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ARTICLE

DEFINING THE LIMITS OF FEDERAL COURT JURISDICTION OVER STATES IN BANKRUPTCY COURT

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I. INTRODUCTION

Sovereign immunity jurisprudence has always been, and probably always will be, a confusing jumble of assumptions that often seem inconsistent and incomprehensible.[1] Despite the confusion, understanding sovereign immunity has become increasingly important in the wake of the United States Supreme Court's decision in *Seminole Tribe of Florida v. Florida*.[2] Although *Seminole Tribe* was widely reported in the press as an Indian gambling case, the case actually signals a dramatic shift in the Supreme Court's Eleventh Amendment jurisprudence.[3] The constitutional issues raised in *Seminole Tribe* amount to nothing less than a reinterpretation of the fundamental balance of power between the federal and state governments as embodied in the United States Constitution and its amendments,[4] and the power of Congress to affect that balance.[5]

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1. *See* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1134 (1996) (overruling *Union Gas*); United States v. Nordic Village, Inc., 503 U.S. 30, 42 (1992) (Stevens, J., dissenting) (noting that sovereign immunity is both favored and disfavored by judges); Pennsylvania v. Union Gas Co., 491 U.S. 1, 25 (1989) (Stevens, J., concurring) (commenting on Court's inability to develop coherent doctrine of Eleventh Amendment immunity (citing Hans v. Louisiana, 134 U.S. 1, 10 (1890)); *see also infra* note 49 (listing immunity cases and statistics).

2. 116 S. Ct. 1114 (1996).

3. *Compare Union Gas*, 491 U.S. at 22–23 (finding congressional authority to abrogate Eleventh Amendment immunity in Interstate Commerce Clause of Article I of United States Constitution), *with Seminole Tribe*, 116 S. Ct. at 1134 (overruling *Union Gas* on grounds that Article I powers do not authorize congressional abrogation of Eleventh Amendment immunity). The shift in power is also evident in the Court's recent Tenth Amendment cases. *See* New York v. United States, 505 U.S. 144, 188 (1992) (declaring part of Low-Level Radioactive Waste Policy Act unconstitutional under Tenth Amendment); *see also* United States v. Lopez, 115 S. Ct. 1624, 1633 (1995) (declaring Gun-Free School Zones Act unconstitutional as outside scope of congressional authority under Interstate Commerce Clause).

4. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (describing principle embodied in Eleventh Amendment as "constitutionally mandated balance of power adopted to ensure protection of fundamental liberties").

5. Depending on one's viewpoint, the debate raised in *Seminole Tribe* involves either: (1) the power of Congress to subject states to suit by private parties in federal court, *see Seminole Tribe*, 116 S. Ct. at 1133 (Stevens, J., dissenting) (opining that case is about Congress's power to create cause of action against states), or (2) the power of Congress to amend the Constitution by expanding federal court jurisdiction as set forth in Article III of the Constitution, *see Union Gas*, 491 U.S. at 39–40 (Scalia, J., concurring in part and dissenting in part) (criticizing plurality opinion for allowing Congress to expand federal court jurisdiction beyond Article III by relying on Article I powers). Interestingly, Justice Stevens has consistently admitted that Congress does not have the constitutional authority to abrogate what he describes as "the legitimate scope of the Eleventh Amendment limit on

The Court's decision will undoubtedly awaken sleeping dogs and occasion great debate.[6] The purpose of this Article is to make that debate accessible to those persons interested in this issue.

This Article discusses sovereign immunity as it pertains to states and state agencies,[7] by specifically focusing on immunity issues arising under the Bankruptcy Code.[8] The Article first addresses the historical underpinnings of the current state of the law, both with respect to sovereign immunity and the Bankruptcy Code. The Article then examines the ways in which a state can become involved in a bankruptcy case to show how such proceedings may be

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federal judicial power" because "a statute cannot amend the Constitution." *Id.* at 24. Thus, Justice Stevens does not fundamentally disagree with the *Union Gas* dissent or the *Seminole Tribe* majority that Congress may not use Article I powers to expand the scope of federal court jurisdiction under Article III. Instead, Justice Stevens's disagreement is with the Court's interpretation of the scope of the Eleventh Amendment and the extent to which it limits Article III jurisdiction in the first place.

6. Signs of the Court's interest in the balance of power between state and federal governments are evident almost daily. *See, e.g.*, Laurie Asseo, *Justices Question Brady Law Requirement*, AUSTIN AM. STATESMAN, Dec. 4, 1996, at A17 (quoting Justice O'Connor questioning "the notion that the federal government can just commandeer state officials to carry out a federal program"); Tom Diemer, *High Court Hears Case on Brady Law, States' Rights*, PLAIN DEALER, Dec. 4, 1996, at A19 (quoting Justice Scalia, who described effect of Brady Bill as making states "dance like marionettes in the fingers of the federal government"). Indeed, even where state concerns are not implicated, the Court has begun to limit the power of the federal government by applying a much stricter analysis to congressional enactments. *See Lopez*, 115 S. Ct. at 1634 (restricting congressional exercise of power under Commerce Clause); United States v. Wall, 92 F.3d 1444, 1454 (6th Cir. 1996) (Boggs, J., dissenting) (characterizing pre-*Lopez* Commerce Clause as "Hey, you-can-do-whatever-you-feel-like Clause" (citing Alex Kozinski, *Introduction*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995)). In *Wall*, Judge Boggs notes that "*Lopez* has made us consider anew the concepts [regarding the Commerce Clause] we had become used to accepting without comment." *Wall*, 92 F.3d at 1454. The Supreme Court's decision in *Seminole Tribe* has occasioned the same sort of reconsideration with respect to the interplay between federal statutes and the Eleventh Amendment.

7. The Eleventh Amendment to the United States Constitution provides states with immunity from suit in federal court; the federal government is not included within the scope of the Amendment. U.S. CONST. amend. XI.

8. 11 U.S.C. §§ 101–1330 (1994) [hereinafter "Bankruptcy Code"]. Again, depending on one's viewpoint, the Bankruptcy Code is either: (1) an Article I enactment that is necessarily affected by the decision in *Seminole Tribe*, *see* U.S. CONST. art. I, § 8, cl. 4 (proclaiming that "[t]he Congress shall have power to . . . establish . . . uniform laws on the subject of bankruptcies throughout the United States"), or (2) a Fourteenth Amendment enactment unaffected by *Seminole Tribe*, *see In re* Southern Star Foods, Inc., 190 B.R. 419, 425 (Bankr. E.D. Okla. 1995) (stating that Fourteenth Amendment provides basis for abrogation of Eleventh Amendment immunity). *But see In re* NRV L.P., 206 B.R. 831, 840 (Bankr. E.D. Va. 1997) (holding that section 106 of Bankruptcy Code was not enacted pursuant to Fourteenth Amendment).

affected by the decision in *Seminole Tribe.* A brief discussion of the *Seminole Tribe* decision follows to illustrate how the decision impacts Eleventh Amendment jurisprudence. Finally, the Article addresses the impact of *Seminole Tribe* on the abrogation and waiver provisions of the Bankruptcy Code, and evaluates the arguments that have been raised with respect to those provisions, as well as similar provisions in other federal statutes. Although this Article focuses on the Bankruptcy Code and its abrogation and waiver provisions, the legal analysis contained herein is applicable to any federal statute enacted pursuant to Article I of the United States Constitution that purports to abrogate or waive a state's Eleventh Amendment immunity.

II. Historical Background: Sovereign vs. Eleventh Amendment Immunity

Meaningful understanding of the immunity issues that are beginning to arise in cases brought under the Bankruptcy Code requires a working knowledge of how the Supreme Court arrived at the concept of sovereign immunity expressed in *Seminole Tribe*, as well as a familiarity with the Bankruptcy Code provisions that Congress enacted to limit the availability of sovereign immunity as a defense.

Not all sovereign immunity is sovereign immunity. It may sound silly, but that concept is the key to understanding the long-running debate over what the courts call "sovereign immunity." Many courts, including the United States Supreme Court,[9] use the term sovereign immunity to identify both the common-law doctrine of sovereign immunity[10] and the "immunity" guaranteed to the states under the Eleventh Amendment to the United States Constitu-

9. But not Justice Stevens, who has consistently emphasized the differences between the two doctrines. *See* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1142 (1996) (Stevens, J., dissenting) (asserting "fundamental error that continues to lead the Court astray is its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment.") (internal quotation marks omitted); United States v. Nordic Village, Inc., 503 U.S. 30, 42 (1992) (Stevens, J., dissenting) (commenting on Court's "love affair" with doctrine of sovereign immunity); Pennsylvania v. Union Gas Co., 491 U.S. 1, 24 (1989) (Stevens, J., concurring) (declaring that state immunity doctrine has "absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment").

10. Hereinafter "common-law sovereign immunity" or simply "sovereign immunity."

tion.[11] Although sovereign immunity and Eleventh Amendment immunity are often discussed interchangeably,[12] the two doctrines are not identical. To understand the current state of the law on sovereign immunity, one must distinguish the two doctrines. The substantive differences between sovereign immunity and Eleventh Amendment immunity affect congressional ability to abrogate or waive the latter, but not the former.

A. *Common-Law Sovereign Immunity*

Sovereign immunity is a judicially-created doctrine of governmental immunity, derived from the common-law premise that the king could do no wrong.[13] Sovereign immunity is enjoyed by both the federal and state governments.[14] Because sovereign immunity is not constitutionally guaranteed, it may be waived by legislative action.[15] Congressional waivers, which are narrowly construed by courts, may not be implied and are only effective if "unequivocally

11. Hereinafter "Eleventh Amendment immunity."

12. *See Seminole Tribe*, 116 S. Ct. at 1127 (opining that "[i]t was well established . . . that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III"); *see also Union Gas*, 491 U.S. at 23–24 (Stevens, J., concurring) (citing Hans v. Louisiana, 134 U.S. 1, 10 (1890), as case in which Court muddled distinction between Eleventh Amendment immunity and common-law sovereign immunity).

13. United States v. Nordic Village, Inc., 503 U.S. 30, 42 (1992) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *246).

14. *See* West Virginia v. United States, 479 U.S. 305, 311 (1987) (holding that state has limited immunity from suits by private parties, but has no such immunity from similar suits by federal government); United States v. Sherwood, 312 U.S. 584, 586 (1941) (noting that United States is immune from suits to which it has not consented); Guillory v. Port of Houston Auth., 845 S.W.2d 812, 813 (Tex. 1993) (holding that Port Authority was protected by governmental immunity and its liability was limited by Texas Tort Claims Act).

15. *See Nordic Village*, 503 U.S. at 34 (discussing waiver or sovereign immunity); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (holding that in order to abrogate constitutionally guaranteed immunity, congressional intent must be unequivocally expressed).

expressed."[16] What constitutes "unequivocal expression" is subject to subtle shifts in statutory interpretation.[17]

Sovereign immunity is simply a *defense* to suit, a trump card that provides a way for the sovereign (state or federal) to get out of court once it has been dragged in.[18] Practically speaking, the doctrine protects the sovereign by making it immune to suit in the courts it has established to administer justice to its citizens.[19] Ac-

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16. *Nordic Village*, 503 U.S. at 33. In *Nordic Village*, the Supreme Court addressed the validity of the waiver contained in section 106 of the Bankruptcy Code, and found that it did not unequivocally express a waiver with respect to monetary damages assessed against a governmental unit. *Id.* Section 106 was amended in 1994, and the amended section 106 appears to be the sort of unequivocal expression required by the Court. 11 U.S.C. § 106 (1994). *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974) (discussing distinction between money damages and injunctive relief).

17. *See Nordic Village*, 503 U.S. at 42 (Stevens, J., dissenting) (observing that "doctrine of sovereign immunity is nothing but a judge-made rule that is sometimes favored and sometimes disfavored") (footnotes omitted). In favor of the doctrine, Justice Stevens cited United States v. Sherwood, 312 U.S. 584, 590 (1941) ("Because 'a relinquishment of a sovereign immunity . . . must be strictly interpreted,' we construe the statutory language with conservatism'."). *Id.* at 42 n.7. As cases disfavoring the doctrine, Justice Stevens cited Block v. Neil, 460 U.S. 289, 298 (1983) ("'The exemption of the sovereign from suit involved hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced'." (quoting Anderson v. Hayes Constr. Co., 153 N.E. 28, 29–30 (1926) (Cardozo, J.))) and Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955) (Frankfurter, J.) (writing that, the "Court should not be a 'a self-constituted guardian of the Treasury [and] import immunity back into a statute designed to limit it'."). *Nordic Village*, 503 U.S. at 42 n.8 (Stevens, J., dissenting). Indeed, the very strength of the doctrine of sovereign immunity is subject to shifts in interpretation. Sovereign immunity has been described as "an unprincipled accommodation between state and federal interests," *Pennhurst*, 465 U.S. at 147 (Stevens, J., dissenting), and a "prudential interest in federal-state comity and . . . concern for "Our Federalism," Pennsylvania v. Union Gas Co., 491 U.S. at 24 (1989) (Stevens, J., concurring). It has also been described on the one hand as having "absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment," *id.*, and on the other as being the principle underlying the limitation on federal court jurisdiction embodied by the Eleventh Amendment, *Seminole Tribe*, 116 S. Ct. at 1127. Whether an unequivocal expression is even required in order for Congress to waive a state's sovereign immunity is only one aspect of the ongoing debate about the relationship between sovereign and Eleventh Amendment immunity. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 254 (1985) (Brennan, J., dissenting) (opining that requirement or "unequivocal expressed" is just a "hurdle" to keep "disfavored suits out of the federal courts").

18. Remember playing cops and robbers as a child? Remember those kids who always tried to avoid being taken down by shouting "I'm bulletproof"? Remember how everyone shouted them down unless you happened to be playing in their backyards? That's sovereign immunity.

19. *See Nordic Village*, 503 U.S. at 33-34 (barring suits against governmental entities absent "unequivocally expressed" waiver of sovereign immunity). The doctrine recognizes that governments are often strapped for cash, and that the judiciary has no method for

cordingly, sovereign immunity has been described as a "persistent threat to the impartial administration of justice."[20] To lessen the impact of this threat, Congress must be entitled to abrogate or waive sovereign immunity with an unequivocal expression,[21] and there is no question that Congress may do so.[22]

B. *Eleventh Amendment Immunity*

Congress's ability to waive the immunity from suit that is guaranteed to the states in the Eleventh Amendment is much more limited than its ability to waive common-law sovereign immunity. This limitation exists because Eleventh Amendment immunity is not "immunity" at all. Rather, the Eleventh Amendment *limits the jurisdiction of the federal courts* under Article III of the Constitution.[23] A constitutional limitation on federal court jurisdiction is a whole different ballgame from a defense to a suit based on the idea that the king can do no wrong.

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enforcing a monetary judgment issued against such entities. *See* Karen Cordry, *Sovereign Immunity: Time to Come in from the Cold!*, AM. BANKR. INST. J., Sept. 13, 1994, at 19 (explaining that real reason for sovereign immunity is that courts have no way to enforce money judgments against states); *see also* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES 16–18 (1987) (finding basis for enactment of Eleventh Amendment in war bond debt-repudiation and Supreme Court's inability to enforce repayment).

20. *Nordic Village*, 503 U.S. at 43 & n.7 (Stevens, J., dissenting) (citing Kenneth Gulp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383 (1969)); *see* Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924) (lamenting U.S. government's immunity from liability for injuries caused by its officers); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 476, 494 (1953) (describing sovereign immunity as "unwanted and unjust" concept and "outmoded and undemocratic dogma").

21. *See* United States v. Shaw, 309 U.S. 495, 501 (1940) (explaining that "[a] sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule").

22. *See Nordic Village*, 503 U.S. at 33, 34 (stating that government may waive its sovereign immunity, assuming its waiver is unequivocally expressed). Likewise, states may waive their immunity to suit in their own state courts. *See, e.g.*, Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–101.109 (Vernon 1986) (making state and political subdivisions liable for damages caused by wrongful acts of employees arising from operation of motor vehicles or equipment and for premises defects).

23. Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1122 (1996) (noting that Eleventh Amendment restricts "Article III diversity jurisdiction of the federal courts"). Article III provides: "The judicial Power shall extend to all Cases, in Law and Equity, . . . between a State and Citizens of another State;—between Citizens of different States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1.

Specifically, the Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[24] Thus, the Eleventh Amendment deprives the federal courts of jurisdiction over suit brought against unconsenting states in federal court based upon diversity of citizenship.[25] The United States Supreme Court has also interpreted the Eleventh Amendment to deprive the federal courts of jurisdiction over a suit brought against an unconsenting state by one of its own citizens as well as by "citizens of another state."[26]

The Eleventh Amendment was specifically designed and adopted to protect the states' ability to function without the interference of the federal judiciary.[27] The history behind the Amendment explains exactly what it is intended to do.[28] Article III of the United States Constitution, which has historically been considered the exclusive grant of federal court jurisdiction,[29] provides that the jurisdiction of the federal courts extends to controversies "between

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24. U.S. CONST. amend. XI.

25. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) (reiterating that "fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III").

26. *Id.* (citing Hans v. Louisiana, 134 U.S. 1, 18–19 (1890)). Although the text of the Amendment clearly refers only to cases brought against a state by citizens of another state (which language tracks the language of article III of the Constitution), the Court in *Hans* extended the protection afforded the states under the Eleventh Amendment to suits brought against them in federal court by one of their own citizens. Part of the court's reasoning was that the states retained their inherent sovereignty, and that suits by a state's own citizens would fall within the spirit, if not the letter, of the Amendment. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 31–32 (1989) (Scalia, J., concurring in part and dissenting in part) (explaining that *Hans* reflected "a consensus that the doctrine of sovereign immunity . . . was part of the understood background against which Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away"). Thus, *Hans* is the source of much of the Court's difficulty with the relationship between sovereign immunity and the Eleventh Amendment. However, *Hans* does not appear to be in any danger of reversal. *See id.* at 34–35 (describing onerous consequences of overruling *Hans*).

27. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949) (describing public policy reason for sovereign immunity: "The government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.").

28. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139, 146 (1993) (writing that "very intent and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties" (quoting *In re* Ayers, 123 U.S. 443, 503 (1887)).

29. *Seminole Tribe*, 116 S. Ct. at 1128.

a State and Citizens of another State."[30] In *Chisholm v. Georgia*,[31] the Supreme Court interpreted this language as creating federal court jurisdiction over a suit brought by a citizen of South Carolina against the state of Georgia.[32] The Court's decision—that the Constitution could force an unconsenting state into federal court—"created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted."[33] The language of the Amendment, which parallels the language in Article III that led to the *Chisholm* decision, limits the jurisdiction of the federal courts in any suit against an unconsenting state based on diversity jurisdiction.[34] This limitation on jurisdiction, which is ordinarily referred to simply as "immunity" (hence the confusion with sovereign immunity),[35] extends to suits for monetary, injunctive,

30. U.S. CONST. art. III, § 2, cl. 1.

31. 2 U.S. (2 Dall.) 419 (1793).

32. *Id.* at 420.

33. *Pennhurst*, 465 U.S. at 97 (quoting *Monaco v. Mississippi*, 292 U.S. 313 (1934)).

34. *Compare* U.S. CONST. art. III, § 2, cl. 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies between two or more States;—*between a State and Citizens of another State*;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and *between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.*"), *with* U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against *one of the United States by Citizens of another State, or by Subjects of any Foreign State.*") (emphasis added). Political subdivisions such as counties, municipalities, and townships do not necessarily enjoy sovereign immunity protection. *See* Monell v. Department of Soc. Serv., 436 U.S. 658, 690 n.54 (1978) (holding that municipalities do not have Eleventh Amendment immunity from suit in federal court); DeVito v. Chicago Park Dist., 83 F.3d 878 (7th Cir. 1996) (holding that "municipal corporations do not possess sovereign immunity or Eleventh Amendment immunity"); D'Orio v. Town of East Haddam, 56 B.R. 263 (Bankr. D. Conn. 1985) (observing that generally, "[a] suit against a municipality is not a suit against a sovereign; the doctrine of sovereign immunity does not apply, and municipalities are not immune from suit."); *see also* Will v. Michigan Dep't of State Police, 491 U.S. 58, 70 (1989) (affirming that "[s]tates are protected by the Eleventh Amendment while municipalities are not"); *Will*, 491 U.S. at 67 n.7 (observing that by end of 19th century, municipalities had lost sovereign immunity they had previously enjoyed).

35. In addition to confusing phraseology, it is important to note that the Supreme Court itself has been unable to decide if sovereign immunity and the limitation on federal court jurisdiction contained in Article III are really related. In 1890, the Court decided in *Hans v. Louisiana* that the Eleventh Amendment deprived federal courts of jurisdiction over suits brought against a state by one of its own citizens. 134 U.S. 1, 18 (1890). The Court refused to limit the Eleventh Amendment to its terms, relying on the sovereignty of the states and the absurdity of the idea that the states would ratify an amendment to the Constitution that would protect them from suits by citizens of another state but leave them

and declaratory relief.[36] Thus, after the Eleventh Amendment was ratified, it appeared that the federal courts' ability to hear claims against states in federal court was severely limited.

With the Eleventh Amendment in place, one of the few ways an individual can sue a state in federal court without its consent is under the legal fiction established in *Ex parte Young*.[37] In *Young*, the Supreme Court established an "exception" to the Eleventh Amendment that allows a private party to sue a state *official*—but not the state itself—for prospective relief in order to end a continuing violation of federal law.[38] However, the *Young* doctrine, which is a sort of "constitutional tort theory" regarding violations of federal law by state officials, cannot be used to supplement existing remedial schemes put in place by Congress.[39] That is, where Congress has created a specific statutory scheme for relief, the Court has refused to expand the *Young* exception by allowing suits against federal officials acting under color of their authority in addition to the statutory remedy.[40] Rather, *Young* exists to prevent

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vulnerable to suits filed by their own citizens. *Id.* at 10–11, 15. Ever since, sovereign immunity and Eleventh Amendment immunity have been inextricably intertwined.

36. Cory v. White, 457 U.S. 85, 91 (1982); Worcester County Trust Co. v. Riley, 302 U.S. 292, 299–300 (1937).

37. 209 U.S. 123 (1908).

38. *Seminole Tribe*, 116 S. Ct. at 1132.

39. *Id.*

40. *Id.*; *see* Schweiker v. Chilicky, 487 U.S. 412, 420 (1988) (holding that cause of action for money damages was not available for improper denial of social security disability benefits). In *Schweiker*, Justice O'Connor relied on the Court's decision in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971), which allowed a suit against federal narcotics agents for alleged violations of the Fourth Amendment, even though such agents were acting under color of their authority, where Congress had not created an exclusive remedy. *Schweiker*, 487 U.S. at 421. The *Bivens* "constitutional tort theory" has been applied to federal officers' violations of the Due Process Clause of the Fifth Amendment, Davis v. Passman, 442 U.S. 228, 249 (1979), and the Cruel and Unusual Punishments Clause of the Eighth Amendment, Carlson v. Green, 446 U.S. 14, 25 (1980). More recently, the Court has refused to extend *Bivens* to allow suits by military personnel alleging unconstitutional treatment by superior officers, Chappell v. Wallace, 462 U.S. 296, 305 (1983), and suits alleging violations of the First Amendment against a United States employee, Bush v. Lucas, 462 U.S. 367, 390 (1983). Obviously, lifting the Eleventh Amendment bar to jurisdiction is different from the creation of a constitutional tort remedy. However, the *Seminole Tribe* Court found that the principles expressed in *Schweiker* with respect to *Bivens* actions are equally applicable with respect to *Young* actions; thus, where Congress has provided "a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting a suit against a state officer based on *Ex parte Young*." *Seminole Tribe*, 116 S. Ct. at 1132. Justice Stevens, who concurred in part in

federal and state officials otherwise protected by sovereign or Eleventh Amendment immunity from continuing to violate federal law.[41]

Of course, Congress may abrogate or waive Eleventh Amendment immunity under certain circumstances. To do so, a statute must unequivocally express congressional intent to waive[42] and must have been passed pursuant to a valid exercise of congressional power.[43] For example, Congress may validly abrogate or waive Eleventh Amendment immunity when it is legislating pursuant to the Fourteenth Amendment; that Amendment, which was aimed directly at the states, came after the Eleventh Amendment and necessarily limited the principle of immunity embodied therein.[44] Whether Congress has the power to do so when legislating pursuant to its Article I powers (which preceded the Eleventh Amendment) is a harder question.[45]

Schweiker, noted in his *Seminole Tribe* dissent that Congress may abrogate common-law immunity defenses to certain federal claims such as the judicially-fashioned *Bivens* remedy, and posited that there should be no difference between congressional power to displace defenses to *Bivens* actions and congressional power to displace Eleventh Amendment immunity. *Id.* at 1139 (Stevens, J., dissenting).

41. Green v. Mansour, 474 U.S. 64, 68 (1985).

42. *Seminole Tribe* emphasizes the congressional power issue, but it is important not to neglect the "clear or unequivocal statement" rule, which is equally important with respect to the validity of a congressional waiver or abrogation of immunity. *See* United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992) (holding pre-1994 11 U.S.C. § 106(c) is not valid to waive federal government's immunity from actions for monetary relief because it does not unequivocally express intent to do so).

43. *Green*, 474 U.S. at 68.

44. *See* Quern v. Jordan, 440 U.S. 332, 343 (1979) (concluding that statutes enacted by Congress pursuant to the Fourteenth Amendment may abrogate states' Eleventh Amendment immunity if there is clear intent to do so); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding substantive provisions of Fourteenth Amendment were "by express terms directed at the states . . . [and] 'were intended to be . . . limitations of the power of the states and enlargements of the power of Congress.'" *Fitzpatrick*, 427 U.S. at 453–54 (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880))). The chronological aspect of the *Quern/Fitzpatrick* analysis makes sense when considered in light of the "[A]rticle III/*Chisholm*/Eleventh Amendment" chain of events.

45. The disagreement as to whether state sovereign immunity has been incorporated into the Eleventh Amendment—or, perhaps more accurately, whether state sovereign immunity has necessarily limited federal court jurisdiction as set forth in Article III of the Constitution—is at the heart of the Court's inability to reach a consensus on this issue, and the Court's decision in *Hans v. Louisiana* is at the center of the debate. *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 478–79 (1986) (discussing controversy surrounding "constitutional foundation of state sovereign immunity"). *Hans* clearly stands for the proposition that the Eleventh Amendment embodies a broad constitutional princi-

Before *Seminole Tribe*, the Supreme Court had determined that Congress could indeed abrogate the states' Eleventh Amendment immunity when exercising Article I powers, but only once, and not by a majority.[46] In *Pennsylvania v. Union Gas Co.*, a plurality of

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ple of sovereign immunity. *Union Gas*, 491 U.S. at 37. The Court in *Hans* relied on the states' sovereign immunity—in existence at the time the Constitution was adopted—to support its extension of the Eleventh Amendment beyond its literal text to federal-question, or non-diversity, cases. *See Hans*, 134 U.S. at 15 (holding that "cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States"). If, as the *Seminole Tribe* majority and Justice Scalia's *Union Gas* dissent suggest, the Eleventh Amendment is a limitation on federal court jurisdiction, the question raised by a challenge to an Article I statutory enactment that purports to abrogate or waive the Eleventh Amendment is one of congressional power to expand the federal court jurisdiction under Article III, not simply one of congressional power to subject states to liability. *See Union Gas*, 491 U.S. at 38 (Scalia, J., dissenting) (arguing that "state immunity from suit in federal courts is a structural component of federalism" rather than default disposition to be altered by Congress pursuant to Article I); *see also* Clark v. Barnard, 108 U.S. 436, 447 (1883) (describing states' immunity as being "respected and protected by the constitution *within the limits of the judicial power* of the United States") (emphasis added). Viewed in that light, the question must be answered in the negative, as even Justice Stevens has noted. *Union Gas*, 491 U.S. at 23–24 (opining that "a statute cannot amend the Constitution").

46. *Union Gas*, 491 U.S. at 23; *see id.* at 40 (Scalia, J., concurring in part and dissenting in part) (pointing out that plurality opinion is unable to cite single Supreme Court case upholding congressional abrogation of states' Eleventh Amendment immunity when exercising its power under Commerce Clause of Article I); *see Seminole Tribe*, 116 S. Ct. at 1128 (stating: "Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment."). Notwithstanding the Eleventh Amendment's apparent limitation on federal court jurisdiction over the states, many lower federal courts continued to assert jurisdiction over states in cases involving federal law based on Article I powers. These courts apply a two prong test: (1) whether Congress *intended* to abrogate the states' Eleventh Amendment immunity for the specific cause of action, and (2) whether Congress had the *power* to abrogate. *Green*, 474 U.S. at 68; *see* Dellmuth v. Muth, 491 U.S. 223, 227-28, 230 (1989) (holding that The Education of the Handicapped Act, 20 U.S.C. § 1400–1491, did not abrogate state immunity, and stating: "we affirm today that . . . evidence of congressional intent must be both unequivocal and textual"); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (holding that the Rehabilitation Act of 1973, 29 U.S.C § 794, did not abrogate state immunity, and stating: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute"); *Pennhurst*, 465 U.S. at 99 (holding federal courts' pendent jurisdiction to hear state law claims does not override states' Eleventh Amendment immunity); *Fitzpatrick*, 427 U.S. at 450, 457 (affirming Court of Appeals's holding that award of monetary damages under Title VII is not barred by Eleventh Amendment because Congress expressly authorized such damages); Edelman v. Jordan, 415 U.S. 651, 673 (1974) (rejecting argument that Illinois had "constructively consented" to suit and stating that "[i]n deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or by such overwhelming implica-

tions from the text as [will] leave no room or any other reasonable conclusion" (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909))); William L. Norton, Jr. et al, 1 NORTON BANKRUPTCY LAW AND PRACTICE § 14.16 (2d ed. 1995) (describing second part of two part test as "that the constitutional provision by which Congress legislates its abrogation must grant Congress the power to override the Eleventh Amendment"). The Bankruptcy Court in Hoffman v. Connecticut determined that section 106 of the Bankruptcy Code was intended to abrogate Eleventh Amendment immunity in an action by the bankruptcy trustee against the state for money damages arising from the state's alleged failure to pay for Medicaid services provided by the debtor. *See* Hoffman v. Connecticut (*In re* Willington Convalescent Home, Inc.), 39 B.R. 781, 783, 789 (Bankr. D. Conn. 1984).

Hoffman, the bankruptcy trustee for Willington Convalescent Home, Inc., filed an adversary proceeding for "turnover" of funds allegedly owed to the estate under 11 U.S.C. § 542(b), and to avoid a preference under 11 U.S.C. § 547(b). *See* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 99 (1989). The state had refused to make payments for services provided by the debtor in March, 1983, based on its determination that the debtor had been overpaid for services for the period 1976 through 1980. *Hoffman*, 39 B.R. at 783. The state calculated that the debtor owed it $121,408.82, but did not file a proof of claim. *Id.* at 783-84.

Regarding the second prong of the test, whether Congress could abrogate state's Eleventh Amendment immunity under its Article I powers, the *Hoffman* court observed that Bankruptcy Court decisions were mixed and that the Supreme Court had never ruled on the issue. *Id.* at 785–86, 789. The court went on to describe the history of Eleventh Amendment immunity in the circuit courts. *Id.* at 789-91. The United States Court of Appeals for the Fifth Circuit held that the federal government could abrogate a state's Eleventh Amendment immunity under the Article I, section 8 War Powers Clause in Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1080 (5th Cir. 1979). The *Peel* Court based its decision on Monaco v. Mississippi, 292 U.S. 313 (1934), in which Chief Justice Hughes wrote that "[s]tates . . . shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention." *Id.* at 322-23 (quoting THE FEDERALIST No. 81 (Alexander Hamilton)). The *Peel* court held that "nothing in the history of the Eleventh Amendment, the doctrine of sovereign immunity, or the case law indicates that Congress, when acting under an article I, section 8 delegated power, lacks the authority to provide for federal court enforcement of private damage actions against the states." *Peel*, 600 F.2d at 1080.

The United States Court of Appeals for the Seventh Circuit also relied on the *Monaco* Court's "plan of the convention" rationale to uphold Congress's power to abrogate states' Eleventh Amendment immunity in Jennings v. Illinois Office of Educ., 589 F.2d 935, 941-42 & n.13 (7th Cir. 1979), another War Powers Clause case. The Third Circuit, in an alternative holding, determined that Congress could abrogate Eleventh Amendment immunity under the Bankruptcy Clause in *Gardner v. Pennsylvania Dep't of Pub. Welfare*, 685 F.2d 106, 109 (3d Cir. 1982) (citing Van Huffel v. Harkelrode, 284 U.S. 225 (1931) and Gardner v. New Jersey, 329 U.S. 565, 578 (1947)). Finally, the Second Circuit appeared to have applied the *Peel* rationale to uphold abrogation in cases involving the Article IV Extradition Clause. See, for example, County of Monroe v. Florida, 678 F.2d 1124, 1132 n.8, 1135 (2d Cir. 1982) (holding that to deny Congress power to abrogate state Eleventh Amendment immunity pursuant to specific authorization of Article IV Extradition Clause would be "inconsistent with the 'plan of the Constitution'" (citing THE FEDERALIST NO. 81 (Alexander Hamilton))), and the Article I Commerce with the Indians Clause, *see* Oneida Indian Nation of New York v. New York, 691 F.2d 1070, 1080 (2d Cir. 1982) (holding that suit by Indian Nation to overturn treaties with state are not barred by state's Eleventh Amend-

the Court held that Congress could abrogate or waive Eleventh

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ment immunity because "[w]hen the states granted to Congress the power '[t]o regulate commerce . . . with the Indian tribes,' U.S. Constitution, Art. I, § 8, cl. 3, they necessarily 'surrendered a portion of their sovereignty'" (citing Parden v. Terminal Ry., 377 U.S. 184, 191 (1964)). Based on this precedent, the Bankruptcy Court in *Hoffman* held that Congress may validly abrogate the Eleventh Amendment immunity of the states based on the Bankruptcy Clause. *Hoffman*, 39 B.R. at 791.

On appeal, the District Court reversed the Bankruptcy Court judgment based on the intent prong of the test; it was not "certain" that Congress intended to abrogate immunity for the precise cause of action that the plaintiff trustee had asserted against the defendant state. Connecticut Dep't of Income Maintenance v. Hoffman (*In re* Willington Convalescent Home, Inc.), 72 B.R. 1002, 1012 (D. Conn. 1987). The District Court expressly reserved decision on the second, "power," prong of the test; whether "Congress *could* have abrogated a state's Eleventh Amendment immunity from suit pursuant to its power under the Bankruptcy Clause." *Id.* On appeal, the decision was affirmed by the Second Circuit. 850 F.2d 50, 57 (2d Cir. 1988). The Supreme Court granted certiorari to resolve a conflict between the Second Circuit's decision and contrary decisions on the intent issue, *see* Vazquez v. Pennsylvania Dep't of Pub. Welfare (*In re* Vazquez, Guerrero & Compton), 788 F.2d 130, 133 (3d Cir. 1986) (holding Bankruptcy Code validly abrogated state's immunity from suit in federal court by debtor seeking recovery of state's collection of discharged debt under 11 U.S.C. § 524(A)), and Seventh Circuits, *see* McVey Trucking, Inc. v. Secretary of State of Illinois (*In re* McVey Trucking, Inc.), 812 F.2d 311, 326-27 (7th Cir. 1987) (holding state not immune from suit to avoid preference under section 547(b) of the Bankruptcy Code). *Hoffman*, 492 U.S. at 100. A plurality of the Court affirmed the Second Circuit decision, holding that because Congress had not expressed a clear intention to do so, Congress had not abrogated the Eleventh Amendment immunity of the state for the causes of action asserted. *Id.* at 104. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined in Justice White's opinion. *Id.* at 98. As a result of this opinion and the Court's 1992 opinion in United States v. Nordic Village, Inc., 503 U.S. 30 (1992), Congress amended section 106 in 1994, Pub. L. 103-394, Title I, § 113, 108 Stat. 4117 (1994), to make unmistakably clear its intent to abrogate states' Eleventh Amendment immunity with respect to specific provisions of the Bankruptcy Code. *See* H.R. REP. NO. 103–835 at 42 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3336, 3350–51 (stating amended section 106(c) would overrule Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989), and United States v. Nordic Village, Inc., 503 U.S. 30 (1992)). Justice Scalia concurred in the judgment on the ground that the federal government has no power to abrogate states' Eleventh Amendment immunity under the Bankruptcy Clause or any other Article I power. *Hoffman*, 492 U.S. at 105 (Scalia, J., concurring in the judgment). In her concurring opinion, Justice O'Connor agreed with Justice Scalia that Congress had no power to abrogate Eleventh Amendment immunity under the Bankruptcy clause. *Id.* at 105 (O'Connor, J., concurring). Justice Marshall, joined by Justices Brennan, Blackmun and Stevens, dissented based on the belief that section 106(c) of the Bankruptcy was "unmistakably clear" in its intention to abrogate the state's Eleventh Amendment immunity. *Id.* at 106 (Marshall, J., dissenting). In support of Congress's power to abrogate states' Eleventh Amendment immunity, the dissent cited *Union Gas*, 491 U.S. at 19, a plurality opinion upholding Congress's power to abrogate pursuant to the Commerce Clause. *Id.* at 111 (Marshall, J., dissenting). The dissent agreed with Justice Scalia that, for purposes of determining whether Congress has the power to abrogate states' Eleventh Amendment immunity, there was no reason to distinguish between the Commerce Clause and the Bankruptcy Clause. *Id.*; *id.* at 105 (Scalia, J., concurring in the judgment). By deciding *Hoffman* based

Amendment immunity when legislating pursuant to the Interstate Commerce Clause, a grant of power found in Article I, section 8 of the Constitution.[47] The badly fractured decision is typical of the Court's Eleventh Amendment immunity cases.[48] Justice Brennan, joined by Justices Blackmun, Stevens and Marshall, held that Congress could abrogate the Eleventh Amendment when legislating pursuant to the Commerce Clause because the states ceded their immunity to Congress when they agreed in the Plan of the Convention to give it plenary authority to regulate commerce.[49] Justice White, who provided the fifth vote for the result, disagreed with Justice Brennan's reasoning.[50] Justice Scalia, joined in part by Justices Rehnquist, O'Connor and Kennedy, dissented strongly, arguing that the Eleventh Amendment necessarily limited the catalogue of federal court jurisdiction set forth in Article III, and

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on the "intent" prong of the Eleventh Amendment immunity test, the plurality avoided the "power" prong of the test which had divided the Court in the previous term.

47. *Union Gas*, 491 U.S. at 23.

48. *See, e.g., Seminole Tribe*, 116 S. Ct. at 1119 (5–4 decision, Rehnquist, C.J., Scalia, O'Connor, Kennedy, and Thomas, J.J., in the majority; Stevens, Souter, Ginsberg and Breyer, J.J., dissenting); *Hoffman*, 492 U.S. at 98, 105, 106, 111 (5–4 decision, Rehnquist, C.J., joined by, O'Connor, White and Kennedy, J.J., with Scalia, J., concurring in judgment; Marshall, Brennan, Stevens, and Blackmun, J.J., dissenting); *Union Gas*, 491 U.S. at 5, 23, 29, 45, 57 (5–4 plurality decision, opinion of Brennan, Marshall, Blackmun and Stevens, J.J., with White, J., concurring in judgment; Rehnquist, C.J., Scalia, O'Connor and Kennedy, J.J., concurring in part and dissenting in part); *Welch*, 483 U.S. at 470, 495, 496 (5–4 plurality decision, opinion of Rehnquist, C.J., Powell, White, O'Connor, J.J., with Scalia, J.J., concurring in judgment; Brennan, Marshall, Blackmun and Stevens, J.J., dissenting); *Atascadero State Hosp.*, 473 U.S. at 235, 247 (5–4 decision, Burger, C.J., Powell, White, Rehnquist, and O'Connor, J.J., in the majority; Brennan, Marshall, Blackmun, and Stevens, J.J., dissenting); *Pennhurst*, 465 U.S. at 91, 125, 126 (5–4 decision, Burger, C.J., Rehnquist, Powell, O'Connor and White, J.J., in the majority; Stevens, Brennan, Blackmun and Marshall, J.J., dissenting).

49. *Union Gas*, 491 U.S. at 19–20. This is referred to as the "plan of the convention" exception to Eleventh Amendment immunity. *Id.* at 19.

50. *Id.* at 57 (White, J., concurring in the judgment in part and dissenting in part). Specifically, Justice White wrote: "I agree with the conclusion reached by Justice Brennan . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." *Id.* Justice White did not elaborate on his own reasoning. He also indicated that he agreed with the plurality opinion that *Hans* should not be overruled for the reasons stated in *Welch*. *Id.* at 57 n.8. This section of *Welch* argues that *Hans* is not limited to the diversity jurisdiction of the federal courts but also prohibits citizens from bringing federal question actions against states in federal court. *Welch*, 483 U.S. at 479 n.9. White joined the *Welch* plurality which "assume[d] without deciding or intimating a view on the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment." *Welch*, 483 U.S. at 475.

that Congress could not alter that result when legislating pursuant to an antecedent provision.[51]

By 1995, Justices Brennan, Blackmun, Marshall and White were no longer on the Court; of the *Union Gas* plurality, only Justice Stevens remained. Chief Justice Rehnquist and Justices Scalia, O'Connor, and Kennedy, all *Union Gas* dissenters, remained on the Court and had been joined by Justice Thomas. Thus, the stage was set for the Court to reconsider its analysis of congressional power to abrogate the Eleventh Amendment pursuant to an exercise of Article I powers. *Seminole Tribe* provided the Court with an opportunity to do so.[52]

III. The Bankruptcy Code and Immunity

Article I, Section 8, Clause 4 of the Constitution authorizes Congress to pass uniform laws on the subject of bankruptcy.[53] Congress passed the Bankruptcy Code pursuant to this grant of authority, and included a waiver of states' Eleventh Amendment immunity. As amended in 1994, section 106 of the Bankruptcy Code provides:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

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51. *Union Gas*, 491 U.S. at 35–45. The dissent in *Union Gas* foreshadows the Court's decision in *Seminole Tribe* and raises additional points about the validity of the Court's decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), that are worth considering if one is looking ahead to the next round.

52. Right behind *Seminole Tribe* in reaching the Supreme Court was Ohio Agric. Commodity Depositors Fund v. Mahern (*In re* Merchants Grain, Inc.), 59 F.3d 630 (7th Cir. 1995). *Merchants Grain* presented the same issue—whether Congress could use an Article I power to abrogate the Eleventh Amendment—but instead of the Indian Gaming Regulatory Act, *Merchants Grain* involved the Bankruptcy Code, which was also enacted pursuant to the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4. *Id.* at 633. *Merchants Grain* was eventually vacated and remanded to the Seventh Circuit for further consideration in light of *Seminole Tribe*. Ohio Agric. Commodity Depositors Fund v. Mahern (*In re* Merchants Grain, Inc.), 116 S. Ct. 1411 (1996). The Court also vacated and remanded a Fifth Circuit decision involving congressional power to abrogate Eleventh Amendment immunity under Article I. *See* Chavez v. Arte Publico Press, 59 F.3d 539, 544–45 (5th Cir. 1995) (noting that Justice White's concurrence rendered the continuing validity of *Union Gas* in doubt), *cert. dismissed sub nom.*, University of Houston v. Chavez, 116 S. Ct. 1667 (1996) (vacating and remanding to 5th Circuit for further consideration).

53. Article I, Section 8 contains the powers granted to Congress. In addition to the bankruptcy clause, Section 8 contains the power to regulate commerce with foreign nations, among the several states, and with Indian tribes.

> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.
>
> (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.
>
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.
>
> (b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.
>
> (c) Notwithstanding an assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.[54]

The purpose of the 1994 amendment to section 106 was to unequivocally state Congress's intent to abrogate or waive Eleventh Amendment immunity with respect to suits for monetary as well as injunctive relief.[55] In 1992, the Supreme Court addressed the valid-

54. 11 U.S.C. § 106 (1994).

55. *See* H.R. REP. NO. 103-835 at 42 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3336, 3350-51 (stating 1994 amendment to section 106(c) "expressly provides for a waiver of

ity of the prior version of section 106,[56] and held that although it contained an unequivocal waiver of sovereign immunity with respect to injunctive or declaratory relief, that section did not waive sovereign immunity with respect to suits against governmental units for monetary damages.[57] Obviously, Congress intended the new section 106 to make the abrogation of sovereign immunity unmistakably clear. However, even the clearest statement is ineffective if the statute abrogating immunity is not enacted pursuant to a valid exercise of power.

IV. The Role of States and State Agencies in Bankruptcy Proceedings

A state or state agency may become involved in a bankruptcy case in a number of ways. A state may become involved by filing a proof of claim in an attempt to collect an outstanding debt owed to

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sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief").

56. Until its revision in 1994, section 106 read in full:

Waiver of sovereign immunity.

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and *notwithstanding any assertion of sovereign immunity*—

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. § 106 (1988) (emphasis added).

57. United States v. Nordic Village, Inc., 503 U.S. 30 (1992); *see* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 104 (1989) (finding that section 106(c) did not contain unmistakably clear statement of congressional intent to abrogate Eleventh Amendment immunity). In *Hoffman*, a Chapter 7 trustee sued the state of Connecticut for turnover of certain funds, and the state asserted Eleventh Amendment immunity. *Id.* at 99. The Supreme Court held, in a plurality decision, that Congress had not abrogated the state's immunity in section 106 because the statutory language was not unmistakably clear. *Id.* at 102. However, foreshadowing what was to come later in *Seminole Tribe*, Justices O'Connor and Scalia both wrote separately to state that they would not have based the decision on the fact that the statement was not unmistakably clear, but would instead have decided the case on the ground that Congress may not abrogate Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause. *Id.* at 105 (O'Connor, J., concurring); *id.* (Scalia, J., concurring).

the state by the debtor.[58] Although a debtor may owe fees, fines or penalties, the most common type of debt owed to the state is unpaid taxes. These taxes include sales taxes collected by businesses, unemployment and state workers' compensation taxes on employee salaries, ad valorem property taxes, franchise taxes, and income taxes. Unfortunately, it is common for businesses experiencing cash flow problems or other financial difficulties to use taxes which have been collected or withheld on behalf of the state as a free "loan," thereby making the state an involuntary creditor. Many states, faced with mounting budgetary restrictions and monetary losses, are becoming increasingly active creditors in bankruptcy cases, and routinely file claims.[59] In addition, states may intervene in bankruptcy proceedings to enforce the provisions of state escheat and unclaimed property laws.[60]

Even when a state does not voluntarily enter a bankruptcy proceeding, it may be drawn into the case by a debtor or trustee. A debtor may list a cause of action against a state or state agency as property of the debtor's estate.[61] Any type of claim, be it contract, tort, or statutory, which a person or entity might have against a state outside of bankruptcy may be asserted on behalf of the bankrupt estate. For example, when the state contracts for the construction of a highway, bridge or building,[62] or purchases or leases real

58. The provisions of the Bankruptcy Code apply to states as well as to all other creditors, so, with limited exceptions, a state that seeks to collect a debt from a bankrupt must do so within the procedures set out in the Code. *See* 11 U.S.C. § 101(27) (1994) (defining governmental unit to include state). A state that chooses to file a claim has voluntarily submitted to the jurisdiction of the federal bankruptcy court, to a limited extent. *See* Gardner v. New Jersey, 329 U.S. 565, 574 (1947) (declaring that filing proof of claim waives immunity).

59. Dan Morales, *The "New" State Attorneys General: The Sleeping Giants Awake*, 12 AM. BANKR. INST. J. 1, 1 (Sept. 1993); *see* Karen Cordry, *Sovereign Immunity: Time to Come in from the Cold!*, 13 AM. BANKR. INST. J. 19, 38 (Sept. 1994) (arguing that *Hoffman* and *Nordic Village* limit states' legitimate right to recover from debtors in bankruptcy).

60. *In re* Continental Airlines, Inc., 161 B.R. 101 (Bankr. D. Del. 1993) (holding that state had standing to assert claim regarding unclaimed property).

61. *See* 11 U.S.C. § 541 (1994) (defining property of debtor's estate).

62. *See In re* William Ross, Inc., 199 B.R. 551, 552, 553 (Bankr. W.D. Pa. 1996) (discussing suit resulting from sub-contracting agreement); *In re* Craftsmen, Inc., 183 B.R. 116, 117 (Bankr. N.D. Tex. 1995) (considering dispute resulting from construction contract); *In re* Arid Waterproofing, Inc., 175 B.R. 172, 174 (Bankr. E.D. Pa. 1994) (detailing proceeding in bankruptcy court over garage construction contract); *In re* Rocchio & Sons, Inc., 165 B.R. 86, 87 (Bankr. D.R.I. 1994) (considering debtor's suit under construction contracts); Official Comm. of Unsecured Creditors of Operation Open City, Inc. v. New York (*In re*

property or equipment,[63] it may be subject to breach of contract claims. In addition, a debtor may have claims which arise from the state's conduct as a governmental entity. A debtor may claim a refund of overpaid taxes,[64] reimbursement for medical services provided under Medicaid programs,[65] unpaid social security pay-

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Operation Open City, Inc.), 148 B.R. 184, 186, 192 (Bankr. S.D.N.Y. 1992) (holding that state's offset of debts owed to debtor under contract for rehabilitation of housing was a violation of automatic stay); *In re* Western States Drywall, Inc., 145 B.R. 661, 663 (Bankr. D. Idaho 1992) (discussing debtor's suit for money owed pursuant to construction contract); *In re* Guerra Constr. Co., 142 B.R. 826, 827 (Bankr. N.D. Ill. 1992) (considering suit over highway reconstruction contract); *In re* Hughes-Bechtol, Inc., 132 B.R. 339, 340 (Bankr. S.D. Ohio 1991) (including breach of contract claim involving construction contract); *In re* Crum, 20 B.R. 160, 160 (Bankr. D. Idaho 1982) (discussing suit over construction contract); *In re* Regal Constr. Co., 18 B.R. 353, 355 (Bankr. D. Md. 1982) (deciding suit for damages under construction contract).

63. AER-Aerotron, Inc. v. Texas Dep't of Transp., 104 F.3d 677, 678 (5th Cir. 1997) (addressing whether state had waived its sovereign immunity in breach of contract claim by trustee arising out of contract to provide statewide radio system); Federal Nat'l Mortgage Ass'n v. County of Orange (*In re* Orange County), 183 B.R. 609, 619–20 (Bankr. C.D. Cal. 1995) (holding that under California law, sovereign immunity does not apply to state's breach of contract claim arising out of failed investment); Solow v. Greater Orlando Aviation Auth. (*In re* Midway Airlines, Inc.), 175 B.R. 239, 241, 244–45 (Bankr. N.D. Ill. 1994) (holding that various governmental unit creditors waived sovereign immunity by filing proof of claims arising from leases and contracts); PeakSolutions Corp. v. Ohio Dep't of Transp. (*In re* PeakSolutions Corp.), 168 B.R. 918, 920–21 (Bankr. D. Minn. 1994) (involving state's alleged breach of software licensing agreement with debtor); Ehre v. New York (*In re* Adirondack Ry.), 28 B.R. 251, 256–57 (Bankr. N.D.N.Y. 1983) (determining that state had waived Eleventh Amendment immunity in case involving state's revocation of debtor's lease of state owned railroad right of way); West Virginia v. Hassett (*In re* O.P.M. Leasing Serv., Inc.) 21 B.R. 993, 1000–05 (Bankr. S.D.N.Y. 1982) (holding that state had waived sovereign immunity by initiating adversary proceeding in breach of contract claim arising out of lease computer equipment).

64. *See* Texaco, Inc. v. Louisiana Land & Exploration Co., 113 B.R. 924, 926–27 (M.D. La. 1990) (holding that state had waived Eleventh Amendment immunity by filing claim for underpayment of severance taxes and mineral royalties in case where debtor filed counterclaim for alleged overpayment of taxes and royalties).

65. *See* Sullivan v. Town & Country Home Nursing Serv., Inc. (*In re* Town & Country Home Nursing Serv., Inc.), 963 F.2d 1146, 1153 (9th Cir. 1991) (holding federal government had waived its Eleventh Amendment immunity by offsetting medicare payments to debtor, provider of medicare services); WJM, Inc. v. Massachusetts Dep't of Pub. Welfare, 840 F.2d 996, 999 (1st Cir. 1988) (involving claim by debtor nursing home for reimbursement of expenses incurred for providing Medicaid services); Saint Joseph's Hosp. v. Pennsylvania Dep't of Pub. Welfare (*In re* Saint Joseph's Hosp.), 103 B.R. 643, 646, 651 (Bankr. E.D. Pa. 1989) (holding that state had waived Eleventh Amendment immunity when department of revenue filed proof of claim for in case where debtor challenged department of public welfare's method of calculating Medicaid reimbursement); Griffin v. West Side Corp. (*In re* Erlin Manor Nursing Home, Inc.), 86 B.R. 307, 312 (D. Mass. 1985) (involving challenge to state's application of its Medicaid reimbursement rate setting formula to debtor); Greenwald v. Axelrod (*In re* Greenwald), 48 B.R. 263, 267 (S.D.N.Y. 1984) (hold-

ments,[66] or disbursements from a state retirement fund.[67] A state's conduct may give rise to tort claims for negligence,[68] conversion of property,[69] or even a state's lack of diligence in performing it's duty.[70] These claims, if asserted outside bankruptcy, may be brought in any court of competent jurisdiction. However, when the plaintiff is a debtor in bankruptcy, the bankruptcy court may also acquire jurisdiction over the suit.[71] Debtors frequently seek to bring all causes of action in the bankruptcy court, where many believe—rightly or wrongly—that they will receive more favorable treatment than they would receive in state or federal district court.

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ing debtor nursing home could offset its claim for Medicaid reimbursement against state's claim of overpayment).

66. *See* Lee v. Schweiker (*In re* Lee), 25 B.R. 135, 137 (E.D. Pa. 1982) (holding that government's recoupment of past overpaid social security payments from post-bankruptcy payments is violation of automatic stay). *But see* Neavear v. Schweiker (*In re* Neavear), 16 B.R. 528, 530 (C.D. Ill. 1981) (holding that overpayment of disability insurance benefits under Social Security Act to debtor is not dischargeable debt and government may recoup from future benefits).

67. *See* Hollis v. State Employees' Retirement Sys. of Illinois (*In re* Groves), 120 B.R. 956, 964, 966–67 (Bankr. N.D. Ill. 1990) (holding debtor's interest in state retirement fund is property of estate but that trustee can only obtain turnover under circumstances debtor could collect outside bankruptcy); Magill v. Lyons (*In re* Lyons), 114 B.R. 572, 578 (Bankr. C.D. Ill. 1990) (holding debtor's contributions to state employees' retirement system were property of the estate and court could order turnover to trustee).

68. *See* Freudenmann v. Drainage District #2 (*In re* Freudenmann) 76 B.R. 600, 601 (Bankr. S.D. Tex. 1987) (finding jurisdiction over claim by debtor against water district for reduction of debtor's income arising out of water district's failure to clear creek); Prime, Inc. v. Illinois Dep't of Transp. (*In re* Prime, Inc.), 44 B.R. 924, 925, 927 (Bankr. W.D. Mo. 1984) (holding state's Eleventh Amendment immunity was not waived in case involving claim by debtor that its vehicle was damaged by state's faulty maintenance of highways).

69. *See* Farmers State Bank v. Norris (*In re* Norris), 90 B.R. 424, 425-26 (Bankr. D. Neb. 1988) (holding that state had not waived its Eleventh Amendment immunity in case brought by secured creditor of debtor against state for conversion of secured interest in debtor's inventory and accounts receivable).

70. *See* Louisiana *ex rel.* Guste v. Public Investors Inc., 35 F.3d 216, 219 (5th Cir. 1994) (involving trustee's counterclaim against state that state officials "failed to perform their duties because they approved, or failed to prevent [debtor's] shady transactions at a time . . . they knew [debtor] was insolvent").

71. *See* 28 U.S.C. § 157(a) (1994) (providing that all cases and proceedings under Bankruptcy Code "or arising in or related to a case under [the Bankruptcy Code] shall be referred to the bankruptcy judges for the district"). Debtors may assert that jurisdiction is proper if the cause of action is property of the debtor's estate. *See* 28 U.S.C. § 1334(e) (1994) (providing that district courts shall have exclusive jurisdiction over all of debtor's property, wherever located, as of commencement of case, and of property of estate). Note, however, that the United States Supreme Court has rejected the idea that there is an in rem exception to the Eleventh Amendment bar to federal jurisdiction. *See In re* NVR L.P., 206 B.R. 831, 834 (Bankr. E.D. Va. 1997).

Finally, the Bankruptcy Code itself creates causes of action which allow the debtor to sue third parties, including states and state agencies, in the bankruptcy court.[72] A debtor may seek injunctive relief to prohibit a state from discriminating against a debtor solely on the basis of bankruptcy.[73] In addition, the Bankruptcy Code provides causes of action for the determination of tax liability,[74] avoidance of liens on exempt property,[75] and recovery of preferential payments.[76] Another important cause of action allows the debtor to seek injunctive relief and to recover actual and, in some cases, punitive damages for willful violation of the automatic stay.[77]

However, the Bankruptcy Code provides an exception to the automatic stay which allows the "commencement or continuation of an action or proceeding by a governmental unit" to ensure a debtor's compliance with state police or regulatory powers to protect public health, safety and welfare.[78] Any area of state regula-

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72. *See, e.g.*, 11 U.S.C. §§ 362(h) (1994) (damages for violations of the automatic stay); *id.* § 505 (determination of tax liability); *id.* § 522(f) (avoidance of lien upon exempt property); *id.* § 547 (recovery of preferential payment).

73. *Id.* § 525.

74. *Id.* § 505.

75. *id.* § 522(f).

76. *Id.* § 547.

77. 11 U.S.C. § 362(h) (1994). The automatic stay generally prohibits creditors from taking any action to collect pre-petition debts from debtors after they have filed a petition in bankruptcy. *Id.* § 362(a). Some conduct, such as criminal actions and enforcement of police and regulatory powers, is not subject to the automatic stay. *Id.* § 362(b).

78. *Id.* § 362(b)(4). "The policy behind this 'police or regulatory exception' to the automatic stay is to prevent the bankruptcy court from becoming a haven for wrongdoers." Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc., 700 F.2d 1279, 1283 (9th Cir. 1983) (citing 2 COLLIER ON BANKRUPTCY § 362.05). However, the type of judgments which are exempt from the automatic stay are limited to injunctive and declaratory relief. 11 U.S.C. § 362(b)(5) (1994). Section 362(a) provides that, except as provided in subsection (b), filing a petition in bankruptcy "operates as a stay, applicable to all entities, of . . . (2) the enforcement, against the debtor or against the property of the estate, of a judgment obtained before commencement of the case under this title." 11 U.S.C. § 362(a) (1994). Section 362(b) provides that filing a petitions "does not operate as a stay . . . (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b) (1994); *see* EEOC v. Rath Packing Co., 787 F.2d 318, 324 (8th Cir. 1986) (state action to enforce Title VII within section 362(b)(4)); Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267, 270 (3d Cir. 1984) (state action to enforce environmental statutes within section 362(b)(4)); Herman v. Brown, 160 B.R. 780, 782 (E.D. La. 1993) (state action to insure compliance with State Insurance Code within section 362(b)(4)).

tion may be involved in a bankruptcy proceeding, including consumer protection,[79] employment discrimination,[80] occupational safety and health,[81] nuisance abatement,[82] and zoning.[83] State regulation of specific industries such as banking,[84] securities,[85] educa-

79. *See* Georgia v. Family Vending, Inc. (*In re* Family Vending, Inc.), 171 B.R. 907, 909 (Bankr. N.D. Ga. 1994) (holding that writ by state against debtor for violation of Fair Business Practices Act did not violate automatic stay); Hyman v. Iowa State Bank (*In re* Health Care Prod., Inc.), 159 B.R. 332, 334–36 (Bankr. M.D. Fla. 1993) (holding that state did not have Eleventh Amendment immunity in suit by trustee seeking determination that debtor's funds held in segregated accounts as required by settlement of prior state "deceptive marketing scheme" action against debtor were property of estate); Ohio v. Hughes (*In re* Hughes), 87 B.R. 49, 49, 52 (Bankr. S.D. Ohio 1988) (validating state's right to sue debtor in state court for violation of state law prohibiting odometer rollback); *In re* Liss, 59 B.R. 556, 558, 561 (Bankr. N.D. Ill. 1986) (modifying automatic stay to allow state civil action in state court against debtor/jeweler who sold cubic zarconia as diamonds).

80. *See* EEOC v. McLean Trucking Co., 834 F.2d 398, 399 (4th Cir. 1987) (reversing lower court decision that automatic stay prevented EEOC from suing debtor for age and race discrimination); EEOC v. Rath Packing Co., 787 F.2d 318, 325 (8th Cir. 1986) (holding debtor's chapter 11 petition filing did not automatically stay EEOC proceedings to remedy sex discrimination); Finfrock v. Interco, Inc. (*In re* Interco, Inc.), 153 B.R. 858, 859-61 (Bankr. E.D. Mo. 1993) (holding that state department of human rights' complaint against debtor on behalf of employee who suffered from AIDS alleging unlawful handicap discrimination was barred by automatic stay).

81. *See* Brown v. United States (*In re* Rebel Coal Co., Inc.), 944 F.2d 320, 321 (6th Cir. 1991) (reversing lower court judgment that government garnishment of penalty imposed under Mine Safety and Health Act, 30 U.S.C. § 801–962, was voidable preference under 11 U.S.C. § 547(B)); Brock v. Morysville Body Works, Inc., 829 F.2d 383, 390 (3d Cir. 1987) (holding abatement order but not money judgment for violation of Occupational Safety and Health Act was enforceable against Chapter 11 debtor).

82. *See* Smith-Goodson v. Citfed Mortgage Corp. (*In re* Smith-Goodson), 144 B.R. 72, 74-75 (Bankr. S.D. Ohio 1992) (holding city's notice to Chapter 13 debtors requiring that their real property be brought into compliance with city ordinances was exempt from automatic stay); *In re* Porter, 42 B.R. 61, 67 (Bankr. S.D. Tex. 1984) (holding state court judgment padlocking debtor's building to prevent its use for prostitution was not violation of automatic stay).

83. *See* Cournoyer v. Town of Lincoln, 790 F.2d 971, 977 (1st Cir. 1986) (holding that town enforcement of state court judgment that allowed town to clear junkyard operated in violation of zoning ordinance did not violate automatic stay); *In re* Catalano, 155 B.R. 219, 221 (Bankr. D. Neb. 1993) (holding "condemnation proceeding by a city to rid the city of a structure deemed unsafe" is exempt from automatic stay in case where debtor filed petition on day before demolition of structure was scheduled).

84. *See* Sunshine Dev., Inc. v. FDIC 33 F.3d 106, 113 n.8 (1st Cir. 1994) (affirming lower court judgment that FDIC, acting as receiver of insolvent bank, is not exercising regulatory power and therefore is prohibited by automatic stay from foreclosing on debtor's property); *In re* Interchemicals Co., 148 B.R. 263, 268 (Bankr. S.D. Tex. 1992) (holding that Superintendent of Banks of State of New York, acting to liquidate assets of failed bank, is not subject to automatic stay); Murray v. United States (*In re* Murray), 128 B.R. 517, 520 (Bankr. N.D. Tex. 1991) (holding that action by United States Department of

tion,[86] transportation,[87] oil and gas,[88] and even horse racing[89] might be the subject of a bankruptcy proceeding. The most visible regulatory scheme involves enforcement of state environmental statutes.[90] Although not an intended benefit, polluters often seek to

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Treasury, Office of Thrift Supervision, to determine "liability for alleged violation of federal banking laws" is exempt from automatic stay).

85. *See* SEC v. First Fin. Group of Texas, 645 F.2d 429, 438 (5th Cir. 1981) (finding that SEC's appointment of temporary receiver was not stayed under Bankruptcy Code); *In re* Knoell, 160 B.R. 825, 826 (D. Ariz. 1993) (deciding that automatic stay did not prevent Arizona Corporation Commission from investigating debtor's possible securities violations).

86. *See In re* Draughon Training Inst., Inc., 119 B.R. 921, 927 (Bankr. W.D. La. 1990) (holding that state certificate approval, necessary for debtor to continue business, was property of estate and state withdrawal was violation of automatic stay).

87. *See* ICC v. Lifschultz Fast Freight Corp., 151 B.R. 150, 153 (N.D. Ill. 1993) (holding that ICC could enforce trucking rate regulations against debtor motor common carrier); Wengert Transp., Inc. v. Crouse Cartage Co. (*In re* Wengert Transp., Inc.), 59 B.R. 226, 231 (Bankr. N.D. Iowa 1986) (holding that automatic stay does not prevent state transportation regulation authority from holding hearings on debtors application for certificate to operate as common carrier).

88. *See In re* Security Gas & Oil, Inc., 70 B.R. 786, 790, 792 (Bankr. N.D. Cal. 1987) (finding that state's action requiring debtor to reclaim abandoned wells and shut down remaining operations did not violate automatic stay).

89. *See* Tri-City Turf Club, Inc. v. Kentucky Racing Comm'n (*In re* Tri-City Turf Club, Inc.), 203 B.R. 617, 620 (Bankr. E.D. Ky. 1996) (holding that state's Eleventh Amendment immunity precluded bankruptcy court jurisdiction over case in which chapter 11 debtor in possession sought injunction against state for revoking its license to hold live horse races and conduct intertrack betting); Will Rogers Jockey & Polo Club, Inc. v. Oklahoma Horse Racing Comm'n (*In re* Will Rogers Jockey & Polo Club, Inc.), 111 B.R. 948, 950-51 (Bankr. N.D. Okla. 1990) (distinguishing debtor's state law claim, for which state had Eleventh Amendment immunity, from Bankruptcy Act claim of discrimination, for which Congress had validly abrogated state's Eleventh Amendment immunity in case involving state refusal to issue license to conduct pari-mutuel racing).

90. *See* City of New York v. Exxon Corp., 932 F.2d 1020, 1023–25 (2d Cir. 1991) (deciding that governmental suits for recovery of costs incurred in actions for "completed violations" of environmental laws fall under exemption to automatic stay); *Penn Terra Ltd.*, 733 F.2d at 278 (recognizing Congress's intention to provide exception to automatic stay in Bankruptcy Code); New Jersey Dep't of Envtl. Protection & Energy v. Madison Indus., Inc. (*In re* Madison Industries, Inc.), 161 B.R. 363, 365 (D.N.J. 1993) (finding that Congress intended for state police and regulatory power to include environmental protection actions); Hagaman v. New Jersey Dep't of Envtl. Protection & Energy, 151 B.R. 696, 698–99 (D.N.J. 1993) (determining that state police power to force compliance with pollution laws was exempt from stay provisions and not limited to "imminent hazards"); Friends of the Sakonnet v. Dutra, 125 B.R. 69, 71 (D.R.I. 1991) (asserting exemption to automatic stay in actions where governmental unit attempts to prevent violation of environmental protection laws); Wilner Wood Prod. Co. v. Maine Dep't of Envtl. Protection (*In re* Wilner Wood Prods. Co.), 119 B.R. 345, 349 (Bankr. D. Me. 1990) (considering state department of environmental protection's motion for stay pending appeal); *In re* Microfab, Inc., 105 B.R. 152, 158 (Bankr. D. Mass. 1989) (reasoning that under exception to automatic stay, state may

avoid the liability for fines and environmental cleanup costs by filing for bankruptcy protection.[91]

The cases in which states are involuntarily drawn into bankruptcy by debtors are the type most directly impacted by the Supreme Court's decision in *Seminole Tribe* because it is in those cases that congressional power to abrogate a state's immunity from suit in federal court becomes an issue.

V. *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*

The facts in *Seminole Tribe of Florida v. Florida* are straightforward. The Indian Gaming Regulatory Act provides that Indian tribes may conduct certain gaming activities only in conformance with a valid compact between the tribe and the state in which the gaming activities are located.[92] The Act, passed by Congress under the Indian Commerce Clause,[93] requires the state involved to negotiate in good faith with the tribe to establish the compact,[94] and it allows the tribe to bring suit in federal court if the state fails to negotiate in good faith.[95]

In 1991, the Seminole Indian Tribe of Florida brought suit against the state of Florida in federal district court pursuant to the Indian Gaming Regulatory Act, alleging that the State failed to ne-

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perfect lien without violating stay); Utah Div. of Oil, Gas & Mining v. Kaiser Steel Corp. (*In re* Kaiser Steel Corp.), 87 B.R. 662, 666–67 (Bankr. D. Colo. 1988) (holding that state's commencement of enforcement proceedings for alleged violations of environmental law is "presumptively an exercise of its police and regulatory powers" excepted from automatic stay); Norwesco Dev. Corp. v. Pennsylvania Dep't of Envtl. Resources (*In re* Norwesco Dev. Corp.), 68 B.R. 123, 126 (Bankr. W.D. Pa. 1986) (explaining that when state department of environmental resources seeks prevention of future damage to environment, these police power activities would not be subject to automatic stay); *In re* Commonwealth Oil Refining Co., Inc., 58 B.R. 608 (Bankr. W.D. Tex. 1985) (holding U.S. Environmental Protection Agency enforcement action against debtor was not subject to automatic stay and denying debtor's motion for stay under 11 U.S.C. § 105), *aff'd*, 805 F.2d 1175 (5th Cir. 1986).

91. *See* United States v. Nicolet, Inc., 857 F.2d 202, 210 (3d Cir. 1988) (holding that automatic stay did not prevent government from continuing pre-bankruptcy petition lawsuit seeking recovery from debtor of pre-petition expenditures for environmental cleanup, but that stay would prevent government from executing on any money judgment).

92. 25 U.S.C. § 2710(d)(1)(C) (1994).

93. U.S. CONST. art. I, § 8, cl. 3.

94. 25 U.S.C. § 2710(d)(3)(A) (1994).

95. *Id.* § 2710(d)(7).

gotiate in good faith towards the establishment of a compact.[96] The state of Florida filed a motion to dismiss the suit, alleging that the suit violated the State's immunity from suit in federal court. The district court denied Florida's motion to dismiss.[97] On an interlocutory appeal of the denial, the United States Court of Appeals for the Eleventh Circuit reversed and held that the Indian Commerce Clause did not grant Congress the power to abrogate a state's Eleventh Amendment immunity from suit.[98] The court of appeals also found that the doctrine of *Ex parte Young*[99] could not be used to force the state to conduct good faith negotiations.[100] The court concluded that it had no jurisdiction over the lawsuit, and remanded the matter to the district court with directions to dismiss the suit.[101]

The United States Supreme Court granted certiorari[102] and held that (1) "the Eleventh Amendment prevent[s] Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause," and (2) the *Ex parte Young* doctrine does not permit suits for prospective injunctive relief against a governor to enforce the good-faith bargaining requirement of the Indian Gaming Regulatory Act.[103]

The majority, led by Chief Justice Rehnquist, held that Congress could not abrogate Florida's immunity from suit under the Eleventh Amendment when legislating pursuant to the Indian Commerce Clause.[104] The Court acknowledged that Congress has the authority to abrogate a state's immunity from suit when legislating

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96. Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1121 (1996). The Court determined that relief against state officials under *Young* was not available because there were specific congressional remedies in place, and *Young* should not be used to supplement those remedies, especially when the relief available under *Young* greatly exceeded the relief provided by statute. *Id.* at 1132–33.

97. *Id.* at 1121.

98. *Id.*

99. 209 U.S. 123 (1908). The *Young* doctrine allows a suit against a state official when the suit seeks only prospective injunctive relief to end a continuing violation of federal law. *Seminole Tribe*, 116 S. Ct. at 1132.

100. *Seminole Tribe*, 116 S. Ct. at 1121–22

101. *Id.* at 1122.

102. 115 S. Ct. 932 (1995).

103. *Seminole Tribe*, 116 S. Ct. at 1122.

104. U.S. CONST. art. I, § 8, cl. 3.

pursuant to the Fourteenth Amendment.[105] The Court then turned to the question of whether Congress could abrogate Eleventh Amendment immunity through an exercise of Article I powers.[106] The Court acknowledged its decision in *Pennsylvania v. Union Gas Co.*,[107] which held that Congress could abrogate Eleventh Amendment immunity pursuant to the Interstate Commerce Clause, an Article I power. The Court found no principled distinction to be made between the Indian Commerce Clause—the Article I power at issue in *Seminole Tribe*—and the Interstate Commerce Clause, which was the Article I power at issue in *Union Gas*.[108] The Court then turned its attention to the underlying issue—whether Congress could expand federal court jurisdiction under Article III through an exercise of Article I powers.

The *Seminole Tribe* Court observed that the decision in *Union Gas* had been reached without an expressed rationale agreed upon by the majority of the Court, and that the decision had created confusion in the lower courts.[109] Further, the majority observed that the decision deviated sharply from established federalism jurisprudence, essentially eviscerating the Court's earlier interpretations of Eleventh Amendment immunity.[110] The Court noted that it "was well-established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle

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105. *Seminole Tribe*, 116 S. Ct. at 1125 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452–56 (1976)).

106. *Id.* at 1126–27.

107. 491 U.S. 1, 13–14 (1989).

108. *Seminole Tribe*, 116 S. Ct. at 1127. So much for the argument that *Pennsylvania v. Union Gas Co.* could be limited to the Interstate Commerce Clause. The gist of the Court's determination was that an Article I power is an Article I power; either Article I gives Congress the power to abrogate the Eleventh Amendment immunity, or it does not. There is no principled distinction that may be drawn between the Indian Commerce Clause and any other Article I power, including the Bankruptcy Clause, that would operate to allow Congress to abrogate the Eleventh Amendment pursuant to an exercise of those powers. *Id.* at 1131–32; *see supra* note 27 and accompanying text.

109. *Seminole Tribe*, 116 S. Ct. at 1127; *see* Chavez v. Arte Publico Press, 59 F.3d 539, 1027 (5th Cir. 1995) (observing that "Justice White's vague concurrence renders the continuing validity of *Union Gas* in doubt.") (internal quotation marks omitted).

110. *See Seminole Tribe*, 116 S. Ct. at 1127 (citing Hans v. Louisiana, 134 U.S. 1 (1890)). The push to overrule *Hans* has been consistent. In *Welch*, Justice Powell acknowledged the dissenters' numerous attempts to overrule *Hans*, and cited the following cases: Papasan v. Allain, 478 U.S. 265, 293 (1986); Green v. Mansour, 474 U.S. 64, 74 (1985); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985)). *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987).

that state sovereign immunity limited the federal courts' jurisdiction under Article III."[111] With a nod to the dissent in *Union Gas*, the Court also noted that the plurality's idea—"that Congress could under Article I expand the scope of federal court jurisdiction as set forth in Article III"[112]—contradicted the Court's "unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal court jurisdiction."[113] Finally, the *Seminole Tribe* Court found that the *Union Gas* plurality had based its conclusions regarding the expansion of Article III jurisdiction upon a misreading of precedent,[114] and held that *Union Gas* was wrongly decided and should be overruled.[115]

With *Union Gas* out of the way, the Court went on to cement the relationship between sovereign immunity and the constitutional limitation on federal court jurisdiction embodied in the Eleventh

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111. *Seminole Tribe*, 116 S. Ct. at 1127. Several Justices would surely take issue with this statement. *See Union Gas*, 491 U.S. at 24 (Stevens, J., concurring) (stating that sovereign immunity has absolutely nothing to do with limit on judicial power contained in Eleventh Amendment). Of the thirteen Supreme Court Justices to have addressed this issue, eight have determined that Congress has the authority to abrogate the states' immunity when acting pursuant to Article I powers. *Seminole Tribe*, 116 S. Ct. at 1142 (Stevens, J., dissenting).

112. *Seminole Tribe*, 116 S. Ct. at 1128.

113. *Id.* (citing Pennsylvania v. Union Gas, 491 U.S. 1, 39 (1989) (Scalia, J., concurring in part and dissenting in part)).

114. *Id.* The Court discussed *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), which stands for the unrelated principle that states may waive their immunity, and noted that the *Union Gas* plurality had cited as precedent several decisions in which the Court had merely assumed a proposition for the sake of argument. *See Seminole Tribe*, 116 S. Ct. at 1128 (refraining specifically from deciding whether Congress has power to waive Eleventh Amendment when legislating pursuant to Commerce Clause); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 252 (1985) ("assuming, without deciding" that Congress has authority to waive Eleventh Amendment when legislating under Commerce Clause). Finally, the Court explained that the plurality's reliance on the Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that Congress may abrogate Eleventh Amendment when legislating pursuant to Fourteenth Amendment) was misplaced, because that decision involved congressional abrogation pursuant to the Fourteenth Amendment, not an antecedent provision of the Constitution. *Seminole Tribe*, 116 S. Ct. at 1128.

115. *Seminole Tribe*, 116 S. Ct. at 1128. Justice Rehnquist noted that the policies underlying stare decisis do not require continued adherence to the holding in *Union Gas*, citing Nicholas v. United States, 511 U.S. 738 (1994) (reasoning that degree of confusion following splintered decision is itself reason to reexamine that decision). *Id.* Justice Rehnquist also noted that a majority of the members of the *Union Gas* court expressly disagreed with the rationale of the plurality. *Seminole Tribe*, 116 S. Ct. at 1127, 1128 (naming Justice White—who concurred in *Union Gas* result but not reasoning—and Justices Rehnquist, O'Connor, Scalia and Kennedy who all disagreed with plurality's reasoning).

Amendment. The Court stated that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government."[116] In the words of the Chief Justice, "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[117]

The Court also held that the doctrine of *Ex parte Young* could not be invoked to force the state of Florida into good faith negotiations with the tribe.[118] The tribe had argued that the "continuing violation of federal law" required in order to invoke *Young* was the governor's failure to comply with section 2710(d)(3) of the Indian Gaming Regulatory Act.[119] However, the Court refused to allow the tribe to proceed against the governor, noting that the Court has refused to create additional remedies under *Young* where Congress has provided a remedial scheme.[120] This is especially true where Congress has created a specific and limited remedy.[121] If the duty imposed upon a state by a federal statute could be enforced by a suit under *Ex parte Young*—which would subject the state to "the full remedial powers of the federal court"—any limited remedy provided in the statute could be rendered superfluous.[122]

Not surprisingly, Justice Stevens dissented.[123] In addition to bemoaning the "shocking character of the majority's affront to a co-equal branch of our government,"[124] Justice Stevens warned of the majority decision's far-ranging implications:

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116. *Seminole Tribe*, 116 S. Ct. at 1131.

117. *Id.* at 1131–32.

118. *Id.* at 1133.

119. *Id.* at 1132.

120. *See id.* (discussing *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (holding that when Congress has provided adequate remedial scheme, Court has not created additional remedies)).

121. *Seminole Tribe*, 116 S. Ct. at 1132. Section 2710(d)(7) of the Indian Gaming Regulatory Act provided only that a court may order a state to conclude a compact within 60 days. *Id.*

122. *Id.* at 1133.

123. *Id.* (Stevens, J., dissenting).

124. *Id.* at 1134.

> [t]he importance of the majority's decision to overrule the Court's holding in *Pennsylvania v. Union Gas Co.* cannot be overstated. The majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.[125]

In a lengthy, detailed, and historically interesting dissent that the majority describes as "disregard[ing] our case law in favor of a theory cobbled together from law review articles and its own version of historical events,"[126] Justice Souter rejected the majority's view of congressional power, and postulated that *Seminole Tribe* effectively overruled *Ex parte Young*.[127] Justice Souter's dissent is interesting reading, if one is inclined to find Eleventh Amendment constitutional history interesting, but it is Justice Stevens's view—a view that has prevailed at least once, in *Union Gas*—that we are likely to see rise again.[128]

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125. *Seminole Tribe*, 116 S. Ct. at 1134. Justice Stevens's dissent echoes his other opinions in this area, and it is the strongest challenge to the majority's position. Chief Justice Rehnquist pointed out in response to the dissenters that there are several avenues that remain available to ensure compliance with federal law, including suits brought by the federal government against the states, suits brought by an individual against the state under *Ex parte Young*, and the review of state law decisions concerning a question of federal law by the United States Supreme Court. *Id.* at 1131, n.14.

126. *Seminole Tribe*, 116 S. Ct. at 1129–30 (Souter, J., dissenting).

127. *Id.* at 1145, 1146 (Souter, J., dissenting). The majority responded to Justice Souter's dissent by distinguishing its actual holding—that the Indian Gaming Regulatory Act does not authorize a suit under *Ex parte Young* against an individual state officer—from a finding that Congress could not have authorized such a suit, which the majority specifically disavows. *Id.* at 1133, n.17.

128. Unlike *Union Gas*, which was a fractured and internally-flawed opinion, *Seminole Tribe* is a solid 5-4 decision that should withstand the test of time. However, given the Court's tortured history with respect to this issue, and the fact that Justices Stevens, Souter, Ginsberg, and Breyer are solidly in the dissent (just as Chief Justice Rehnquist and Justices Scalia, O'Connor, and Kennedy were in *Union Gas*), the issue could come up again. The swiftness with which the issue resurfaces remains to be seen.

VI. THE EFFECT OF *SEMINOLE TRIBE* ON THE BANKRUPTCY CODE

The Supreme Court's decision in *Seminole Tribe* has implications far beyond the regulation of Indian gaming. The Court's analysis makes it clear that Congress cannot use an Article I power to abrogate the limitation on federal court jurisdiction embodied in the Eleventh Amendment.[129] This decision affects a wide range of federal legislation[130] and calls into question the validity of any federal statute enacted pursuant to Article I purporting to abrogate Eleventh Amendment immunity by creating federal court jurisdiction over a nonconsenting state. The Bankruptcy Code is within this group of statutes.[131]

Bankruptcy practitioners—and bankruptcy judges—are accustomed to conducting almost all litigation respecting the debtor in a

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129. Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1133 (1996). The *Seminole Tribe* majority did not mince words. "The Eleventh Amendment restricts the judicial power under [A]rticle III, and [A]rticle I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 1131–32. The Chief Justice acknowledged that the majority's holding would affect a wide range of Article I enactments, but suggested in response to the cries of alarm in the dissent that "it has never been widely thought that the federal antitrust, copyright, or bankruptcy statutes abrogated the state's sovereign immunity." *Id.* at 1131 n.16. Justice Rehnquist's observation is interesting in light of the lower court's opinions to the contrary. *See* McVey Trucking, Inc. v. Secretary of State of Illinois (*In re* McVey Trucking), 812 F.2d 311, 326–27 (7th Cir. 1987), (holding state not immune from suit to avoid preference under section 547(b) of Bankruptcy Code).

130. *Seminole Tribe*, 116 S. Ct. at 1134 (Stevens, J., dissenting). Justice Stevens noted that federal copyright, patent, environmental, and bankruptcy statutes are implicated, as well as any statute enacted to regulate interstate commerce. *Id.* Indeed, since *Seminole Tribe* was announced, the lower courts have addressed the constitutionality of several Article I statutes, including the Fair Labor Standards Act. *See* Wilson-Jones v. Caviness, 99 F.3d 203, 207 (6th Cir. 1996) (positing that congressional authority under Commerce Clause is insufficient to abrogate Eleventh Amendment); Genentech, Inc. v. Regents of the Univ. of Cal., 939 F. Supp. 639, 642 (S.D. Ind. 1996) (discussing congressional authority under Article I and Fourteenth Amendment as basis for enactment of patent act); Union Pacific R.R. v. Burton, 949 F. Supp. 1546, 1554 (D. Wyo. 1996) (observing that Railroad Revitalization and Regulatory Reform Act was enacted pursuant to Commerce Clause, not Fourteenth Amendment, thus insufficient to abrogate Eleventh Amendment immunity); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 948 F. Supp. 400, 426 (D.N.J. 1996) (stating that false advertising prong of Lanham Act was Commerce Clause enactment and thus insufficient to overcome Eleventh Amendment immunity); Ellenberg v. Board of Regents (*In re* Midland Mechanical Contractors, Inc.), 200 B.R. 453, 457–58 (Bankr. N.D. Ga. 1996) (stating that abrogation provisions of Bankruptcy Code do not affect states' Eleventh Amendment immunity).

131. U.S. CONST. art. I, § 8, cl. 4; *see* 11 U.S.C. §§ 101–1330 (1994) (the Bankruptcy Code).

single forum.[132] Because many state governments are active participants in bankruptcy cases across the country,[133] Eleventh Amendment challenges to bankruptcy court jurisdiction based on the application of *Seminole Tribe* to the Bankruptcy Code arose almost immediately.[134] The Supreme Court's decision in *Seminole Tribe* is forcing the bankruptcy courts to come to terms with the idea that single-forum resolution of all claims may no longer be possible. Although a few courts have refused to acknowledge and properly apply *Seminole Tribe* to the Bankruptcy Code,[135] it appears as though a growing majority of courts are prepared to do so.[136]

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132. Schulman v. California State Water Resources Control Bd. (*In re* Lazar), 200 B.R. 358, 379 (Bankr. C.D. Cal. 1996) (advocating adjustment of all of debtor's obligations in single forum).

133. *See* Dan Morales, *The "New" State Attorneys General: The Sleeping Giants Awake*, 12 AM. BANKR. INST. J. 1, 1 (Sept. 1993) (describing Texas's role in bankruptcy cases); Stephen W. Sather et al., *Borrowing from the Taxpayer: State and Local Tax Claims in Bankruptcy*, 4 AM. BANKR. INST. L. REV. 201, 201 (1996) (noting that state governments are becoming more active in bankruptcy collections).

134. In fact, many states had, albeit unsuccessfully, asserted Eleventh Amendment immunity to suit in bankruptcy court well before *Seminole Tribe* was decided. *See, e.g.*, Mather v. Oklahoma Employment Sec. Comm'n (*In re* Southern Star Foods, Inc.), 190 B.R. 419, 422 (Bankr. E.D. Okla. 1995); Sparkman v. Florida Dep't of Revenue (*In re* York-Hannover Devs., Inc.), 181 B.R. 271, 273 (Bankr. E.D. N.C. 1995); Harden v. Texas Dep't of Transp. (*In re* AER-Aerotron, Inc.), 181 B.R. 268, 268 (Bankr. E.D. N.C. 1995).

135. *See, e.g.*, Sacred Heart Hosp. v. Pennsylvania Dep't of Welfare (*In re* Sacred Heart Hosp.), 199 B.R. 129, 135 (Bankr. E.D. Pa. 1996) (distinguishing, without citation of any authority, declaratory judgment action as beyond reach of Eleventh Amendment), *rev'd*, 204 B.R. 132, 138 (E.D. Pa. 1997) (finding no congressional authority to abrogate sovereign immunity under Bankruptcy Clause); Headrick v. Georgia (*In re* Headrick), 200 B.R. 963, 967 (Bankr. S.D. Ga. 1996) (holding Congress has power to abrogate state sovereign immunity in Bankruptcy Code under Fourteenth Amendment); Burke v. Georgia (*In re* Burke), 203 B.R. 493, 497 (Bankr. S.D. Ga. 1996) (holding Fourteenth Amendment gives Congress power to enforce Bankruptcy Code "privileges and immunities by creating private rights of action against the states").

136. *See, e.g.*, Tri-City Turf Club, Inc. v. Kentucky Racing Comm'n (*In re* Tri-City Turf Club, Inc.), 203 B.R. 617, 620 (Bankr. E.D. Ky. 1996) (finding no abrogation under section 106(a) after *Seminole Tribe*); Ossen v. Connecticut (*In re* Charter Oaks Assocs.), 203 B.R. 17, 20–23 (Bankr. D. Conn. 1996) (discussing sections 106(a) and (b)); *In re* Lush Lawns, Inc., 203 B.R. 418, 421 (Bankr. N.D. Ohio 1996) (holding no abrogation under section 106 after *Seminole Tribe*); *Midland Mechanical*, 200 B.R. at 457, 458 (emphasizing no abrogation under section 106 after *Seminole Tribe*); *see also In re* Martinez, 196 B.R. 225, 230 (D.P.R. 1996) (analyzing and applying *Seminole Tribe* to invalidate abrogation under section 106).

A. *Abrogation Under Section 106(a) of the Bankruptcy Code*

The first, and perhaps most obvious, argument to flow from *Seminole Tribe* involves the Bankruptcy Code's abrogation provisions.[137] The decision in *Seminole Tribe* reaffirms Congress's power to abrogate a state's Eleventh Amendment immunity provided that Congress: (1) unequivocally expresses its intention to abrogate such immunity and subject the states to suit in federal court, and (2) enacts such a provision pursuant to a valid exercise of power.[138] Section 106(a),[139] which purports to abrogate sovereign immunity with respect to the specific Code sections enumerated therein (thereby allowing suit under those sections against an unconsenting state in federal court), was amended in 1994 to include a clear and unmistakable statement of congressional intent to waive the sovereign immunity of state and federal governmental

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137. *See* 11 U.S.C. § 106(a) (1994) (abrogating sovereign immunity for state and federal governmental units).

138. Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1123 (1996) (citing Green v. Mansour, 474 U.S. 64, 68 (1985)).

139. Section 106(a) provides:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.
>
> (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.
>
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

11 U.S.C. § 106(a) (1994).

units as to actions under the enumerated sections for monetary, injunctive, and declaratory relief.[140]

With respect to the first question, there is no dispute that section 106(a) contains a clear statement of congressional intent to abrogate Eleventh Amendment immunity.[141] However, with the exception of a few aberrant decisions,[142] most courts have properly

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140. Koehler v. Iowa College Student Aid Comm'n (*In re* Koehler), 204 B.R. 210, 214–15 (Bankr. D. Minn. 1997) (noting that prior version of statute had been insufficiently clear expression of congressional intent, citing United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992) and Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 104 (1989)).

141. *See In re* Martinez, 196 B.R. 225, 229 (D.P.R. 1996) (commenting that Congress clearly intended to abrogate state sovereign immunity in 1994 amendment to section 106(a)); Tri-City Turf Club, Inc. v. Kentucky Racing Comm'n (*In re* Tri-City Turf Club, Inc.), 203 B.R. 617, 619 (Bankr. E.D. Ky. 1996) (noting Congress's intention in section 106(a) to abolish state sovereign immunity); Ellenberg v. Board of Regents (*In re* Midland Mechanical Contractors, Inc.), 200 B.R. 453, 457 (Bankr. N.D. Ga. 1996) (renerating congressional intent in section 106(a) to set aside state immunity in bankruptcy context and citing *In re* Merchants Grain, Inc., 59 F.3d 630, 634–35 (7th Cir. 1995)).

142. *See* Headrick v. Georgia (*In re* Headrick), 200 B.R. 963, 967 (Bankr. S.D. Ga. 1996) (noting that congressional power to abrogate state sovereign immunity in Bankruptcy Code is found in Fourteenth Amendment and citing Mather v. Oklahoma Employment Sec. Comm'n (*In re* Southern Star Foods, Inc.), 190 B.R. 419, 425 (Bankr. E.D. Okla. 1995)); Burke v. Georgia (*In re* Burke), 203 B.R. 493, 497 (Bankr. S.D. Ga. 1996) (restating congressional power found in Fourteenth Amendment to abrogate state sovereign immunity). The *Southern Star Foods, Headrick* and *Burke* courts find congressional authority to abrogate the states' Eleventh Amendment authority in the Fourteenth Amendment. Given that Congress is empowered to make uniform laws on the subject of bankruptcy by Article I, Section 8 of the Constitution, finding congressional power to abrogate the Eleventh Amendment in the Fourteenth Amendment is a stretch. Although the Supreme Court has held that the Fourteenth Amendment does authorize congressional abrogation of the Eleventh Amendment, *see* Quern v. Jordan, 440 U.S. 332, 343 (1979) (concluding that where Congress has power to abrogate Eleventh Amendment immunity pursuant to Fourteenth Amendment, there must be significant indication of Congress's intent to do so); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding, with reference to Eleventh Amendment, that "Congress may, . . . for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts"), an act is only a valid act of enforcement if it is "rationally related" to the amendment's subject matter. Wilson-Jones v. Caviness, 99 F.3d 203, 208 (6th Cir. 1996) (citing South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)); *see* Hutto v. Finney, 437 U.S. 678, 698 n.31 (1978) (noting that Congress may use Section 5 of Fourteenth Amendment to enforce parts of Bill of Rights which are incorporated into Fourteenth Amendment and apply to states.). Under *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), the three elements of the rational relationship test to be applied to legislation passed under Section 5, the Enforcement Clause, of the Fourteenth Amendment are: (1) whether a statute may be regarded as an enactment to enforce the Fourteenth Amendment, (2) whether the statute is plainly adapted to that end, and (3) whether it is not prohibited but is consistent with the letter and spirit of the Constitution. Where

applied the second part of the *Seminole Tribe* test and concluded that the abrogation provisions of the Bankruptcy Code were not enacted pursuant to a valid exercise of power, because the Bankruptcy Clause, an Article I power, cannot be used to abrogate the limitation on federal court jurisdiction embodied in the Eleventh Amendment.[143] Accordingly, the abrogation provisions of section 106(a) are an unconstitutional attempt by Congress to expand the jurisdiction of the federal courts using an Article I power and are ineffective against an unconsenting state.[144]

Congress is silent as to the source of its constitutional power, something about the statute must connect it to recognizable Fourteenth Amendment aims. *See Wilson-Jones*, 99 F.3d at 210 (holding that Fair Labor Standards Act "may not be regarded as passed to enforce the Fourteenth Amendment simply because it is aimed to remedy a mundane 'discrimination' between private- and public-sector workers"). "The Fourteenth Amendment contains rather specific constitutional goals, such as the elimination of race discrimination by state actors, and more general goals, such as the guarantee to every citizen of equal protection of the laws." *Id.* at 209. Generally, the goal of equal protection covers every aspect of an individual's interaction with the government; if every congressional enactment that evidenced a rational relationship to achieving the equal protection of the law were valid under Section 5 of the Fourteenth Amendment, then the Enforcement Clause of the Fourteenth Amendment would be a license to Congress to pass "any sort of legislation whatsoever," notwithstanding the Eleventh Amendment. *Id.* In effect, Section 5 of the Fourteenth Amendment would operate as a repeal of the Eleventh Amendment. It is unlikely that the current Supreme Court would interpret Section 5 so broadly, and the lower courts—faced with Fourteenth Amendment arguments regarding other federal statutes—have rejected the proposition that federal court jurisdiction can be "saved" by finding a Fourteenth Amendment rationale for a piece of legislation. *See, e.g.*, *Wilson-Jones*, 99 F.3d at 209 (finding no Fourteenth Amendment basis for Fair Labor Standards Act); Raper v. Iowa, 940 F. Supp. 1421, 1426 (S.D. Iowa 1996) (concluding that Fair Labor Standards Act was not enacted to further equal protection objectives); *Tri-City Turf Club*, 203 B.R. at 620 (holding that there is no Fourteenth Amendment basis for Bankruptcy Code).

143. *See Martinez*, 196 B.R. at 229 (holding abrogation provisions of section 106(a) unconstitutional as applied to unconsenting state); *Tri-City Turf Club*, 203 B.R. at 619 (holding that reasoning of *Seminole Tribe* applies to Bankruptcy Code and precludes federal court jurisdiction over state); *Midland Mechanical*, 200 B.R. at 456–57 (stating "the avoidance of Eleventh Amendment immunity found within [Bankruptcy] Code section 106 has no validity in the wake of *Seminole* [*Tribe*] because it relies upon a nonexistent Article I power of abrogation for its generative impetus"); *see also* Harden v. Texas Dep't of Transp. (*In re* AER-Aerotron, Inc.), 104 F.3d 677, 683 (4th Cir. 1997) (Niemeyer, J., concurring) (stating "Congress'[s] enactments under Article I are *irrelevant* to whether state retains Eleventh Amendment immunity because Congress lacks power to affect that immunity in the exercise of its Article I powers") (emphasis added).

144. Note that although the provisions of section 106(a) are unconstitutional to the extent that they purport to abrogate the states' Eleventh Amendment immunity, the provisions remain effective as against the federal government, and city, county, and municipal governments not entitled to Eleventh Amendment protection. *See* United States v. Lomayaoma, 86 F.3d 142, 145 (9th Cir. 1996) (indicating that congressional authority to

In practice, the loss of section 106(a) will affect those situations in which a debtor seeks to drag a state or state agency into bankruptcy court without the state's consent. Debtors who have listed a cause of action against a state or state agency may no longer bring suit in bankruptcy court against an unconsenting state simply because the cause of action may be property of the debtor's estate. Similarly, debtors may no longer bring suit in federal court under the numerous sections of the Bankruptcy Code that authorize relief against a state without that state's consent to suit in that particular forum.[145]

Stay violation damages provide a good example of *Seminole Tribe's* effect. Before *Seminole Tribe*, if a state or state agency was alleged to have violated the automatic stay,[146] the debtor could bring suit in federal court under section 362(h) to recover damages.[147] Even if the affected state had not filed a claim or otherwise participated in the case, section 106(a) purported to abrogate a state's immunity from suit in federal court; accordingly, the suit could proceed in federal court without a state's consent. The Supreme Court's ruling in *Seminole Tribe* has altered this result. Because the Court has determined that Congress does not have the constitutional authority to abrogate a state's Eleventh Amendment immunity in an Article I enactment, it follows that the abrogation

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regulate Indian affairs is undisturbed by *Seminole Tribe* unless Congress attempts to abrogate Eleventh Amendment). If *Seminole Tribe* has any effect on Article I enactments, it is only to the extent such enactments purport to expand the scope of federal court jurisdiction; otherwise, congressional power is undisturbed. *See id.* (holding that *Seminole Tribe* did not undermine Congress's authority under Indian Commerce Clause, U.S. CONST. art. I, § 3).

145. For example, section 106(a) purported to abrogate immunity among others with respect to: section 362, automatic stay; section 365, executory contracts and unexpired leases; section 505, determination of tax liability; section 525, protection against discriminatory treatment; section 547, preferences; and section 553, setoff.

146. 11 U.S.C. § 362(a), (h) (1994).

147. *See, e.g.*, Fritz v. Washington Mutual (*In re* Fritz), 188 B.R. 438, 443 (E.D. Wash. 1995) (finding state's statute, which permitted continuance of foreclosure sale to future date by "public proclamation," violated automatic stay under Bankruptcy Code); *In re* Whitefield, 165 B.R. 867, 870 (M.D. Tenn. 1994) (awarding attorney fees against state for violating automatic stay); Illinois Dep't of Pub. Aid v. Ellis (*In re* Ellis), 66 B.R. 821, 828 (N.D. Ill. 1986) (finding bankruptcy court's order that state pay debtor's attorney fees consistent with Eleventh Amendment's limited state immunity). *But see In re* Sumpter, 171 B.R. 835, 847 (Bankr. N.D. Ill. 1994) (protecting, under Eleventh Amendment immunity rationale, sheriffs and deputies who were acting as arm of state judicial system from damages arising from wrongful eviction of debtors).

provisions of the Bankruptcy Code—section 106(a) and possibly section 106(c)—are unconstitutional as applied to an unconsenting state. Thus, even if a state or state agency violates the automatic stay, the debtor may not bring suit against the state in federal court unless the state has consented.

This result does not mean that the automatic stay does not apply to states or their agencies, or that states and their agencies are free to disregard the automatic stay. The impact of *Seminole Tribe* is much narrower; it only affects federal court jurisdiction. An action to enforce the automatic stay—or any other provision of the Bankruptcy Code that creates a cause of action against a state—may still be brought in state court because federal law establishes concurrent jurisdiction with state courts for many bankruptcy proceedings. Section 1334(b) of title 28, United States Code, provides for "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to a case under title 11."[148]

That such an action might be brought in state court may be little comfort to bankruptcy lawyers, who favor the single-forum resolution of all aspects of a bankrupt's affairs. However, state court is an excellent alternative when one considers that many federal statutes do not even offer the possibility of a state forum for resolution of claims over which a federal court does not have jurisdiction. For example, actions brought under federal copyright statutes must be brought in federal court because Congress did not provide concur-

148. 28 U.S.C. § 1334(b) (1994). This statute provides that federal courts "shall have original and exclusive jurisdiction of all cases under title 11." *Id.* The only limitations this "exclusive jurisdiction" appears to place on the state courts are that a bankruptcy petition may not be filed in a state court and that state courts may not decide questions involving the actual filing of a petition. *See In re* Wood, 825 F.2d 90, 92–93 (5th Cir. 1987) (finding that "case" in 28 U.S.C. § 1334(a) refers only to filing of petition); Gonzales v. Parks, 830 F.2d 1033, 1035–36 (9th Cir. 1987) (holding that state court did not have subject matter jurisdiction to determine whether filing petition was abuse of process); GEORGE M. TREISTER ET AL., FUNDAMENTALS OF BANKRUPTCY LAW § 2.01(c)(1), at 39-40 (4th ed. 1996) (observing that, beyond filing bankruptcy petition and proceedings involving the petition itself, there has not been judicial need to define "case" as used in 28 U.S.C. § 1334(a)). Essentially any action, other than one involving the actual petition, may be brought in a state court.

But, while federal law allows state court jurisdiction over most aspects of bankruptcy proceedings, it is less clear that state law provides for jurisdiction. That question is discussed in section VI. C. below, which concludes that state courts will be required by the Supremacy Clause to enforce the Bankruptcy Code against nonconsenting states.

rent state court jurisdiction with respect to copyright statutes as it did with respect to the Bankruptcy Code.[149] Post-*Seminole Tribe* plaintiffs with a copyright action against an unconsenting state or state agency have a problem; the Eleventh Amendment protects the state from suit in federal court (and abrogation is not available), and there is no state court jurisdiction. Unless and until Congress creates concurrent jurisdiction in the state courts for copyright and other similarly-situated federal statutes, plaintiffs with claims against unconsenting states under those statutes will have no forum in which to bring their claims. When viewed in that light, state court litigation of Bankruptcy Code causes of action seems much more palatable.

B. *Waiver Under Sections 106(b) and (c) of the Bankruptcy Code*

As the fate of the Code's abrogation provisions becomes clear,[150] attention has turned to the waiver provisions of sections 106(b) and (c). Unlike abrogation, waiver by the state of either its common-law sovereign immunity or Eleventh Amendment immunity is a "voluntary" act. Generally, a state will be found to have waived immunity only where it has legislatively stated its intent to waive "by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable conclusion."[151] A state's statutory enactments and constitutional

149. Chavez v. Arte Publico Press, 59 F.3d 539, 546 (5th Cir. 1995).

150. *See* AER-Aerotron, Inc. v. Texas Dep't of Transp., 104 F.3d 677, 680–81 (4th Cir. 1997) (stating that "perhaps the handwriting is on the wall that the abrogation provisions of the Bankruptcy Code will suffer the same fate as the statutes involved in *Seminole [Tribe].*"); *In re* NRV L.P., 206 B.R. 831, 838 (Bankr. E.D. Va. 1997) (writing that "[s]ince Congress . . . intended in § 106(a) to abrogate the states' Eleventh Amendment immunity, the holding in *Seminole [Tribe]* requires this court to find it unconstitutional").

151. Edelman v. Jordan, 415 U.S. 651, 673 (1974) (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)). The fact that a state may waive its Eleventh Amendment immunity and "consent" to suit in federal court raises questions about the nature of the limitation on subject-matter jurisdiction contained in the Eleventh Amendment. Parties may not ordinarily confer jurisdiction upon federal courts where it otherwise does not exist. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). That a state's waiver of Eleventh Amendment immunity operates to confer otherwise unavailable jurisdiction may support the idea that the Amendment's limitation on federal court jurisdiction is an embodiment of the states' common-law sovereign immunity rather than an inherent constitutional limitation on federal court jurisdiction as set forth in Article III. *See* Union Pacific R.R. v. Burton, 949 F. Supp. 1546, 1550–51 (D. Wyo. 1996) (acknowledging that precise nature of Eleventh Amendment jurisdictional bar has

provisions must specify the state's intention to subject itself to suit in *federal* court for a waiver of Eleventh Amendment immunity to be found.[152] Waiver of a state's sovereign immunity in its own courts does not operate as a waiver of a state's Eleventh Amendment immunity from suit in federal court.[153]

Finding constructive waiver in the absence of a specific legislative or constitutional provision is problematic.[154] The Supreme Court has held that a constructive waiver of a state's Eleventh

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never been defined (citing Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1133 (1996) (affirming Eleventh Circuit's dismissal for lack of subject-matter jurisdiction based on Eleventh Amendment))); *In re* Prairie Island Dakota Sioux, 21 F.3d 302, 305 (8th Cir. 1994) (finding that immunity is separate jurisdictional consideration from subject-matter jurisdiction); ITSI TV Prods. v. Agricultural Ass'ns, 3 F.3d 1289, 1291 (9th Cir. 1993) (stating that Eleventh Amendment immunity is affirmative defense)); PeakSolutions Corp. v. State of Ohio (*In re* PeakSolutions Corp.), 168 B.R. 918, 922 (Bankr. D. Minn. 1994) (dismissing suit based on Eleventh Amendment for lack of in personam jurisdiction).

152. A state must specify *where* it has consented to suit, in addition to whether it has consented to suit. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985) (holding that state must specify intention to subject itself to suit in federal court).

153. Thiel v. State Bar of Wisconsin, 94 F.3d 399, 403 (7th Cir. 1996) (citing Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 306 (1990)); Sherwinski v. Peterson, 98 F.3d 849, 851–52 (5th Cir. 1996) (citing Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 473-74 (1987) and Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984)); *see* Kuhnle Bros., Inc. v. County of Geauga, 103 F.3d 516, 520 (6th. Cir. 1997) (holding that Eleventh Amendment does not affect jurisdiction of state courts).

154. *See Welch*, 483 U.S. at 478 (overruling Parden v. Terminal Ry., 377 U.S. 184 (1964)). In *Parden*, the Supreme Court found that the state of Alabama constructively waived its immunity from suit under the Federal Employer's Liability Act by engaging in an activity that the Act specifically regulated, even though the Act did not specifically state that it was intended to include participating states within the full coverage of the Act. *Parden*, 377 U.S. at 196-98. In *Welch*, the Supreme Court held that the language of the Jones Act, another federal statute that was silent as to the specific inclusion of the states within the coverage of the statute, was insufficient to authorize suits against the states in federal court. *Welch*, 483 U.S. at 475. After *Welch*, it was still widely believed that Congress could define a waiver of the Eleventh Amendment if: (1) Congress indicated a clear, unmistakable intent to subject the states to suit in federal court if they engaged in a specific activity, and (2) a state then voluntarily engaged in such activity. Koehler v. Iowa College Student Aid Comm'n (*In re* Koehler), 204 B.R. 210, 214 (Bankr. D. Minn.) (citing ERNEST CHEMERINSKY, FEDERAL JURISDICTION 410 (2d. ed. 1994)). If Congress lacks the constitutional authority to abrogate a state's Eleventh Amendment immunity, there exists a legitimate question as to whether Congress may accomplish the same result by using a creative definition of waiver, and thereby do indirectly what it may not do directly. *See AER-Aerotron*, 104 F.3d at 682 (Niemeyer, J., concurring) (pointing out that "Congress'[s] enactments under Article I are *irrelevant* to whether a state retains its Eleventh Amendment immunity") (emphasis added); American Fed'n of State, County and Mun. Employees v. Virginia, 949 F. Supp. 438, 442 (W.D. Va. 1996) (rejecting implied waiver theory because Congress may not do indirectly what it may not do directly).

Amendment immunity may only be found where there exists an "unequivocal indication that the state intends to consent to federal jurisdiction that would otherwise be barred by the Eleventh Amendment."[155] An integral part of the "unequivocal indication" required by the Court before either waiver by appearance[156] or waiver by engaging in regulated or defined activity[157] may be found is the authority to waive Eleventh Amendment immunity.[158] Whether a state official or employee has been delegated authority

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155. *Atascadero State Hosp.*, 473 U.S. at 238, n.1. The Supreme Court has observed, emphasizing the stringent nature of the test used to determine if there has been a waiver of Eleventh Amendment immunity, that the doctrine of constructive consent is not commonly associated with the waiver of constitutional rights. *Id.* (citing Edelman v. Jordan, 415 U.S. 651, 673 (1974) (finding no place for doctrine of constructive consent in Eleventh Amendment analysis)); *see also PeakSolutions*, 168 B.R. at 923 (defining "waiver" as "intentional relinquishment of a known right").

156. The doctrine of waiver by general appearance appears to have been "severely undermined, if not discarded . . . [by] the Supreme Court's decision in *Ford Motor Company*." Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1282 (9th Cir. 1979) (indicating no waiver despite general appearance); Aerojet-General Corp. v. Askew, 453 F.2d 819, 828 (5th Cir. 1971) (citing Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 466–67 (1945) (finding no waiver despite appearance, litigation, and appeal)). *But see* Schulman v. California State Water Resources Control Bd. (*In re* Lazar), 200 B.R. 358, 381 (Bankr. C.D. Cal. 1996) (discussing waiver by general appearance in case and citing Hankins v. Finnel, 964 F.2d 853, 856 (8th Cir. 1992) (holding that general appearance subjects party appearing to jurisdiction of court, but ignoring Ninth Circuit precedent)). *Cf.* Missouri v. Fiske, 290 U.S. 18, 24–25 (1933) (allowing state to file limited appearance in order to preserve right to have dispute as to state property heard in state court).

157. *See* discussion at *supra* note 155. The Supreme Court has been deeply divided on the related issue of the extent to which a state waives its immunity when participating in federal programs. *See, e.g.*, *Welch*, 483 U.S. at 475 (holding no waiver); Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (reversing lower court holding of no waiver); *Edelman*, 415 U.S. at 652 (finding that state did not consent to suit in federal court).

158. *See, e.g.*, Ellenberg v. Board of Regents (*In re* Midland Mechanical Contractors, Inc.), 200 B.R. 453, 458 (Bankr. N.D. Ga. 1996) (holding that state attorney general cannot waive immunity unless state legislature has delegated such authority (citing Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 467 (1945))); Terrell v. United States, 783 F.2d 1562, 1565 (11th Cir. 1986) (indicating no presumption in favor of state officials' power to waive immunity of state); Freimanis v. Sea-Land Serv., Inc., 654 F.2d 1155, 1160 (5th Cir. 1981) (deciding that attorney had no right to waive state's immunity). That authority to waive is a prerequisite to finding that an act of a state or state official constitutes waiver is confirmed in Gardner v. New Jersey, 329 U.S. 565 (1947). In *Gardner*, the Supreme Court analyzed the state statutes that governed the authority of the entity that filed the proof of claim and concluded that the proof of claim was authorized, and that accordingly, there had been a waiver of immunity. *Gardner*, 329 U.S. at 568–74. Because *Gardner* was decided long before the Supreme Court narrowed the test for waiver of Eleventh Amendment immunity, there is good reason to question whether the statutes that were found to authorize waiver of immunity in *Gardner* would be found to do so today. *See* Mark

to waive Eleventh Amendment immunity is necessarily a question of state law,[159] and it is incumbent on the courts to determine that a party alleged to have effected a waiver had the authority to do so.[160]

1. Section 106(b)

Section 106(b) of the Bankruptcy Code provides that when a governmental unit files a proof of claim, it is deemed to have "waived" its immunity with respect to any claims which are property of the estate and which arose out of the same transaction or occurrence as the governmental unit's claim against the estate.[161] On its face, section 106(b) appears to define a voluntary waiver of immunity, rather than an unconstitutional abrogation. However, the facial analysis is misleading.[162] Although the courts have traditionally held that a state has constructively consented to bankruptcy court jurisdiction when it files a claim in a bankruptcy case,[163] the courts have limited the extent of that consent (or waiver) to include only counterclaims arising out of the same trans-

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Browning, *Who Can Waive State Immunity?*, 15 AM. BANKR. INST. J. 10, 10 n.7 (1997) (discussing Supreme Court's analysis in *Gardner*).

159. *See* Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 467 (1945) (stating that power of administrative and executive officers of Indiana to waive state's immunity is based on state law). Since the issue had not been determined by state courts, the Court resorted to examining the "general policy of the state as expressed in its Constitution, statutes and decisions." *Id.*; *see Terrell*, 783 F.2d at 1565.

160. *See In re* NVR L.P., 206 B.R. 831, 838–39 (Bankr. E.D. Va. 1997).

161. *See* 11 U.S.C. § 106(b) (1994) (providing waiver provisions as amended in 1994 Bankruptcy Reform Act, Pub. L. 103–394, title I, § 113, 108 Stat. 4117). Section 106(b) provides:

> (b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

Id.

162. *See AER-Aerotron*, 104 F.3d at 683 (Niemeyer, J., concurring) (suggesting that, under *Seminole Tribe*, Congress lacks authority when exercising Article I power not only to abrogate Eleventh Amendment immunity but to define circumstances that constitute waiver of that immunity as well).

163. *See Gardner*, 329 U.S. at 574 (noting that state's filing of bankruptcy proof of claim waives Eleventh Amendment immunity); Clark v. Barnard, 108 U.S. 436, 446 (1883) (detailing how state consented to jurisdiction of federal court when it sought recovery of receivership funds).

action or occurrence that are asserted against a state *defensively*.[164] The "same transaction or occurrence" test[165] set forth in section 106(b) does not limit the "waiver" described therein to defensive counterclaims.[166] To the extent that section 106(b) purports to broaden the scope of waiver beyond the limits traditionally observed by the courts, it is an unconstitutional abrogation of the states' Eleventh Amendment immunity under *Seminole Tribe*.[167]

For example, if a state's Employment Security Commission (ESC) files a claim in a bankruptcy case for unpaid unemployment taxes, has the state's ESC waived immunity as to a debtor's claim for refund of allegedly overpaid unemployment taxes for the same tax period? Under the court's traditional test for waiver, the answer would be no. Although the alleged overpayment of unemployment taxes arose out of the same tax period—or the same transaction or occurrence—as the ESC's claim for unemployment taxes, it could be used by the debtor only to reduce ESC's claim for unemployment taxes; in other words, ESC's waiver would extend only to the defensive use of the alleged overpayment. Under no circumstances would the waiver authorize the bankruptcy court to issue an order directing ESC to make a refund to the debtor.

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164. *See* United States v. Mottolo, 605 F. Supp. 898, 910 (D.N.H. 1985) (collecting cases that hold waiver does not extend to counterclaims that are not related state's claim or to claims that are asserted to obtain affirmative judgment against state).

165. The scope of the same transaction or occurrence test is similar to, but not coextensive with, the logical relationship test found in Federal Rule of Civil Procedure 13(a), which defines the scope of a compulsory counterclaim. FED. R. CIV. PROC. 13(a). Generally, the logical relationship test applied under Rule 13(a) is expansive. *See Lazar*, 200 B.R. at 378 (discussing logical relationship test of Rule 13(a) and comparing 11 U.S.C. § 106). The *Lazar* court acknowledged the danger of the logical relationship test; that is, it could be expanded to cover all counterclaims. *Id.* at 379. The court also noted that, in determining whether there has been a waiver of sovereign immunity, different policies may apply. *Id.* Surprisingly, after acknowledging these facts, the *Lazar* court inexplicably suggested that the logical relationship test be applied *more loosely* in determining if a waiver has occurred, so that issues will be resolved in favor of litigation in a single forum. *Id.* This suggestion is understandable as an example of "bankruptcy thinking," but it has no validity in view of the Supreme Court's increasingly expansive view of the Eleventh Amendment.

166. Section 106(b) provides that a governmental unit that has filed a proof of claim in the case "is deemed to have waived sovereign immunity with respect to *a claim against such governmental unit*." 11 U.S.C. § 106(b) (1994) (emphasis added).

167. *See* S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195, 209–11 (1996) (arguing that section 106(b) is not entirely constitutionally valid because it "permits affirmative recovery exceeding the amount of the state's claim and this goes beyond recoupment").

However, the result under section 106(b) could be different because that section does not incorporate the defensive counterclaim limitation that the courts have traditionally employed. Rather, section 106(b) would define ESC's waiver as encompassing any action arising out of the same transaction or occurrence. Because both claim and counterclaim arise from the same tax period, section 106(b) appears to support a bankruptcy court order directing the agency to make a refund to the debtor if the facts so warranted, a result that could not occur under the courts' more limited test.

To the extent that section 106(b) goes further than the courts' traditional test for waiver, it could be viewed as an abrogation statute, and should be unconstitutional as applied against an unconsenting state. There is already some question in the courts as to whether Congress has the authority to define waiver at all.[168] As the focus shifts from abrogation to waiver as a means of forcing state compliance with federal law, congressional power to define waiver—and tie waiver to the receipt of federal monies—will probably be examined in depth.

2. Section 106(c)

Although characterized by many as a waiver provision, section 106(c), which provides that "there shall be offset against a claim or interest of a governmental unit *any claim* against such governmental unit that is property of the estate,"[169] is arguably an abrogation provision that lacks even facial validity.[170] The "any claim" lan-

168. *See AER-Aerotron*, 104 F.3d at 680–81 (refusing to answer question of Congress's authority to define waiver but noting that "perhaps the handwriting is on the wall that the abrogation provisions of the Bankruptcy Reform Act will suffer the same fate as the statutes involved in *Seminole* [*Tribe*]").

169. 11 U.S.C. § 106(c) (1994) (emphasis added). The full text of section 106(c) reads: "(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate." *Id.*

170. The mandatory language in section 106(c)—there *shall be offset*—is an abrogation provision, not a waiver provision. Section 106(c) requires no affirmative action on the part of the states; a state need only have a claim against a debtor. *Accord* John's Insulation, Inc. v. Facilities Dev. Corp., No. 96–CV–672 (LEK-DRH) 1996 W.L. 679723, at *8 (N.D.N.Y. Oct. 17, 1996) (characterizing section 106(c) as forcing waiver); Ossen v. Connecticut, 203 B.R. 17, 21–22 (Bankr. D. Conn. 1996) (finding that waiver provision of section 106(c) does not facially conflict with *Seminole Tribe*). Additionally, the fact that section 106(c) does not even contain the "same transaction or occurrence" limitation found in section 106(b) may subject it to constitutional challenge. *See* S. Elizabeth Gibson, *Sover-*

guage in section 106(c) is even broader than the "same transaction or occurrence" language of section 106(b), which is itself broader than the waiver test established by the courts.[171] Thus, even though it does not appear to allow any affirmative recovery against the state,[172] section 106(c) extends the scope of federal court jurisdiction beyond the limits traditionally observed by the courts, and to that extent, the section constitutes an unconstitutional abrogation of the states' Eleventh Amendment immunity under *Seminole Tribe*.[173] For example, if a state's Department of Revenue (DOR) had a claim against a debtor for unpaid sales tax for the second quarter, and the debtor alleged an overpayment of unemployment tax for the previous year, would the debtor be entitled to reduce DOR's claim by the amount overpaid to the state's ESC? Under the traditional waiver test, the debtor would not be allowed to offset or use the overpayment to ESC to reduce DOR's claim, because the claims did not arise out of the same transaction or occurrence. Indeed, all that is required under section 106(c) is that a debtor *have* a claim against a governmental unit.

Moreover, some courts have determined that the entity against whom the debtor is holding a claim need not be the same entity asserting a claim against the debtor. Most courts that have found waiver by one entity effective for other state entities have relied on the "unitary creditor principle," *i.e.*, that all state funds go into a central treasury. While reliance on the unitary creditor principle is appropriate in an offset context, it is doubtful that the principle has any place in the determination of whether a state has waived its Eleventh Amendment immunity. The majority of cases to address this issue have held that the filing of a proof of claim by one gov-

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eign Immunity in Bankruptcy: The Next Chapter, 70 AM. BANKR. L.J. 195, 211–12 (1996) (discussing involuntary nature of participation in bankruptcy cases (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (observing that "creditors lack an alternative forum to the bankruptcy court in which to pursue their claims"))).

171. *Koehler*, 204 B.R. at 213 (predicting that section 106(c) may be subject to challenge to extent it does not incorporate same transaction or occurrence test).

172. *Id.*

173. *See* S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195, 209–11 (1996) (suggesting that section 106(c) is constitutionally valid only to extent it permits recoupment counterclaim arising out of "same transaction or occurrence" as government's claim).

ernmental agency does not waive immunity for different agencies involved in different transactions with the debtor.[174]

C. *Bankruptcy Cases in State Court?*

It is important to keep in mind that if *Seminole Tribe* has any affect on a particular section of the Bankruptcy Code, it is only as that section may affect the debtor's or trustee's ability to invoke *federal court jurisdiction* over an unconsenting state. *Seminole Tribe* does not undercut the validity of the Bankruptcy Code to any other extent. Under the Supremacy Clause, the states are bound by the provisions of the Bankruptcy Code that do not fail under *Seminole Tribe.* Under the Supremacy Clause, the Constitution and the laws of the United States made pursuant thereto are the supreme law of the land, notwithstanding anything to the contrary in the constitution or laws of any state.[175] The Bankruptcy Code is a federal statute, and with the exception of its attempt to abrogate states' Eleventh Amendment immunity, Congress enacted the Bankruptcy Code pursuant to a valid grant of power. State law provisions or policies that conflict or are inconsistent with the

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174. *Compare* WJM Inc. v. Massachusetts Dep't of Pub. Welfare, 840 F.2d 996, 1003–04 (1st Cir. 1988) (holding that filing of claim by state department of revenue for payment of back taxes did not waive immunity of department of public welfare in separate claim of overpayment for services), *and* Rocchio & Sons, Inc. v. Rhode Island Dep't of Transp. (*In re* Rocchio & Sons, Inc.), 165 B.R. 86, 88 (Bankr. D.R.I. 1994) (holding proofs of claim filed by state department of taxation and department of employment training did not waive Eleventh Amendment immunity of department of transportation which had made no claim in suit by debtor for turnover of funds allegedly owed under contract), *with* Gibson v. United States (*In re* Gibson), 176 B.R. 910, 916 (Bankr. D. Or. 1994) (holding that filing proof of claim by Internal Revenue Service waived sovereign immunity of entire U.S. government), *and* Hiser v. Pennsylvania Dep't of Pub. Welfare (*In re* St. Mary Hosp.), 125 B.R. 422, 425–26 (Bankr. E.D. Pa. 1991) (holding that filing proofs of claim by state department of revenue and department of labor and industry waived Eleventh Amendment immunity of department of public welfare which had not filed proof of claim). *See also* Sacred Heart Hosp. v. Pennsylvania Dep't of Welfare (*In re* Sacred Heart Hosp.), 199 B.R. 129, 135 (Bankr. E.D. Pa. 1996) (finding that claim filed by one state agency constituted waiver of Eleventh Amendment immunity rights for all state agencies), *rev'd*, 204 B.R. 132 (E.D. Pa. 1997). The bankruptcy court found support for construing waiver of Eleventh Amendment immunity by one agency as effective for all agencies in those cases applying the "unitary creditor" principle with respect to setoff, but the District Court rejected that proposition, finding that the single creditor principle had no applicability to the determination of waiver. Sacred Heart Hosp. v. Pennsylvania Dep't of Welfare, 204 B.R. 132, 142 (E.D. Pa. 1997).

175. U.S. CONST. art. VI.

Bankruptcy Code are unenforceable under the Supremacy Clause because the states are not free to disregard federal statutes.[176]

The Supreme Court has long acknowledged that jurisdiction over federal causes of action is concurrent in the state and federal courts unless Congress expressly provides otherwise.[177] Where there is concurrent jurisdiction, the federal cause of action may be brought in the state court if that court properly has jurisdiction under state law.[178] Accordingly, if a state has not waived Eleventh Amendment immunity, and the federal statute at issue provides for concurrent jurisdiction in state court, the federal cause of action may be pursued in that forum pursuant to that states' neutral rules of judicial administration.[179]

Further, a state's common-law sovereign immunity should not operate to protect the state from suit based on federal law.[180]

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176. *See* Mondou v. New York, New Haven, & Hartford R.R., 223 U.S. 1, 52 (1912) (noting supremacy of constitutional federal laws over state law (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819))); Howlett v. Rose, 496 U.S. 356, 367 (1990) (reiterating effect of Supremacy Clause on state laws).

177. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 572–73 (1832) (holding that state courts must follow Supreme Court's rulings in enforcing federal statutes if such actions properly come within their jurisdiction); *see also Howlett*, 496 U.S. at 367 (charging state courts with enforcing federal statutes within their jurisdiction); Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 823 (1990) (observing that Congress may provide that state courts shall not have jurisdiction over specific federal causes of action). Section 1334(b) of title 28 states specifically that the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under, or arising in or related to cases under the Bankruptcy Code. 28 U.S.C. § 1334(b) (1994). This has been interpreted as providing concurrent jurisdiction in the state courts. *See* Saunders v. City of Brady, Texas, Mun. Gas Corp. (*In re* Brady, Texas, Mun. Gas Corp.), 936 F.2d 212, 218 (5th Cir. 1991) (providing concurrent jurisdiction in state courts except for "the bankruptcy petition itself"). That state courts have concurrent jurisdiction is affirmed by the principle that bankruptcy courts are prohibited from relitigating these issues if they have already been litigated in the state forum. Grogan v. Garner, 498 U.S. 279, 284 n.10 (1991) (acknowledging bankruptcy court's restraint in deciding issues litigated in state courts).

178. *See* Douglas v. New York, New Haven & Hartford R.R., 279 U.S. 377, 387–88 (1929) (noting state court's duty to adjudicate federal cause of action vitiated by valid excuse); *Mondou*, 223 U.S. at 12 (noting that federal cause of action susceptible of adjudication according to prevailing rules of procedure).

179. *See* S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195, 203–08 (1996) (discussing state court litigation of bankruptcy cases).

180. *See id.* (analyzing question of whether federal remedies can be pursued against nonconsenting state in state courts); *Seminole Tribe*, 116 S. Ct. at 1131 n.14 (including in list of methods to compel compliance with federal law, United States Supreme Court review of state court decision on federal law "where a State has consented to suit" (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821))); *id.* at 1172-73 & n.52 (Souter, J., dis-

Under the Supremacy Clause, a state may not evade federal law because that law conflicts with state constitutional or statutory provisions or state policy.[181] State rules of judicial administration must be neutral in application and not designed to favor one party over others.[182] Because state sovereign immunity protects only states, it is obviously not neutral and should not be a valid excuse for a state

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senting) (arguing that abrogation of Eleventh Amendment immunity was necessary for individuals to be able to enforce non-Fourteenth Amendment constitutional rights against states, because they could not be enforced in state courts).

181. *Howlett*, 496 U.S. at 367. There are three aspects to the analysis regarding the validity of a state defense to a federal cause of action brought in state court. First, "a state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'" *Id.* at 369. The existence of concurrent jurisdiction creates an implied duty to exercise such jurisdiction; if such jurisdiction does not properly exist under state law, the states need not create a court to exercise such jurisdiction. *Douglas*, 279 U.S. at 387; *Mondou*, 223 U.S. at 58. Second, "an excuse that is inconsistent with or violates federal law is not a valid excuse:" the Supremacy Clause forbids state courts from dissociating themselves from federal law because they disagree with it or refuse to recognize its superiority. *Howlett*, 496 U.S. at 371. Third, whether parties are properly before a state court depends on state law, and a state court may refuse jurisdiction because of a neutral state rule of judicial administration; the federal law takes the state courts as it finds them. *Id.* at 372. Thus, the Supreme Court has concluded that the states have great latitude to establish the structure and jurisdiction of their courts. *Id.*; Missouri v. Lewis, 101 U.S. 22, 30–31 (1879). Further, "states may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Howlett*, 496 U.S. at 372; *see* Hilton v. South Carolina Public Highways Comm'n, 502 U.S. 197, 202 (1991); Felder v. Casey, 487 U.S. 131, 138 (1988); JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES 139 (1987) (noting that idea that state courts must hear federal actions is novel).

182. The United States Supreme Court has identified three neutral rules of judicial administration that constitute the sort of valid excuse needed for a state court to properly refuse jurisdiction over a federal cause of action. In *Douglas*, the state court properly exercised its discretion in dismissing a case pursuant to a state statute that allowed dismissal of both state and federal claims where neither the plaintiff nor defendant was a resident of the state. 279 U.S. at 387-88. In Herb v. Pitcairn, the trial court properly dismissed a federal claim that arose outside the jurisdiction of that court as defined by state statute. 324 U.S. 117, 121 (1945). The Supreme Court noted that although the trial court could not have dismissed simply because the case involved a federal claim, there was no evidence that the jurisdictional statute had been applied in a discriminatory fashion. *Id.* at 123. Finally, in Missouri v. Mayfield, the state court properly applied the doctrine of *forum non conveniens* to dismiss a suit brought under a federal statute. 340 U.S. 1, 3 (1950). The Supreme Court held that a state should be free to decide the availability of the principle of *forum non conveniens* according to its own law. *Id.*; *see Howlett*, 496 U.S. at 374-75 (holding that state court can dismiss federal case applying doctrine of *forum non conveniens*). The state courts must treat parties asserting a federal cause of action in the same way they would treat parties asserting a cause of action arising from another source. Miles v. Illinois Cent. R.R., 315 U.S. 698, 704 (1942); *see* Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 221 (1916) (holding that nature of cause of action does not dictate rules of procedure that trial court should follow).

court's refusal of jurisdiction over an otherwise proper federal cause of action.[183] Statutes and rules of procedure that are truly neutral in application should, however, be applicable in any action brought under the Bankruptcy Code in state court.[184]

VII. CONCLUSION

The Supreme Court's decision in *Seminole Tribe* is undeniably a major shift in constitutional interpretation, and the implications of the holding with respect to the balance of power between the state and federal governments are, without question, serious. For bankruptcy practitioners, though, *Seminole Tribe* should not prove to be the destructive influence that Justice Stevens has predicted.

If the states were rogue creditors out to destroy the bankruptcy system—and there are probably countless debtor's attorneys who believe just that—*Seminole Tribe* could and would indeed spell big trouble. Fortunately, that is not, and never has been, the case. In the role of creditor, states and their agencies share a common goal with every other creditor: the collection of unpaid debts. States ordinarily file claims in almost every asset case, and states litigate

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183. *See* Felder v. Casey, 487 U.S. 131, 153 (1988) (holding that state notice-of-claim statute which imposed exhaustion requirement and effectively shortened statute of limitations otherwise applicable to section 1983 claim conflicted with federal law); Martinez v. California, 444 U.S. 277, 284 (1980) (holding, unanimously, that state statute purporting to immunize state officials from section 1983 liability for parole release decisions conflicted with federal law). The provisions at issue in *Martinez* and *Felder* were clearly designed to benefit one specific party (the state and state officials), and to the extent they interfered with or frustrated the substantive right created by Congress, the Supremacy Clause rendered them ineffective.

184. It is not enough that a rule or statute be denominated jurisdictional in nature. The rule at issue must actually reflect concern for "power over the person and competence over the subject matter that jurisdictional rules are designed to protect." *Howlett*, 496 U.S. at 381. "[A] court of otherwise competent jurisdiction may not avoid its parallel obligation under the Full Faith and Credit Clause to entertain another State's cause of action by invocation of the term 'jurisdiction.'" *Id.* "Similarly, a State may not evade the strictures of the Privileges and Immunities Clause by denying jurisdiction to a court otherwise competent." *Id.* at 381. The same is true of the Supremacy Clause; a state may not avoid its application merely by amending jurisdictional statutes to remove jurisdiction from the state courts in those areas where state and federal law conflict. *Id.* at 382; *see* Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 207 (1991) (holding that, under Supremacy Clause, federal statutes are law and fully enforceable in state court). "The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is . . . subject to the restrictions imposed by the federal Constitution." *Howlett*, 496 U.S. at 382 n.26 (citing McKnett v. St. Louis & San Francisco Ry., 292 U.S. 230 (1934)).

in bankruptcy court regularly to determine the validity of those claims. As the states build their bankruptcy-collection teams, the value of bankruptcy as a forum that promotes the payment of debts becomes increasingly clear; indeed, many state tax creditors are relieved when a delinquent taxpayer files bankruptcy. The increased level of scrutiny that accompanies bankruptcy—and the watchful eye of a bankruptcy judge—often make even the most reluctant of taxpayers realize the value of compliance with state tax laws. In short, states have no incentive to boycott or otherwise threaten the bankruptcy system as we know it. The system's own success demands that the states continue to participate, and the states will certainly do so. The effect of *Seminole Tribe* on *the bankruptcy system as a whole* will probably be minimal.

Several commentators—and, unfortunately, even some bankruptcy judges—have called the states "extremists" because they have asserted the Eleventh Amendment as a defense to certain bankruptcy actions taken against them. Extremist, however, is a harsh label to apply to a state that is merely asserting its constitutionally-guaranteed immunity from suit against a debtor or trustee who is trying to drag the state into a forum that the United States Constitution says is off-limits.

One of the nice features of bankruptcy practice is the fairly insular community. The nature of the practice creates "bankruptcy thinking," though, and bankruptcy lawyers—and, unfortunately, even some bankruptcy judges—tend to forget about the big picture; that is, the constitutionally-mandated balance of power between the state and federal governments, and instead focus solely on bankruptcy practice.

Yes, after *Seminole Tribe*, sometimes a debtor will be unable to bring an unconsenting state into bankruptcy court. Yes, sometimes a debtor might have to go to state court to get the relief it seeks. But the relief *is available* in state court, just as the Constitution envisions. The fact that a debtor or trustee may have to seek relief in state court is only extraordinary when viewed in the narrow bankruptcy context; in the broader context, it is perfectly consistent with the relationship between the states and the federal government.

The number of cases in which states assert the Eleventh Amendment in bankruptcy court will be defined by two factors. First, as noted, the success of the bankruptcy system in getting funds to

creditors demands that the states participate, and almost every state is participating in some ever-increasing measure. To the extent there are funds to be had, it is reasonable to assume that the states will file claims and submit to the jurisdiction of the bankruptcy court to determine the validity of those claims.

The second factor involves the conduct of counsel representing debtors and trustees. Early in the post-*Seminole Tribe* discussion, certain debtor's attorneys lamented the loss of "jurisdiction by ambush" and the fact that they might have to actually talk to and negotiate with states as to their claims.[185] Despite these regrets, jurisdiction by ambush was never proper to begin with and there is nothing to imply that a state will not negotiate with a debtor in good faith absent such "leverage." Rather than being a death knell to the bankruptcy system, *Seminole Tribe* is an anathema only to those counsel that rely on devices like jurisdiction by ambush and other bullying tactics to accomplish their ends. For instance, if debtors' counsel are no longer able to drag a state across the country to litigate the validity of a five-dollar claim for nondischargeable taxes in a no-asset Chapter 7 case, or enjoin nondebtor responsible person tax assessments or state regulatory action,[186] it is simply because the Constitution does not allow it. To the extent it forces debtors and trustees to negotiate fairly with states and treat them as the law requires, *Seminole Tribe* will ultimately prove to be a benefit to the bankruptcy system, not a burden.

185. Seminole: *What It Means/Possible Defenses*, BANKRUPTCY COURT DECISIONS WEEKLY NEWS AND COMMENT, Aug. 13, 1996, at A12.

186. In this context, *Seminole Tribe* actually operates to protect the states from relief that *is not available under the law in any event.* The sad truth is that the states should not have been subjected to such suits in the first place. The fact that the states were subjected to such suits at all—and that the debtor bar prevailed often enough so that they came to be accepted as mainstream entitlements—is illuminating.