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I. INTRODUCTION

Bankruptcy is the principal device by which failing businesses and financially-troubled families get one last chance to reorganize their affairs back to financial health. It is also the graveyard for business failures, the place where we bury dead corporations and divide their remaining assets among their surviving creditors.

In the last decade, the bankruptcy system has given seven million middle-class families a way to start over—an opportunity to save their homes from foreclosure, rid themselves of overwhelming debts, and reintegrate themselves into the workforce as productive citizens. It has also been the way that 10,000 corporations have restructured their way from failure to health, avoiding the disruptive costs of dissolution and liquidation and instead preserving jobs, stabilizing community tax bases, and fueling the longest period of economic expansion in United States history. Another 100,000 less fortunate corporations have had their funerals in bankruptcy, as their

creditors have divided their assets and facilitated the redistribution of capital and labor resources that must accompany liquidation.

Bankruptcy is the safety valve in America's capitalist system: technical and arcane, but so important. For the last 100 years, bankruptcy has functioned efficiently, providing a vital lubricant at the rough edges of the American economy. We do not expect individuals to live life without hope and force them into the underground economy to avoid a mountain of debt. Nor do we discourage entrepreneurs from starting new ventures by holding them personally liable if that corporate venture fails. Instead, we give each individual and business person a fair chance to start over. This second chance breeds innovation and risk taking that puts the United States at the cutting edge of technological and scientific development.

When our corporations experience liquidity problems, we do not allow lenders to shut them down and break them up. Rather, we permit sick businesses to file under chapter 11 to provide a breathing spell to rehabilitate themselves; if rehabilitation cannot be accomplished, we provide a forum for liquidation of the businesses for the collective good of all creditors.

At a time when the economies of Europe and Asia are moving toward an American-style bankruptcy system, an ironic twist has taken place in the United States. In cases concerning gambling rights on Indian territory, the Fair Labor Standards Act, and trademarks and the value of patents, the United States Supreme Court inadvertently has thrown the bankruptcy system into upheaval. As the shock wave of the cases reverberates, the bankruptcy system threatens to shake apart at its core, at least in those cases in which a state is involved.[1]

The premise behind bankruptcy is that efficiency can be accomplished with aggressively enforced collective action. All of a debtor's problems are dealt with in a single case in a single court. The rules of the court are clear, and unless creditors agree otherwise, they will have rights determined according to a strict priority scheme—secured creditors ahead of unsecured creditors, employees ahead of taxing authorities, and trustees ahead of creditors. If there is any chance to save the business, all creditors will be forced to hold off in their collection actions, while they have predetermined rights to

1. The severity of this threat has not been the subject of an empirical study. However, the few reported decisions hint at the magnitude of state abuse that occurs in numerous other cases. *See, e.g., infra* notes 147-55.

shape (or even stop) the company's efforts to reorganize.[2] Although unsecured creditors often must be satisfied with only pennies on the dollar for what they are owed, they can draw comfort from one fact: every other general unsecured creditor of the debtor is in exactly the same boat.

In 1996, the Supreme Court decided a case that ended that certainty as it applies to states and the involvement of states in bankruptcy cases. Three years later, it is apparent that although some states are complying with traditionally held notions of bankruptcy law, other states are defying bankruptcy law by seizing money or property of a bankrupt business or individual. When bankrupt debtors try to sue states in bankruptcy court to remedy this defiance, states rely on newly-minted Supreme Court jurisprudence to assert the Eleventh Amendment as a defense to federal jurisdiction, rendering the federal bankruptcy courts powerless to act.[3]

Not only does self-help allow the states to get more than their fair share by jumping ahead of other creditors without regard to statutory priorities, it also enables states to seize essential equipment or assets that can cripple the ability of a business to reorganize. As one court noted:

> Our national bankruptcy system, in which Congress intended debtors to retain the opportunity to reorganize and to obtain a fresh start, may be in grave danger if the states cannot be bound by orders issued by the federal courts under bankruptcy law.[4]

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2. In a chapter 11 reorganization case, the automatic stay enjoins most creditors from commencing or continuing litigation or other debt collection activities against the debtor or its property. *See* 11 U.S.C. § 362 (1994). Creditors may shape the reorganization case by negotiating their treatment under a plan of reorganization. If a plan impairs creditors' rights, the affected creditors have the right to vote to accept or reject the plan. *See id.* §§ 1124, 1129(a)(8). In order for a class of claims to accept the plan, 2/3 in dollar amount and a majority in number of those voting must vote te accept the plan. *See id.* § 1126(c). The plan may be confirmed consensually if it is accepted by all impaired classes. *See id.* § 1129(a)(8). If an impaired class does not vote to accept the plan, contested confirmation is possible but difficult to achieve. *See id.* § 1129(b). Creditors who oppose the plan or are antagonistic toward the debtor may seek to dismiss the bankruptcy case or convert it te a liquidation case under chapter 7 of the Bankruptcy Code. *See id.* § 1112(b). Creditors also might seek to limit or condition the operation of the business or seek the appointment of a trustee or examiner to exert control over the reorganization case. *See id.* §§ 1104, 1108.

3. Nor, apparently, may a debtor now sue states in state courts without their consent. *See* Alden v. Maine, 119 S. Ct. 2240, 2246 (1999).

4. *In re* NVR, L.P., 206 B.R. 831, 843 (Bankr. E.D. Va. 1997).

This dire pronouncement, made by Bankruptcy Judge Tice of the Eastern District of Virginia, relates to the Supreme Court's 1996 decision in *Seminole Tribe v. Florida*, in which the Court stated that Congress has no authority to abrogate a state's immunity under the Eleventh Amendment by enacting legislation pursuant to an exercise of the powers enumerated in Article I of the Constitution.[5] Although the *Seminole Tribe* holding itself did not involve bankruptcy law, the Court, in dictum,[6] and nearly every court and commentator that subsequently have addressed the issue,[7] interpreted the decision to render unconstitutional section 106(a) of the Bankruptcy Code,[8] by which Congress has attempted to abrogate Eleventh Amendment immunity in the context of bankruptcy cases. Abrogation enables a bankruptcy court to hold states accountable under the Supremacy Clause for compliance with the Bankruptcy Code, including violation of the automatic stay or receipt of preferential or fraudulent transfers.[9] In many cases, states are creditors based on regulatory claims, such as permit and license fees and fines, tax claims, student loans, unpaid alimony claims, small-business loans, and the like.[10] The importance of the states' claims (and thus the importance of abrogation) can vary from case to case, but in a particular case, states now may elect to act aggressively to seize money or property postpetition in violation of the automatic stay or a discharge injunction. This wrongful activity can advantage states with respect to other creditors, can imperil the viability of a business as a going concern, and can undermine the discharge and the debtor's fresh start.

As a result of *Seminole Tribe*, some states have felt free to violate the myriad protections afforded to debtors and creditors by the Bankruptcy Code and thereafter to assert the Eleventh Amendment

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5. *See* Seminole Tribe v. Florida, 517 U.S. 44, 71-72 (1996) (invalidating congressional legislation promulgated under the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3).

6. *See id.* at 72 n.16; *see also id.* at 77 (Stevens, J., dissenting).

7. *See infra* notes 102-11 and accompanying text.

8. 11 U.S.C. § 106(a) (1994). Thus far, the cases have addressed the unconstitutionality of section 106(a) to the extent it abrogates sovereign immunity to subject states to suits in federal courts. *See, infra* notes 102-11.

9. *See, e.g.*, Merchants Grain, Inc. v. Mahern, 59 F.3d 630 (7th Cir. 1995), *vacated*, Ohio Agric. Commodity Depositors Fund v. Mahern, 517 U.S. 1130, 1130 (1996); *In re* Shealy, 90 B.R. 176 (Bankr. W.D.N.C. 1988); *In re* Ellis, 66 B.R. 821 (N.D. Ill. 1986).

10. "States play an important role in the bankruptcy process, appearing in many bankruptcy cases in a myriad of roles—as priority tax creditor, secured creditor, unsecured creditor, police and regulatory authority, environmental creditor, landlord, guarantor, bondholder, leaseholder, and equity interest holder." NATIONAL BANKRUPTCY REVIEW COMM'N BANKRUPTCY: THE NEXT 20 YEARS 900 (1997).

to avoid the enforcement of the federal statute by a bankruptcy court or, indeed, by any federal court at all. In so doing, such states have fulfilled a prophecy made by the Court of Appeals for the Seventh Circuit more than a decade ago:

> [If] the federal courts were not able to order a state to turn over assets to a bankruptcy estate, then any state owed money by a debtor having financial problems would have a strong incentive to collect whatever funds it believed to be due as rapidly as possible—even if this pushed the debtor into insolvency—rather than risking the possibility of recovering only a portion of their debt in any subsequent bankruptcy proceedings. In effect, we would be holding that the Constitution makes a state a preferred creditor in every bankruptcy. The very existence of this power would doubtless encourage other creditors to accelerate their collections. The end result would be an increase in bankruptcies and a distortion of the system of preferences that Congress has carefully crafted.[11]

Indeed, one bankruptcy court has concluded that, without the abrogation of the Eleventh Amendment provided by section 106(a), "[t]he Bankruptcy Code would soon unravel and the Bankruptcy Clause [of Article I of the Constitution] would be rendered meaningless."[12]

But the Supreme Court has not rested with *Seminole Tribe.* Earlier this year, in three cases the Court dramatically disrupted the balance of power between the states and the federal government.[13] In one, *Alden v. Maine*, the Court held that the Constitution provided states with the right to assert common law sovereign immunity in state court as a defense to suits brought to enforce rights conferred by Article I of the United States Constitution.[14] In a second case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* the Court held that congressional legislation that authorized

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11. McVey Trucking, Inc. v. Secretary of State (*In re* McVey Trucking, Inc.), 812 F.2d 311, 328 (7th Cir. 1987); *see* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 109-11 (1989) (Marshall, Brennan, Blackmun & Stevens, JJ., dissenting) (agreeing with the analysis in *McVey*); Employment Dev. Dep't v. Joseph (*In re* HPA Assocs.), 191 B.R. 167, 174 (B.A.P. 9th Cir. 1995) (same).

12. Stern v. Massachusetts Alcohol Beverage Control Comm'n (*In re* J.F.D. Enters.), 183 B.R. 342, 354 (Bankr. D. Mass. 1995). Examples of the unraveling of the Bankruptcy Code are discussed *infra* notes 147-55.

13. *See generally* Alden v. Maine, 119 S. Ct. 2240 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999).

14. *See Alden,* 119 S. Ct. at 2246.

suits against states for patent infringement was unconstitutional.[15] Last, the Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* overturned the doctrine of "implied" or constructive waiver of sovereign immunity.[16] Each of these cases concerns separate issues, but together they represent a great shift in favor of states' rights. And with this shift comes a very real apprehension of state abuse of federal rights in the bankruptcy context.

Although these fears might be exaggerated,[17] congressional inability to abrogate the states' Eleventh Amendment and common law sovereign immunity can lead to and has resulted in troubling situations that are antithetical to some of the core purposes of the Bankruptcy Code. Consider the case of the Tri-City Turf Club, a horse racing facility in Kentucky.[18] After Tri-City filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code, the state unilaterally revoked Tri-City's license to conduct live horse racing and intertrack wagering.[19] In doing so, the state violated the automatic stay of section 362(a) of the Bankruptcy Code,[20] which Congress has deemed to be "one of the fundamental debtor protections provided by the bankruptcy laws,"[21] and deprived Tri-City of the

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15. *See Florida Prepaid*, 119 S. Ct. at 2202; *see also infra* notes 276-85 and accompanying text.

16. *See College Sav. Bank*, 119 S. Ct. at 2228; *see also infra* notes 176-81 and accompanying text.

17. Some states appear to have obeyed the bankruptcy laws despite the availability of Eleventh Amendment and sovereign immunity to shield improper conduct. Perhaps this is due to enlightened self-interest on the part of government officials in the executive branch who have reputational concerns and must be accountable for their actions to the electorate in a political arena. Some government officials might have concluded that the failure of a state to obey federal bankruptcy law would provoke preemptive actions by other creditors to encumber, attach, or seize the debtor's assets before bankruptcy. Indeed, if bankruptcy relief becomes ineffective for debtors, they can be expected to resort to asset-backed securitization and other forms of financing ex ante that will remove assets from the reach of the state. For example, a state has little recourse against a debtor that leases all assets or has all valuable assets located offshore. Full development of these second-order effects is beyond the scope of this Article.

18. Tri-City Turf Club, Inc. v. Kentucky Racing Comm'n (*In re* Tri-City Turf Club), 203 B.R. 617 (Bankr. E.D. Ky. 1996).

19. *See id.* at 618.

20. 11 U.S.C. § 362(a) (1994); *see generally* James O. Johnston, Jr., *The Inequitable Machinations f Section 362(a)(3): Rethinking Bankruptcy's Automatic Stay Over Intangible Property Rights*, 66 S. CAL. L. REV. 659, 690-96 (1992) (analyzing decisions regarding governmental revocation of licenses and related rights). *But see* 11 U.S.C. § 362(b)(4) (1994), *amended by* Pub. L. No. 105-277, § 603, 112 Stat. 2681, 2886 (1998) (ambiguously exempting governmental police or regulatory power from section 362(a)(3)).

21. H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296.

ability to reorganize its business operations. Tri-City thereafter commenced an adversary proceeding in bankruptcy court against the state to enjoin the state from violating the automatic stay.[22] The bankruptcy court dismissed the adversary proceeding, believing that "[t]he inescapable conclusion . . . is that the holding of *Seminole Tribe* clearly undermines the jurisdictional basis of this action against the defendant, Kentucky Racing Commission, and the members of the Commission. The court simply lacks jurisdiction to entertain this adversary proceeding."[23] Tri-City therefore was unable to enforce one of the Bankruptcy Code's "most fundamental debtor protections" in the forum in which its bankruptcy case was pending.

Consider also the case of Harry and June Mitchell, who filed chapter 7 bankruptcy cases and subsequently received a discharge of more than $300,000 in back taxes owed to the State of California.[24] After the Bankruptcy Court entered its discharge order, the state commenced assessment proceedings with respect to the discharged taxes, and the Mitchells thereafter commenced an adversary proceeding in federal bankruptcy court to determine the dischargeability of their tax debt and to recover damages based on the state's violation of the Bankruptcy Court's discharge order.[25] The Bankruptcy Court, however, dismissed the Mitchells' complaint on the ground that the state's Eleventh Amendment immunity deprived the court of jurisdiction over the action, and the Bankruptcy Appellate Panel for the Ninth Circuit subsequently affirmed that determination.[26] As a consequence, the Mitchells were unable to receive the full benefit of the fundamental "fresh start" otherwise accorded to them by the Bankruptcy Code.[27]

This Article explores policy concerns and legislative solutions to determine whether there is any escape from the "inescapable

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22. *See In re Tri-City Turf Club*, 203 B.R. at 618.

23. *Id.* at 620. To the extent the court thought it was powerless to grant prospective injunctive relief, the opinion appears to be erroneous. The court probably could have issued a prospective injunction against the responsible state official in accordance with *Ex parte Young*. *See infra* Part IV.D.

24. *See* Mitchell v. California Franchise Tax Bd. (*In re* Mitchell), 222 B.R. 877, 878-79 (B.A.P. 9th Cir. 1998); *see also* 11 U.S.C. § 727 (setting forth the discharge provisions).

25. *See In re Mitchell*, 222 B.R. at 878-79. The Mitchells did not seek prospective injunctive relief against a named state official. *See id.* at 881 n.4.

26. *See id.* at 888.

27. Congress deemed the discharge to be "the heart of the fresh start provisions of the bankruptcy law." H.R. REP. NO. 95-595, at 384 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6340.

conclusion" (in the words of the *Tri-City* court) seemingly demanded by *Seminole Tribe* and exacerbated by *Alden* and its companion decisions. For the reasons set forth below, the Eleventh Amendment, as construed in *Seminole Tribe*, and common law sovereign immunity, as construed in *Alden*, render unconstitutional section 106(a) of the Bankruptcy Code to the extent Congress has purported to abrogate state sovereign immunity and Eleventh Amendment immunity in the context of suits against states in bankruptcy courts. Moreover, *Alden* has the effect of denying the vindication of bankruptcy rights in state courts and federal courts alike. As a result, *Seminole Tribe* and *Alden* have the effect of undermining a key purpose of the federal bankruptcy laws by altering the priorities legislated by Congress to elevate states to preferred positions relative to other creditors.[28] The various mechanisms that courts and commentators have proposed to circumvent or limit the effect of these decisions, as discussed below, are of limited utility.[29] Congress should consider enacting legislation that ameliorates the effects of *Seminole Tribe* and *Alden* in order to level the playing field on which states and other creditors find themselves in bankruptcy cases.[30] Without change, the system is likely to crumble or, at a minimum, produce vastly different and inequitable results in cases in which states take an active role. One greedy governmental creditor can undo all the good for literally millions of debtors, creditors, employees, and communities. The case law now shows us that the only way to stop it is by congressional action—not by relying on clever arguments in court. Because we are dealing with a constitutional proscription, congressional options are limited, but they are not nonexistent. Below, we consider fundamental policy concerns and offer the best options available.

Part II of this Article briefly summarizes the history and nature of Eleventh Amendment immunity and the common-law doctrine of sovereign immunity and concludes with an examination of *Seminole Tribe*, *Alden*, and the states' newly enshrined constitutional sovereign immunity right. Part III examines the effect of constitutional sovereign immunity on section 106(a) of the Bankruptcy Code,

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28. For the law regarding priorities in bankruptcy cases, see 11 U.S.C. § 507(a). For the numerous ways in which the federal bankruptcy laws apply to the states and other creditors, see, for example, *infra* notes 147-55 and accompanying text. Readers who are unfamiliar with bankruptcy law concepts like priorities are referred to GEORGE M. TREISTER ET AL., FUNDAMENTALS OF BANKRUPTCY LAW (4th ed. Supp. 1998).

29. *See infra* Part III.A-B.

30. *See infra* Part IV.A-E.

and Part IV reviews the various arguments that courts have considered regarding limitation of sovereign immunity in the bankruptcy context. Finally, Part V considers and critiques legislation that Congress possibly could enact to neutralize constitutional sovereign immunity, which include (a) reenactment of an analog to section 106(a) under the guise of the Fourteenth Amendment; (b) creation of an automatic prospective injunction against state officials with respect to bankruptcy matters; (c) authorization of suits by the United States trustee or private rights of action by bankruptcy estates and their representatives on behalf of the United States; (d) disallowance of state claims unless the state waives immunity; and (e) encouragement of a waiver of Eleventh Amendment immunity through the conditional receipt of federal funds.

II. THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY

A. Common-Law Sovereign Immunity and Eleventh Amendment Immunity

The common law doctrine of sovereign immunity flows from the premise that the "King could do no wrong,"[31] and in its most basic form operates such that "the sovereign cannot be sued in [its] own courts without [its] consent."[32] Before *Alden*, however, such common law sovereign immunity was not thought to be constitutionally guaranteed.[33] As a result, until *Seminole Tribe* it appeared that the Supremacy Clause of the Constitution enabled Congress unilaterally to waive or abrogate common law sovereign immunity for several purposes, including enforcement of the Bankruptcy Code.[34] Although

31. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 76 (1988); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 4 (1963).

32. The Siren, 74 U.S. (7 Wall.) 152, 153-54 (1868); Jaffe, *supra* note 34, at 1. The concept of sovereign immunity in American jurisprudence is taken from the law in England that the Crown could not be sued without consent in its own courts. *See* Alden v. Maine, 119 S. Ct. 2240, 2247 (1999). By comparison, a voluntary grant of immunity by one sovereign to another sovereign in the first sovereign's courts is considered a form of comity. *See* Nevada v. Hall, 440 U.S. 410, 416 (1979).

33. *See* Patricia L. Barsalou, *Defining the Limits of Federal Court Jurisdiction Over States in Bankruptcy Court*, 28 ST. MARY'S L.J. 575, 580-81 (1997).

34. *See, e.g.*, United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992) (dealing with congressional waiver of federal sovereign immunity).

Congress has power to waive federal sovereign immunity,[35] it is less clear whether Congress has the power to abrogate state sovereign immunity to subject a state to suit without its consent in federal or state courts.[36]

Noting that the Constitution in its original form did not refer to or purport to preserve state sovereign immunity, the Supreme Court held in the 1793 decision of *Chisholm v. Georgia*[37] that the federal courts had jurisdiction under Article III of the Constitution to hear and determine actions by citizens of one state against another state as a sovereign entity.[38] The four judges who concurred in the *Chisholm* decision each wrote a separate opinion, but the common thread binding their judgments was the theory that Article III of the Constitution "evidenced the states' surrender of sovereign immunity as to those provisions extending jurisdiction over suits to which States were parties."[39] The *Chisholm* decision, however, apparently produced such a great "shock of surprise" that the Eleventh Amendment was proposed quickly and was ratified in about two years.[40]

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State."[41] Under the Amendment, therefore, federal courts lack jurisdiction over suits against non-consenting states.[42]

By its plain language, the Eleventh Amendment does not extend to suits against a state by its own citizens[43] or, arguably, to suits based on federal-question jurisdiction (as opposed to diversity

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35. *See id.*

36. *See infra* notes 41-52 and accompanying text.

37. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

38. *See* Michael P. Kenny, *Sovereign Immunity and the Rule of Law: Aspiring to a Highest-Ranked View of the Eleventh Amendment*, 1 GEO. MASON INDEP. L. REV. 1, 8-9 (1992).

39. Alden v. Maine, 119 S. Ct. 2240, 2250 (1999). Two of the four *Chisholm* judges argued a more extreme position—that state sovereign immunity was inconsistent with the principle of popular sovereignty established by the Constitution. *See id.* at 2249-50 (citing *Chisholm*, 2 U.S. (2 Dall.) at 454-58, 470-72).

40. *See* Monaco v. Mississippi, 292 U.S. 313, 325 (1934).

41. U.S. CONST. amend. XI.

42. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 119-20 (1984); McKay v. Boyd Constr. Co., 769 F.2d 1084, 1086 (5th Cir. 1985).

43. *See* Seminole Tribe v. Florida, 517 U.S. 44, 67-68 (1996).

jurisdiction).[44] Indeed, perhaps because there was no general federal question jurisdiction in the district courts at the time,[45] the Supreme Court initially interpreted the Eleventh Amendment narrowly, holding that its protection applied solely to actions based on diversity jurisdiction.[46]

However, in the 1880s, the Court implied that under the Eleventh Amendment, a state could not be sued under federal question jurisdiction by a citizen of another state.[47] Then, in its 1890 decision of *Hans v. Louisiana*, the Court broadened the scope of the Eleventh Amendment by holding that its protections applied to cases based on federal question jurisdiction filed by a citizen against the citizen's own state.[48] In effect, *Hans* went beyond the language of the text and appeared to elevate the doctrine of common law sovereign immunity to constitutional status through the Eleventh Amendment.[49]

Since *Hans*, the Supreme Court has reaffirmed its expansive view of the Eleventh Amendment, holding repeatedly that the Eleventh Amendment prohibits not only suits against a state by another state's citizen, but also suits against a state by its own

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44. *See id.* at 110-11 (Souter, J., dissenting) ("In precisely tracking the language in Article III providing for citizen-state diversity jurisdiction, the text of the Amendment does, after all, suggest to common sense that only the Diversity Clauses are being addressed.").

45. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (adopting, for the first time, federal-question jurisdiction in 1875).

46. *See* United States v. Peters, 9 U.S. (5 Cranch) 115 (1809); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1968 (1983) ("The Marshall and Taney Courts read the eleventh amendment in the narrowest possible way and in no instance applied it to cases other than those in which federal jurisdiction depended solely upon party status.").

47. *See In re* Ayers, 123 U.S. 443, 506-08 (1887); Hagood v. Southern, 117 U.S. 52, 69-71 (1886).

48. Hans v. Louisiana, 134 U.S. 1, 10-11 (1890). *See generally* Alan D. Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1 (1967) (focusing on the importance of the source of the cause of action).

49. *See also* Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934). The Court made clear its current view that the constitutional bar contained in the Eleventh Amendment is derived from common-law sovereigu immunity:

> [W]e cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, 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. (citations omitted).

citizens, even if the case involves only federal question jurisdiction.[50] The Court, however, occasionally has recognized various limitations on the scope of the Eleventh Amendment,[51] including, from 1989 until the *Seminole Tribe* decision, the authority of Congress to abrogate Eleventh Amendment immunity pursuant to an exercise of power enumerated in Article I of the Constitution.[52]

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50. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) ("[T]he 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 . . . that is under the exclusive control of the Federal Government."); Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 472 (1987) ("[T]he Court long ago held that the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State.").

The Court's prevailing intorpretation of the Eleventh Amendment is subject te much debate. Indeed, four current Justices appear to favor an interpretation that would prevent application of the Eleventh Amendment to cases based on federal-question jurisdiction and cases involving suits against a state by its own citizens. *See Seminole Tribe*, 517 U.S. at 76-101 (Stevens, J., dissenting); *id.* at 101-85 (Souter, Ginsburg, & Breyer, JJ., dissenting). Several recently departed Justices shared similar views, *see Welch*, 483 U.S. at 496-521 (Breunan, Marshall, Blackmun & Stovens, JJ., dissenting), as do numerous commentaters, *see* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3524 n.186 (2d ed. Supp. 1995) (surveying commentary critical of the Court's current Eleventh Amendment jurisprudence). *See also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 31 (1989) (Scalia, J., dissenting) (acknowledging that modern sovereign immunity doctrine depends on "some other constitutional principle beyond the immediate text of the Eleventh Amendment").

51. *See, e.g.*, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation, 496 U.S. 18, 27 (1990) (The Supreme Court has "repeatedly and without question accepted jurisdiction to review issues of federal law arising in suits brought against States in state court."); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (Eleventh Amendment applies only to states and stato agencies and not to local governmental entities); *Ex parte* Young, 209 U.S. 123, 144-45 (1908) (federal courts have jurisdiction over a suit against a state official for prospective injnnctive relief); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 376-77, 430 (1821) (rejecting argument that the Eleventh Amendment bars the Supreme Court's power on writ of error to review the judgment of a state court involving an issue of federal law); *infra* notos 102-93 and accompanying text; *see generally* Kurt E. Springmann, Comment & Legis. Rev., *The Impact of* Seminole *on Intellectual Property Infringement By State Actors: The Interaction of Article I, Article III, the Eleventh Amendment, and the Fourteenth Amendment*, 29 ARIZ. ST. L.J. 889, 892-94 (1997).

52. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (holdimg that the Commerce Clause of Article I gives Congress the authority to render states "liable in money damages in federal court"). The *Union Gas* decision was the product of only a four-Justice plurality (Justices Brennan, Marshall, Blackmun, and Stevens), with Justice White concurring only in the result. Nevertheless, both before and after *Union Gas*, lower federal courts routinely held that Congress in fact could abrogate state sovereign immunity when legislating pursuant to its Article I authority. *See, e.g.*, Merchants Grain, Inc. v. Maheru, 59 F.3d 630, 634-36 (7th Cir. 1995) ("[T]here was no constitutional basis for distinguishing between the plenary powers accorded Congress under the Fourteenth Amendment and those accorded under Article I.") *vacated*, Ohio Agric. Commodity Depositors Fund v. Mahern, 517 U.S. 1130 (1996) (mem.); Employment Dev. Dep't v. Joseph (*In re* HPA Assocs.), 191 B.R. 167, 172-74 (B.A.P. 9th Cir. 1995) ("Congress' plenary powers under Article I did empower it te abrogate sovereign immunity pursuant to the Bankruptcy Clause mandate te establish uniform bankruptcy laws.");

B. *The* Seminole Tribe *Decision*

In *Seminole Tribe*, the Supreme Court held unconstitutional Congress's attempt to abrogate state Eleventh Amendment immunity under the Indian Gaming Regulatory Act,[53] which was enacted pursuant to the Indian Commerce Clause of Article I of the Constitution.[54] The Court, noting a "'due concern for the Eleventh Amendment's role as an essential component of our constitutional structure,'"[55] held that Congress, acting under either the Commerce Clause or the Indian Commerce Clause of Article I, could not abrogate Eleventh Amendment immunity and require states to submit to a federal court's order for mediation. Specifically, the Court reasoned that "[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."[56]

Seminole Tribe has been interpreted to stand for the proposition that no clause in Article I "bestows upon Congress the power to abrogate a state's Eleventh Amendment immunity."[57] *Seminole Tribe*, however, does not purport to render void, as a *per se* rule, any and all attempts by Congress to abrogate Eleventh Amendment immunity. Rather, under *Seminole Tribe*, a "simple but stringent" two-question test applies to determinations whether Congress may abrogate state immunity in a particular context: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity;' and second, whether Congress has acted 'pursuant to a valid exercise of

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McVey Trucking, Inc. v. Secretary of State (*In re* McVey Trucking, Inc.), 812 F.2d 311, 314-23 (7th Cir. 1987) (concluding that "Congress may abrogate state immunity to suit pursuant to any of its plenary powers," including the Bankruptcy Clause); Mather v. Oklahoma Employment Sec. Comm'n (*In re* Southern Star Foods, Inc.), 190 B.R. 419, 425-26 (Bankr. E.D. Okla. 1995); Florida Dep't of Revenue v. Sparkman (*In re* York-Hannover Devs., Inc.), 190 B.R. 62, 65-66 (E.D.N.C. 1995) ("[I]t is clear that the states have ceded their sovereign immunity in the field of bankruptcy law."); Stern v. Massachusetts Alcohol Beverage Control Comm'n (*In re* J.F.D. Enters.), 183 B.R. 342, 354 (Bankr. D. Mass. 1995); Murray v. Withrow (*In re* PM-II Assocs.), 100 B.R. 940, 942 (Bankr. S.D. Ohio 1989); Wayne Manor, Inc. v. Department of Pub. Welfare (*In re* Wayne Manor, Inc.), 94 B.R. 240, 243-44 (Bankr. D. Mass. 1988).

53. Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (1994).

54. U.S. CONST. art. I, § 8, cl. 3.

55. Seminole Tribe v. Florida, 517 U.S. 44, 56 (1996) (quoting Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989)).

56. *Id.* at 72-73.

57. *In re* NVR, L.P., 206 B.R. 831, 837 (Bankr. E.D. Va. 1997); *see Seminole Tribe*, 517 U.S. at 72-73. The *Florida Prepaid* case removes any doubt that *Seminole Tribe* was limited to Commerce Clause legislation. "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers. . . ." Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2205 (1999).

power,' "[58] (which, after *Seminole Tribe*, may not be found within the confines of Article I itself). Unless both prongs of the *Seminole Tribe* test are satisfied, the congressional enactment will be insufficient to abrogate the states' Eleventh Amendment immunity.

C. Alden v. Maine *and the New Constitutional Sovereign Immunity Principle*

Until 1999, the Supreme Court, despite its expansive interpretation of the Eleventh Amendment, did not elevate to constitutional status a state's common law sovereign immunity to suits in state court. Thus, it was thought that Congress had the power to abrogate a state's sovereign immunity to further legislation enacted under Article I.[59]

In *Alden v. Maine*, the Supreme Court created a new principle of constitutional sovereign immunity by holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts."[60] The plaintiffs in *Alden* were probation officers employed by the State of Maine. They initially brought suit in federal court alleging Maine had violated the overtime provisions of the Fair Labor Standards Act ("FLSA"), seeking compensation and liquidated damages.[61] The federal district court dismissed the suit pursuant to the Eleventh Amendment, reasoning that the *Seminole Tribe* decision deprived the federal court of jurisdiction to hear the suit. The plaintiffs then filed the same action in state court. The trial judge dismissed the action pursuant to Maine's assertion of sovereign immunity, the Maine Supreme Judicial Court affirmed, and the United States Supreme Court granted certiorari to resolve the constitutional issue.[62]

In concluding that Maine's state sovereign immunity barred the suit, the Supreme Court based its decision on three key concepts. First, the Constitution's structure and history, coupled with the Court's interpretation of the Eleventh Amendment, establishes that "the States' immunity from suit is a fundamental aspect of the

58. *Seminole Tribe*, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).
59. *See supra* notes 41-52 and accompanying text.
60. Alden v. Maine, 119 S. Ct. 2240, 2246 (1999).
61. *See id.*
62. *See id.*

sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments."[63] The majority opinion, authored by Justice Kennedy, strived mightily to prove that at the time the Constitution was ratified, the states universally believed that immunity from suit was a key aspect of their continuing vitality in the new government.[64] From this concept Justice Kennedy was able to conclude "that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."[65]

Second, the Court determined that neither the Supremacy Clause of the Constitution, nor the powers delegated to Congress under Article I authorizes Congress to abrogate the states' sovereign immunity. The Court reasoned that when "a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States."[66]

Third, according to the *Alden* majority, principles of federalism favor constitutional sovereign immunity as a bar to federal legislation: "[i]n some ways, of course, a congressional power to authorize suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum."[67]

Alden is a flawed decision for at least four reasons.[68] First, the majority premises its decision on the existence of the states' constitu-

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63. *Id.* at 2246-47. Justice Kennedy, writing for the majority, focused on the purported acknowledgement by the Founders that states could not be sued without their consent. *See id.* at 2247.

64. *See id.* at 2247-49.

65. *Id.* at 2254. *Alden* makes clear that the principles of sovereign immunity that served as a backdrop to the Eleventh Amendment are not restricted to only cases involving the Eleventh Amendment. "While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States . . . this is not the only structural basis of sovereign immunity in the constitutional design." *Id.* at 2255.

66. *Id.* at 2255-56. The Court also rejected appeals to the Necessary and Proper Clause as "incidental authority to subject States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers." *Id.* at 2256. Yet as explained below, the Court does not appear to extend this rule to the Spending Clause. *See infra* notes 354-56, and accompanying text.

67. *Alden*, 119 S. Ct. at 2264.

68. We also note the majority's questionable account of the history of sovereign immunity at the time of the ratification of the Constitution and its conclusion that *Chisholm* was wrongly decided, but we leave that criticism for development by others. *See id.* at 2270-71 (Souter, J., dissenting).

tional right to sovereign immunity. The Constitution, except for the Supremacy Clause, which supports the primacy of federal power, and the Eleventh Amendment, which concerns federal court jurisdiction, contains no mention nor hints of the existence of a constitutional sovereign immunity.[69] The majority implicitly concedes that the Constitution does not expressly grant the right of sovereign immunity; instead, "[t]his separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution."[70] In essence, "Kennedy found a penumbra."[71]

Second, by finding a new constitutional right to sovereign immunity, the Supreme Court prospectively renders the Eleventh Amendment irrelevant. Constitutional sovereign immunity in *Alden* necessarily precludes suits both in federal and state courts. Justice Kennedy attempted to explain why the Eleventh Amendment's language is fairly limited: "Congress chose not to enact language codifying the traditional understanding of sovereigu immunity but rather to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision."[72] But the majority made no concerted effort to analyze why the Eleventh Amendment is necessary if "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."[73] If the Constitution was always meant to guarantee a state's right to sovereign immunity to suits both in state and federal court, then surely *Chisholm* was wrongly decided and the Eleventh Amendment was surplus. Thus the Court violated the ancient rule of construction: "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."[74]

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69. *See* Erwin Chemerinsky, *High Court Wrongly Lets States Off the Hook*, L.A. TIMES, June 25, 1999, at B9.

70. *Alden*, 119 S. Ct. at 2255.

71. Molly Ivins, *Hey, Watch Out! Those Supremes Are at it Again*, FORT WORTH STAR-TELEGRAM, June 29, 1999, at 11; *see also* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2219 (1999) (Stevens, J., dissenting) ("The full reach of [*Seminole Tribe*'s] dramatic expansion of the judge-made doctrine of sovereign immunity is unpredictable; its dimensions are defined only by the present majority's perception of constitutional penumbras rather than constitutional text.").

72. *Alden*, 119 S. Ct. at 2251.

73. *Id.* at 2254.

74. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

Third, *Alden* creates unnecessary and substantial constitutional questions.[75] Under the Court's rationale, the *Alden* plaintiffs have a federal right under the FLSA against the State of Maine for money damages that cannot be enforced in any court. *Alden* therefore violates the "general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."[76] The "right and remedy" principle, which has deep roots in English law,[77] is particularly well-settled in American law and as much inheres in the United States Constitution as does the purported penumbral right of sovereign immunity.[78]

Moreover, leaving parties with private rights no remedy to protect those rights opens the door for abuse by the states.[79] The majority attempts to rebut this argument by noting certain limitations on the exercise of sovereigu immunity[80] and by further stating: "We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."[81] But reliance on a state's "good faith" is an unsetthing justification.[82] As the Court previously stated, "[i]f the Constitution provided no protection against unbridled authority, all property rights would exist only at the whim of the sovereign."[83]

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75. *See* Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 697 (1982).

76. *Alden*, 119 S. Ct. at 2293 (Souter, J., dissenting) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

77. *See* Ashby v. White, 87 Eng. Rep. 808, 815 (K.B. 1794).

78. Justice Souter noted in *Alden* that several of the states perceived the principle to be so crucial that it was enshrined in state constitutions. *See Alden*, 119 S. Ct. at 2293 n.42 (citing the Delaware, Maryland, Massachusetts, Kentucky and Tennessee, Constitutions); *see also* Charles Fried, *Supreme Court Folly*, N.Y. TIMES, July 6, 1999, at A21 (in criticizing *Alden*, *Florida Prepaid*, and *College Savings Bank*, Fried noted: "Patent and related protection is proclaimed in the Constitution itself, and the Court did not deny that patent and trademark laws bind the States. Its structural argument was just that the patent holders cannot sue states to protect their rights. What kind of structure is that?"). Moreover, the Court's conclusion may create a conflict with the Takings Clause of the Fifth Amendment. *See infra* notes 243-53 and accompanying text.

79. *See* Chemerinsky, *supra* note 69, at B9.

80. *See Alden*, 119 S. Ct. at 2266-68. We discuss these limitations in greater detail below. *See infra* Part III.

81. *Alden*, 119 S. Ct. at 2266.

82. "[I]t is implausible to claim that enforcement by a public authority without any incentive beyond its general enforcement power will ever afford the private right a traditionally adequate remedy." *Id.* at 2293 (Souter, J., dissenting); *see also id.* at 2294 n.43.

83. Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 697 (1982).

Fourth, *Alden* dramatically, and perhaps unknowingly in its full ramifications,[84] alters the balance of power to favor the states. Under *Alden*, legislation that authorizes private parties to sue states to enforce federal rights is unconstitutional. Yet the Supremacy Clause requires the states to accept and enforce lawful federal legislation.[85] One must ponder how lawful federal legislation, which the FLSA undoubtedly is, can ever be enforced adequately? The Court mentions the fact that the federal government itself can sue states in violation of federal law,[86] but as Justice Souter notes in dissent, that supposed check against state abuse is likely illusory as a practical matter.[87]

Moreover, the Court concedes the principle that the Supremacy Clause guarantees primacy of federal law but states that "[a]ppeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power."[88] However, *Alden*'s view of the Supremacy Clause makes no sense when one considers the purpose of the *Ex parte Young* doctrine,[89] which *Alden* expressly reaffirms and which permits suit in federal court against state officials to enforce federal law.[90]

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84. The rule that the United States Supreme Court has jurisdiction to review state court decisions involving federal questions, enshrined in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816), might fall in light of the recent Supreme Court decisions. Because the Court interprets constitutional sovereignty to allow states to assert immunity to suits against it in either state or federal court, it is not inconceivable for a state to waive immunity in state court on a federal cause of action, obtain a favorable ruling and then assert immunity in an appeal to the United States Supreme Court. *Martin v. Hunter's Lessee* is premised on Article III's grant of jurisdiction to the Supreme Court to review state court decisions involving federal questions. Yet *Seminole Tribe* and *Alden* make clear that the statos did not surrender their sovereignty in Article III. *See Alden*, 119 S. Ct. at 2253. Unless there is some other constitutional principle of judicial review (which the majority may have to create) that trumps constitutional sovereign immunity, the bar that *Alden* and *Seminole Tribe* support theoretically would prevent the Court from reviewing state court decisions without state consent.

85. *See Alden*, 119 S. Ct. at 2288 (Souter, J., dissenting).

86. *See id.* at 2267.

87. *See id.* at 2293 (Souter, J., dissenting). "[T]he allusion to enforcement of private rights by the National Government is probably not much more than whimsy." *Id.*

88. *Id.* at 2255. The Court's authority for this statement is Alexander Hamilton's analysis: "But it will not follow from [the Supremacy Clause] that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land." THE FEDERALIST NO. 33, at 204 (Alexander Hamilten) (Clinton Rossiter ed., 1961). But Hamilton was concerned with federal intrusion on areas of traditional state governing. In *Holeu*, Congress had acted pursuant to its lawful powers under Article I.

89. *See infra* Part IV.D.

90. *See Alden*, 119 S. Ct. at 2262-63.

III. *SEMINOLE TRIBE*, *ALDEN*, AND SECTION 106 OF THE BANKRUPTCY CODE

Section 106(a) of the Bankruptcy Code provides that, "[n]otwithstanding 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" various enumerated sections of the Bankruptcy Code.[91] Through section 106(a), Congress expressed an unequivocal intent to abrogate state immunity.[92] Thus, under the rubric of *Seminole Tribe* and *Alden*, the question is whether, in so legislating, Congress acted within a valid exercise of its power.

A. Section 106(a) Is Unconstitutional as Applied to the States

In 1989, the Supreme Court held that former section 106(c) of the Bankruptcy Code,[93] the predecessor to current section 106(a), did not express an unequivocal intent to abrogate state Eleventh Amendment immunity with respect to money judgments for bankruptcy-related causes of action.[94] As a result, Congress subsequently enacted the current version of section 106(a) to make clear its unequivocal intent to abrogate state immunity in bankruptcy matters. Indeed, the legislative intent of section 106(a) is unequivocal: "[t]his amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief."[95] Courts considering the issue therefore have held that Congress unequivocally intended to abrogate state immunity through section 106(a),[96] and the statute accordingly satisfies the first prong of the *Seminole Tribe* analysis.

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91. 11 U.S.C. § 106(a) (1994). The Bankruptcy Code defines "governmental units" to include the states. *Id.* § 101(27).

92. *See infra* notes 95-96 and accompanying text.

93. Former section 106(c), the predecessor to section 106(a), provided that, "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 under such a provision binds governmental units." *Id.* § 106(c) (repealed 1994).

94. *See* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101-04 (1989).

95. 140 CONG. REC. H10766 (1994) (Judiciary Committee Chairman Jack Brooks describing § 113 of H.R. 5116). Congress confused its own power to abrogate state sovereign immunity with a state's "waiver" of its own immunity, but congressional intent to overturn *Hoffman v. Connecticut* and abrogate state sovereign immunity is crystal clear.

96. *See, e.g.*, Department of Transp. & Dev. v. PNL Management Co. (*In re* Fernandez), 123 F.3d 241, 243 (5th Cir. 1997); Schlossberg v. Maryland (*In re* Creative Goldsmiths), 119 F.3d

Whether Congress actually had the power to so act, however, is a more difficult question. Congress clearly has the power to waive or abrogate federal, foreign, or local sovereign immunity.[97] Prior to *Seminole Tribe*, it also appeared that Congress had the power to abrogate state Eleventh Amendment immunity in the bankruptcy context because (a) the Supreme Court consistently had held that Congress could abrogate Eleventh Amendment immunity when enacting legislation pursuant to the "Enforcement Clause" of the Fourteenth Amendment;[98] and (b) in *Pennsylvania v. Union Gas Co.*, a plurality of the Court had held that Congress similarly could do so when enacting legislation pursuant to its plenary powers under the Commerce Clause of Article I.[99] Indeed, following the *Union Gas* decision and prior to *Seminole Tribe*, every lower court to consider the issue had held that Congress had the power to abrogate state immunity when enacting legislation pursuant to its plenary powers under the Bankruptcy Clause of Article I of the Constitution,[100] and several

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1140, 1145 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998); California Employment Dev. Dep't v. Taxel (*In re* Del Mission Ltd.), 98 F.3d 1147, 1152 n.6 (9th Cir. 1996); Employment Dev. Dep't v. Joseph (*In re* HPA Assocs.), 191 B.R. 167, 171-72 (B.A.P. 9th Cir. 1995); Wyoming Dep't of Transp. v. Straight (*In re* Straight), 209 B.R. 540, 549 (D. Wyo. 1997), *aff'd*, 143 F.3d 1387 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 446 (1998); *In re* NVR, Inc., 206 B.R. 831, 837 (Bankr. E.D. Va. 1997); Florida Dep't of Revenue v. Sparkman (*In re* York-Hannover Devs., Inc.), 190 B.R. 62, 65 (E.D.N.C. 1995); Mather v. Oklahoma Employment Sec. Comm'n (*In re* Southern Star Foods, Inc.), 190 B.R. 419, 425-26 (Bankr. E.D. Okla. 1995); Stern v. Massachusetts Alcohol Beverage Control Comm'n (*In re* J.F.D. Enters.), 183 B.R. 342, 354 (Bankr. D. Mass. 1995).

97. *See* 28 U.S.C. §§ 1604-05 (1994); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989); United States v. Mississippi, 380 U.S. 128, 140-41 (1965).

98. The Enforcement Clause provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." U.S. CONST. amend. XIV, § 5; *see, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976).

99. Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-23 (1989) (Brennan, Marshall, Blackmun, & Stevens, JJ.); *see also id.* at 45 (White, J., concurring without explanation in the plurality's conclusion, but not concurring in its reasoning). The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

100. *See, e.g.*, Merchants Grain, Inc. v. Mahern, 59 F.3d 630, 634-36 (7th Cir. 1995), *vacated*, Ohio Agric. Commodity Depositors Fund v. Mahern, 517 U.S. 1130 (1996) (mem.) ("[T]here was no constitutional basis for distinguishing between the plenary powers accorded Congress under the Fourteenth Amendment and those accorded under Article I."); *In re HPA Assocs.*, 191 B.R. at 172-74 ("Congress' plenary powers under Article I did empower it to abrogate sovereign immunity pursuant to the Bankruptcy Clause mandate to establish uniform bankruptcy laws."); *In re York-Hannover Devs., Inc.*, 190 B.R. at 64-65 ("[I]t is clear that the states have ceded their sovereign immunity in the field of bankruptcy law."); *In re Southern Star Foods*, 190 B.R. at 425-26; *In re J.F.D. Enters.*, 183 B.R. at 354.

courts had reached the same conclusion prior to the issuance of the *Union Gas* opinion.[101]

In *Seminole Tribe*, however, the Supreme Court held that Congress had no authority under the Commerce Clause or the Indian Commerce Clause of Article I to abrogate Eleventh Amendment immunity. As a result, since *Seminole Tribe* a significant majority of courts, including all of the Courts of Appeals to consider the issue,[102] have held that Congress may *not* abrogate state Eleventh Amendment immunity pursuant to the Bankruptcy Clause of Article I of the Constitution.[103] Such courts have reasoned that congressional power to enact legislation pursuant to the Bankruptcy Clause is analogous to and coextensive with its authority to enact legislation pursuant to the Commerce Clause and the Indian Commerce Clause and that, as a result, there is "no basis for treating its powers under the Bankruptcy Clause any differently"[104] from the explicated powers under the Commerce Clause.[105]

Unfortunately, these courts are correct because there are no logical bases to distinguish the Indian Commerce Clause from the Bankruptcy Clause or other grants of Congressional power under

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101. *See, e.g.*, McVey Trucking v. Secretary of State (*In re* McVey Trucking, Inc.), 812 F.2d 311, 314-23 (7th Cir. 1987) (concluding that "Congress may abrogate state immunity to suit pursuant to any of its plenary powers," including the Bankruptcy Clause); Murray v. Withrow (*In re* PM-II Assocs.), 100 B.R. 940, 942 (Bankr. S.D. Ohio 1989); Wayne Manor, Inc. v. Department of Pub. Welfare (*In re* Wayne Manor, Inc.), 94 B.R. 240, 243-44 (Bankr. D. Mass. 1988); *cf.* WJM, Inc. v. Massachusetts Dep't of Pub. Welfare, 840 F.2d 996, 1002 (1st Cir. 1988) (declining to consider whether Congress has the power to abrogate state sovereign immunity under the Bankruptcy Clause because of "the uncertainty that permeates the subject of abrogation").

102. *See* Sacred Heart Hosp. v. Pennsylvania (*In re* Sacred Heart Hosp.), 133 F.3d 237, 243-44 (3d Cir. 1998); Department of Transp. and Dev. v. PNL Management Co. (*In re* Fernandez), 123 F.3d 241, 244-45 (5th Cir. 1997), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); Schlossberg v. Maryland (*In re* Creative Goldsmiths), 119 F.3d 1140, 1147 (4th Cir. 1997); Aer-Aerotron, Inc. v. Texas Dep't of Transp. (*In re* Aer-Aerotron, Inc.), 104 F.3d 677, 680-81 (4th Cir. 1997) ("[P]erhaps 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*."); Light v. State Bar (*In re* Light), 87 F.3d 1320 (9th Cir. 1996) (unpublished disposition); *In re* NVR, L.P., 206 B.R. 831, 838 (Bankr. E.D. Va. 1997); Sparkman v. Florida Dep't of Revenue (*In re* York-Hannover Devs., Inc.), 201 B.R. 137, 141 (Bankr. E.D.N.C. 1996) (listing cases in which courts have so held).

103. The Bankruptcy Clause provides that "[t]he Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

104. Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 105 (1989) (Scalia, J., concurring in judgment).

105. *See In re Sacred Heart Hosp.*, 133 F.3d at 243; *In re Fernandez*, 123 F.3d at 244; *In re Creative Goldsmiths*, 119 F.3d at 1145-46.

Article I of the Constitution. Indeed, even the Constitution's Framers recognized that the Article I powers are "intimately connected"[106] and reflect the need to "escape the risks of economic balkanization."[107] Moreover, both the majority and the dissent in *Seminole Tribe* foreshadowed this conclusion. The dissent, for example, decried that application of the *Seminole Tribe* reasoning "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."[108] Rather than dispute that conclusion, the majority readily agreed, but nevertheless professed to be unconcerned:

> [I]t has not been widely thought that the federal antitrust, *bankruptcy*, or copyright statutes abrogated the States' sovereign immunity. . . . Although the copyright and *bankruptcy* laws have existed practically since our nation's inception, . . . there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States.[109]

In fact, following the issuance of *Seminole Tribe*, the Supreme Court granted certiorari of the *Merchants Grain* decision, in which the Seventh Circuit had concluded that section 106(a) represented a valid exercise of power under the Bankruptcy Clause,[110] and the Court promptly vacated and remanded that decision "for further consideration in light of *Seminole Tribe*."[111]

In defense of *Seminole Tribe*'s rendering unconstitutional Section 106(a), certain commentators opined that bankruptcy causes of action against states could be resolved in state courts and that as a result, *Seminole Tribe* would not have the catastrophic impact that many believed it would have. Before *Alden*, these commentators were

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106. THE FEDERALIST NO. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961).

107. *In re Fernandez*, 123 F.3d at 244.

108. Seminole Tribe v. Florida, 517 U.S. 44, 77 (1996) (Stevens, J., dissenting) (emphasis added).

109. *Id.* at 72 n.16 (emphasis added). Several bankruptcy courts have taken issue with the Court's statement that there is no tradition of allowing enforcement of federal hankruptcy laws against the states. *See, e.g.*, O'Brien v. Vermont (*In re* O'Brien), 216 B.R. 731, 736 (Bankr. D. Vt. 1998) ("We, like every bankruptcy judge we know, regularly and routinely enforced applicable bankruptcy law against the States prior to *Seminole*."); Schulman v. California Water State Resources Control Bd. (*In re* Lazar), 200 B.R. 358, 376 (Bankr. C.D. Cal. 1996).

110. Merchants Grain, Inc. v. Mahern, 59 F.3d 630, 634-37 (7th Cir. 1995), *vacated,* Ohio Agric. Commodity Depositors Fund v. Mahern, 517 U.S. 1130 (1996) (mem.).

111. *See* Ohio Agric. Commodity Depositors Fund v. Mahern, 517 U.S. 1130, 1130 (1996).

correct that federal question causes of action could be brought against a state in state court without offending Eleventh Amendment immunity. States cannot rely on the Eleventh Amendment immunity to protect them against suits in their own court system.[112] Moreover, when states have waived sovereign immunity through statutes or conduct, they clearly can be sued in state courts.[113] Under the prevailing pre-*Alden* view,[114] Congress could abrogate common-law "sovereign immunity enjoyed by states in their own courts by legislating pursuant to its Article I powers,"[115] including, presumably, its

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112. *See* Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. 197, 204-05 (1991) ("[A]s we have stated on many occasions, the Eleventh Amendment does not apply in state courts.").

113. Many states have elected to waive sovereign immunity with respect to proprietary, as opposed to governmental, functions. For example, New York State has done so in section 8 of its Court of Claims Act. *See* Miller v. New York, 467 N.E.2d 493, 496 (N.Y. 1984). If a debtor were owed money by the State of New York based on a proprietary function, the debtor could sue the state. *See also* 705 ILL. COMP. STAT. 505/8 (West Supp. 1998) ("The court [of claims] shall have exclusive jurisdiction to hear . . . [a]ll claims against the state for damages in cases sounding in tort . . . ."). In all, it appears that thirty-four states have enacted statutes waiving sovereign immunity in state courts, to some extent. *See* ALASKA STAT. 09.50.250 (Michie Supp. 1997); ARIZ. REV. STAT. ANN. § 12-821 (1995); ARK. CODE ANN. § 19-10-201 to -210 (Michie 1998); CONN. GEN. STAT. ANN. § 4- 61(a) (West Supp. 1998); GA. CODE ANN. § 50-21-1 (Michie 1998); HAW. REV. STAT. § 661-1 (1993); 705 ILL. COMP. STAT. § 505/8 (West Supp. 1998); KAN. STAT. ANN. § 46-913 (1994); KY. REV. STAT. ANN. § 45A.245 (Michie 1997); LA. REV. STAT. ANN. § 38:2181 (West 1999); ME. REV. STAT. ANN. tit. 5, § 1510-A (West 1989 & Supp. 1997); MD. CODE ANN., STATE GOV'T § 12-201(a) (Supp. 1997); MICH. COMP. LAWS ANN. § 600.6419 (West 1995); MINN. STAT. § 3.751 (1997); MISS. CODE ANN. § 11-45-1 (1993); MONT. CODE ANN. § 18-1-404 (1994); NEB. REV. STAT. § 81-8,301 (1994); NEV. REV. STAT. § 41.031 (Supp. 1997); N.H. REV. STAT. ANN. § 491:8 (1997); N.J. STAT. ANN. § 59:13-3 (West 1995); N.M. STAT. ANN. § 37-1-23 (Michie 1990); N.Y. Ct. Cl. Act § 8 (McKinney Supp. 1998); N.D. CENT. CODE § 32-12-02 (1996); OHIO REV. CODE ANN. § 2743.02(A)(1) (Anderson Supp. 1997); OR. REV. STAT. § 30.320 (Supp. 1996); 72 PA. CONS. STAT. ANN. § 4651-1 (1998); R.I. GEN. LAWS § 37-13.1-1 (1997); S.D. CODIFIED LAWS §§ 21-32-2, 21-32-10 (Michie 1987); TENN. CODE ANN. § 9-8-307(a)(1)(L) (Supp. 1997); UTAH CODE ANN. § 63-30-5 (1997); VA. CODE ANN. § 11-69,11-70 (Michie 1995); WASH. REV. CODE ANN. § 4.92.010 (West 1988); W. VA. CODE § 14-2-4, 14-2-13 (1995); WYO. STAT. ANN. § 1-39-104 (Michie 1997).

114. *See* Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 58 & n.273; Henry Paul Monaghan, Comment, *The Soverign Immunity "Exception,"* 110 HARV. L. REV. 102, 122-25 (1996). This view is "better" precisely because the original doctrine of sovereign immunity was not so much about *"whether* the Crown or its agents could be sued, but *how*." PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1002 (4th ed. 1996). Adoption of the contrary position, as in *Alden*, will immunize states and their agents from retrospective suits in any forum and would encourage state defiance of federal laws without accountability to any court.

115. *In re* NVR, L.P., 206 B.R. 831, 843 (Bankr. E.D. Va. 1997). *See* Howlett v. Rose, 496 U.S. 356, 374-78 (1990). Only if the state court invokes a neutral rule of judicial administration may it refuse to exercise its general jurisdiction against the state on a federal cause of action. *See id.* To the extent state law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law. The *Howlett* Court was careful to note that it left open the question "whether Congress can require the States to

powers under the Bankruptcy Clause. At least one lower court held that section 106(a) of the Bankruptcy Code validly abrogated common law sovereign immunity for actions against a state brought in state courts.[116]

Indeed, the Court had held that the Supremacy Clause not only provides state courts with jurisdiction over federal causes of action, it also *required* state courts of general jurisdiction to exercise such jurisdiction absent some other available federal forum.[117] But to say that a state court has subject matter jurisdiction[118] to resolve federal causes of action is not to resolve whether Congress can abrogate a state's immunity in its own courts with respect to those actions.[119] *Seminole* ducked the issue but noted in passing that "this

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create a forum with the capacity to enforce federal statutery rights or to authorize service of process on parties who would not otherwise be subject to the court's jurisdiction." *Id.* at 378.

116. *See* O'Brien v. Vermont (*In re* O'Brien), 216 B.R. 731, 736-38 (Bankr. D. Vt. 1998).

117. *See* Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 207 (1991) ("[When] a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court.") (quoting *Howlett*, 496 U.S. at 367-68); Testa v. Katt, 330 U.S. 386 (1947); *see also In re O'Brien*, 216 B.R. at 736 ("[S]tates are bound by federal law; they must comply with federal law; and federal law can ensure that they do."); *In re NVR, L.P.*, 206 B.R. at 843. Section 1334(b) of title 28, United States Code, the primary bankruptcy jurisdictiou statute, supports this point by providing that the federal courts "shall have original *but not exclusive* jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b) (1994) (emphasis added). Nevertheless, some commentators have suggested that only states may determine whether to provide jurisdiction in state courts of federal causes of action. *See* Karen Cordry, *State Governments in the Bankruptcy Courts After* Seminole*: Are They the New 800-Pound Gorillas*, 28 BANKR. CT. DECISIONS WKLY. NEWS & COMMENT 23, at A10 (May 14, 1996). Moreover, it is doubtful that a state court would have jurisdiction over disputes relating to property of the estate or other matters over which Congress has granted exclusive jurisdiction to federal courts, such as in 28 U.S.C. § 1334(e), which grants the federal district court exclusive jurisdiction over property of the estate. *See* Scott P. Glauberman, *Citizen Suits Against States: The Exclusive Jurisdiction Dilemma*, 45 J. COPYRIGHT SOC'Y U.S.A. 63, 99-100 (1997); Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 TEX. L. REV. 685, 765 (1989); Monaghan, *supra* note 114, at 132. Thus, Congress should consider amending section 1334(e) to grant state courts concurrent jurisdiction over property of the estate solely for actions that caunot be brought in federal court without the state's consent.

118. Some courts have held that the Eleventh Amendment bars a court's subject matter jurisdiction over tbe suit. *See, e.g.*, Demery v. Kupperman, 735 F.2d 1139, 1149 n.8 (9th Cir. 1984). The better view is that although sovereign immunity is jurisdictional, it is "not of the same character as subject matter jurisdiction." *In re* Prairie Island Dakota Sioux, 21 F.3d 302, 304 (8th Cir. 1994); *see infra* note 182. When a state waives sovereign immunity, it confers personal jurisdiction rather than subject matter jurisdiction on the court. *See* PEAKSolutions Corp. v. State Dep't of Transp. (*In re* PEAKSolutious Corp.), 168 B.R. 918, 922 & n.10 (Bankr. D. Minn. 1994).

119. *See* Meltzer, *supra* note 114, at 57-60. Where a state deprives a person of property in violation of federal law, the state court must provide relief, notwithstanding "the sovereign immunity States traditionally enjoy in their own courts." Reich v. Collins, 513 U.S. 106, 110 (1994) (tax refund case).

Court is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit."[120]

As a conceptual matter, where the state had not consented to suit, Congress should be able to abrogate state sovereign immunity to require vindication of federal causes of action in state courts.[121] Otherwise no forum would be available to vindicate state violations of federal law, federal legislative power would be impotent to bind the states, and the Supremacy Clause would be undercut severely.[122]

Despite these obvious concerns, the Supreme Court's decision in *Alden* squarely decides the issue in favor of the states. Under *Alden*, states may assert sovereign immunity to suit in their courts to any cause of action arising under Article I. Congress's abrogation of sovereign immunity in section 106(a), like its attempted abrogation in the Fair Labor Standards Act, is unconstitutional as applied to a state without its consent. Thus, while causes of action for money damages granted under the Bankruptcy Code against a state are, in theory, available, there is currently no forum in which to bring such bankruptcy causes of action.

B. Section 5 of the Fourteenth Amendment

In *Seminole Tribe*, the Supreme Court reaffirmed[123] that Congress constitutionally may abrogate state Eleventh Amendment

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120. Seminole Tribe v. Florida, 517 U.S. 44, 71 n.14 (1996)

121. *See* Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1171-77 (1984); Meltzer, *supra* note 114, at 58; Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CAL. L. REV. 189 (1981).

122. *See* Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 211 (1991) ("If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a state to its courts . . . an easy way is open to prevent the enforcement of many provisions of the Constitution . . . ."). Indeed one might speculate whether state prosecutors and other officials will misbehave if they are immune from federal review and liability. Prospective injunctive relief under *Ex parte Young* might not be sufficient to remedy actions taken by state officials before injunctive relief is granted. Conceivably, second order reputational and political pressures will operate to keep state officials obedient to federal law. *See supra* note 17. Resorting to state courts to resolve complex bankruptcy issues is inconsistent with concepts of federalism.

123. *See Seminole Tribe*, 514 U.S. at 59; Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (recognizing congressional power to abrogate Eleventh Amendment immunity under the Fourteenth Amendment). Recently the Court renewed this reaffirmation in *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2206-07 (remedial legislation waiving state sovereign immunity under section 5 of the Fourteenth Amendment is limited to cases where Congress identifies a pattern of state deprivation of constitutional rights).

immunity when legislating pursuant to the Fourteenth Amendment. The Court reasoned that, since the Fourteenth Amendment was ratified by the states after the Eleventh Amendment was ratified, federal legislation enacted pursuant to the Fourteenth Amendment constitutionally could "intrude upon the province of the Eleventh Amendment."[124]

At least four bankruptcy courts and one district court have seized upon this "exception" to the Eleventh Amendment to hold that section 106(a) in fact is constitutional.[125] The first such case was *Southern Star Foods, Inc.*,[126] in which a chapter 7 trustee brought an adversary proceeding against a state agency to recover an unauthorized postpetition transfer[127] of property of the estate and to equitably subordinate the agency's claim against the debtor in priority of distribution to claims of other creditors.[128] After the state argued that Congress lacked the power to abrogate Eleventh Amendment immunity and that section 106(a) was unconstitutional,[129] the bankruptcy court held that the Privileges and Immunities Clause of the Fourteenth Amendment[130] enabled the trustee's action to proceed. Specifically, the court held that the exercise of "national legislative powers under any of the provisions of Article I will usually (if not invariably)

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124. *Seminole Tribe*, 517 U.S. at 59. Another basis to distinguish the Fourteenth Amendment from Article I is that the Fourteenth Amendment is of limited scope and was intended specifically to alter the relationship between states and the federal government. *See Fitzpatrick*, 427 U.S. at 454-55.

125. *See* Wyoming Dep't of Transp. v. Straight (*In re* Straight), 209 B.R. 540, 555 (D. Wyo. 1997), *aff'd*, 143 F.3d 1387 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 446 (1998); Headrick v. Georgia (*In re* Headrick), 203 B.R. 805, 808 (Bankr. S.D. Ga. 1996); Mather v. Employment Sec. Comm'n (*In re* Southern Star Foods, Inc.), 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995); Burke v. Georgia (*In re* Burke), 203 B.R. 493, 497 (Bankr. S.D. Ga. 1996), *aff'd on other grounde*, 146 F.3d 1313, 1317 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 2410 (1999).

126. *In re Southern Star Foode, Inc.*, 190 B.R. at 426. Although *Southern Star* actually predates *Seminole Tribe*, its reasoning has been followed by every court that has held section 106(a) to be constitutional since *Seminole Tribe* was published.

127. *Id.* at 422. *See* 11 U.S.C. §§ 549(a), 550(a) (1994) (permitting the trustee to avoid an unauthorized postpetition transfer of property of the estate and to recover the transferred property or its value from the transferee).

128. *In re Southern Star Foods, Inc.*, 190 B.R. at 422. *See* 11 U.S.C. § 510(c) (permitting the trustee to bring an action to equitably subordinate the priority in distribution granted to the claim of one creditor to the claims of other creditors).

129. *See In re Southern Star Foods, Inc.*, 190 B.R. at 422.

130. *See id.* at 426. The Privileges and Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment thus forbids states from abridging the "privileges and immunities that flow from national citizenship." Storer v. French (*In re* Storer), 58 F.3d 1125, 1128 (6th Cir. 1995).

implicate" privileges and immunities within the scope of the Fourteenth Amendment and that, as a result, section 106(a) is a constitutional embodiment of Congress's powers under the Fourteenth Amendment.[131] The court reasoned that the Bankruptcy Code provides citizens with at least the following "privileges and immunities" within the scope of the Fourteenth Amendment:

> [The] efficient liquidation or other use and ratable distribution of a debtor's assets, or (to put it another way) with immunity from the inefficient liquidation or use and inequitable distribution of a debtor's assets which may occur under State laws; the privilege of discharge, or . . . with immunity from oppressive debt collection which may obtain under State laws; liberty from economic bondage, and protection against undue loss of value of property in exigent financial circumstances; and fair and efficient determination of all of the above, according to the process due in a national court of equitable jurisdiction, without regard to persons or to any special privileges save those considered by Congress to be justified as a matter of policy.[132]

Courts that have followed *Southern Star* have adopted similar reasoning.[133]

Courts of Appeals addressing the issue, however, unanimously have rejected the Fourteenth Amendment as a means of "rescuing" the viability of section 106(a).[134] In so doing, the appellate courts have focused on the legislative history of the statute[135] where, not surpris-

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131. *In re Southern Star Foods, Inc.*, 190 B.R. at 426.

132. *Id.*

133. *See* Wyoming Dep't of Transp. v. Straight (*In re* Straight), 209 B.R. 540, 555 (D. Wyo. 1997), *aff'd*, 143 F.3d 1387 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 446 (1998); Headrick v. Georgia (*In re* Headrick), 203 B.R. 805, 808 (Bankr. S.D. Ga. 1996); Burke v. Georgia (*In re* Burke), 203 B.R. 493, 497 (Bankr. S.D. Ga. 1996). Courts addressing the issue also could note that bankruptcy is not a right of citizenship and that entities that are not individual human beings, residents of the United States, or citizens may be debtors under the Bankruptcy Code. *See* 11 U.S.C. §§ 101(9), (27), (40), (41), 109(a) (1994).

134. *See, e.g.*, Sacred Heart Hosp. v. Pennsylvania (*In re* Sacred Heart Hosp.), 133 F.3d 237, 244 (3d Cir. 1998); Department of Transp. & Dev. v. PNL Management Co. (*In re* Fernandez), 123 F.3d 241, 245 (5th Cir. 1997), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); Schlossberg v. Maryland (*In re* Creative Goldsmiths), 119 F.3d 1140, 1146 (4th Cir. 1997); *cf.* Velasquez v. Frapwell, 160 F.3d 389, 391 (7th Cir. 1998) ("[I]f section 5 is not to be distended beyond all reasonable bounds, it cannot be used te authorize legislation so remote from the policies and objectives of the equal protection clause as [the Uniformed Services Employment and Reemployment Rights Act] is."); Elias v. United States (*In re* Elias), 218 B.R. 80, 84-86 (B.A.P. 9th Cir. 1998).

135. *See In re Sacred Heart Hosp.*, 133 F.3d at 244; *In re Fernandez*, 123 F.3d at 245; *In re Creative Goldsmiths*, 119 F.3d at 1146; *see also* Bakst v. New Jersey (*In re* Ross), 234 B.R. 199, 202 (Bankr. S.D. Fla. 1999); *In re* NVR, L.P., 206 B.R. 831, 842 (Bankr. E.D. Va. 1997); Schulman v. California Water State Resources Control Bd. (*In re* Lazar), 200 B.R. 358, 382 (Bankr. C.D. Cal. 1996); *In re* Lush Lawns, 203 B.R. 418, 421 (Bankr. N.D. Ohio 1996); Tri-City

ingly, "there is simply no evidence suggesting that section 106(a) was enacted pursuant to any constitutional provision other than Congress's Bankruptcy Clause authority."[136] The better reasoned result, therefore, is that *Seminole Tribe* sounded the death knell for section 106(a) and that, as a result, states' Eleventh Amendment immunity currently remains intact with respect to most, if not all, bankruptcy causes of action brought against a state in federal bankruptcy court.

One very limited exception might lead a court to conclude that section 106(a) effectively abrogates Eleventh Amendment immunity with respect to actions to remedy discriminatory practices brought against a state in bankruptcy court pursuant to section 525 of the Bankruptcy Code.[137] Although there is no legislative history indicating that Congress promulgated Section 525 under the Fourteenth Amendment,[138] the prohibition against discriminatory treatment goes to the heart of the Equal Protection Clause of the Fourteenth Amendment. A section 525 cause of action is analogous to a cause of action brought under section 1983 of title 42 of the United States Code.[139] Although the Court has held Congress did not explicitly abrogate a state's Eleventh Amendment immunity with respect to section 1983 of title 42,[140] this precedent should not apply by analogy

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Turf Club, Inc. v. Kentucky Racing Comm'n (*In re* Tri-City Turf Club), 203 B.R. 617, 620 (Bankr. E.D. Ky. 1996) ("The court can find no hint that Congress had in its collective mind Fourteenth Amendment concerns when it enacted Section 106(a) of the Bankruptcy Code.").

136. [T]he conclusion seems logically inescapable that in passing the 1994 [Bankruptcy] Act Congress exercised the same specifically enumerated Article I bankruptcy power that it has traditionally relied on in enacting prior incarnations of the bankruptcy law dating back te 1800—68 years before the passage of the Fourteenth Amendment. We will not presume that Congress intended te enact a law under a general Fourteenth Amendment power te remedy an unspecified violation of rights when a specific, substantive Article I power clearly enabled the law.

In re Creative Goldsmiths, 119 F.3d at 1146 (citation omitted). *See also In re Sacred Heart Hosp.*, 133 F.3d at 244; *In re NVR, L.P.*, 206 B.R. at 840.

137. Section 106(a) expressly abrogates sovereign immunity with respect to section 525 of the Bankruptcy Code. Section 525 protects debtors, who are, or have been, seeking protection under the Bankruptcy Code from discriminatery treatment. *See* 11 U.S.C. § 525.

[Section 525] codifies the result in *Perez v. Campbell*, 402 U.S. 637 (1971), which held that a state would frustrate the congressional policy of a fresh start for a debtor if it were permitted to refuse to renew the debtor's driver's license because a tort judgment against the debtor resulting from an autemobile accident had been unpaid as a result of a discharge in bankruptcy.

H.R. REP. NO. 95-595, at 366 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6321-22.

138. Congress is not required to state expressly that it enacts legislation pursuant to the Fourteenth Amendment. *See* EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983).

139. *See* Maya v. Philadelphia Gas Works (*In re* Maya), 8 B.R. 202 (Bankr. E.D. Pa. 1981). *But see* Toth v. Michigan State Hous. Dev. Auth., 136 F.3d 477, 479 n.1 (6th Cir. 1997).

140. *See* Quern v. Jordan, 440 U.S. 332, 345 (1979).

to preclude abrogation with respect to section 525 of the Bankruptcy Code in light of the explicit reference to section 525 in section 106(a).[141] Courts holding that they are without jurisdiction to order a state to reinstate a debtor's driver's license have simply overlooked the possibility that section 525 was promulgated under section 5 of the Fourteenth Amendment.[142]

The potential flaw in relying on the Equal Protection Clause to uphold abrogation with respect to section 525 is that bankruptcy debtors are not members of suspect classifications. Some courts have held that using the Equal Protection Clause and section 5 of the Fourteenth Amendment to overcome sovereign immunity should be limited to discrimination based upon suspect classifications.[143] The Supreme Court may resolve this issue during the October 1999 term.[144]

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141. Section 106(a) provides in pertinent part: "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . with respect to . . . [section] 525 . . . of this title." 11 U.S.C. § 106(a).

142. *See, e.g., In re* Burkhardt, 220 B.R. 837, 842 (Bankr. D.N.J. 1998); *In re* Perez, 220 B.R. 216, 224-25 (Bankr. D.N.J. 1998), *aff'd*, No. 98-2043, 1998 U.S. Dist. LEXIS 21513 (D.N.J. Aug. 10, 1998) (unpublished opinion) (holding in light of *Seminole Tribe* that "to the extent earlier cases have relied on . . . the 'anti-discrimination provision' set forth at Bankruptcy Code § 525, to restore a debter's driver's license . . . such reliance . . . is no longer applicable").

143. *See* Velasquez v. Frapwell, 160 F.3d 389, 391 (7th Cir. 1998); *see also infra* note 261 and accompanying text. *But see* Little Rock Sch. Dist. v. Mauney, No. 98-1721, 1999 U.S. App. LEXIS 13166, at *7 (8th Cir. June 14, 1999). The Court of Appeals for the Eighth Circuit held that Congress validly abrogated state Eleventh Amendment immunity with respect to the Individuals with Disabilities Education Act. *Id.* The court rejected the state's argument that because disabled status is not a suspect classification Congress could not use the Fourteenth Amendment exception to the Eleventh Amendment. Citing the Eleventh Circuit's decision in *Kimel v. Florida Bd of Regents*, 139 F.3d 1429 (11th Cir. 1998), the court stated: "the mere fact of non-suspect status does not preclude Congress from legislating on a group's behalf." *Id.* at *23. Moreover, the court explained why the IDEA satisfies the *Boerne* "proportionality" test. The Eighth Circuit reaffirmed its views on non-suspect status in *Alsbrook v. City of Maumelle*, No. 97-1825, 1999 U.S. App. LEXIS 16945, at *23 (8th Cir. July 23, 1999).

144. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999). Even if the Equal Protection Argument fails, section 525 might survive as a provision protecting "property" rights secured by the Due Process Clause. *See infra* notes 276-85 and accompanying text.

IV. LIMITATIONS ON THE APPLICABILITY OF THE ELEVENTH AMENDMENT IN BANKRUPTCY CASES AFTER *SEMINOLE TRIBE* AND *ALDEN*

Because Congress cannot simply "overrule" the decisions (which, of course, are based on interpretations of the Constitution), *Seminole Tribe* and *Alden* have created a "potentially irreconcilable conflict" between the Bankruptcy Code, the Eleventh Amendment, and constitutional sovereign immunity.[145] Indeed, as noted at the outset of this Article,[146] constitutional sovereign immunity, as construed by *Seminole Tribe* and *Alden*, might substantially undermine the paramount bankruptcy policies of a debtor's discharge and "fresh start" and of the fair and equitable distribution of the estate's assets to creditors. For example, since the *Seminole Tribe* decision was published, courts have held that unless states consent to bankruptcy court jurisdiction, the Bankruptcy Code's provisions regarding discharge,[147] avoidance of preferences,[148] avoidance of fraudulent conveyances,[149] avoidance of unauthorized postpetition transfers,[150]

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145. *See In re* NVR, L.P., 206 B.R. 831, 843 n.25 (Bankr. E.D. Va. 1997).

146. *See supra* notes 4-12 and accompanying text.

147. 11 U.S.C. § 727 (1994); *see, e.g.*, Franchise Tax Bd. v. Lapin (*In re* Lapin), 226 B.R. 637, 641 (B.A.P. 9th Cir. 1998); Mitchell v. California Franchise Tax Bd. (*In re* Mitchell), 222 B.R. 877, 883-84 (B.A.P. 9th Cir. 1998); Elias v. United States (*In re* Elias), 218 B.R. 80, 83-84 (B.A.P. 9th Cir. 1998); Morrell v. Franchise Tax Bd. (*In re* Morrell), 218 B.R. 87, 90 (Bankr. C.D. Cal. 1998); Kish v. Verniero (*In re* Kish), 221 B.R. 118, 124 (D.N.J. 1997); Ranstrom v. IRS (*In re* Ranstrom), 215 B.R. 454, 455-56 (Bankr. N.D. Cal. 1997); Rose v. United States Dep't of Educ. (*In re* Rose), 214 B.R. 372, 375 (Bankr. W.D. Mo. 1997); Koehler v. Iowa College Student Aid Comm'n (*In re* Koehler), 204 B.R. 210, 216-17 (Bankr. D. Minn. 1997). *But see* Department of Transp. and Dev. v. PNL Management Co. (*In re* Fernandez), 123 F.3d 241, 243-44 (5th Cir. 1997).

148. 11 U.S.C. § 547; *see, e.g.*, Brewer v. New York State Dep't of Correctional Servs. (*In re* Value-Added Communications, Inc.), 224 B.R. 354, 359 (N.D. Tex. 1998); *see also* Ted Janger, *Strategies For Preserving the Bankruptcy Trustee's Avoidance Power Against States After Seminole Tribe*, 23 OHIO N.U. L. REV. 1431, 1435 (1997).

149. 11 U.S.C. § 548; *see, e.g.*, Sparkman v. Florida Dep't of Revenue (*In re* York-Hannover Devs., Inc.), 201 B.R. 137, 138, 142 (Bankr. E.D.N.C. 1996) (holding fraudulent conveyance action brought by trustee against state was barred by Eleventh Amendment).

150. 11 U.S.C. § 549; *see also* Janger, *supra* note 148, at 1435. In *Southern Star Foods*, the court held that the Eleventh Amendment defense was not available to a state because laws enacted pursuant to Article I are enforceable through the Fourteenth Amendment. *See* Mather v. Oklahoma Employment Sec. Comm'n (*In re* Southern Star Foods, Inc.) 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995). Because the Fourteenth Amendment exception cannot withstand analysis as applied to a postpetition transfer in the bankruptcy context, the court should have held that the Eleventh Amendment barred the exercise of bankruptcy court jurisdiction against the state in an adversary proceeding under section 549 of the Bankruptcy Code.

turnover of property of the estate,[151] protection against discriminatory treatment,[152] the automatic stay,[153] and determination of tax liability of the bankruptcy estate[154] cannot be enforced against states in federal bankruptcy courts.[155]

Application of *Seminole Tribe*, *Alden*, and principles of constitutional sovereign immunity to bankruptcy cases, however, will not result in a blanket immunity from bankruptcy-related matters for all governmental units. Rather, the scope of sovereign immunity is limited by several established doctrines, which are summarized below and have been explored and defined in a veritable torrent of opinions published after the *Seminole Tribe* decision.

A. Only States and Agents Are Protected

One significant and well-established limitation on the scope of Eleventh Amendment immunity is that only a state and its agents may invoke the amendment's protection. Other governmental units, including local jurisdictions such as counties and municipalities, cannot avail themselves of the Eleventh Amendment and its protections.[156]

Because many tax and licensing issues involve local governments, the benefit to a bankruptcy estate and its creditors of such a

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151. 11 U.S.C. § 542; *see, e.g.*, Guiding Light Corp. v. Louisiana (*In re* Guiding Light Corp.), 213 B.R. 489, 491 (Bankr. E.D. La. 1997); Horwitz v. Zywiczynski (*In re* Zywiczynski), 210 B.R. 924, 925-26 (Bankr. W.D.N.Y. 1997).

152. 11 U.S.C. § 525; *see In re* Perez, 220 B.R. 216, 224-25 (Bankr. D.N.J. 1995), *aff'd*, No. 98-2043, 1998 U.S. Dist. LEXIS 21513 (D.N.J. Aug. 10, 1998) (unpublished opinion).

153. 11 U.S.C. § 362; *see, e.g.*, *In re* Burkhardt, 220 B.R. 837, 843-44 (Bankr. D.N.J. 1998); Louis;Harris v. Barall (*In re* Louis;Harris), 213 B.R. 796, 798 (Bankr. D. Conn. 1997); Tri-City Turf Club, Inc. v. Kentucky Racing Comm'n (*In re* Tri-City Turf Club), 203 B.R. 617, 618 (Bankr. E.D. Ky. 1996); *In re* Martinez, 196 B.R. 225 (D.P.R. 1996).

154. 11 U.S.C. § 505; *see* Bakst v. New Jersey (*In re* Ross), 234 B.R. 199, 202-03 (Bankr. S.D. Fla. 1999); Mueller v. Idaho (*In re* Mueller), 211 B.R. 737, 739-40 (Bankr. D. Mont. 1997).

155. *See In re* Burkhardt, 220 B.R. 837, 842 (Bankr. D.N.J. 1998) (holding that finding court lacked jurisdiction to compel state agency to return driver's license privilege even though return of license is aspect of confirmed chapter 13 plan); *In re* Lush Lawns, Inc., 203 B.R. 418, 420 (Bankr. N.D. Ohio 1996); *see also* Teresa K. Goebel, Comment, *Obtaining Jurisdiction Over States in Bankruptcy Proceedings After* Seminole Tribe, 65 U. CHI. L. REV. 911 (1998).

156. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Hadley v. North Ark. Community Technical College, 76 F.3d 1437, 1438 (8th Cir. 1996) ("Eleventh Amendment immunity does not extend to independent political subdivisions created by the State, such as counties and cities."); Ruehman v. Sheahan, 34 F.3d 525, 528 (7th Cir. 1994) ("[A]lthough states and their agencies are protected by the eleventh amendment, counties and municipalities are not."); *In re* Christie, 218 B.R. 27, 31 (Bankr. D.N.J. 1998).

limitation is clear.[157] However, because state law determines the status of a particular governmental unit, a local governmental unit that is regarded as autonomous in one state may be regarded as a mere agent in another state for Eleventh Amendment purposes.[158] Moreover, the same kinds of governmental functions may be exercised by an arm of the state in one state but by a local agency in another state.[159] As a result, the "local government" exception to the Eleventh Amendment has varying and inconsistent application.[160]

B. States Are Protected Only Against "Suits In Law Or Equity"

By its plain language, the Eleventh Amendment applies only to "suits in law or equity."[161] As a consequence, several courts have attempted to limit the applicability of *Seminole Tribe* on the ground that bankruptcy cases, or at least particular matters within a bankruptcy case, do not constitute "suits" within the scope of the Eleventh Amendment.[162]

The Court of Appeals for the Fifth Circuit, for example, has held that the Eleventh Amendment did not per se preclude the bankruptcy court's discharge of a claim held by a state because the

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157. Because a local governmental unit cannot shield itself behind the Eleventh Amendment, it is subject to the automatic stay provisions in § 362 and may be compelled to appear in federal court to have its tax assessments determined pursuant to § 505.

158. *See, e.g., Doyle*, 429 U.S. at 280. The Ninth Circuit has articulated a five-prong test for determining whether, under state law, a particular governmental unit is an agent of a state:

> To determine whether a governmental agency is an arm of the state, the following factors must be examined: [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporato status of the entity.

Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 250-51 (9th Cir. 1992).

159. As the court in *Belanger* noted, California school districts, unlike school districts in most of the states, have budgets that are controlled and funded by state government rather than by local school districts. *See Belanger*, 963 F.2d at 251. Because school district funding comes from the state, a judgment against a California school district will be paid out of the stato treasury. *See id.* at 252. Thus, in California, school districts are arms of the state. This result differs from that in *Doyle*, where the Supreme Court concluded that Ohio school districts were not arms of the state of Ohio. *Doyle*, 429 U.S. at 280.

160. *Compare* Moore v. Alameda, 411 U.S. 693, 717-21 (1973) (holding that a county is not arm of the state under California law) *with* DeKalb County Div. of Family & Children's Servs. v. Platter (*In re* Platter), 140 F.3d 676, 679 n.1 (7th Cir. 1998) (implying county family services division is an arm of the state).

161. U.S. CONST. amend. XI.

162. *See* Virginia v. Collins (*In re* Collins), 173 F.3d 924, 929 (4th Cir. 1999) (finding a motion to reopen bankruptcy to determine whether a debt owed to state was dischargeable was not a suit against the state).

bankruptcy case in which the discharge was granted did not constitute a "suit" against the state for Eleventh Amendment purposes:

> In a bankruptcy case, in its simplest terms, a debtor turns over his assets, which constitute the estate, for liquidation by a trustee for the benefit of creditors according to their statutory priorities. Bankruptcy law modifies the state's collection rights with respect to claims against the debtor, but it also affords the state an opportunity to share in the collective recovery. Bankruptcy operates by virtue of the Supremacy Clause and *without forcing the state to submit to suit in federal court.* From this standpoint, [the debtor]'s entitlement to assert his discharge against the state's claims invoked no Eleventh Amendment consequences [because] *[t]he state never was hauled into federal court against its will in the bankruptcy.*[163]

Other courts have reached the same conclusion with respect to the determination of a debtor's tax liability to a state pursuant to section 505 of the Bankruptcy Code[164] and with respect to the treatment and discharge of a state's claim under a chapter 11 plan of reorganization[165] or a chapter 13 plan of adjustment.[166] Moreover, prior to *Seminole Tribe*, the Supreme Court had held that the objection to a proof of claim filed by a state in a bankruptcy case did not constitute a "suit" within the meaning of the Eleventh Amendment.[167]

Although appearing to be a neat solution to the "problem" of Eleventh Amendment immunity in bankruptcy cases and proceedings, the actual application of the "bankruptcy cases are not suits for Eleventh Amendment purposes" line of reasoning is quite limited. For example, the Fifth Circuit itself expressly noted that the Eleventh Amendment does apply to preclude the "commencement of certain adversary proceedings directly against a state."[168] Thus, courts have held repeatedly that *adversary proceedings* to determine the dischargeability of a debt to a state in fact are "suits" within the scope of

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163. Texas v. Walker, 142 F.3d 813, 822 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999) (emphasis added); *see also Collins*, 173 F.3d at 929.

164. *See* Smith v. Psychiatric Hosps., Inc. *(In re* Psychiatric Hosps., Inc.), 216 B.R. 660, 661 (M.D. Fla. 1998).

165. *See In re* Barrett Refining Corp., 221 B.R. 795, 801-08 (Bankr. W.D. Okla. 1998).

166. *See In re* Burkhardt, 220 B.R. 837, 847-50 (Bankr. D.N.J. 1998).

167. *See* Gardner v. New Jersey, 329 U.S. 565, 573 (1947) ("If the claimant is a state, the procedure of proof and allowance is not transmuted into a suit against the state because the court entertains objections to the claim.").

168. *Walker*, 142 F.3d at 823.

the Eleventh Amendment.[169] Courts have reached the same conclusion with respect to other complaints that request declaratory judgments regarding other aspects of the operation of the bankruptcy laws.[170]

The recent case *In re Burkhardt*[171] nicely illustrates the illusory nature of this "limitation" on the Eleventh Amendment. In *Burkhardt*, a bankruptcy court held that it could enter an order *confirming* a chapter 13 plan and discharging the debtor's debt to the state because confirmation of the plan did not result in a "suit in law or equity" that would trigger application of the Eleventh Amendment.[172] The court, however, concluded that the Eleventh Amendment precludes *enforcement* of the discharge and thus the plan against the state:

> With its holding herein, the Court fully recognizes that in confirming a Chapter 13 plan which contemplates a discharge of a debtor's motor vehicle violations upon completion of all payments under the Plan, *the Bankruptcy Court is in effect granting a "right without a remedy,"* insofar as the ability of this Court to compel the restoration of a state issued driver's license. While acutely aware of this anomaly created by the recognition of the discharge of the debt under the federal bankruptcy statutes, without the jurisdictional ability to compel the sovereign to enforce the discharge, the proper redress lies with the United States Congress and is beyond the prerogative of this Court.[173]

As such, even though a bankruptcy case may not constitute a "suit" for Eleventh Amendment purposes and a bankruptcy court accordingly may have the power to enter orders in a case that directly

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169. *See, e.g.*, Mitchell v. California Franchise Tax Bd. (*In re* Mitchell), 222 B.R. 877, 882-84 (B.A.P. 9th Cir. 1998); *cf.* Ranstrom v. IRS (*In re* Ranstrom), 215 B.R. 454, 455-56 (Bankr. N.D. Cal. 1997).

170. *See, e.g.*, NVR Homes, Inc. v. Clerks of the Circuit Courts (*In re* NVR, LP), Nos. 98-2211, 98-2244, 98-2271, 98-2272, 98-2273, 1999 U.S. App. LEXIS 15499, *18-*27 (4th Cir. July 12, 1999) (finding a debtor's motion for declaratory relief against the state to recover transfer taxes is a suit subject to the Eleventh Amendment); Sacred Heart Hosp. v. Pennsylvania (*In re* Sacred Heart Hosp.), 204 B.R. 132, 137-39 (E.D. Pa. 1997), *aff'd*, 133 F.3d 1237 (3d Cir. 1998) (adversary proceeding for a declaratory judgment regarding applicability of section 108(a) of the Bankruptcy Code); Guiding Light Corp. v. Louisiana (*In re* Guiding Light Corp.), 213 B.R. 489, 492 (Bankr. E.D. La. 1997) (adversary proceeding for declaratory judgment regarding extent of property of the estate).

171. *In re* Burkhardt, 220 B.R. 837, 838 (Bankr. D.N.J. 1998).

172. *Id.* at 849.

173. *Id.* at 850 (emphasis added); *see also* Franchise Tax Bd. v. Lapin (*In re* Lapin), 226 B.R. 637, 646 (B.A.P. 9th Cir. 1998) (holding that a bankruptcy court had no jurisdiction to sanction a state for violating a discharge order). But query whether the bankruptcy judge could issue an *Ex parte Young* injunction against a state official to reinstate the debtor's driver's license?

affects the rights of a state, the bankruptcy court may be powerless to enforce its orders against the state. If so, at least with respect to the state, the debtor and its creditors may be no better off than if the bankruptcy court lacked jurisdiction in the first place.[174]

C. *Waiver of Immunity*

States always may consent to be sued in federal court and can waive their Eleventh Amendment immunity expressly.[175] Thus, proof of a voluntary waiver of immunity by a state would constitute another way to gain jurisdiction over a state consistent with constitutional sovereign immunity.[176]

The doctrine of waiver, however, is quite narrow in scope. For example, a state waives its Eleventh Amendment immunity only if it unequivocally expresses an intent to waive its constitutional immunity protection,[177] and a state's intent to waive is strictly construed. Indeed, even a state's waiver of sovereign immunity in its own state courts is insufficient to waive the state's Eleventh Amendment immunity to permit it to be sued in federal court.[178]

Moreover, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court overturned the "implied waiver" doctrine,[179] holding that a state does not waive its sovereign immunity, constructively or by implication, merely by

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174. *But see infra* Part III.E (discussing the possibility of enforcing bankruptcy court orders against states in state courts).

175. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) (stating that a state may expressly consent to suit in federal court through a clear statement in its constitution or a statute).

176. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2204 (1999).

177. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); *see also* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) ("The Court will give effect to a State's waiver of Eleventh Amendment immunity 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'") (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)); Magnolia Venture Capital Corp. v. Prudential Secs., Inc., 151 F.3d 439, 443-44 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1115 (1999); V-1 Oil Co. v. Utah State Dep't of Pub. Safety, 131 F.3d 1415, 1421 (10th Cir. 1997).

178. *See Florida Prepaid*, 119 S. Ct. at 2205; *Atascadero*, 473 U.S. at 241. In *Atascadero*, the Court stated, "[a]lthough a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity gnaranteed by the Eleventh Amendment 'absent a clear' intention to subject itself to suit in federal court." *Id.; accord* Smith v. Reeves, 178 U.S. 436, 441-45 (1900).

179. *See* Parden v. Terminal Ry. Co., 377 U.S. 184, 192 (1964).

participating in a federal program.[180] In *College Savings Bank*, the petitioner argued that Florida waived its immunity to suits brought under the Trademark Remedy Clarification Act ("TRCA") because Florida voluntarily engaged in activities covered by the TRCA. A five-member majority of the Court rejected the petitioner's argument, reasoning that the "implied waiver" doctrine "stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of constitutional law."[181]

Nevertheless, it is possible for a state to explicitly waive its Eleventh Amendment immunity. Such a potential waiver presents two important issues. First, what constitutes a sufficient waiver of Eleventh Amendment immunity? Second, who has the authority to waive immunity on behalf of a state?

When a state *commences* an adversary or similar proceeding in a federal forum, whether a bankruptcy court or otherwise, it waives its sovereign and Eleventh Amendment immunity at least with respect to the subject matter of that proceeding and any defenses, counterclaims, and causes of action against the state that arise out of the same transaction or occurrence on which the state's proceeding is based.[182] This comports with the general rule that a state waives its immunity by "voluntarily invoking [federal court] jurisdiction."[183]

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180. *See Florida Prepaid*, 119 S. Ct. at 2204-05; *see also* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987); *Atascadero*, 473 U.S. at 246-47; Kit Kinports, *Implied Waiver After* Seminole Tribe, 82 MINN. L. REV. 793, 800-01 (1998).

181. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2228 (1999). The Court stated the "implied waiver" doctrine violated the rule that a state's express waiver of sovereign immunity be unequivocal. *See id.* The fact that the TRCA placed states on notice that they could be subject to suit for conduct did not satisfy the unequivocal express waiver test. Justice Scalia explained: "the most that can be said with certainty is that the State has been put on notice that Congress intends to subject [the State] to suits brought by individuals. That is very far from concluding that *the State* made an 'altogether voluntary' decision to waive its immunity." *Id.* (quoting Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857)).

182. *See, e.g.*, *In re* Platter, 140 F.3d 676, 679-80 (7th Cir. 1998) (holding that a stato waived sovereign immunity by commencing an adversary proceeding for declaratory relief that its claim was nondischargeable); Confederated Tribes v. White (*In re* White), 139 F.3d 1268, 1271 (9th Cir. 1998) ("Initiation of a lawsuit is an action that 'necessarily establishes consent to the court's adjudication of the merits of that particular controversy,' including the risk of being bound by an adverse determination.") (quoting McClendon v. United States, 885 F.2d 627, 630 (9th Cir. 1989)). *But see* United States v. Murdock Mach. & Eng'g Co., 81 F.3d 922, 931 (10th Cir. 1996) (Applying pre-Bankruptcy Code law, the Tenth Circuit held that the United States does not waive its sovereign immunity, absent consent, when its agents institute an action or file a claim in court.); United States v. Forma, 42 F.3d 759, 764 (2d Cir. 1994) (Absent unequivocal waiver of sovereign immunity, a court does not have jurisdiction to hear a counterclaim against the United States, even though the United States initiated the action.

Courts have extrapolated that concept to hold that a state's active participation in a bankruptcy case, even absent the commencement of an adversary proceeding against the debtor, suffices to waive the state's applicable immunity.[184] Moreover, the Supreme Court long ago held that a state also waives its immunity when it files a proof of claim in a debtor's bankruptcy case, even if it otherwise does not participate in the bankruptcy case, at least with respect to

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The court recognized, however, that the counterclaim could be asserted by way of setoff or recoupment.). *Murdock* and *Forma* appear to conflict with the Supreme Court's decision in *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947), in which the Court held that a state waives its immunity when it files a proof of claim in a debtor's bankruptcy case. Moreover, *Murdock* and *Forma* have little application in bankruptcy cases and proceedings where Congress has explicitly waived federal sovereign immunity under section 106(b) of the Bankruptcy Code. *See also* Davis v. U.S. Postal Serv. *(In re* Leeth Constr., Inc.), 170 B.R. 684, 688 (Bankr. D. Ariz. 1994).

183. *College Sav. Bank*, 119 S. Ct. at 2228; *see* Gunter v. Atlantic Coast Line Ry. Co., 200 U.S. 273, 284 (1906); *see also* Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1235 (10th Cir. 1999) (The state waived Eleventh Amendment immunity by removing the case from state court to federal court and litigating the merits of the case).

184. *See, e.g.*, Wyoming Dep't of Transp. v. Straight (*In re* Straight), 143 F.3d 1387, 1389-90 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 446 (1998); *In re White*, 139 F.3d at 1270-71 (holding that Native American Tribe waived its immunity by twice voting on the debtor's plan of reorganization, objecting to confirmation of the plan, submitting an order denying confirmation, and otherwise participating in the bankruptcy case). The prospect that a state may waive its Eleventh Amendment immunity creates a potential conflict with traditional notions of jurisdiction. Similar to a claim that a federal court lacks subject matter jurisdiction, *see* Farmers Ins. Co. v. Hubbard, 869 F.2d 565, 570 (10th Cir. 1989), a state may assert its Eleventh Amendment immunity to bar federal jurisdiction at any point in litigation, including on appeal for the first time. *See* Ambus v. Granite Bd. of Educ., 975 F.2d 1555, 1559 (10th Cir. 1992) ("The Eleventh Amendment defense is jurisdictional [and, therefore, is a threshold issue]."). Generally a party cannot waive the requirement that a federal court must have subject matter jurisdiction over the matter being litigated; that is, the parties cannot confer subject matter jurisdiction on a federal court. *See* Insurance Corp. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 702 (1982). But the Supreme Court has held consistently that a state may waive its Eleventh Amendment immunity defense. *See, e.g.*, Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2052 (1998) ("The State can waive the defense."); Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944); Clark v. Barnard, 108 U.S. 436, 447 (1883). The reason for the distinction between Eleventh Amendment immunity and subject matter jurisdiction lies in the history of the Eleventh Amendment. The amendment has its roots in the ancient doctrine of sovereign immunity, *see* Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934), which could always be waived with proper consent. *See* The Siren, 74 U.S. (7 Wall.) 152, 154 (1868). The Court explained in *Clark v. Barnard* that "immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure." *Clark*, 108 U.S. at 447. "The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject matter jurisdiction." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 267 (1997). "The Eleventh Amendment . . . does not automatically destroy original jurisdiction." *Schacht*, 118 S. Ct. at 2052. For an excellent overview of the debate whether the Eleventh Amendment implicates subject matter or personal jurisdiction, *see* Glauberman, *supra* note 117, at 69-70 & n.39.

matters regarding allowance of that claim.[185] Specifically, the Court reasoned as follows:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some other way than payment in cash. *When the State becomes an actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim.*[186]

Based on such reasoning, Congress has enacted an express waiver of sovereign immunity through section 106(b) of the Bankruptcy Code, which provides for the following:

> 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.[187]

Thus, section 106(b) expressly deems the filing of a state's proof of claim to be a waiver of immunity with respect to claims against the

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185. *See Gardner*, 329 U.S. at 573; New York v. Irving Trust Co., 288 U.S. 329, 330 (1933); *see also* Virginia v. Collins (*In re* Collins), 173 F.3d 924, 929-30 (4th Cir. 1999).

186. *See Gardner*, 329 U.S. at 573-74 (emphasis added); *see also Irving Trust Co.*, 288 U.S. at 332 ("If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.").

187. *In re Straight*, 143 F.3d at 1390 (finding that section 106(b) codifies the *Gardner* rule). *See also* 11 U.S.C. § 106(c) (1994) ("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."). Critics of this view might assert that section 106(b) is an abrogation of immunity rather than a waiver, because the filing of a proof of claim is an act by a state that does not implicate immunity. On the contrary, however, Congress has imposed a condition on the right of a state to file a proof of claim: under section 106(b) the state's election to file a proof of claim is deemed a waiver of immunity with respect to compulsory counterclaims, even if they exceed the amount of the claim and result in an affirmative recovery. Moreover, a state cannot argue that it is deprived of a right of access to the courts without due process of law. The Fifth Amendment to the Constitution requires due process when the federal government deprives a person of life, liberty or property. A state is not a "person" within the meaning of the Fifth Amendment. *See* South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966); *In re* Herndon, 188 B.R. 562, 565 n.8 (Bankr. E.D. Ky. 1995).

state that arose out of the "same transaction or occurrence out of which the claim of such governmental unit arose."[188]

Notwithstanding long-standing Supreme Court authority regarding a state's waiver of sovereign immunity on the filing of a proof of claim, however, several courts have held and commentators have speculated, post-*Seminole Tribe*, that section 106(b) is an unconstitutional attempt to "deem" a wavier on the part of the states.[189] The courts finding section 106(b) to be unconstitutional instead have adopted the standards used to identify compulsory counterclaims under Rule 13(a) of the Federal Rules of Civil Procedure, holding that the "fundamental fairness of judicial process" requires only that a state's proof of claim waives immunity with respect to matters that would constitute compulsory counterclaims to a typical complaint.[190]

These critics may find support in the Supreme Court's decision in *College Savings Bank* in which Justice Scalia specifically distinguishes between notice to the states that Congress intended for the states to be subject to suits in federal court and actual waivers of immunity by the states.[191] Under the *College Savings Bank* rationale, section 106(b)'s effect should be no more than to notify states that Congress intended for the states to be subject to federal court jurisdiction. Thus, under *College Savings Bank*, it may be said that section 106(b)'s abrogation of immunity is unconstitutional.

Other courts, however, have held that section 106(b) is constitutional notwithstanding *Seminole Tribe*.[192] These opinions

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188. 11 U.S.C. § 106(b).

189. *See, e.g.*, Schlossberg v. Maryland (*In re* Creative Goldsmiths, Inc.), 119 F.3d 1140, 1147 (4th Cir. 1997); Rose v. U.S. Dep't of Educ. (*In re* Rose), 215 B.R. 755 (Bankr. W.D. Mo. 1997); Grabscheid v. Michigan Employment Sec. Comm'n (*In re* C.J. Rogers, Inc.), 212 B.R. 265 (E.D. Mich. 1997); *In re* NVR, L.P., 206 B.R. 831, 239 (Bankr. E.D. Va. 1997); *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). One commentator notes that filing a proof of claim in bankruptcy may be an insufficient voluntary act by the state to constitute a waiver because the state has no alternative forum in which to collect on its claim. *See* S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195, 212 (1996). Another flatly states that Congress does not have the power to decree that a state's filing a proof of claim constitutes a waiver of its Eleventh Amendment immunity. *See* Glauberman, *supra* note 117, at 89.

190. *See* Brewer v. New York State Dep't of Correctional Servs. (*In re* Value-Added Communications, Inc.), 224 B.R. 354, 357 (N.D. Tex. 1998).

191. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2228 (1999).

192. *See, e.g., In re Straight*, 143 F.3d at 1391-92; Texas v. Walker, 142 F.3d 813, 820-23 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999); Dekalb County Div. of Family & Children's Servs. v. Platter (*In re* Platter), 140 F.3d 676, 678-80 (7th Cir. 1998); *In re Aer-Aerotron*, 104

represent the better view because they recognize the states are voluntarily invoking federal jurisdiction by filing a proof of claim.[193] Nevertheless, because section 106(b) imposes a "same transaction or occurrence" test that is similar, if not identical, to the standards used to determine compulsory counterclaims, the same results generally will occur under both lines of authority.[194]

Finally, a minority of courts has determined that a state's filing of a proof of claim represents a broad consent to suit in federal court, regardless of the nature of claim at issue.[195] Notwithstanding the persuasive reasoning followed by this line of cases, the conclusion that a proof of claim amounts to a broad waiver is difficult to defend in light of the language of section 106(b) and the Supreme Court's insistence on strictly construing waivers of Eleventh Amendment immunity.[196] Of course even if immunity is not waived, the estate may still assert any of the debtor's defenses to disallow the state's claim.[197]

Waiver will likely continue to be one of the most vigorously contested issues in disputes between states and other parties to a bankruptcy proceeding. As one commentator recognized, "the doctrine of waiver of Eleventh Amendment immunity . . . provides a foothold for the efforts of bankruptcy trustees and courts to assert authority over states in the bankruptcy process, while also respecting federalism concerns."[198] Despite the courts' splintering, debtors and

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F.3d at 680; Confederated Tribes v. White (*In re* White), 139 F.3d 1268, 1271 (9th Cir. 1998); *In re* Fennelly, 212 B.R. 61, 63 (D.N.J. 1997); Schulman v. California State Water Resources Control Bd. (*In re* Lazar), 200 B.R. 358, 377 (Bankr. C.D. Cal. 1996).

193. *See* cases cited *supra* note 185.

194. *See, e.g.*, Georgia Dep't of Revenue v. Burke (*In re* Burke), 146 F.3d 1313, 1317 n.8 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 2410 (1999); Mather v. Oklahoma Employment Sec. Comm'n (*In re* Southern Star Foods, Inc.), 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995); *In re Value-Added Communications, Inc.*, 216 B.R. at 550 (noting that the same result occurs under section 106(b) and the compulsory counterclaim test) Burke v. Georgia (*In re* Burke), 203 B.R. 493, 497 (Bankr. S.D. Ga. 1996) (noting that "§ 106(b) may well be a correct restatement of the jurisprudence regarding waiver of Eleventh Amendment immunity").

195. *See, e.g., In re Fennelly*, 212 B.R. at 64 (holding that, irrespective of section 106, a state may consent to be sued in federal court, and filing a proof of claim constitutes consent); Ossen v. Connecticut Dep't of Soc. Servs. (*In re* Charter Oaks Assocs.), 203 B.R. 17, 22 (Bankr. D. Conn. 1996) ("In short, because section 106[b] unambiguously alerts the states as to the consequence of filing a bankruptcy claim . . . a governmental unit that does so waives its sovereign immunity.") (quoting WJM, Inc. v. Massachusetts Dep't of Pub. Welfare, 840 F.2d 996, 1003 (1st Cir. 1988)); Burke v. Georgia (*In re* Burke), 200 B.R. 282, 287 (1996); *In re* Barrett Refining Corp., 221 B.R. 795, 810 (Bankr. W.D. Okla. 1998).

196. *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974).

197. *See* 11 U.S.C. § 558 (1994); Gardner v. New Jersey, 329 U.S. 565, 573 (1947).

198. Goebel, *supra* note 155, at 928.

creditors, other than a state, should take comfort with what appears to be a rough majority rule—that a state waives its Eleventh Amendment immunity when it files a proof of claim, at least with respect to that claim and other claims satisfying the transaction/occurrence test.

Another limitation on the waiver doctrine, however, is that not all agents of a state have authority to waive the state's Eleventh Amendment immunity. The law of a particular state determines who has the authority to waive its Eleventh Amendment immunity,[199] and in many cases, state law requires an act of the state legislature to effectuate a valid waiver of immunity.[200] As a result, at least one court has held that since the state had not authorized a state attorney general to waive its Eleventh Amendment immunity, the attorney general's proof of claim simply was not sufficient to effect a waiver, notwithstanding section 106(b).[201] Moreover, a split of authority exists with respect to the question whether, even if there has been a duly authorized waiver of Eleventh Amendment immunity as a result of a proof of claim filed by one state agency or arm of a state, such a waiver eliminates Eleventh Amendment immunity just for that one agency or for the entire state and other agencies of the state.[202] Consonant with what constitutes a waiver, the issue whether a state

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199. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467 (1945); Magnolia Venture Capital Corp. v. Prudential Sec., Inc., 151 F.3d 439, 444 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1115 (1999) ("[T]he state's waiver must be accomplished by someone to whom that power is granted under state law."); Mark Browning, *Who Can Waive State Immunity*, AM. BANKR. INST. J., Jan. 15, 1997, at 10 (contending that states may only waive immunity by constitution or statute).

200. *See Gardner*, 329 U.S. at 573; *Ford Motor Co.*, 323 U.S. at 467.

201. *See* Midland Mechanical Contractors, Inc. v. Board of Regents, 200 B.R. 453, 459 (Bankr. N.D. Ga. 1996); *see also Magnolia Venture Capital Corp.*, 151 F.3d at 444, (holding that authority to waive Eleventh Amendment immunity cannot be inferred from a general authorization te enter into contracts); Georgia Dep't of Revenue v. Burke (*In re* Burke), 146 F.3d 1313, 1318 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 2410 (1999); Mather v. Oklahoma Employment Sec. Comm'n (*In re* Southern Star Foods, Inc.), 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995); Burke v. Georgia (*In re* Burke), 203 B.R. 493, 497 (Bankr. S.D. Ga. 1996); *see also* Estate of Porter v. Illinois, 36 F.3d 684, 691 (7th Cir. 1994) (holding that under Illinois law, the stato attorney general is not authorized to waive Eleventh Amendment immunity in a non-bankruptcy context).

202. *Compare* Wyoming Dep't of Transp. v. Straight (*In re* Straight), 143 F.3d 1387, 1390 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 446 (1998) (holding that the waiver on behalf of one state agency constitutes a waiver for all state agencies), Brewer v. New York State Dep't of Correctional Servs. (*In re* Value-Added Communications, Inc.), 216 B.R. 547, 549 (Bankr. N.D. Tex. 1997) (same), *and* Ossen v. Connecticut Dep't of Soc. Servs. (*In re* Charter Oak Assocs.), 203 B.R. 17, 22 (Bankr. D. Conn. 1996) (same), *with* Schulman v. California State Water Resources Control Bd. (*In re* Lazar), 200 B.R. 358, 378 (Bankr. C.D. Cal. 1996) (holding waiver limited to waiving agency), *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).

official is authorized to waive Eleventh Amendment immunity and bind all other arms of the state will continue to be significant for the courts. The split in authority over these issues merely reflects the overall problem created by *Seminole Tribe*—trying to vindicate the need for a centralized, efficient, and just reorganization or distribution of resources in a context where a state, by virtue of the Supreme Court's strained interpretation of the Eleventh Amendment, can seize a preferred position.

D. Ex parte Young *Injunctions.*

Another "exception" to the Eleventh Amendment is the *Ex parte Young* doctrine.[203] Under *Ex partc Young*, a federal court may exercise "federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.' "[204] Thus, although a federal bankruptcy judge presumably cannot, after *Seminole Tribe*, issue a money judgment against a state without a waiver of immunity, he or she may be able, under *Ex parte Young*, to issue a prospective injunction to enjoin state officials from violating the provisions of the Bankruptcy Code. But a prospective injunction will not be effective to recover preferences or fraudulent transfers paid into the state treasury or property transferred to the state before the commencement of a bankruptcy case or property seized by the state after the commencement of the bankruptcy case before the injunction issues.

The Court in *Seminole Tribe*, however, made it difficult to invoke the *Ex parte Young* exception.[205] In fact, in *Seminole Tribe* itself, the plaintiff actually had sought an injunction against the Governor of the State of Florida for prospective injunctive relief under *Ex parte Young*.[206] The Court, however, refused to permit even that aspect of the plaintiff's case to proceed because "Congress ha[d] prescribed a *detailed remedial scheme* for the enforcement against a

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203. *See Ex parte* Young, 209 U.S. 123, 149 (1908).

204. Seminole Tribe v. Florida, 517 U.S. 44, 73 (1996) (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

205. *See id.*; *see* ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1189 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 904 (1999). *See also* Gibson, *supra* note 189, at 213. Indeed, one commentator has speculated that "*Young* may not be good law for long." Glauberman, *supra* note 117, at 80.

206. *See Seminole Tribe*, 517 U.S. at 73.

State of a statutorily created right."[207] Thus, the Court reasoned, Congress "chose to impose upon the state a liability that is significantly more limited than would be the liability imposed upon the State officer under *Ex parte Young*,"[208] and Congress therefore must have intended not to impose *Ex parte Young* liability on a state official.[209]

Simply put, under *Seminole Tribe*, congressional intent regarding enforcement of federal statutes against the states is important in the *Ex parte Young* context.[210] Specifically, with respect to bankruptcy law, the question is whether the Bankruptcy Code provides a detailed remedial scheme for the enforcement against a state of a statutorily created right.[211] At least one bankruptcy court has concluded that it does not,[212] a result that appears to be correct. Specifically, a "detailed remedial" scheme, as described by *Seminole Tribe*, exists where Congress has crafted an intricate statutory scheme that limits or prohibits potential remedies.[213] Although the

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207. *Id.* at 74 (emphasis added). Under IGRA, on request of a tribe, a state is required to negotiate in good faith with a tribe to create a class III tribal-state gaming compact. *See* 25 U.S.C. § 2710(d)(3)(A) (1994). If the state is not responsive, the tribe may sue the state in federal district court where the state has the burden of proving that it has negotiated in good faith. *See id.* § 2710(d)(7). If the district court finds that the state has failed to negotiate in good faith, then a detailed negotiation and mediation procedure is prescribed from which a state-tribal compact must result. *See id.* § 2710(d)(7)(B). The district court is not authorized to award monetary damages or auy other remedy against the state.

208. *Seminole Tribe*, 517 U.S. at 75.

209. *See id.*; *see also* Gibsou, *supra* note 189, at 214.

210. *See* Gibson, *supra* note 189, at 214.

211. *See Seminole Tribe*, 517 U.S. at 75; *supra* note 210,.

212. *See* Guiding Light Corp. v. Louisiaua Dep't of Health & Hosps. (*In re* Guiding Light Corp.), 213 B.R. 489, 492 (Bankr. E.D. La. 1997); *see also* Schmitt v. Missouri Western State College (*In re* Schmitt), 220 B.R. 68, 79 (Bankr. W.D. Mo. 1998). As one commentator noted, the statutory scheme in *Seminole Tribe* is distinguishable from the bankruptcy enforcement mechanism because in *Seminole Tribe*, the IGRA permitted only substantially limited relief against a state in federal court. More importantly, Congress had established a "system of mediation and possible intervention by the Secretary of the Interior." Gibson, *supra* note 197, at 215. The Bankruptcy laws do not substantially limit relief in federal court; if anything, the opposite is true. *See* 11 U.S.C. § 105(a); *cf.* Ellis v. University of Kan. Med. Ctr., 163 F.3d 1186, 1198 (10th Cir. 1998) (Congress did not craft a detailed remedial scheme when it enacted 42 U.S.C. § 1981 because there was "nothing in § 1981 that shows Congress intended to limit or bar remedies generally available te an aggrieved party."). Although the United States Trustee has standing to be heard on any bankruptcy matter, the Trustee's stauding flows from the need to protect the rights of the United States and not, like the Secretary of the Interior, to facilitate a specific mediation between a Native American tribe and a state. *See* 25 U.S.C. § 2710(d)(7)(B)(iii)-(v).

213. *See* ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1192 (10th Cir. 1998). In *ANR Pipeline*, the Tenth Circuit considered the issue of whether the Tax Injuuction Act, 28 U.S.C. § 1341, was a "detailed remedial scheme" that precluded use of the *Ex parte Young* doctrine. *See*

Bankruptcy Code is certainly an intricate weaving of various policies and considerations, there is nothing in the Code that indicates Congress intended to limit or prevent certain remedies against a state or state officials.[214]

Moreover, the Supreme Court recently recognized yet another limitation on the use of *Ex parte Young*. In *Idaho v. Coeur d'Alene Tribe*, the Court held that the *Ex parte Young* doctrine does not apply where the requested injunctive relief implicates a state's "special sovereignty interests."[215] Because the ability of a state to levy and

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ANR Pipeline, 150 F.3d at 1188. The court held the Tax Injunction Act was a "detailed remedial scheme" under *Seminole Tribe* because Congress expressly limited the power of federal courts to issue certain types of remedies pertaining to the assessment, levy or collection of state taxes. *See id.* at 1191.

214. Although section 362(a) is an automatic stay against creditors, it is not a limit on the debtor's remedies, except perhaps for section 362(h), which grants individual debtors detailed remedies for *willful* violations of the stay. "An individual injured by any willful violation of a stay provided by [section 362] shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h); *cf.* Pinkstaff v. United States (*In re* Pinkstaff), 974 F.2d 113 (9th Cir. 1992) (explaiing that if the United States waives sovereign immunity, an individual debtor can assert a compulsory counterclaim for actual damages under section 362(h)). Nor is there a detailed remedial scheme in section 105 of the Code. It provides in relevant part: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). In enacting section 105, Congress intended to not limit, but expand, remedies available to aggrieved parties. "[A]lthough the waters may have been muddied a bit, it appears to continue te be permissible to sue state officials in the bankruptcy court in their official capacities to prevent future violations of the bankruptcy laws." Gibson, *supra* note 189, at 215.

215. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997); *id.* at 289 (O'Connor, J., concurring). In *Coeur d'Alene*, a Native-American tribe sought a declaratery judgment against the State of Idaho establishing the Tribe's right to quiet enjoyment over submerged lands located in Idaho as well as prospective injunctive relief against state officials to prevent them from exercising the state's asserted regulatory jurisdiction over the lands. *Id.* at 265-66. The Court held that *Ex parte Young* may not be used when the requested injunctive relief was "functional[ly] equivalent" te an award of money damages: "[i]t is apparent . . . that if the Tribe were to prevail, Idaho's sovereign interest in its land and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 287. Moreover, in *Coeur d'Alene*, two Justices further attempted to limit the *Ex parte Young* doctrine by imposing a case-by-case, fact-specific inquiry into whether (a) an available forum existed to vindicate the federal rights at issue, and (b) the matter involves the interpretation of novel questions of important federal law. *Id.* at 270. A majority of the Court, however, held that the appropriate inquiry under *Ex parte Young* remains "a straightforward inquiry inte whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 296 (O'Connor, Scalia, & Thomas, JJ., concurring in part); *id.* at 298-99 (Souter, Stovens, Ginsberg, & Breyer, JJ., dissenting); *see also* Earles v. State Bd. of Certified Pub. Accountants, 139 F.3d 1033, 1039 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 444 (1998); Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1997). However, a 5-4 majority in *Coeur d'Alene* recognized the special sovereignty intorest exception to *Ex parte Young*. *See Coeur d'Alene*, 521 U.S. at 269 (Kennedy, Rehnquist, O'Connor, Scalia, & Thomas, J.J.). At least one circuit has stated that *Coeur d'Alene* places a new limitation on the application of *Ex parte Young*. *See ANR Pipeline*, 150 F.3d at 1193; *see also* James E. Pfander,

collect taxes is a "special sovereignty interest,"[216] prospective injunctive relief in bankruptcy, granted pursuant to the *Ex parte Young* doctrine, might conceivably implicate a state's "special sovereignty interest" in its power to levy and collect taxes and therefore be inapplicable.[217] On the other hand, because Congress has created exclusive jurisdiction over property of the estate in the federal district courts,[218] a court could conclude that the state's sovereignty interest does not extend to the federally created bankruptcy estate.[219]

E. The In Rem *Exception*

Bankruptcy courts have exclusive *in rem* jurisdiction "of all property, wherever located, of the debtor as of the commencement of [the bankruptcy case], and of property of the estate."[220] Such *in rem* jurisdiction enables bankruptcy courts to determine the claims and interests in and to property of the estate,[221] including the claims and

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216. *See ANR Pipeline*, 150 F.3d at 1194 ("The [appellants'] request to rewrite Kansas' property tax code with respect to its application against the personal property of natural gas pipelines is certainly a major intrusion into Kansas' special sovereignty interests.").

217. *See, e.g.*, 11 U.S.C. § 362(a) (the automatic stay); 11 U.S.C. § 505 (determination of tax liability).

218. *See* 28 U.S.C. § 1334(e) (1994).

219. Like the federal government, *see* U.S. CONST. art. I, § 8, cl. 1, states have the power to lay and collect taxes. The power to tax is a critical function of government, *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819), and the issue whether a state may levy a tax has formed the substance of one of American jurisprudence's most recognized statements in one of its most famous cases. *Id.* at 431 ("That the power to tax involves the power to destroy.").

220. 28 U.S.C. § 1334(e); *see also* Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1997); O'Brien v. Vermont Agency of Natural Resources (*In re* O'Brien), 216 B.R. 731, 737 (Bankr. D. Vt. 1998). Section 1334(e)

> was intended to eliminato jurisdictional disputes arising from the equity principle that makes *in rem* jurisdiction over an item of property exclusive in the first court to assert jurisdiction over it. A creditor might file a lien against property of the debtor in a court in State *A* and shortly afterward the debtor might declare bankruptcy in State *B*. Control over the debtor's property would be shared by the court in *A* and the bankruptcy court in *B*—it might even be the same piece of property. . . . Section 1334(d) gives the bankruptcy court control of all the property. Creditors who want to enforce their liens have to do so in that court regardless of the location of the creditor or the property.

In re United Statos Brass Corp., 110 F.3d 1261, 1268 (7th Cir. 1997).

221. *See In re O'Brien*, 216 B.R. at 737 (quoting JAMES WM. MOORE ET AL., 16 MOORE'S FED. PRACTICE 108-06 (3d ed. 1997)):

> Our *in rem* jurisdiction over property of the debtor and the estate empowers us "to determine all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is one 'against the world.' The practical effect of such an action is to establish unquestionable title to the property because no one can

interests of a state in and to such property notwithstanding a state's assertion of Eleventh Amendment immunity.[222] The reason for this is that, unlike an adversary proceeding that causes the bankruptcy court "to issue process summoning the state to appear," the exercise of *in rem* jurisdiction simply is not a "suit against one of the United States by a private party."[223] Rather, it is a "suit," if at all, against the property itself.

Maryland v. Antonelli Creditors' Liquidating Trust[224] is a good example of this concept. In that case, the State of Maryland and two local counties brought suit in state court to collect taxes on transfers of estate property made pursuant to a confirmed plan of reorganization and the bankruptcy court's confirmation order, which exempted the relevant transfers from state taxes.[225] Although the state taxing authorities had received adequate notice of the bankruptcy case, they declined to participate by filing a proof of claim or otherwise.[226] After the case was removed to federal court, the taxing authorities asserted that the Eleventh Amendment barred the bankruptcy court from exercising jurisdiction over them in the confirmation proceeding and that, as a result, its confirmation order could not and did not bind the taxing authorities to the plan.[227]

The Court of Appeals for the Fourth Circuit rejected the state's argument. Among other things, the court reasoned that a confirmation order "was not entered in a suit 'against one of the United States' filed by a private party,"[228] and that the power to enter a confirmation order was derived, not from jurisdiction over a state or creditors, but

later claim exemption from the effect of the judgment on the ground that the court lacked jurisdiction.

222. *See Antonelli*, 123 F.3d at 786. *But see* French v. Georgia Dep't of Revenue (*In re* ABEPP Acquisition Corp.), 215 B.R. 513, 517 (B.A.P. 6th Cir. 1997) (holding that Eleventh Amendment immunity applied to a debtor's adversary proceeding to recover prepetition tax payments, noting (questionably) that the debtor "has not alleged that the 3% tax remained an identifiable *res*").

223. *Antonelli*, 123 F.3d at 786-87; *see supra* Part III.B.

224. *Antonelli*, 123 F.3d 777.

225. *See* 11 U.S.C. § 1146(c) (1994) ("the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title[ ] may not be taxed under any law imposing a stamp tax or similar tax").

226. *See Antonelli*, 123 F.3d at 780.

227. *See id.* at 786.

228. *Id.; see supra* Part III.B. If, however, the debtor pays transfer taxes and sues the state to recover the transfer taxes, the state may assert Eleventh Amendment immunity to bar the suit. *See* NVR Homes, Inc. v. Clerks of the Circuit Courts (*In re* NVR, LP), Nos. 98-2211, 98-2244, 98-2271, 98-2272, 98-2273, 1999 U.S. App. LEXIS 15499, at *18-*27 (4th Cir. July 12, 1999).

rather from jurisdiction over the debtor and the property of its estate.[229] Thus, a party's status or assertion of immunity had no bearing "on the bankruptcy court's power to determine whether the terms of a reorganization plan comply with federal law."[230]

The court further noted that, if the state wanted to challenge a bankruptcy court's order of which it had notice, it could waive Eleventh Amendment immunity and submit to federal jurisdiction.[231] Recognizing that such may present a Hobson's choice for the states, the court noted that the choice resulted from "Congress' constitutionally authorized legislative power to make federal courts the exclusive venue for administering the bankruptcy law."[232]

The Supreme Court recently examined the *in rem* "exception" to Eleventh Amendment immunity in *California and State Lands Commission v. Deep Sea Research, Inc.*,[233] which was decided after *Seminole Tribe*. In *Deep Sea Research*, the Court held that, at least in cases where a state does not have actual possession of the vessel at issue, the Eleventh Amendment does not preclude a suit pursuant to the federal courts' *in rem* admiralty jurisdiction[234] to determine title to an abandoned shipwreck, even where the state is one of the potential title holders.[235]

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229. *See Antonelli*, 123 F.3d at 786.

230. *Id.* at 787.

231. *See id.*

232. *Id.*; *see also* O'Brien v. Vermont Agency of Natural Resources (*In re* O'Brien), 216 B.R. 731, 737 (Bankr. D. Vt. 1998) ("The Eleventh Amendment is not violated, because [the state] cannot be compelled to appear and defend. It can choose to stay home."); Schulman v. California State Water Resources Control Bd. (*In re* Lazar), 200 B.R. 358, 380 (Bankr. C.D. Cal. 1996) (The fact that a state "finds these choices unattractive does not convert the choice into an involuntary decision: if this were so, many of the choices that people make in many different contexts of life would be 'involuntary,' and some people could live virtually their entire lives without making any voluntary choices at all."); *cf.* New Jersey v. Mocco, 206 B.R. 691, 693 (D.N.J. 1997) ("The very object and purpose of the [Eleventh] Amendment [is] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties .... In the present case, the state is not a defendant and, as such, cannot invoke the protection of the Eleventh Amendment."). The question of a compulsory waiver of immunity is developed more fully *supra* notes 179-94 and accompanying text.

233. California & State Lands Comm'n v. Deep Sea Research, Inc., 118 S. Ct. 1464 (1998).

234. *See* 28 U.S.C. § 1333(1) (1994). Federal admiralty jurisdiction encompasses "maritime causes of action begun and carried on as proceedings *in rem*, that is, where a vessel or thing itself is treated as the offender and made the defendant by name or description in order to enforce a lien." Madruga v. Superior Court, 346 U.S. 556, 560 (1954). Even though suits in admiralty are not suits in "law or equity," the Supreme Court has applied the Eleventh Amendment to admiralty suits generally. *See Ex parte* New York, 256 U.S. 490, 498 (1921).

235. *See Deep Sea Research*, 118 S. Ct. at 1472. Four concurring Justices in *Deep Sea Research* (Justices Stevens, Kennedy, Ginsburg, and Breyer) indicated that they would reach the same result regardless of whether the property at issue was in the possession of the state.

Given that result, and the Fourth Circuit's reasoning in *Antonelli*, states may be unable to raise their Eleventh Amendment immunity to avoid the application of orders entered generally in a bankruptcy case, such as, for example, orders confirming a plan of reorganization, orders authorizing the sale of property of the estate, or, perhaps, orders enforcing the automatic stay.[236] As long as the order pertains to property of the bankruptcy estate, the Eleventh Amendment should not be an obstacle to its enforcement where the debtor is in possession of the property.[237]

However, as with those cases that hold that bankruptcy cases generally are not "suits" within the meaning of the Eleventh Amendment,[238] the scope of this *in rem* "exception" is not limitless. In fact, the Supreme Court specifically has held that an *in rem* jurisdictional basis, standing alone, does not provide authorization for the issuance of process directly against a state:

> The fact that a suit in a federal court is *in rem*, or *quasi in rem*, furnishes no ground for the issuance of process against a non-consenting State .... [W]hen the State does not come in and withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit.[239]

Moreover, the Court specifically has noted, in the bankruptcy context, that "we have never applied an *in rem* exception to the sovereign-immunity bar against *monetary recovery*, and have suggested that no

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Id. at 1473-74 (Stevens, J., concurring); *id.* at 1474 (Kennedy, Ginsburg, & Breyer, JJ., concurring).

236. For example, the *in rem* theory has been applied to a discharge order, which was subsequently used as an affirmative defense against a state in state court, *see* Texas v. Walker, 142 F.3d 813, 820-22 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999), and an adjudication of dischargeability where the state filed an adversary proceeding. *See* Dekalb County Div. of Family & Children's Servs. v. Platter (*In re* Platter), 140 F.3d 676, 679-80 (7th Cir. 1998).

237. The *in rem* exception is not necessarily limited only to those circumstances where the debtor possesses the property, as long as the state does not have possession. In *Bouchard Transportation Co. v. Updegraff*, the court, interpreting *Deep Sea Research*, held that a state is not entitled to Eleventh Amendment immunity where the plaintiff neither named the state in a suit or served the state with process and the *res* was in the possession of the court. Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344, 1349 (11th Cir. 1998) ("Florida does not have possession of the disputed *res*—the [*res* is] part of the record in this case, currently in the possession of the federal judiciary.").

238. *See supra* notes 161-70 and accompanying text.

239. Missouri v. Fiske, 290 U.S. 18, 28 (1933); *see also* O'Brien v. Vermont Agency of Natural Resources (*In re* O'Brien), 216 B.R. 731, 737 (Bankr. D. Vt. 1998) (citing Freeman v. Alderson, 119 U.S. 185, 189 (1886) ("[N]o personal liability ... can be created against the absent [state]; the power of the court being limited to the disposition of the property, which is alone within its jurisdiction")).

such exception exists."[240] As a result, the *in rem* nature of bankruptcy cases and proceedings likely does not enable a trustee or debtor in possession to bring affirmative causes of action for monetary recovery, such as preference or fraudulent conveyance actions, against a state in bankruptcy court absent the state's consent. It is unclear whether the trustee or debtor in possession can obtain an order requiring the state to turn over property of the estate in the state's possession.

Finally, following *Alden*, it is not clear that the *in rem* "exception" or, indeed, any limitation of state immunity based upon the text of the Eleventh Amendment, retains any practical viability whatsoever. If, as discussed above,[241] *Alden* means that the Court now has enshrined common law sovereign immunity with Constitutional status and essentially rendered the Eleventh Amendment underinclusive and redundant,[242] the *in rem* doctrine simply has no further applicability because, unlike the Eleventh Amendment, the common law doctrine of sovereign immunity is not limited merely to "suits in law or equity." If not limited to "suits," the foundations of the *in rem* doctrine fall away, leaving *Alden*'s concept of constitutional common law sovereign immunity to preclude *all* actions that affect nonconsenting states, even those that may not be deemed to be "suits" within the meaning of the Eleventh Amendment.

F. The Takings Clause

The Fifth Amendment Takings Clause presents an intriguing constitutional possibility in overcoming a state's Eleventh Amendment defense. The Clause provides: "nor shall private property be taken for public use, without just compensation."[243] A person who is deprived of a vested legal cause of action by the government[244] is deprived of property and must be justly compensated.[245] Courts have

240. United States v. Nordic Village, Inc., 503 U.S. 30, 38 (1992) (emphasis added).

241. *See supra* Part II.C.

242. *See supra* notes 68-78 and accompanying text.

243. U.S. CONST. amend. V.

244. The Takings Clause applies te both the federal government and, through the Fourteenth Amendment, the states. *See, e.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980). *See also infra* note 251.

245. *See* Alliance of Descendants of Tex. Land Grants v. United States, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (explaining that a legal cause of action is property within the meaning of the Fifth Amendment.); *cf.* McGrath v. Rhode Island Retirement Bd., 906 F. Supp. 749, 769 (D.R.I. 1995) ("Contract rights are as much private property under the Takings Clause as they are under the Due Process Clause.").

held that the United States may not assert its sovereign immunity as a defense to a Takings Clause claim.[246] By asserting a sovereign immunity defense, the state acts to deprive a debtor's estate of vested legal causes of action, such as preferences and fraudulent conveyances, for money damages.

Prior to *Alden*, the Takings Clause argnment stopped short of success. If the state itself provided a forum for compensation, there could be no impermissible taking of private property, and as a result, a state could continue to assert an Eleventh Amendment immunity defense. In *Harbert International, Inc. v. James*, the plaintiff asserted a Fifth Amendment "takings" claim for money damages against state officials, alleging the state's failure to make payments and perform contractual duties in connection with the construction of a bridge constituted a taking without just compensation.[247] The state asserted the Eleventh Amendment as a bar to federal court jurisdiction.[248] The Court of Appeals for the Eleventh Circuit agreed that the state could assert the Eleventh Amendment defense because "Alabama state courts do provide Harbert with a means of redress for its claim."[249] Thus, if the state provides a forum in which it may be sued, there is no taking of a debtor's estate's cause of action for money damages.

Alden dramatically changes the analysis. By allowing a state to use sovereign immunity to defeat federal claims brought in state courts, unless the state has consented to suit, *Alden* leaves parties with no ability to seek a money damages remedy for the deprivation of a federal right. The practical effect of leaving no forum to enforce vested causes of action is to deprive the parties possessing those actions of "property" without just compensation. Takings claims could be legitimate options for parties seeking to enforce their bankruptcy rights against those states that have not consented to be sued in state courts.[250]

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246. *See* Arnsberg v. United States, 757 F.2d 971, 980 n.7 (9th Cir. 1985) ("Actions brought under the taking clause of the fifth amendment are, of course, an exception to the rule that sovereign immunity is a bar te damages against the United States for direct constitutional violations.").

247. *See* Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1274 (11th Cir. 1998).

248. *See id.* at 1276.

249. *Id.* at 1277.

250. Any "Takings" claim must first exhaust existing state law "just compensation" remedies. *See* Suitum v. Tahoe Reg. Planning Agency, 520 U.S. 725, 734 (1997). Usually a takings claimant will need te show an exhaustion of state "inverse condemnation" causes of action. *See id.* at 734 n.8 ("Ordinarily, a plaintiff must seek compensation through state inverse

The Takings claim will fail, however, for the simple reason that in order enforce the Takings Clause against a state, a party must rely on the Fourteenth Amendment.[251] But the Fourteenth Amendment by itself does not abrogate a state's immunity[252] and the current statutory vehicle for bringing such a claim, section 1983 of title 42, does not abrogate a state's sovereign immunity.[253]

V. CONGRESS MAY EXERCISE POWER TO LIMIT THE IMPACT OF *SEMINOLE TRIBE*, *ALDEN*, AND THE ELEVENTH AMENDMENT

As explained above,[254] the Supreme Court's construction of the Eleventh Amendment under *Seminole Tribe* and establishment of the new constitutional sovereign immunity doctrine under *Alden* risk undermining the paramount bankruptcy policies of a debtor's discharge and "fresh start," and of the fair and equitable distribution of the estate's assets to creditors. Indeed, at its most basic level, *Seminole Tribe*'s and *Alden*'s discovery of a constitutional right to sovereign immunity undermines essential aspects of bankruptcy law by elevating states to preferred positions relative to other creditors. Except to any extent the states consent to be sued, states appear to be free to infringe upon the bankruptcy rights of other parties without fear of suit for money damages in any court.[255]

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condemnation proceedings before initiating a takings suit in federal court, unless the state does not provide adequate remedies for obtaining compensation."); *see also* Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610, 612 (11th Cir. 1997). If a state does not provide a forum for bringing inverse condemnation claims against the state, either by failing to provide a cause of action by statute or through assertion of constitutional sovereign immunity, then the exhaustion prerequisite has been satisfied. *See Suitum*, 520 U.S. at 734 n.8.

251. The Fifth Amendment, according to its literal language, applies only to the federal government. However, the substantive protections of the Fifth Amendment are applied to the states through the Fourteenth Amendment. *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236 (1897).

252. *See* Alabama v. Pugh, 438 U.S. 781, 782 (1978).

253. *See* Quern v. Jordan, 440 U.S. 332, 340 (1979). Of course Congress could abrogate the states' immunity for section 1983 actions or enact other appropriate legislation te redress monetarily the wrongs asserted under the Takings Clause. *See* Garrett v. Illinois, 612 F.2d 1038, 1040 (7th Cir. 1980). We address this point further in Part IV.A.

254. *See supra* notes 4-12 and accompanying text.

255. *Alden* asserts that the fear of the unrestrained state is without merit:

> We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

Alden v. Maine, 119 S. Ct. 2240, 2266 (1999) (quoting U.S. CONST. art. VI.).

Moreover, as noted above, the existing options to ameliorate the effects of constitutional sovereign immunity are only of limited effectiveness in the bankruptcy context. As a result, Congress should consider enacting legislation to neutralize some of the deleterious effects of the Supreme Court's decisions, and this Article sets forth five potential avenues that Congress could explore.[256] First, Congress could purport to re-enact section 106(a) of the Bankruptcy Code pursuant to its powers under the Fourteenth Amendment. Second, Congress could authorize United States trustees, and possibly private trustees or debtors-in-possession, to sue states for bankruptcy causes of action in the name of the United States. Third, Congress could amend the Bankruptcy Code to provide for a standing injunction against state officials pursuant to the *Ex parte Young* doctrine. Fourth, Congress could amend the Bankruptcy Code to provide for disallowance of a state's claim, unless the state waived sovereign immunity and Eleventh Amendment immunity regarding the claim and compulsory counterclaims. Fifth, Congress could encourage a waiver of Eleventh Amendment immunity through conditions to the receipt of federal funds.

A. Reenactment Under the Fourteenth Amendment

Because legislation enacted pursuant to the Section 5 of the Fourteenth Amendment may abrogate a state's Eleventh Amendment immunity[257] or sovereign immunity,[258] Congress conceivably could purport to reenact section 106(a) under the guise of its Fourteenth Amendment Enforcement Clause authority.[259] The reenacted section 106(a), however, likely would fail as an unconstitutional abrogation of

256. Other commentators have analyzed congressional options after *Seminole* with respect to a broader range of federal regulatory issues. *See, e.g.*, Glauberman, *supra* note 125, at 100-16 (discussing conditional spending power, suit by the United States, and amendment of exclusive jurisdiction statutes); Meltzer, *supra* note 114, at 49-61 (discussing Section 5 of the Fourteenth Amendment, conditional spending power, and suit by the United States).

257. *See* Seminole Tribe v. Florida, 517 U.S. 44, 65-66 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

258. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2224 (1999) (reaffirming the test to abrogate state sovereign immunity set forth in *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)).

259. Congress is not required to expressly state that it enacts legislation pursuant to the Fourteenth Amendment. *See* EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997). Section 5 of the Fourteenth Amendment empowers Congress to enforce any provision of the Fourteenth Amendment to achieve its ends. *See, e.g.*, United States v. Price, 383 U.S. 787, 789 (1966).

Eleventh Amendment and sovereign immunity, notwithstanding the nominal imprimatur of the Fourteenth Amendment, except perhaps for legislation enacted under the Due Process Clause.

On its face, legislation enacted pursuant to the Fourteenth Amendment must be rationally related to recognized Fourteenth Amendment aims.[260] However, bankruptcy is not connected to the traditional Fourteenth Amendment purposes of preventing discrimination against individuals on the basis of suspect classifications like race or gender.[261] As noted above,[262] some cases attempt to link section 106(a), through the Privileges and Immunities Clause,[263] with recognized Fourteenth Amendment aims. The better reasoned view, however, is that bankruptcy is not a privilege or immunity of national citizenship that is protected by the Fourteenth Amendment.[264] Indeed, the Supreme Court has determined there is no constitutional right to a bankruptcy discharge,[265] one fundamental feature of the federal bankruptcy laws.

More importantly, the Privileges and Immunities Clause has been rendered of little use in this context due to the Supreme Court's century-old decision in the *Slaughter-House Cases*, in which the Court determined that the Privileges and Immunities Clause protects only rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[266] The Court's list of recognized privileges and immunities under that standard is very

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260. *See Flores*, 521 U.S. at 532; Velasquez v. Frapwell, 160 F.3d 389, 391 (7th Cir. 1998); Wilson-Jones v. Caviness, 99 F.3d 203, 208 (6th Cir. 1996).

261. *See Wilson-Jones*, 99 F.3d at 210. A court must apply three factors to determine whether a congressional enactment is pursuant to the Equal Protection Clause of the Fourteenth Amendment: (1) whether the statute was enacted to enforce the Equal Protection Clause; (2) whether it is "plainly adapted to that end"; and (3) whether it is consistent with the "letter and spirit of the constitution." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

262. *See supra* notes 129-33 and accompanying text.

263. "The citizens of each Stato shall be entitled to all privileges and immunities of citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

264. *See* U.S. CONST. art IV, § 2, cl. 14; Kish v. Verniere (*In re* Kish), 212 B.R. 808, 817 (D.N.J. 1997) (holding that bankruptcy does not constitute a privilege or immunity under the Fourteenth Amendment, and criticizing contrary cases for failing to consider, under the "privileges and immunities" theory, whether section 106(a) was enacted for remedial or preventive purposes). Moreover, in order to fall within the scope of the Fourteenth Amendment, bankruptcy itself would have to be a privilege or immunity because "the judiciary has recognized that the 'privileges and immunities of national citizenship do not . . . encompass the right to have a federal question heard in a federal forum.' " *In re* NVR, L.P., 206 B.R. 831, 841 n.23 (Bankr. E.D. Va. 1997) (quoting Carr v. Axelrod, 798 F. Supp. 168, 172 (S.D.N.Y. 1992)).

265. *See* United States v. Kras, 409 U.S. 434, 446-47 (1973).

266. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873); *see In re NVR, L.P.*, 206 B.R. at 842.

limited,[267] and, notwithstanding the Court's recent decision in *Saenz v. Roe*, the Court is unlikely to "discover" a new bankruptcy-related right that falls within the scope of the Fourteenth Amendment, as noted recently by a bankruptcy court:

> Against such a backdrop, this court can conceive of no ground which might warrant the "discovery" of a bankruptcy privilege in the Fourteenth Amendment. Although the United States Department of Justice has referred to the "right to obtain a fresh start" as belonging to the national citizenry . . . no authority has been cited as elevating that right to constitutional status.[268]

Thus, legislation that merely reenacts section 106(a) with an express statement that the stated abrogation of state Eleventh Amendment and sovereign immunity is achieved pursuant to the Fourteenth Amendment is unlikely to survive judicial scrutiny.[269]

The *Velasquez v. Frapwell*[270] case provides a good analogy. In *Velasquez*, the Seventh Circuit considered whether the Uniformed Services Employment and Reemployment Rights Act ("USERRA")[271] was enacted pursuant to Section 5 of the Fourteenth Amendment to permit suits against a state in federal court without running afoul of the Eleventh Amendment.[272] The court held that Section 5 of the Fourteenth Amendment did not provide the constitutional basis for enacting USERRA because the statute was too remotely connected to the policies of the Fourteenth Amendment.[273] Courts probably would

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267. These include: the right to become a citizen of the state in which a citizen of the United States resides, *see* Saenz v. Roe, 119 S. Ct. 1518, 1530 (1999); the right to take and hold real property, *see* Oyama v. California, 332 U.S. 633, 640 (1948); the right to carry on interstate commerce, *see* Crutcher v. Kentucky, 141 U.S. 47, 56 (1891); the right to be free from violence while in the lawful custody of a United States marshal, *see* Logan v. United States, 144 U.S. 263, 266 (1892); the right to vote in national elections, *see* The Ku-Klux Cases, 110 U.S. 651, 664 (1884); the right to enter the public lands, *see* United States v. Waddell, 112 U.S. 76, 79 (1884); the right to petition Congress for redress of grievances, *see* United States v. Cruikshank, 92 U.S. 542, 552 (1875); the right to pass freely from state to state, *see* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867); and the right to inform federal officials of violations of federal law, *see In re* Quarles, 158 U.S. 532, 537 (1895).

268. *In re NVR, L.P.*, 206 B.R. at 842.

269. Indeed, at least one court has warned that allowing Congress to enact bankruptcy law pursuant to Section 5 of the Fourteenth Amendment would "render Eleventh Amendment stato sovereign immunity meaningless and eviscerate the fundamental construct of federalism in our constitutional form of government." *In re* Fernandez, 123 F.3d 241, 245 (5th Cir. 1997).

270. Velasquez v. Frapwell, 160 F.3d 389, 391 (7th Cir. 1998).

271. 38 U.S.C. §§ 4301-4333 (1994).

272. *See Frapwell*, 160 F.3d at 391.

273. *See id.* (noting that military personnel are not members of a discrete or insular minority)

reach a similar result if Congress purported to reenact the Bankruptcy Code under Section 5 of the Fourteenth Amendment.

Although Congress cannot rely on the Equal Protection Clause and the Privileges and Immunities Clause as a means of reenacting section 106(a), the *Florida Prepaid* decision leaves some room for Congress to abrogate a state's Eleventh Amendment immunity for bankruptcy purposes to further the protections guaranteed by the Fourteenth Amendment's Due Process Clause. In *Florida Prepaid*, College Savings Bank was the owner of a patent for a methodology for the financing of future college expenses.[274] It brought suit against the Florida Prepaid Postsecondary Education Expense Board (the "Board"), alleging the Board infringed upon College Savings Bank's patent.[275] By the time College Savings Bank had brought its suit, Congress had enacted the Patent and Plant Variety Protection Remedy Clarification Act ("Patent Remedy Act"),[276] which purported to subject states to suit in federal court for infringements of patents.[277] The Board, which the Court concluded was an "arm of the State" of Florida,[278] asserted that congressional abrogation of its Eleventh Amendment immunity was unconstitutional under *Seminole Tribe*. The Court of Appeals for the Federal Circuit rejected the immunity defense, reasoning that patents are property subject to the protections of the Due Process Clause and that Congress's "objective in enacting the Patent Remedy Act was permissible because it sought to prevent states from depriving patent owners of this property without due process."[279] The Supreme Court reversed the Court of Appeals, holding that the Patent Remedy Act was not legislation appropriately enacted under Section 5 of the Fourteenth Amendment. In order for legislation to be "appropriate" under Section 5, Congress "must identify conduct transgressing the Fourteenth Amendment's substan-

274. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2201 (1999).

275. *See id.*

276. 35 U.S.C. § 271(h), 296(a) (1994).

277. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2223 (1999). Congress had passed the statute to meet the *Atascadero* requirement of a "clear statement" of abrogation of Eleventh Amendment immunity.

278. In the companion *College Savings Bank* case, Justice Stevens, in dissent, disputes the conclusion that the Board may assert sovereign immunity. *Id.* at 2233-34 (Stevens, J., dissenting). Justice Stevens argues that a state should not be able to assert sovereign immunity where the state engages in "commercial activities." *Id.* at 2234.

279. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 148 F.3d 1343, 1349-50 (Fed. Cir. 1998), *rev'd*, 119 S. Ct. 2199 (1999).

tive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[280] The Patent Remedy Act failed to meet *Florida Prepaid*'s test because, in legislating the Act, Congress failed to consider the availability of state remedies for patent infringement, and the Act failed to detail a history of widespread and persisting deprivation of property rights "of the sort Congress has faced in enacting proper prophylactic § 5 legislation."[281] This lack of information made the abrogation provisions of the Patent Remedy Act " 'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' "[282]

But *Florida Prepaid* expressly accepts the proposition that Congress can abrogate a state's sovereign immunity in order to vindicate property rights protected under the Due Process Clause. The Court stated: "if the Due Process Clause protects patents, we know of no reason why Congress might not legislate against their deprivation without due process under § 5 of the Fourteenth Amendment."[283] Bankruptcy concerns property rights that are protected by the Due Process Clause.[284] Thus, Congress could re-enact the Bankruptcy Code pursuant to Section 5 of the Fourteenth Amendment if Congress can show a widespread and persistent pattern of state deprivations of property rights protected under the Bankruptcy Code. Given the numerous times states have been found to violate the automatic stay, one of many instances of potential state abuse, it seems fairly simple for Congress to establish such a pattern.[285]

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280. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2201 (1999).

281. *Id.* at 2202.

282. *Id.* at 2210 (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

283. *Id.* at 2208.

284. Although bankruptcy law does not create property rights, *see, e.g.*, Butner v. United States, 440 U.S. 48, 55 (1979), Abele v. Phoenix Suns Ltd. Partnership (*In re* Harrell), 73 F.3d 218, 219 (9th Cir. 1996), it does determine what is "property of the estate," 11 U.S.C. § 541 (1994), and provides protections against interference with estate property. *See Id.* §§ 362(a), 549(a). For example, welfare benefits may constitnte "property of the estate." *See* Howell v. Commonwealth of Penn., Dep't of Pub. Welfare (*In re* Howell), 138 B.R. 484, 486 (W.D. Pa. 1992). The denial of welfare benefits under certain circumstances constitntes a violation of the Due Process Clause. *See* Goldberg v. Kelly, 397 U.S. 254, 261 (1970). If a state asserts sovereign immunity to a valid claim for welfare benefits in bankruptcy, it "deprives" the claimant of the claimant's property rights without just compensation. *See supra* note 251; *see also* Air Line Pilots Ass'n, Int'l v. American Nat'l Bank & Trust Co. (*In re* Ionosphere Clubs, Inc.), 156 B.R. 414, 436-37 (holding that causes of action are property of the estate).

285. Justice Stevens noted in dissent that the Copyright Remedy Clarification Act of 1990, unlike the Patent Remedy Act, did include a study of state infringements of copyrights and

Additionally, Congress could reenact section 1983 of title 42 to provide for abrogation of the states' sovereign immunity. Such abrogation would allow takings claims to proceed in federal court against a state for money damages.[286] Although a takings claim will not lie if a state has provided a forum in state court, at least with respect to the causes of action against states, like Maine,[287] that have not waived sovereign immunity broadly or at all, some forum would be provided for aggrieved bankruptcy parties.

B. Suing in the Name of the United States

Congress also could authorize suits against states by a United States Trustee,[288] or possibly by a private trustee or debtor-in-possession, on behalf of the United States.[289] *Alden* recognized that

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potential state remedies. *See Florida Prepaid*, 119 S. Ct. at 2215, n.9 (Stevens, J., dissenting). Congress could use such information to model similar Bankruptcy legislation. *But see* Alsbrook v. City of Maumelle, No. 97-1825, 1999 U.S. App. LEXIS 16945, *23-*28 (8th Cir. Jan. 11, 1999) (holding that extensive legislative record alone did not suffice to bring title II of the Americans with Disability Act under the umbrella of Section 5 of the Fourteenth Amendment where legislation goes beyond rational relationship standard and forces states to make modifications).

286. *See* Garrett v. Illinois, 612 F.2d 1038, 1040 (7th Cir. 1980).

287. *See* Alden v. Maine, 119 S. Ct 2240, 2268 (1999).

288. Meltzer believes that authorizing suit by the United States Trustee perhaps "would alleviate the serious problems otherwise posed by *Seminole* for the administration of bankruptcy." Meltzer, *supra* note 114, at 57 & n.264. Glauberman doubts whether Meltzer's analysis is correct, noting that many bankruptcy suits arise under state law and questioning whether Congress may authorize the United States to bring actions against states that do not arise as federal causes of action. *See* Glauberman, *supra* note 117, at 104-06 & n.259.

289. This could work in at least two ways. First, the United States Trustee could sue a state for bankruptcy causes of action held by the federal bankruptcy estate and not by any private plaintiff. *See* United States v. Mississippi, 380 U.S. 128, 140 (1965); United States v. Minnesota, 270 U.S. 181 (1926) (holding that the state could not maintain an Eleventh Amendment defense against a suit brought by the United States even though the suit was brought for the benefit of a Native American tribe; however, under section 307 of the Bankruptcy Code, the United States Trustee has standing to do so.) The important issue is whether the United States has a sufficient interest in the suit to justify an elimination of a state's Eleventh Amendment defense. The interest need not be a direct pecuniary interest. *See* North Dakota v. Minnesota, 263 U.S. 365, 375 (1923); United States v. University of N.M., 731 F.2d 703, 705 (10th Cir. 1984) (The United States may bring suit against a state as a trustee for a Native American tribe in a trespass action.); Multi-district Vehicle Air Pollution M.D.L. No. 31 v. Automobile Mfrs. Ass'n, Inc. (*In re* Multidistrict Vehicle Air Pollution), 481 F.2d 122, 131 (9th Cir. 1973) (holding that the United States may sue as *parens patriae* to vindicate the interests of its citizens.). On the other hand, the United States may not delegate its own power to sue a state te a private party. *See* Blatchford v. Native Village of Noatak, 501 U.S. 775, 783 (1991) (dictum) (not permitting Native American tribes to sue in the name of the United States to redress injury to the tribes.).

Second, within the constraints of *Alden* and *Blatchford*, Congress could authorize a private party, like a chapter 7 trustee or chapter 11 debtor in possession, to bring suits on behalf of the Unitod States. *See* Joseph F. Riga, *State Immunity in Bankruptcy After* Seminole Tribe v.

suits brought in the name of the United States differ "in kind from the suit of an individual."[290] In fact, one court already has provided a post-*Seminole Tribe* bankruptcy law roadmap for Congress to do so. Specifically, in *Department of Transportation and Development v. PNL Asset Management Co. (In re Fernandez)*, the Court of Appeals for the Fifth Circuit considered whether a judgment creditor, who had acquired a judgment from the Federal Deposit Insurance Corporation ("FDIC") and thereafter contested a state's title to property purchased from the debtor, could step into the shoes of the United States to sue the state in federal court.[291]

The court first noted that the "Eleventh Amendment does not bar the United States government from filing suit in federal court against a state."[292] However, the court ultimately held that the judgment creditor's suit could not proceed because "a private successor to the FDIC cannot *by implication* enjoy the status accorded the national government for Eleventh Amendment purposes."[293] Thereafter, in denying a petition for a rehearing, the Fifth Circuit noted that:

> we are persuaded that there must be a *clear expression of purpose* to abrogate the Eleventh Amendment in any extension of agency status to a private party for the purpose of jurisdiction. We find no such clarity of purpose [in section 106(a)] as required by the Supreme Court in *Seminole Tribe*.[294]

Although it is clear from the *Fernandez* decision that private parties cannot merely step into the shoes of the federal government to sue states at will, Congress probably could authorize bankruptcy trustees and debtors-in-possession to bring suits based on federally created bankruptcy claims for relief in the name of the United States

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Florida, 28 SETON HALL L. REV. 29, 59 (1997). Thus, the suits would have to assert claims for relief created as a matter of federal bankruptcy law that do not belong to a private plaintiff. Whether this proposal will avoid Eleventh Amendment and sovereign immunity depends on whether courts will consider injury to a federally created bankruptcy estate to be injury to the United States and whether the United States Trustee's supervisory authority over trustees and debtors in possession constitutes sufficient government control over the litigation. *See* United States *ex rel.* Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195, 202-03 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999) (holding that *qui tam* suits against States are not barred by the Eleventh Amendment); *infra* notes 311-20 and accompanying text.

290. *Alden*, 119 S. Ct. at 2267.

291. Department of Transp. & Dev. v. PNL Asset Management Co. (*In re* Fernandez), 123 F.3d 241, 245-46 (5th Cir. 1997), *amended by* 130 F.3d 1138, 1138-39 (5th Cir. 1997).

292. *In re Fernandez*, 123 F.3d at 245; 130 F.3d at 1138 (citing United States v. Mississippi, 380 U.S. 128, 140 (1965)). When states entered into the Union, they consented to be sued by the United States. *See id.* 123 F.3d at 246; 130 F.3d at 1138.

293. *Id.* 130 F.3d at 1139 (emphasis added).

294. *Id.* at 1139 (emphasis added).

as long as it made such authorization clear and unequivocal.[295] Congress also likely would have to create a stronger nexus between the United States Trustee and the private trustee, such as requiring the United States to receive a percentage of any funds recovered from a state.[296] Indeed, Congress already has done so in the analogous context of *qui tam* suits brought in the name of the United States. In these suits, a state's Eleventh Amendment immunity cannot be asserted successfully.[297] The *qui tam* statute presents a simple model for Congress to follow:

> A person may bring a civil action for a violation of section 3729 for the person and for the United States government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and

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295. *See* Janger, *supra* note 148, at 1438 (suggesting Congress could vest power in the United States trustee te bring avoidance actions). Under current law, the private trustee or debtor in possession stands in the shoes of all of the debtor's unsecured creditors, including the United States when it is an unsecured crediter. *See* 11 U.S.C. § 544(b) (1994). Under *Fernandez* this statute might meet the requirement that the private trustee or debtor in possession enjoys the status accorded the national government for Eleventh Amendment purposes because section 106(a) of the Bankruptcy Code clearly and expressly abrogates sovereign immunity with respect te section 544. *Cf., e.g.*, Pate v. Hunt (*In re* Hunt), 136 B.R. 437, 450-51 (Bankr. N.D. Tex. 1991) (holding that trustee's claim asserted on behalf of the United States was not barred by the state statute of limitations since the trustee was empowered to assert rights of the United States as a creditor); United States v. Gleneagles Inv. Co., 565 F. Supp. 556, 583 (M.D. Pa. 1983), *aff'd sub nom.*, United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986) (same). In our view it is unlikely, however, that the Supreme Court would accord such a charitable construction to the Bankruptcy Code. Relying on *City of Boerne*, the Court would probably hold that there is no clear statement that Congress intended in section 544(b) to lend the name of the United States to abrogate immunity and there is not a sufficient nexus between the United States and the private trustee te allow such a suit. Moreover, even if congressional intent was clear, we think the Court would find delegation of the power to sue in the name of the United States to transgress the constraints of *Blatchford*. *See supra* note 289 and accompanying text.

296. *See* United States *ex rel.* Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195, 202-03 (2d Cir. 1998). Providing the United States a monetary incentive is not itself dispositive, *see supra* note 295, but it would strongly favor an indication that the United States is the real party in interest.

297. *See Stevens*, 162 F.3d at 202-03; United States *ex rel.* Berge v. Board of Trustees, 104 F.3d 1453, 1458 (4th Cir. 1997) (holding that the Eleventh Amendment does not apply in *qui tam* context); United States *ex rel.* Milam v. University of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 50 (4th Cir. 1992); United States v. University of Mich., 860 F. Supp. 400, 404 (E.D. Mich. 1994) (dismissing on Eleventh Amendment grounds a retaliation suit brought by individual against state pursuant to False Claims Act but noted that Eleventh Amendment would not bar a private suit brought under main *qui tam* action.); Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 550 (1995); Justin V. Switzer, Note, *Did they really think this is over?* Seminole Tribe v. Florida *and the Bankruptcy Code*, 34 HOUS. L. REV. 1243, 1275 (1999) (analogizing to *qui tam* actions). *But see* Glauberman, *supra* note 117, at 102-04 (finding this analysis to be fatally flawed once it is extended beyond traditional *qui tam* suits).

the Attorney General give written consent to the dismissal and their reasons for consenting.[298]

In a *qui tam* suit, a private plaintiff may sue in the name of the United States[299] to seek civil damages for violation of the False Claims Act.[300] Under the False Claims Act, a person who makes a false monetary claim to the United States government is liable to the government for treble damages plus a $5,000-$10,000 civil penalty.[301] The United States is given control over the litigation through the power to intervene,[302] settle,[303] or terminate[304] the suit. If the United States does not intervene, the private plaintiff conducts the action,[305] but any recovery belongs to the United States, subject to the right of the private plaintiff to receive a percentage of the proceeds of the suit.[306]

Delegating the power to sue in the name of the United States to private parties is not without substantial criticism. Allowing private parties to sue in the federal government's name in bankruptcy, essentially for the purpose of circumventing Eleventh Amendment and sovereign immunity, distorts the principles of federalism by removing the states' constitutional protection against non-consensual appearances in federal court.[307] The Court of Appeals for the Fifth Circuit, in recognizing the blatant end-run around the

298. 31 U.S.C. § 3730(b)(1) (1994). However, *qui tam* actions might be distinguished from bankruptcy actions on one important ground. Unlike *qui tam* actions, in bankruptcy, the United States is often a creditor itself. Thus, one commentator has suggested that vesting power in the bankruptcy trustee to bring suits in the name of the United States may create a conflict of interest. *See* Janger, *supra* note 148, at 1440. But since the United States stands to benefit from any recovery from the state that is distributed to creditors, the conflict is more appearance than real.

299. *See* 31 U.S.C. § 3730(b)(1).

300. 31 U.S.C. §§ 3729-3731.

301. *See id.* § 3729(a).

302. *See id.* § 3730(c).

303. *See id.* § 3730(c)(2)(B).

304. *See id.* § 3730(c)(2)(A).

305. *See id.* § 3730(b)(4)(B).

306. *See id.* § 3730(d).

307. *See* Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996) ("The Eleventh Amendment . . . serves to avoid the 'indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties' . . .") (quoting Puerto Rico Aquaduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)); *see also* Siegel, *supra* note 297, at 558. *Qui tam* actions, unlike bankruptcy, do not adversely affect federalism principles because such actions directly vindicate the interests of the federal government. *See* Siegel, *supra* note 244, at 561 (delegating of authority to sue in the name of the United States should be permitted for *qui tam* actions because they are "genuinely actions in which the United States is the plaintiff").

Eleventh Amendment, held that the Eleventh Amendment bars *qui tam* suits brought by private parties where the United States declines to intervene.[308] The court reasoned that when the federal government takes a passive role in a *qui tam* action, "it is difficult to treat it as the party that has 'commenced or prosecuted' the suit."[309] Moreover, the *qui tam* statute does not contain the clear expression of abrogation of Eleventh Amendment immunity in its extension of agency status to private parties.[310]

This issue should be resolved by the Supreme Court in the October 1999 term. The Court granted certiorari to review the Second Circuit's decision in *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*.[311] In *Stevens*, the plaintiff had filed a *qui tam* action under the False Claims Act, alleging the Vermont agency had made fraudulent claims against the United States.[312] The United States declined to intervene in the suit.[313] The state agency moved to dismiss the complaint, arguing that that the state was not a "person" within the meaning of the False Claims Act[314] and, more importantly, the Eleventh Amendment barred the suit.[315] The majority opinion in *Stevens* concluded that the term "person" included states within the meaning of the False Claims Act and further decided that the Eleventh Amendment defense had no application.[316] The court first noted that the states have no sovereign immunity as

308. United States *ex rel.* Foulds v. Texas Tech Univ., 171 F.3d 279, 294 (5th Cir. 1999).

309. *Id.* at 291. The *Foulds* decision has placed the Fifth Circnit at odds with the Eighth Circuit's decision in *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2387 (1999), the Second circuit's decision in *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 201-03 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999), and the Fourth Circuit's decision in *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992). The *Foulds* decision rests on the notion that although the United States stands to recover, at minimum, seventy percent of any recovery against a state and thus must be considered the "real party in interest," the Eleventh Amendment will bar suit because it is the private party that invests resources in bringing the snit and makes the day-to-day litigation decisions. *Foulds*, 171 F.3d at 293. ("With the merely chimerical presence of the United States in this case, the relator's significant control over the litigation process plainly impinges on state sovereignty.").

310. *See Foulds*, 171 F.3d at 294.

311. United Statos ex rel. Stevens v. Stato of Vermont Agency of Natural Resources, 162 F.3d 195, *cert. granted*, 119 S. Ct. 2391 (1999).

312. *See id.* at 198.

313. *See id.* at 199.

314. The False Claims Act authorizes suits only against "persons" who defraud the federal government. 31 U.S.C. § 3729(a) (1994).

315. *See Stevens*, 162 F.3d at 199.

316. *See id.* at 205.

against the United States.[317] The court then concluded that the False Claims Act's statutory design indicates that the real party in interest is the federal government, even in suits where the United States declines to intervene.[318] Thus, a private *qui tam* suit is still a cause of action that belongs to the federal government[319] and the immunity states enjoy must yield to it. Assuming that the Court does not reverse *Stevens*, an assumption that is dubious in the current climate of the balance of power between the federal government and the states,[320] then modeling the Bankruptcy Code after the False Claims Act is constitutional and reasonably feasible.

C. *Self-Executing* Ex parte Young *Injunction*

As noted above,[321] the Supreme Court in *Seminole Tribe* recognized that individuals may sue state officials for prospective injunctive relief in federal court under the *Ex parte Young* doctrine as long as Congress has not already crafted a "detailed remedial scheme" in the statute at issue.[322] In *Alden*, the Supreme Court reaffirmed the vitality of the *Ex parte Young* doctrine.[323] Accordingly, one additional avenue that Congress should consider to ameliorate the effects of *Seminole Tribe* in the bankruptcy context is the promulgation of a statutory provision that automatically creates, on the date of the filing of a bankruptcy petition, a standing injunction applicable to state officials and proscribing the violation of federal bankruptcy laws.[324] Such an injunction could supplement and reinforce the

317. *See id.* at 201 (citing West Virginia v. United States, 479 U.S. 305, 311 (1987)).

318. *See id.* at 202.

319. *See id.* at 203. Because the cause of action belongs to the federal government, the Supreme Court's rule in *Blatchford* does not apply. *See id.*

320. Given this Court's makeup, we would not be surprised to find the Court agreeing with the dissent's view in *Stevens*, which remarkably foretold many of the arguments expressed in *Alden*, *see id.* at 211 (Weinstein, district judge, dissenting), that the *qui tam* suit against a state is barred by the Eleventh Amendment. *Id.* at 229. *But cf.* Alden v. Maine, 119 S. Ct. 2240, 2267 (1999). Justice Kennedy's opinion hinted that a suit brought in the name of the United States overcomes sovereign immunity as long as the suit does not represent a "broad delegation to private persons to sue nonconsenting States." *Id.* at 2267. Thus, the most promising course for Congress should be to authorize suits against states by the United States trustee in the name of the United States.

321. *See supra* notes 205-15 and accompanying text.

322. Seminole Tribe v. Florida, 517 U.S. 44, 74 (1996).

323. *See Alden*, 119 S. Ct. at 2263.

324. The Automatic Stay of section 362(a) already enjoins a state official who pursues the state's interest as a prepetition creditor. *See* 11 U.S.C. § 362(a) (1994). Section 362 is a statutory injunction, equivalent to a court-ordered injunction, that arises without any court

existing injunctive provisions of section 362(a) of the Bankruptcy Code, which state that the commencement of a bankruptcy case automatically operates as a stay of certain actions and conduct.[325]

Creating a standing *Ex parte Young* injunction would be beneficial in at least three respects. First, it would save the bankruptcy estate the litigation costs and the bankruptcy court system the administrative costs that would be incurred in bringing a separate proceeding for prospective injunctive relief against state officials at the commencement of every case. Second, it could act as a deterrent against willful violations of the Bankruptcy Code by a state, because it would place state officials on notice that they could be held accountable for such violations.[326] Third, it would avoid litigation over any existing ambiguity regarding the ability to bring *Ex parte Young* actions in bankruptcy cases or proceedings.

At the very least, Congress should make clear in the Bankruptcy Code its intent to authorize parties in interest from commencing *Ex parte Young* actions in bankruptcy courts to enforce some or all of the provisions of the statute.

D. Conditional Claims Allowance

Congress could amend the Bankruptcy Code to allow a state's claim for purposes of voting and distribution[327] only if the state has waived sovereigu immunity and Eleventh Amendment immunity

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action. *See, e.g.*, Johnston Envtl. Corp. v. Knight (*In re* Goodman), 991 F.2d 613, 620 (9th Cir. 1993); Carver v. Carver, 954 F.2d 1573, 1578 (11th Cir. 1992); Atkins v. Martinez (*In re* Atkins), 176 B.R. 998, 1004 (Bankr. D. Minn. 1994) ("The automatic stay in bankruptcy comes into existence as a matter of law; it is self-effectuating."); *In re* Xavier's, Inc., 172 B.R. 667, 672 (Bankr. M.D. Fla. 1994). Although the stay is imposed by statute rather than court order, courts have considered the statutory stay to be the equivalent of a court-ordered injunction. Thus, section 362 provides a model for Congress for enacting a statutory injunction embodying *Ex parte Young*.

325. See 11 U.S.C. § 362(a) which arguably already serves this purpose.

326. Notwithstanding the Eleventh Amendment, state officials may be required to pay money damages as "costs" for violating a court's equitable order. *See* Hutto v. Finney, 437 U.S. 678, 690-92 (1978). The *Hutto* Court reasoned that the cost of disobeying a federal court order is ancillary to enforcement of federal law. *See id.* at 690. Thus, a state official who willfully disobeys the automatic stay, or any other bankruptcy court order, may be held in contempt and ordered to pay money damages to the aggrieved party.

327. In a chapter 11 case, a creditor may have a claim allowed for two separate purposes. First, the claim may be allowed for purposes of voting on a plan of reorganization. *See* 11 U.S.C. §§ 502, 1111(a), 1126; FED. R. BANKR. P. 3018(a). Second, the claim may be allowed for purposes of distribution even if the creditor was not permitted to vote on the plan. *See* 11 U.S.C. §§ 1123(a)(3), 1124.

regarding the claim and compulsory counterclaims.[328] Under current law, the state may file a proof of claim which is deemed allowed unless an objection is timely filed.[329] As noted above,[330] section 106(b) of the Bankruptcy Code purports to deem the filing of a proof of claim by the state to be a waiver of sovereign immunity regarding compulsory counterclaims.[331] Some courts have questioned whether section 106(b) is unconstitutional.[332]

Even if section 106(b) is impotent to waive state sovereign immunity, Congress could amend section 502(b) of the Bankruptcy Code[333] to disallow a state's claim unless the state has waived Eleventh Amendment and sovereign immunity regarding the claim and compulsory counterclaims. Under the Bankruptcy Clause of the Constitution,[334] Congress has the power to enact uniform laws on the subject of bankruptcies throughout the United States. Congress has enacted a Bankruptcy Code that creates an estate comprised of all property of the debtor on the date of the filing of a bankruptcy petition.[335] It is solely within the province of Congress to determine who has the right to share in the estate and the priority of distribution of the estate's assets.[336] Congress could simply amend the Bankruptcy Code to provide that if the state wants access to share in the distribution of the estate, the state must agree, perhaps through an act of its legislature, to surrender its immunity as the price of admission. At least where the state holds an unsecured claim, there should be no Constitutional impediment to the imposition of such a condition.[337]

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328. Based on his view that the constructive waiver doctrine is defunct and that Congress cannot use its Article I power to abrogate Eleventh Amendment immunity, Glauberman sharply disagrees that Congressional action of this kind will work. *See* Glauberman, *supra* note 117, at 87 (discussing conditional patent or copyright legislation). But Glauberman is more optimistic about congressional legislation that would condition access to the bankruptcy court on the state legislature's having passed a law waiving the state's Eleventh Amendment immunity. *See id.* at 87 n.145 (discussing possible copyright and patent legislation).

329. *See* 11 U.S.C. §§ 501(a), 502(a).

330. *See supra* note 187 and accompanying text.

331. *See* 11 U.S.C. § 106(b).

332. *See supra* notes 189-90 and accompanying text.

333. 11 U.S.C. § 502(b) (providing nine bases to disallow claims under current law).

334. U.S. CONST. art. I, § 8, cl. 4.

335. *See* 11 U.S.C. § 541(a).

336. *See id.* §§ 507(a), 726(a).

337. As stated above in note 187, the state may not assert a due process or takings defense under the Fifth Amendment because the state is not a "person" within the meaning of the Amendment.

E. Conditional Spending

Finally, as a last resort, Congress could encourage the waiver of state Eleventh Amendment immunity through conditions to the receipt of federal funds.

The Supreme Court has held that, pursuant to the Spending Clause power,[338] Congress may condition the receipt of federal funds to "further broad policy objectives,"[339] and Congress repeatedly has used its Spending Clause power to condition receipt of federal funds to influence states to regulate or act in a federally-desired manner.[340] Presumably, Congress could require that states agree to waive their Eleventh Amendment immunity with respect to bankruptcy-related actions in order to receive, for example, federal highway funds.[341]

Although there are several limits to Congress's authority in this regard, none would appear to prevent Congress from enacting such a bankruptcy-related provision. The first such limitation is found within the Spending Clause itself—exercise of the power must be in pursuit of the "general Welfare."[342] This limitation has little substantive application, however, because the Supreme Court has given substantial deference to the judgment of Congress regarding the

338. The Spending Clause provides that Congress has the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay for the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

339. Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

340. *See* South Dakota v. Dole, 483 U.S. 203, 208 (1987) (National Minimum Drinking Age Act); Del A. v. Edwards, 855 F.2d 1148, 1149 (5th Cir. 1988) (Adoptive Assistance and Child Welfare Act of 1980); Kit Kinsport, *Implied Waiver After* Seminole, 82 MINN. L. REV. 793, 822-23 (1998). In response to the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded the scope of congressional power under the Commerce Clause), President Clinton annonnced that the federal government should "encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans." Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1.

341. Kinsport discusses the general subject at some length and concludes that there is nothing in the Eleventh Amendment that would bar such conditioning. *See* Kinsport, *supra* note 340, at 826. In particular, Kinsport notes that because the Eleventh Amendment itself envisions the possibility of a waiver, "asking the states to exercise their waiver rights does not require them to violate any 'independent constitutional bar.' " *Id.; see* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 281-82 (1959) (finding a state's agreement in compact to congressional condition subjected it to suit). Moreover, the Court of Appeals for the Sixth Circuit stated in *Tennessee Department of Human Services v. United States Department of Education*, 979 F.2d 1162, 1166 (6th Cir. 1992): "A state can waive its immunity explicitly when it opts to participate in a federal program in which Congress clearly has conditioned participation on such waiver."

342. U.S. CONST. art. I, § 8, cl. 1; *see also Dole*, 483 U.S. at 207.

nature of the "general Welfare."[343] Thus, in the bankruptcy context, Congress likely could justify use of its Spending Clause power to further the goals of the Bankruptcy Code, which is a legal scheme crafted in the interest of the general welfare.[344]

A second limitation might arise from dictum that conditions on federal funds "might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.' "[345] The relationship between the conditions and the federal interest involved, however, need only be reasonable, and there need not be a direct relationship.[346] Additionally, the relationship only needs to run between the condition and the federal interest that is served; the interest need *not* be related to the purpose of the funds.[347] Conditioning waiver of Eleventh Amendment immunity with respect to bankruptcy matters clearly would be reasonably related to the important federal interests in fostering a debtor's "fresh start" and a level playing field for creditors, both of which would be enhanced by eliminating a state's ability to secure a preferred position relative to

343. *See Dole*, 483 U.S. at 207. The "general Welfare" by its very terms includes a broad range of activities and necessarily includes concerns beyond what the Constitution directly grants Congress the power to legislate. *See* United States v. Butler, 297 U.S. 1, 66 (1936) (explaining that the spending clause power is not "limited by the direct grants of legislative power found in the Constitution"). The Court in *Dole* questioned whether the "general Welfare" limitation is at all a judicially enforceable restriction on congressional power. *Dole*, 483 U.S. at 207 n.2; *see also* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1929 (1995).

344. *Dole* instructs the courts to "defer substantially to the judgment of Congress" when determining whether the first element of the Spending Clause test has been met. *Dole*, 483 U.S. at 207.

345. *Id.* (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

346. The Supreme Court left this issue open in *Dole*. *Id.* at 208 n.3. Lower courts, however, have consistently applied the reasonable relationship standard instead of the more exacting direct relationship standard. *See, e.g.*, California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997).

347. *See* New York v. United States, 505 U.S. 144, 167 (1992); *see also Dole*, 483 U.S. at 207; Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) (upholding a condition withholding highway funds from the states when a highway official violated the Hatch Act's prohibition against participating in a political campaign). This distinction is subtle but important. Consider the highway funds scenario. Bankruptcy has, at best, a very remote relationship to highways. Congress, however, may use highway funds to further an unrelated, constitutionally permissible interest. Thus, Congress could use highway funds to further the federal interest in bankruptcy law (clearly a permissible interest under Article I of the U.S. Constitution) as long as the condition imposed (a waiver of the Eleventh Amendment immunity) and the federal interest in bankruptcy are reasonably related.

other creditors through the assertion of Eleventh Amendment or sovereign immunity.[348]

Third, the Supreme Court has noted "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[349] This limitation, however, is designed to prevent Congress from requiring states to engage in discriminatory treatment of individuals on the basis of suspect classifications, engage in the restriction of free speech or free exercise of religion, and the like. It does not limit use of the Spending Clause to require a waiver of Eleventh Amendment immunity. Specifically, courts have held that although Congress may not use the Spending Clause power to require states to engage in unconstitutional activity in order to receive federal funds, it in fact may require a waiver of Eleventh Amendment immunity as a condition to receipt of federal funds because such a condition would not require the state to engage in any unconstitutional activity (since states always are free to waive their Eleventh Amendment immunity).[350]

States may argue that Congress exceeds its permissible use of the Spending Clause power by "coercing" states into waiving their Eleventh Amendment immunity in bankruptcy cases, and, in fact, the Supreme Court has recognized that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' "[351] The

348. *But see* Meltzer, *supra* note 114, at 55. Meltzer speculates that congressional bankruptcy statutes abrogating sovereign immunity "are not now, and could not easily be, associated with federal spending programs." *Id.*; *see also* Glauberman, *supra* note 117, at 108 n.274 (agreeing with Meltzer's proposition).

349. *Dole*, 483 U.S. at 208.

350. *See* Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997) ("One way for a state to waive its immunity is te accept federal funds where the funding statute 'manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.' " (quoting Atascadero State Hosp. v. Scanlon, 473 U.S.234, 247 (1985)); Tennessee Dep't of Human Servs. v. United States Dep't of Educ., 979 F.2d 1162, 1166 (6th Cir. 1992); Beasley v. Alabama State Univ., 3 F. Supp. 2d. 1304, 1314 (M.D. Ala. 1998) ("[E]ven the most expansive language in *Seminole Tribe* should not be read as curtailing Cougress's spending clause power to condition receipt of federal funds on states' waiver of their sovereign immunity.").

351. *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). Indeed, the state might argue that although Congress can encourage a state to adopt a new program as a condition to receiving federal funds, it cannot require the state te relinquish a property right or immunity as a condition to engaging in commerce. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2211 (1999) ("[W]e think where the coustitutionally guaranteed protection of the states' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver

"coercion" theory, however, has not been used in any reported decision as a reason for barring Congressional use of the Spending Clause power.[352] Additionally, a "coercion" theory makes little analytical sense: "can a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds—or is the state merely presented with hard political choices?"[353] Recent Supreme Court cases offer little further guidance. In *Alden*, the Court, citing *South Dakota v. Dole*, stated: "[n]or, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the states' voluntary consent to private suits."[354] Yet a statement in *College Savings Bank* indicates the current Court's uneasiness in allowing Congress to condition federal funding on waiver of sovereign immunity. Justice Scalia stated: "we think where the constitutionally gnaranteed protection of the states' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the state from otherwise lawful activity."[355] But Justice Scalia's statement should not affect Congress's ability to condition federal funding on waiver of sovereign immunity with respect to bankruptcy cases and proceedings. The Court instead was distinguishing between the withholding of a gift or gratuity of federal funds and exclusion from otherwise permissible activity.[356] Thus while the recent cases appear to breathe some life into the "coercion theory," requiring states to waive immunity in bankruptcy cases in order to receive federal funds should not result in unconstitutional use of the Spending Clause power.

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destroyed—when what is attached to the refusal te waive is the exclusion of the State from otherwise lawful activity.").

352. *See* California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) (noting that no party challenging the conditioning of federal funds has ever succeeded under the coercion theory). Indeed, the Court in *Dole* noted that "coercion" theory would apply only in the most extraordinary circumstances. *Dole*, 483 U.S. at 210-11.

353. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989).

354. Alden v. Maine, 119 S. Ct. 2240, 2276 (1999). The Court's reference to "constitutional limitations" is merely a confirmation of the existing limits the Constitution places on the Spending Clause power and does not add any new restrictions.

355. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2231 (1999).

356. "In the present case, however, what Congress threatens if the State refuses te agree to its condition is not the denial of a gift or gratnity, but a sanction: exclusion of the State from otherwise permissible activity." *Id.*

States also may argue that the Tenth Amendment[357] prohibits Congress from "commandeering" states' legislative process "by directly compelling them to enact and enforce a federal regulatory program."[358] This argument similarly fails because the Tenth Amendment "commandeering" theory does not apply to use of the Spending Clause power to condition receipt of federal funds.[359] Congress, by reason of conditioned receipt of federal funds, does not "commandeer" a state's legislation into waiving that state's Eleventh Amendment or sovereign immunity. Instead, all that conditioning does is present a state with a choice—either it can accept federal funds and waive its Eleventh Amendment and sovereign immunity for bankruptcy purposes, or it can decline the federal funds in order to maintain its constitutional immunity.

F. Federalism Concerns

Although the options outlined above are constitutionally permissible, we must ask whether the threats to bankruptcy law caused by the Eleventh Amendment justify our prescriptions on policy grounds. Given that *Seminole Tribe* and *Alden* establish a constitutional right to sovereign immunity, a proper defense of the listed options requires an analysis of federalism principles.[360] We are certain that despite the apparent harshness of some of our recommended options, federalism justifies all of them.

Federalism is a subject that has occupied the attention of lawyers, judges, scholars, and politicians since the earliest days of our

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357. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

358. New York v. United States, 505 U.S. 144, 161 (1992) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

359. *See id.* at 168 ("By [use of the Spending Clause power], as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply."); Missouri v. United States, 918 F. Supp. 1320, 1330 (E.D. Mo. 1996) ("Congress may 'hold out incentives to the State as a method of influencing a State's policy choices . . . .' ") (quoting *New York v. United States*, 505 U.S. at 165)).

360. *Alden* premised its decision in part on an appeal to federalism principles. Alden v. Maine, 119 S. Ct. 2240, 2263-65 (1999); *see also supra* note 67 and accompanying text. We note there is a marked lack of scholarship on bankruptcy law within the context of federalism. This gap likely is attributable to the pre-*Seminole Tribe* absence of conflict between the federal government and states over bankruptcy issues. We do not intend to transform this Article into a lengthy discussion of federalism. Instead, we attempt only initially to defend on federalism grounds the potential solutions available to Congress to overcome the *Seminole Tribe* and *Alden* decisions.

republic.[361] Essentially, federalism concerns the allocation of power between the federal government and the states.[362] But such a broad definition offers little guidance unless the investigation is limited to our narrow topic: whether federalism justifies congressional enactments that specifically are designed to circumvent the Eleventh Amendment's bar to the nonconsensual exercise of federal jurisdiction against a state in bankruptcy court. We believe that federalism provides such justification.[363]

Before examining each of our proposed congressional solutions on federalism grounds, it is helpful to note certain considerations that guide the analysis. First, by virtue of the Supremacy Clause, federalism principles favor federal power if the Constitution generally permits the federal government to engage in particular actions.[364] As a corollary to the Supremacy Clause consideration, in areas of federal economic policy-making, the justification for judicial restraint is particularly strong.[365] Congress is granted preemptive authority to enact bankruptcy laws.[366] Thus, even if the new constitutional sovereign immunity, as applied in *Seminole Tribe* and *Alden*, prevents Congress from using its Article I power to abrogate the states' constitutional immunity in bankruptcy, other constitutional methods that achieve the same result should be favored.

The Supreme Court's recent decisions undercut our conclusion to some extent. *Alden* elevates common law sovereign immunity to a constitutional status that trumps the use of Article I power. *Florida Prepaid* restricts the use of the Due Process Clause to overcome constitutional sovereign immunity. *College Savings Bank* eliminates

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361. *See* Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1299 (1997).

362. *See* Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 U. KAN. L. REV. 1219, 1220 (1997).

363. Because appearing in state courts to enforce bankruptcy rights would undercut the policy of uniformity and is a practice most bankruptcy practitioners would care to avoid, our policy discussion is limited to abrogating immunity to suit in federal court. Nevertheless, the inability to sue states in state courts undercuts traditional bankruptcy jurisdiction that allows the estate's representative to sue in state courts. *See* 11 U.S.C. § 1334(b) (1994).

364. A clear example of this consideration is the Court's venerable decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). There the Court held that a Maryland tax on the National Bank of the United States violated Congress's power to legislate under the Necessary and Proper Clause. Particular to our inquiry, Justice Marshall stated that "congress should exercise its discretion as to the means by which it must execute the powers conferred upon it." *Id.* at 326.

365. *See* Herbert Hovenkamp, Essay, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213, 2220 (1996).

366. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 195-96 (1819); *supra* notes 97-101 and accompanying text.

the implied waiver doctrine. All three cases must be interpreted as a triumph of states' rights.[367] But the Court did not reject the well-grounded theory that federalism favors federal power if that power is lawfully exercised, even if the purpose of the use of lawful power is to diminish the states' sovereign immunity.[368] The Court carefully recognized the limitations on sovereign immunity and noted that the states are bound to follow federal law.

Second, the traditional justifications for protecting states on federalism grounds have little application to bankruptcy law. These traditional concerns include the "indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties,"[369] fear of the tyranny of the federal government,[370] the states' better ability to respond to its citizens' needs,[371] and the benefit of having states act as laboratories for social and economic change.[372] To the extent such justifications are legitimate,[373] none affect bankruptcy.

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367. *See* Joan Biskupic, *Justices, 5-4, Strengthen State Rights*, WASH. POST, June 24, 1999, at A1.

368. The Court's affirmation of the principles of *Ex parte Young* and *Dole* indicates approval.

369. *In re* Ayers, 123 U.S. 443, 505 (1887); *see* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 287-88 (1997).

370. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 525 (1995). The *Lopez* decision reasoned that if Congress could enact a law banning guns around schools on Commerce Clause grounds, then Congress could fairly justify a law regulating school curriculum on the same theory. *See* United States v. Lopez, 514 U.S. 549, 565 (1995). Implicit in this reasoning is the fear that Congress's regulation of local school curricula is an exercise of tyrannical federal power. Fear of federal power has roots extending to earliest years of the Unitod States, *see* Weinberg, *supra* note 361, at 1302-03 (noting that the Kentucky and Virginia Resolutions were a response to the Sedition Act of 1798), and has provided a powerful platform for electoral candidates. *See* Hovenkamp, *supra* note 365, at 2221.

371. *See* Chemerinsky, *supra* note 370, at 527.

372. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Brandeis stated:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id.

373. George Washingtou once stated: "To be fearful of vesting Congress, constituted as that body is, with ample authorities for national purposes, appears to me the very climax of popular absurdity and madness." Weinberg, *supra* note 361, at 1299 (quoting Lotter from George Washington to John Jay (Aug. 15, 1786) *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 207-08 (Henry P. Johnson ed., 1970)). The reliance on federalism to favor states' rights has, on numerous occasions throughout American history, produced terrible results. Before the Civil War, southern legislators consistently relied upon notions of federalism to defend the institution of slavery. *See id.* at 1301. Federalism and the protection of the states was invoked te defeat national labor laws. *See* Hovenkamp, *supra* note 365, at 2213-14. During

There cannot be fear of federal tyranny by the mere creation of a neutral forum for marshaling, sorting through, and distributing a debtor's assets. Moreover, preventing a suit against a state in bankruptcy court does not further a state's responsiveness to its citizens. And because bankruptcy is the paramount domain of Congress, state insolvency laws are superseded by any federal bankruptcy law.[374] Thus, the benefit of states as laboratories for social and economic development simply does not exist in the bankruptcy context.[375] Last, the argument that states ought not be subject to the indignity of the coercive process, while bandied about by the current majority of the Supreme Court in a slew of cases, has little merit in American jurisprudence.[376]

Third, states have the ability to protect their interests in bankruptcy both inside the courthouse and in Congress. States already receive some preference in bankruptcy.[377] States also have a

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the Civil Rights Movements of the 1950s and 1960s, the principles of federalism were consistently paraded by the southern states in their attempts to defeat desegregation and implementation of the Voting Rights Act. *See* South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966). In a challenge to a provision of the Voting Rights Act that required all voting changes by covered states to be "precleared" by the United States Department of Justice, South Carolina premised its attack on federalism grounds. *See id.* Justice Black, in concurring and dissenting in the case, echoed South Carolina's argument:

> [The Voting Rights Act], by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.

Id. at 358 (Black, J., concurring and dissenting); *see also* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 19-20 (1993). In each case the rhetoric of federalism was used to hide the desire of the states to continue repugnant practices.

374. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 195-96 (1819).

375. *See* Chemerinsky, *supra* note 370, at 539 (noting that the National Labor Relations Act's weaknesses have led states to enact laws that better guarantee fair working conditions for all employees). If anything, changes in the national economy require flexibility and experimentation at the national level, which counsel for more deference to federal decision-making. *See* Hovenkamp, *supra* note 365, at 2221.

376. *See* Alden v. Maine, 119 S. Ct. 2240, 2289 (1999) (Souter, J., dissenting). Justice Souter aptly noted that the theory of "dignity" as a justification for state sovereign immunity is anomalous te a republican form of government. *See id.* The very concept of sovereign immunity has its roots in separating the royal from his subjects. *See id.* Under the American form of government, the people *are* the government. *See id.*

377. *See* 11 U.S.C. § 362(b)(4) (1994) (automatic stay apparently does not apply to a governmental unit's commencement or continuation of a proceeding to enforce the governmental unit's police or regulatory power); *id.* § 503(b)(1)(B) (administrative expense priority for certain types of tax claims); *id.* § 507(a)(8) (some unsecured pre-petition tax claims entitled to priority ahead of general unsecured creditors).

unique lobbying power at the national level that safeguards their autonomy and insures that Congress does not abuse its power.[378]

Fourth, there is a strong, uniquely national, interest in bankruptcy[379] and a specific national interest in the bankruptcy court as a neutral forum.[380] As we stated in the introduction, bankruptcy provides resolution to competing claims that often cross state lines. The Court's apparent disregard in *Florida Prepaid* for the national interest in patent law uniformity, as a justification for overcoming sovereign immunity, must cause some concern for bankruptcy advocates, but even in *Florida Prepaid* the Court accepted the basic premise that patent law needs to be uniform in order to be effective.[381]

Armed with these considerations,[382] we examine whether the options available to Congress may be justified. We begin with the easiest suggestion—the enactment of the self-executing *Ex parte Young* injunction. As mentioned above, Congress could amend the Bankruptcy Code to provide for a standing *Ex parte Young* injunction. Such an enactment would promote bankruptcy interests by saving private and public litigation costs and deterring state officials from willfully violating Bankruptcy Code provisions. In light of the federalism principles we discuss, clearly such a provision favors federal power. *Ex parte Young* provides for the supremacy of federal law.[383] It applies only to prospective injunctive relief claims and thus does not directly affect a state's treasury. And such an enactment

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378. *See* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1163 (1987). The "political safeguards" theory is not without its critics. *See* Baker, *supra* note 343, at 1940; H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 911-12 (1999). Moulton does concede that the "political safeguards" theory at least "rightly focuses attention on the fact that most of the hard work of allocating responsibility among levels of government happens outside the courtroom." *Id.* at 913.

379. The national interest in uniform bankruptcy laws has been recognized for over two hundred fifty years. *See Sturges*, 17 U.S. (4 Wheat.) at 124 ("[C]ongress only can make laws on the subject of bankruptcies. It is a national subject . . . .").

380. *See* Elizabeth Warren, *Why Have a Federal Bankruptcy System?*, 77 CORNELL L. REV. 1093, 1094-95 (1992). A bankruptcy court is not ouly beneficial as a neutral fornm for debtors and creditors, but by virtue of its federal character, it prevents the need to resort to state courts to vindicate national interests. *See* Chemerinsky, *supra* note 362, at 1229. James Madison once stated: "Confidence cannot be put in State Tribunals as guardians of the National authority and interests." *Id.* (quoting 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 27 (1913)).

381. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2209 (1999).

382. We by no means assume our list is exhaustive. Considerations governing federalism no doubt span well beyond the scope of this Article. *See supra* note 360.

383. *See* Chemerinsky, *supra* note 362, at 1228.

would significantly deter state officials from willfully abusing the automatic stay, thereby helping to maintain the level playing field among creditors.

Amending the Bankruptcy Code to disallow a state's claim unless it waives immunity with respect to the claim and compulsory counterclaims that may be asserted against a state also respects federalism principles. It is perfectly reasonable to require a state, the one kind of creditor that can assert an Eleventh Amendment and sovereign immunity, to surrender those defenses in order to participate in a federal bankruptcy *res*. Such a prescription restores the level playing field bankruptcy requires in order to fulfill its purpose. And the state's invocation of federal jurisdiction to vindicate its claim should distinguish our proposal from the Court's attack on involuntary waivers in *College Savings Bank*.[384]

The last three options appear to be more difficult to justify on federalism grounds. Reenacting the Bankruptcy Code pursuant to the Due Process Clause and Section 5 of the Fourteenth Amendment sets a potentially dangerous precedent.[385] Any federal program enacted pursuant to Article I might be made to apply to the states through the Due Process Clause, assuming that Congress could satisfy the conditions that the Court set in *Florida Prepaid*.[386] However, the resolution of property rights in bankruptcy has direct connections to legitimate due process concerns.[387] Moreover, the rate of state abuse of the bankruptcy laws is something Congress easily can catalog and present as evidence of a continuing and pervasive pattern of state violations of the Due Process Clause. Thus, although concerns that Congress could stretch the Fourteenth Amendment exception to

384. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2231 (1999) ("We think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.").

385. As explained above, re-enacting the Bankruptcy Code pursuant to the Fourteenth Amendment's Privileges and Immunities Clause and Equal Protection Clause likely exceeds the scope of Congress's power. *But see* Saenz v. Roe, 119 S. Ct. 1518, 1526-27 (1999) (arguably breathing new life into the privileges and immunities clause).

386. *See* Department of Transp. & Dev. v. PNL Asset Management Co. (*In re* Fernandez), 123 F.3d 241, 245 (5th Cir. 1997), *amended by* 130 F.3d 1138, 1138 (5th Cir. 1997).

387. The Due Process Clause prohibits the deprivation of "life, liberty or property without due process of law." U.S. CONST. amend. XIV.

tyrannical levels are noteworthy, cloaking bankruptcy with the protections of the Due Process Clause is justified.[388]

Our fourth option, conditional receipt of federal funds, does not have the grandeur of the Due Process Clause. And despite its continued constitutional vitality,[389] conditional spending has been attacked routinely by critics of federal power.[390] Conditioning a state's receipt of federal funds on waiver of the Eleventh Amendment and sovereign immunity in bankruptcy smacks of dirty politicking[391] and blatant intimidation by the federal government. The Spending Clause power works only when Congress makes the receipt of federal funds

388. Even easier than reenacting the entire Bankruptcy Code pursuant to the Due Process Clause, a congressional amendment to section 1983 of title 42 to abrogate sovereign immunity, thus providing bankruptcy parties potential takings claims, is clearly defensible on federalism grounds. The Fifth Amendment already bars the federal government from asserting sovereign immunity to takings claims. *See* Jacobs v. Unitod States, 290 U.S. 13, 13 (1933). There is nothing in the nature of state sovereign immunity that distingnishes it from federal sovereign immunity for purposes of the Fifth Amendment as made applicable to the states through the Fourteenth Amendment.

389. The 1990s are rife with Supreme Court opinions, beyond the Eleventh Amendment cases, supporting states' rights at the expense of limiting federal power, *see, e.g.*, Alden v. Maine, 119 S. Ct. 2240, 2268-69 (1999) (Fair Labor Standards Act cannot abrogate stato sovereign immunity from suit in stato courts); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2210-11 (1999) (Patent and Plant Variety Protection Remedy Clarification Act invalidly abrogates state sovereign immunity under section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549, 567-68 (1995) (The Gun Free School Zones Act exceeds Congress's power under the Commerce Clause.); New York v. United States, 505 U.S. 144, 149 (1992) (federal law regulating low-level radioactive waste violated the Tenth Amendment because it coerced state legislative and regulatory regimes); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (Congress may regulate the retirement age of state judges only by clear language). One would reasonably think that the Spending Clause cases would be an inviting target for the Supreme Court. Yet Chief Justice Rehnquist was the author of the majority opinion in *Dole*, and Justice Scalia recognized its vitality as an exception to constructive waiver of sovereign immunity in *College Savings Bank*. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2231 (1999).

390. These attacks have focused on the lack of constraints on the Spending Clause power and the inability of states to protect themselves from Congress. *See, e.g.*, Baker, *supra* note 343, at 1933; Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 87 (1988).

391. Justice O'Connor notod in her dissent in *FERC v. Mississippi* that "[c]ongressional compulsion of state agencies . . . blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs." FERC v. Mississippi, 456 U.S. 742, 787 (1982) (O'Connor, J., dissenting). The point Justice O'Counor makes is that the federal government can insulate itself from political accountability by influencing the states to enact legislation that the state's citizens may not in fact want (highway speed limits) in order to receive federal funds. Even if Justice O'Connor's point has merit, it only works if in fact stato citizens would care about the state's surrender to federal influence. It seems doubtful that state citizens would generate hostility or offer any opinion on whether a state waives its Eleventh Amendment immunity and consents to be sued in federal court.

irresistible.[392] Moreover, it must be conceded that the Eleventh Amendment defense in bankruptcy is difficult to connect with federal funds.[393]

Yet the power of Congress to influence decision making at the state level through the Spending Clause clearly supports federalism principles. Congress itself is made up of representatives of the states. Congressional members are not immune to the pressures from home to protect specific state interests.[394] Thus, the states can, in some measure, protect themselves against abusive federal conditioning.[395] Moreover, the actual harm to a state in surrendering its constitutional sovereign immunity in bankruptcy is "more rhetoric than fact."[396] Finally, because bankruptcy is an area of federal economic regulation,[397] Congress must be given more deference to promote bankruptcy goals, including, if necessary, conditioning receipt of federal funds on waiver of Eleventh Amendment immunity and sovereign immunity in bankruptcy.

Last, we consider whether authorizing private trustees or debtors in possession to sue in the name of the United States offends or supports federalism principles. Unlike the other solutions, lending the name of the United States to a private party causes a direct confrontation between the federal government and the states.

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392. *See* William Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People*, 16 HARV. J.L. & PUB. POL'Y 303, 319-20 (1993). States substantially rely upon federal funding te support a wide array of projects. *See* McCoy & Friedman, *supra* note 390, at 86.

393. For example, receipt of education funds on the condition that states enact gun-free zone laws or receipt of highway funds as a condition of raising minimum drinking ages are logically connected. Justice O'Connor, in her dissent in *Dole*, argued for a rule that required Congress to show a more than attenuated or tangential connection between the federal funds being offered to a state and the federal program in which Congress wishes the states to participate. *See* South Dakota v. Dole, 483 U.S. 203, 213-15 (1987) (O'Connor, J., dissenting). It is reasonable to believe that a few retirements of current Supreme Court Justices could elevate Justice O'Connor's dissent in *Dole* to majority status.

394. Public choice theory states that most regulatory schemes are enacted to promote the interests of particular groups. *See* Hovenkamp, *supra* note 365, at 2217. There is no reason why states cannot lobby for self-interested legislation as effectively as a manufacturing lobby, trial lawyers, or the American Association of Retired Persons. *See infra* note 395.

395. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954); *see also* Hovenkamp, *supra* note 365, at 2221. As Wechsler notes, national level politicking "is intrinsically well adapted te retarding or restraining new intrusions by the center on the domain of the states." Wechsler, *supra* at 558. Not all commentators accept Wechsler's "political safeguards" theory. *See* Moulton, *supra* note 378, at 911-12.

396. *Dole*, 483 U.S. at 211. As noted above, *supra* note 391, state citizens likely do not care whether the Eleventh Amendment is waived as a condition te receipt of federal funds.

397. *See* Hovenkamp, *supra* note 365, at 2220.

Assuming *arguendo* the constitutionality of such a gambit, such authorizations solve the problem of *Seminole Tribe* and *Alden* only because the Eleventh Amendment must yield to the supremacy of the federal government when the federal government directly confronts a state.

Yet there is a flaw in authorizing private trustees to sue in the name of the United States such that federalism principles suggest abandoning this option. The Supreme Court likely would conclude that the federal government's interest in bankruptcy estates represented by private trustees or debtors-in-possession is at best remote. This is distinguished from *qui tam* suits where the favorable resolution of the suit in fact benefits the United States directly.[398] The direct benefit to the federal government in *qui tam* actions justifies lending the federal government's power to abrogate Eleventh Amendment immunity.[399]

If the "suing in the name of the United States" statute is tailored such that the United States stands to benefit from any bankruptcy recovery, however, then federalism favors such a provision. Moreover, if the United States trustee exercises governmental discretion whether to prosecute the action on behalf of the estate in the name of the United States, then federalism concerns evaporate. *Alden* recognized that the states' constitutional sovereign immunity right must yield to suits brought by the federal government; in fact, one point of contention between the majority and the dissenters was on the likelihood of the federal government actually bringing suits to enforce federal law.[400] Both the *Alden* majority and Justice Souter, in debating the likelihood of federal intervention in Fair Labor Standard Act suits, implicitly accept the notion that federalism principles favor suits against states in federal court where the United States stands to benefit.[401] Thus, granting trustees in bankruptcy cases the right to sue in the name of the United States in order to partially recover for the United States should be preferred.

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398. *See* United States *ex rel.* Foulds v. Texas Tech Univ., 171 F.3d 279, 290 (5th Cir. 1999); *see also supra* note 306 and accompanying text.

399. Amending the Bankruptcy Code to require the estate to distribute a percentage of any recovery to the United States treasury may solve this problem. The fees to which the United States Trustee is entitled in 28 U.S.C. § 1930 probably are insufficient to create a nexus between a private trustee and the United States because those fees are generated in every bankruptcy case, not just in suits against a state.

400. *See supra* notes 86-87 and accompanying text.

401. *See id.*

VI. CONCLUSION

The Supreme Court's decisions in *Seminole Tribe* and *Alden* render section 106(a) of the Bankruptcy Code unconstitutional as applied to its abrogation of the states' Eleventh Amendment and sovereign immunity. Congress, though providing the necessary unequivocal intent to abrogate the states' immunity, failed to abrogate states' immunity pursuant to a valid exercise of power because the Bankruptcy Clause of Article I is not a source of legislative power that may abrogate the states' Eleventh Amendment immunity. Bankruptcy courts cannot save section 106(a) by applying the Fourteenth Amendment exception to the Eleventh Amendment because there is no legal basis to view bankruptcy as a privilege or immunity of national citizenship. Nor will the Takings Clause be available as long as section 1983 of title 42 does not abrogate sovereign immunity. But, subject to the constraints of *Boerne* and *Florida Prepaid*, Congress might be able to reenact section 106 of the Bankruptcy Code to address Fourteenth Amendment Due Process issues, at least to the extent states act intentionally to seize or destroy property of the estate. Except for possible Due Process redress, it appears that a bankruptcy court may not exercise jurisdiction over a state absent the state's consent or waiver of Eleventh Amendment and sovereign immunity.

Although *Seminole Tribe* and *Alden* have significant adverse effects for enforcing bankruptcy law against states, trustees or debtors-in-possession still have a variety of limited options at their disposals. Governmental units that are not arms of the state, such as counties and cities, may not invoke Eleventh Amendment protections successfully. Trustees may still sue state officials for prospective injunctive relief pursuant to the *Ex parte Young* doctrine. And, there may be a limited *in rem* "exception" to the Eleventh Amendment in the bankruptcy context.

But these limited options provide no relief to debtors and creditors in cases such as *Tri-City Turf Club*, described in this Article's introduction. To provide meaningful resolution to the problems caused by *Seminole Tribe* and *Alden*, Congress should amend the Bankruptcy Code to further the policies of bankruptcy law. Congress might achieve this goal in several ways. First, Congress could amend the Bankruptcy Code to authorize the United States trustee, and possibly private trustees or debtors in possession, to sue

states in the name of the United States. Second, Congress could amend the statute to provide for a standing, self-executing *Ex parte Young* injunction against state officials. Third, Congress could condition a state's claim to bankruptcy proceeds on a waiver of Eleventh Amendment and sovereign immunity. Fourth, Congress could resort to the Spending Clause power to condition a state's receipt of federal funds on a waiver of Eleventh Amendment and sovereign immunity.

Although these potential legislative enactments either have a limited scope or cause uneasiness with respect to notions of federalism,[402] they are desirable to remedy the potentially devastating effect of *Seminole Tribe*, *Alden,* and their progeny in bankruptcy cases and proceedings.

402. *See* Rosenthal, *supra* note 378, at 1133.