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STATE SOVEREIGNTY IN BANKRUPTCY AFTER *KATZ*

THOMAS E. PLANK*

INTRODUCTION

What happens after *Central Virginia Community College v. Katz*?[1] Relying on the history of bankruptcy law, the Supreme Court in *Katz* held that a State's sovereign immunity from suit did not bar a bankruptcy trustee's action to recover from the State the amount of a pre-petition preferential transfer by the debtor to the State. As a predicate to its holding, the Court also concluded that a State's immunity from suit did not bar enforcement of a bankruptcy discharge. Because *Katz* directly contradicts the robust form of State sovereign immunity under *Seminole Tribe of Florida v. Florida*,[2] courts most likely will view *Katz* as creating

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1 126 S.Ct. 990 (2006).

2 517 U.S. 44 (1996).

a special exception to the States' general sovereign immunity when Congress acts pursuant to its power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[3]

Other futures are possible, however. As I explain below and Professor Ralph Brubaker[4] and Professor Martin Redish[5] explain elsewhere, the Court's historical and logical analysis is manifestly deficient. The Court's analysis consists of two elements: (1) a reasonable summary of some aspects of bankruptcy history and (2) a great deal of magic-wand waving. Although the Framers undoubtedly intended to permit Congress to enact a federal bankruptcy law to adjust the relationship between an insolvent debtor and his or her creditors that supercedes state bankruptcy laws, there is no historical evidence that this general goal included a subordination of a State's sovereignty as a creditor. Indeed, some historical evidence supports a contrary conclusion that no such subordination should be implied. Accordingly, the historical and logical deficiencies of *Katz* could impel a future Court to limit *Katz* strictly to the bankruptcy discharge and preference actions. It could also impel a court to overrule *Katz*. On the other hand, as Professor Redish has suggested,[6] the unprincipled result in *Katz* could presage the complete abandonment of the robust view of State sovereign immunity articulated in *Seminole Tribe*.

Regardless of the legacy of *Katz* or indeed *Seminole Tribe*, however, Congress may not completely abrogate a State's sovereignty in bankruptcy. First, the history of bankruptcy law prescribes a limit on whatever power Congress may have under the Bankruptcy Clause to abrogate a State's immunity from suit. Specifically, Congress may not, under the Bankruptcy Clause, expand the debtor's non-bankruptcy rights against a third person, including a State. Accordingly, if a State has retained immunity from suit on its debts, and a creditor of the State becomes a debtor in bankruptcy, Congress may not abrogate the State's immunity in a proceeding by a bankruptcy trustee to collect that debt. Second, although the Bankruptcy Clause does subordinate some of the sovereignty of the States, the limitations of the Bankruptcy Clause preserves States' sovereignty in other important respects.

The primary goal of this Article is to analyze the extent to which State sovereignty survives *Katz*. Although I disagree with much of *Katz*'s historical analysis, I am thankful for *Katz*'s reliance on bankruptcy history. Both the history and the nature of bankruptcy law before and at the time of the adoption of the Constitution confirm the existence and establish the minimum contours of a State's

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[3] U.S. CONST. art. I, § 8, cl. 4.

[4] *See* Ralph Brubaker, *Explaining* Katz*'s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95 (2007) [hereinafter Brubaker, *The Bankruptcy Power as a Federal Forum Power*].

[5] *See* Martin Redish & Daniel M. Greenfield, *Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of* Central Virginia Community College v. Katz, 15 AM. BANKR. INST. L. REV. 13 (2007) [hereinafter Redish & Greenfield, *Principled Decision Making*].

[6] *See* Redish & Greenfield, *Principled Decision Making*, *supra* note 5, at 18–19.

sovereignty in bankruptcy after *Katz*.

This Article proceeds as follows: Part I identifies five aspects of a State's sovereignty. Part II briefly summarizes the essential differences and common features of eighteenth-century bankruptcy law and describes my views, based on that history and developed in several earlier articles,[7] on the limits of Congress's Bankruptcy Power as they relate to debtors and creditors generally. Part III describes the *Katz* decision, critiques its historical analysis, and suggests a framework for analyzing sovereignty immunity *sans Katz*. Part IV analyzes those aspects of State sovereignty that survive *Katz* regardless of whether and how well *Katz* or *Seminole Tribe* survives.

I. THE DIFFERENT ASPECTS OF SOVEREIGNTY

To analyze more precisely the relationship between bankruptcy law and sovereignty, I distinguish different aspects of sovereignty. I suggest the following categories:

1. The power of the sovereign to legislate for its citizens, or "legislative sovereignty."
2. The power of the sovereign to adjudicate disputes between its citizens, or "judicial sovereignty."
3. The power of the sovereign to execute the law, or "executive sovereignty."
4. The power of the sovereign to exempt itself from the law, or "sovereign exemption."
5. The immunity of the sovereign from suit in its courts or the courts of another sovereign, or "sovereign immunity."[8]

An illustration of these distinctions that is relevant to bankruptcy law is the provision in Article 1, section 10, of the Constitution that prohibits States from impairing the obligation of contract.[9] This prohibition expressly abrogates the State's legislative sovereignty. The Supreme Court held that this prohibition

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[7] *See* Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1076–89 (2002) [hereinafter Plank, *Bankruptcy and Federalism*]; Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 499–526 (1996) [hereinafter Plank, *Constitutional Limits*].

[8] To a certain extent, sovereign immunity could be seen as an exemption from judicial process. *See generally* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1613 (2002) (noting "sovereign immunity emphasized sovereigns' exemptions from compulsory process"); Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 160 (1998) (asserting sovereign immunity bars judicial relief against government). The term "sovereign immunity" may also need further refinement: To what extent does it mean immunity from all forms of judicial process or simply immunity from a suit for money damages? I leave that question for others.

[9] *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .").

applied to contracts of the State[10] and thus eliminated the sovereign exemption from this prohibition. Nevertheless, as the Supreme Court held in *Hans v. Louisiana*,[11] because of a State's sovereign immunity from suit, elimination of the State's sovereign exemption does not give a private party to a State contract the ability to sue the State for violating that prohibition.

Katz and some of the commentary on *Katz* fail to distinguish between these categories. The greater precision afforded by these categories allows a more focused analysis of the extent to which Congress may or may not subordinate a State's sovereignty to federal bankruptcy law.

II. EIGHTEENTH-CENTURY BANKRUPTCY LAW AND ITS CONSTITUTIONAL LIMITS

A. Eighteenth-Century Bankruptcy Laws: Differences and Common Features

Bankruptcy law at the time of the adoption of the Constitution consisted of a wide variety of statutory procedures that sought the optimum adjustment of the relationship between an insolvent debtor and his or her creditors. These bankruptcy laws superceded the remedies that an individual creditor could use to collect a debt owed by a debtor. These remedies included imprisonment for debt in a debtor's prison until the debtor paid the debt, and the seizure and sale of the goods and, in many American jurisdictions but not in England, the lands of the debtor.[12]

The bankruptcy laws replaced this individualistic creditor collection proceeding

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[10] *See, e.g.*, Woodruff v. Trapnall, 51 U.S. 190, 207 (1850) ("A state can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals."). In this case, the State of Arkansas obtained a judgment against its former treasurer for recovery of moneys received by him. The State, however, refused to accept the full amount due in the form of the notes of the Bank of the State of Arkansas, created by and owned by the State, because of a repeal of a section of State law that had declared that the notes shall be received in payment of all debts due the State. The former treasurer sought a writ of mandamus from the State's supreme court to require the State to accept the notes, but the State supreme court ruled that the repeal of the law gave sufficient grounds for refusal to issue the writ of mandamus. The Supreme Court reversed the State supreme court's judgment. *Id.* at 207. The Court also rejected the argument that the continued enforceability of the notes issued before the repeal "trenches upon the sovereignty of the State." *Id.*

[11] 134 U.S. 1 (1890).

[12] Creditors resorted to imprisonment for debt as a creditor collection device in the seventeenth and eighteenth centuries not to punish debtors but to provide an incentive for debtors who owned property which could not be reached by the legal process of the day to pay their debts. Other remedies entitled creditors to the seizure and sale of goods and to obtain rents from or the benefits of the use of land; in many American jurisdictions, but not in England, land could also be seized and sold. *See generally* 3 WILLIAM BLACKSTONE, COMMENTARIES *414, *417–21 (listing five "[e]xecutions in actions where money only is recovered, as a debt or damages (and not any specific chattel) . . . ." against the debtor consisting of the writs of (i) *capias ad satisfaciendum* [the body of the debtor], (ii) *fieri facias* [the debtor's goods and chattels], (iii) *levari facias* [the debtor's goods and profits of lands], (iv) *eligit* [debtor's goods and possession of debtor's lands], and (v) *extendi facias* or "extent" [body, lands, and goods of debtor]); PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900, at 3–5, 15 (1974) (describing debtor-creditor relations in early English law); Jay Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 155 (1982).

with a collective proceeding in which all of the creditors could participate and pursuant to which the debtor obtained different forms of relief. In the eighteenth century, these bankruptcy laws consisted of (1) the English Bankrupt Acts, (2) the English Insolvency Acts, and (3) a great variety of American acts that used a variety of features of the first two groups and added innovations of their own. The English Bankrupt Acts[13] created a nominally "involuntary" proceeding commenced by creditors against only a merchant that had committed an act of bankruptcy in which the property of the "bankrupt" was liquidated, proceeds were distributed to creditors, and the bankrupt could receive a discharge of debts and protection from subsequent imprisonment.[14]

The English Insolvency Acts,[15] typically entitled "An Act for the Relief of

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[13] These Acts consisted of the 1570 Statute of 13 Elizabeth, 13 Eliz., c. 7 (1570) (Eng.) ("An Act Touching Orders for Bankrupts."), the 1604 Statute of 1 James, 1 Jam., c. 15 (1604) (Eng.) ("An Act for the better Relief of the Creditors against such as shall become Bankrupts."), the 1623 Statute of 21 James, 21 Jam., c. 19 (1623) (Eng.) ("An Act for the further Description of a Bankrupt, and Relief of Creditors against such as shall become Bankrupts, and for inflicting corporal Punishment upon the Bankrupts in some special Cases."), and the 1732 Statute of 5 George II, 5 Geo. 2, c. 30 (1732) (Eng.) ("An Act to prevent the Committing of Frauds by Bankrupts."), as extended and amended. *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1079–80 & nn.63–67 (noting that the English Bankrupt Acts were the most developed of three groups of bankruptcy laws in England); Plank, *Constitutional Limits*, *supra* note 7, at 500–13 (describing how the English Bankrupt Act evolved from acts passed for the benefit of creditors, not for the protection of debtors, to a more complex scheme that sought the optimum way of adjusting the relationship between an insolvent merchant and his or her creditors); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7–12 (1995) [hereinafter Tabb, *History*] (discussing "First Bankruptcy Laws: 1542 and 1570"); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 331–44 (1991) [hereinafter Tabb, *Discharge*] ("The century and a half following the 1542 act saw episodic English legislation on the subject of bankruptcies . . . ."). The English Parliament passed the first Bankrupt Act in 1542 during the reign of King Henry VIII. *See* 34 & 35 Hen. 8, c. 4 (1542–1543) (Eng.) ("An Act against such Persons as do make Bankrupt."). It is generally considered the first English bankruptcy act. Although the 1542 Act remained in effect until 1824, the later acts so changed and amplified the bankruptcy law that it retained little independent significance.

All citations to and quotations from English statutes, including the year of enactment, are from the STATUTES AT LARGE (Owen Ruffhead, ed., vols. 1–9, 1762–1765, *reprinted in* 1769–1770 & vols. 10–14, 1771–1786).

[14] *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1079–82 (noting that the English Bankrupt Acts replaced the race to the courthouse with a collective proceeding.); Plank, *Constitutional Limits*, *supra* note 7, at 500–13 (analogizing the English Bankrupt Acts to modern liquidation under chapter 7 of the Code); Thomas E. Plank, *The Security of Securitization and The Future of Security*, 25 CARDOZO L. REV. 1655, 1723 (2004) [hereinafter Plank, *Security of Securitization*] ("For the most part, these laws established a collective proceeding for the debtor and all the creditors in which commissioners, justices of the peace, assignees, or in some cases judges gathered and liquidated substantially all of the debtor's property and distributed the proceeds pro rata to the creditors."). *See* also 2 WILLIAM BLACKSTONE, COMMENTARIES *473–74 (stating that limiting the English Bankrupt Acts to merchants discouraged extravagant borrowing by non traders but provided "for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself").

[15] *See, e.g.*, 11 Geo., c. 21 (1724) (Eng.) ("An Act for the Relief of insolvent Debtors."); 2 Geo. 2, c. 20 (1729) (Eng.) ("An Act for the Relief of Insolvent Debtors."); 21 Geo. 2, c. 31 (1748) (Eng.) ("An Act for the Relief of Insolvent Debtors."); 28 Geo. 2, c. 13 (1755) (Eng.) ("An Act for Relief of Insolvent Debtors."); 9 Geo. 3, c. 26 (1769) (Eng.) ("An Act for the Relief of Insolvent Debtors."); 12 Geo. 3, c. 23 (1772) (Eng.) ("An Act for the Relief of Insolvent Debtors; and for indemnifying the Marshal of the *King's Bench* Prison from Prosecution at Law, for certain Escapes from the said Prison."); 14 Geo. 3, c. 77 (1774) (Eng.) ("An Act for the Relief of Insolvent Debtors, and for the Relief of Bankrupts, in certain Cases."); 16

Insolvent Debtors" and enacted periodically during the eighteenth century, allowed certain debtors (those that owed debts, other than to the Crown, of less than a specified amount) imprisoned for debt on specified dates to petition for release from prison upon surrendering all their property for liquidation and distribution to creditors. These debtors did not receive a discharge of their debts but did receive a discharge from debtor's prison and immunity from further arrest for these debts.[16]

Different American colonies and states adopted a wide variety of bankruptcy law in effect before and at the Framing that provided for the surrender and distribution of the debtors property (other than specified exempt property) for the benefit of creditors. These included (1) laws that discharged from debtor's prison only specified individuals or, like the English Insolvency Acts, individuals in prison on a certain date; (2) laws of general application providing a voluntary procedure for discharge from prison, in some instances with and in other instances without creditor consent; (3) laws that permitted discharge of debts upon a vote of a specified percentage of creditors; (4) a few laws, like the 1787 Maryland bankruptcy act,[17] that provided for discharge of debts without creditor consent; (5) a few laws modeled on the English Bankrupt Acts, like the 1785 Pennsylvania bankruptcy act;[18] (6) a few laws that provided for discharge from prison or from debt upon a debtor's performing a term of service; and (7) a few special acts that permitted debtors to retain property and continue in business pursuant to an arrangement to which a majority of creditors agreed.[19]

Despite this great variety, all of the bankruptcy acts[20] started with the non-

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Geo. 3, c. 38 (1776) (Eng.) ("An Act for the Relief of Insolvent Debtors; and for the Relief of Bankrupts, in certain Cases."); 18 Geo. 3, c. 52 (1778) (Eng.) ("An Act for the Relief of Insolvent Debtors; and for the Relief of Bankrupts, in certain Cases."); 21 Geo. 3, c. 63 (1781) (Eng.) ("An Act for the Discharge of certain Insolvent Debtors.").

[16] *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1082–84 (explaining that, although debtor could "obtain release from prison," debts were not discharged and "creditors could execute on any future goods acquired by the debtor to satisfy the preexisting debt."); Plank, *Constitutional Limits*, *supra* note 7, at 513–17 (describing the English Insolvency Acts).

[17] An Act Respecting Insolvent Debtors, ch. 34, Apr. Sess., 1787 Md. Laws, *repealed* May 20, 1788, ch. 10, 1787 Md. Laws, discussed *infra* note 80 and accompanying text.

[18] *See* An Act for the Regulation of Bankruptcy, ch. 1183, 1785 Pa. Stat. § 2, *reprinted in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 70 (Clarence M. Bush St. printer, 1896) [hereinafter "PA. STAT. 1682–1801"], *available at* http://www.palrb.us/statutesatlarge/17001799/1785/0/act/1183.pdf; *see also* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 602–06 (1998) [hereinafter Plank, *Bankruptcy Judges*] (describing the provisions of the 1785 Pennsylvania act and showing how this act was a revised composite of the English Bankrupt Acts).

[19] *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1085–87 & nn.90–102 (citing the American laws, each of which provided one or more of these seven forms of relief); Plank, *Constitutional Limits*, *supra* note 7, at 518–25 & nn.159–199 (describing the American laws that allowed for the great variety of procedures and debtor relief).

[20] Although many of these acts were called insolvency acts, and some eighteenth-century commentators distinguished "insolvency acts" from the English Bankrupt Acts, the common definition of "bankruptcy" was synonymous with that of "insolvency": the inability to pay one's debts. *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1077 & nn.56–57 (noting "bankruptcy" and "insolvency" used interchangeably); Plank, *Constitutional Limits*, *supra* note 7, at 529–32 (discussing the terms "bankruptcy" and "insolvency").

bankruptcy rights of the debtors and their creditors and then modified those non-bankruptcy rights.[21] The modifications, however, changed only the method by which creditors would be paid. With the exception of the discharge of the debts of an individual debtor or the discharge of an individual debtor from debtor's prison, those modifications did not expand the substantive, non-bankruptcy rights of the debtors or the creditors. As I have argued elsewhere, the Framers of the Constitution understood this essential nature of federal bankruptcy law,[22] and unlike other provisions of the Constitution, this understanding has, with a few recent exceptions, remained constant since the Framing.[23]

B. The Constitutional Limits on Federal Bankruptcy Law

From the history and understanding of bankruptcy law at the time of the Framing, I derived four principles prescribing the limits of the Bankruptcy Power. These are (1) the Debtor-Creditor Adjustment Principle, (2) the Non-Expropriation Principle, (3) the Non-Interference Principle, and (4) the Debtor-Insolvency Principle.[24]

Under the Debtor-Creditor Adjustment Principle, Congress may adjust the debtor-creditor relationship by curtailing the non-bankruptcy rights of a debtor for the benefit of the debtor's creditors and by curtailing the non-bankruptcy rights of creditors against the debtor for the benefit of the debtor or other creditors.[25] Under

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[21] *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1078 (noting that, although three different groups of bankruptcy laws were enacted, "they all shared common features"). *See generally id.* at 1076–89 (discussing the Framers original conception of bankruptcy and non-bankruptcy rights); Plank, *Constitutional Limits*, *supra* note 7, at 499–526 (describing the pre-Constitutional features of bankruptcy laws that form the boundaries of the Bankruptcy Clause).

[22] *See* Plank, *Constitutional Limits*, *supra* note 7, at 527–33 (arguing the Framers' understood the limitations inherent in the variety of English and American bankruptcy acts as only adjusting the relationship between a debtor and his or her creditors, as well as the meaning of "bankruptcy" as synonymous with "insolvency"). The Court in *Katz* cited *Constitutional Limits* for certain aspects of the history of bankruptcy law. *See* Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 999 (2006).

[23] *See* Plank, *Constitutional Limits*, *supra* note 7, at 533–45 (discussing historical enactment of federal bankruptcy acts or amendments from 1841 through 1935).

[24] *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1089 (explaining "four guiding principles" amplifying limitation on Bankruptcy Clause); *see also* Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH & LEE L. REV. 931, 961 (2004) [hereinafter Mooney, *Normative Theory*] (recognizing four principles as "coherent and comprehensive doctrinal theory of the limited powers of Congress and the courts under the Bankruptcy Clause"); Plank, *Security of Securitization*, *supra* note 14, at 1724 ("To the extent that these principles constrain Congress, they similarly constrain federal courts in bankruptcy.").

[25] *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1089–90 (stating, *inter alia*, that "Bankruptcy law may provide that any right or privilege that the debtor could use . . . to satisfy her debts outside of bankruptcy may be used in bankruptcy to satisfy those debts . . . even if creditors under state law could not directly reach such rights or privileges."); *see also* Mooney, *Normative Theory*, *supra* note 24, at 970 ("[B]ankruptcy law generally has carte blanche to adjust the rights between a debtor and creditor, and among creditors."); Plank, *Security of Securitization*, *supra* note 14, at 1724 (explaining that, under such theory, "Congress may also provide that any liability of the debtor, regardless of how remote or contingent, may be reduced, subordinated, or discharged.").

this principle, Congress may create–and has created–a substantive entitlement for an individual debtor—that is, a debtor that is a natural person—to receive a discharge of his or her debts. It also may create[26]—and as Ralph Brubaker[27] and others have described, it has created—a federal forum for such adjustment. This principle provides the grounds for subordinating the States' legislative and judicial sovereignty over the "subject of Bankruptcies" to federal bankruptcy law. This principle may also authorize the subordination of a State's sovereign exemption from law affecting it as a creditor. Finally, under the "reasoning" of *Katz*, this principle provides *some* basis for *some* abrogation of a State's sovereign immunity.

Under the Non-Expropriation Principle, however, Congress may not expand the rights of debtors or their creditors beyond those necessary to adjust their relationship. Congress may not diminish either (i) the rights or prerogatives of parties outside of the debtor-creditor relationship ("Third Parties") for the benefit of the debtor or the creditors or (ii) the non-bankruptcy rights of the debtor or the creditors for the benefit of these Third Parties.[28] For example, federal bankruptcy law may not expropriate the property of third parties to help pay the debtor's creditors; create assets on behalf of the debtor that do not exist under non-bankruptcy law; or create claims in bankruptcy for the benefit of Third Parties that they do not have outside of bankruptcy. As discussed below, this principle absolutely limits Congress's power to abrogate the States' sovereignty.

The Non-Interference Principle provides an important but limited constraint to the Non-Expropriation Principle. It provides that Congress may prevent a Third Party from using non-bankruptcy law to frustrate the bankruptcy process or from using the bankruptcy of a debtor to obtain a benefit that the Third Party could not obtain under non-bankruptcy law.[29] Accordingly, notwithstanding the general

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[26] *See* Plank, *Bankruptcy Judges*, *supra* note 18, at 595–610 (discussing initial bankruptcy adjudication under the bankruptcy laws in effect before adoption of the Constitution by adjudicators, such as "commissioners of bankrupt" and justices of the peace, who were not judges with life tenure, and arguing that the Bankruptcy Power impliedly permitted Congress to establish bankruptcy judges as initial adjudicators who are not Article III judges with life tenure); *see also* U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."). *Compare* U.S. CONST. art. III, § 1 (defining authority of article III courts and judges), *with* 28 U.S.C. § 151 (2006) (describing designation of bankruptcy courts and judges).

[27] *See generally* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743 (2000) (examining constitutional basis of federal bankruptcy jurisdiction).

[28] *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1091–92 (discussing Non-Expropriation Principle and arguing "bankruptcy law may not create rights or property interests for . . . debtors or their creditors . . . that do not exist under state law or federal nonbankruptcy law"); *cf.* 11 U.S.C. § 541(d) (2006) (limiting inclusion of property in the estate to property debtor holds only legal title to, "but not to the extent of any equitable interest in such property that the debtor does not hold").

[29] Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1092–93 (discussing Non-Interference Principle and stating "[b]ankruptcy law may prevent creditors and Third Parties from interfering with the bankruptcy process"); *see also* Mooney, *Normative Theory*, *supra* note 24, at 961 n.137 (restating Plank's principle as disallowing Third Parties from using "their nonbankruptcy rights, which would otherwise remain enforceable under the Non-Expropriation Principle, to prevent a debtor or creditor from initiating a bankruptcy case or otherwise obtaining the benefits of bankruptcy law"); Plank, *Security of Securitization*, *supra* note 14, at 1726 ("The Non-Interference Principle is a narrow exception to the Non-Expropriation

enforceability of a Third Party's contractual or property rights under state law, bankruptcy law may abrogate ipso facto clauses that provide for a forfeiture or limitation of a person's contractual or property rights in a bankruptcy case if that person becomes a debtor in bankruptcy.[30] In certain circumstances, this principle may provide a basis for limiting States' sovereignty.

Under the Debtor-Insolvency Principle, a person cannot be a debtor in bankruptcy unless the debtor is insolvent in a balance sheet or cash flow sense.[31] This principle does not directly implicate States' sovereignty. Further, the Bankruptcy Code does not recognize this principle,[32] and one case has expressly rejected it.[33] Accordingly, if federal courts recognize no limits to the abrogation of a State's sovereignty immunity in bankruptcy, a solvent debtor that could not sue a State outside of bankruptcy, like the plaintiff in *Hans v. Louisiana*,[34] could theoretically become a debtor and sue the State in bankruptcy court.

Principle that only prevents direct interference with Congress's power to adjust the insolvent debtor-creditor relation.").

[30] An ipso facto provision is any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor or on the commencement of a bankruptcy case and that effects or allows a forfeiture, modification, or termination of the debtor's interest in property or a contract. *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1126–27 (describing ipso facto provision as allowing "the discretionary or automatic termination of the debtor's contract and property rights because the debtor filed a bankruptcy petition or becomes insolvent"); *see also* 11 U.S.C. § 363(l) (2006) (providing bankruptcy trustee or persons authorized by chapter 11 plan "may use, sell, or lease . . . property of the estate" notwithstanding ipso facto clause); 11 U.S.C. § 365(a), (e)(1) (2006) (providing executory contract or unexpired lease of debtor may be assumed notwithstanding ipso facto clause); 11 U.S.C. § 541(c)(1) (2006) (providing "an interest of the debtor in property becomes property of the estate . . . notwithstanding" ipso facto provision).

[31] *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1093–95 (discussing Debtor-Insolvency Principle); *see also* 11 U.S.C. § 101(32) (2006) (giving different definitions of "insolvent"); Plank, *Constitutional Limits*, *supra* note 7, at 545 (arguing that Congress' bankruptcy power only extends to insolvent debtors).

[32] *See* 11 U.S.C. § 301 (2006) (providing any person that may be debtor under 11 U.S.C. § 109 may file voluntary petition); *In re* Johns-Manville Corp., 36 B.R. 727, 729–30 (Bankr. S.D.N.Y. 1984) (noting there was no requirement in Bankruptcy Code that debtor be insolvent to file voluntary petition, in analyzing good faith of chapter 11 petition filed by debtor facing 16,000 lawsuits for personal injury from asbestos that would be required to book reserve of $1.9 billion to cover potential liability); *see also In re* N.R. Guaranteed Ret. Inc., 112 B.R. 263, 272 (Bankr. N.D. Ill. 1990) (discussing court's willingness to consider voluntary petitions filed under chapter 11 without need for relief).

[33] *In re* Marshall, 300 B.R. 507, 516–17 & n.21 (Bankr. C.D. Cal. 2003) (rejecting balance sheet insolvency as jurisdictional requirement for filing voluntary bankruptcy petition).

[34] 134 U.S. 1 (1890), discussed *supra* in text accompanying note 11.

III. BANKRUPTCY LAW AND SOVEREIGNTY IN *KATZ*

*A. Pre-*Katz *Sovereignty Immunity*

Whether or to what extent a State may resist the jurisdiction of a federal court, including a bankruptcy court, on the grounds of its sovereign immunity has bedeviled courts, parties, their lawyers and scholars since the founding of the United States.[35] During the debate over ratifying the Constitution, opponents and some supporters of the Constitution stated that the provision of section 2 of Article III extending the "Judicial Power" to "controversies . . . between a State and Citizens of another State"[36] expressly overrode the sovereign immunity of the States.[37] Alexander Hamilton,[38] James Madison, and others argued that it did not.[39] In 1794, the Supreme Court in *Chisolm v. Georgia*[40] held that Article III did override the sovereign immunity of the State of Georgia in a suit by a South Carolina Citizen to collect Revolutionary War debts owed by Georgia. In response, Congress immediately passed and the States quickly 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.[41]

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[35] *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 7.1–7.7, at 393–462 (4th ed. 2003) (discussing sovereign immunity and Eleventh Amendment); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF FEDERAL POWER 179–203 (1990).

[36] *See* U.S. CONST. art. III, § 2, cl. 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;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

[37] *See* CHEMERINSKY, *supra* note 35, § 7.2, at 398–99 (describing debate that occurred at state ratification conventions over Article III and sovereign immunity); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 104 (1996) (Souter J., dissenting) (stating there was some "dispute among the Framers and others over whether ratification of the Constitution would preclude a State sued in federal court from asserting sovereign immunity . . . .").

[38] THE FEDERALIST NO. 81, at 511–12 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) ("Unless, therefore, there is a surrender of this immunity . . . it will remain with the States.")

[39] *See* CHEMERINSKY, *supra* note 35, § 7.2, at 399–400 (discussing views of Hamilton and Madison).

[40] 2 U.S. (2 Dall.) 419 (1793).

[41] *See* U.S. CONST. amend. XI.; *see also* New York City Health & Hosps. Corp. v. Perales, 50 F. 3d 129,

In *Hans v. Louisiana*,[42] the Court extended the States' sovereign immunity to a suit in federal court by a citizen of Louisiana against his own State for repudiating its bonds in violation of the prohibition against the impairment of contract set forth in the U.S. Constitution.[43] Although the express terms of the Eleventh Amendment did not prohibit such a suit, the Court noted that applying only the express language of the Eleventh Amendment "is an attempt to strain the constitution and the law to a construction never imagined or dreamed of."[44] In 1908, however, the Court held in *Ex Parte Young*[45] that a State's sovereign immunity did not extend to an action against a State officer to enjoin a violation of federal law.[46]

More recently, the Court held in *Pennsylvania v. Union Gas Co.*[47] that Congress could, pursuant to its powers under Article I, abrogate a State's sovereign immunity in federal court.[48] This decision, however, proved short-lived. Seven years later, in *Seminole Tribe of Florida v. Florida*,[49] the Court overruled *Union Gas* and held that Congress did not have the power under the Indian Commerce Clause to overrule a State's sovereign immunity from suit. The Court stated: "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[50]

The clear statement in *Seminole Tribe* that Congress cannot use Article I to abrogate a State's sovereign immunity caused consternation among bankruptcy professionals. Because States and their agencies today are important players in many bankruptcy cases, assertions of sovereign immunity could reduce recoveries to creditors, impede efforts to reorganize debtors, and impose greater hardships on individual debtors. Courts and scholars responded with a variety of arguments to avoid these consequences.[51] In 2004, the Supreme Court ameliorated some of the concerns of bankruptcy professionals in *Tennessee Student Assistance Corp. v.*

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134 (2d Cir. 1995) (stating that because of the reaction by states after *Chisolm*, the Eleventh Amendment was swiftly passed).

[42] 134 U.S. 1 (1890).

[43] *See* U.S. CONST. art. I, § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .").

[44] *Hans*, 134 U.S. at 15; *see also* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 553 n.6 (2006) (describing how the decision in *Hans* to bar suit by citizen against his State reflects the application of common law principles to constitutional law interpretation).

[45] 209 U.S. 123 (1908).

[46] *Id.* at 159. *See generally* Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief*, 76 AM. BANKR. L.J. 461, 483–501 (2002) [hereinafter Brubaker, *State Sovereign Immunity and Prospective Remedies*] (analyzing *Ex Parte Young*).

[47] 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[48] *Id.* at 13.

[49] 517 U.S. 44 (1996).

[50] *Id.* at 72–73.

[51] *See* Brubaker, *State Sovereign Immunity and Prospective Remedies*, *supra* note 46, at 463–65 (noting impact of *Seminole Tribe*); *see also* Rubino v. Saddlemire, 2007 WL 685183, at *4 (D. Conn. 2007) ("The Eleventh Amendment does not bar suits for prospective injunctive relief against state officials, as such falls within the *Ex parte Young* exception to sovereign immunity.").

Hood.[52] In *Hood*, the Court held that, because a bankruptcy proceeding is in the nature of an *in rem* proceeding, a proceeding in bankruptcy court against a State agency to adjudicate the dischargeability of a student loan owed by an individual debtor is not a suit against the State for purposes of the Eleventh Amendment.[53]

Ralph Brubaker has cogently argued that the doctrine of *Ex Parte Young* provides ample justification for adjudicating and upholding the discharge of debtors in bankruptcy against the objections of a State.[54] The doctrine of *Ex Parte Young* or the bankruptcy court's *in rem* jurisdiction[55] may also provide a basis for allowing an initial adjudication of issues against a state by a bankruptcy court or other forms of bankruptcy relief, such as the recovery of specific property items transferred to a State as a pre-petition fraudulent or preferential transfer or a post-petition unauthorized transfer. The more difficult issue is to what extent could a bankruptcy court order a State to pay to the bankruptcy trustee a sum of money, which would then be applied toward the payment of the administrative expenses of the bankruptcy case or to the payment of dividends to unsecured creditors. It would seem that, under *Seminole Tribe*, a bankruptcy court could not enter such an order.

B. The Katz *Decision*

In January and February 2003, Bernard Katz, the liquidating supervisor under the reorganization plan for a chapter 11 debtor, Wallace's Bookstores, sought to recover money owed by, and preferential transfers of money to, four Virginia colleges and community colleges.[56] Each of the defendants filed motions to dismiss

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[52] 541 U.S. 440 (2004).

[53] *Id.* at 443, 450–52.

[54] *See generally* Brubaker, *State Sovereign Immunity and Prospective Remedies*, *supra* note 46.

[55] Ralph Brubaker has criticized the Court's *in rem* analysis in *Hood*. *See* Ralph Brubaker, *From Fictionalism to Functionalism in State Sovereign Immunity: The Bankruptcy Discharge as* Ex parte Young *Relief After* Hood, 13 AM. BANKR. INST. L. REV. 59, 125 (2005) (stating most "glaring deficiency" in *Hood's in rem* analysis is it is "*not* effective in fully capturing the compulsory essence of the federal bankruptcy process"); *see also* Leonard H. Gerson, Hood's *Understated Alteration of the Eleventh Amendment Landscape*, 3 DEPAUL BUS. & COM. L. J. 437, 440 (2005) ("*Hood* arguably grants a bankruptcy court extremely wide latitude in issuing orders that would affect a state's interest.").

[56] *See* Brief of Respondent at 6 & n.12, Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006) (No. 04-885), 2005 WL 2055877 [hereinafter Brief of Respondent Katz]; Complaint to Avoid and Recover Preferential Transfers and to Disallow Claims Pursuant to 11 U.S.C. § 502, Katz v. New River Cmty. Coll. (*In re* Wallace's Bookstores, Inc.), No. 01-50545, Adv. Proc. No. 03-05041 (Bankr. E.D. Ky.) (doc. no. 1, filed Jan. 31, 2003) [hereinafter New River Complaint], also *reproduced in* Joint Appendix, *Katz*, 126 S.Ct. 990, *available at* 2005 WL 1464848, at *28 [hereinafter Joint Appendix]; Complaint to Avoid and Recover Preferential Transfers and to Disallow Claims Pursuant to 11 U.S.C. § 502, Katz v. Va. Mil. Inst. (*In re* Wallace's Bookstores, Inc.), No. 01-50545, Adv. Proc. No. 03-05068 (Bankr. E.D. Ky.) (doc. no. 1, filed Feb. 5, 2003) [hereinafter VMI Complaint], also *reproduced in* Joint Appendix, *supra*, at *2; Complaint to Avoid and Recover Preferential Transfers and to Disallow Claims Pursuant to 11 U.S.C. § 502, Katz v. Cent. Va. Cmty. Coll. (*In re* Wallace's Bookstores, Inc.), No. 01-50545, Adv. Proc. No. 03-05081 (Bankr. E.D. Ky.) (doc. no. 1, filed Feb. 11, 2003) [hereinafter Central Virginia Complaint], also *reproduced in* Joint Appendix, *supra*, at *11; Complaint to Avoid and Recover Preferential Transfers and to Disallow Claims Pursuant to 11 U.S.C. § 502, Katz v. Blue Ridge Cmty. Coll. (*In re* Wallace's Bookstores, Inc.), No. 01-50545, Adv. Proc. No. 03-05093 (Bankr. E.D. Ky.) (doc. no. 1, filed Feb. 14, 2003) [hereinafter Blue Ridge

on the basis of their sovereign immunity.[57] The bankruptcy court denied the motions to dismiss,[58] the Virginia colleges appealed, and the rest is history.

Katz had sought to recover approximately (x) $163,800 alleged to be owed to the debtor under section 541 of the Bankruptcy Code and (y) $188,301 in preference payments that the debtor had made to the Virginia colleges under section 547 of the Bankruptcy Code.[59] These two causes of action differ substantially. Under section 541, the commencement of a case creates an estate that consists primarily of all of the interests of the debtor in property.[60] This would include any debts owed to the debtor, which can be collected pursuant to section 542(b).[61]

In contrast, under section 547 of the Bankruptcy Code, a bankruptcy trustee may avoid certain pre-petition transfers of an interest of the debtor in property, including cash, to a creditor on account of an antecedent debt if the transfer would enable the creditor to receive a greater amount than it would have received in a chapter 7 liquidation.[62] Hence, with certain exceptions, just about any payment to an

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Complaint], also *reproduced in* Joint Appendix, *supra*, at *19.

[57] *See, e.g.*, Amended Motion [of Defendant Central Virginia Community College to Dismiss Adversary Proceeding], at 2–3, Katz v. Cent. Va. Cmty. Coll. (*In re* Wallace's Bookstores, Inc.), No. 01-50545, Adv. Proc. No. 03-05081 (Bankr. E.D. Ky.) (doc. no. 7, filed Mar. 11, 2003).

[58] *See, e.g.*, Order Denying Motion to Dismiss Adversary Proceeding, Katz v. Cent. Va. Cmty. Coll. (*In re* Wallace's Bookstores, Inc.), No. 01-50545, Adv. Proc. No. 03-05081 (Bankr. E.D. Ky.) (doc. no. 21, filed Apr. 24, 2003).

[59] *See* Brief of Respondent Katz, *supra* note 56, at i, iii–v, 6 & n.13; New River Complaint, *supra* note 56, at 4, 5, & Exh. A, B, also *reproduced in* Joint Appendix, *supra* note 56, at *31–34, ($93,175 debt owed to debtor, $65,264 preference payments); VMI Complaint, *supra* note 56, at 3–6, & Exh. A, B, also *reproduced in* Joint Appendix, *supra* note 56, at *5–9 ($30,409 debt owed to debtor, $25,595 preference payments, plus $54,059 recoverable under Kentucky preference law through section 544(b), outside the 90 day period of section 547); Central Virginia Complaint, *supra* note 56, at 3–5, also *reproduced in* Joint Appendix, *supra* note 56, at *13–16 ($4,898 debt owed to debtor, $63,387 preference payments); Blue Ridge Complaint, *supra* note 56, at 4–6, & Exh. A, B, C, also *reproduced in* Joint Appendix, *supra* note 56, at *21–23, 26 ($35,317.61 debt owed to debtor, $34,054.58 preference payments).

[60] *See* 11 U.S.C. § 541 (2006):

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

Id. This is the principal definition for property of the estate. The other enumerated items refer to community property, *id.* § 541(a)(2), and to property added to the estate after the commencement of the case, *id.* § 541(a)(3)–(7).

[61] *See* 11 U.S.C. § 542(b) (2006):

> [With exceptions not relevant here], an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

Id.

[62] *See* 11 U.S.C. § 547(b) (2006):

unsecured creditor within ninety days before the filing of a bankruptcy petition is susceptible to avoidance.[63] If a transfer is "avoided," then under section 550, the trustee can recover the property item so transferred or the value of such item.[64] The essential purpose of preference law is to prevent a creditor from opting out of the

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> (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
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> (1) to or for the benefit of a creditor;
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> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Id.; *see also In re* Plascencia, 354 B.R. 774, 781 (Bankr. E.D. Va. 2006) ("A preferential transfer . . . is a payment or other transfer made within 90 days before the bankruptcy filing . . . on account of an antecedent debt that enables the creditor to receive more than the creditor would have received in a chapter 7 liquidation had the transfer not been made."); Rocin Liquidation Estate v. Alta AH & L (*In re* Rocor Intern., Inc.), 352 B.R. 319, 329–30 (Bankr. W.D. Okla. 2006) ("[A]ny payment on account to an unsecured creditor during the preference period will enable that creditor to receive, for preference-avoidance purposes, more than it would have received in a hypothetical chapter 7 liquidation had the payment not been made.").

[63] For example, assume that, shortly before filing a bankruptcy petition, a debtor has paid $100 to an unsecured creditor to discharge a debt. If the debtor had not discharged the debt, the creditor would have an unsecured claim in the bankruptcy case and would generally share pro-rata with the other unsecured creditors (after payment of administrative expenses and certain priority claims). *See* 11 U.S.C. §§ 726, 507, 503 (2006). Because almost all debtors in bankruptcy are insolvent, the payment would be less that the amount that the creditor actually received. The creditor would not be paid in full in a chapter 7 unless there were sufficient assets to pay all creditors in full. *See In re* Pameco Corp., 356 B.R. 327, 336 (Bankr. S.D.N.Y. 2006) ("Indeed, the purpose of § 547 is not to establish 'whether a creditor may have recovered all of the monies owed by the debtor from any source whatsoever, but instead . . . whether the creditor would have received less than a 100% payout in a Chapter 7 liquidation.'" (quoting *In re* Virginia-Carolina Fin. Corp. 954 F.2d 193, 198 (4th Cir. 1992))).

[64] *See* 11 U.S.C. § 550(a) (2006):

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made.

Id.; *see also* Williams v. Mortillaro (*In re* Res., Recycling & Remediation, Inc.), 314 B.R. 62, 69 (Bankr. W.D. Pa. 2004) ("Section 550(a) is a recovery provision and gives rise to a secondary cause of action which applies after the trustee has prevailed under one (or more) of the avoidance provisions found in the Bankruptcy Code."); Santee v. Nw. Nat'l Bank (*In re* Mako, Inc.), 127 B.R. 471, 473–74 (Bankr. E.D. Okla. 1991) ("[B]y passing § 550, Congress hoped to preclude multiple transfers or convoluted business transactions from frustrating the recovery of avoidable transfers.").

bankruptcy case and receiving full payment instead of its pro-rata share of the debtors assets.

In their motions to dismiss Katz's complaints in the adversary proceedings,[65] their petition for a writ of certiorari,[66] and their argument in the Supreme Court,[67] the defendant colleges asserted their sovereign immunity against both the claims for payment of the debts owed to the debtors and the claims for recovery of the preference. Katz, however, limited his response to the motions to dismiss the adversary complaints to Congress's abrogation of the States' sovereign immunity under section 106 of the Bankruptcy Code.[68] Section 106 abrogates State's sovereign immunity with respect to sections 547 and 550 of the Bankruptcy Code but not with respect to section 541.[69] Further, in the Supreme Court, Katz limited

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[65] *See, e.g.*, Amended Motion, *supra* note 57 (dismissing on basis of sovereign immunity).

[66] *See* Petition for Writ of Certiorari, at i, Central Va. Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006) (No. 04-885), 2004 WL 3017740. In this Petition, the petitioners referred to both the preference actions and the debt collection action, *see id.* at 9 (noting that Katz "commenced adversary proceedings to recover alleged preferential transfers under 11 U.S.C. § 547(b), and to collect on accounts receivable that the debtor alleges are owed to it by the Virginia Institutions"). However, in places they mentioned only the preference actions, *see id.* at 5 ("More importantly, because this matter involves bankruptcy adversary proceedings seeking to recover alleged preferential transfers, there is no possibility that the case can be decided because of *in rem* jurisdiction.").

[67] *See* Brief of Petitioners at i, 29 & n.35, *Katz*, 126 S.Ct. 990 (2006) (No. 04-885), 2005 WL 1464719 (requesting Supreme Court bar claim because of sovereign immunity).

[68] *See, e.g.*, Plaintiff's Response to Motion to Dismiss of Central Virginia Community College, at 2, 5–6, Katz v. Cent. Va. Cmty. Coll. (*In re* Wallace's Bookstores, Inc.), No. 01-50545, Adv. Proc. No. 03-05081 (Bankr. E.D. Ky.) (doc. no. 16, filed Apr. 9, 2003):

> In this action, the Plaintiff seeks to recover preferential payments made to Defendant. In section 106(a), Congress expressly abrogated sovereign immunity with respect to claims filed pursuant to section 547 of the Bankruptcy Code, the statutory provision authorizing the recovery of preferential transfers . . . . As the Sixth Circuit held in *Hood*, the Constitution provided Congress with the power to pass "uniform" laws regarding bankruptcy, which necessarily included the authority to abrogate states' immunity from suit.

Id.

[69] *See* 11 U.S.C. § 106(a) (2006):

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit

his argument to the preference actions and advised the Court that he had moved to dismiss the counts seeking repayment of the debts owed to the debtor.[70] The Virginia colleges successfully opposed the motion to dismiss in the bankruptcy court while the case was before the Supreme Court.[71]

> shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.
> (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

Id.; *see also* William Ross, Inc. v. Biehn Constr., Inc. (*In re* William Ross, Inc.), 199 B.R. 551, 554 (Bankr. W.D. Pa. 1996):

> As suggested by the Supreme Court, section 106(a)(1) specifically lists those sections of title 11 with respect to which sovereign immunity is abrogated. This allows the assertion of bankruptcy causes of action, but specifically excludes causes of action belonging to the debtor that become property of the estate under section 541.

Id.

[70] *See* Brief of Respondent Katz, *supra* note 56, at i, iii–v, 6 & n.13 (describing the questions presented to include whether filing proof of claim waives sovereign immunity with respect to preference action and whether assuming no waiver, sovereign immunity bars preference action or bars bankruptcy court from exercising its *in rem* jurisdiction to recover funds received by state agency, and otherwise referring to sovereign immunity from preference actions); *see also* Plaintiff's Motion for Partial Dismissal With Prejudice, Katz v. Cent. Va. Cmty. Coll. (*In re* Wallace's Bookstores, Inc.), No. 01-50545, Adv. Proc. No. 03-05081 (Bankr. E.D. Ky.) (doc. no. 75, filed Aug. 18, 2005) (stipulating to dismissing of Count I [cause of action for payment of account] but continuing to assert Count III [avoidance and recovery of preferential transfers under 11 U.S.C. §§ 547 and 550]).

In its brief in the Supreme Court, Katz also argued that 11 U.S.C § 542(a) also authorized the return of the preferential payments. *See* Brief of Respondent Katz, *supra* note 56, at 17 ("By operation of law, if Petitioners received avoidable preferences, they are not entitled to keep them because section 551 preserves any avoided transfer for the benefit of the estate, and section 542 directs that the avoided transfer must be returned to the estate."); *id.* at 30–31, 39–40, 48 (referring to the recovery of preferential transfers under sections 547, 542, 550, and 551). Such reliance is misplaced. Property transferred pre-petition to a third party is no longer property of the estate because it is no longer an "interest of the debtor in property as of the commencement of the case." *See* 11 U.S.C. § 541(a)(1), *supra* note 60 ("Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case."). Section 542(a) provides that a third party in possession of property that the trustee may use under 11 U.S.C. § 363(b) & (c) must return that property. *See* 11 U.S.C. § 542(a) (2006). Section 363(b) & (c) authorizes the trustee to use property of the estate. Accordingly, section 542(a) does not apply to property no longer property of the estate, even if that property had previously been property of the debtor and transferred in a preferential transfer. Property recovered by a bankruptcy trustee under 11 U.S.C. § 550 because of an avoidance of a preferential transfer under section 547 becomes property of the estate under 11 U.S.C. § 541(a)(3). *See id.* § 541(a)(3) (including in property of the estate "[a]ny interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title").

[71] *See* Memorandum Opinion and Order, Katz v. Cent. Va. Cmty. Coll. (*In re* Wallace's Bookstores, Inc.), No. 01-50545, Adv. Proc. No. 03-05081 (Bankr. E.D. Ky.) (doc. no. 85, filed Sept. 13, 2005) (overruling motion to dismiss).

I speculate that the Virginia colleges continued to argue their sovereign immunity against both the debt collection claim and the preference claim to booster the chances of a reversal of the lower courts' denial of their claim of sovereign immunity. In any event, the Supreme Court did not address Katz's claims for collecting the debts owed to the debtor and expressly limited its holding to Katz's preference claims. Specifically, the Court described the scope of its decision:

> In this case we consider whether a proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies is barred by sovereign immunity. Relying in part on our reasoning in *Hood,* we reject the sovereign immunity defense advanced by the state agencies.[72]

Further, in describing the facts, the court referred only to Katz's complaint to recover preferential payments and made no mention of the claim to collect the debts owed by the Virginia colleges.[73]

Finally, in its conclusion, the Court stated:

> The relevant question is not whether Congress has "abrogated" States' immunity in proceedings to recover preferential transfers . . . . The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact "Laws on the subject of Bankruptcies." We think it beyond peradventure that it is.[74]

C. The Court's Use and Misuse of Bankruptcy History

The Court begins its analysis:

> [1] It is appropriate to presume that the Framers of the Constitution were familiar with the contemporary legal context when they adopted the Bankruptcy Clause—[2] a provision which, as we explain in Part IV, infra, reflects the States' acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law sovereign immunity defenses that might have been asserted in bankruptcy proceedings.[75]

I agree with the first part of this sentence. As to the second part of the sentence,

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[72] *See* Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 994 (2006).

[73] *See id.* (noting Katz "commenced proceedings in the Bankruptcy Court pursuant to §§ 547(b) and 550(a) to avoid and recover alleged preferential transfers to each of the petitioners").

[74] *See id.* at 1005.

[75] *See id.* at 996.

however, the Court fails to present any historical evidence that the Bankruptcy Clause "reflect[s] the State's acquiescence" in subordinating sovereign immunity defenses to "the pressing goal of harmonizing bankruptcy law."
The Court continued:

> The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena.[76]

In its opinion, the Court discusses (a) the apparent desire to reconcile differences in the relief offered to debtors under different pre-Framing state bankruptcy laws, (b) the nature of a bankruptcy proceeding as an *in rem* proceeding in which the bankruptcy court has jurisdiction over the property and body of the debtor, and (c) the fact that one form of relief under the 1800 Bankruptcy Act—discharge from debtor's prison—was effected by a writ of habeas corpus directed to a State officer having custody of the debtor. Although there was a "pressing need" to harmonize bankruptcy laws as they applied to creditors and debtors in different states, neither this pressing need, the nature of bankruptcy proceedings as *in rem,* nor the authorization of a writ of habeas provides any basis for the Court's conclusions that States subordinated their sovereign exemption or their sovereign immunity to Congress's Bankruptcy Power.

1. Harmonizing Bankruptcy Law

In part II of its opinion, the Court describes two cases decided by Pennsylvania courts that illustrated the variety of relief provided by state bankruptcy laws and the question of the extent to which the courts in one state would respect the relief granted under the law of a different state.[77] One case, *James v. Allen,*[78] involved a Pennsylvania creditor that sought to imprison a debtor who had received a discharge in New Jersey from imprisonment for debt. New Jersey's debtor relief law provided only a discharge from prison upon surrender and liquidation of the debtor's

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[76] *See id.*; *see also* Eric R. Sender, Comment, *The Constitutionality of Section 106: A Historical Solution to a Modern Debate*, 18 BANK. DEV. J. 131 (2001). In this comment, the author correctly notes that the proceedings of the Constitutional Convention lend insight into the Framers' intention regarding the meaning of the Bankruptcy Clause. *Id.* at 150–51. However, like the Court, the author fails to distinguish between the abrogation of legislative sovereignty, on the one hand, and sovereign exemption or sovereign immunity, on the other, and appears to assume that the abrogation of the former means the abrogation of the latter. *See, e.g., id.* at 143–44, 156–60, 166–67.

[77] *See id.* at 998–99 (citing how two cases showcase "uncoordinated actions of multiple sovereigns").

[78] 1 U.S. (1. Dall.) 188 (C.P. Philadelphia, 1786).

property, and the Pennsylvania court held that such relief did not prevent arrest under Pennsylvania's creditor collection law.

The second case, *Miller* [or *Millar*] *v. Hall*,[79] involved a Pennsylvania creditor that sought to imprison a debtor who had received a discharge of all his debts under Maryland law. The Maryland bankruptcy law, which was a rarity among eighteenth-century American bankruptcy law and which proved to be short-lived, was an early version of today's chapter 7.[80] The debtor by voluntary petition could receive a discharge of most debts upon surrendering all of his or her property, which would be liquidated and distributed pro-rata to the creditors. The law even contained a primitive preference avoidance provision.[81] In *Miller v. Hall*, the Pennsylvania supreme court held that the discharge prevented the debtor's arrest under Pennsylvania's creditor collection law.

The Court also cites the discussions in the Constitutional convention, in which the proposal to add to the Constitution a power to enact bankruptcy laws followed a discussion of the clause that became the Full Faith and Credit Clause and the necessity for extending such a clause to legislative Acts and insolvency acts.[82] From this, the court concluded part II of its opinion by stating that "there was general agreement on the importance of authorizing a uniform federal response to the problems presented in cases like *James* and [*Miller*]."[83]

2. *In Rem* Jurisdiction

In part III of its opinion, the Court noted that bankruptcy law extended beyond the granting of a discharge, and discussed the *in rem* nature of bankruptcy jurisdiction—jurisdiction over the property of the debtor's estate and over the debtor

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[79] 1 U.S. (1. Dall.) 229 (Pa. 1788), *reprinted in* Pa. Reports 240 (4th ed. 1880). The court cites *Miller v. Hall* throughout as "*Millar v. Hall*." The report of the case, which is cited at 1 U.S. (1. Dall.) 229 (Pa. 1788), that is reprinted in Pa. Reports 240 (4th ed. 1880) uses "Miller" as the spelling.

[80] An Act Respecting Insolvent Debtors, ch. 34, Apr. Sess., 1787 Md. Laws, *repealed* May 20, 1788, Ch. 10, 1787 Md. Laws. For a general description of the law, see Plank, *Constitutional Limits, supra* note 7, at 523–24; *see also* Plank, *Bankruptcy and Federalism, supra* note 7, at 1086 (commenting on similarities between Maryland's "An Act Respecting Insolvent Debtors" and "Chapter 7 of the Bankruptcy Code").

[81] An Act Respecting Insolvent Debtors, ch. 34, Apr. Sess., 1787 Md. Laws, § 10:

> And be it enacted, That if any debtor shall prefer any of his creditors, except securities, who have *bona fide* become such before the passing of this act, such preference shall be void in law and equity, and any money paid, or property given, in preference, shall be recovered by the trustee or trustees of such debtor.

Id.; *see In re* Dehon, 327 B.R. 38, 63 (Bankr. D. Mass. 2005) (stating early Maryland laws allowed for recovery of preferences).

[82] *See* Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 999 (2006) (citing discussions at constitutional convention); Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 216–22 (1957) (discussing proceedings of constitutional convention in detail); *see also* Plank, *Constitutional Limits, supra* note 7, at 527–29 (describing adoption of Bankruptcy Clause at constitutional convention).

[83] *See Katz*, 126 S.Ct. at 999–1000.

as well. This scope encompassed the power to recover preferential transfers.[84]

So far, so good. But then the Court made this leap:

> And it [the power to avoid preferential transfers], like the authority to issue writs of habeas corpus releasing debtors from state prisons, see Part IV, *infra,* operates free and clear of the State's claim of sovereign immunity.[85]

There is a conclusion, not analysis. There is no historical evidence that supports this conclusion.

3. Process to Officers Having Custody of the Debtor

The Court engages in more magic-wand waving in part IV of the opinion. The Court states: "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."[86] To support this statement, the Court relies on the fact that the first Bankruptcy Act enacted in 1800 empowered the district court to issue writs of habeas corpus to state officials to obtain the release of debtors imprisoned. The Court contrasted this early authorization of habeas corpus with the fact that the writ of habeas corpus was not generally available to "state prisoners" until sixty-seven years later.[87]

Here, the Court's historical analysis fails completely. The Court neglects to place the use of a writ of habeas corpus in the context of eighteenth-century bankruptcy and other law.[88] First, imprisonment for debt was not a criminal proceeding for violating State laws, and it did not implicate the sovereignty of the

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[84] *See id.* at 1000–02 (proclaiming *in rem* jurisdiction power to recover preferential transfers); *cf.* 11 U.S.C. § 547 (2006) (authorizing the avoidance of preferential transfers to creditors); *see also supra* note 62 and accompanying text (quoting section 547(b) and discussing ability of trustee to avoid some pre-petition transfers to creditors under section 547(b)).

[85] *See Katz,* 126 S.Ct. at 1002.

[86] *See id.*

[87] *See id.* at 1002–03 (noting writ of habeas corpus was not available to state prisoners until after ratification of the Fourteenth Amendment); *cf. Ex parte* Royall, 117 U.S. 241 (1886) (extending use of habeas corpus to state prisoners, in this case an individual imprisoned for selling a coupon on a state bond without a license or without paying a license tax).

[88] *See also* Brubaker, *The Bankruptcy Power as a Federal Forum Power, supra* note 4, at 117 (stating that the Court's reliance on habeas corpus as evidence of surrender of sovereign immunity in the Bankruptcy Clause is "a distortion of the historical pedigree of the habeas corpus power vis-à-vis the immunity of the sovereign against suit" and noting that the writ did not implicate sovereign immunity). Judge Randolph Haines has presented an historical analysis of habeas corpus as it relates to state sovereign immunity in bankruptcy. *See* Hon. Randolph J. Haines, *The Uniformity Power: Why Bankruptcy is Different,* 77 AM. BANKR. L.J. 129, 184–86 (2003) [hereinafter "Haines, *The Uniformity Power*"]. I disagree, however, with Judges Haines' historical analysis, in that, as discussed in the immediately following text, the writ of habeas corpus had a broader role than that which he describes and in the bankruptcy context, at least, its use against an officer of the sovereign did not implicate the immunity of the sovereign.

Crown, a colony or a State. Imprisonment for debt was merely one of several creditor collection remedies that that the law made available to creditors.[89] In this regard, characterizing a debtor imprisoned for debt as a "state prisoner" is misleading. A more accurate characterization is "prisoner of a creditor," albeit under the sanction of state law.

Second, a standard feature of all bankruptcy law—the English Bankrupt Acts,[90] the English Insolvency Acts,[91] and many American bankruptcy Acts[92]—allowed a debtor that was eligible for relief to use some form of process to require a sheriff or other jailer to release the debtor. For example, in *The King v. Eddington*,[93] a bankrupt who had been committed to jail for failure to pay accounts owed sought a

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[89] William Blackstone discussed imprisonment for debt (pursuant to a "*capias ad satisficiendum*") as one of the methods for collecting a money judgment in his volume on private wrongs, which he distinguished from public wrongs or crimes. 3 WILLIAM BLACKSTONE, COMMENTARIES *1–2, 414–17; *see also supra* note 12 and accompanying text (describing the five writs of execution used for collection of debts).

[90] *See, e.g.*, 5 Geo. 2, c. 30, § 5 (1732) (Eng.) (providing that if, after issuance of commission of bankruptcy, any bankrupt is arrested for debt, bankrupt shall be discharged from arrest upon showing arresting officer summons or notice of commission); 5 Geo. 2, c. 30, § 7 (noting that if after receiving discharge from debt bankrupt is arrested on account of discharged debt, bankrupt shall be discharged upon common bail); 5 Geo. 2, c. 30, § 13 (indicating that if after receiving certificate of discharge from debt bankrupt is arrested on account of judgment on discharged debt entered before certificate was issued, judges of court that issued judgment may "order any Sheriff [or other officer having] any such Bankrupt in his Custody, by Virtue of any such execution, to discharge such Bankrupt out of Custody on such Execution without Payment of any fee or reward"); *see also* ARCHIBALD CULLEN, PRINCIPLES OF THE BANKRUPT LAW 398–402 (1800) (describing that bankrupt may avail himself of certificate of discharge by plea or, if arrested, by motion).

[91] *See, e.g.*, 21 Geo. 3, ch. 63, § 14 (1781) (Eng.) (providing that if justices determined that petitioning debtor was entitled to benefits of Act, justices "shall command the said Sheriff [or other persons having custody of a debtor in debtor's prison] forwith to set at liberty such prisoner"); *see also* 28 Geo. 2, ch. 13, § 9 (1755) (Eng.) (same); 9 Geo. 3, ch. 26, § 10 (1769) (Eng.) (same); 12 Geo. 3, ch. 23, § 11 (1772) (Eng.) (same); 14 Geo. 3, ch. 77, § 11 (1774) (Eng.) (same); 16 Geo. 3, ch. 38, § 13 (1776) (Eng.); 18 Geo. 3, ch. 52, § 14 (1778) (Eng.) (same).

[92] *See, e.g.*, An Act for the Relief of Insolvent Debtors, within this Government, ch. 76, § 3, 1740 Del. Laws, *amended by* An Act for the Relief of Insolvent Debtors, ch. 118, 1751 Del. Laws (providing that if a debtor discharged from prison act were subsequently arrested for a discharged debt, "any Judge of the Court whence the process issued [may] release and discharge out of custody such [debtor]"). The amended Delaware law was in effect until at least 1792. *See* An Act for the More Early and Speedy Recovery of Small Debts, ch. 250, § 17, 1792 Del. Laws (referring to the 1740 Act); *see also* An Act for the Relief of Insolvent Persons, with respect to the Imprisonment of Their Persons, ch. 98, 10th Sess., 1787 N.Y. Laws (providing that person discharged from imprisonment under act could not be imprisoned for same cause, and if so, imprisoned court out of which process issued may discharge such person out of custody); An Act for the Relief of Insolvent Debtors within the Province of Pennsylvania, ch. 315, 1729/30 Pa. Stat. § 1, *reprinted in* 4 PA. STAT. 1682–1801, at 173–74, also *available at* http://www.palrb.us/statutesatlarge/17001799/1730/0/act/0315.pdf (providing that an order of discharge is sufficient warrant for the sheriff to set the debtor at liberty). The Act remained in effect through 1792. *See* A Supplement to the Laws Made for the Relief of Insolvent Debtors with the Commonwealth, ch. 1605, 1792 Pa. Stat., *reprinted in* 12 PA. STAT. 1682–1801, at 200, *available at* http://www.palrb.us/statutesatlarge/17001799/1792/0/act/1605.pdf; *see also* An Act for the Regulation of Bankruptcy, ch. 1183, 1785 Pa. Stat. §§ 12, 25, *reprinted in* 12 PA. STAT. 1682–1801, at 76. The 1785 Pennsylvania Law is comparable to 5 Geo. 2, ch. 30, §§ 5, 13 (1732). *See supra* note 90 and accompanying text (describing similar provisions under the English Bankrupt Acts); *see also* Smallwood v. Wood, 19 N.C. (2 Dev. & Bat.) 356 (1837) (pointing to the second section of the North Carolina act of 1822 which "makes it the duty of the sheriff to release the debtor from confinement or custody").

[93] 99 Eng. Rep. 1144 (K.B. 1786).

writ of habeas corpus to be released from custody. Lord Mansfield denied the petition on the grounds that the debt, which was not due before the filing of the petition, could not be proved under the Bankrupt Act. There was no suggestion in the case that the petition for a writ of habeas corpus implicated the sovereign immunity of the Crown.[94]

Further, sheriffs in England[95] and America[96] were subject to suits for executing on the goods of debtors or for damages if debtors were improperly released from debtor's prison. The English Insolvency Acts[97] and several numerous eighteenth-century American bankruptcy laws provided that the specific bankruptcy act could be used by a sheriff as a defense to any suits.[98] This fact is significant because, as discussed below, the English Insolvency Acts and many American bankruptcy acts specifically provided that the relief offered by the acts did not extend to debts due the sovereign.[99] It is hard to imagine how the authorization of process directed against an officer holding a debtor in a debtor's prison, whether a writ of habeas corpus or otherwise, in a bankruptcy law implies a waiver of sovereignty immunity when the same or a similar law exempts the sovereign from its debtor relief provisions.

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[94] *See id.* In *Rex v. Nathan*, a bankrupt was committed by commissioners of bankrupt on a warrant that recited that the bankrupt had notoriously prevaricated. The court discharged the bankrupt on a writ of habeas corpus on grounds that the statute, 1 Jam., ch. 15 (1604) (Eng.), required written interrogatories. *See* Rex v. Nathan, 93 Eng. Rep. 914 (K.B. 1730).

[95] *See* Smith v. Milles, 99 Eng. Rep. 1205 (K.B. 1786) (in an action for trespass brought by assignees of bankrupt against sheriff for sale of good levied by sheriff, giving judgment for sheriff on the grounds that, although the goods were taken in execution after an act of bankruptcy and before the issuing of the commission of bankrupt, the goods were sold by sheriff before actual assignment to assignees); Aldridge v. Ireland, 99 Eng. Rep. 715 (K.B. 1784) (reversing jury verdict in an action in trover brought by assignees of bankrupt against sheriff, who had levied on bankrupt's goods and later sold them after an alleged act of bankruptcy, on the grounds that the alleged act—the bankrupt leaving her house to consult with a creditor—did not constitute an act of bankruptcy); Walker v. Burnell, 99 Eng. Rep. 205 (K.B. 1780) (in action in trover, granting judgment to assignees of bankrupt against sheriff for selling goods that sheriff had seized on writ of fieri facias and that were in the possession of bankrupt as agent for assignees pending liquidation); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *415 (stating that, if a debtor imprisoned for debt escapes, the sheriff is liable for the debt).

[96] *See, e.g.*, Carrington v. Parsons, 4 Day 45 (Conn. Sup. Ct. Err. 1809) (noting an action on the case by creditor against Sheriff of the county of Middlesex for the escape of a debtor committed to debtor's prison on an execution in favor of the creditor); Smith v. Huntington, 2 Day 562 (Conn. Sup. Ct. Err. 1807) (discussing an action by creditor against Sheriff of the county of New London for the escape of a debtor committed to debtor's prison on an execution in favor of the creditor).

[97] *See* citations in *supra* note 91 (same section references).

[98] *See* An Act for the Relief of Insolvent Debtors, within this Government, ch. 76, § 4, 1740 Del. Laws *amended by* An Act for the Relief of Insolvent Debtors, ch. 118, 1751 Del. Laws (providing that a Sheriff or other custodian for a released debtor could plead the act as a defense in any action brought for releasing the debtor). The amended Delaware law was in effect until at least 1792. *See* An Act for the More Early and Speedy Recovery of Small Debts, ch. 250, § 17, 1792 Del. Laws (referring to the 1740 Act); *see also* An Act for Giving Relief in Cases of Insolvency, ch. 92, 11th Sess., 1788 N.Y. Laws (providing relief similar to 1740 Delaware Act); An Act for the Relief of Insolvent Persons, with respect to the Imprisonment of Their Persons, ch. 98, 10th Sess., 1787 N.Y. Laws (same).

[99] *See infra* notes 111–16 and accompanying text.

4. The "Uniformity" Requirement

The Court suggested that the "uniformity" provision in the Bankruptcy Clause supports its conclusion:

> Although our analysis does not rest on the peculiar text of the Bankruptcy Clause as compared to other Clauses of Article I, we observe that, if anything, the mandate to enact "uniform" laws supports the historical evidence showing that the States agreed not to assert their sovereign immunity in proceedings brought pursuant to "Laws on the subject of Bankruptcies." . . . As our holding today demonstrates, Congress has the power to enact bankruptcy laws the purpose and effect of which are to ensure uniformity in treatment of state and private creditors.[100]

Judge Randolph Haines has also argued that the "uniformity" requirement also supports the abrogation of sovereign immunity.[101] I disagree. In the full context of bankruptcy law history, the requirement of "uniform" federal bankruptcy law provides no support for the Court's conclusion that the ratification of the Constitution reflects an understanding that States as creditors would be treated the same as private creditors.

Indeed, the partial history that the Court gives on the different treatment of debtors under different state bankruptcy laws demonstrates the purpose of "uniformity." One of the ironies of the Court's discussion of the two Pennsylvania cases is the fact that Pennsylvania had yet another form of bankruptcy law for which the two debtors were likely not eligible: Pennsylvania's bankruptcy law was an adapted version of the English Bankrupt Acts, which provided for an "involuntary"[102] proceeding—initiated by a petition by creditors—against only a

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[100] *See* Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1003 n.13 (2006).

[101] Randolph J. Haines, *The Uniformity Power*, *supra* note 88; *see also In re* Hood, 319 F.3d 755, 762 (6th Cir. 2003) (providing support to Judge Haines' proposition); *In re* Flores, 300 B.R. 599, 603 (Bankr. D. Vt. 2003) (following the analysis of the decision of the United States Court of Appeals in *In re* Hood, *supra*, that to ensure uniformity in the bankruptcy system, Congress has the ability to abrogate state sovereign immunity).

[102] Professor Bruce Mann, in his Amicus Brief, quite correctly criticizes the notion that the Bankruptcy Clause must be interpreted as only permitting a bankruptcy law modeled on the English Bankrupt Acts because the 1800 Bankruptcy Act was substantially identical to the English Bankrupt Acts. *See* Brief of Bruce Mann as Amicus Curia Supporting Respondent, at 8, Central Va. Cmty. Coll. v. Katz, 126 S.Ct. 990 (2006) (No. 04-885) [hereinafter "Mann Amicus Brief"] ("It is commonly claimed, albeit erroneously, that English law, which could only be invoked by creditors, was the sole governing model of the Bankruptcy Act of 1800."). However, I disagree with his reasoning. He asserts that the 1800 Bankruptcy Act was substantially different from the English Bankrupt Acts in that the 1800 Bankruptcy Act operated as a voluntary proceeding because of the great extent to which commercial debtors colluded with creditors to initiate the involuntary proceeding. *Id.* at 9 ("The immediacy with which debtors, creditors, and their lawyers recognized the voluntary potential of the process, together with the assertions of the drafter that the Act was

merchant who had committed certain acts of bankruptcy.[103] Hence, these two cases present some—but by no means all—of the variety in American bankruptcy laws adopted before or in effect at the Framing.[104]

There is another irony lurking behind a reliance on "uniformity." The Court mentioned that the drafting of the Bankruptcy Clause followed a discussion on the need to extend full faith and credit to acts of the legislature and acts of insolvency. In *Railway Labor Executives' Ass'n v. Gibbons*,[105] which struck down a bankruptcy law for a specific railroad as violating the uniformity requirement of the Bankruptcy Clause, Justice Rehnquist for the Court stated that one of the purposes of the uniformity requirement was to prevent Congress from passing private acts of bankruptcy.[106] Judge Haines has argued that there was no historical evidence that the uniformity provision was intended to prevent Congress from enacting private bankruptcy acts.[107]

Again, I disagree. Private bankruptcy acts were a significant type of bankruptcy law, enacted by several states, including Connecticut, New York and Pennsylvania, at the time of the Framing and earlier during the eighteenth century.[108] The widespread use of these private acts at least provides some historical

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necessary to protect entrepreneurial debtors, strongly indicate that the latent voluntarism of the process was deliberate."). In fact, the English Bankrupt Acts were also only nominally involuntary and debtors often induced friendly creditors to initiate a proceeding, a practice that was widely recognized and that the English Parliament sometimes attempted in vain to curb. *See* Plank, *Constitutional Limits*, *supra* note 7, at 510–12 (describing debtors using friendly creditors to initiate bankruptcy proceedings). His larger point—that the scope of the Bankruptcy Clause should reflect the full range of American bankruptcy law—echoes my own conclusions. *See* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1076–89 (explaining development of English Bankrupt Acts and English Insolvency Acts and the incorporation and variation of these Acts in American bankruptcy legislation); Plank, *Constitutional Limits*, *supra* note 7, at 499–526 (discussing English Bankrupt Acts, Insolvency Acts and American statutes and describing substantial similarities despite their differences).

[103] *See* An Act for the Regulation of Bankruptcy, ch. 1183, 1785 Pa. Stat. §§ 1, 2, *reprinted in* 12 PA. STAT. 1682–1801, at 70–71 (providing that merchants and certain traders that commit certain acts of bankruptcy may be adjudged a bankrupt and that the President of the Supreme Council of Pennsylvania may, upon petition creditors owed a specified minimum amount, appoint commissioners of the bankrupt); *see also* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1087 ("Pennsylvania enacted a statute in 1785 that was a composite of the English Bankrupt Acts."); Plank, *Bankruptcy Judges*, *supra* note 18, at 602–06 (presenting detailed summary of Pennsylvania Act and comparing provisions with those of English Bankrupt Acts).

[104] *See supra* notes 17–19 and accompanying text (discussing different state statutes for surrender and distribution of debtor's property).

[105] 455 U.S. 457 (1982).

[106] *See id.* at 472 ("Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest.").

[107] *See* Haines, *The Uniformity Power*, *supra* note 88, at 156 n.112 ("There is no historical evidence found by Professor Mann of such abuse by dishonest legislators, nor that the uniformity provision was intended to prohibit Congress from enacting private bankruptcy bills, or even that anyone thought that might occur."); *see also* Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 55–56 (1983) (noting that "there is no textual support for the thesis that the Framers sought to prohibit private insolvency laws . . . . At best, it is only a speculative inference from historical circumstances").

[108] Plank, *Constitutional Limits*, *supra* note 7, at 519 n.160–62 (citing laws enacted near the time of the Framing in Connecticut, New York, Pennsylvania, Rhode Island, and Vermont, and earlier in Maryland and New Hampshire).

support for Justice Rehnquist's conclusion that uniformity was intended in part to prevent congressional enactment of private bankruptcy laws. In contrast, there is no historical evidence that the uniformity requirement was intended to empower Congress to mandate the uniform treatment of State and private creditors.

D. Bankruptcy Law, Sovereign Exemption and Sovereign Immunity—Possible Conclusions from History

Under the Debtor-Creditor Adjustment Principle, there can be no doubt that, after the ratification of the Constitution, the States subordinated their legislative and judicial sovereignty over bankruptcy law to Congress's Bankruptcy Power. Notwithstanding their wide variety, the eighteenth-century bankruptcy laws adjusted the relationship between a debtor in financial distress and its creditors and provided some relief to individual debtors. The Constitution gave Congress this power. Congress has, with a few exceptions, complied with the constitutional limits of the Bankruptcy Clause in enacting bankruptcy law that override conflicting state law.[109]

The subordination of States' legislative sovereignty over debtors and private creditors, however, does not automatically imply subordination of a State's sovereign exemption or a State's sovereign immunity. We must analyze each of these issues separately. To do so, it is helpful to distinguish the two aspects of bankruptcy law: 1) the creation of a substantive right of an individual to a discharge, and 2) the creation of the federal forum for the adjustment of the debtor-creditor relationship.

1. Discharge, the Bankruptcy Forum, and Sovereign Exemption

The Court in *Katz* treats sovereign exemption as simply part of legislative sovereignty. It baldly stated that "Congress has the power to enact bankruptcy laws the purpose and effect of which are to ensure uniformity in treatment of State and private creditors."[110] There is no historical basis for such treatment and there is some historical evidence that would support a contrary conclusion. For example, as Ralph Brubaker has pointed out, sovereign exemption was the default rule in England: The sovereign was exempt from general legislation unless it agreed to be subject to such legislation.[111] In particular, in the case of the sovereign's finances,

[109] *See generally* Plank, *Bankruptcy and Federalism*, *supra* note 7 at 1095–1126 (discussing specific provisions of Bankruptcy Code that violate limits of Bankruptcy Clause of Constitution); Plank, *Constitutional Limits*, *supra* note 7, at 559–81 (addressing limits and specific applications of Code for third parties); *see also* Nathalie D. Martin, *The Insolvent Life Care Provider: Who Leads the Dance Between the Federal Bankruptcy Code and State Continuing-Care Statutes?*, 61 OHIO ST. L.J. 267, 291 (2000) ("Congress can and occasionally does outstep its bounds, and there are limits to the ways in which the Bankruptcy Code can interfere with legitimate powers of states.").

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

[111] *See* Brubaker, *State Sovereign Immunity and Prospective Remedies*, *supra* note 46, at 502 ("In England though, one of the prerogatives of the sovereign was 'that the king is not bound by any act of parliament,

debts owed to the sovereign had priority over other creditors, as did executions (known as an "extent") issued for collection of debts owed the sovereign.[112]

The bankruptcy discharge is a good example of sovereign exemption. In the case of the English Bankrupt Acts, which contained no express exemption for debts owed to the Crown, the Lord Chancellor held in 1745 that the Crown was not subject to the Bankrupt Acts and therefore a certificate of discharge did not discharge a debt owed to the Crown.[113] This sovereign exemption was known in America no later than 1800.[114] More explicitly, the ten English Insolvency Acts enacted between 1724 and 1781 provided that debtors that owed debts to the Crown were not eligible for discharge from prison.[115] Similarly, a number of American statutes that discharged debtors from prison also provided that the acts did not apply to discharge debtors that owed money to the Crown or to the colony.[116] At the time

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unless he be named therein by special and particular words.'"(citing 1 WILLIAM BLACKSTONE, COMMENTARIES *253)).

[112] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *233 (explaining that one of the King's indirect prerogatives is that "his debt shall be preferred before a debt to any of his subjects"); 3 WILLIAM BLACKSTONE, COMMENTARIES *420 (stating that the "writ of extent" had priority over private creditors that have not obtained a judgment, and binds property of debtor from the time of the delivery to the sheriff); *see also* Rex v. Cotton, 28 Eng. Rep. 186 (Exch. 1754) (analyzing the law regarding the priority of the Crown against a landlord that had a distress for rent); Rex v. Mann, 93 Eng. Rep. 186 (K.B. 1724) (analyzing the law regarding the priority of the Crown over other creditors and assignees of a bankrupt under the English Bankrupt Acts in the property of the bankrupt). An "extent" was a writ issued by Exchequer to recover a debt owed to the Crown. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *420, *discussed supra* note 12; BLACK'S LAW DICTIONARY 622 (8th ed. 2004).

[113] *See* Anon., 26 Eng. Rep. 167 (Ch. 1745). In this case, the Lord Chancellor denied a petition by a bankrupt that had been discharged under the English Bankrupt Acts to be discharged from a debt owed to the Crown, the report of the case stating "the crown is not within the statutes of bankrupts, and therefore he cannot be discharged from a commitment on behalf of the crown." *See id.*; *see also* ARCHIBALD CULLEN, PRINCIPLES OF THE BANKRUPT LAW 391 (1800) (restating the proposition). *See generally* THOMAS COOPER, THE BANKRUPT LAW OF AMERICA COMPARED WITH THE BANKRUPT LAW OF ENGLAND (1801).

[114] *See* THOMAS COOPER, THE BANKRUPT LAW OF AMERICA COMPARED WITH THE BANKRUPT LAW OF ENGLAND 360 (1801) (citing *Ex Parte Marshall* and *Anon.*, *supra* note 113, and directing the reader to cases cited in *Rex v. Cotton*, *supra* note 112, and *Rex v. Mann*, *supra* note 112). Cooper states that a certificate "in England will not bar an extent." *Id.* As noted *supra* note 112, an "extent" was a writ issued by Exchequer to recover a debt owed to the Crown.

[115] *See, e.g.*, 11 Geo., c. 21 (1724) (Eng.) (declaring debts to the Crown will not be discharged); 2 Geo. 2, c. 20 (1729) (Eng.) (denying discharge of debts owed to the Crown); 21 Geo. 2, c. 31 (1748) (Eng.) (denying discharge of debts owed to the Crown); 28 Geo. 2, c. 13, § 31 (1755) (Eng.) (excepting debtors to the Crown from those afforded relief); 9 Geo. 3, c. 26, § 40 (1768) (Eng.) (excluding debtors to the Crown from the benefits of this act); 12 Geo. 3, c. 23, § 42 (1772) (Eng.) (excluding debtors to the Crown from the benefits of this act); 14 Geo. 3, c. 77, § 42 (1774) (Eng.) (allowing discharge of debtors with debts to the Crown only if the Privy Council does not object); 16 Geo. 3, ch. 38, § 49 (1776) (Eng.) (excluding debtors to the Crown from the benefits of this act); 18 Geo. 3, ch. 52, § 55 (1778) (Eng.) (excluding debtors to the Crown from the benefits of this act); 21 Geo. 3, ch. 63, § 48 (1781) (Eng.) (excluding debtors to the Crown from the benefits of this act).

[116] *See, e.g.*, An Act for the Relief of Insolvent Debtors, within this Government, ch. 76, § 6, 1740 Del. Laws (providing "this act shall not extend to discharge any person out of prison who shall stand chargeable at the suit of the crown only"), *amended by* ch. 118, 1751 Del. Laws. This was in effect at least until 1792. *See* ch. 250, § 17, 1792 Del. Laws (referring to the 1740 Act); An Act for the Relief of Insolvent Debtors within the Province of Pennsylvania, Ch. 315, 1729/30 Pa. Stat. § 3, *reprinted in* 4 PA. STAT. 1682–1801, at 175 (providing that an order of discharge is sufficient warrant for the sheriff to set the debtor at liberty). The

of the Framing there were many instances in which private creditors were treated differently from sovereign creditors, and there is simply no basis for stating that bankruptcy law did not recognize those differences, whether with regard to the discharge or anything else.[117]

Accordingly, State subordination of its legislative and judicial sovereignty over bankruptcy legislation does not necessarily imply subordination of its sovereign exemption from discharge under Congress's Bankruptcy Power. Nevertheless, in tying to accommodate States' sovereignty with federal legislative power under a federal system, it may be reasonable to conclude as a constitutional policy judgment that a State's ability to exempt itself from its own bankruptcy acts, including an exemption from a discharge, should be subordinated to a superior sovereign's ability to provide debtor relief from both private and State debts. The more important point, however, is that this issue should not be assumed away. In any future reevaluation of *Katz*, this issue should be specifically recognized and addressed.

Similarly, the express subordination of the State's legislative and judicial sovereignty under the Bankruptcy Clause suggests that the State should not be able to exempt itself from those federal rules that are particular to the bankruptcy forum. This would certainly be true for those aspects of the bankruptcy forum that did not implicate sovereign immunity. Accordingly, under the Debtor-Creditor Adjustment Principle, the State as a creditor would, for example, be subject to the automatic stay of creditor collection actions[118] and the discharge of the debts of artificial legal entities[119] under chapter 11. Under the Non-Interference Principle, contracts

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act remained in effect through 1792. *See* A Supplement to the Laws Made for the Relief of Insolvent Debtors with the Commonwealth, Ch. 1605, 1792 Pa. Stat., *reprinted in* 14 PA. STAT. 1682–1801, at 200; *see also* An Act for Relief of Insolvent Debtors Within This State, ch. 14, 7th Sess., 1784 N.Y. Laws (passed April 17, 1784) (providing that no person employed in any public department as purchaser under the United States or New York could be discharged unless he proves that his public accounts were settled). Later that year, the legislature revived this act. *See* Act of Nov. 24, 1784, ch. 14, 8th Sess., 1784 N.Y. Law (discharging several named individuals even though not then in prison, if two thirds in value of their creditors agreed). In 1785, it extended the benefits of the 1784 acts to a large number of named individuals. *See* An Act Granting Relief to Certain Insolvent Debtors, ch. 87, 8th Sess., 1785 N.Y. Laws (passed April 28, 1985).

[117] The 1787 Maryland bankruptcy act, An Act Respecting Insolvent Debtors, ch. 34, Apr. Sess., 1787 Md. Laws, *repealed* May 20, 1788, Ch. 10, 1787 Md. Laws, in which debtors could by voluntary petition receive a discharge of debts, also provides an interesting example. Section 17 of that Act provides that if the State were a creditor, the chancellor or the county court supervising the bankruptcy proceedings, and the Attorney General on behalf of the State, should "take care of the interest of the state, and that the right of the state, and the preferment in payment, in such cases where such preferment is given by law, be obtained." *Id.* Although this provision may suggest that Maryland did not expect to be exempt from its bankruptcy law, such a conclusion is harder to draw in light of the fact that Maryland had legislatively abolished sovereign immunity in 1786. *See* An Act to Provide a Remedy for Creditors and Others Against This State, ch. 53, Nov. Sess., 1786 Md. Laws, *available in* 204 Archives of Md., Laws of Maryland 1785–1791, at 193–94, *repealed* ch. 210, 1820 Md. Laws.

[118] *See* 11 U.S. C. § 362 (2006) (providing that a bankruptcy petition acts as an automatic stay of judicial actions against the debtor, acts to control property of the estate, and acts to collect a claim against the debtor).

[119] *See* 11 U.S. C. § 1141(d) (2006). A discharge for individual, living person can be seen as a substantive right, but artificial legal entities do not have a right to "live." Discharge for artificial legal entities is more properly viewed as promoting the policy of the most cost-effective means of reorganizing the financial

between the State and the debtor would be subject to the abrogation of ipso facto clauses.

In addition, under the Debtor-Creditor Adjustment Principle or the Non-Interference Principle, a State might be exempt from a determination—as distinguished from enforcement of that determination—that a pre-bankruptcy transfer to it was a preference or a fraudulent conveyance. On the other hand, to the extent that such determinations also would invade a State's sovereign immunity, then preference and fraudulent conveyance determinations may not be subordinated to the federal bankruptcy forum. Preference and fraudulent conveyance determinations may represent a set of bankruptcy forum proceedings for which there can be no easy separation from sovereign exemption and sovereign immunity. If so, as discussed below, the historical record provides a greater hurdle for concluding that States could be subject to preference recovery actions.

2. Discharge, the Bankruptcy Forum, and Sovereign Immunity

If a State's sovereign exemption for discharge of individual debtors is subordinate to federal bankruptcy law, the question then becomes how to enforce the subordination. Under *Katz*, this question is moot. Nevertheless, if *Katz* were overruled, *Tennessee Student Assistance Corp. v. Hood*[120] could remain applicable. On the other hand, a reappraisal of *Katz* might lead to a reconsideration of *Hood* and provide an opportunity to reexamine the extent to which enforcement of an individual's discharge would interfere with a State's sovereign immunity. As explained by Ralph Brubaker, *Ex Parte Young*[121] does provide the answer.[122] Professor Brubaker's analysis also may provide guidance for resolving other issues left open by *Katz* discussed below.

To the extent that a State's sovereign exemption as a creditor is subject to the rules of the bankruptcy forum, the question then remains how these rules are enforced. Like enforcement of the discharge for an individual debtor, enforcement of some of these bankruptcy rules—such as enforcement against the State or its officers of the automatic stay or the discharge of the debts of artificial legal entities in chapter 11—would seem to fit easily into pre-*Katz* sovereign immunity doctrine.

In the other situations, the question is not clear. For example, let us assume that a bankruptcy court may properly make a determination that a transfer of a specific property item—say, Van Gogh's *Starry Night*—to a State was an avoidable preference. The bankruptcy trustee now seeks to recover the property item. Traditional exceptions to sovereign immunity may allow recovery of the property item—as opposed to a money judgment.[123] This issue was not explicitly decided by

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affairs legal entities.

[120] 541 U.S. 440 (2004).

[121] 209 U.S. 123 (1908).

[122] *See generally* Brubaker, *State Sovereign Immunity and Prospective Remedies*, *supra* note 46.

[123] An action to recover a property item can not include an action to recover money. Under basic property law, no one can have a property interest in money unless the person is in possession of it.

Katz, but under *Katz*, the issue appears to be moot. If we were to return to pre-*Katz* land, this issue needs to be addressed. Again, *Ex Parte Young* may provide the answer.

Another example is the abrogation of ipso facto clauses. The Bankruptcy Code may provide that a State may not cancel a contract with a person solely because the person became a debtor in bankruptcy, and the bankruptcy court may allow the assumption and assignment of such a contract to another person. The question is whether current sovereign immunity doctrine, *sans Katz*, would permit enforcement of the prohibition of the cancellation of the contract.

On the other hand, the enforcement of any of these rules by a judgment for the payment of money presents a more difficult question. Under the history of bankruptcy law as well as pre-*Katz* sovereign immunity doctrine–and indeed under *Hans v. Louisiana*[124]–such a money judgment would not be permitted. There is no historical basis–not even the requirement that bankruptcy laws be uniform–for *Katz*'s conclusion that the States would have understood that, upon ratification of Congress's Bankruptcy Power, the States were subjecting themselves to suits in a federal court for the payment of money pursuant to avoidance of a preferential transfer made before the commencement of the bankruptcy case.

Preference law was initially viewed as a form of fraudulent conveyance.[125] Eighteenth century bankruptcy laws empowered those acting on behalf of the bankruptcy estate to recover property that had been fraudulently transferred by the debtor before the commencement of the bankruptcy case.[126] Initially, the bankruptcy adjudicators—commissioners of bankrupt under the English Bankrupt Acts, justices of the peace under the English Insolvency Acts, a variety of adjudicators under the American bankruptcy acts, and the assignees of the debtors' property—made such determinations.[127] Most of these adjudicators, however, were

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[124] 134 U.S. 1 (1890).

[125] *See, e.g.*, Alderson v. Temple, 98 Eng. Rep. 165, 166 (K.B. 1768). This case was an action in trover by the assignees of a bankrupt under the English Bankrupt Acts against a creditor of the bankrupt to recover a note transferred by bankrupt to the creditor. The court held that the bankrupt's endorsement of the note to the creditor was a fraudulent preference and was void.

[126] *See, e.g.*, 13 Eliz., c. 7, § 7 (1570) (Eng.) (providing for forfeiture by third parties of double value of debts, goods, lands and tenements that third parties possess or claim, unless they possess or claim them as result of just consideration and without fraud or collusion); 1 Jac., c. 15, § 5 (1604) (Eng.) (authorizing commissioner of bankrupts to convey any property previously conveyed by bankrupt to third party except property transferred for marriage of his or her children or for valuable consideration); 4 Anne., c. 17, § 9 (1705) (Eng.) (permitting recovery of £100 fine plus double value of estate fraudulently concealed by third parties), *continued in* 5 Geo. 2, c. 30, § 21 (1732) (Eng.); 21 Geo. 3, c. 63, § 39 (1781) (Eng.) (providing that fraudulent conveyance disqualified debtor from discharge from prison and that such fraudulent conveyance was void); 1788 N.Y Laws 92, § 13 (permitting recovery of £100 fine plus double value of estate fraudulently concealed by third parties); An Act for the Regulation of Bankruptcy, ch. 683, 1785 Pa. Stat., §§ 9, 10, *reprinted in* 12 PA. STAT. 1682–1801, at 74 (allowing recovery of double value of estate fraudulently concealed by third parties and allowing commissioner to avoid pre-bankruptcy transfers except those for marriage of bankrupt's children or those for valuable consideration); Plank, *Bankruptcy Judges*, *supra* note 18, at 617 (examining "eighteenth-century fraudulent conveyance actions in the context of eighteenth-century bankruptcy adjudication").

[127] Plank, *Bankruptcy Judges*, *supra* note 18, at 584–87, 599, 604–05 (examining the role of bankruptcy

not judges with life tenure. Further, most of these determinations had to be enforced by resort to then available judicial remedies.[128] In other words, an action at law[129] or a suit in equity.[130] At this point, a sovereign subject to enforcement of such a determination retained its sovereign immunity unless it had waived it. This fact raises a fairly high barrier of historical evidence against *Katz*'s conclusion that States subordinated their sovereign immunity in preference actions. Unlike a discharge, which implicates a State's sovereignty to a much lesser extent, an action for the payment of a money judgment directly implicates a State's sovereign immunity, even a peculiarly bankruptcy-related action like a preference or fraudulent conveyance avoidance and recovery proceeding.

IV. THE STATE SOVEREIGNTY THAT SURVIVES *KATZ*

Let us assume the worst or the best (depending on one's point of view): The legacy of *Katz* is the overruling of *Seminole Tribe*; nay, even the judicial repeal of the Eleventh Amendment. Under this future, a State still retains significant sovereignty, including some sovereign immunity, under the Bankruptcy Clause. Neither Congress nor federal courts[131] in bankruptcy may abrogate a State's sovereignty in a bankruptcy case if this abrogation exceeds Congress's power under the Bankruptcy Clause. Any abrogation must fall within either the Debtor-Creditor Adjustment Principle or the Non-Interference Principle. Neither Congress nor federal courts in bankruptcy may abrogate a State's sovereignty in violation of the Non-Expropriation Principle.

A. Non-Bankruptcy Entitlements and Sovereign Immunity

Katz's reliance on the subordination of a State's sovereign exemption from discharge to Congress's Bankruptcy Power and its summary conclusion that this subordination abrogates a State's sovereign immunity in a preference action—fantastic or not—does not provide a basis for complete abrogation of a State's sovereign immunity in bankruptcy. If there are no limits to Congress's ability to

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adjudicators).

[128] *See id.* at 582–83 (summarizing the available judicial remedies for a bankrupt, the assignees of the bankrupt's estate, creditors, or third parties to challenge a decision of the commissioners of bankrupt).

[129] *See, e.g.*, Alderson v. Temple, 98 Eng. Rep. 165, 166 (K.B. 1768), *discussed supra* note 125; M'Mechen's Lessee v. Grundy, 3 H. & J. 185 (Md. 1810) (discussing an unsuccessful action for ejectment brought against transferee/creditor to recover as fraudulent preference real estate transferred to creditor before commission of bankruptcy had been issued against transferor).

[130] *See, e.g.*, Manro v. Gittings, 1 H. & J. 492 (Md. Gen. 1804) (holding that, in suit against debtor and creditor-transferees, conveyances of property transferred by debtor to creditors in contemplation of insolvency was improper preference and therefore void under Maryland bankruptcy act).

[131] *See* Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 636 (2004) (arguing that under most basic part of *Erie* Doctrine, federal courts may not make federal common law that exceeds Congress's power under Constitution).

limit a State's sovereign immunity under Article I of Constitution, then Congress could abrogate a State's sovereign exemption and its sovereign immunity in bankruptcy only pursuant to the Bankruptcy Clause. Accordingly, in *adjusting* the insolvent debtor-creditor relationship under the Debtor-Creditor Adjustment Principle or in preventing Third Parties from using their non-bankruptcy rights to impede the bankruptcy forum, Congress could subject the States to proceedings to enforce a discharge,[132] the automatic stay,[133] the abrogation of ipso facto clauses,[134] the turnover of property of the estate[135] or to collect the value of preferential, [136] fraudulent,[137] unperfected, [138] or unauthorized post-petition transfers.[139]

On the other hand, neither Congress nor federal courts in bankruptcy may expropriate the property of Third Parties for the benefit of the debtor or other creditors. Hence, the bankruptcy trustee may not expropriate the property of the debtor's neighbor—whether a private person or the State—for the benefit of the debtor's creditors. This principle applies even to persons who have a relationship with the debtor as a creditor. For example, a landlord that has leased a property item to a person that becomes a debtor in bankruptcy may be both a creditor—with respect to past due rent—and a non-creditor, or Third Party, with respect to the on going leasehold. The landlord—whether a private person or the State—may be required to accept only a pro-rata portion of the pre-bankruptcy rent obligation owed by the debtor but it may not be required to continue to lease the property to the debtor during bankruptcy for only a pro-rata portion of the rent.

The most important example for purposes of sovereign immunity is a debt owed by a Third Party to the debtor. From the very beginning, under the English Bankrupt Acts,[140] the English Insolvent Acts,[141] and the American bankruptcy

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[132] *See* 11 U.S.C. § 727 (2006) (providing discharge for debtors that are individuals); *id.* § 1141(d) (providing discharge pursuant to a confirmed chapter 11 plan); *id.* § 1228 (providing discharge pursuant to confirmed chapter 12 plan); *id.* § 1328(d) (providing discharge pursuant to confirmed chapter 13 plan).

[133] *See id.* § 362 (providing that a bankruptcy petition acts as an automatic stay of judicial actions against the debtor, acts to control property of the estate, and acts to collect a claim against the debtor).

[134] *See supra* note 30 and accompanying text.

[135] *See* 11 U.S.C. § 542(a) (2006) (requiring the turnover of property that the trustee may use under 11 U.S.C § 363(b) & (c), i.e., property of the estate); *see also supra* note 70 (describing interplay between property of estate and turnover provisions of section 542(a)).

[136] *See* 11 U.S.C. § 547(b) (2006) (providing trustee may avoid certain pre-petition transfers of an interest of the debtor in property to or for the benefit of a creditor on account of antecedent debt); *see also supra* note 62 and accompanying text (quoting section 547(b) and discussing ability of trustee to avoid some pre-petition transfers under section 547(b)); Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1098–99 (explaining why avoidance of preferential transfers does not violate the Non-Expropriation Principle).

[137] *See* 11 U.S.C. § 548 (2006) (indicating trustee may avoid fraudulent transfers made or acquired by debtor within two years of filing petition); *see also* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1098–99 (explaining why avoidance of fraudulent transfers does not violate the Non-Expropriation Principle).

[138] *See* 11 U.S.C. § 544(a) (2006) (authorizing trustee to avoid debtor's pre-petition unperfected transfers); *see also* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1098–99 (explaining why avoidance of unperfected transfers does not violate the Non-Expropriation Principle).

[139] *See* 11 U.S.C. § 545 (2006) (permitting trustee to avoid certain statutory liens).

[140] *See* 13 Eliz., ch. 7, § 2, cl. (7) (1570) (Eng.) (providing property of bankrupt subject to power of commissioners included "his or her Money, Goods, Chattels, Wares, Merchandizes and Debts, wheresoever

acts,[142] debts owed to the debtor became part of the bankruptcy estate, and the predecessors to today's bankruptcy trustee could enforce those debts as part of the effort to maximize the debtor's estate. Consistent with the Non-Interference Principle, the commencement of the bankruptcy case did not, however, expand the bankruptcy's trustee's rights to enforce those debts.

For example, assume that a Third Party—whether a private party or the State—owed to a debtor the principal amount of $100 on which interest accrued at a rate of 12% per annum. There is no question that a bankruptcy court could not require the Third Party to pay 18% interest or $200 in principal. Now assume that the debtor had lent $100 to the State but the State retained its immunity from suit on its obligation to repay the debt. Outside of bankruptcy, the debtor would have to resort to other methods to obtain repayment, such as petitioning the State for payment. Similarly, inside bankruptcy, the bankruptcy trustee's rights cannot exceed those of the debtor.

Accordingly, to the extent that a State's sovereign immunity is a limitation to the substantive rights of debtors, that sovereign immunity would remain operative under bankruptcy law. Under the Non-Interference Principle, ratification of the Constitution by the States could not reasonably be interpreted as a waiver of their sovereign immunity against debts owed by the State to a debtor that a bankruptcy trustee seeks to collect.

As noted above, when Congress purported to abrogate the States' sovereign immunity under section 106 of the Bankruptcy Code, it excluded the operation of

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they may be found or known"); 1 Jam., ch. 15, §§ 5, 13 (1604) (Eng.) (permitting assignment of debts to assignees and giving assignees same rights to recover debt bankrupt would have had); *see also* Plank, *Constitutional Limits, supra* note 7, at 500–01 (summarizing English Bankrupt Acts and requirement of bankrupt to transfer all property to commissioners of bankrupt).

[141] *See, e.g.*, 2 & 3 Anne, ch. 16 (1703) (Eng.) ("Prisoners before discharge shall declare on oath what effects or debts are belonging to them. A schedule thereof to be made. Creditors may sue for such debts in prisoner's name."); 28 Geo. 2, ch. 13, § 3 (1755) (Eng.) (providing debts owed debtor vested in clerk of peace and are to be assigned to assignees who are empowered to sue and recover in name of debtor); 9 Geo. 3, ch. 26, § 11 (1768) (Eng.) (requiring all debts owed to debtor be vested in clerk and conveyed to creditors of debtor); 12 Geo. 3, ch. 23, § 12 (1772) (Eng.) (providing debts of debtor vested in clerk and enforceable by creditors); 14 Geo. 3, ch. 77, § 12 (1774) (Eng.) (authorizing creditors to enforce debts owed to debtor); 16 Geo. 3, ch. 38, § 14 (1776) (Eng.) (mandating debtors must transfer property, including debts owed, to clerk); 18 Geo. 3, ch. 52, § 14 (1778) (Eng.) (requiring debts owed to debtor to be conveyed to creditors); 21 Geo. 3, ch. 63, § 15 (1781) (Eng.) (allowing creditors to collect debts owed to debtor).

[142] An Act for the Regulation of Bankruptcy, ch. 1183, 1785 Pa. Stat. § 3, *reprinted in* 12 PA. STAT. 1682–1801, at 72 (authorizing commissioners to receive, sue for, and recover debts due bankrupt); An Act Respecting Insolvent Debtors, ch. 34, Apr. Sess., 1787 Md. Laws, § 7 (repealed 1788) (empowering trustees for debtor to sue for recovery of any property or debts of debtor); An Act for the Relief of Insolvent Debtors within the Province of Pennsylvania, Ch. 315, 1729/30 Pa. Stat. § 1, *reprinted in* 4 PA. STAT. 1682–1801, at 173–74 (providing that assignees of the debtor's property may sue "in like manner ass assignees of commissioner of bankrupts"). The Act remained in effect through 1792. *See* A Supplement to the Laws Made for the Relief of Insolvent Debtors with the Commonwealth, Ch. 1605, 1792 Pa. Stat., *reprinted in* 14 PA. STAT. 1682–1801, at 200; *see also supra* note 80 and accompanying text (comparing Maryland bankruptcy law to modern day chapter 7); Plank, *Constitutional Limits, supra* note 7, at 523–24 (exploring historical example of bankruptcy law requiring debtor to relinquish property to trustee).

section 541 of the Bankruptcy Code.[143] This exclusion expresses Congress's intent not to abrogate a State's sovereign immunity if the trustee seeks to collect a debt owed by a State to the debtor pre-petition and therefore to the bankruptcy estate. Unfortunately, Congress did not exclude section 542(b), which requires those who owe moneys to the estate under certain circumstances to pay the bankruptcy trustee. Further, *Katz* specifically held that the abrogation of a State's sovereign immunity in preference actions depended not on Congressional action but on the ratification of the Constitution itself. Consequently, bankruptcy courts may erroneously determine that a State no longer has sovereign immunity in a proceeding by a bankruptcy trustee to collect a debt owed by the State.

For example, in *Kids World of America, Inc. v. Georgia (In re Kids World of America, Inc.)*[144] a bankruptcy court held that a State agency could not assert a sovereign immunity defense to defeat the bankruptcy court's jurisdiction over a core proceeding in an action by the debtor in possession to collect on a debt claimed to be owed by a State agency to the debtor. Although the bankruptcy court attempted to distinguish a turnover action under section 542(b) from a suit for a damage claim,[145] there is in fact no such difference. If a person owes money to a debtor, property of the estate does not include the money. It only includes the contractual right to payment of the money. The Supreme Court recognized this elementary property law in *Citizens Bank of Maryland v. Strumpf*.[146] Hence, a "turnover" action under section 542(b) is nothing other than an action to enforce the payment of amounts due under a contract. Aside from the question of the bankruptcy court's jurisdiction to adjudicate a claim against a state, an extension of *Kids World* to a holding that a State agency could not assert a sovereign immunity defense in an action by the debtor in possession to collect on a debt claimed to be owed by a State agency would violate the Non-Interference Principle.

B. The Non-Bankruptcy Rights and Legislative and Executive Immunity

That a person becomes a debtor in bankruptcy does not, by itself, immunize either the debtor or the bankruptcy proceeding from a State's sovereignty. For

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[143] *See* 11 U.S.C. § 106(a) (2006) (abrogating state sovereign immunity under certain sections of the Bankruptcy Code); *see also supra* note 69 and accompanying text (quoting 11 U.S.C. § 106(a) (2006)); S. Elizabeth Gibson, *Congressional Response to* Hoffman *and* Nordic Village*: Amended Section 106 and Sovereign Immunity*, 69 AM. BANKR. L.J. 311, 330 (1995) (describing the policy reasons for Congress's decision to exclude section 541 from section 106's abrogation of state sovereign immunity, but noting inclusion of section 542(b), which requires person that owes certain debts to debtor to pay those debts to trustee).

[144] 349 B.R. 152, 166 (Bankr. W.D. Ky. 2006) (relying on *Katz* to determine that court had jurisdiction over claim by trustee against state agency for amount due debtor notwithstanding state agency's sovereign immunity).

[145] *See id.* at 164 (determining requirements for turnover claims).

[146] 516 U.S. 16, 21 (1996) (holding administrative hold on debtor's checking account was not exercising control over "property of the estate" because property of estate was not money in debtor's account, but debtor's contract right to withdraw money, subject to bank's right of set-off).

example, if an individual becomes a debtor in bankruptcy, the debtor is not immune from prosecution for committing a crime or immune from the requirements of generally applicable state law, such as obtaining and maintaining a driver's license. The exceptions to the automatic stay expressly recognize this principle,[147] but under the Non-Expropriation Principle, such exceptions are a matter of constitutional mandate. Moreover, as I have argued elsewhere, the States' legislative sovereignty over Third Parties may not—except in the limited cases, such as abrogation of ipso facto clauses—be subordinated to Congress's Bankruptcy Power. As Alfred Hill once remarked more than fifty years ago, Congress could not enable a bankruptcy court to grant a divorce to a debtor from his or her spouse.[148] Any attempt to do so would implicate a State's sovereignty over domestic relations.

More recently, Congress has unconstitutionally interfered with the States' sovereignty in certain respects. The most egregious example is section 1146(a), which provides that transfers pursuant to a confirmed plan are not subject to State stamp taxes.[149] Certainly, this provision benefits debtors and their creditors because it transfers value to the debtor and therefore to the creditors that would otherwise go to the taxing authority.[150] But so would a provision that required lawyers to provide legal services to chapter 7 debtors for free or for reduced fees or that required airlines or taxi companies to provide free transportation to individual debtors to help give them a "fresh start." To the extent that the State has exercised its legislative sovereignty to impose taxes on the transfer of property generally, Congress's abrogation of those taxes for transfers by a debtor to another person violates both the Debtor-Creditor Adjustment Principle or the Non-Interference Principle. This

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[147] 11 U.S.C. § 362(b)(1), (4) (2006):

> The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay
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> (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
>
> . . . .
>
> (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

Id.

[148] *See* Alfred Hill, *The* Erie *Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1037–38 (1953).

[149] *See* 11 U.S.C. § 1146(a) (2006) ("The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax."). *See generally In re* Amsterdam Ave. Dev. Assoc., 103 B.R. 454, 456–59 (Bankr. S.D.N.Y. 1989) (describing three part test to qualify under tax exemption and applying exemption for benefit of solvent debtor).

[150] *See generally* John C. Murray, *Transfer-Tax Considerations In Real Estate Bankruptcy Proceedings*, 38 REAL PROP. PROB. & TR. J. 377, 379 (2003) (describing ways to reduce amount of transfer and recording taxes through use of confirmed plans and consensual agreements with creditor and in particular stating that exemption extends to solvent debtors that file chapter 11 plans and to debtors that liquidate through chapter 11 instead of chapter 7).

abrogation exceeds Congress's powers under the Bankruptcy Clause.

As I have described elsewhere, [151] there are a few other examples of congressional violation of State legislative sovereignty. Section 363(f) of the Bankruptcy Code permits a bankruptcy trustee to sell property in which both the bankruptcy estate and a Third Party have interests under certain conditions, one of which is that such sale is authorized by non-bankruptcy law.[152] However, the Bankruptcy Code overrides non-bankruptcy law in several instances in a way that violates the rights of Third Parties. Specifically, section 363(g) abolishes the rights of a non-debtor to dower or curtesy,[153] and section 363(g) overrides the non-bankruptcy rights of a non-debtor tenant by the entirety,[154] who under non-bankruptcy law may prevent the sale of the property held in tenancy by the entirety at the instance of a creditor of only the one tenant.[155] It may be that, as a general policy matter, neither dower, curtesy nor the rights of one tenant by the conform entirety should be respected. Nevertheless, to the extent that those rights exist generally under non-bankruptcy law as a matter of State legislative or judicial sovereignty, Congress does not have the power under the Non-Expropriation Principal to overrule that sovereignty.

CONCLUSION

Katz held that a State could not raise its sovereign immunity as a defense in a preference action to recover money paid to it. It "reasoned" that the history of bankruptcy law at the time of the adoption of the Constitution, in effect, made bankruptcy law "special" and not subject to the normal sovereign immunity constraints on Congress's Article I powers. On its face, its historical analysis fails to establish any bankruptcy "exceptionalism." Further, the historical evidence provides some indication—though certainly not proof—that bankruptcy law is no different from other Article I powers. Hence, a reconsideration of *Katz* is in order.

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[151] *See generally* Plank, *Bankruptcy and Federalism*, *supra* note 7, at 1100–26 (analyzing expansion of estate by expropriation of third party entitlements); Plank, *Constitutional Limits*, *supra* note 7, at 564–81 (discussing Congress's attempt to create direct third party benefits or harming third parties in the Code).

[152] *See* 11 U.S.C. § 363(f)(1) (2006); *In re* Leckie Smokeless Coal Co., 99 F.3d 573, 578 (4th Cir. 1996) (referring to section 363(f)(1) stating trustee may sell property free and clear of interest in that property "when 'applicable nonbankrupcty' law so permits").

[153] *See* 11 U.S.C. § 363(g) (2006) ("Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy."); *In re* Whaley, 353 B.R. 209, 214 n.4 (Bankr. E.D. Tenn. 2006) (indicating section 363(g) allows trustee to sell property notwithstanding vested or contingent dower or curtesy rights).

[154] *See* 11 U.S.C. § 363(h) (2006); *see also* Price v. Harris (*In re* Harris), 155 B.R. 948, 949 (Bankr. E.D. Va. 1993) (ordering sale of residential property owned by elderly retired debtor living on fixed income and his elderly non-debtor wife on ground that benefit to debtor's and spouse's joint creditors exceeded detriment to non-debtor spouse (even though, as the court failed to note, under non-bankruptcy law the joint creditors could not reach property of either debtor or spouse)).

[155] *See* 7 POWELL ON REAL PROPERTY § 52.01[3], at 52-4 to 52-12 (Michael Allan Wolf ed., 2000) (surveying laws in fifty states and the District of Columbia); WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 5.5, at 195–97 (3d ed. 2000) (describing limitations on rights of individual tenant by the entirety).

Such a reconsideration may arise if a bankruptcy trustee overreaches and uses *Katz* as a means to abrogate all of a State's sovereign immunity or indeed all of a State's sovereignty. Indeed, Judge Haines has suggested such a possibility.[156]

One type of overreaching would be an extension of *Katz* to the abrogation of sovereign immunity as a defense to debt collection action by a bankruptcy trustee against a State to collect a debt owed by the state that the debtor in bankruptcy could not collect outside of bankruptcy. The bankruptcy court in *Kids World of America, Inc. v. Georgia (In re Kids World of America, Inc.)*[157] has already entertained this possibility. This result would perhaps not trouble those who oppose sovereign immunity. But it should certainly trouble those who are concerned about creating a significant incentive for forum shopping for creditors of a State. Should bankruptcy law become a super corrective power to overturn policies that, whatever their faults, have been established and allowed to continue under non-bankruptcy law? I believe not.

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[156] *See generally* Randolph J. Haines, *Federalism Principles in Bankruptcy After* Katz, 15 AM. BANKR. INST. L. REV. 135 (2007).

[157] 349 B.R. 152 (Bankr. W.D. Ky. 2006) (relying on *Katz*).