# THE HISTORICAL ARGUMENT FOR STATE SOVEREIGN IMMUNITY IN BANKRUPTCY PROCEEDINGS

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## INTRODUCTION

In *Central Virginia Community College v. Katz*, the Supreme Court held that state sovereign immunity does not apply in proceedings arising under Congress's bankruptcy powers.[1] In a five-to-four opinion by Justice Stevens, the Court departed from a line of prior cases in which it consistently upheld state sovereign immunity in various contexts[2] and, relying on the history of the Constitutional Convention and the ratification debates, made one of its broadest sovereign immunity rulings. Rather than holding that Congress had the power to abrogate state sovereign immunity pursuant to its bankruptcy powers, the Court instead ruled that the "States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies[,]'" meaning that state sovereign immunity does not apply at all in the bankruptcy context.[3] Thus, unlike other scenarios involving the abrogation of state sovereign immunity, the Court held that Congress's power to treat states the same as other, private creditors or to exempt them from those laws "arises from the Bankruptcy Clause itself; the relevant 'abrogation' is the one effected in the plan of the Convention, not by statute."[4]

This holding raises the question of what distinguishes the bankruptcy power from the other Article I, Section 8 powers, like Congress's authority to create patents, such that the waiver of state sovereign immunity arose from the constitutional plan rather than statutory abrogation. After all, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,

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[1] 546 U.S. 356, 377 (2006).

[2] *See, e.g.*, Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647-48 (1999) (holding that Congress cannot authorize private suits against states for patent infringement); Alden v. Maine, 527 U.S. 706, 754 (1999) (holding that states are immune to private suit in their own courts and that Congress has no power to abrogate this immunity); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

[3] *Katz*, 546 U.S. at 377.

[4] *Id.* at 379.

the Supreme Court ruled that Congress had no power to authorize private suits against states for patent infringement.[5]

For the Justices in the *Katz* majority, that answer rested in the in rem nature of federal bankruptcy proceedings.[6] The majority observed that because

> [b]ankruptcy jurisdiction, at its core, is *in rem* . . . . it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction. That was as true in the 18th century as it is today. Then, as now, the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the administration and distribution of the res.[7]

Thus, although the majority recognized that "some exercises of bankruptcy courts' powers—issuance of writs of habeas corpus included—unquestionably involved more than mere adjudication of rights in a res[,]"[8] it nonetheless concluded that by "ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts."[9]

Interestingly, and despite the in personam-in rem distinction favored by the *Katz* majority, at least seven of the participating Justices apparently could find no principled difference between the bankruptcy power and the other Article I, Section 8 powers: Justices Scalia, Kennedy, and Thomas would have found state sovereign immunity barred both the bankruptcy and patent suits, while Justices Stevens, Souter, Ginsburg, and Breyer would have allowed both suits.[10] Justice O'Connor took different positions in the two cases without writing a separate opinion to explain her reasoning, but her decision in *Katz* was among her last before

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[5] *Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. at 647.

[6] *Katz*, 546 U.S. at 378 ("The scope of [the States'] consent [not to assert sovereign immunity defenses] was limited; the jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction.").

[7] *Id.* at 362 (citation omitted).

[8] *Id.* at 378.

[9] *Id.*

[10] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 443 n.30 (6th ed. 2012).

stepping down from the Court.[11] Taken together, these factors weaken *Katz's* precedential value.

The views of the *Katz* majority and dissent turn on which of two foundational assumptions the Justices believed: either that the states, in ratifying the Bankruptcy Clause of the Constitution, thereby surrendered their sovereign immunity and consented to private suit in all matters relating to Congress's bankruptcy power, or that the Bankruptcy Clause only provides Congress a grant of authority to legislate uniform national bankruptcy laws binding on all the states, similar to the powers of copyright, patent, and naturalization also contained in Article I, Section 8. This Article argues that, based on the general evolution of bankruptcy law and the specific history of the bankruptcy power, the latter interpretation was the original understanding of the Bankruptcy Clause. As such, the Court wrongly decided *Katz*.

In Part I, this Article reviews the development of a singular bankruptcy regime under English common law, with particular focus on how the practice of discharging unpayable debt originated. Part II turns to the unique challenge to a functioning American bankruptcy scheme posed by the Articles of Confederation, under which numerous sovereign states—each with a disparate bankruptcy and discharge framework—operated within a loose national system. In Part III, this Article reviews how the Framers addressed the unique challenge to a coherent bankruptcy scheme raised by lack of uniformity among the states during the Constitutional Convention, paying special attention to the role played by notions of sovereignty. Through a close reading of the Bankruptcy Clause's proposal and inclusion in the Constitution, its position in the Constitution's overall structure, and the immediate postratification history of the bankruptcy power, this Article contends that the Framers did not contemplate a waiver of any aspect of state sovereign immunity in conjunction with the bankruptcy power. Part IV bolsters this conclusion by reviewing how the post-Revolutionary War environment influenced the states' concerns about their sovereign immunity and the Framer's arguments with respect to these concerns in the ratification debates. The Article then briefly concludes.

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[11] *See id.* at 442-43.

## I. BANKRUPTCY LAW FROM ITS ORIGIN TO COLONIAL-ERA ENGLAND

Nathan Bailey's *An Universal Etymological English Dictionary*, first published in 1721 and widely used at the time of the Founding, defines a "bankrupt" as "one who by the Laws of the Land is obliged by his Creditors to yield up his Goods, Chattels, Estate and Debts, &c. for their Use, till they are discharged of their respective Debts as far as the said Estate, &c. will allow."[12] The Framing-era understanding of both the word "bankruptcy" and the legal scheme it entails derived from that period's conceptions of the classical civilizations.

Writing on the Statute of Bankrupts, Lord Coke observed, "We have fetched as well the name as the wickedness[] of bankrupts from foreign nations . . . . Some say it should be derived from *banque* and *rumpue*, as he that hath broken his banque or state."[13] The eighteenth-century English legal literati believed a difficult fate awaited those unfortunate enough to break their banques in the classical civilizations. Sir Robert Chambers, for instance, observes that under the "primitive constitutions" of Athens and Rome, insolvent debtors could be imprisoned or sold into slavery by their creditors to pay their debts.[14] Among the most infamous of these "primitive constitutions" was the Roman Laws of the Twelve Tables, promulgated circa 450 B.C., which authorized creditors to, as a last resort, cut the debtor's body into proportionate shares to settle the debt.[15] Although it is unclear if many—or any—debtors suffered this cruel settlement, Montesquieu observes that "[a] great many sold their children to pay their debts."[16]

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[12] NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY 92 (20th ed. 1763).

[13] SIR EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 277 (1644). Bailey's dictionary contains the same conclusion. *See* BAILEY, *supra* note 12, at 92. Blackstone endorsed this etymology, noting that the word was derived from the Latin "*bancus* or *banque*" meaning a tradesman's counter and "*ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone[.]" 2 WILLIAM BLACKSTONE, COMMENTARIES *472.

[14] 2 SIR ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW 1767–1773 198 (Thomas M. Curley, ed. 1986).

[15] F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 16 (1919).

[16] 1 CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 264 n.*, *in* THE COMPLETE WORKS OF M. DE MONTESQUIEU (T. Evans, ed. 1777).

Many English legal minds viewed these primitive bankruptcy concepts as little more than relics from antiquity to review, perhaps ridicule, but most importantly advance beyond. Typical is Blackstone's effort to distinguish English bankruptcy law from the cruelty of its classical forbears—according to him, English laws "have steered in the middle between both extremes: providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid[.]"[17] Even so, from the earliest English statutes concerning debtors until well after the American colonies were established, English debtor law was heavily creditor-focused and provided for the imprisonment of debtors.[18]

### *A. Early English Debtor Statutes*

During the earliest period of the English common law's development, imprisonment did not exist as a creditor's remedy for defaulted debtors.[19] Instead, a creditor's recourse was limited to the writs of *fieri facias*, which instructed the sheriff to seize and sell the debtor's goods and chattels until the debt was satisfied, or *levari facias*, which permitted the sheriff to levy the debtor's lands and goods and apply the rents and profits thereof toward the debt

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[17] 2 BLACKSTONE, *supra* note 13, at *472-73. Other contemporary English legal writers employed this same middle-of-the-road metaphor, rife with a complacent confidence in English law's superiority:

> When trade was advancing in the *Roman* Common-wealth, the first laws made against debtors were sanguinary and inhuman; the last too lenient and futile. Those of *England* have wisely steered between both extremes, and have provided at once against the inhumanity of creditors, and prodigality of debtors. As they are, they seem well adapted to the situation of the country and manners of the people. To alter them would be inconvenient and dangerous, to abrogate them would be accelerating ruin and bankruptcy.

1 GEORGE CROMPTON, PRACTICE COMMON-PLACED: OR, THE RULES AND CASES OF PRACTICE IN THE COURTS OF KING'S BENCH AND COMMON PLEAS, METHODICALLY ARRANGED lxxiv-lxxv (2d ed. 1783).

[18] *See generally* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995).

[19] *See* Jay Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 29 L. SCH. REC. 5, 6 (1983).

until satisfied.[20] The reason these remedies, which substantially mirror some modern methods of judgment execution,[21] were the only ones available is rooted in the feudal system of the time: arrest of a debtor's person was prohibited because of his obligation to serve his lord.[22]

The first statute providing for arrest and imprisonment as a civil remedy was the Statute of Marlbridge of 1267,[23] which broke with the common law and Magna Carta in doing so.[24] That enactment provided:

That if bailiffs, which ought to make Account to their Lords, do withdraw themselves, and have no Lands nor Tenements whereby they may be distrained; then they shall be attached by their Bodies; so that the Sheriff, in whose Bailiwick they be found, shall cause them to come to make their Account.[25]

The form of imprisonment provided for by the Statute of Marlbridge was thus limited—it applied only to the interlocutory confinement of a debtor obligated to make an accounting, and then only if the debtor did not own land, until a trial could establish the obligation—and it did not allow for imprisonment after the debtor had been adjudged liable.[26] This sort of imprisonment functioned much like present-day pretrial detention in that it was intended

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[20] *See* 3 BLACKSTONE, *supra* note 13, at *417 ("The next species of execution is against the goods and chattels of the defendant, and is called a writ of fieri facias, from the words in it where the sheriff is commanded, quod fieri faciat de bonis, that he cause to be made of the goods and chattels of the defendant the sum or debt recovered . . . . A third species of execution is by writ of levari facias; which affects a man's goods and the profits of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff."); *see also* CROMPTON, *supra* note 17, at lxix ("For in no *civil* case was the person of a defendant liable to an arrest, or imprisonment at the Common Law; the writ of *distringas ad infinitum* being the only process to compel an appearance to the action, and the writs of *levari* and *fieri facias* to give the plaintiff execution of judgment obtained by him.").

[21] For instance, the writ of *fieri facias* remains in use as a tool for enforcing judgments in many jurisdictions. *See, e.g.*, GA. CODE ANN. § 15-9-62 (2017) (authorizing writ of *fieri facias* for costs due to probate court); VA. CODE ANN. § 8.01-466 (2017) (authorizing writ of *fieri facias* for execution on money judgments).

[22] *See* CROMPTON, *supra* note 17, at lxx.

[23] The Statute of Marlbridge, 52 Hen. 3, ch. 23 (1267) (Eng.).

[24] *See* CROMPTON, *supra* note 17, at lxvii-lxviii.

[25] The Statute of Marlbridge, 52 Hen. 3, ch. 23 (1267) (Eng.).

[26] *See* Marcus Cole, *A Modest Proposal for Bankruptcy Reform*, 5 GREEN BAG 2D 269, 271-72 (2002).

primarily to prevent flight rather than satisfy the obligation from the person, and it eventually became known as imprisonment upon mesne process.[27]

Subsequent legislation governing debtors was soon deemed necessary in response to the perils of increasing commercialization without adequate regulation:

> But when, upon the introduction of commerce, the people of necessity began to contract debts with each other . . . it was seen towards the reign of *Edward* the first, how easy it was for any one to procure personal wealth upon credit, and then purchase lands with it, and thereby not only defraud his creditors, but against all reason and equity, enjoy the profits of that estate, which he had bought with another's money.[28]

The reign of Edward I (1272–1307) marked an unprecedented period of English legal development whose effects are still visible to some degree in the structure of modern common law legal systems.[29] During his reign, many statutes were promulgated "touch[ing] upon almost every point of law, both public and private" and reforming areas as diverse as property law, criminal law, legal procedure, and, of course, debtor-creditor relations.[30]

An initial effort at providing merchants greater security from debtors manifested in the 1283 Statute of Acton Burnell, which provided a more expedited process for satisfaction of debts than previously allowed.[31] The statute permitted a merchant to bring a debtor before a designated official to acknowledge the debt and its due date.[32] If the debt was not paid on time, then the official could seize and sell the debtor's moveable chattels until the debt was

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[27] *Id.*

[28] *See* CROMPTON, *supra* note 17, at lxx.

[29] *See, e.g.*, Jonathan Rose, *Medieval Attitudes Toward the Legal Profession: The Past as Prologue*, 28 STETSON L. REV. 345, 347-48 (1998) ("Numerous scholars consider the reign of Edward I (1272-1307) to be one of the most important eras of law reform in English legal history. During this period, a number of statutes were passed that significantly affected property law, criminal law, constitutional law, procedure, the judicial and feudal systems, law of new territories, and the judicial power to expand remedies.").

[30] BRYCE LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 431 (2d ed. 1980); *see also* Rose, *supra* note 29, at 347 & n.6.

[31] The Statute of Acton Burnell, 11 Edw. 1 (1283) (Eng.).

[32] *Id.*

satisfied, or if no buyer could be found, deliver the chattels to the creditor.[33] If the debtor lacked any chattels, the statute provided that he would be imprisoned until he or his friends reached an arrangement with the creditor.[34] The imprisonment could be indefinite as long as the creditor provided sustenance for the confined debtor—the costs of which "the Debtor shall recompense him with his Debt, before that he be let out of Prison."[35]

Acton Burnell, however, proved unworkable as the officials charged with implementing it widely refused to do so.[36] In response to Acton Burnell's ineffectiveness, the Statute of Merchants was promulgated in 1285, superseding and reiterating Acton Burnell with more expansive provisions.[37] The preamble to the Statute of Merchants noted its purpose of providing even greater protections to merchants in the context of the failed earlier enactment: "But Forasmuch as Merchants after complained unto the King, that Sheriffs misinterpreted his Statutes, and sometimes by Malice and false Interpretation delayed the execution of the Statute, to the great damage of Merchants; the King . . . caused the said Statute made at Acton Burnel to be rehearsed[.]"[38] The Statute of Merchants strengthened the Acton Burnell provisions and allowed for imprisonment on the debt regardless of whether the debtor had sufficient chattels to satisfy his debt.[39]

Subsequent statutes continued to expand the role of imprisonment to coerce repayment of debts in a variety of contexts, but the system they created suffered from a number of flaws reducing its utility.[40] These problems lead to the development of concepts that remain critical components of the modern bankruptcy system in use today.

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See* Jerome S. Arkenberg, *Medieval Sourcebook: Statuta de Mercatoribus (Statutes of Merchants), 11 Edw. I (1283) & 13 Edw. I (1285)*, http://sourcebooks.fordham.edu/source/1283stat-merchants.asp [https://perma.cc/8M8P-36UW].

[37] *See* Statute of Merchants, 13 Edw. 1, s. 3 (1285) (Eng.).

[38] *Id.*

[39] *Id.*

[40] *See* Cohen, *supra* note 19, at 6.

### *B. The Rise of Bankruptcy Law and the Concept of Discharge*

Somewhat counterintuitively in light of the modern understanding of bankruptcy procedure, bankruptcy law originated as a tool to facilitate a creditor's collection from a debtor.[41] Coercive imprisonment to compel debt repayment was a powerful creditor remedy from a deterrence perspective, but lacked real utility as a debt collection mechanism.

Chief among the flaws of England's debtor laws was the fact that debtors had multiple means of evading imprisonment in the first place. The ancient sanctuary doctrine enabled a debtor to immunize himself from arrest or imprisonment by fleeing to consecrated ground—in practice, a church or church property—and remaining there.[42] Should an official pursue a debtor into such an asylum, that official risked excommunication and other punishments.[43] Additionally, debtors could simply flee the realm without paying their creditors.[44] If they managed to escape without being apprehended, then they were free from debt—albeit at the price of being an outlawed exile and losing all fixed possessions remaining in England.[45] For hopeless debtors more attached to their homeland there remained the option of "keeping house," a sort of self-imposed house arrest that precluded creditors from seizing a debtor's person because the common law prohibited entry into one's house for the purpose of serving civil process.[46] Debtors who somehow gained the King's favor may have obtained a letter of safe conduct whose authority flowed from the royal prerogative.[47]

The availability and frequent exercise of these options for avoiding debtor's prison and frustrating creditors' collection efforts

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[41] *See id.*

[42] *See* 4 BLACKSTONE, *supra* note 13, at *327-28. Sanctuary was available not just to debtors, but to any person accused of a crime except for treason or sacrilege. *Id.* This privilege was substantially curtailed during the reign of Henry VIII, and abolished entirely by the statute 21 Jac. 1., c. 28 (1623). *Id.*

[43] *See* Louis E. Levinthal, *The Early History of English Bankruptcy*, 67 U. PENN. L. REV. 1, 10 (1919).

[44] *See id.*

[45] *See* Cohen, *supra* note 19, at 6.

[46] Cole, *supra* note 26, at 272.

[47] *See* Levinthal, *supra* note 43, at 10.

in large part gave rise to the earliest bankruptcy laws.[48] In fact, the preamble to the first English statute concerning bankruptcy,[49] promulgated in 1542 during the reign of Henry XII, specifically lists evasion of creditors as its justification:

> Where divers and soondrye persones craftelye obteyning into theyre handes greate substaunce of other mennes goods doo sodenlie flee to partes unknowne or kepe theyre houses, not mynding to paie or restore to any theyre creditoures theyre debtes and dueties, but at theyre owne willes and pleasures consume the substaunce obteyned by credyte of other men, for theyre owne pleasures and delicate lyving, againste all reasonee quytie and good conscience . . . .[50]

This "act against such persons as do make bankrupt[]" gave creditors powers beyond those contained in earlier debtor laws, with a key innovation being the power to divide and distribute debtors' property in satisfaction of debts through a system of administration.[51]

The statute set forth two features that remain cornerstones of modern bankruptcy regimes: the discovery and collection of all the debtor's assets followed by an orderly distribution of those assets to creditors.[52] The guiding principle behind the legislation appears to be preventing fraud on the part of debtors while allowing for more efficient satisfaction of creditors' claims. To that end, in addition to providing for examination of the debtor before the Chancellor and bankruptcy commissioners in order to uncover concealed assets, the act contained numerous penal provisions, such as requiring a debtor who concealed assets to forfeit twice their value and allowing imprisonment of debtors until they forfeited their possessions.[53] The statute retained, however, one of the central absurdities of the earlier debtor statutes going back to

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[48] *See* Cohen, *supra* note 19, at 6.

[49] Levinthal, *supra* note 43, at 1 ("Writers who deal with the history of English bankruptcy almost unanimously regard the Act of Parliament of 34 & 35 Henry VIII, c. 4 (1542) as the earliest legislation on the subject.").

[50] 34 & 35 Henry VIII, c. 4, pmbl. (1542–43).

[51] *See* Tabb, *supra* note 18, at 7; *see also* EDWARD CLEMENTS, THE LAW AND PRACTICE OF BANKRUPTCY IN IRELAND 3 (1850).

[52] Levinthal, *supra* note 43, at 14.

[53] *See* Cohen, *supra* note 19, at 6-7; Levinthal, *supra* note 43, at 15-16.

the days of Edward I: even after a debtor was stripped of all his property, he remained liable for all unsatisfied claims.[54] Without an accompanying discharge of the remaining, unpayable debt, this first effort at bankruptcy remained incomplete.

As the weaknesses of the 1542 statute became increasingly apparent, Parliament saw the need to expand upon that initial effort. Thus in 1570, it promulgated a more comprehensive bankruptcy act that superseded the 1542 statute and became the keystone of bankruptcy law well into the colonial period.[55] Foremost among its improvements was provision for the equal distribution of the debtor's assets among the creditors.[56] In *Smith v. Mills* (known as The Case of Bankrupts), the court of Queen's Bench had occasion to discuss this aspect of the 1570 bankruptcy act in holding that a bankrupt debtor cannot prefer one creditor over another in paying his debts from his bankrupt estate.[57] That Court observed that:

> [T]he intent of the makers of the said Act, expressed in plain words, was to relieve the creditors of the bankrupt equally, and that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst the creditors, having regard to the quantity of their several debts; so that one should not prevent the other, but all should be *in æquali jure*.[58]

Despite this significant step toward a bankruptcy system recognizable to a modern practitioner, the reformed Elizabethan statute continued to lack provisions allowing for the discharge of hopeless debt.[59] Thus, this bankruptcy regime continued to suffer from the lack of a discharge mechanism.

Because the threat of imprisonment remained real even after the Elizabethan proto-bankruptcy statutes came into effect,[60] the system continued to be "fraught with inefficiencies."[61] Chief

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[54] *See* Cohen, *supra* note 19, at 6-7; *see also* Levinthal, *supra* note 43, at 16.

[55] *See* Tabb, *supra* note 18, at 7-8; *see also* 13 Eliz., c. 7 (1570).

[56] *Id.*

[57] Smith v. Mills (1584) 2 Co. Rep. 25a (QB).

[58] *Id.* at 464-68.

[59] *See* Cohen, *supra* note 19, at 7.

[60] *See, e.g., id.*

[61] Cole, *supra* note 26, at 272.

among these was that the bankruptcy statutes, like the earlier debtor statutes, failed to distinguish between solvent and insolvent debtors.[62] For insolvent debtors, imprisonment to coerce repayment had the paradoxical effect of depriving them of the only means with which to earn funds to repay the debt.[63] Further, creditors retained the obligation of providing sustenance for their imprisoned debtors, which served to increase further the debt owed the creditor and making release even less probable for truly insolvent debtors.[64] Although the institutional efficacy of debtor's prison was in large part dependent on an insolvent debtor's plight compelling his friends and family to repay debts on his behalf, where the money was not forthcoming—or simply not there—the institution served only to foreclose the debtor's only option for earning repayment funds.[65]

The inescapable predicament of truly insolvent debtors did not go unnoticed, although it took many decades before Parliament took action to reform the bankruptcy system established during the sixteenth century.[66] The necessary fix, obvious to students of modern practice, was the introduction of procedures permitting the discharge of unpayable debt. As Levinthal notes, "[t]he discharge was the result of the gradual realization of the fact that in many cases the bankrupt might be properly an object of pity, and that the unlimited incarceration of the debtor did not tend to reimburse the creditors at all."[67]

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[62] *Id.*

[63] Cohen, *supra* note 19, at 7. One pamphlet from the seventeenth century, representative of views held by debtor imprisonment critics of the time, contended that it was "not agreeable to the Rule of Justice, to thrust all kind of Debtors into prison together in a heap, without respect to [whether they were] . . . more or less guilt[y] of fraud or obstinacy." *Id.* (citing *A Petition to the Kings Most Excellent Majestie, the Lords Spirituall and Temporall and Commons of the Parliament Now Assembled, Wherein is Declared the Mischiefs and Inconveniences Arising to the King and Commonwealth by the Imprisoning of Mens Bodies for Debt* 11 (London, 1622)).

[64] Cole, *supra* note 26, at 272; *see supra* note 31 and accompanying text.

[65] *Id.* Additionally, any dependents of the imprisoned debtors became responsible for procuring their own livelihood as the creditors' sustenance obligations extended only to the imprisoned debtors themselves. As a result, family and dependents of insolvent debtors unable to obtain income independently became burdens on their communities reliant on public charity or individual almsgiving. *Id.*

[66] *See infra* text accompanying notes 69-73.

[67] Levinthal, *supra* note 43, at 18.

"Discharge" had a dual meaning in bankruptcy context well into the time of the American Founding: it could refer either to the release of the debtor from prison or the forgiveness of the debts themselves.[68] Unsurprisingly, this first meaning entered English doctrine long before the second did. In 1649, Parliament passed "An Act for discharging Poor Prisoners unable to satisfie their Creditors" whose purpose was to "discharge the said party of and from his or her Imprisonment," but said nothing of also dispelling the debt.[69] Only in 1705, when Parliament promulgated "An act to prevent frauds frequently committed by bankrupts," did the English bankruptcy scheme expand to encompass both meanings of discharge.[70] Under this statute, an insolvent trader who "within the time limited by this act, surrender[s] . . . to the major part of the commissioners therein named, and in all things conform[s] as in and by this act is directed, . . . shall be discharged from all debts . . . due and owing at the time [he or she] did become bankrupt[.]"[71]

In essence, bankrupts who cooperated with bankruptcy proceedings could have some debts they were incapable of paying discharged pursuant to this act. Once discharged, debtors became free from further harassment or imprisonment by their now-former creditors. The incentives created by the introduction of a discharge system provided critical balance to the English bankruptcy scheme. As the discharge provision limited the liability of bankrupts, it incentivized them to submit voluntarily to the proceedings provided for in the statute.[72]

The statute's preamble, however, strongly suggests that the inclusion of a discharge function did not arise out of Parliament's benevolence for down-on-their-luck merchants. It declares that bankruptcy resulted "not so much by reasons of losses and unavoidable misfortunes," but instead followed from the "intent to defraud and hinder their creditors of their just debts and duties to

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[68] *See* 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 293 (3d ed. 1765) (defining "discharge" as both "to exonerate" and "[t]o clear a debt by payment").

[69] An Act for Discharging Poor Prisoners Unable to Satisfie Their Creditors, (1649) II ACTS & ORDS. INTERREGNUM, 240-41 (Eng.).

[70] An Act to Prevent Frauds Frequently Committed by Bankrupts, 1705, 4 Ann., c. 17 (Eng.) [hereinafter 4 Ann., c. 17].

[71] *Id.* at § 7.

[72] *See* Cohen, *supra* note 19, at 7.

them due and owing."[73] Regardless of the legislative motivation for including discharge provisions, their inclusion incentivized both creditors and debtors to participate in the bankruptcy process. In doing so, the English bankruptcy system matured into the form most recognizable to the legal thinkers charged with establishing America's government.

This bankruptcy scheme—one that emphasized creditor's rights against debtors but permitted debtors to, through process, discharge their debts—formed the baseline understanding the Framers had in mind when they convened the Constitutional Convention in 1787.[74] But they faced a problem no other legislative body designing a bankruptcy scheme had yet addressed: rather than one sovereign responsible for administering a single system of discharge, America had a loose confederacy of thirteen separate sovereigns, each with their own laws and policies governing insolvent debtors.

## II. AMERICA UNDER THE ARTICLES OF CONFEDERATION: DISCHARGE AND MULTIPLE SOVEREIGNS

In modern America, it is settled law that under the Supremacy Clause, a discharge order issued by a federal bankruptcy court is binding on states no less than other creditors.[75] Under the Articles of Confederation, however, the situation was much different: absent a strong central government with the power to establish uniform bankruptcy laws, the separate states each had their own bankruptcy scheme.[76] Indeed, "[t]he only consistency among debt laws in the eighteenth century was that every colony, and later every state, permitted imprisonment for debt[.]"[77] With the consequences for debt so high, debtors understandably relied on the bankruptcy process, and specifically discharge, to free them from insurmountable debt. Because travel between the states was common even in Articles-era America, the

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[73] 4 Ann., c. 17, at *supra* note 70. Cohen observes that similar language is present in the later bankruptcy statutes of 1718 and 1732. *See* Cohen, *supra* note 19, at 7.

[74] *See* NOEL, *supra* note 15, at 67.

[75] U.S. CONST. art. VI, § 2. *See* Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 448 (2004).

[76] *See* NOEL, *supra* note 15, at 67-68. *See generally id.* at 33-66.

[77] BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 79 (2002).

value of a bankruptcy discharge order was directly related to whether other states would honor it.

In theory, states were obligated to recognize these orders. The Articles of Confederation provided that "[f]ull faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State."[78] In practice, however, states often ignored this mandate and refused to recognize other states' discharge orders.

For instance, in the case of *James v. Allen*, decided under the Articles of Confederation, a debtor released from prison in New Jersey was later arrested in Pennsylvania for the same debt.[79] The debtor argued that because New Jersey was a fellow state in the Confederation, the Pennsylvania court was "under an additional obligation to pay respect to the decisions of the courts there, by the terms of the articles of confederation."[80] The Pennsylvania court observed that the insolvent laws of each state are different and "have never been considered as binding out of the limits of the state that made them."[81] The court ultimately distinguished the full faith and credit requirement in the Articles by interpreting it to mean only that each state must accept the records of another state as proof of the acts they record.[82] Under the Pennsylvania court's jurisprudence, debtors like the one in *James* found their debts to be an insuperable shackle even after successfully obtaining a discharge in one state.

The *James* case illustrates but one instance of what was undoubtedly a common problem. Given the chaos caused by the disparity in bankruptcy and insolvency laws among the states, one of the many tasks faced by the Framers in the 1787 Constitutional Convention was to unify treatment of debtors among the states without encroaching on each state's sovereignty over its citizens. Although a bankruptcy system had never before existed within a federal form of government, the records from the convention and the structure of the Constitution it produced indicate that the Framers created a solution to the uniformity problem without

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[78] ARTICLES OF CONFEDERATION of 1781, art. IV, para. 3.

[79] 1 U.S. (1 Dall.) 188, 188-89 (Pa. Com. Pl. 1786).

[80] *Id.* at 191.

[81] *Id.*

[82] *Id.* at 191-92.

infringing on the most emblematic hallmark of state sovereignty: state sovereign immunity.

## III. FRAMING AN ANSWER TO THE UNIFORMITY QUESTION

Despite the *Katz* majority's characterization, the states did not "acquiesce[] in a subordination of whatever sovereign immunity they might otherwise have asserted" in the bankruptcy context by ratifying the Bankruptcy Clause.[83] The Framers never fathomed that by granting Congress the power to create uniform bankruptcy laws for the whole country, the states would necessarily lose their sovereign immunity with respect to bankruptcy and be open to suit by private individuals without their consent, regardless of whether the specific action was in rem. Instead, they intended the bankruptcy power to be like the other grants of congressional power contained in Article I, Section 8: limited powers designed to remedy the weaknesses of the Articles of Confederation by creating a strong central government whose legislature alone had the power to promulgate laws in certain fields.

### *A. The Madisonian Framework for Uniformity*

James Madison recognized the weaknesses of the Articles of Confederation and believed that greater national uniformity in laws affecting the entire nation would improve conditions. In observing the need for these changes in the preface to his records of the Constitutional Convention, Madison also emphasized several reasons that the states needed protection from private suit:

> [T]he radical infirmity of "the arts. of Confederation." was the dependance of Congs, on the voluntary and simultaneous compliance with its Requisitions, by so many independant communities, each consulting more or less its particular interests & convenience and distrusting the compliance of the others . . . . The close of the war however brought no-cure for the public embarrasments. The States relieved from the pressure of foreign danger, and flushed with the enjoyment of independent and sovereign power; (instead of a diminished

[83] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378 (2006).

> disposition to part with it,) persevered in omissions and in measures incompatible with their relations to the Federal Govt. and with those among themselves .... Among the defects which had been severely felt was that of a uniformity in cases requiring it, as laws of naturalization, bankruptcy, a Coercive authority opperating on individuals and a guaranty of the internal tranquility of the States[.][84]

Madison observes that the Articles of Confederation's lack of a uniform national bankruptcy system and the power to enforce it equally among the states resulted in a situation in which the states acted as independent sovereigns rather than coordinate sovereigns in a national system. His words imply that he thought the states, "flushed with the enjoyment of independent and sovereign power," saw little need to consider the well-being of the Confederation or their sister states in the creation and enforcement of their own laws.[85]

With respect to bankruptcy specifically, Madison recognized that the states collectively refused to acknowledge discharges and other decisions by sister states, and tacitly attributed that result—at least in part—to the postwar weakness of the states.[86] The states used their newfound sovereign power to preserve their own interests above those of other states, regardless of any language in the Articles requiring a contrary result.[87]

The solution Madison envisioned involved creating a means for national uniformity in bankruptcy law while guaranteeing the "internal tranquility of the States"—a solution that could not involve states sacrificing their sovereign immunity and opening themselves to private suit, which would be a certain route to disrupting internal tranquility when the states were filled with postwar debtors claiming past wages and other reparations from the state treasuries.[88]

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[84] James Madison, *Preface to Debates in the Convention of 1787, reprinted in* 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 542-43, 548 (1911) [hereinafter FARRAND'S RECORDS].

[85] *Id.* at 542-43.

[86] *See id.* at 548.

[87] *See id.* (acknowledging that depreciated paper money resulting from war debt caused state to violate contracts, which affects other states' rights as creditors).

[88] *Id.*

Although the extant records demonstrate that Framers intended bankruptcy judgments to be binding on all the states, nothing therein suggests that any participants in the 1787 convention believed establishing such uniformity would require states to surrender any aspect of their sovereign immunity in this context.[89] In fact, merely allowing discharge orders to bind the states provided a stronger protection for debtors against the sovereign than English debtors of the time had.[90] In England, the King and his agents were not governed by bankruptcy decisions; as Blackstone records, "the king is not . . . within the statutes of bankrupts . . . for if, after the act of bankruptcy committed, and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby."[91]

This contrast suggests that the Framers believed that making the states subject to the results of bankruptcy proceedings provided ample protection for both creditors and debtors—the additional step of stripping states of sovereign immunity and exposing them to private suit in the bankruptcy context was unnecessary to protect creditors and debtors. Such appears to be Alexander Hamilton's understanding in The Federalist 81, in which he refutes claims that the Constitution purports to remove state sovereign immunity:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States.[92]

As a review of the convention's history demonstrates, no such surrender of immunity was contemplated in the constitutional plan set forth in the 1787 Convention.

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[89] *See infra* Parts III.B, IV.B.

[90] *See generally supra* Part I.B.

[91] 2 BLACKSTONE, *supra* note 13, at *486; *see also id.* at *475 ("[A] *receiver of the king's taxes* is not capable, [] as such, of being a bankrupt; lest the king should be defeated of those extensive remedies against his debtors which are put into his hands by the prerogative.").

[92] THE FEDERALIST No. 81, at 411 (Alexander Hamilton) (Ian Shapiro ed., 2009).

### *B. The Bankruptcy Clause's Origins During the Constitutional Convention*

Despite the recognized need for a means of creating a uniform system of bankruptcy laws, and in contrast to the *Katz* majority's characterization, the topic of bankruptcy received markedly little attention during the Constitutional Convention—and certainly less attention than a provision purporting to strip states of sovereign immunity would have been expected to receive.[93]

As Justice Story, one of the last great contemporary commentators on the Constitution, observed, "[t]he power to pass laws on the subject of bankruptcies was not in the original draft of the constitution."[94] Moreover, in the entirety of The Federalist Papers, there is but one discussion of the subject of bankruptcy.[95] There, Madison observes in conclusory fashion that granting Congress the power to establish "uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds, where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question."[96]

As these observations suggest, Madison and the other Framers recognized the need for a uniform national bankruptcy power, but did not contemplate that power would require the states to forfeit their sovereign immunity.[97] In light of this treatment, the Framers' vision of the bankruptcy power was that it would be just one of many routine grants of exclusive national authority to legislate in fields that were once subject to state legislation.[98] Because the Framers viewed the bankruptcy power as an uncontroversial provision, the fact that it was proposed late in the convention and adopted with little fanfare is unsurprising.

The Constitutional Convention was scheduled to begin on May 14, 1787, but nearly two more weeks passed until enough

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[93] *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 373-74 (2006).

[94] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1100 (1833).

[95] *Id.*

[96] THE FEDERALIST No. 42, at 218-19 (James Madison) (Ian Shapiro ed., 2009).

[97] *Id.*

[98] *See* U.S. CONST. art. I, § 8.

delegates arrived in Philadelphia to begin business on May 25.[99] The entire summer had almost elapsed before Charles Pinckney of South Carolina first mentioned bankruptcy on Wednesday, August 29.[100] Pinckney, who had received his education in England and was intimately familiar with English bankruptcy law,[101] and perhaps knew of the plight of debtors such as the defendant in *James v. Allen*, proposed that the words "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange" be included in Article XVI of the draft Constitution.[102]

At the time, Article XVI contained the draft Constitution's version of the full-faith-and-credit language originally included in the Articles of Confederation—the authority on which the *James v. Allen* debtor relied.[103] The draft constitutional language then read: "Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State."[104] The representatives voted nine to two to submit Pinckney's motion to the Committee of Detail.[105]

On the following Saturday, September 1, the Committee of Detail reported its recommendations for Wednesday's motions.[106] John Rutledge, Pinckney's fellow South Carolina delegate, chair of the committee, and future chief justice of the Supreme Court, informed the convention that Pinckney's proposed language, "To establish uniform laws on the subject of bankruptcies," should not be included in the Article XVI full-faith-and-credit section, but instead should be inserted in Article VII, Section 1—which recorded the powers of Congress—alongside a clause granting Congress power to create uniform naturalization rules.[107]

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[99] *See* NOEL, *supra* note 15, at 77.

[100] *Id.* at 79.

[101] *See* James M. Olmstead, *Bankruptcy a Commercial Regulation*, 15 HARV. L. REV. 829, 831 (1902).

[102] 2 FARRAND'S RECORDS, *supra* note 84, at 447.

[103] *Id.* at 447 n.2; *see also* James v. Allen, 1 U.S. (1 Dall.) 188, 188-89 (Pa. Com. Pl. 1786).

[104] 2 FARRAND'S RECORDS, *supra* note 84, at 447 n.2.

[105] *Id.* at 448.

[106] *Id.* at 483.

[107] *Id.* at 483 & n.1; *see* Olmstead, *supra* note 101, at 831.

The Bankruptcy Clause was taken up for the final time on Monday, September 3, when the full body of delegates debated its inclusion.[108] The debate itself was brief; Madison's notes record only two comments. Roger Sherman of Connecticut was opposed to the provision because bankruptcies were occasionally punishable by death in England, and he did not wish to grant Congress such power.[109] Gouverneur Morris, representing Pennsylvania, acknowledged the delicacy of the bankruptcy question, but nonetheless agreed to the provision because he did not see potential for abuse by Congress.[110] When the vote was called, only Connecticut opposed including the clause.[111] The Bankruptcy Clause was never again discussed separately during the Philadelphia convention.[112] On September 17, it was signed and adopted as part of the pre-ratification Constitution.[113]

Such is the entirety of the Bankruptcy Clause's history in the Constitutional Convention. In less than one week, the Bankruptcy Clause was proposed, edited, debated, and accepted. Of the few records relating to bankruptcy made during the Constitutional Convention, none suggest that any of the delegates believed the Bankruptcy Clause would operate to strip states of their sovereign immunity.[114] Had the delegates to the convention imagined that by accepting this provision, they were opening their states to suit by private individuals, one would expect at least some discussion on that point. Instead, the records suggest that the discussion focused on the scope of Congress's power to legislate bankruptcy policy, which is consistent with the Framers' goal of creating a means for a uniform bankruptcy system without infringing on state sovereign immunity.[115] The Bankruptcy Clause's location in

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[108] *See* 2 FARRAND'S RECORDS, *supra* note 84, at 489.

[109] *Id.* ("Mr. Sherman observed that Bankruptcies were in some cases punishable with death by the laws of England— & He did not chuse to grant a power by which that might be done here.").

[110] *Id.* ("Mr Govr Morris said this was an extensive & delicate subject. He would agree to it because he saw no danger of abuse of the power by the Legislature of the U— S.").

[111] *Id.*

[112] *See* NOEL, *supra* note 15, at 77.

[113] *Id.*

[114] *See supra* text accompanying notes 93-112.

[115] *See supra* text accompanying notes 101-10.

the final Constitution's structure and its treatment in the decades following ratification support this conclusion.

### *C. Structural Implications of the Bankruptcy Clause's Placement*

The Committee of Detail's decision to include the Bankruptcy Clause in the congressional power section rather than the full-faith-and-credit section of the Constitution is significant because the bankruptcy power is located alongside other grants of exclusive power for Congress to legislate uniformly in a particular area of law. The Bankruptcy Clause remains where the Committee of Detail placed it, sharing its constitutional real estate with the Naturalization Clause: "To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."[116] Nor are these clauses alone: Article I, Section 8 contains twenty-six government functions which "by consent of the sovereign people their Congress has power to control," in large part because the powers contained in Article I, Section 8 "can never be properly administered by more than one authority."[117]

But no one, during the Founding Era or thereafter, has seriously contended that the states forfeited their sovereign immunity and consented to be sued by private individuals for damages by ratifying the Naturalization Clause. Even Justice Stevens, author of the *Katz* majority opinion, explicitly acknowledged the lack of distinction between the bankruptcy power and the other Article I, Section 8 powers:

> I see no reason to distinguish among statutes enacted pursuant to the power granted to Congress to regulate commerce among the several States . . . the power to establish uniform laws on the subject of bankruptcy, [or] the power to promote the progress of science and the arts by granting exclusive rights[.][118]

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[116] U.S. CONST. art. I, § 8, cl. 4.

[117] NOEL, *supra* note 15, at 77.

[118] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 93-94 (1996) (Stevens, J., dissenting).

The Bankruptcy Clause cannot be distinguished from its sister clauses because they are intended to function in a federal system. As Hamilton maintains in The Federalist 32, because "the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."[119] The only power the Bankruptcy Clause purports to delegate to Congress is the power to legislate uniform laws on bankruptcies.[120] Accordingly, states only lose their sovereign power to legislate bankruptcy laws when Congress passes national bankruptcy laws; they retain their sovereign immunity in the bankruptcy context because it is a right of sovereignty they had before the Constitution's ratification and this right has not been exclusively delegated to the United States.

### *D. Implications from the Bankruptcy Clause's Immediate Postratification History*

The postratification history of the Bankruptcy Clause further supports this conclusion. Congress's languid attitude toward the bankruptcy power in the years following ratification demonstrates that the founding generation did not view a national bankruptcy scheme to be so pressing as to justify constitutional abrogation of state sovereign immunity.

Writing in 1833, Justice Story lamented Congress's failure, beyond the short-lived Bankruptcy Act of 1800,[121] to enact the sort of long-term, national bankruptcy law envisioned by the Framers: "One of the most pressing grievances, bearing upon commercial, manufacturing, and agricultural interests at the present moment, is the total want of a general system of bankruptcy. It is well known, that the power has lain dormant, except for a short period, ever since the [C]onstitution was adopted[.]"[122] Indeed, for all but

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[119] THE FEDERALIST No. 32, at 155 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[120] *See* U.S. CONST. art. I, § 8, cl. 4.

[121] Passed on April 4, 1800, the Act was effective for only five years following its narrow 48–48 vote passage in the House of Representatives in which the Speaker cast the deciding vote. *See* NOEL, *supra* note 15, at 130.

[122] 3 STORY, *supra* note 94, § 1103 at 8; *see also id.* § 1105, at 9 ("It cannot but be matter of regret, that a power so salutary should have hitherto remained (as has been already intimated) a mere dead letter. It is extraordinary, that a commercial nation,

sixteen of the first 109 years following the Constitution's ratification, states were free to promulgate and follow their own bankruptcy legislation despite the Constitution's exclusive grant of bankruptcy power to Congress.[123]

Even though the Bankruptcy Clause provided Congress the exclusive power to legislate uniform bankruptcy laws, the Supreme Court, addressing a state bankruptcy law after the Bankruptcy Act of 1800's repeal, held that state bankruptcy laws were legitimate absent such a uniform congressional act.[124] Writing for the Court, Chief Justice John Marshall held that "until the power to pass uniform laws on the subject of bankruptcies be exercised by [c]ongress, the [s]tates are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the first article of the constitution of the United States."[125] The states thus had the Supreme Court's blessing to continue enacting and enforcing their own bankruptcy legislation despite the Framers' goals in the Constitutional Convention and the existence of the Bankruptcy Clause.

The lack of congressional action in light of the continued uncertainty caused by disparate state bankruptcy laws strongly suggests that the states did not surrender their sovereign immunity by ratifying the Bankruptcy Clause because the clause

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spreading its enterprise through the whole world, and possessing such an infinitely varied, internal trade, reaching almost to every cottage in the most distant states, should voluntarily surrender up a system, which has elsewhere enjoyed such general favour, as the best security of creditors against fraud, and the best protection of debtors against oppression."); NOEL, *supra* note 15, at 111 ("The misery, the wretchedness, the suffering, the despair, the crime and the injustice of those years are now scarcely comprehensible. And it was all due to the timidity, ignorance, and conservatism of the early law-makers of the Republic [who] did not legislate according to their convictions.").

[123] *See* Tabb, *supra* note 18, at 13-14 ("During this period, many states stepped into the void and passed their own bankruptcy legislation. A federal bankruptcy law was in existence only from 1800 to 1803, from 1841 to 1843, and from 1867 to 1878. Permanent federal bankruptcy legislation did not go into effect until 1898.").

[124] *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 196-97 (1819).

[125] *Id.*; *see also* 3 STORY, *supra* note 94, at 14 ("[T]he power in congress is not exclusive; that when congress has acted upon the subject, to the extent of the national legislation the power of the states is controlled and limited; but when unexerted, the states are at liberty to exercise the power in its full extent, unless so far as they are controlled by other constitutional provisions. And this . . . opinion is now firmly established by judicial decisions.").

permitted states to continue enacting the same sort of legislation Congress could have enacted. If the *Katz* majority's interpretation of the Bankruptcy Clause is correct, then for those ninety-three years without a congressional bankruptcy act, the states would have been subject to involuntary private suit in their own courts and under their own laws—a concept repugnant to American notions of sovereign immunity.[126] After all, "sovereign immunity was long established and unquestioned" in the context of a sovereign sued by private parties in its own courts.[127]

The initial need for a uniform bankruptcy power in light of the Articles of Confederation, the Bankruptcy Clause's inception and passage during the Constitutional Convention, its position in the constitutional structure, and the clause's postratification history all suggest that the Framers intended the congressional bankruptcy power to be nothing more than a grant of legislative authority. Nothing in the history of the bankruptcy power itself suggests that the Framers ever envisioned it as a constitutional abrogation of state sovereign immunity in matters concerning Congress's bankruptcy power. A review of the wider social and political environment surrounding the ratification debates provides additional support for the conclusion that the Framers did not intend the bankruptcy power to divest states of sovereign immunity in the bankruptcy context.

## IV. PUBLIC DEBT AND THE POST-REVOLUTION ENVIRONMENT

### *A. Fear Among Postwar States*

In the uncertain, debt-ridden years following the Revolutionary War, states were jealous of their treasuries and unlikely to adopt a Constitution that would expose them to suit by

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[126] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 742 (1999). Absent congressional action, and thus a national bankruptcy act, bankruptcy cases would have been heard in the state courts as they had been prior to the Constitution's ratification; *see also* *id.* at 730-54.

[127] *Id.* at 742; *see also* 1 SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 502 (1898) ("[The king] [cannot] be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his court is, we may say, an accident.").

private individuals for money.[128] In his argument for ratification in *The Federalist 81*, Hamilton assures readers that the Constitution will not strip states of their sovereign immunity and places particular emphasis on the problem of public debt:

> [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State[.][129]

Hamilton's evocation of waging war against a debtor state in the context of a contract between a sovereign and an individual is likely an intentional rhetorical device. The public debt was among the foremost social problems in the post-Revolution United States. As such, states considering ratification would weigh heavily the new Constitution's prospective effects on their sovereign debt in making their ratification decisions.

The states had good reason to be concerned about public debt. After all, as at least one contemporary writer put it, "[t]he grand sinew of war is money."[130] The American Revolution was financed on credit, primarily in the form of paper currency issued by the Continental Congress and state governments.[131] This issuance formed a sort of "currency finance" system in which Congress and the states issued credit and loans to purchase supplies and pay soldiers with the promise of future interest or redemption.[132] The

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[128] *See, e.g.*, MANN, *supra* note 77, at 169.

[129] THE FEDERALIST No. 81, at 411-12 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[130] CONSIDERATIONS ON THE SUBJECT OF FINANCE: IN WHICH THE CAUSES OF THE DEPRECIATION OF THE BILLS OF CREDIT EMITTED BY CONGRESS ARE BRIEFLY STATED AND EXAMINED, AND A PLAN PROPOSED FOR RESTORING MONEY TO A CERTAIN, KNOWN VALUE 1 (Philadelphia, 1779) [hereinafter CONSIDERATIONS ON THE SUBJECT OF FINANCE].

[131] MANN, *supra* note 77, at 169.

[132] *Id.*

value of this currency, however, was "in direct relation to the confidence of those who held it that the issuing government would fulfill its pledge to withdraw the money from circulation[,]" and those promises were impossible for states to fulfill during and in the aftermath of the war.[133] A sharp decline in the currency's value followed, exacerbated by increasing inflation caused by large-scale government war purchases.[134]

Thus, when the war ended and the soldiers and suppliers paid on credit came to collect, the states were understandably reluctant to do anything that would leave their treasuries vulnerable to private suits by individuals. Those individuals were in dire straits and would be willing to use any legal option available to collect their due. The anonymous author of the 1779 pamphlet *Considerations on the Subject of Finance*, who was, perhaps, himself among this unfortunate class, describes their plight:

> Thousands among the most worthy part of the community, who, either by their own industry or that of their ancestors, have acquired what they fondly hoped would have supported themselves and their families in affluence . . . see their fairest hopes on the brink of destruction, and find themselves within a step of the most wretched poverty and distress. This situation must be the more mortifying to many of them as, through zeal in the common cause of America, and confidence in the conditions of our public affairs, they have brought themselves into it by risking their all upon the success of the revolution, and the wisdom and good management of those to whose guidance it was committed[.][135]

### *B. The Framers' Assurances During Ratification*

To protect their treasuries, states relied on their sovereign immunity. As such, when the proposed Constitution was submitted to the states, those that ratified the Constitution relied heavily on the assurances of prominent Framers who, writing in *The Federalist Papers* and speaking at state ratifying conventions, said that states could not be haled into court by private

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[133] *Id.* at 170.

[134] *Id.*

[135] CONSIDERATIONS ON THE SUBJECT OF FINANCE, *supra* note 130, at 2.

individuals without their consent under the text of the Constitution.

By way of example, Hamilton, in *The Federalist 81*, assured states that because "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*[,]" they need not fear that the Constitution would strip them of their sovereign immunity.[136] Likewise, in addressing the important Virginia ratifying convention, Madison said simply that "[i]t is not in the power of individuals to call any state into court."[137] Later in the Virginia debates, John Marshall clarified and broadened Madison's declaration, saying "I hope that no gentleman will think that a state will be called at the bar of the federal court . . . . It is not rational to suppose that the sovereign power shall be dragged before a court."[138]

Although these Framers were addressing sovereign immunity generally under Article III in the federal system, their statements demonstrate they did not envision any abrogation of state sovereign immunity in the bankruptcy proceedings, regardless of their in rem nature. After all, in the indebted states' tense postwar situation, in rem jurisdiction over assets posed as significant a threat as any in personam claim directly implicating their sovereignty.[139] The fact that the Framers failed to additionally assure states that the Article I bankruptcy power would not necessitate a forfeiture of their sovereign immunity is consistent with the limited discussion of the Bankruptcy Clause at the Constitutional Convention and the postwar, debt-heavy environment in which the ratifying states found themselves. It simply went without saying.

The Framers never addressed the issue of curtailed sovereign immunity with respect to the Bankruptcy Clause because they did not understand the clause to have such power over states'

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[136] THE FEDERALIST No. 81, at 411 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[137] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 533 (Jonathan Elliot ed., 2d ed. 1836).

[138] *Id.* at 555.

[139] *Contra* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378 (2006) ("[T]he jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction.").

inherent sovereign rights. To suppose otherwise would be to envision a Constitution that no debtor state would ratify.

## CONCLUSION

The *Katz* majority's interpretation of the Article I, Section 8 Bankruptcy Clause does not comport with the Framers' understanding of the clause as evidenced by the Constitutional Convention's history and the postwar social environment of the ratifying states. Far from purporting to strip states of their sovereign immunity with respect to all proceedings related to the congressional bankruptcy power, the Bankruptcy Clause merely provides Congress the power to legislate a uniform bankruptcy system binding on all the states. Under this view, the bankruptcy power is simply a grant of exclusive legislative authority like the other powers contained in Article I, Section 8. Given its position as an aberration in the Supreme Court's sovereign immunity jurisprudence, and that it was a five-to-four decision with a departing Justice casting the deciding vote—an unexplained vote that was inconsistent with her prior decisions[140]—*Katz* stands ready to be overruled.

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[140] *See* CHEMERINSKY, *supra* note 10, at 442-43.