clauses in this section give some hints about the Framers' intention for the role of the judiciary: (1) "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," and (2) it shall extend "to Controversies . . . between a State and Citizens of another State."⁹⁸ In the first clause, the Framers spoke in terms of cases and controversies, not in terms of the parties involved. The Supreme Court and the inferior federal courts that Congress chose to establish decide all cases that arise under the Constitution and the laws of the United States. Again, there is no mention of state sovereign immunity limiting this jurisdiction.

In the second clause—the diversity clause—the Framers *did* focus on the parties involved. They specifically extended federal judicial power to cases between one State and citizens of another state. The inclusion of this phrase is perplexing. These types of controversies are already included in the federal courts' jurisdiction under the first clause if they arise under the Constitution or federal laws. The Framers seemingly wanted to broaden the scope of federal jurisdiction specifically for cases where a state was a party.

Although there seems to have been little or no discussion about the diversity clause during the Convention,⁹⁹ it was a matter of discussion at

96. U.S. CONST. art. I, § 8, cls. 1, 3–5.

97. *Id.* at art. I, § 9.

98. U.S. CONST. art. III, § 2, cl. 1.

99. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A*

the various state ratification debates.¹⁰⁰ The Framers were aware that one of the implications of this clause was the possibility that States would be exposed to lawsuits in federal court. Edmund Randolph, a key drafter of Article III, “defended the clause on the twin assumptions that the state could be either a plaintiff or a defendant and that the clause would indeed subject the states to liability.”¹⁰¹ George Mason and Patrick Henry, both of whom opposed ratification of the Constitution, addressed the concern that the diversity clause of Article III exposed States to liability in federal court.¹⁰² George Mason wrote:

Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is this not disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender?¹⁰³

Some of the Framers believed that the diversity clause in Article III did not pose a threat to state sovereign immunity.¹⁰⁴ Both Alexander Hamilton and James Madison thought States could not be sued in federal court without their consent, despite the language in the clause.¹⁰⁵

Notwithstanding the debate over the diversity clause and the lack of clarity in its language, the Framers chose to include it without any reference to implications for state sovereign immunity. So, they either intended to abrogate sovereign immunity despite the reservations of some States, or they thought that sovereign immunity so clearly survived the diversity clause that there was no need to include anything in the text. One thing is certain: The surrender of immunity or lack thereof was anything but clear in the plan of the Convention.

Immediately following the Supreme Court’s decision in *Chisholm*, the country ratified the Eleventh Amendment. The language of this Amendment expressly rejects the language of the diversity clause in Article III. The Eleventh Amendment expresses the idea that Americans considered repugnant to the Constitution the idea that a citizen should be

Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033, 1046 (1983). The clause was a “marginal note to a draft of Article III” and was adopted with very little editing. *Id.* at 1045–46.

100. See Chemerinsky, *supra* note 91, at 1206–08.

101. Fletcher, *supra* note 99, at 1050. Some people, Edmund Randolph among them, felt that abrogation of state sovereign immunity was an appropriate means of holding States accountable for their wrongs. See Chemerinsky, *supra* note 91, at 1207–08. Randolph asked, “Are we to say that we shall discard this government because it would make us all honest?” *Id.* (citation omitted).

102. See Chemerinsky, *supra* note 91, at 1207.

103. *Id.* (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526–27 (Jonathan Elliot ed., 1937)).

104. *Id.* at 1208–09.

105. *Id.* at 1208.

allowed to sue a State without its consent. However, it is worded quite narrowly and does not communicate the full scope of state sovereign immunity as the Supreme Court sees it.

Nonetheless, the fact remains that the language of the Constitution contemplates suits against States. In a relatively short document in which each word is assigned special significance, the Framers chose to include the words of the diversity clause, and chose not to include anything about state sovereign immunity.

V. IS BANKRUPTCY REALLY DIFFERENT?

The history of state sovereign immunity and its place within the Constitutional structure is far from clear. It is therefore easy to see why courts have had a difficult time articulating a consistent state sovereign-immunity doctrine. But the Supreme Court's decisions in *Seminole Tribe* and *Katz* are so incompatible that it is hard to see how both can stand at once.

In *Seminole Tribe*, the Court unequivocally stated that Congress may never abrogate state sovereign immunity under *any* of its Article I, Section 8 powers.¹⁰⁶ In *Katz*, the Court then declined to follow *Seminole Tribe*, calling statements in it that led to the assumption that its holding applied to the Bankruptcy Clause, "dicta."¹⁰⁷ The Court's holding reflects the belief that the Bankruptcy Clause somehow differs from the other Article I legislative powers, specifically the Commerce Clause and the Indian Commerce Clause. What makes this holding interesting is that the Court insinuates that (1) state sovereign immunity existed at the time of ratification (and is implicitly contained in the Constitution), and (2) the Framers intended Article I legislative powers each to be treated differently with respect to state sovereign immunity.

The following sections will discuss the history of the Bankruptcy Clause and compare it with the history of the Patent Clause to determine if the Court was right in *Katz*. In *Katz* and in *Florida Prepaid*, the Court treats the Patent Clause and the Bankruptcy Clause differently with respect to state sovereign immunity even though both are legislative powers enumerated in Article I, Section 8. If it is true that these two clauses are different, then *Seminole Tribe* is essentially destroyed and courts must now evaluate each legislative power separately as regards state sovereign immunity. This further complicates the messy doctrine.

106. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).

107. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 362, 363 (2006).

A. *History of Bankruptcy Law*

There was no uniform bankruptcy law at the time of this country's founding. Each State had its own variations on the laws. One of the common themes of state bankruptcy law, however, was the debtor's prison. "[E]very colony, and later every state," allowed for imprisonment of debtors.¹⁰⁸ Debtors who were imprisoned were subjected to inhuman conditions and indeterminate sentences.¹⁰⁹ There were two major problems with this system of imprisoning debtors: (1) it did not help the debtor repay his debts; and (2) even if a debtor paid off his debts in one state, he might still be subject to imprisonment in another state.¹¹⁰ As with interstate commerce, the Framers understood that inconsistent bankruptcy laws would inhibit their goal of creating a united nation of states.¹¹¹

The Court recognized these problems in *Katz*. "Foremost on the minds of those who adopted the Clause were the intractable problems, not to mention the injustice, created by one State's imprisoning of debtors who had been discharged (from prison and of their debts) in and by another State."¹¹² According to the Court, the Framers' concern over uniformity prompted the inclusion of the Bankruptcy Clause in the Constitution.¹¹³ And, through the Bankruptcy Clause, the Framers authorized Congress to establish a system of bankruptcy laws and a federal judicial process that would bind debtors and creditors to a comprehensive scheme.¹¹⁴ It was hoped that this would resolve the problems with debtor's prisons and allow for greater debt repayment.

The first federal bankruptcy act was passed in 1800.¹¹⁵ This act shifted the balance of power from the States to the federal government. It authorized federal courts to issue writs of habeas corpus to state offi-

108. Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 154 (2003) (quoting BRUCE MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 182-83 (2002) (internal quotation marks omitted)).

109. *Id.*

110. *Id.* at 155; see also Ralph Brubaker, *From Fictionalism to Functionalism in State Sovereign Immunity: The Bankruptcy Discharge as Statutory Ex Parte Young Relief After Hood*, 13 AM. BANKR. INST. L. REV. 59, 86 (2005) ("[T]here were apparently no decisions treating a state court discharge as an *in rem* decree binding upon all of the debtor's creditors irrespective of their state of residence.") (emphasis in original).

111. See Haines, *supra* note 108, at 157 (proposing that debtor's prisons caused the Framers to consider expanding the Full Faith and Credit clause so that each state would have to recognize its sister states' bankruptcy rulings).

112. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006); see also Hermann & Dearborn, *supra* note 79, at 49.

113. *Katz*, 546 U.S. at 362; see also Haines, *supra* note 108, at 157.

114. See Brubaker, *supra* note 110, at 69.

115. Anthony J. Enright, Note, *The Originalist's Dilemma: Katz and the New Approach to the State Sovereign Immunity Defense*, 81 NOTRE DAME L. REV. 1553, 1558 (2006).

cials to prompt the release of state bankruptcy prisoners.¹¹⁶ However, the first bankruptcy act was narrow and temporary. It provided only limited relief for debtors, was only available to merchants and traders, and was largely a pro-creditor remedy.¹¹⁷ It was not until 1867 that Congress passed an expansive and permanent federal bankruptcy act.¹¹⁸

The Bankruptcy Clause and the first bankruptcy act were necessary to achieve the Framers' goal of a uniform system of bankruptcy laws. These measures, however, required the States to give up sovereign control over bankruptcy actions. This worried some Framers, who thought that the States had already given up so much. As one commentator put it, the Constitutional Convention was "a Convention whose delegates had already exceeded the authority the states had vested in them, which was merely to consider revisions to the Articles of Confederation."¹¹⁹ Did the States also agree to cede their sovereign immunity for the sake of uniform bankruptcy laws? The *Katz* Court believed that they did.

B. Focus on "Uniform"

The Bankruptcy Clause, located in Article I, Section 8 of the Constitution gives Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."¹²⁰ Much of the discussion about bankruptcy's special status focuses on the word "uniform." The only other Article I, Section 8 power to contain the word "uniform" is the Naturalization Clause, which is structurally connected to the Bankruptcy Clause.¹²¹ Even the Commerce Clause, which was written specifically to allow Congress to uniformly control interstate commerce, does not actually contain the word "uniform."¹²²

Scholars have attempted to distinguish the Bankruptcy Clause from other Section 8 powers based on the word "uniform."¹²³ The uniformity

116. See Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 72 (2006).

117. Randolph J. Haines, *Getting to Abrogation*, 75 AM. BANKR. L.J. 447, 457–58 (2001).

118. *Id.* at 461–62.

119. See Haines, *supra* note 108, at 157. Although this commentator recognizes that the Framers probably did not even have the authority to abrogate state sovereign immunity as to bankruptcy [or anything else, for that matter], he believes that the abrogation was minor compared to all of the other powers states were transferring to the federal government under the Constitution. See *id.*

120. U.S. CONST. art. I, § 8, cl. 4.

121. *Id.* (granting Congress the power "[t]o establish an uniform Rule of Naturalization").

122. *Id.* art. I, § 8, cl. 3. (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

123. See Haines, *supra* note 108, at 158–59 (asserting that a certain interpretation of the uniformity language in the bankruptcy clause provides the strongest argument for that clause being different from the other Article I, section 8 powers); see also Gerson, *supra* note 59, at 11.

provision makes bankruptcy a “uniquely federal interest.”¹²⁴ However, whether the Framers meant for bankruptcy to be super-uniform, meaning the same across state lines and the same for every creditor, is ambiguous.¹²⁵

There is an alternative and logical reason for the Framers’ inclusion of the word “uniform” in the Bankruptcy Clause. The Framers may have intended there to be geographic uniformity in bankruptcy laws.¹²⁶ After looking at the issues that prompted inclusion of the Bankruptcy Clause in the Constitution, this interpretation seems highly plausible. The chief problem with bankruptcy before ratification was that debts discharged in one state were not always discharged in every state. Uniform federal bankruptcy laws would solve this problem. Members of the Supreme Court have validated this interpretation on at least one occasion, stating that the uniformity requirement “is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country regardless of the State in which the bankruptcy court sits.”¹²⁷

Moreover, simply because the States ceded virtually all control over bankruptcy lawmaking to the federal government does not mean that they also ceded their sovereign immunity. The argument that the States ceded their sovereign immunity is nearly identical to Justice Brennan’s argument in *Pennsylvania v. Union Gas Co.*¹²⁸ In *Union Gas*, Justice Brennan held that Congress could abrogate state sovereign immunity under the Interstate Commerce Clause.¹²⁹ He reasoned that the States, in giving Congress plenary power to regulate interstate commerce, ceded their sovereign immunity.¹³⁰ The *Seminole Tribe* Court later overruled *Union Gas* holding that Congress could not abrogate state sovereign immunity under any of the Article I powers.¹³¹ In essence, the Court determined that the States did not automatically cede their immunity when they gave Congress the power to regulate the areas listed in Article I, Section 8. The Court’s broad holding did not attempt to distinguish any particular congressional power.

Although the Bankruptcy Clause is textually different from the

124. Levitin, *supra* note 116, at 71 (quoting *Bank of Marin v. England*, 385 U.S. 99, 103 (1966) (internal quotation marks omitted)).

125. Courts seem to have interpreted the Bankruptcy Clause as requiring an extreme (or super) level of uniformity as compared to the other Article I, Section 8 powers.

126. See Haines, *supra* note 108, at 158.

127. *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring).

128. 491 U.S. 1 (1989).

129. *Id.* at 23.

130. *Id.* at 14.

131. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).

other Article I, Section 8 clauses because of its use of the word "uniform," there is insufficient evidence to suggest that the Framers intended "uniform" to mean anything more than geographic uniformity. History suggests that the Framers included the Bankruptcy Clause in the Constitution to try to remedy the lack of uniformity. Super-uniformity in bankruptcy proceedings tended to make settlements easier and fairer, and prevented States from using their sovereign immunity to gain an unfair advantage over other creditors.¹³² History, however, shows that this was not the main purpose behind the Bankruptcy Clause.

The *Katz* Court attempted to prove the super-uniformity theory through the grant of habeas power in the first bankruptcy act.¹³³ But the power of federal courts to issue writs of habeas corpus to States does not lead to the conclusion that States ceded their sovereign immunity in bankruptcy suits. The habeas power clearly flows from the need for uniformity in bankruptcy administration; opening up States to private suits, however, does not.

C. Comparing the Bankruptcy Clause to the Patent Clause

Because no Article I power is overtly distinct from another, it is important to compare the histories and uses of the powers. The Patent Clause, for example, provides an especially relevant comparison to the Bankruptcy Clause, as evidenced in the Court's recent decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.¹³⁴

In *Florida Prepaid*, the Court addressed the constitutional validity of the Patent Remedy Act.¹³⁵ That Act specifically abrogated state sovereign immunity in patent-infringement actions, defining "whoever" as including "any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity."¹³⁶ The Court struck down the Patent Remedy Act¹³⁷ and reiterated the holding in *Seminole Tribe* that Congress may not abrogate state sovereign immunity pursuant to any of its Article I powers.¹³⁸

The U.S. patent system derived from the English system.¹³⁹ The

132. See Gerson, *supra* note 59, at 9.

133. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 375 (2006).

134. 527 U.S. 627 (1999).

135. *Id.* at 631.

136. 35 U.S.C. § 271(h) (1994), *invalidated by* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

137. *Fla. Prepaid*, 527 U.S. at 630.

138. *Id.* at 636.

139. See Edward C. Walterscheid, *To Promote the Progress to Useful Arts: American Patent Law and Administration, 1787-1836 (Part I)*, 79 J. PAT. & TRADEMARK OFF. SOC'Y, 61, 68

colonies adopted the English practices.¹⁴⁰ Now, however, U.S. patent law “consists of domestic precedents that are essentially free-standing.”¹⁴¹ Before the Constitution, the American intellectual-property system consisted of various state laws that did not always coincide with one another.¹⁴² There was a similar lack-of-uniformity problem in this system as there was in the bankruptcy system.

Despite this need for uniformity in intellectual property, the Patent Clause did not garner much attention at the Constitutional Convention.¹⁴³ This does not mean that the States did not have concerns about intellectual-property rights. There was a need to protect these rights in order “to encourage socially beneficial innovation.”¹⁴⁴

Although intellectual-property rights did not occupy a great deal of time among Constitutional Convention delegates, the Patent Clause was included as one of the few enumerated legislative powers in the Constitution, indicating its importance. The clause gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁴⁵ The economy and development of the country depended on promoting innovation and technology.¹⁴⁶ In describing the Patent Clause, Justice Story wrote:

It is beneficial to all parties, that the national government should possess this power; to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject, which would impair, and might even destroy the value of their rights; to the public, as it will promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint.¹⁴⁷

There are actually two different theories on the purpose behind the

(1997); see also 1 R. CARL MOY, *MOY'S WALKER ON PATENTS* § 1:6, at 1-20 (4th ed. 2006). The major English statute on patents was the State of Monopolies of 1623. *Id.*

140. See Walterscheid, *supra* note 137, at 68.

141. MOY, *supra* note 137, § 1:2, at 1-8.

142. Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTEL. PROP. L. 1, 22 (1994).

143. *Id.* at 24-26. No state instructed its delegates to seek a copyright law in the Constitution. *Id.* at 24.

144. *Id.* at 27 n.89 (quoting Morgan Sherwood, *The Origins and Development of the American Patent System*, 71 AM. SCI. 500, 500 (1983)).

145. U.S. CONST. art. I, § 8, cl. 8.

146. See MOY, *supra* note 137, § 1:5, at 1-18 (indicating that patents for new inventors were good for the country's economy); see also Walterscheid, *supra* note 140, at 34 (describing an economic reason for the implementation of the Patent Clause).

147. Joseph Story, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 558, at 402-03 (Boston, Hilliard, Gray, & Co. 1833).

Patent Clause: (1) “to provide fundamental justice to the inventor,” and (2) to provide “a useful means for the State to encourage invention.”¹⁴⁸ The text of the clause and the historical evidence seem to indicate that the second theory was the central purpose of the Clause; however, it would be difficult to encourage invention and “promote the progress of science and the useful arts” without ensuring inventors and authors that their works would be protected. Innovation is, after all, an expensive venture that usually requires large investments of time and money. Any meaningful guarantee of protection for inventors involves protection from any infringement, even state infringement. Despite the clear need for super-uniformity under the Patent Clause, the Court has ruled that Congress does not have the power to abrogate state immunity under that Clause.¹⁴⁹

The Bankruptcy and Patent Clauses share the common purpose of creating a uniform federal system of laws. The States suffered from a lack of uniformity in both areas before ratification. In bankruptcy law, the problem was the States’ lack of respect for other States’ bankruptcy judgments. In patent law, there was an economic need for a common, federal recognition of inventors’ property rights. The States gave up portions of their sovereignty to make both of these federal systems work. But it does not seem that the States gave up more sovereignty in bankruptcy than they did in intellectual property.

D. *The Court’s Dicta Argument: An Exercise in Semantics*

Comparing the Bankruptcy Clause with the Patent Clause shows the unlikelihood that the Framers intended to treat state sovereign immunity differently as to each Article I power. The Court drew this conclusion in *Seminole Tribe*. But in *Katz*, the Court insisted that the Bankruptcy Clause is somehow different. It seems only logical that the Court would overturn *Seminole Tribe*, at least with respect to its bold statement about Article I powers. Nonetheless, the Court avoided having to do this through a tricky mincing of words—it called its broad *Seminole Tribe* rule “dicta” and declined to follow it.¹⁵⁰

The Court’s assertion in *Katz* that the language in *Seminole Tribe* about Article I and state sovereign immunity was mere dicta is difficult to believe. The Court reaffirmed its statement about Article I powers on a number of occasions.¹⁵¹ In *College Savings Bank v. Florida Prepaid*

148. MOY, *supra* note 137, § 1:12, at 1-30.

149. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999).

150. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006).

151. See, e.g., Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 749-50 (2002);

Postsecondary Education Expense Board, the Court referred to the language in *Seminole Tribe* as its “antiabrogation holding.”¹⁵² In the companion case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court boldly stated, “*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers.”¹⁵³ These opinions were handed down just three years after the same Court’s decision in *Seminole Tribe*. The Justices fully understood the holding in *Seminole Tribe* because they wrote and signed on to it.

Within the *Seminole Tribe* opinion itself, the majority discussed the difference between obiter dicta and binding precedent in response to the dissent’s accusation of attending to dicta.¹⁵⁴ In defending its “well-established rationale,” the majority asserted that both the results of its own opinions bind it and “those portions of the opinion necessary to that result.”¹⁵⁵

The majority’s statement that Congress could never abrogate state sovereign immunity under one of its Article I powers is necessary to reach the specific result in *Seminole Tribe*. The Court used a two-part test in deciding whether the Indian Gaming Regulatory Act was a valid abrogation of state sovereign immunity: (1) Has Congress “unequivocally expressed its intent” to abrogate state sovereign immunity?; and (2) Has Congress acted “pursuant to a valid exercise” of congressional power?¹⁵⁶ Both questions had to be answered in the affirmative for the Act to pass constitutional scrutiny. The Court found it “unmistakably clear” and “indubitable” that Congress intended to abrogate state sovereign immunity under the Act.¹⁵⁷ However, it denied jurisdiction to hear the case because the Act did not pass the second prong of the test—Congress did not act pursuant to a valid congressional power.¹⁵⁸ The Court had a chance, but chose not to do a clause-by-clause analysis of

Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683 (1999); *Fla. Prepaid*, 527 U.S. at 636.

152. *Coll. Sav. Bank*, 527 U.S. at 683.

153. *Fla. Prepaid*, 527 U.S. at 636.

154. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67 (1996) (“Contending that our decision is a novel extension of the Eleventh Amendment, the dissent chides us for ‘attend[ing]’ to dicta. We adhere in this case, however, not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.”).

155. *Id.*

156. *Id.* at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

157. *Id.* at 56–57 (internal quotation marks omitted).

158. The petitioner argued for an alternative basis for jurisdiction under the doctrine of *Ex parte Young*, but was again denied. *Id.* at 75–76. However, this argument never would have been necessary if the Court found the abrogation to be constitutional.

the connection between each Article I power and state sovereign immunity.¹⁵⁹ Instead, the Court swiftly overturned *Pennsylvania v. Union Gas Co.* and made a sweeping "antiabrogation" statement about all Article I powers.¹⁶⁰ The outcome of the case depended on that statement; it may have been overly broad, but it certainly was not dictum.

VI. CONCLUSION

State sovereign-immunity jurisprudence is a tricky area of law that the Supreme Court attempted to simplify through *Seminole Tribe*. But that simplicity did not last long. The Court's puzzling decision in *Katz* opened up the door to a complete reworking of the state sovereign-immunity doctrine—one that requires careful examination of each separate Article I, Section 8 power. If the Bankruptcy Clause is somehow different, what about the Tax Clause or the Naturalization Clause? The *Seminole Tribe* holding would have to be overturned under this kind of doctrine. *Katz* destroys the idea that Congress can never abrogate state sovereign immunity under any of the Article I powers. No amount of explaining can combine *Seminole Tribe* and *Katz* into a coherent doctrine.

As this Article shows, the Court's rationale in *Katz* is highly questionable. The Bankruptcy Clause is really not that different from the Patent Clause or the other Article I, Section 8 powers. Each power involves the States' relinquishment of some sovereignty in order to allow for uniform systems of law. But none specifically mentions state sovereign immunity. This is because a uniform system of federal laws does not require States to give up their sovereign immunity; it can be accomplished with less of a sacrifice.

If the Court refuses to overrule *Seminole Tribe*, then it must overrule *Katz*. Both holdings cannot stand simultaneously. The holding in *Hood*, the precursor to *Katz*, can be reconciled with *Seminole Tribe* because a typical bankruptcy suit is focused on the res, not the specific creditors. But an ancillary suit against the State, itself, is different. It involves an affront to state dignity that sovereign immunity was meant to avoid. History does not conclusively show that States intended to abrogate their sovereign immunity with respect to suits like this.

Seminole Tribe and *Katz* are on two completely different ends of the doctrinal spectrum. The Court will have to choose. And when it does, it will have some explaining to do.

159. See Dodson, *supra* note 80, at 744–45.

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