

A departure from our usual format to alert readers to the Supreme Court's granting certiorari in two states' rights cases today.

The first is *Tennessee Student Assistance Corp. v. Hood*. The question is whether Congress can override states' sovereign immunity under the Bankruptcy Clause.

As most of you know, the Court has said that Congress cannot override immunity under other powers found in Article I of the Constitution, including the Commerce Clause and the Patent Clause. The only source of authority that the Court has recognized as giving Congress the power to authorize suits for money damages against unconsenting states is Section 5 of the Fourteenth Amendment.

Every previous circuit to rule on the question had said that the Bankruptcy Clause doesn't allow Congress to override states' sovereign immunity, relying on the Court's blanket statement in *Seminole Tribe* that *no* Article I power gives Congress that capacity. The Sixth Circuit in *Hood* disagreed, because the Bankruptcy Clause says Congress may "establish *uniform* laws on the subject of bankruptcies throughout the United States." The word "uniform," as well as historical evidence that Congress was intended to have plenary authority to grant relief to debtors, convinced the Sixth Circuit to depart from its sisters.

This case involves an attempt to discharge a student loan along with other debts in a consumer bankruptcy; it exemplifies one common circumstance in which a state can be a significant creditor and often an essential party if the bankruptcy process is to function effectively.

So now Tennessee has two 11th Amendment cases this Term; the other is *Tennessee v. Lane*, which deals with an override of sovereign immunity under Section 5 in the ADA context.

The second case is *Hibbs v. Winn*, making this the second Term in a row with a states' rights case from the Ninth Circuit with a party named Hibbs. The case challenges, under the Establishment Clause, a tax credit that Arizona gives for contributions to parochial schools. The question is whether the Anti-Injunction Act or general principles of comity preclude a federal court from enjoining the state from allowing the tax credit. The Ninth Circuit said that since the injunction in this case actually increased the state's tax revenue and didn't enjoin it from collecting taxes from anyone, it was permissible for a federal court to grant it.

These two cases, plus *Tennessee v. Lane*, plus *Frew v. Hawkins* (which raises several questions regarding enforcement of consent decrees that states voluntarily agree to in federal court), give the Court a significant number of states' rights cases this Term.