

LEADING CASES

I. CONSTITUTIONAL LAW

A. *Constitutional Structure*

State Sovereign Immunity — Bankruptcy. — Bankruptcy law has come a long way since the eighteenth century, when debtors were often punished with imprisonment and fared worse in colonial jails than common criminals.¹ Thanks partly to the U.S. Constitution's Bankruptcy Clause,² a debtor can no longer be stripped of all his assets in New Jersey and then thrown in jail in Pennsylvania for not having paid his debts.³ Likewise, federal bankruptcy law now provides more protection to creditors than was available in the eighteenth century by striving toward an equitable distribution of assets — a development especially important for small creditors, who might otherwise suffer significantly from a debtor's bankruptcy.⁴ Last Term, in *Central Virginia Community College v. Katz*,⁵ the Supreme Court advanced equitable distribution doctrine a step further. Grounding its decision in original intent, the Court held that a state acting as a creditor cannot claim sovereign immunity as a defense when a bankruptcy trustee at-

¹ “[I]nsolvents, unlike criminals, were forced to provide their own food, fuel, and clothing while behind bars.” *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 997 (2006).

² U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have power . . . [t]o establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States . . .”).

³ Precisely this situation took place in *James v. Allen*, 1 U.S. (1 Dall.) 188, 189 (Pa. Ct. Com. Pl. 1786). The court emphasized the different states' laws in asserting that New Jersey's discharge would keep the debtor out of jail only in New Jersey. *See id.* at 190–91. Passage of the Constitution did not immediately eliminate debtor's prisons; in the years surrounding 1833, roughly the same percentage of American citizens went to debtor's prison as filed for bankruptcy in 2002. Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 134 (2004). Rather, the Bankruptcy Clause merely enabled Congress to enact a uniform law of bankruptcy, to which Congress eventually responded by creating a system that provided greater protection to debtors. *See* Ann Habermeld, *A Reexamination of the Non-Dischargeability of Criminal Restitutive Obligations in Chapter 13 Bankruptcies*, 43 HASTINGS L.J. 1517, 1527–28, 1556–58 (1992). Over time, recognizing its ineffectiveness as a response to bankruptcy, states began on their own to dispense with the imprisonment of debtors. *See id.* at 1527.

⁴ For example, whereas a creditor could once use state law to bring suits against a debtor irrespective of other creditors' suits originating in other states, now all of a debtor's assets are frozen in bankruptcy and suits must be brought through the federal bankruptcy system. *See* Shu-Yi Oei, *Rethinking the Jurisdiction of Bankruptcy Courts over Post-Confirmation Federal Tax Liabilities: Towards a New Jurisprudence of 11 U.S.C. § 505*, 19 AKRON TAX J. 49, 83–84 (2004). Bankruptcy's threat to smaller creditors would theoretically be greater than the threat to larger creditors, who by definition have more resources. *See* Steven Kropp, *A Case of Misplaced Priorities: A Proposed Solution To Resolve the Apparent Conflict Between Sections 507 and 1113 of the Bankruptcy Code*, 18 CARDOZO L. REV. 1459, 1460 (1997).

⁵ 126 S. Ct. 990.

tempts to recover assets from the state in order to redistribute those assets more equitably among all creditors.⁶ But although its holding saved bankruptcy from the reach of the Eleventh Amendment, the Court neither specified what other bankruptcy proceedings will similarly overcome a sovereign immunity defense nor sufficiently explored the implications of its original intent analysis. With its bare 5–4 majority and the replacement since the decision of one of the majority Justices⁷ by a states’ rights advocate,⁸ *Katz*’s step forward for bankruptcy law remains tenuous.

Bernard Katz was the bankruptcy trustee for Wallace’s Bookstores, which conducted business with Central Virginia Community College.⁹ After becoming insolvent but prior to filing for bankruptcy, Wallace’s Bookstores made payments to the college, which Katz subsequently attempted to recover as “preferential” payments.¹⁰ Under federal bankruptcy law, such payments must be disgorged so that the total assets of a bankrupt entity can be fairly distributed among all creditors.¹¹ To prevent the debtor from giving more of her assets to the creditors she favors (for example, a relative) than to those she disfavors (a credit card company), the trustee can sue the preferred creditors to get those

⁶ *Id.* at 994, 996, 1005.

⁷ Justice O’Connor retired on January 31, 2006.

⁸ Justice Samuel Alito is considered by many to be a states’ rights advocate. *See, e.g.*, Denise C. Morgan, *Introduction: A Tale of (at Least) Two Federalisms*, 50 N.Y.L. SCH. L. REV. 615, 616 & n.6 (2005).

⁹ *Katz*, 126 S. Ct. at 994.

¹⁰ *Id.* A “preferential payment” is defined as:

transfer of an interest of the debtor in property —

- (1) to or for the benefit of a creditor;
- (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 [11 U.S.C. §§ 701–84 et seq.];
 - (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 [11 U.S.C. §§ 101–1532].

11 U.S.C. § 547(b) (West 1999 & Supp. 2006).

¹¹ 11 U.S.C. §§ 541(a)(1), (a)(3), 547, 550 (West 1999 & Supp. 2006); *see also* *Begier v. IRS*, 496 U.S. 53, 58 (1990); Brief for Susan Block-Lieb et al. as Amici Curiae Supporting Respondent at 6–7, *Katz*, 126 S. Ct. 990 (No. 04-885), 2005 WL 2043043 [hereinafter Block-Lieb Brief]. The federal bankruptcy statute makes this equal distribution possible by giving federal bankruptcy courts exclusive jurisdiction over these assets. *See* 28 U.S.C.A. §§ 157(a), 1334(e) (West 2006).

“preferential” payments back.¹² The College raised the defense of sovereign immunity: as a state institution of higher education, the College is considered an arm of the state of Virginia.¹³

The United States Bankruptcy Court for the Eastern District of Kentucky rejected the petitioner’s motion to dismiss the proceedings on the basis of sovereign immunity.¹⁴ It anchored its decision to the Sixth Circuit case *In re Hood*,¹⁵ which held that the Bankruptcy Clause grants Congress the authority to abrogate states’ sovereign immunity.¹⁶ The district court and the court of appeals for the Sixth Circuit affirmed.¹⁷

The Supreme Court affirmed. In rejecting the sovereign immunity defense, Justice Stevens, writing for the majority,¹⁸ focused on the intent of the Constitution’s Framers. The Court first outlined the historical context of the Bankruptcy Clause¹⁹: Foremost on the Framers’ minds were the “intractable problems” and injustices caused by states’ imprisonment of debtors who had already been cleared through the bankruptcy process of another state.²⁰ The absence of debate preceding the passage of the Bankruptcy Clause, the Court determined, suggests that the Framers generally agreed that uniform bankruptcy laws were necessary to prevent the problems caused by inconsistent state laws.²¹

Justice Stevens went on to assert that bankruptcy jurisdiction is at its core in rem.²² Bankruptcy proceedings focus on an estate rather than on a person and thus, as a baseline, do not significantly implicate states’ sovereignty.²³ To the extent an action seeking the return of preferential payments goes beyond in rem, the text of the Bankruptcy Clause provides a more expansive power to establish “uniform laws on the subject of Bankruptcies throughout the United States.”²⁴ To fulfill

¹² 11 U.S.C. § 550 (2000); see also *Begier*, 496 U.S. at 58.

¹³ *Katz*, 126 S. Ct. at 994.

¹⁴ *Katz v. New River Cmty. Coll.*, 330 B.R. 193, 194 (Bankr. E.D. Ky. 2005).

¹⁵ 319 F.3d 755 (6th Cir. 2003).

¹⁶ *Id.* at 758. The Supreme Court had not yet ruled on the question whether the Bankruptcy Clause grants Congress the authority to abrogate states’ sovereign immunity, because after it granted certiorari to *In re Hood* it decided the case on other grounds. *Katz*, 126 S. Ct. at 994.

¹⁷ *In re Wallace’s Bookstore, Inc.*, 106 F. App’x 341, 341 (6th Cir. 2004) (per curiam); *Katz*, 330 B.R. at 194. The Sixth Circuit, in a one-paragraph opinion, stated simply that *In re Hood* controlled the case. *Wallace’s Bookstore*, 106 F. App’x at 341.

¹⁸ Justices O’Connor, Souter, Ginsburg, and Breyer joined the opinion.

¹⁹ See *Katz*, 126 S. Ct. at 996.

²⁰ *Id.*

²¹ *Id.* at 999–1000.

²² *Id.* at 995.

²³ *Id.* at 995–96. The Court held in *Tennessee Student Assistance Corp. v. Hood*, 124 S. Ct. 1905 (2004), that a bankruptcy court did not infringe on state sovereignty when it adjudicated a bankruptcy estate even if the court extinguished a debt owed to a state in doing so. *Id.* at 448.

²⁴ *Katz*, 126 S. Ct. at 1000 (quoting U.S. CONST. art. I, § 8, cl. 4).

this mandate, the Framers must have understood that it would be necessary to adjudicate matters relating not only to property, but also to people.²⁵ Courts handling bankruptcy matters have also historically had the power to “issue ancillary orders enforcing their in rem adjudications”;²⁶ proceedings to turn over preferential payments fit this “ancillary” description.²⁷ To administer bankruptcy estates fully, it would sometimes be necessary to recover preferential transfers that had been paid to certain creditors.²⁸

The historical context examined by the majority included legislation passed in the years following the ratification of the Constitution. In the Bankruptcy Act of 1800, Congress “granted federal courts the authority to issue writs of habeas corpus effective to release debtors from state prisons,”²⁹ sixty-seven years before passage of the Fourteenth Amendment made those writs available to state prisoners generally.³⁰ Even though the nation was hotly debating state sovereignty around the time the Bankruptcy Act became law, there is no record of any sovereign immunity objection to the Act’s habeas corpus provision.³¹ Justice Stevens concluded that because the legislation passed so smoothly and so soon after the Constitutional Convention, the states must have agreed during the Convention not to assert sovereign immunity defenses against laws enacted under the Bankruptcy Clause.³² The Court concluded that the question the respondents and petitioners had raised — whether Congress had “abrogated” sovereign immunity in 11 U.S.C. § 106 — was irrelevant because the states had waived that sovereign immunity through the Constitution with respect to bankruptcy cases.³³ Thus, in passing any given piece of bankruptcy legislation, Congress has the authority to decide whether to treat the states like any other creditor or to exempt them from that particular legislation.³⁴

²⁵ *Id.* For example, the first bankruptcy statute empowered bankruptcy commissioners to imprison third parties in possession of the bankrupt estate’s property. *Id.* However, as the dissent pointed out, this statute was repealed after only a few years. *Id.* at 1009 (Thomas, J., dissenting).

²⁶ *Id.* at 1000 (majority opinion).

²⁷ *Id.* at 1002.

²⁸ *Id.* at 1001.

²⁹ *Id.* at 1002.

³⁰ *Id.* at 1003 (citing *Ex parte Royall*, 117 U.S. 241, 247 (1886)).

³¹ *Id.*

³² *Id.* at 1004.

³³ *Id.* at 1005. The ultimate question that the Supreme Court asked, and the answer to that question, came from an amicus brief filed by historian Bruce Mann. See Brief for Bruce H. Mann as Amicus Curiae Supporting Respondent at 1–2, *Katz*, 126 S. Ct. 990 (No. 04-885), 2005 WL 2043042 [hereinafter Mann Brief].

³⁴ See *Katz*, 126 S. Ct. at 1005.

Justice Thomas dissented.³⁵ He argued first that the majority's decision conflicted with prior doctrine, stating that "for over a century . . . we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States,"³⁶ regardless of whether such suits implicated the Bankruptcy Clause. Justice Thomas also asserted that the majority confused two distinct aspects of sovereignty: a sovereign's authority to regulate its own citizens and its immunity from suit by private citizens.³⁷ The Bankruptcy Clause's mandate to establish "uniform laws" may necessitate that the states waive their legislative authority, he wrote, but it does not require that they waive their sovereign immunity.³⁸ Finally, Justice Thomas saw two main flaws in the majority's determination that the Framers intended to eliminate sovereign immunity with respect to bankruptcy legislation. First, the historical record "refute[d] . . . the majority's premise that the Framers placed paramount importance on the enactment of a nationally uniform bankruptcy law."³⁹ Second, the majority produced no historical evidence suggesting that the Framers intended to subject states to private suits under a national bankruptcy law.⁴⁰

Although *Katz* went far in ridding bankruptcy of its Eleventh Amendment constraints, the majority's decision overlooked two critical vulnerabilities to future sovereign immunity challenges. By failing to define the boundaries of an "ancillary" proceeding and by not fully supporting its original intent analysis, the Court left its decision open to future judicial attacks. These flaws undermine what is otherwise a decision with multiple levels of significance. Merely as a threshold matter, *Katz* will soften the impact of bankruptcy on creditors by making the distribution of estate funds more equitable than it would be were states, frequent creditors that they are,⁴¹ exempt from the restrictions on preferential payments. But the decision's impact extends beyond the protection of creditors. It arrested the momentum that state sovereign immunity had been gaining in recent Supreme Court juris-

³⁵ Chief Justice Roberts and Justices Scalia and Kennedy joined the dissent.

³⁶ *Katz*, 126 S. Ct. at 1006 (Thomas, J., dissenting) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)) (internal quotation marks omitted).

³⁷ *Id.* at 1008.

³⁸ *Id.* at 1009.

³⁹ *Id.* at 1010. For example, federal bankruptcy legislation was absent "for all but 16 of the first 109 years after the Constitution was ratified." *Id.* at 1009 (quoting Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1995)) (internal quotation mark omitted). Unlike the majority, however, which cited the work of historian Bruce Mann, *see id.* at 997 (majority opinion), the dissent did not cite any historians' work to support its claims.

⁴⁰ *Id.* at 1010 (Thomas, J., dissenting).

⁴¹ *See* Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory Ex parte Young Relief*, 76 AM. BANKR. L.J. 461, 463-64 (2002).

prudence,⁴² and it resolved the issue left open in *Tennessee Student Assistance Corp. v. Hood*⁴³ regarding whether Congress could validly abrogate state sovereign immunity.⁴⁴ The *Katz* Court put this question to rest by answering the narrower question whether the states, in ratifying the Constitution, had waived their sovereign immunity for ancillary bankruptcy proceedings specifically.⁴⁵ These aspects of *Katz*, though beneficial, are diminished in value by the majority's failure to consider all of the implications of its holding.

First, the Court's vagueness leaves unclear the types of bankruptcy proceedings, other than preferential transfers, that would similarly overcome the defense of sovereign immunity. The Court focused on how courts "historically have had the power to issue ancillary orders enforcing their in rem adjudications."⁴⁶ What *Katz* lacked, however, was a clear definition of "ancillary." Many other bankruptcy proceedings that, like preferential transfers, aim to generate or preserve an estate's assets could fall under this definition.⁴⁷ Some of these proceedings are obvious, such as enforcement of an automatic stay, which prohibits a creditor from taking actions to collect from a debtor who has filed for bankruptcy.⁴⁸ Under *Katz*, these more obvious bankruptcy proceedings would logically overcome sovereign immunity defenses.⁴⁹ Less obvious is whether, for example, sovereign immunity applies to a debtor's action against a state to suppress the application of a state law,⁵⁰ a debtor's cause of action arising against a state after commencement of the core bankruptcy proceedings,⁵¹ or a cause of ac-

⁴² See, e.g., *Seminole Tribe*, 517 U.S. at 54. So great was this sovereign immunity momentum that the *Katz* decision surprised some observers of the Court. See, e.g., Posting of Steve Jakubowski to Bankruptcy Litigation Blog, <http://www.bankruptcylitigationblog.com> (Jan. 23, 2006). Even the Solicitor General declined to defend federal bankruptcy law in *Katz*, because he felt "there was no reasonable argument to be made in favor of its constitutionality." Posting of Kevin Russell to SCOTUSblog, <http://www.scotusblog.com> (Jan. 23, 2006, 13:40 EST).

⁴³ 124 S. Ct. 1905 (2004).

⁴⁴ *Katz*, 126 S. Ct. at 995.

⁴⁵ See *id.*. This course is even bolder because this question (along with its answer) was raised solely in an amicus brief. See Mann Brief, *supra* note 33, at 1-2.

⁴⁶ *Katz*, 126 S. Ct. at 1000.

⁴⁷ See Richard Lieb, *State Sovereign Immunity: Bankruptcy Is Special*, 14 AM. BANKR. INST. L. REV. 201, 230-31 (2006).

⁴⁸ See, e.g., ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 137 (5th ed. 2005).

⁴⁹ See *id.*

⁵⁰ See *Kessler v. Dep't of Pub. Safety*, 369 U.S. 153 (1961) (upholding a state law authorizing a judgment creditor to initiate suspension of bankrupt's driver's license when he fails to satisfy the judgment), *overruled by Swift & Co. v. Wickham*, 382 U.S. 111 (1965), and *Perez v. Campbell*, 402 U.S. 637 (1971).

⁵¹ See *In re Broboff*, 766 F.2d 797 (3d Cir. 1985).

tion against a state that arises pre-petition and passes from the debtor to the bankruptcy estate.⁵²

Thus, without a firm definition of “ancillary,” lower courts have little guidance regarding exactly which bankruptcy proceedings may be brought against states.⁵³ It is possible for lower courts to construe *Katz* narrowly to apply only to those proceedings that have been found in previous cases to be sufficiently “related to” the core bankruptcy proceedings.⁵⁴ Or lower courts could go further, interpreting *Katz*’s emphasis on the “limited” scope of the Bankruptcy Clause⁵⁵ to allow sovereign immunity defenses even in proceedings that have traditionally been held ancillary to bankruptcy. In describing the nature of ancillary proceedings, for instance, the Court declared that “[t]he Framers would have understood that laws ‘on the subject of Bankruptcies’ included laws providing, in certain *limited* respects, for more than simple adjudications of rights in the res.”⁵⁶

The Court’s hedging language frustrates a primary goal of ancillary proceedings: ensuring fairness to creditors and debtors alike. The Court essentially left for another day the decision which other ancillary proceedings would overcome the sovereign immunity defense. The potential consequence of such forestalling — exemption for states from certain ancillary bankruptcy proceedings — is likely to weaken an essential mechanism for supplying creditors, especially small creditors, with often badly needed equitable portions of estates’ assets. The Court could have avoided such a result by making clear that its reasoning in *Katz* applied to all proceedings seeking to recover or preserve assets for a bankrupt estate.

The other major flaw in the opinion is the majority’s narrow reliance on original intent. First, the majority’s historical analysis was incomplete: its reasoning revolved around the Framers’ intent to protect debtors in bankruptcy proceedings even though preferential transfer actions primarily benefit creditors. Second, the Court missed an opportunity to strengthen its reasoning by distinguishing *Katz* from pre-

⁵² See *Zweygardt v. Colo. Nat’l Bank of Denver*, 52 B.R. 229 (Bankr. D. Colo. 1985).

⁵³ The word “ancillary” was first used by a member of the Court in the bankruptcy context in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92 (1982) (Burger, C.J., dissenting), which addressed a contract claim by a debtor in a chapter 11 reorganization against one of its creditors. The word has never been adequately defined in any subsequent Supreme Court case, however, and the *Katz* decision provided little indication of the limits it understands “ancillary” to convey.

⁵⁴ See 8A C.J.S. *Bankruptcy* § 159 (2006) (compiling varied court articulations of “related” in the bankruptcy context).

⁵⁵ See, e.g., *Katz*, 126 S. Ct. at 1005 n.15 (“We do not mean to suggest that every law labeled a ‘bankruptcy’ law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity.”).

⁵⁶ *Id.* at 1000 (emphasis added) (quoting U.S. CONST. art. I, § 8, cl. 4).

vious Supreme Court precedents holding that other Article I powers did not abrogate state sovereign immunity.

The majority focused almost exclusively on bankruptcy's roots as a protector of the bankrupt. Its discussion of pre-Constitutional Convention bankruptcy fastened onto the *James v. Allen*⁵⁷ scenario: the plight of a debtor who could be discharged of his debts in one state and then thrown in jail in a second state that did not recognize that discharge.⁵⁸ Preventing such interstate injustice, the majority stated, is a concern at the core of the Bankruptcy Clause.⁵⁹ When the majority did acknowledge bankruptcy's pre-colonial objective of protecting the creditor, it concluded that the Framers must have seen the need to protect debtors from such an unbalanced system: "[T]he Framers' primary goal was to prevent competing sovereigns' interference with the debtor's discharge."⁶⁰

This reasoning likely explains only part of the Framers' concerns. Indeed, as the majority acknowledged in its debtor-protection discussion, two of the three principal purposes of bankruptcy law are to maintain exclusive jurisdiction over the bankrupt's property and to ensure an equitable distribution of the bankrupt's assets.⁶¹ Thus, much of bankruptcy law's historical objective has been the protection of creditors — both from each other and from their debtors.⁶² As a class of individuals who were more often creditors than debtors, the Framers likely recognized the importance of that goal. In fact, equitable distribution to creditors was so large a bankruptcy consideration at the time of the Convention that one court of that era felt compelled to explain its refusal to jail a debtor for already-discharged debts in terms of fairness to creditors.⁶³

⁵⁷ 1 U.S. (1 Dall.) 188 (Pa. Ct. Com. Pl. 1786).

⁵⁸ See *Katz*, 126 S. Ct. at 998–99.

⁵⁹ See *id.* at 1002.

⁶⁰ *Id.*; see also *id.* at 996–97, 999.

⁶¹ See *id.* at 996. The third purpose is to give the debtor a "fresh start" by discharging his or her debts. See *id.*

⁶² See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995) (noting that "[e]arly English law had a distinctly pro-creditor orientation" and that "[c]reditors needed protection from defaulting debtors and from each other"); see also C.R. Bowles, Jr. & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Cases?*, 5 AM. BANKR. INST. L. REV. 47, 48 n.3 (1997) ("In their earliest form, English Bankruptcy laws were quasi-criminal statutes to protect creditors from debtors."). For three centuries starting in 1570, only creditors could commence bankruptcy proceedings in England. Tabb, *supra*, at 8. This limitation speaks to bankruptcy law's purpose "to aid creditors in the collection of debts." *Id.* Since the Framers of the U.S. Constitution had English bankruptcy law as their chief point of reference in drafting the Bankruptcy Clause, *id.* at 6, they likely recognized that uniformity in ancillary proceedings was important for protecting creditors as well as debtors.

⁶³ In *Millar v. Hall*, 1 U.S. (1 Dall.) 229 (Pa. 1788), a debtor discharged in one state was imprisoned in another, partly because he failed to list one of his creditors in the schedule he submit-

This emphasis on the protection of creditors is particularly important in the context of proceedings that, like preferential transfer recoveries, are intended primarily to benefit creditors by ensuring an equitable distribution of the estate. The debtor remains largely unaffected by these proceedings, because he will still be released from liability even if the estate fails to recover the funds. By failing to recognize the Framers' intent to protect creditors' rights, the majority missed an opportunity to show why the waiver of state sovereign immunity in ancillary bankruptcy proceedings made sense in the historical context.

The second misstep in the Court's original intent reasoning is that the majority ignored entirely a persuasive independent basis for its holding. *Katz* is distinguishable from previous Supreme Court cases holding that other Article I powers did not abrogate state sovereign immunity. As amici pointed out in their brief, bankruptcy differs significantly from other Article I powers with respect to state sovereign immunity.⁶⁴ Although sovereign immunity has its limits, those limits are well-defined: Congress may authorize the United States to sue states, and "[a] federally-created entity may likewise sue a State in federal court to enforce federally-created rights."⁶⁵ Bankruptcy trustees suing to recover preferential payments are federally created entities enforcing a federally created right and thus fall within a clearly delineated exception to state sovereign immunity.⁶⁶

Both case law and the structure of bankruptcy estates support this view of the trustee as a federal representative enforcing a federally created right.⁶⁷ The bankruptcy estate is a federally created entity under the control of a federally appointed representative and a federal court.⁶⁸ Proceedings to recover preferential transfers are brought by the representative on behalf of the estate rather than on behalf of the

ted to the discharging court. The court ruled against imprisonment, explaining that doing otherwise "would be giving a superiority to some creditors, and affording them a double satisfaction." *Katz*, 126 S. Ct. at 999 (quoting *Millar*, 1 U.S. (1 Dall.) at 232).

⁶⁴ See Block-Lieb Brief, *supra* note 11, at 4 (noting that bankruptcy statutes are different from other Article I laws, such as tax and commerce, in that bankruptcy representatives are not acting as fiduciaries of private parties and the "substantive provisions of bankruptcy statutes are not regulatory laws").

⁶⁵ *Id.* at 12 (citing *United States v. Mississippi*, 380 U.S. 128, 140 (1965); *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 825, 870–71 (1824)).

⁶⁶ See *id.* at 13–14.

⁶⁷ *Id.* at 13 ("When suing to recover preferentially-transferred 'property of the debtor' for equitable sharing among all creditors of the estate, the authorized representative of a bankruptcy estate is 'exactly the same as that of the Bank of the United States' pursuing 'a right arising under the law of the United States . . .'" (quoting *Clafin v. Houseman*, 93 U.S. 130, 135 (1876))).

⁶⁸ See *id.* at 13–14 (citing 11 U.S.C.A. § 1104 (West 1999 & Supp. 2006); 28 U.S.C.A. § 586(a)(1), (a)(3), (c), (d) (West 2006); Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 814–30 (2000)).

debtor.⁶⁹ That representative is “appointed by, subject to removal by, and supervised by” the U.S. Trustee, who is appointed by the U.S. Attorney General.⁷⁰ As amici pointed out, “[u]nlike the tax, commerce and other Article I powers resolved in the Court’s recent [sovereign immunity cases cited by the dissent,] bankruptcy causes of actions . . . are enforceable *only* by the estate representative designated by the [federal bankruptcy] court.”⁷¹ If sovereign immunity does not limit the federal government’s power to sue the states, neither should it limit proceedings by federally empowered trustees against states to recover preferential transfers.

The majority’s commendable decision saved bankruptcy, at least temporarily, from the Eleventh Amendment: *Katz* forbids states from behaving like bankruptcy freeloaders, benefiting when trustees collect preferences from other creditors but refusing to disgorge their own improperly acquired payments. But with the recent changes in the Court’s composition, *Katz* will likely face close scrutiny and resistance in the future. Congress has already shown a predilection for chipping away at bankruptcy’s debtor protections, recently making it significantly more difficult for debtors to file under chapter 7.⁷² By failing to define “ancillary” or to buttress its reasoning more fully, the *Katz* majority left the issue open to further assault by the courts, to the detriment of not only debtors, but also many creditors.

B. Criminal Law and Procedure

1. *Eighth Amendment — Death Penalty — Consideration of Invalid Sentencing Factors.* — The practice of judging may be a pursuit of legal predictability,¹ but it is not only that. It is also a quest for coherence. Judges must undergird any doctrine with a coherent idea that binds varying situations in reasoned, expected, and therefore accepted, treatment before the law.² Such an idea has eluded capital punish-

⁶⁹ See *id.* at 14.

⁷⁰ *Id.* at 13–14 (citing 11 U.S.C.A. § 1104 (West 1999 & Supp. 2006); 28 U.S.C.A. §§ 582, 586(a)(3) (West 2006)).

⁷¹ *Id.* at 16 (emphasis added).

⁷² See Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 457–59 (2005) (summarizing shortcomings of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (to be codified in scattered sections of 11 U.S.C.)).

¹ See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) (“The object of our study . . . is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”).

² See CHARLES FRIED, SAYING WHAT THE LAW IS 2 (2004) (“[E]ach legal decision should be referable to a rule or principle; it should be justifiable not just by the good that it does but as part of the fabric of the law.”); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1094 (1975) (“[A judge] must construct a scheme of . . . principles that provides a coherent justification for all common law precedents and . . . constitutional and statutory provisions as well.”).