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STATE SOVEREIGN IMMUNITY AND THE BANKRUPTCY CODE [PART TWO]

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This article is the second of a two-part series in which Professor Gebbia-Pinetti considers how the complexities of state sovereign immunity apply to bankruptcy actions. The first article laid the foundation by analyzing the source, scope, and nature of states' immunity from suits filed in federal, court to enforce state and federal law (Journal of Bankruptcy Law and Practice, September/October 1998). The present article considers the extent to which the bankruptcy estate may enforce Bankruptcy Code actions against the states, notwithstanding state sovereign immunity.

IV. THE SOVEREIGN STATE AND THE BANKRUPTCY COURTS

A. Deconstructing Eleventh Amendment Immunity

Four circuit courts of appeals and a large number of lower courts have expressly held that the Bankruptcy Code's abrogation provision is unconstitutional. They reason that Congress has no power under the Bankruptcy Clause to abrogate states' immunity from citizen suits filed in bankruptcy court.³³¹ Consequently, abrogation using Congress's Bankruptcy Clause powers is no longer an effective means of enforcing the Bankruptcy Code §4 against the states.³³² The Bankruptcy Code's abrogation provision should, §5 however, remain valid as a waiver of the federal government's immunity³³³ and should permit federal court suits against political subdivisions of states, which are not protected by the Eleventh Amendment.³³⁴

§6 Notwithstanding these conclusions, commentators advance three theories in an attempt to obviate (in whole or in part) *Seminole's* implications in bankruptcy cases. Under the first theory, Eleventh Amendment immunity doctrine would not apply to actions filed in the bankruptcy courts because bankruptcy courts are not Article III courts (Part IV.A.1). Under the second, the bankruptcy courts would be able to bind states in matters that require only notice, rather than service of process, because the Eleventh Amendment only prohibits "suits" against states (Part IV.A.2). Under the third, Congress would be authorized to abrogate states' immunity in Bankruptcy Code cases by using its Fourteenth Amendment powers rather than its Bankruptcy Clause powers (Part IV.A.3).

1. Does the Eleventh Amendment Apply in Bankruptcy Court?

The Bankruptcy Code complicates immunity doctrine because bankruptcy courts have jurisdiction over both federal and state law causes of action,³³⁵ state courts have concurrent jurisdiction over most federal bankruptcy law causes of action,³³⁶ bankruptcy actions are virtually always enforced by private parties, and bankruptcy judges are not Article III judges.

Most courts simply assume that states are as immune from suit in federal bankruptcy court as they are in other federal courts.³³⁷ Some commentators suggest, however, that the Eleventh Amendment may not apply in bankruptcy court because bankruptcy courts are "Article I" rather than "Article III" courts.³³⁸ The argument, which relies on the "plain meaning" of the Eleventh Amendment and of Article III, is straightforward: because the Eleventh Amendment only limits federal courts' Article III "judicial power,"³³⁹ the Amendment only applies to courts established under Article III. If bankruptcy courts were established under Article I and did not exercise Article III powers, then the Eleventh Amendment would not limit bankruptcy §7 courts' powers.³⁴⁰ Consequently, states would not be immune from suits filed in bankruptcy court. This argument fails, however, for several reasons.³⁴¹

First, although the bankruptcy courts are not freestanding, independent Article III courts, and bankruptcy judges are not Article III judges, the bankruptcy courts are not Article I courts.³⁴² In 1978, when Congress first enacted the Bankruptcy Code, it established a bankruptcy court for each judicial district (as an "adjunct" to the district court).³⁴³ Congress granted the bankruptcy courts jurisdiction over all bankruptcy cases and all civil proceedings that arose under the Bankruptcy Code or arose in or related to a bankruptcy case.³⁴⁴ Congress also granted bankruptcy judges the power to hear and determine all matters within the bankruptcy courts' jurisdiction. Nevertheless, because the bankruptcy judges lacked (and still lack) the critical attributes of life-tenure, removal only by impeachment, and salary protection,³⁴⁵ they were not (and are not) Article III judges.³⁴⁶

In 1982, the Supreme Court held that the congressional grant of extensive Article III federal judicial powers to an independent court made up of non- §8 Article III judges was unconstitutional.³⁴⁷ In 1984, Congress resolved this constitutional defect by

modifying bankruptcy courts' jurisdiction. Under the current structure, the bankruptcy judges appointed in each federal judicial district constitute a "unit" of that district's federal district court.³⁴⁸ This "unit" is "known as" the bankruptcy court.³⁴⁹ In other words, the bankruptcy courts are administrative components of the district courts rather than freestanding federal courts.³⁵⁰ The jurisdictional statutes grant the district courts, rather than the bankruptcy courts, original and exclusive jurisdiction over all bankruptcy cases and original but not exclusive jurisdiction over all civil proceedings that arise under the Bankruptcy Code or arise in or relate to a bankruptcy case.³⁵¹ Congress has authorized each district court to refer all bankruptcy matters to the bankruptcy court for that district.³⁵² Each district court has, in fact, referred all bankruptcy matters to its bankruptcy court.

In summary, bankruptcy courts are not Article I legislative courts. Rather, they are a part of the judicial branch. Indeed they are a component (a "unit") of the district courts. At best, a bankruptcy court is a unique hybrid, an arm of an Article III court that serves only to determine matters that arise under or relate to a specific Article I statute. Simply stated, the bankruptcy court is an inextricable part of the district court itself. The same immunity concepts apply.

Second, federal courts exercise Article III judicial power over federal question causes of action.³⁵³ If there were no bankruptcy courts, federal district courts would exercise generalized jurisdiction over federal bankruptcy law, as they do over most other federal laws.³⁵⁴ If district courts heard bankruptcy matters, states would be protected by the same immunity that protects the states in other federal question matters.

*9 Bankruptcy jurisdiction differs from general federal question jurisdiction, of course, because Congress has created specialized bankruptcy courts and specialized bankruptcy judges. As a result of the referral of jurisdiction to the bankruptcy courts, bankruptcy matters rarely come before the district court. Instead, they are filed in and proceed to their conclusion almost exclusively in the bankruptcy courts (excepting appeals). Nevertheless, the district court may withdraw the reference any time, with respect to all or any part of a bankruptcy case, on its own motion or the motion of any party, for cause shown.³⁵⁵ There is no dispute that the states enjoy immunity if a bankruptcy matter is tried in a federal district court.³⁵⁶ Consequently, if the states were not immune from suit in the bankruptcy courts, a state that was sued in bankruptcy court could simply move for a withdrawal of the reference.³⁵⁷ The district court is likely to grant such a motion.

Although the Bankruptcy Code does not define "cause" for removal, courts have suggested that the district court should consider factors such as judicial economy, uniformity of bankruptcy administration, reduction of forum shopping and confusion, and the economic use of the debtor's and creditors' resources.³⁵⁸ Applying these types of factors, courts commonly withdraw the reference in proceedings in which the defendant demands a jury trial. Removal in these cases fosters efficiency because bankruptcy courts cannot conduct jury trials without the parties' consent. Also, in non-core proceedings, the parties are entitled to *de novo* review of the bankruptcy court's findings, but the Seventh Amendment prohibits *de novo* review of jury verdicts.³⁵⁹

The immunity issue presents at least as strong a case for withdrawal. Cause would appear to exist if the consequence of proceeding in bankruptcy court rather than district court would be a substantial impairment of the state's rights. This would be the case if the state is not immune from suit in bankruptcy court but is immune from suit in district court. Denying the state immunity *10 in bankruptcy court, but granting it immunity in district court, would also impair uniformity and foster inappropriate forum shopping.

Third, all of the powers bankruptcy judges exercise derive from the district courts.³⁶⁰ Bankruptcy courts do not exercise all of the district courts' Article III powers,³⁶¹ but they clearly exercise some Article III powers.³⁶² The Supreme Court did not prohibit Article III adjunct courts from exercising any judicial powers; it simply prohibited them from exercising extensive judicial powers without adequate coordination and review by an Article III court.³⁶³ The Eleventh Amendment applies to any exercise of judicial powers, including by non-Article III bankruptcy judges.³⁶⁴

Fourth, it is unlikely that the drafters or ratifiers of the Eleventh Amendment expressly considered whether states would be immune from suit in "bankruptcy courts." Although the Bankruptcy Clause grants Congress the power to enact uniform laws on the subject of bankruptcies,³⁶⁵ the first federal bankruptcy law was not effective until 1800, two years after the Eleventh Amendment became effective.³⁶⁶ That law, and the other federal bankruptcy laws enacted during most of the ensuing century, was limited in scope and *11 short-lived in duration.³⁶⁷ Comprehensive federal bankruptcy legislation has been in force only since 1898, one hundred years after the Eleventh Amendment.³⁶⁸ Even if the drafters had considered the possibility that Congress would enact federal bankruptcy legislation, they presumably would have expected the federal courts to exercise the same degree of jurisdiction over federal bankruptcy law as they did over other federal laws. It is hard to imagine that the drafters could have contemplated the modern hybrid under which specialized non-Article III courts and specialized judges exercise

jurisdiction by referral over not only bankruptcy cases but also non-bankruptcy matters that arise in or relate to bankruptcy cases.³⁶⁹

Fifth, some commentators argue that excluding bankruptcy courts from the reach of the Eleventh Amendment violates the spirit of the Amendment and is inconsistent with the Court's expansive reading of the Amendment in cases such as *Seminole*.³⁷⁰

*12 In summary, the Eleventh Amendment applies to suits³⁷¹ filed against states in federal bankruptcy court to the same extent that it applies to suits filed against states in federal district court.

The next question is whether every bankruptcy action that affects states constitutes a “suit against the state.”

2. Does Every Bankruptcy Action Require a “Suit Against the State?”

A discrete but significant issue blunts *Seminole's* impact in bankruptcy cases, at least to a limited degree. This issue arises from the fact that the Eleventh Amendment's jurisdictional bar extends only to “any suit at law or in equity” commenced by a citizen against a state.³⁷² The Supreme Court made clear in *Cohens v. Virginia*³⁷³ that a judicial proceeding might affect the state's interests without being a “suit” for purposes of the Eleventh Amendment, even if the proceeding expressly names a state as a party.

In *Cohens*, a state had sued an individual in state court. After the state court rejected the individual's federal law defense, the individual brought a writ of error in federal court to review the state court's decision. The Court held that the writ was not a “suit” because (i) the individual did not seek to prosecute or pursue a claim, demand or request, in a court of justice, for the purposes of recovering or being restored to a personal thing that had been withheld from him, (ii) the state was given notice but was not served with process and could not be compelled to appear, and (iii) the writ was asserted defensively.³⁷⁴ The Court added that, even if it were a suit, it was not *13 “against” the state because it was asserted defensively in a proceeding reviewing a decision that had been rendered in a suit by the state.³⁷⁵

A recent bankruptcy court, summarizing *Cohens's* analysis, has stated that: “a suit consists of: (1) an adversarial proceeding, (2) which arises as a result of a deprivation or injury, (3) which involves at least two parties, (4) which compels the attendance of the parties, (5) which asserts and prosecutes a claim against one of the parties, and (6) which demands the restoration of some thing from the defending party.”³⁷⁶ The last factor must be clarified because a “suit,” for Eleventh Amendment purposes, includes an action in which the plaintiff seeks any legal or equitable remedy, including injunctive or declaratory relief against the state.³⁷⁷

Do bankruptcy cases involve suits against the state? The answer is complicated because the bankruptcy case itself does not appear to satisfy the definition of “suit,” yet many of the proceedings within the bankruptcy case do appear to be suits.

In somewhat over-simplified terms, when a bankruptcy case is filed, the court takes jurisdiction over the debtor and property of the debtor's estate.³⁷⁸ The debtor's primary object is a discharge of pre-existing debt. The price the debtor pays for this discharge depends on the type of case the debtor files. In a liquidation case, the debtor essentially forfeits all of his non-exempt assets in exchange for the discharge. A trustee collects and liquidates all of the debtor's (non-exempt) property and distributes the proceeds to creditors in accordance with the priorities established by the Bankruptcy Code.³⁷⁹ Alternatively, the debtor might choose to forego a portion of its future earnings in exchange for the discharge. In such a case, the debtor retains control of the property and pays a portion of its debts over time under an individual wage-earner plan or business reorganization plan.³⁸⁰ In both types of cases, creditors (collectively, although not necessarily individually) benefit from the cost-savings and efficiency that accompanies a collective enforcement proceeding.

*14 The bankruptcy case itself has none of the common attributes of a suit. It is not an adversarial proceeding; it does not assert a claim or cause of action against any creditor or interest holder; it does not seek to remedy an injury or restore any thing of which the debtor has been wrongly deprived; and it does not compel any person or entity other than the debtor to attend any judicial proceeding.³⁸¹ Rather, as in *Cohens*, creditors (including states) are given notice and an opportunity to participate.³⁸²

Also, as in *Cohens*, a creditor will be bound by the discharge whether or not the creditor participates in the case.³⁸³ The discharge clearly “impairs” creditors' non-bankruptcy law rights, because it prohibits creditors from collecting discharged debts.³⁸⁴ This impairment does not, however, transform the bankruptcy case into a suit. The bankruptcy case affects the state's interests in a manner similar to the writ of error in *Cohens*. The Bankruptcy Code bestows a federal right (the discharge) upon a discharged debtor just as the federal law at issue in *Cohens* bestowed a federal right upon the defendants. As in *Cohens*, the debtor may assert this right in defense to an action filed by a state to collect on a discharged debt. Consequently, the courts have long held that the bankruptcy case that bestows this right is not a suit against the state.³⁸⁵

During the course of the bankruptcy case, however, the court may enter a variety of orders that bind particular creditors and other entities. For example, consider the most common disputes between states and debtors- *15 those relating to taxes. Among

other matters, the bankruptcy court might: (1) determine the amount of a state tax claim,³⁸⁶ (2) determine whether a tax claim is entitled to priority of distribution in the bankruptcy case, vis-à-vis other claims,³⁸⁷ (3) determine whether a tax claim is dischargeable in the bankruptcy case,³⁸⁸ (4) determine whether a lien securing a tax claim is valid,³⁸⁹ (5) avoid a lien securing a tax claim,³⁹⁰ (6) enforce the automatic stay to prevent the state from collecting on a tax claim during the bankruptcy case and, perhaps, hold the state in contempt and compel the state to pay damages for violating the stay,³⁹¹ (7) enforce the discharge injunction to prevent the state from collecting on a tax claim that was discharged in the bankruptcy case, and, perhaps, hold the state in contempt and compel the state to pay damages for violating the injunction,³⁹² (8) permit the trustee to sell, lease, or otherwise dispose of property subject to a tax lien,³⁹³ (9) determine the amount of and compel the state to turnover a tax refund due to the debtor,³⁹⁴ (10) compel the state to return to the trustee tax payments made to the state before the filing of the bankruptcy case in preference to other creditors,³⁹⁵ or (11) bind the state to the treatment accorded to a tax claim under a confirmed plan of reorganization.³⁹⁶ Other relationships between the debtor and the state may give rise to other bankruptcy proceedings. For example, if the state is the debtor's landlord, the debtor might seek to assume or reject the lease.³⁹⁷ If the debtor is the state's supplier, the debtor might seek to collect from the state in a traditional breach of contract action.³⁹⁸ All of these proceedings ultimately facilitate the collection and liquidate assets, determination of claims, distribution of assets, and discharge of the debtor. Many, however, particularly those that arise under non-bankruptcy ***16** law or seek to bind one specific party, look suspiciously like "suits." Can the trustee effectively bind the state in these types of proceedings without actually "suing" the state and, consequently, without implicating the Eleventh Amendment?

Some argue that bankruptcy proceedings, of any kind, are not suits because they are dependent on the bankruptcy case, which itself is not a suit.³⁹⁹ This approach is simplistic and overly broad.⁴⁰⁰ Others suggest that every bankruptcy court proceeding is barred by the Eleventh Amendment.⁴⁰¹ This approach is simplistic and overly restrictive. More appropriately, it seems that some bankruptcy proceedings are suits and others are not. Consequently, the courts should examine each proceeding separately.

A bankruptcy court's orders may flow from three distinct types of proceedings, namely, adversary proceedings commenced by complaint and summons,⁴⁰² contested matters commenced by motion,⁴⁰³ and administrative matters based simply upon notice, an opportunity for objection, and an opportunity for a hearing.⁴⁰⁴ To determine whether a bankruptcy proceeding involves a suit against a state, the court should apply the *Cohens/Barrett* factors in light of both the nature of the action and the process by which the state is bound. Post-*Seminole* bankruptcy cases provide little guidance in this venture. Although many cases hold that the Eleventh Amendment bars bankruptcy court actions against states, the vast majority of these cases do not expressly consider whether a particular action involves a "suit."⁴⁰⁵ The relatively few cases that consider whether a particular proceeding is a ***17** "suit"⁴⁰⁶ generally involve discrete issues such as the binding effect of the discharge or the determination of objections to a state's claim.⁴⁰⁷ These cases do not establish broad guidelines applicable to other types of proceedings.

The following discussion tests three broad generalizations that seem to flow from applying the *Cohens/Barrett* factors to bankruptcy proceedings. These generalizations are not universally applicable; they must be applied to each type of proceeding in light of those factors.

a. Administrative Determinations

First, most administrative determinations that are made after the state is given notice and an opportunity to participate probably do not involve a suit against the state. A corollary to this generalization is that due process requires that the court be vigilant to ensure that the debtor does not attempt to bind the state based solely on notice in a matter that requires a complaint, summons and adversary proceeding (which may be a suit).⁴⁰⁸

The administrative matters most likely to affect a state's claims against the debtor are the automatic stay, the determination of the amount and priority of the state's claim, the treatment of and/or distribution on the state's claim, and the debtor's discharge and associated discharge injunction. To determine whether these matters involve "suits," consider the processes by which these orders are entered and the substantive effect that these orders have on the state.

First, the automatic stay, as its name suggests, takes effect automatically upon the filing of the bankruptcy case.⁴⁰⁹ The stay affects the state because, among other things, the stay prohibits a state from taking action to collect on its pre-bankruptcy claims.⁴¹⁰ Nevertheless, the imposition of the stay does not occur in the context of a suit. No motion, complaint or even advance notice is required before the stay is imposed. The stay does not assert any claim or demand against the state, seek to redress any injury or deprivation, ***18** threaten the state's treasury, or compel the state to appear in court. Moreover, the stay is imposed only as a temporary device to maintain the status quo. The state may obtain relief from the stay in appropriate circumstances,⁴¹¹ and the stay will terminate as automatically as it arose when the case is closed or the discharge is granted or denied.⁴¹² Although

the imposition of the stay is not a suit, the debtor may be required to take action against the state if the state ignores or violates the stay. Whether an action to enforce the stay might be a suit will be considered below.

Second, the discharge injunction, in contrast, is imposed only after notice. If the debtor is liquidating, the creditors will receive notice and an opportunity to object to the debtor's discharge.⁴¹³ The Bankruptcy Code determines the treatment accorded to each claim in a liquidation case.⁴¹⁴ In contrast, if the debtor is establishing a plan for the repayment of all or a portion of its debts, the plan will determine the treatment of each creditor's claim (within constraints imposed by the Bankruptcy Code).⁴¹⁵ Creditors will be given an opportunity to object to the confirmation of the plan.⁴¹⁶ Moreover, secured creditors will be given an opportunity to vote to accept or reject a chapter 12 family farmer plan or Chapter 13 wage-earner plan, and all impaired creditors will be given an opportunity to vote with respect to a Chapter 11 business reorganization plan.⁴¹⁷ Plan confirmation (and, in chapter 12 and 13 cases, payment under the plan) binds creditors and discharges the debtor from all debts dealt with in the plan.⁴¹⁸ Confirmation essentially replaces old the debts with the debtor's new obligations under the plan. Discharge is accompanied by a discharge injunction that prohibits creditors from collecting discharged debts.⁴¹⁹

Plan confirmation, treatment of the state's claims under the plan, discharge of the state's claims, and the attendant discharge injunction flow from proceedings in which the state is given notice and an opportunity to participate. As in *Cohens*, the state is neither served with process nor compelled to *19 appear. Although the state will be bound whether or not it chooses to participate, the proceedings concern the debtor and the distribution of the debtor's property, not the state. They are not adversarial proceedings and they involve no action directly "against" the state. They do not assert any claim or demand against the state, seek to redress any injury or damage, or demand the restoration or recovery of anything from the state. In short, these orders are not entered in the course of any "suit" against a state, for Eleventh Amendment purposes.

Two circuit courts and several lower courts have held that the discharge, discharge injunction, and plan provisions concerning the treatment of a state's claims do not involve suits against the state, at least where the state initiates the action challenging the discharge, discharge injunction, or plan. *Texas v. Walker*⁴²⁰ involved a former state university professor who filed a bankruptcy case. He received a discharge of his debts, including a debt arising from the state's claim for conversion and breach of contract. The state had not participated in the case.⁴²¹ When the state later sued the former professor to enforce the claim, the professor raised the discharge injunction as a defense.⁴²² The state argued that the Eleventh Amendment prohibited the discharge and that the state could not have waived its immunity because it had not participated in the bankruptcy case.⁴²³ The Fifth Circuit held that the debtor's discharge did not implicate the Eleventh Amendment because the state had never been compelled to appear as a defendant in federal court against its will.⁴²⁴ The state had the option to participate in the case. If it received notice but chose not to participate, its claim would be discharged. The discharge injunction would bar the state from collecting on the claim.⁴²⁵

*20 Similarly, in *Maryland v. Antonelli Creditors' Liquidating Trust*,⁴²⁶ state taxing authorities sued to recover taxes from a trust that had been created under a confirmed plan of reorganization. The taxing authorities had received notice of the plan confirmation hearing but had chosen not to object to the plan. The Fourth Circuit held that the taxing authorities were bound by the terms of the plan confirmation order.⁴²⁷ As in *Walker*, the court reasoned that the state had never been named as a party or compelled to appear in federal court.⁴²⁸ The taxing authorities had the option to appear and object to the plan. If they chose not to, they would be bound.⁴²⁹ The court also reasoned that the confirmation order did not implicate the Eleventh Amendment because the confirmation of the plan had nothing to do with the federal courts' jurisdiction over the state. Instead, it was entered under the bankruptcy court's jurisdiction over the debtor and over property of the debtor's bankruptcy estate.⁴³⁰

In both *Walker* and *Antonelli*, the actions challenging the bankruptcy courts' orders were commenced by the state, rather than against the state. As with the automatic stay injunction, however, the debtor may be forced to initiate action against a state if the state ignores or violates the discharge injunction or the provisions of a confirmed plan. Again, whether such an enforcement proceeding is a suit against the state is discussed below.

Third, the debtor may also ask the bankruptcy court to determine the amount, allowability and priority of a state's claim.⁴³¹ Although nonbankruptcy law determines the amount of a claim, the Bankruptcy Code determines the allowability⁴³² and priority⁴³³ of a claim. If the state is listed as a creditor on the debtor's schedule of liabilities, the state will receive notice *21 of the case and an opportunity to file a claim.⁴³⁴ If the state chooses not to file a claim, the amount of the claim will be fixed at the amount listed by the debtor.⁴³⁵ If, however, the state disputes the amount listed by the debtor, the state may file a claim.⁴³⁶ If the debtor has listed the state's claim as being contingent, unliquidated or disputed, the state must file a claim in order to vote on a plan and receive distribution on the claim.⁴³⁷ If the state properly files a claim, the claim is deemed allowed unless a party in interest objects.⁴³⁸ The debtor also may file a motion to determine the amount and priority of state's claim.

The question that commonly arises is whether the proceeding commenced by an objection to the state's claim is a suit against the state. The courts have virtually unanimously held that it is not, for two distinct reasons. First, the filing of a proof of claim usually constitutes a waiver of the state's immunity, at least with respect to the determination of the claim and compulsory counterclaims.⁴³⁹ Second, some courts have held that the proceeding commenced by the objection to a claim is an action by the state (to enforce the claim), rather than a proceeding against the state (to determine the objection).⁴⁴⁰ The leading case considering these issues is *Gardner v. New Jersey*,⁴⁴¹ a railroad reorganization case.

In *Gardner*, the state had filed a claim for unpaid taxes. The proof of claim also asserted that the amounts due were secured by a lien on all of the debtor's land and tangible property located in the state.⁴⁴² The debtor and trustee objected to the amount of the claim and priority of the lien. The state argued that any determination of the objections would be an improper suit against the state.⁴⁴³ The Supreme Court disagreed. It held that neither the determination of the amount of the claim, nor the determination of the validity, ***22** priority and extent of the liens constituted a "suit" against the state.⁴⁴⁴ The Court reasoned that, by filing a claim with the reorganization court, the state had used a "traditional method of collecting a debt."⁴⁴⁵ "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 by the consequences of that procedure."⁴⁴⁶ "If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim."⁴⁴⁷

Similarly, in *In re Barrett Refining Corporation*,⁴⁴⁸ the debtor had filed a plan that treated the state's tax pollution fine and penalty claim partially as a priority claim and partially as a non-priority claim. The state argued that the Eleventh Amendment prohibited the bankruptcy court from exercising jurisdiction to adjudicate the state's claim.⁴⁴⁹ The court disagreed, reasoning that the bankruptcy case was not a suit, that the state had waived its immunity in any event by filing a claim, and that the filing of a claim constituted an affirmative demand for relief by the state against the debtor.⁴⁵⁰

These cases establish that a proceeding to determination objections to a state's proof of claim does not constitute a suit. We must also consider whether the process by which a claim is allowed in the absence of a proof of claim involves a suit. In such a case, the debtor controls the determination of the state's claim, either by listing the claim on the schedules or commencing a contested matter (by motion) to determine the amount of the claim. In either case, there is no action by the state that might constitute a waiver of immunity. Moreover, a contested matter looks like a suit because it is an adversarial matter between two parties, involving a claim. Absent bankruptcy, the state could choose the forum in which to prosecute its claim. Thus, one might argue that forced determination of a claim in federal court is akin to a ***23** declaratory judgment action, which would be barred under the Eleventh Amendment.

Most courts agree, nevertheless, that the determination of a claim is not a suit even in these circumstances. The court is called upon to determine the amount of a claim asserted by the state, not a claim *against* the state.⁴⁵¹ Moreover, a motion to determine the amount of a claim does not compel the state to appear. Finally, fixing the amount of the state's claim is merely a necessary prelude to making distributions to the state.

Fourth, the final inquiry relevant to administrative determinations concerns proceedings to enforce bankruptcy injunctions. As previously noted, no suit is required for the issuance of the automatic stay or discharge injunction. If, however, the state ignores these injunctions by attempting to collect its claims, the debtor or trustee may be required to take action against the state to enforce the stay or discharge. The debtor might assert an affirmative defense in a case commenced against the debtor by the state, commence a contested matter by motion in the bankruptcy court, commence an adversary proceeding by complaint in bankruptcy court,⁴⁵² or commence a suit by complaint in state court to enforce the injunction. It is necessary to distinguish between the action in which the injunction is obtained and the action in which the injunction is enforced.

An adversary proceeding or contested matter to enforce a bankruptcy injunction has many of the classic elements of a suit. It is an adversarial proceeding by one party against another, that seeks to redress an injury (the violation of the injunction), through equitable relief (enforcement of the injunction), and that may request monetary damages, costs or sanctions.⁴⁵³ Nevertheless, if the proceeding in which the injunction is entered is not a suit, it seems odd that the proceeding to enforce the injunction would be a suit. If that were the case, the state could simply ignore the injunction and then claim immunity in the enforcement proceeding.

Moreover, if the debtor asserts the stay or discharge injunction defensively, ***24** there is no suit against the state.⁴⁵⁴ Why should the effectiveness of the injunction turn on whether the debtor asserts the injunction (i) defensively, in the state's suit to enforce a claim in violation of the stay or discharge injunction, or (ii) offensively, in the debtor's action to prevent the state from pursuing non-judicial enforcement of the same claim? This is, of course, the heart of immunity doctrine. Claims that may be asserted defensively when the state sues a citizen may not be asserted offensively when the state has not sued.

At least one court has held that the Eleventh Amendment does not bar the debtor's adversary proceeding against the state to enforce the discharge injunction because the proceeding is not a suit against the state.⁴⁵⁵ In contrast, most courts have held that the Eleventh Amendment bars an adversary proceeding to enforce the automatic stay.⁴⁵⁶ These courts did not, however, expressly consider whether an action to enforce the automatic stay is a suit for Eleventh Amendment purposes. It seems odd that the Eleventh Amendment would bar an action to enforce the temporary stay but would not bar an action to enforce the permanent discharge injunction.

Moreover, an action to enforce the stay merely prevents the state (temporarily) from enforcing its claims against the debtor; it does not assert claims against the state. Or does it? A valid basis for barring an action to enforce the stay may lie in the nature of the relief the debtor requests. In stay violation proceedings, the debtor often demands a monetary award, usually consisting of attorneys' fees and costs of the action. In discharge enforcement, in contrast, the debtor usually seeks only to enforce the injunction. Although the Eleventh Amendment applies to actions for both monetary and injunctive relief, the relief the debtor seeks may be significant because the enforcement proceeding does not impose the injunction. The injunction was already imposed in an action that the Eleventh Amendment did not bar. If the debtor requests sanctions, however, the debtor has added a claim for additional relief. Consequently, perhaps the debtor's enforcement proceeding ^{*25} is not a suit if the debtor merely seeks to enforce the automatic stay or discharge injunction, but is a suit if the debtor requests additional relief, such as sanctions.⁴⁵⁷ Even the compromise works, however, only if the enforcement proceeding escapes the reach of the Eleventh Amendment by virtue of its nexus to the original proceeding in which the injunction was imposed, a result which is at best questionable.

b. Adversary Proceedings

The second generalization is that adversary proceedings by the trustee against the state usually do involve a suit against the state. A corollary to this generalization is that an adversary proceeding in which the state sues the trustee or debtor does involve a "suit" but the suit is not barred by the Eleventh Amendment because it is a suit "by" rather than "against" the state.⁴⁵⁸ (Waiver principles govern the extent to which counterclaims that the trustee or debtor asserts against the state in such a matter are barred.⁴⁵⁹)

Adversary proceedings are, essentially, mini-lawsuits within the bankruptcy case. They are commenced by a complaint, summons and issuance of process; are styled "plaintiff vs. defendant;" and are governed by bankruptcy procedural rules that incorporate or mirror the Federal Rules of Civil Procedure.⁴⁶⁰

The debtor or trustee must file an adversary proceeding in order to: recover money or property from the state; determine the validity, priority or extent of the state's lien or other interest in property; determine the dischargeability of certain of the state's claims; enjoin the state or obtain other equitable relief against the state; or obtain a declaratory judgment against the state relating to any of these matters.⁴⁶¹ Applying the *Cohens/Barrett* factors, an adversary proceeding clearly is a (1) an adversarial proceeding, (3) which ^{*26} involves at least two parties, and (4) which compels the attendance of the parties. Whether these proceedings also (2) arise as a result of deprivation or injury, (5) assert and prosecute a claim against the state, and (6) demand the restoration of some thing from the state (or injunctive or declaratory relief) depends on the nature of the relief requested in the proceeding.

First, virtually all proceedings to recover money or property from the state clearly meet these final three *Cohens/Barrett* factors. Consider three types of adversary proceedings in which the trustee typically might seek to recover money or property from the state: state law or non-bankruptcy federal law claims that relate to the case (*e.g.*, breach of contract), avoidance powers (*e.g.*, preferential or fraudulent transfers),⁴⁶² and turnover of property of the estate held by the state (*e.g.*, tax refund).

An action falling in either of the first two categories clearly is a suit. Nonbankruptcy law causes of action seek to remedy an injury or damage recognized under state or federal law. Avoidance actions seek to recover value transferred from the debtor to the state before the case was commenced. Not surprisingly, several cases have held that the Eleventh Amendment bars the debtor or trustee from prosecuting against a state an adversary proceeding seeking to recover money or property from the state under either bankruptcy law or non-bankruptcy law causes of action.⁴⁶³

Similarly, a turnover action seeks to recover money or property from the state. In theory, a turnover proceeding simply requests that the state turn property of the estate over to the trustee so that the property may be ^{*27} administered in accordance with the provisions of the Bankruptcy Code.⁴⁶⁴ Congress has granted the bankruptcy courts exclusive jurisdiction over all of the debtor's property, wherever located.⁴⁶⁵ In theory, a "simple" turnover proceeding would not affect the state's interests at all. Turnover actions rarely present the simple case of a state holding property that clearly belongs to the debtor, however. Often, the debtor demands the "turnover" of a tax refund or monies due under a contract. These actions are often difficult to distinguish from disputed tax or contract claims. The state commonly disputes the amount due, or claims an interest in the "property," often for

purposes of setoff against claims the state asserts against the debtor. In these situations the court cannot order a turnover until it first resolves the dispute and determines whether the state holds any interest in the property. The Eleventh Amendment clearly bars a “turnover” proceeding in these circumstances.⁴⁶⁶

Nevertheless, at least one court has held that the Eleventh Amendment does not bar the court from determining whether property claimed by the state but held by a third party is subject to turnover.⁴⁶⁷ That court acknowledged that the Amendment barred the debtor's complaint to determine and extinguish the state's claims to the property.⁴⁶⁸ The court noted, however, that, if the property was turned over, the state might be compelled to waive immunity by filing a claim asserting its interest in the property.⁴⁶⁹

In any event, the courts agree that the debtor can bring an action to compel turnover by the state official who has possession or constructive possession of property that is property of the estate.⁴⁷⁰ The availability of such relief (which is not so readily available in actions seeking to recover damages) ***28** substantially diminishes the enforcement problem in true turnover proceedings.⁴⁷¹

Second, the debtor or trustee might commence an adversary proceeding to determine the validity, priority or extent of a lien that the state asserts against estate property. Lien determination presents a more difficult case than an action to recover money from the state. This is because lien determination, like claim determination, involves a claim by the state rather than a claim against the state. Nevertheless, a lien determination proceeding probably is a suit against the state (if the state has not filed a claim).

First, the proceeding appears to have all of the elements of a suit. Although it might not seem to seek any recovery from the state, it does in fact seek to restore property to the debtor. A lien impairs the debtor's interest in property. An adversary proceeding seeking to determine the validity of a lien, or a contested matter seeking to avoid a lien, demands that the state restore the property to the debtor. Second, a proceeding to determine the validity of a lien is essentially a request for declaratory relief, which the Eleventh Amendment bars. Third, lien determination is not “merely a necessary prelude” to any distribution to the state. In this respect, an unsecured claim is fundamentally different from a claim secured by a lien. A claim is a personal right against the debtor. If an unsecured creditor chooses not to file a claim, the claim will be discharged. If a creditor does file a claim, the court must determine the amount of the claim and the validity of any lien as a necessary prelude to making any distribution to the creditor.⁴⁷² If, however, a secured creditor chooses not to file a claim or bring action in the bankruptcy case to establish the validity or extent of its lien, the claim may be discharged, but the lien will ride through bankruptcy unimpaired.⁴⁷³ Thereafter, the lien may be enforced in an *in rem* action against the property (in that action, the debtor may dispute the lienholder's rights). Consequently, a proceeding that forces the state to defend and prove the validity and extent of its lien in bankruptcy court significantly impairs the state's rights. It is not merely a necessary prelude to distribution because the lienholder may choose to forego any distribution in the bankruptcy case and pursue its *in rem* rights outside of bankruptcy instead.

This conclusion is not contrary to *Gardner*.⁴⁷⁴ The *Gardner* Court held that the Eleventh Amendment did not bar the bankruptcy court from ***29** determining the amount of a claim and validity and priority of a lien. In *Gardner*, however, the state had waived its immunity by filing a claim.⁴⁷⁵ Similarly, where the state has waived immunity by participating in the plan confirmation process, the terms of the plan may determine and extinguish the lien.⁴⁷⁶

A third type of proceeding involves “dischargeability.” Even if the debtor receives a general discharge, certain types of debts are deemed to be “non-dischargeable” in individual debtors' bankruptcy cases.⁴⁷⁷ A ruling that a particular debt is not dischargeable allows the creditor to enforce its claim against the debtor notwithstanding the discharge. An adversary proceeding is required to determine dischargeability. Whether the adversary proceeding is commenced by the debtor or the creditor, however, depends upon the nature of the claim.

For certain categories of potentially non-dischargeable debts, the creditor is required to file a complaint to determine dischargeability.⁴⁷⁸ Such a proceeding is a suit, but it is by, rather than against, the state. If the creditor does not file a timely complaint to determine dischargeability, the debt will be discharged.⁴⁷⁹ This result follows even if the state is the creditor because the state is not excused from the provisions of the Bankruptcy Code that ***30** require the timely filing of claims and complaints to determine dischargeability.⁴⁸⁰

For the other categories of non-dischargeable debts, the Bankruptcy Code does not require that the creditor take any action in the bankruptcy case to determine dischargeability.⁴⁸¹ This latter group includes, significantly, priority tax claims.⁴⁸² The state has little incentive to file a complaint to determine dischargeability with respect to such claims because the state would thereby submit to the court's jurisdiction with respect to the complaint and probably with respect to compulsory counterclaims as well.⁴⁸³ Consequently, the debtor typically will either file a complaint to determine dischargeability or simply wait to see if

the state attempts to enforce the claim after the bankruptcy case is closed. If the state files suit to collect on its claim, the debtor will defend on the ground that the claim was discharged. In that case, the state court can determine the dischargeability issue. The state probably will have waived any state court immunity by commencing the suit. If, however, the state employs non-judicial collection efforts, the debtor typically will ask the bankruptcy court to reopen the bankruptcy case to hear the debtor's adversary complaint to determine dischargeability.⁴⁸⁴

Does the Eleventh Amendment bar the debtor's adversary proceeding to determine the dischargeability of a state's claims? Several courts have held ***31** that it does (although these cases did not expressly consider whether the proceeding was a "suit").⁴⁸⁵ Such a proceeding is adversarial, compels the state's attendance, and is clearly a suit. It is less clear, however, whether the suit is against the state.

The proceeding concerns the state's claims against the debtor, not the debtor's claims against the state. Also, unlike a lien determination proceeding, a dischargeability determination does not impair the state's interests in any particular property. Moreover, the action is closely linked to the discharge itself. Although it may not be a necessary prelude to the discharge, it essentially seeks to define the scope of the discharge.

Certainly, if a claim is held to be dischargeable, the state's interests will be affected. Nevertheless, the impact is no different than the impact of the discharge itself, which most courts have held is not a suit against the state. Arguably, it is inconsistent to allow the discharge of a state's claims, and allow the debtor to raise the discharge as a defense, but to bar the debtor's action to determine dischargeability simply because it occurs in the context of an action by the debtor. Nevertheless, the Eleventh Amendment, as interpreted by *Seminole*, does seem to compel this result. Under immunity doctrine, a party cannot assert a claim affirmatively against a state, but can assert the same claim defensively against the state if the state has waived immunity by filing suit against the party.

Fortunately, the circumstances in which the debtor must raise dischargeability offensively rather than defensively are limited because an unsecured creditor generally must use judicial processes to collect its claim. Tax claimants, however, may impose liens without judicial process. Debtors have no forum in which to raise the discharge injunction defensively in such a case. Moreover, even if the state is required to file suit in state court to collect a claim, the debtor may be subjected to the harassment of non-judicial collection efforts before the suit is filed. The attorney can urge the debtor to remain firm and refuse to pay until the state files suit, then assert the discharge injunction as a defense. At that point the state court will determine whether ***32** the debt was dischargeable. This approach is risky, however, because the debtor cannot be certain that the state court ultimately will find the debt to have been discharged. If the state court holds that the debt was not discharged, the debtor is likely to have incurred additional fees and penalties during the period it refused to succumb to non-judicial collection efforts.

Fourth, adversary proceedings are also required for injunctive or other equitable relief.⁴⁸⁶ An action seeking to enjoin the state typically is considered to be a suit against the state.⁴⁸⁷ As previously discussed, proceedings to enforce the stay or discharge injunction might not be suits (unless they seek affirmative recovery). If, however, the debtor seeks to impose other injunctions on the state, the action is a suit and is barred by the Eleventh Amendment.

c. Contested Matters

Finally, the third generalization is that contested matters determined after the debtor or trustee files a motion may or may not be suits. Contested matters are so varied that it is impossible to extract any general rule. The result will depend on the nature of the particular proceeding (several examples are discussed above).

It might be argued that no contested matter is a suit because contested matters do not compel any party's attendance. A party may appear, and will be bound if it chooses not to appear. Some contested matters, however, might be suits. For example, a contested matter might seek administrative relief, not directed at a particular party (*e.g.*, motion to obtain credit, set a bar date, extend the time for filing a plan).⁴⁸⁸ Others may seek specific relief against a particular party (*e.g.*, motion to use cash collateral and provide adequate protection).⁴⁸⁹ The former are not suits; the latter might be. In contested matters, the court should determine on a case by case basis whether the proceeding is a suit against a state.⁴⁹⁰

In summary, even though a bankruptcy case may affect the interests of a ***33** state, the case itself is not a suit against a state. Also, the Eleventh Amendment does not bar administrative proceedings that do not involve suits against the state. These include discharge, determination of a claim, determination of objections to a claim, determination of objections to the validity, extent and priority of a lien, some dischargeability actions, and perhaps actions to enforce the discharge injunction or automatic stay if the debtor does not seek affirmative recovery.

Certain other proceedings in the bankruptcy case probably are suits against the state. These clearly include adversary proceedings in which the debtor seeks to recover money or property from the state, such as breach of contract actions, preference and other avoidance power actions, most turnover actions, and probably actions to determine the validity, extent and priority

of a lien if the state has not filed a claim. For simplicity, the remainder of this Article will focus on the debtors' options for enforcing these types of actions against the states.

First, however, because it is clear that some bankruptcy actions do involve suits against the state, it is necessary to consider whether Congress might abrogate the state's immunity with respect to those actions.

3. Is the Bankruptcy Code a Creature of the Fourteenth Amendment?

Can Congress abrogate states' immunity from suit in bankruptcy court? *Seminole* suggests that Congress cannot abrogate states' immunity using its Article I powers, but reaffirms that Congress can abrogate states' immunity using its Fourteenth Amendment powers.⁴⁹¹ Debtors, seeking to take advantage of the Fourteenth Amendment "exception," have argued that Congress may use its Fourteenth Amendment powers to abrogate states' immunity in bankruptcy cases, even though the Bankruptcy Code itself is a creature of the Bankruptcy Clause.⁴⁹²

The United States Department of Justice ("DOJ") has been the principal architect of the Fourteenth Amendment argument. The DOJ has intervened in several bankruptcy cases and has filed (on behalf of itself and the United States Attorney General and United States Attorney) a brief supporting the constitutionality of the Bankruptcy Code's abrogation provisions (*i.e.*, section 106(a)).⁴⁹³ The DOJ contends, *inter alia*, that the courts must look at the *34 Constitution in its entirety to determine Congress's powers.⁴⁹⁴ The Court in *Seminole* prohibited Congress from using its Article I powers to abrogate states' immunity, but never considered whether Congress might have achieved the same result using its Fourteenth Amendment powers.⁴⁹⁵ In the bankruptcy context, the DOJ argues that bankruptcy relief is an exclusively federal right available to all national citizens.⁴⁹⁶ Although the rights and privileges of the Bankruptcy Code are secured under Article I, the DOJ suggests that section 5 of the Fourteenth Amendment is designed to guarantee that the states do not infringe on rights granted to national citizens by federal law.⁴⁹⁷ The DOJ concludes that Congress may exercise its powers under section 5 and the Privileges and Immunities/Due Process Clause of the *35 Fourteenth Amendment to abrogate states' immunity from federal court suits seeking to enforce Bankruptcy Code rights.⁴⁹⁸

The DOJ has raised similar arguments in an effort to justify Congress's abrogation of states' immunity under other Article I laws.⁴⁹⁹

Although this argument is simple and, in many ways, compelling, it suffers from several fatal flaws in the bankruptcy context.

The primary problem is that, under the DOJ's reasoning, the Fourteenth Amendment exception would permit Congress to abrogate states' federal court immunity under any law that both grants federal rights to national citizens and allows citizens to enforce those federal rights. If this were true, it would extend to so many federal laws that it would effectively eviscerate *Seminole*. Although some scholars (particularly advocates of the diversity interpretation of the Eleventh Amendment) might argue that this result would be desirable, it is inconsistent with *Seminole's* overruling of *Union Gas*. Consequently, it is necessary to establish a basis for distinguishing those federal laws under which Congress can use its Fourteenth Amendment powers to abrogate states' immunity from those laws under which Congress cannot use its Fourteenth Amendment powers to abrogate states' immunity.

The DOJ attempts to distinguish the Bankruptcy Code from other federal laws by noting that Congress has the exclusive right to regulate bankruptcy and that the federal courts have exclusive jurisdiction of bankruptcy matters. *36⁵⁰⁰ In contrast, both state and federal governments regulate commerce and both state and federal courts exercise jurisdiction over actions arising under Interstate Commerce Clause statutes.⁵⁰¹ There are, however, several defects in this argument.

First, bankruptcy matters are neither the exclusive domain of federal regulation nor the exclusive domain of federal courts. The Bankruptcy Clause gives Congress power to establish uniform laws on the subject of bankruptcies;⁵⁰² however, states can and do regulate the debtor-creditor relationship, including through receivership and exemption laws. Moreover, although federal courts have original and exclusive jurisdiction over bankruptcy cases, state courts share concurrent jurisdiction over federal bankruptcy matters that arise under the Bankruptcy Code, or arise in a bankruptcy case.⁵⁰³

Second, a stronger exclusivity argument could be made with respect to the Indian Commerce Clause than with respect to the Bankruptcy Clause because Congress truly does exercise exclusive regulatory power over Indian affairs. Yet, the *Seminole* Court held that Congress has no power to abrogate states' immunity under an Indian Commerce Clause statute.

Third, and most significantly, it is not clear why federal exclusivity (even if it existed) should determine the extent to which Congress can abrogate states' immunity.

The analysis of whether a law legitimately employs the Fourteenth Amendment to abrogate states' immunity should focus, instead, on the proper scope of the Fourteenth Amendment as a device for implementing federal law. Two questions define this

inquiry. First, is the law an exercise of Congress's Fourteenth Amendment powers (*i.e.*, was the law enacted under the Fourteenth Amendment)? Second, is the law a legitimate exercise of Congress's Fourteenth Amendment powers (*i.e.*, did Congress have power under the Fourteenth Amendment to enact such a law)?⁵⁰⁴

*37 As to the first question, most courts agree that Congress need not expressly state that it is using its Fourteenth Amendment powers, nor even subjectively “intend” to use its Fourteenth Amendment powers. Instead, many courts undertake an “objective inquiry,” in which they ask simply whether Congress *could* have enacted the law under the Fourteenth Amendment.⁵⁰⁵ It is possible, however, that a court would decline to find a Fourteenth Amendment basis for a law if Congress clearly stated that it did not intend to enact the law under its Fourteenth Amendment powers.⁵⁰⁶

*38 Other courts apply the “logical connection” test articulated in *Wilson-Jones v. Caviness*.⁵⁰⁷ In *Wilson-Jones*, the Sixth Circuit considered whether one may “regard the legislation as an enactment to enforce the [Fourteenth Amendment].”⁵⁰⁸ The court reasoned that “[t]he simplest way to meet this requirement is for Congress to declare explicitly that the legislation is passed to enforce Fourteenth Amendment rights.”⁵⁰⁹ If Congress does not explicitly identify the source of its power as the Fourteenth Amendment, “there must be something about the act connecting it to recognized Fourteenth Amendment aims.”⁵¹⁰ Some courts have retitled this test the “rationally related” test.⁵¹¹ Others, applying basically the same test, ask whether the statute has a “rational relation” or “rational connection” to the Fourteenth Amendment.⁵¹²

Courts that find that a statute was or could have been enacted under the Fourteenth Amendment have employed several different, although generally compatible, tests to determine whether the law is “appropriate legislation” within the scope of Congress's Fourteenth Amendment powers.

Several courts have expressly applied the test that the Supreme Court established three decades ago in *Katzenbach v. Morgan*.⁵¹³ Under this test “a statute is ‘appropriate legislation’ under § 5 of the Fourteenth Amendment if the enactment is ‘plainly adapted’ to enforcing the Equal Protection Clause *39 and not prohibited by but is consistent with ‘the letter and spirit of the [C]onstitution.’”⁵¹⁴

In 1997, however, in *City of Boerne v. Flores*,⁵¹⁵ the Court emphasized that Fourteenth Amendment legislation must be designed to remedy or deter constitutional violations, rather than to impose new substantive constitutional rights.⁵¹⁶ In determining whether an act is remedial or deterrent, “there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”⁵¹⁷ *Boerne* modifies *Katzenbach* by prohibiting Congress from creating new substantive rights, even if those rights are “not prohibited by” the Constitution.⁵¹⁸

*40 Several courts have focused on the *Boerne* test;⁵¹⁹ others have used it in conjunction with the *Katzenbach* test.⁵²⁰

Courts applying these tests (or less concrete tests) have held that Title IX⁵²¹ and the Railroad Revitalization and Regulatory Reform Act⁵²² are valid exercises of Congress's Fourteenth Amendment power to abrogate states' immunity. Most courts have held that abrogation under the Americans With Disabilities Act is legitimate under the Fourteenth Amendment,⁵²³ although a *41 couple of courts have disagreed.⁵²⁴ Courts have rejected arguments that abrogation under the Trademark Remedy Clarification Act,⁵²⁵ Family and Medical Leave Act,⁵²⁶ Uniformed Services Employment and Reemployment Rights Act,⁵²⁷ Copyright Act,⁵²⁸ Crime Control Consent Act,⁵²⁹ Resource Conservation and Recovery Act,⁵³⁰ and Emergency Medical Treatment and Active Labor Act⁵³¹ are valid exercises of Congress' Fourteenth Amendment powers. The overwhelming majority of courts have refused to permit Congress to abrogate states' immunity under the Fair Labor Standards Act (“FLSA”),⁵³² although most courts have held that Congress does have *42 authority to abrogate states' immunity under the Equal Pay Act (an amendment to the FLSA).⁵³³ Similarly, most courts have held that abrogation under the Age Discrimination in Employment Act (an amendment to the FLSA) is *43 a valid exercise of Congress's Fourteenth Amendment powers,⁵³⁴ although several courts have disagreed.⁵³⁵

In the bankruptcy context, three circuit courts of appeal and the vast majority of lower courts have held that the Fourteenth Amendment cannot be used to justify section 106(a)'s abrogation of states' bankruptcy court immunity.⁵³⁶ Most of these cases have used the rational relation/logical connection *44 test to determine whether section 106(a) was enacted under the Fourteenth Amendment.⁵³⁷

It is difficult to establish a rational relation or logical connection between the Fourteenth Amendment and the Bankruptcy Code because the Bankruptcy Code was not enacted under the Fourteenth Amendment and is not designed to foster the objectives of the Fourteenth Amendment.⁵³⁸ Neither the Bankruptcy Code, in general, nor section 106(a), in particular, seek to protect citizens against state actions or laws that result in civil rights violations, disparate impact, invidious discrimination, takings without due process, or unequal protection to citizens.⁵³⁹ Instead, the Bankruptcy Code is concerned primarily with establishing a single forum for collective action against a debtor and granting the debtor a discharge of its debts.

The DOJ argues, broadly, that the Fourteenth Amendment extends to all privileges of citizenship, such that any state action that infringes on any federal right available to national citizens violates the Fourteenth Amendment. This argument fails, however, because bankruptcy is not a privilege or immunity of citizenship.⁵⁴⁰ Even if it were, it is not clear how a state's immunity infringes on a debtor's rights in bankruptcy.

Consequently, most bankruptcy scholars and constitutional law scholars reject efforts to extend the Fourteenth Amendment exception to suits filed in federal bankruptcy court to enforce Bankruptcy Code causes of action.⁵⁴¹

To date, only two post-*Seminole* courts have held that section 106(a) is ***45** constitutional under the Fourteenth Amendment.⁵⁴² Each of these cases was appealed; however, the circuit courts declined to consider whether abrogation was appropriate because the states' waiver of immunity mooted the issue⁵⁴³

In summary, the Eleventh Amendment bars suits filed against the states in bankruptcy court to enforce the Bankruptcy Code. Although some administrative proceedings may not involve "suits" against the state, many other proceedings, including most adversary proceedings, do involve suits against the state. As to these matters, Congress cannot use its powers under either the Fourteenth Amendment or the Bankruptcy Clause to abrogate states' immunity. How, then, can the trustee enforce the Bankruptcy Code against the states?

B. ENFORCING THE BANKRUPTCY CODE AGAINST THE STATES

Justice Stevens argued that the *Seminole* majority opinion eviscerates Congress's power to enact federal law because it effectively prevents citizens from suing states to enforce federal law, including the Bankruptcy Code.⁵⁴⁴

This Part identifies five potential means of enforcing federal law against the states, and considers the viability of these alternatives in the context of ***46** the Bankruptcy Code.⁵⁴⁵ First, can the trustee sue the state in federal bankruptcy court if the state waives immunity or consents to be sued (Part IV.B.1)? Second, can the trustee sue the state in state court without the state's consent (Part IV.B.2)? These first two alternatives have received the most attention by commentators because they would provide the simplest and most effective means of litigating against the states in the absence of congressional abrogation. The viability of these enforcement devices depends, however, upon the nature of states' federal court immunity and the scope of states' state court immunity. Parts IV.B.1 and IV.B.2 consider the extent to which these devices are viable after *Seminole* and the extent to which their limitations impair enforcement.⁵⁴⁶

The next three options are suggested by footnotes in the *Seminole* majority opinion.⁵⁴⁷ They are: Supreme Court review of a question of federal bankruptcy law that arises from a state court action (Part IV.B.3), citizen suits filed in federal court against state officials rather than the state itself, (Part IV.B.4), and federal government enforcement suits (Part IV.B.5). Although these methods are viable, they are significantly narrower in scope than the first two options. Parts IV.B.3 through IV.B.5 consider the extent to which these more limited alternatives might be effective in enforcing the Bankruptcy Code against the states.

For simplicity, Part IV emphasizes those actions to which the Eleventh Amendment clearly applies (*i.e.*, "suits"). These include actions seeking to recover money or property from the estate, such as preferential transfers, turnover of tax refunds, and state law contract claims.

1. Sue in Federal Bankruptcy Court if the State Consents or Waives Immunity?

Under traditional common law immunity doctrine, a sovereign may agree (impliedly by waiver or affirmatively by consent)⁵⁴⁸ to be bound in a citizen ***47** suit filed in the state's own court.⁵⁴⁹ Waiver and consent do not completely obviate the immunity hurdle because they require some degree of state cooperation before a suit may proceed. Nevertheless, a chance to sue the state after it has waived immunity or consented to suit is better than no chance at all.

Waiver and consent are compatible with common law immunity doctrine because common law immunity is "merely" a personal privilege granted to the sovereign.⁵⁵⁰ This privilege is a practical necessity because a state's own courts cannot impose justice on the state if the state resists.⁵⁵¹ The state's consent obviates this problem.

Before *Seminole*, courts assumed that the trustee could sue a state in federal bankruptcy court if the state consented to suit or was deemed to have waived its immunity.⁵⁵² This assumption seemed unremarkable because the Supreme Court had routinely held that a state could waive its immunity and consent to suit in federal court, just as a state might waive its immunity and consent to suit in its own courts.⁵⁵³ After *Seminole*, most courts and commentators continue to assume that the trustee may sue a consenting state in §48 bankruptcy court.⁵⁵⁴ *Seminole* throws this conclusion into doubt, however, because it defines states' federal court immunity as a jurisdictional bar rather than a mere personal privilege of the sovereign.⁵⁵⁵ Consequently, after *Seminole*, implied waiver raises different jurisdictional questions than affirmative consent. This Part considers *Seminole's* effect, first, on waiver and, then, on consent.

a. Waiver

Notwithstanding the Eleventh Amendment's jurisdictional bar, a state probably can “waive” immunity and thereby essentially confer jurisdiction upon a federal court, but only in limited circumstances. For purposes of this discussion, “limited waiver” occurs when the state initiates action in federal court and, thereby, subjects itself to the determination of both its claim and compulsory counterclaims.⁵⁵⁶ “Constructive waiver,” in contrast, may occur (to the extent that it remains a viable doctrine) when the state subjects itself to suit in federal court by participating in activities that Congress has regulated.⁵⁵⁷ In contrast, “consent” occurs when the state voluntarily agrees to a suit (Part IV.B.1.b).

The courts generally agree that when a state sues a private citizen in federal court the state “waives” immunity and subjects itself to the court's jurisdiction with respect to certain counterclaims. This limited waiver applies only to counterclaims that are (1) compulsory counterclaims that arise from the same transaction or occurrence as the state's claim,⁵⁵⁸ (2) asserted defensively to reduce the state's claim but not to allow affirmative recovery §49 against the state.⁵⁵⁹ Federal court jurisdiction in these circumstances does not violate the Eleventh Amendment's jurisdictional bar because neither Article III nor the Eleventh Amendment limits federal courts' power over suits by states against citizens. Where the court has jurisdiction over a suit by the state, judicial economy and fairness dictate that it also exercise jurisdiction over a narrowly defined range of related matters that are necessary to resolve the state's suit. If waiver were not viable, states could file suit with impunity in a federal forum, demanding recovery and permitting no objection. Thus, “limited waiver” under the defensive compulsory counterclaim rule, is a practical necessity. Nothing in *Seminole* expressly prohibits the courts from exercising jurisdiction over this limited type of compulsory counterclaim.

In a bankruptcy case, the federal court action that subjects the state to counterclaims usually consists of the filing of a proof of claim in the bankruptcy case.⁵⁶⁰ The Supreme Court has long held that objections to the state's claim are not “suits against the state,” and that the bankruptcy court has jurisdiction to determine those objections in the process of determining the claim.⁵⁶¹ These cases do not, however, elaborate the types of counterclaims that the debtor may assert against a state that has filed a claim. The Bankruptcy Code purports to fill this gap by defining the scope of waiver.

The Bankruptcy Code contains two distinct waiver provisions. The first §50 deals with claims that arise from the same transaction (*i.e.*, recoupment); the other deals with claims that arise from different transactions (*i.e.*, setoff).⁵⁶² Each of these “limited waiver” provisions, however, is more liberal than the defensive compulsory counterclaim rule.

Under the Bankruptcy Code's recoupment rule, a state that files a claim in a bankruptcy case is deemed to have waived immunity with respect to all of the bankruptcy estate's counterclaims that arise out of the same transaction or occurrence as the state's claim.⁵⁶³ This rule is broader than the defensive compulsory counterclaim rule because the bankruptcy rule allows affirmative recovery against the state, including punitive damages.⁵⁶⁴

If the trustee's action against the state were limited to defensive compulsory counterclaims, then the state would face little risk in filing a claim in a §51 bankruptcy case. For example, assume that the state files a tax claim of \$10,000, expects a ten percent distribution (\$1,000), is aware that the trustee contends that the claim is only worth \$5,000, and is aware that the trustee might seek to recover \$40,000 in preferential payments and tax refunds relating to the same taxable event as the state's claim.⁵⁶⁵ Under a defensive compulsory counterclaim rule, the state's waiver would allow the court (i) to reduce the claim to \$5,000 if the objection is upheld, and (ii) to reduce the claim to zero if the preference and tax refund counterclaims are upheld, but (iii) not to require the state to make any payments to the estate.

Under the bankruptcy recoupment rule, however, the state faces a choice. It can either forego immunity in order to participate in the case and receive distributions on its claim, or it can forego distributions on its claim in order to avoid being sued by the estate for claims arising from the same transaction as the state's claim. In the foregoing example, the bankruptcy rule allows the court to (i) reduce the claim to \$5,000 if the objection is upheld, (ii) reduce the claim to zero if the preference and tax refund counterclaims are upheld, and (iii) require the state to pay \$35,000 to the estate if the objection and the preference and tax

refund counterclaims are upheld. The state would be better off not filing a claim. It would lose any distribution on its claim, but would avoid having to pay the preference and refund.

Similarly, the Bankruptcy Code contains a “setoff rule” that is broader than the defensive compulsory counterclaim rule. The bankruptcy setoff rule allows the bankruptcy estate to set off all of its claims against the state's claim, even if the claims arise from different transactions or occurrences.⁵⁶⁶ The bankruptcy setoff rule is narrower than the bankruptcy recoupment rule because the setoff rule simply allows the debtor or trustee to reduce the state's recovery, it does not allow the debtor to obtain affirmative recovery against the state. The setoff rule is, however, much broader than the defensive counterclaim rule because the setoff rule is not limited to compulsory counterclaims. For example, if the state files a tax claim, the debtor could set off a claim arising from the same transaction (such as a refund claim), or a very remote transaction (such as a claim for personal injury arising from the state's failure to maintain a public walkway). The requirement is simply mutuality of claims.

To the extent that the recoupment rule of section 106(b) and the setoff rule ^{*52} of section 106(c) grant federal courts broader jurisdiction over states than the defensive compulsory counterclaim rule, they are akin to abrogation. They constitute an attempt by Congress to expand federal court's jurisdiction beyond that permitted under the Eleventh Amendment. Consequently, if defensive compulsory counterclaims are the only constitutionally permissible exception to the Eleventh Amendment, then the Bankruptcy Code's “limited waiver” rules appear to be unconstitutional under *Seminole*, at least to the extent that they are broader than the defensive compulsory counterclaim rule.⁵⁶⁷

^{*53} Some states have also argued the these rules are invalid to the extent that they permit waiver by an state official who was not authorized to waive immunity. Most acknowledge, however, that the official cannot assert authority to file a claim yet deny authority to subject the state to the consequences of filing a claim.⁵⁶⁸

The final waiver question is whether the Bankruptcy Code's waiver provisions might be constitutionally permissible under the doctrine of constructive waiver, if that doctrine remains viable after *Seminole*.⁵⁶⁹ Under constructive ^{*54} waiver “a state is deemed to consent to suit in federal court if it voluntarily engages in some activity that Congress previously declared could lead to liability on the part of the state in federal court.”⁵⁷⁰ Constructive waiver is viable only if (1) Congress's authority to regulate within its enumerated powers includes the authority to condition states' participation in federally regulated activities on states' consent to federal court enforcement, and (2) states' consent, express or implied, can confer jurisdiction on the federal courts notwithstanding the Eleventh Amendment's jurisdictional bar. In contrast, the defensive compulsory counterclaim rule is based on the fairness and judicial efficiency of having the entirety of a claim, including defenses and compulsory counterclaims, determined in one judicial proceeding. It requires neither congressional authority nor states' consent. Similarly, abrogation does not require states' consent. It does, however, require that Congress have power to subject states to federal court jurisdiction without their consent.

As previously discussed, constructive waiver dates back to the 1964 case of *Parden v. Terminal Railways*.⁵⁷¹ In *Parden*, the Court held that a state's operation of a common carrier in interstate commerce subjected the state to suit in federal court to enforce a federal law regulating common carriers.

In subsequent cases, however, the Supreme Court circumscribed the reach of the constructive waiver doctrine in several ways. First, the Court held that constructive waiver would not be found where the federal regulation related to a core state government function (in which the state must participate) rather than an activity in which the state could voluntarily choose to participate or not participate.⁵⁷² Second, the Court expressly overruled *Parden* to the extent that it “is inconsistent with the requirement that an abrogation of ^{*55} Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language.”⁵⁷³

Although the Supreme Court never expressly overruled the portion of *Parden* that permits a clearly expressed constructive waiver with respect to non-core governmental functions, many courts have questioned whether constructive waiver remains constitutionally viable after *Seminole*.⁵⁷⁴ These courts reason that constructive waiver is indistinguishable from abrogation.⁵⁷⁵ This reasoning is consistent with Justice Scalia's argument, in his *Union Gas* dissent, that the Court should overrule *Parden* because constructive ^{*56} waiver is no different than abrogation.⁵⁷⁶ If, as the Court held in *Seminole*, the Eleventh Amendment prohibits Congress from using its Article I powers to expand federal courts' Article III jurisdiction, it should also prohibit Congress from using those same powers to “condition” states' participation in federal programs on states' consent to federal court jurisdiction. Moreover, constructive waiver could undermine *Seminole*'s prohibition on abrogation because it would allow Congress to impose waiver conditions under an extensive array of federal laws. The Fifth Circuit and at least one lower have concluded that *Seminole* effectively eviscerated *Parden* and, consequently, that constructive waiver of Eleventh Amendment immunity is unconstitutional.⁵⁷⁷

Without an express statement from the Court, however, most courts ^{*57} (including the Second, Third and Fourth Circuits) have been reluctant to find that the Supreme Court has overruled *Parden*.⁵⁷⁸ A few post-*Seminole* courts have held that a state

constructively waived immunity.⁵⁷⁹ These courts generally reason that *Welch* expressly overruled only part of *Parden*,⁵⁸⁰ and *Seminole* declined the invitation (made clear in Justice Scalia's *Union Gas* dissent) to overrule the remainder of *Parden*.⁵⁸¹ Other lower courts have held ***58** that, even if constructive waiver remains viable, its requirements had not been satisfied.⁵⁸² Those courts that accept the continued viability of constructive waiver define narrowly the circumstances in which a waiver will be found. As stated by the Third Circuit in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,⁵⁸³ constructive waiver occurs only if:

- (1) Congress enacts a law under which a state is deemed to waive its Eleventh Amendment immunity if the state engages in activity covered by the law;
- (2) the law imposes this condition through a clear statement that gives notice to the states;
- (3) the state voluntarily engages in the activity covered by the federal law; and
- (4) the activity in question is not an important or core government function.⁵⁸⁴

***59** In the bankruptcy context, constructive waiver raises the narrow question whether a state that files a proof of claim thereby subjects itself to setoffs and counterclaims other than defensively asserted compulsory counterclaims.⁵⁸⁵

The first two elements of the narrowed *Parden* doctrine appear to be satisfied. The Bankruptcy Code is a federal law regulating bankruptcy, including the determination of claims in a bankruptcy case. [Bankruptcy Code sections 106\(b\) and 106\(c\)](#) clearly express the terms and scope of the waiver that may occur if the state files a claim in a bankruptcy case.⁵⁸⁶ Focussing only on these considerations, a few bankruptcy cases have held that a state may constructively waive immunity by filing a claim in a bankruptcy case.⁵⁸⁷ The remaining elements, however, are not clearly satisfied in the bankruptcy context.

First, it may be argued that the filing of a proof of claim is not a “voluntary” determination to enter a regulated activity if the filing of such a claim is the only means by which the state can enforce its pre-existing state law rights.⁵⁸⁸ This argument seems inconsistent, however, with the cases that have long held that the filing of a claim is a waiver, at least for purposes of defensive compulsory counterclaims.

***60** Second, and perhaps more significantly, debt collection may fall within the scope of the essential government function exception. The core government function element has not been elaborated extensively by the courts. The only recent non-bankruptcy cases that have found a constructive waiver have involved the Telecommunications Act and Title XI.⁵⁸⁹ Under these laws, the state may choose to accept some tangible, optional new benefit from the federal government, conditioned on the state's waiver of federal court immunity. A state that chooses to use the public airwaves is regulated in its use of those airwaves. A state that chooses to accept federal funding for education is regulated in its use of those funds. In contrast, federal regulation of bankruptcy offers the state no *quid pro quo*. The state already has a right to have its debts paid. Debt collection is a basic function in which states typically have engaged since long before the enactment of federal bankruptcy law. It is not an optional activity that a state might choose to pursue or not pursue. One might argue that the Bankruptcy Code accords states an opportunity to participate in the bankruptcy distribution scheme. That scheme, however, confers no new substantive rights on the state. Instead, it imposes strict limits on the state's exercise of its pre-existing state or federal law debt-collection rights. Consequently, even if constructive waiver remains viable after *Seminole*, the Bankruptcy Code's waiver and setoff provisions may impose an improper condition on a core state function (debt collection). Finally, constructive waiver is viable only if the state's consent (either express or implied through participation in a federally regulated activity) is adequate to confer jurisdiction on a federal court after *Seminole*. Part IV.B.1.b considers this issue.

b. Consent

For purposes of this discussion, “consent” occurs when the state affirmatively agrees to be bound as a defendant in a suit to which it would otherwise have been immune.

A state might simply agree to be bound in a particular case.⁵⁹⁰ More commonly, however, consent is evidenced by state statutory or constitutional provisions under which the state agrees to forego immunity, under defined ***61** circumstances,⁵⁹¹ for specific categories of suits.⁵⁹² A state's waiver will be construed to apply only to suits in the state's own courts, not federal court, however, unless the statute expressly provides that the state intends to subject itself to suit in federal court.⁵⁹³

Consent differs significantly from waiver because consent may permit suit against a state other than for defensively asserted compulsory counterclaims. Such suits raise two questions. First, how likely is it that the state will consent to suit in federal

bankruptcy court? Second, can the federal bankruptcy court exercise jurisdiction over a suit that exposes the state to liability beyond defensively asserted compulsory counterclaims if the state consents?

*62 In the bankruptcy context, a state might choose to file a claim or adversary proceeding, even though it will thereby waive immunity with respect to defensive compulsory counterclaims, because the benefits of recovering on its claim may outweigh the risks.⁵⁹⁴ It is harder to understand why a state would simply agree to be bound in a bankruptcy court suit seeking recovery of a preference, turnover of property, or damages under a contract claim. Consequently, as a practical matter, cases that raise true “consent” issues, as distinguished from “waiver” issues, are likely to be quite rare. These issues remain important, however, because they also underlie constructive waiver (to the extent that that doctrine remains viable) and define the extent to which the debtor may assert counterclaims and setoff rights against a state that files a claim.

Can a suit filed by the trustee against the state in federal bankruptcy court to recover a preference, compel the turnover of property or enforce a contract claim, proceed with the state's consent?

Under *Seminole*, states’ “immunity” in federal question suits filed in federal court is not merely a personal privilege accorded to the sovereign. Rather, the state is “immune” from suit because, under the Eleventh Amendment, federal courts have no “judicial power” over citizen suits against states.⁵⁹⁵ In other words, the federal courts lack subject matter jurisdiction.⁵⁹⁶ Only by raising immunity to a jurisdictional bar was the Court able to prohibit congressional abrogation. First, if states’ federal court immunity arose under federal common law, Congress probably could abrogate that immunity.⁵⁹⁷ Moreover, by characterizing states’ immunity as a jurisdictional bar, the Court overcame arguments that a countervailing constitutional principle would allow Congress to abrogate states’ immunity.⁵⁹⁸ Consequently, it seems that the majority’s view of not only the *63 constitutional source but also the jurisdictional nature of states’ immunity is fundamental and critical to the Court’s holding.⁵⁹⁹ If federal courts’ subject matter jurisdiction is defined by the Constitution and cannot be modified except under a constitutional amendment, how can jurisdiction possibly be expanded merely by a party’s “consent”? A party cannot waive a lack of subject matter jurisdiction (unlike a lack of personal jurisdiction).⁶⁰⁰ Consequently, a jurisdictional bar that can be waived is doctrinally incoherent.

Refusing to permit states to consent to suit in federal court would be shocking in light of a long line of cases in which the Supreme Court has held that a state may waive immunity and consent to jurisdiction in federal court.⁶⁰¹ Before *Seminole*, however, consent was permissible because the jurisdictional nature of states’ federal court immunity was far from clear.

First, the justices were split concerning whether state’s immunity in federal question cases arose under the Eleventh Amendment or the common law.⁶⁰² Moreover, those cases that referred to states’ federal question immunity as being jurisdictional did so primarily in the context of whether a state could raise the immunity defense for the first time on appeal and whether the court could raise the issue *sua sponte*.⁶⁰³ These cases generally did not discuss a comprehensive bar, but rather, noted that “the Eleventh *64 Amendment immunity defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.”⁶⁰⁴

Similarly, constitutional law scholars have explained the consent cases by suggesting that, even if the Eleventh Amendment imposes a jurisdictional bar, it is a bar only in the sense that it may be asserted for the first time on appeal. It is not a complete bar that would prohibit consent or abrogation.⁶⁰⁵ This rationale may explain the Court’s earlier decisions, but it is hard to reconcile with *Seminole*’s insistence that the Amendment limits federal courts’ subject matter jurisdiction.

After *Seminole*, it is clear that the Eleventh Amendment does impose a jurisdictional bar. The effect of such a bar on states’ ability to consent to suit in federal court should have been expected. Before *Seminole*, judges and commentators issued dire warnings against interpreting the Eleventh Amendment as a jurisdictional bar that extended to citizen suits filed against states in federal court to enforce federal law. Justice Stevens, for example, repeatedly argued that states’ immunity in federal question actions filed in federal court must arise from the common law rather than from the Eleventh Amendment because the Amendment imposes a jurisdictional bar that cannot be reconciled with jurisdiction by consent.⁶⁰⁶ Yet, some commentators who earlier argued that a jurisdictional bar might preclude states from consenting *65 to federal court jurisdiction, are now reluctant to accept *Seminole*’s consequences.⁶⁰⁷

Post-*Seminole* bankruptcy cases that purport to allow states to consent to suit in bankruptcy court are of little guidance because most of these cases actually involve waiver (*i.e.*, whether the state waived immunity by filing a claim or adversary proceeding) rather than consent.⁶⁰⁸

*66 A true consent issue did arise, however, in *Gorka v. Sullivan*.⁶⁰⁹ In *Gorka*, the Seventh Circuit applied *Seminole* to a case in which the state had essentially “consented” to suit in federal court by removing the case from state court to federal court.⁶¹⁰ The Seventh Circuit remanded the case to state court, reasoning that removal is permitted only in cases in which the federal

court would have had original jurisdiction.⁶¹¹ Because the underlying suit was a federal question suit against a state, the federal court would not have had original jurisdiction.⁶¹² Because *Seminole* held that federal courts have no original jurisdiction over citizen suits against state, the state could not confer jurisdiction by consent.

Seminole never actually considered whether a state could consent to suit in federal court because the issue was not presented. The majority opinion states, in passing, that “[t]he Eleventh Amendment prevents Congressional authorization of suits by private parties against *unconsenting* States.”⁶¹³ In the Court’s elaboration of alternative methods of enforcing federal law against the states, however, the Court never suggests that a citizen might sue a state in federal court with the states’ consent. This omission seems particularly significant because the Court does expressly note that a citizen could sue a state in state court with the state’s consent.⁶¹⁴ Thus, the Court’s earlier reference to “unconsenting” states may simply mean that a citizen ^{*67} can sue a state in state court with the state’s consent to enforce federal law. It could be argued, however, that the Court failed to include suit in federal court with the state’s consent because that doctrine was so well established that it required no mention.

There is no evidence that the *Seminole* Court intended to prohibit states from consenting to suit in federal court. Rather, the Court intended to prohibit Congress from abrogating states’ federal court immunity. To achieve this result, the Court raised immunity to a jurisdictional bar. Although *Seminole*’s result has been heavily criticized, the result is unlikely to change (at least until the composition of the Court changes).

Is there a way to reconcile or reinterpret *Seminole* in order to obviate the doctrinal incoherence of a waivable jurisdictional bar? In other words, might *Seminole* prohibit Congress from abrogating states’ federal court immunity but still allow states to consent to citizens’ federal question suits filed in federal court?

There are three possibilities, none of which provide an entirely satisfactory resolution.⁶¹⁵

First, the nature of the Eleventh Amendment’s jurisdictional bar has never been precisely defined.⁶¹⁶ Perhaps it could be construed as barring personal jurisdiction rather than subject matter jurisdiction.⁶¹⁷ A party over whom a court has no personal jurisdiction may voluntarily submit to the court’s jurisdiction (if the court has subject matter jurisdiction). This approach would also prohibit abrogation. If the Eleventh Amendment confers upon states a personal jurisdiction defense, Congress cannot abrogate that constitutional defense. Thus, a personal jurisdictional bar can be reconciled with a doctrine that allows consent but prohibits abrogation. Perhaps it could even be ^{*68} reconciled with the Amendment because the Amendment focusses on particular party, *i.e.*, the states.

The personal jurisdiction approach, in fact, underlies early Supreme Court consent cases.⁶¹⁸ Nevertheless, it seems inconsistent with *Seminole*, which seems to view the Amendment as imposing a subject matter jurisdictional bar. Also, it would not explain the cases that allow the state to raise the Amendment’s jurisdictional bar for the first time on appeal, because a lack of personal jurisdiction is waived if not raised in the trial court.⁶¹⁹

Second, perhaps the Eleventh Amendment simultaneously imposes a jurisdictional bar and contains a countervailing constitutional principle that allows jurisdiction by consent. In other words, the Eleventh Amendment prohibits federal courts from exercising jurisdiction over citizen suits against unconsenting states. This would cleanly eliminate the incoherence. The difficulty, however, lies in identifying anything in the crisp language of the Amendment that permits consent. Such a principle exists, if at all, in an underlying “postulate.” What would the nature of such a postulate be? In essence, it would hold, that the Amendment itself incorporates some aspects or characteristics of common law immunity. Specifically, it retains the notion that the state may consent to or waive immunity. It would not permit Congress to abrogate immunity because the common law did not allow abrogation (a state could waive its immunity, but no outside power could eliminate its immunity). Even if Congress can modify common law doctrines, it cannot modify a doctrine that has been transformed into a constitutional principle. This approach probably can be reconciled with earlier cases, but it imposes a heavy burden on the language of the Amendment.

Third, if the Court had not interpreted the Amendment to impose a jurisdictional bar, the Court could easily have devised a doctrine that would grant states immunity, prohibit Congress from abrogating that immunity, and allow states to consent to suit. The Court could simply reinterpret states’ federal court immunity as a constitutional right but not a jurisdictional bar. This interpretation would allow waiver because, although a lack of subject matter jurisdiction cannot be waived, constitutional rights may be waived. This approach would prohibit abrogation because Congress cannot abrogate ^{*69} a constitutional right (an obvious example is the Sixth Amendment right to counsel, which a defendant may waive but Congress cannot eliminate). This approach is compelling in its simplicity, but it is, of course, impossible to reconcile with *Seminole*’s specific reasoning that the Amendment imposes a jurisdictional bar. It is also difficult to reconcile with the language of the Amendment.

In summary, if a state files a claim (or adversary proceeding) in a bankruptcy case, the limited waiver rule appears to provide a viable means of subjecting the state to defensive compulsory counterclaims. Consequently, the trustee should be able to assert (at least defensively) a preference, turnover, or breach of contract claim that arises from the same transaction as the state’s claim.

It is less clear whether the *Pardeen* constructive waiver doctrine would permit the debtor either to assert counterclaims for affirmative recovery or to setoff claims that arise from transactions other than the transaction underlying the state's claim.

It is difficult to imagine that the Court will prohibit states from consenting to citizen suits filed in federal court to enforce federal law. It may be even more difficult, however, to reconcile states' consent to suit with the Court's characterization of immunity as a jurisdictional bar.

Finally, even if consent is a viable means of obtaining federal court jurisdiction, the state is unlikely to consent to the trustee's preference, turnover or breach of contract suit.

2. Sue in State Court Without the State's Consent?

In *Seminole's* wake, several state attorneys general have suggested that the trustee should simply sue the state in state court to enforce federal bankruptcy law⁶²⁰ causes of action.⁶²¹

*70 State court is usually a less desirable forum than federal bankruptcy court as a matter of bankruptcy policy. Forcing the trustee to litigate in multiple fora increases cost and inconvenience for the trustee and decreases efficiency for both the trustee and the courts.⁶²² Bankruptcy judges have extensive expertise applying the complex language of the Bankruptcy Code. They are also well-versed in the literally thousands of cases that elaborate the scope, limitations, defenses and other intricacies of common bankruptcy actions such as the automatic stay,⁶²³ and the avoidance of preferential transfers.⁶²⁴ Even if state court judges ultimately decide bankruptcy issues correctly, they can not do so as efficiently as bankruptcy courts because state courts have little, if any, experience in bankruptcy matters.

A state might argue that state court is more convenient and less costly for the state. It is not clear, however, why this would be true if the federal court and state court were in the same state. Moreover, cynics might wonder whether the state attorneys general who so adamantly insist that suits proceed in state court rather than federal court expect some other advantage of being sued in their home fora.

In any event, despite the drawbacks of suing in state court, state court would be preferable to no forum at all.

The trustee should have little problem obtaining subject matter jurisdiction in state court. Even though federal courts have exclusive jurisdiction over a bankruptcy case itself, state courts have concurrent jurisdiction over virtually every federal bankruptcy law cause of action that the trustee might *71 assert against the states.⁶²⁵ Thus, in most situations, the trustee probably "can" sue a state in state court to enforce federal bankruptcy law.

The more significant question, however, is whether the trustee can sue an *unconsenting* state in state court to enforce federal law, including the Bankruptcy Code.⁶²⁶ In the bankruptcy context, it is unlikely that a state will simply consent to be sued in, for example, an action to recover damages for a violation of the automatic stay,⁶²⁷ or to recover money or property from state as a preferential transfer.⁶²⁸

Commentators who argue that citizens can sue unconsenting states in state court to enforce federal law reason, correctly, that the Eleventh Amendment only bars suit in federal court, not in state court.⁶²⁹ Consequently, the Eleventh Amendment cannot possibly accord states immunity from suits filed in state courts. They conclude that the Eleventh Amendment is "merely" a "forum-selection" provision that requires the federal court to transfer a suit to state court if the state does not consent to suit in the federal court.⁶³⁰

*72 It is true that the Eleventh Amendment does not apply in state courts; but this begs the question. Traditional immunity⁶³¹ protects an unconsenting state from a state court federal question suit unless the Constitution eliminated (or granted Congress power to eliminate) states' traditional immunity with respect to federal question actions.

Under even the narrowest interpretation of traditional immunity, a state is immune from all suits filed against the state in its own courts.⁶³² The source of the law is irrelevant; a state is as immune from suit under another state's law or a foreign country's law as it is from suit under its own law.⁶³³ Federal law, however, is the law of a higher sovereign. Does the supremacy of federal law under the Constitution eliminate (or permit Congress to eliminate) state's traditional immunity with respect to suits to enforce federal law?

Nothing in the Constitution refers directly or indirectly to states' immunity. The Supremacy Clause, however, provides that the Constitution and federal laws are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing

in the Constitution of Laws of any State to the Contrary notwithstanding.”⁶³⁴ Under the Supremacy Clause, federal law is the law in every state, state court judges must enforce federal law,⁶³⁵ and states may not enact laws that conflict with federal law.

Some commentators argue that the Supremacy Clause either abrogates or [*73](#) permits Congress to abrogate state's traditional immunity.⁶³⁶ This argument reasons that any federal law that binds the states overrides any state law that grants the state immunity (in contrast, states enjoy immunity in federal court under federal, constitutional law). This conclusion presumably would extend to claims asserted directly under the Constitution, because the Constitution is federal law that binds the states. It also would extend to federal statutes that create a cause of action against the states. Congress, acting within the scope of its enumerated powers, including Article I,⁶³⁷ may enact federal laws that bind the states, within the constraints of the Tenth Amendment.⁶³⁸

This argument is, at least, plausible. It has traditionally been supposed that Congress can alter the common law, at least the federal common law.⁶³⁹ Diversity proponents have argued unsuccessfully that states' federal question immunity in federal court arises only under the common law and is, therefore, subject to congressional abrogation.⁶⁴⁰ *Seminole* expressly rejected the diversity view when it held that states' federal court immunity arises exclusively under the Eleventh Amendment. States' state court immunity, however, is not rooted in the Eleventh Amendment or elsewhere in the national Constitution. Thus, it might be supposed that Congress has the power to modify state common law, or state statutes or constitutions, simply by acting under its enumerated powers. If so, suing unconsenting states in state court would provide a means of allowing citizens to enforce federal law and would assuage some of the concerns of the diversity proponents.

Notwithstanding these arguments in favor of suing unconsenting states in state court, the two lines of cases on which supporters rely do not clearly establish [*74](#) that citizens may sue unconsenting states in state court to enforce federal law.⁶⁴¹ Moreover, such a rule would be an ironic end to a doctrine that has been characterized by expansion of states' traditional immunity and restriction of Congress's power to subject unconsenting states to private citizen suits.⁶⁴² Consequently, some commentators assume that, even though a citizen may sue a state in state court to enforce federal law, the suit may not proceed without the state's consent.⁶⁴³

The first line of cases establishes two distinct propositions. First, Congress must create a cause of action against states before a federal statute may be enforced against a state.⁶⁴⁴ Second, states may not grant immunity to persons who are subject to federal law and are not entitled to federal court immunity under the Eleventh Amendment.⁶⁴⁵ The second line of cases permits federal courts to review certain state court rulings in favor of states on matters of federal law.⁶⁴⁶

The first line of cases begins with two important interpretations of Section 1 of the Civil Rights Act of 1871, now codified as [42 U.S.C. Section 1983](#) (“[Section 1983](#)”).⁶⁴⁷ Under [Section 1983](#), any “person” who, under color of state law, deprives a person of the rights, privileges and immunities of citizenship, is liable to the person injured.⁶⁴⁸

In *Will v. Michigan Department of State Police*,⁶⁴⁹ an individual filed suit in state court under [Section 1983](#) alleging that the state police department and the director of state police, in his official capacity, had violated the plaintiff's civil rights.⁶⁵⁰ The Court held that neither the state nor the state official [*75](#) acting in his official capacity was a “person” who could be liable under [Section 1983](#).⁶⁵¹ Earlier federal court cases had not addressed this question squarely because the Eleventh Amendment would have protected the state and its officials from suit, even if the language of the statute covered them.⁶⁵² *Will*, however, arose in state court, where the Eleventh Amendment does not apply.⁶⁵³

First, reasoning that the Eleventh Amendment's clear statement rule should be followed whenever Congress seeks to alter the balance between the state and federal governments, the Court stated that: “Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States.”⁶⁵⁴ Noting that that “[t]he doctrine of sovereign immunity was a familiar doctrine at common law,”⁶⁵⁵ the Court held that “[w]e cannot conclude that [§ 1983](#) was intended to disregard the well-established immunity of a State from being sued without its consent.”⁶⁵⁶

Second, [Section 1983](#) was designed to provide a federal forum to remedy civil rights violations by persons acting under color of state law.⁶⁵⁷ Congress could have abrogated states' Eleventh Amendment immunity in order to provide a federal forum for private citizen suits to remedy civil rights violations by states as well, but it chose not to do so. The Court could not accept that Congress nevertheless had chosen to create a cause of action against states that could be filed in state courts, the very forum the law was intended to avoid.⁶⁵⁸

Under *Will*, a federal statute does not apply to states unless Congress expressly includes states in the category of permissible defendants.⁶⁵⁹ Two limitations caution against blithely interpreting *Will* to mean that Congress §76 can abrogate states' state court sovereign immunity simply by making its intention clear and manifest in the language of a federal statute.

First, the issue in *Will* was whether Congress had created a cause of action against the states, not whether the creation of a cause of action would also abrogate state's immunity. *Will* did not even raise an immunity issue. The Court drew strong support from Eleventh Amendment immunity jurisprudence because it found that Section 1983 was not designed to apply to parties protected by Eleventh Amendment immunity. Thus, the Court employed an immunity analysis solely as an aid to statutory interpretation.⁶⁶⁰

Second, Congress enacted Section 1983 under the Fourteenth Amendment. The Fourteenth Amendment grants Congress power to abrogate states' immunity. Congress has used that power in the past to abrogate state's Eleventh Amendment immunity.⁶⁶¹ Consequently, even if *Will* does have abrogation implications, it might simply mean that Congress may use its Fourteenth Amendment powers to abrogate state's traditional state court immunity. *Will*, alone, however, does not hold that Congress has abrogation powers other than those granted by the Fourteenth Amendment. As previously established, Congress cannot use its Fourteenth Amendment powers to abrogate states' Eleventh Amendment immunity with respect to most laws enacted under Article I, including the Bankruptcy Code.⁶⁶²

Like *Will*, *Howlett v. Rose*⁶⁶³ involved a Section 1983 action filed in state court.⁶⁶⁴ *Howlett* presented the converse of *Will*, however, because *Howlett* involved a suit against a Florida state school board. Unlike the state in *Will*, the school board was subject to suit under Section 1983 and would not have been protected by the Eleventh Amendment if the suit had been filed in federal court.⁶⁶⁵ *Will* clearly foreshadowed this circumstance by distinguishing between the state (and state officials acting in their official capacity), which is protected by both the Eleventh Amendment and sovereign immunity, §77⁶⁶⁶ and municipalities, which are not protected by either the Eleventh Amendment or traditional sovereign immunity.⁶⁶⁷ Indeed, *Howlett* cited *Will* for the proposition that “an entity with Eleventh Amendment immunity is not a “person” within the meaning of § 1983.”⁶⁶⁸ In *Howlett*, however, Florida's law included school boards in the category of state entities entitled to immunity.⁶⁶⁹

The Florida District Court of Appeal held that sovereign immunity prohibited the court from exercising jurisdiction.⁶⁷⁰ The United States Supreme Court disagreed. The Court held that the Florida court must accept jurisdiction over the case notwithstanding the school board's immunity claim.⁶⁷¹ The Court supported this conclusion by repeating its previously established rule that a state court of general jurisdiction may not refuse jurisdiction over a suit to enforce federal law, absent a valid excuse.⁶⁷² Although neutral rules of judicial administration might constitute a valid excuse, a state law denying state courts jurisdiction over suits against select groups, such as state officials or school boards, on the basis of sovereign immunity was not a valid excuse.⁶⁷³

Commentators often cite *Howlett* to support the much broader proposition that a *state* may not assert sovereign immunity as a defense in a federal question suit commenced against the state in state court.⁶⁷⁴ *Howlett*, however, expressly rejects this proposition. This aspect of *Howlett* lies in the distinction that the Court drew between the Florida District Court of Appeal opinion and an earlier Florida Supreme Court decision on which the Florida District Court of Appeal had erroneously relied.

§78 In the Florida Supreme Court case, *Hill v. Department of Corrections*,⁶⁷⁵ an individual had sued the state department of corrections under Section 1983. The Florida Supreme Court held that the suit was jurisdictionally barred because Florida's sovereign immunity waiver statute did not waive immunity with respect to suits under Section 1983.⁶⁷⁶ In *Howlett*, the United States Supreme Court noted that “the disposition of the *Hill* case would appear to be unexceptional. The defendant in *Hill* was a state agency protected from suit in a federal court by the Eleventh Amendment.”⁶⁷⁷ The Florida District Court of Appeal erred by extending *Hill's* reasoning to a state school board, which would not have been entitled to Eleventh Amendment immunity in a federal court suit to enforce Section 1983.⁶⁷⁸ Indeed, the Court went on to suggest that a state (or state agency) that is immune from suit in federal court under the Eleventh Amendment is also immune from suit in state court, at least under Section 1983. The Court stated:

The anomaly identified by the State Supreme Court, and by the various state courts which it cited, [footnote omitted] that a State might be forced to entertain in its own courts suits from which it was immune in federal court, is thus fully met by our decision in *Will*. *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court.⁶⁷⁹

Under the obvious extension of this reasoning, whenever a state enjoys Eleventh Amendment immunity in a federal question suit filed in federal court under, it also enjoys immunity in that same federal question suit filed in state court (unless the state consents to be sued). *Howlett's* reasoning is narrower than this, however, because Section 1983 does not create a cause of action against states or state agencies. Consequently, states' freedom from suit under Section 1983 is co-extensive with states' Eleventh Amendment immunity. In contrast, other federal laws might both create a cause of action against states and purport to abrogate state's Eleventh Amendment immunity. In that case, the question would be whether such a law effectively abrogates states' traditional immunity from suit in state court. Consider the possibilities.

First, under laws enacted pursuant to the Fourteenth Amendment, Congress may create a cause of action against states and abrogate states' Eleventh Amendment immunity. Congress also, however, might choose neither to create cause of action nor to abrogate states' immunity, as under Section 1983. Congress also might choose to create a cause of action but not abrogate states' immunity. These possibilities give rise to two questions with respect to Fourteenth Amendment laws: (i) first, does a law that creates a cause of action against states also necessarily abrogate states' immunity, and (ii) second, is Congress's power to abrogate states' federal court immunity also a power to abrogate states' state court immunity?

Second, in contrast, under laws enacted pursuant to Article I, Congress may not abrogate states' Eleventh Amendment immunity. This gives rise to two questions with respect to Article I laws: (i) first, would Congress ever enact a law that creates a cause of action against states even though Congress has no power to abrogate state's federal court immunity, and (ii) second, even though Congress has no power to abrogate states' federal court immunity, does Congress have power to abrogate states' state court immunity?

As to the first question raised concerning Fourteenth Amendment laws and Article I laws, respectively, it seems that Congress might well create a cause of action without abrogating immunity. First, Congress might apply a federal law's duties to the states but not create a cause of private right of action to enforce those duties. Second, even if a federal statute creates a private right of action against states, the mere creation of a cause of action does not necessarily abrogate states' immunity. Congress might create a cause of action against states in recognition that a state might consent to suit in state court (or perhaps federal court, if such consent is permissible) notwithstanding its immunity. In contrast, if a federal law does not create a cause of action against states, then a state cannot consent to suit. A state cannot, merely by consent, establish a cause of action against itself if Congress chose not to subject states to liability under the statute.⁶⁸⁰ Moreover, the Court has repeatedly rejected arguments that various statutes abrogate immunity, even if §80 those statutes clearly create a cause of action against the states.⁶⁸¹ Thus, under either Article I laws or Fourteenth Amendment laws, the mere creation of a cause of action does not abrogate states' federal court immunity. Similarly, the mere creation of a cause of action should not abrogate states' state court immunity.⁶⁸²

The second questions concerning Fourteenth Amendment and Article I laws, respectively, arise only if a federal law contains a clear abrogation provision. For example, both the Civil Rights Act of 1964, as amended,⁶⁸³ and the Bankruptcy Code⁶⁸⁴ purport to abrogate states' immunity. In a Fourteenth Amendment law such as the Civil Rights Act, the provision abrogates states' Eleventh Amendment immunity. In an Article I law, such as the Bankruptcy Code, the provision is ineffective to abrogate states' Eleventh Amendment immunity. In either type of law, does such a provision abrogate state's traditional state court immunity? Commentators who argue that it does rely §81 primarily on *Howlett*, as elaborated by *Hilton v. South Carolina Public Railways Commission*.⁶⁸⁵

In *Hilton*, an employee of a state owned railroad sued the railroad in state court to enforce provisions of the Federal Employers' Liability Act ("FELA").⁶⁸⁶ The Court held that FELA created a cause of action against the state, even though FELA did not contain a clear statement subjecting states to liability.⁶⁸⁷ The Court reasoned that it was bound by *stare decisis*. Its earlier decision in *Parden v. Terminal Railways* had held that FELA created a cause of action against the states.⁶⁸⁸ (*Welch v. Texas Department of Highways & Public Transportation* overruled *Parden's* general holding that Congress did not need to make a clear statement in order to compel states to waive Eleventh Amendment immunity. *Welch* did not, however, overrule *Parden's* specific holding that FELA created a cause of action against the states, despite FELA's lack of a clear statement.)⁶⁸⁹ The Court did not reject *Will's* clear statement discussion, but rather, held that "the clear statement inquiry need not be made and we need not decide whether FELA satisfies that standard, for the rule in any event does not prevail over the doctrine of *stare decisis* as applied to a longstanding statutory construction implicating important reliance interests."⁶⁹⁰

Finally, the Court noted that, if a court concludes that a federal statute does impose liability on the states, "the Supremacy Clause makes that statute the law in every State, fully enforceable in state court."⁶⁹¹ Some commentators interpret this statement in *Hilton* to mean that if a law does create a cause of action it abrogates states' immunity from suit in their own courts, without regard to whether Congress could have abrogated states' Eleventh Amendment immunity.⁶⁹² *Hilton*, however, did not go this far.

First, the Court held only that FELA created a cause of action against states.⁶⁹³ The Court reaffirmed that Congress may abrogate states' Eleventh Amendment immunity only by a clear statement and only under Congress's §82 Fourteenth Amendment

powers.⁶⁹⁴ This also reaffirmed that the mere creation of a cause of action does not abrogate states' immunity. The Court did not consider whether, or under what standard, Congress might abrogate state's traditional state court immunity. The Court's reliance on *Parden* and *stare decisis* does not suggest that Congress can abrogate traditional state court immunity. *Parden* did not address this issue because *Parden* involved a suit filed in federal court.⁶⁹⁵ The *Hilton* Court did suggest, in *dicta*, that the effect of finding that FELA did not create a cause of action, would be to confer upon the state immunity in state court.⁶⁹⁶ The Court never expressly considered, however, whether the creation of a cause of action would automatically eliminate state's traditional immunity in state court. In fact, the state never raised immunity as a defense; it claimed simply that FELA did not apply to it. In contrast, at least four Supreme Court justices have suggested that a state might be able to assert sovereign immunity as a defense in a federal question case filed in state court.⁶⁹⁷

Second, *Seminole* continues the Court's long history of expanding state's immunity in federal question cases. Before Article III, states were immune from suits filed in their own courts by other states' citizens. Article III gave federal courts diversity jurisdiction over those same suits. *Chisholm* held that, in so doing, Article III eliminated any immunity states might have enjoyed in their own courts. The outcry following *Chisholm* demanded that states be accorded the same immunity in federal court as they enjoyed in their own courts. The Eleventh Amendment restored states' immunity in federal court cases. *Hans* ensured that states' immunity would extend to federal question cases. Consequently, after the Eleventh Amendment, states once again enjoyed broad immunity in federal courts as well as in their own [*83](#) courts.⁶⁹⁸ It would be anomalous, at best, to conclude that the Constitution simultaneously granted states immunity in federal court and abrogated states' immunity in their own courts. Moreover, the source of such abrogation is unclear. Even if Article III eliminated (and the Eleventh Amendment restored) states' immunity in federal courts,⁶⁹⁹ Article III could not have abrogated states' immunity in their own courts because it speaks only of the federal judicial power. It would be equally ironic to conclude that states' federal court immunity arises from the virtually impenetrable fortress of a constitutional jurisdictional bar but that states' immunity in their own courts is merely a weak policy that can easily be swept aside by congressional abrogation. If the states did not understand Article I to mean that Congress could abrogate states' federal court immunity, how likely is it that they understood Article I to mean that Congress could abrogate states' state court immunity? Does the Supremacy Clause provide a logical basis for distinguishing between suits in state and federal court?

Third, *Howlett* and *Hilton* cite the Supremacy Clause for the unremarkable proposition that federal laws are enforceable in state courts.⁷⁰⁰ This is apparent from the clear language of the Supremacy Clause.⁷⁰¹ It does not, however, necessarily mean that states may not assert immunity in their own courts. Federal laws are also enforceable in federal court, and yet states are immune from suits in federal court. At a minimum, the Supremacy Clause requires that states enforce federal law in state courts of competent jurisdiction. If federal law accords state courts concurrent jurisdiction, a state may not refuse to exercise that jurisdiction by enacting its own laws that prohibit [*84](#) its courts from exercising jurisdiction.⁷⁰² This principle has nothing to do with immunity.

The Supremacy Clause is, at best, a vague device for effecting a sweeping abrogation of states' immunity. It might be argued that the Supremacy Clause merely implements Congress's enumerated powers by granting Congress the power to override state substantive law on matters of national concern. In other words, Congress can enact laws concerning interstate commerce that supersede conflicting state laws regulating commerce. It is not clear, however, that this power necessarily allows Congress to enact laws that determine states' immunities. A parallel might be found in the Full Faith and Credit Clause.⁷⁰³ That clause requires that states honor and enforce other states' laws, just as the Supremacy Clause requires that states honor and enforce federal law. Yet, the Full Faith and Credit Clause does not abrogate a state's immunity. In other words, a state may invoke sovereign immunity as a basis for refusing to enforce another state's law against itself in its own courts. Similarly, is it possible that a state may invoke sovereign immunity as a basis for refusing to enforce federal law against itself in its own courts? The Supremacy Clause does not provide a clear answer.

Fourth, the policies prohibiting citizen suits against unconsenting states in federal court apply just as strongly to citizen suits against unconsenting states in state court. Suits in either forum threaten states' treasuries and impair their dignity.

Allowing suits in state court but prohibiting suits in federal court also would turn immunity doctrine on its head. The availability of a federal forum in which citizens may enforce federal law against states levels the playing field by removing states from their home fora. The Court has significantly restricted the availability of the federal forum by holding that Congress can abrogate states' federal court immunity only in limited circumstances. Citizens are now forced to sue states in state courts. If one purpose behind providing a federal forum for suits between citizens and states was to protect *citizens* from suits by states, it might be argued that state court remains an appropriate forum for suits against states by citizens. This does not explain, however, why the Constitution prohibits suits against states in federal court. It also does not explain why states should not be entitled to assert immunity as a defense in state court.

Fifth, prior to *Howlett* and *Hilton*, state courts commonly applied state sovereign immunity law to protect the state from federal question suits filed [*85](#) in state court.⁷⁰⁴ These courts relied, in part, on the anomaly of entertaining in their own courts suits that would be barred in federal court. These cases barred not only actions under [Section 1983](#) (under which Congress had not

expressly created a cause of action against the states),⁷⁰⁵ but also actions under other federal laws (under which Congress had created a cause of action against the states).⁷⁰⁶

One recent Arkansas Supreme Court case, *Jacoby v. Arkansas Department of Education*,⁷⁰⁷ rejected a state's argument that sovereign immunity barred a federal question suit filed against the state in state court. The court reasoned that the Supremacy Clause allows Congress to create a cause of action against the states, provide a state court forum, and abrogate state court immunity.⁷⁰⁸ *Jacoby*, however, relied expressly on *Howlett* and *Hilton*, which it interpreted to mean that Congress could abrogate states' immunity.⁷⁰⁹ As noted above, however, *Howlett* and *Hilton* do not go this far.

Sixth, the relatively vague language in *Howlett* and *Hilton* is offset by language in other Supreme Court cases which suggests that citizens may sue states in state court only with the states' consent. *Seminole* is a case in *86 point.⁷¹⁰ *Seminole* suggests, in several passages, that states enjoy immunity from federal question suits filed in a state's own courts unless that state consents to be sued. First, *Seminole* repeatedly notes that states may not be sued without their consent.⁷¹¹ Second, the majority only offers two reasons explaining why the dissents' fears that citizens will be unable to enforce federal law are "exaggerated:" first, citizens may sue state officials in some circumstances, and second, the Court has never held that the federal statutes such as the Bankruptcy Code "authorize suits against states."⁷¹² If state court suit against an unconsenting state were such a simple, obvious solution, then why did the majority "glaringly omit" to suggest that Congress simply give "state courts jurisdiction over these suits?"⁷¹³ Third, the Court specifically suggests that the Supreme Court could review federal questions arising in state court suits to which a state has consented.⁷¹⁴ Nothing in *Seminole* suggests that a citizen can sue an unconsenting state in state court to enforce federal law.

Finally, some commentators argue that a second line of cases holds that the Eleventh Amendment is merely a forum-allocation device.⁷¹⁵ These cases consider whether the Supreme Court has jurisdiction to review federal questions *87 that arise in state court cases. This issue arises because the Eleventh Amendment bars *any* federal court citizen suit against a state; it does not distinguish original from appellate jurisdiction. The suggestion that these cases authorize state court suits against unconsenting states reads far more into those cases than they actually hold.

In *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*,⁷¹⁶ McKesson had sued a state agency in Florida state court complaining that Florida's liquor excise tax violated the Commerce Clause.⁷¹⁷ The state supreme court agreed that the statute was unconstitutional, and enjoined the state from giving future preferences. It refused, however, to award McKesson a tax refund.⁷¹⁸ The United States Supreme Court considered whether the state's refusal to provide a retrospective "remedy" violated the Fourteenth Amendment's prohibition on a taking without Due Process:

The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no. If a state places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.⁷¹⁹

The Court interpreted the Due Process Clause to require that the state provide the taxpayers with (1) "a fair opportunity to challenge the accuracy and legal validity of their tax obligation" and (2) a "'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."⁷²⁰ The Court reversed the Florida Supreme Court decision, holding that Florida failed to provide "meaningful backward-looking relief."⁷²¹

In response to the suggestion that the Eleventh Amendment barred federal *88 court review of the state court judgment, the Court stated that: "[w]e recognize what has long been implicit in our consistent practice and uniformly endorsed in our cases: The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts."⁷²²

Similarly, in *Reich v. Collins*,⁷²³ a taxpayer sued the state of Georgia in state court to recover a refund of monies he had paid under an unconstitutional state statute.⁷²⁴ The Georgia state supreme court denied the refund. The court reasoned that Georgia had reconfigured its tax dispute remedy scheme to eliminate postdeprivation remedies, and that Georgia's predeprivation remedies adequately protected taxpayers.⁷²⁵ The Supreme Court reversed, reasoning that Georgia's changes to its tax scheme constituted a "bait and switch" that violated the Due Process Clause.⁷²⁶ "Georgia held out what plainly appeared to be a 'clear

and certain' postdeprivation remedy, in the form of its tax refund statute, and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists."⁷²⁷

Neither *McKesson* nor *Reich* supports the proposition that a citizen can sue an unconsenting state in state court to enforce federal law. First, the Court has long held that Supreme Court review of a question of federal law arising from a state court determination in favor of a state has no Eleventh Amendment implications. It simply is not a "suit against the state."⁷²⁸ Second, the actions in the Supreme Court were not directly against the state, but rather challenged the constitutionality of state statutes. Third, in each case, the state apparently had consented to the suit in its own courts. Consequently neither case supports the proposition that an unconsenting state may be sued in its own courts.⁷²⁹ Review of a case in which the state has consented to suit does not suggest that a citizen can sue an unconsenting state in state court to enforce federal law.

*89 Some commentators favor suits in state court because there must be some remedy for rights violated by the states.⁷³⁰ This is a valid concern; however, the best way to provide this remedy would be to embrace the diversity view, which allows Congress to abrogate states' federal court immunity. It is only because five justices have rejected this view that commentators must search for an alternate forum in which to enforce federal law. A better approach might be simply to overrule *Seminole* — a position advanced by four of the sitting justices, include three of the four most recent additions to the court.

Alternatively, even if states are immune from suits without their consent in state court, other remedies may exist.

First, the state may consent to suit. Initially, it may seem unlikely that a state's general waiver statute will provide the trustee with authority to sue the state in bankruptcy court to enforce federal bankruptcy law causes of action. If the state statute applies to traditional contract and tort claims, it probably will apply to contract and tort actions that the trustee asserts. It may not, however, expressly extend to federal bankruptcy law causes of action such as avoidance powers actions. Nevertheless, the state might be required to extend its waiver to bankruptcy actions if it extends its waiver to nearly identical state law actions. The state's refusal to do so arguably would be an improper discrimination against federal law, which *Howlett* and *Hilton* prohibit.

Howlett suggests that the Supremacy Clause prohibits a state from discriminating against federal law.⁷³¹ If a state consents to be sued under its own laws, then it must consent to be sued under nearly identical federal laws. For example, how could a state claim immunity in a bankruptcy action to determine and turnover a tax refund if the state has waived immunity in state law actions to determine and pay over tax refunds? How could the state refuse to waive immunity in a bankruptcy action to recover a fraudulent transfer if the state has waived immunity in state law actions to recover fraudulent transfers? In other words, the real import of *Howlett* may lie in its requirement that states employ neutral immunity laws that do not discriminate against federal laws. It is not clear, however, that a trustee could identify a state law action that parallels every bankruptcy action (preferences are the obvious example).

Second, even if a citizen can not sue an unconsenting state in the state's own courts to enforce federal law, a citizen probably can sue an unconsenting state in another state's court. This turns on whether the forum state grants *90 other states immunity from suit as a matter of comity, because traditional immunity does not protect a state in another state's courts.⁷³²

In summary, citizens cannot sue unconsenting states in federal court to enforce federal law because the federal courts have no jurisdiction. A citizen may sue a state in state court to enforce a federal law that binds the states and creates a private right of action against the states, if a state court has concurrent jurisdiction over the matter. The state probably can assert traditional sovereign immunity as a defense if Congress has not expressly abrogated states' state court immunity. Even if Congress has done so, the state might be able to assert a traditional immunity defense. The Court has not expressly answered this question. Finally, a citizen can sue a state in another state's courts to enforce federal law. Whether that state will be able to assert an immunity defense depends upon whether the forum state has chosen to grant other states immunity, as a matter of comity.

Finally, Parts IV.B.3, 4, and 5 consider other methods of enforcing federal law against the states.

3. Supreme Court Review?

The Eleventh Amendment prohibits federal courts from exercising jurisdiction over "any suit against a state" filed by a citizen. This bar would seem to apply to both federal courts' original jurisdiction and appellate jurisdiction.⁷³³ *Seminole* suggests, however, that the Eleventh Amendment's jurisdictional bar does not prevent the Supreme Court from reviewing a question of federal law that arises from a state court case in which the state either has sued a citizen or has consented to be sued by a citizen.⁷³⁴ As noted *supra* in Part IV.B.2, this type of review does not violate the Eleventh Amendment because it is not a "suit against a state."⁷³⁵

In the bankruptcy context, the most significant application of this rule may occur when a state sues a discharged debtor to collect a debt. If the state *91 court rejects the debtor's federal law defense asserting the discharge injunction, the Supreme Court

might accept the case to determine whether the state court validly rejected the discharge injunction defense. This rule is of no benefit, however, unless the state either commenced or consented to the state court suit.

Even if the state does consent to be sued in its own courts, other practical limitations may apply. For example, appellate review does not provide a citizen the same protection as original jurisdiction because issues have been framed and findings of fact have already been made.⁷³⁶ Also, appellate review does not obviate the trustee's concerns about being forced to litigate in multiple fora.

4. Sue a State Official?

In *Ex parte Young*,⁷³⁷ the Court held that a citizen could sue a state official in federal court in an action seeking prospective injunctive relief to remedy an ongoing violation of federal law, notwithstanding the Eleventh Amendment.⁷³⁸

A suit against a state official is based upon a series of legal fictions designed to obviate the reality that the action is a suit against the state barred by the Eleventh Amendment.⁷³⁹ These fictions would be unnecessary if the Court had adopted the diversity interpretation of the Amendment and allowed citizens to sue states in federal court.

These fictions hold that a state official acting in violation of federal law acts unconstitutionally. Because the state has no power to authorize an official to violate federal law, this unconstitutional act is deemed to be outside ***92** of the scope of the official's official duties. The suit, therefore, is against the official personally. It is not a "suit against the state."⁷⁴⁰ In contrast, a suit that names a state official only in her official capacity is a suit against the state.⁷⁴¹

Moreover, in recognition that retrospective monetary damages in a suit against a state official would actually be paid from the state treasury, the courts generally will not award retrospective money damages in a suit against ***93** a state official.⁷⁴² Prospective injunctive relief may be ordered, however, even if it might require that the state expend funds.⁷⁴³

Seminole further limited *Young* by refusing to apply *Young's* "broad remedial tools" to supplement IGRA's narrower, specific remedial scheme. Even though IGRA's specific remedies applied to states rather than state officials, the Court concluded that IGRA's remedial scheme indicated that Congress did not intend to make *Young* relief available against state officials.⁷⁴⁴ This limitation should not have a significant impact in bankruptcy ***94** cases because the Bankruptcy Code does not contain a detailed remedial scheme for actions against states.

The availability of relief against state officials blunts some of the impact of *Seminole's* bar of actions directly against states. Some commentators even suggest that the availability of suits against officials might pose a threat to states that desire to protect their officials.⁷⁴⁵

Under the Bankruptcy Code, the *Young* doctrine might, for example, permit a trustee or debtor to sue a state official to enjoin an ongoing violation of the automatic stay.⁷⁴⁶ It does not, however, permit the bankruptcy trustee to sue a state to avoid a preferential transfer,⁷⁴⁷ recover a wrongfully withheld tax refund,⁷⁴⁸ or collect under a contract claim.

In summary, *Young* provides some relief, but it does not obviate the restrictions that the Eleventh Amendment imposes on suits against states to enforce the provisions of the Bankruptcy Code.⁷⁴⁹ Some commentators have argued, however, that the trustee could enforce all of the provisions of the Bankruptcy Code if the trustee acted as the representative of the United States.

***95** 5. Enlist the Services of the Federal Government to Sue the State?

The Eleventh Amendment does not prohibit the federal government from suing a state in federal court to enforce federal law.⁷⁵⁰ Consequently, in theory, the federal government could enforce the Bankruptcy Code against the states in bankruptcy court. It is difficult, however, to imagine thousands of "*U.S. v. Alabama Department of Revenue*" suits filed in individual bankruptcy cases at federal government expense to recover preferential transfers, compel the turnover of improperly seized property, or recover damages for automatic stay violations.

Some commentators have suggested that the federal government itself need not sue if the trustee sues as an agent of the federal government. Under current law, however, there are several problems with this approach.

First, the United States Trustee might be an agent of the federal government, but the United States Trustee's role is administrative.⁷⁵¹ It is not empowered to prosecute bankruptcy actions. Granting it such a power would fundamentally alter the role of the United States Trustee. Second, the trustee is the representative of the bankruptcy estate. She simply is not an agent of the federal government.

Any effort to designate the trustee (or, less feasibly, the United States Trustee) as an agent of the federal government would require an amendment to the Bankruptcy Code. Such an amendment would either create a federal bankruptcy enforcer or grant the trustees (and debtors) the *qui tam*-like⁷⁵² powers of private attorneys general to enforce the provisions of the Bankruptcy Code. There are, however, several potentially insurmountable hurdles to such an amendment.

First, how likely is it that Congress would create a federal bankruptcy enforcer or grant such powers to trustees? How would such a scheme be funded?

Second, such an amendment might be unconstitutional. In order to avoid ***96** challenge under the Eleventh Amendment, the scheme must create an enforcer who truly acts on behalf of the federal government. Two commentators have suggested a means of creating a federal bankruptcy enforcer,⁷⁵³ but it is not clear that their scheme satisfies the requirements of the Eleventh Amendment.

They argue as follows: First, the United States Attorney General is authorized to bring suit on behalf of the United States against a state for a violation of federal law. The remedy may include a fine measured by and equivalent to the damage suffered by the person on whose behalf the suit has been filed. Second, the fine that is collected by the United States may be paid to the injured party.⁷⁵⁴ Third, Congress may, by statute, authorize a private lawyer to bring suit in the name of the United States. This private lawyer would “represent the interest of the United States in seeing that the states obey federal law.”⁷⁵⁵ Fourth, if all of this is permissible, Congress ought to be able to allow private suits “without the fiction that they are on behalf of the United States.”⁷⁵⁶

A program that employs the more complicated device of allowing a federal enforcer or trustee to sue in the name of the federal government might obviate the bold approach of the fourth step. Even this approach, however, faces several hurdles.

First, in *Blatchford v. Native Village of Noatak*,⁷⁵⁷ the Court held that the federal government could not delegate to an Indian tribe the federal government's right to sue a state, even though the federal government might ***97** have sued on behalf of the Indian tribe.⁷⁵⁸ This problem can be avoided only if the federal government makes the decision to prosecute and actually retains control of the litigation.

Second, even if the federal government purports to retain control of the litigation through its agent, the trustee or United States Trustee, an approach that cloaks the trustee or United States Trustee with the power of the federal government in the context of bankruptcy enforcement appears to be a sham. This is because the federal government can sue only if it is the real party in interest.⁷⁵⁹ The federal government may have an interest in prosecuting a suit or granting private groups the right to prosecute on behalf of the federal government if the state's action affects broad “public rights,” such as environmental protection or public health. It is difficult to see a broad public interest in prosecuting automatic stay violations and preferential transfer recovery actions.⁷⁶⁰

Third, although it may be argued that the federal government has an interest in vindicating violations of federal law, it is not clear that bankruptcy enforcement always involves a violation of federal law. A violation of the automatic stay might violate federal law, but receiving a preference does not violate any law.

V. CONCLUSIONS AND RECOMMENDATIONS

The Eleventh Amendment celebrates its 200th anniversary amidst a sea of confusion and conflict over its meaning. *Seminole* held that states' immunity in federal question cases filed in federal court arises solely under the Eleventh Amendment, that the Amendment imposes a jurisdictional bar on citizen ***98** suits against states, and that Congress cannot abrogate that bar except under its Fourteenth Amendment powers. By this holding, *Seminole* rejects the diversity interpretation of the Eleventh Amendment and exacerbates the doctrinal incoherence that has plagued federal question jurisdiction since *Hans*. From a broader perspective, the Court, once again, has failed to develop a single, comprehensive, coherent doctrine of immunity that is suitable to federalism.

What are the implications in bankruptcy cases?⁷⁶¹

The Eleventh Amendment's bar applies in bankruptcy court even though bankruptcy judges are not Article III judges. Congress has no power under either the Bankruptcy Clause or the Fourteenth Amendment to abrogate states' immunity in bankruptcy cases.

Nevertheless, the Eleventh Amendment's application in bankruptcy is limited because the bankruptcy case itself is not a suit against the state and many administrative orders entered in bankruptcy cases are not suits against the state. Consequently, the Eleventh Amendment poses no bar to the determination and discharge of a state's claims, or to the imposition of the automatic stay or discharge injunctions.

Most adversary proceedings, including proceedings to enforce non-bankruptcy causes of action, avoid preferential and other voidable transfers, compel the state to turnover property, determine the validity, extent and priority of liens, and obtain damages for a violation of the automatic stay probably are suits for Eleventh Amendment purposes. As to these matters, the state might waive its immunity by filing a claim in the bankruptcy case. That claim, however, probably only waives the state's immunity with respect to defensively asserted compulsory counterclaims.

Creating a "bankruptcy enforcer" or granting the United States Trustee or trustee the power to prosecute bankruptcy actions against a state that has not filed a claim is an attractive option. It suffers, however, from potentially insurmountable constitutional and practical hurdles.

Even if the state has not filed a claim, the doctrine of *Ex parte Young* alleviates some of these problems because it allows the debtor to seek prospective injunctive relief against state officials. Such relief may permit the debtor to prevent ongoing automatic stay violations. It will not, however, allow the debtor to recover damages for a past stay violation.

The most common difficulties that *Seminole* causes in bankruptcy cases will arise when the debtor seeks to sue a state to recover preferential or other voidable transfers, or to prosecute a non-bankruptcy contract or tort action. ^{*99} The debtor can prosecute the non-bankruptcy action in state court. If it is a simple contract or state law tort action, the state may very well have waived immunity under a state statute. The waiver may not extend, however, to an action to recover a preferential or other avoidable transfer.

As to such matters, the debtor probably can sue an unconsenting state in another states' court. This will be effective, however, only if the court has jurisdiction over the parties and the forum state's law does not accord other states immunity.

If the worst implication of *Seminole* is that debtors cannot sue states to recover preferential transfers, debtors should be leaping for joy. The preference that might otherwise be recovered likely would be for taxes that the debtor had paid. If such a payment is avoided, the state will have a claim against the debtor. If the taxes were nondischargeable, priority taxes, the individual debtor's fresh start will be impaired by the tax obligation. Similarly, if tax payments made by a business debtor are avoided, the state will simply turn to the responsible officers for payment. If the officers have the ability to pay, the state will be no worse off. Both the individual debtor and the responsible officers of a business debtor, however, are likely to suffer if the trustee recovers preferential tax payments from a state.

Bankruptcy is a leverage game. *Seminole* seems to have shifted the balance in favor of the states. Individual debtors and responsible officers of business debtors, however, also receive an unexpected windfall. Only the creditors lose in this new balance.

Footnotes

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- 331 See *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 31 Bankr. Ct. Dec. (CRR) 1246, 32 Collier Bankr. Cas. 2d (MB) 238, Bankr. L. Rep. (CCH) ¶ 77604 (3d Cir. 1998), as amended, (Feb. 19, 1998) (involving an adversary proceeding under Bankruptcy Code § 108(a) in which the debtor sought to compel the state to accept invoices filed by the debtor after the state-law deadline); *AER-Aerotron, Inc. v. Texas Dept. of Transp.*, 104 F.3d 677, 30 Bankr. Ct. Dec. (CRR) 264, 37 Collier Bankr. Cas. 2d (MB) 512, Bankr. L. Rep. (CCH) ¶ 77244 (4th Cir. 1997) (involving an adversary proceeding by the debtor to recover on various contract claims); *Matter of Estate of Fernandez*, 123 F.3d 241, 31 Bankr. Ct. Dec. (CRR) 601, 38 Collier Bankr. Cas. 2d (MB) 1249, Bankr. L. Rep. (CCH) ¶ 77514 (5th Cir. 1997), amended on denial of reh'g, 130 F.3d 1138 (5th Cir. 1997) (involving an adversary proceeding contesting state's claim of title to property); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 31 Bankr. Ct. Dec. (CRR) 218, 38 Collier Bankr. Cas. 2d (MB) 574, Bankr. L. Rep. (CCH) ¶ 77457 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517, 140 L. Ed. 2d 670 (U.S. 1998) (involving an adversary proceeding under Bankruptcy Code § 547 to recover preferential tax payments); *In re Light*, 87 F.3d 1320 (9th Cir. 1996), cert. denied, 117 S. Ct. 976, 136 L. Ed. 2d 859 (U.S. 1997) (involving an action to enforce Bankruptcy Code §§ 362 (automatic stay), 524 (discharge injunction) and 525 (anti-discrimination provision) against the State Bar Association, which the court found to be an arm of the state); *In re Elias*, 218 B.R. 80, 32 Bankr. Ct. Dec. (CRR) 2, 39 Collier Bankr. Cas. 2d (MB) 782 (Bankr. 9th Cir. 1998) (involving an adversary proceeding to determine the debtor's tax liability); *In re Kish*, 212 B.R. 808, Bankr. L. Rep. (CCH) ¶ 77512 (D.N.J. 1997) (involving an adversary proceeding seeking a determination that surcharges from motor vehicle offenses were discharged); *State of N.J. v. Mocco*, 206 B.R. 691 (D.N.J. 1997) (involving the discharge of a state's claim); *In re Martinez*, 196 B.R. 225, 36 Collier Bankr. Cas. 2d (MB) 680 (D.P.R. 1996) (involving an action to enforce Bankruptcy Code § 362 (automatic stay)); *In re Schmitt*, 220 B.R. 68, 32 Bankr. Ct. Dec. (CRR) 690 (Bankr. W.D. Mo. 1998) (involving an adversary proceeding to determine the dischargeability of a student loan obligation); *In re Christie*, 218 B.R. 27, 39 Collier Bankr. Cas. 2d (MB) 595 (Bankr. D.N.J. 1998), order vacated on reconsideration, 222 B.R. 64 (Bankr. D.N.J. 1998) (involving a motion to avoid a lien securing the debtor's past-due child support obligation); *In re Koehler*, 204 B.R. 210, 30 Bankr. Ct. Dec. (CRR) 176, 37 Collier Bankr. Cas. 2d (MB) 460, Bankr. L. Rep. (CCH) ¶ 77275 (Bankr. D. Minn. 1997) (involving an action seeking to enforce Bankruptcy Code § 362 (automatic stay) and to declare a debt to have been discharged); *In re Louis*;

Harris, 213 B.R. 796, 31 Bankr. Ct. Dec. (CRR) 693 (Bankr. D. Conn. 1997) (involving an action to enforce Bankruptcy Code § 362 (automatic stay)); *In re Morrell*, 218 B.R. 87, 32 Bankr. Ct. Dec. (CRR) 147 (Bankr. C.D. Cal. 1997) (involving a complaint to determine dischargeability of a debt); *In re Mueller*, 211 B.R. 737 (Bankr. D. Mont. 1997) (involving an adversary proceeding to determine the debtor's liability for corporate taxes); *In re NVR L.P.*, 206 B.R. 831, 30 Bankr. Ct. Dec. (CRR) 843 (Bankr. E.D. Va. 1997), *aff'd*, 222 B.R. 514 (E.D. Va. 1998) (involving an action against states to recover tax overpayments); *In re Rose*, 214 B.R. 372, 31 Bankr. Ct. Dec. (CRR) 906, 122 Ed. Law Rep. 472 (Bankr. W.D. Mo. 1997) (involving an adversary proceeding to determine dischargeability of a student loan debt); *Matter of Midland Mechanical Contractors, Inc.*, 200 B.R. 453, 29 Bankr. Ct. Dec. (CRR) 933, 36 Collier Bankr. Cas. 2d (MB) 1397 (Bankr. N.D. Ga. 1996) (involving a suit to enforce contract obligations); *In re Lush Lawns, Inc.*, 203 B.R. 418 (Bankr. N.D. Ohio 1996) (involving an action seeking contempt sanctions for violation of Bankruptcy Code § 362 (automatic stay)); *In re Charter Oak Associates*, 203 B.R. 17, 29 Bankr. Ct. Dec. (CRR) 1318, 37 Collier Bankr. Cas. 2d (MB) 321 (Bankr. D. Conn. 1996) (involving a suit to enforce contract obligations); *In re Lazar*, 200 B.R. 358, 382, 29 Bankr. Ct. Dec. (CRR) 888 (Bankr. C.D. Cal. 1996) (involving claims against a state for reimbursement from a state fund); *In re York-Hannover Developments, Inc.*, 201 B.R. 137, 29 Bankr. Ct. Dec. (CRR) 1066 (Bankr. E.D.N.C. 1996) (involving suit under Bankruptcy Code § 548 (fraudulent transfer)); *In re Tri-City Turf Club, Inc.*, 203 B.R. 617, 620, 30 Bankr. Ct. Dec. (CRR) 81 (Bankr. E.D. Ky. 1996) (involving an adversary proceeding alleging that the state racing commission had violated the automatic stay by revoking the debtor's racing license). *See also In re National Cattle Congress, Inc.*, 91 F.3d 1113 (8th Cir. 1996) (remanding for reconsideration in light of a *Seminole* case in which a Chapter 11 debtor sought to enforce the automatic stay against a state commission after the commission revoked the debtor's dog racing license).

Cf. infra notes 420-430 and accompanying text, discussing *State of Tex. By and Through Bd. of Regents of University of Texas System v. Walker*, 142 F.3d 813, 820, 32 Bankr. Ct. Dec. (CRR) 826, 126 Ed. Law Rep. 92 (5th Cir. 1998) (holding that the Eleventh Amendment bars suit against states in bankruptcy cases; but discharge is not suit against state); *State of Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 31 Bankr. Ct. Dec. (CRR) 475 (4th Cir. 1997) (holding that confirmation order is enforceable against states).

- 332 *See, e.g.*, S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195, 199 (1996) (concluding that § 106(a) is unconstitutional to the extent it purports to subject unconsenting states to suit in federal bankruptcy court by private parties); Mark Browning, *Seminole Tribe of Florida v. Florida: A Closer Look*, 15-JUN. AM. BANKR. INST. J. 10, 10 (1996) (concluding that § 106(a) is unconstitutional as against the states); Meltzer, *supra* note 82, at 3-5 (arguing that if Congress cannot abrogate states' immunity under the exercise of Congress's power to regulate Indian affairs, an area in which Congress's broad control and states' limited control has long been recognized, then it cannot possibly abrogate immunity under its power to regulate bankruptcy); *see also* Field, *supra* note 19, at 15-16 (*Seminole* potentially invalidates the parts of the bankruptcy statute that allow individuals to sue states to enforce federal law, because the bankruptcy statute was not "enacted or enactable under" the Fourteenth Amendment).
- 333 *See, e.g.*, Gibson, *supra* note 322, at 201 (arguing that § 106(a) remains valid as a waiver of federal immunity); Honorable Alexander L. Paskay, *Is the Gorilla Spawned by Seminole Really an 800-Pound Gorilla?*, 28 No. 25 BANKR. CT. DEC. (LRP) 3 (June 4, 1996) (arguing that § 106 is valid with respect to federal government waiver).
- 334 *See* Gibson, *supra* note 322, at 199; *see, e.g.*, *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 50 L. Ed. 2d 471, 1 I.E.R. Cas. (BNA) 76 (1977) (holding that the Eleventh Amendment does not apply to counties and municipal corporations); *Moor v. Alameda County*, 411 U.S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973) (holding that the Eleventh Amendment does not apply to political divisions and departments such as cities, counties, and school districts); *Loeb v. Trustees of Columbia Tp.*, 179 U.S. 472, 21 S. Ct. 174, 45 L. Ed. 280 (1900) (holding that the Eleventh Amendment does not apply to municipal corporations); *Lincoln County v. Luning*, 133 U.S. 529, 530, 10 S. Ct. 363, 33 L. Ed. 766 (1890) (holding that the Eleventh Amendment does not apply to counties); *State of Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 786, 31 Bankr. Ct. Dec. (CRR) 475 (4th Cir. 1997) (applying rule that Eleventh Amendment does not apply to counties in a bankruptcy case); *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996), *reh'g en banc denied*, (Nov. 22, 1996) and *cert. denied*, 117 S. Ct. 2511, 138 L. Ed. 2d 1014 (U.S. 1997) (holding that county sheriff is not entitled to Eleventh Amendment immunity); *Mancuso v. New York State Thruway Authority*, 86 F.3d 289, 42 Env't. Rep. Cas. (BNA) 1961, 26 Env'tl. L. Rep. 21418 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 481, 136 L. Ed. 2d 375, 43 Env't. Rep. Cas. (BNA) 1992 (U.S. 1996) (holding that state Thruway Authority is not entitled to Eleventh Amendment immunity); *Robertson v. Board of County Com'rs of County of Morgan*, 985 F. Supp. 980, 4 Wage & Hour Cas. 2d (BNA) 443, 135 Lab. Cas. (CCH) ¶ 33673 (D. Colo. 1997) (holding that county board is not entitled to Eleventh Amendment immunity); *TM Park Ave. Associates v. Pataki*, 986 F. Supp. 96, 123 Ed. Law Rep. 1159 (N.D.N.Y. 1997) (holding that Dormitory Authority is not entitled to Eleventh Amendment immunity because it is not an arm of the State); *Brickey v. County of Smyth, Va.*, 944 F. Supp. 1310, 3 Wage & Hour Cas. 2d (BNA) 966, 133 Lab. Cas. (CCH) ¶ 33493 (W.D. Va. 1996) (holding that political subdivisions are not entitled to Eleventh Amendment immunity because they are not arms of the state); *In re Christie*, 218 B.R. 27 (Bankr. D.N.J. 1998); *In re Walters*, 219 B.R. 520 (Bankr. W.D. Ark. 1998); *cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 123, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (extending Eleventh Amendment immunity to state and county officials where the relief "substantially concerns ... the State"); Peter W. Low & John C. Jeffries, Jr., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 912 (3d ed. 1994) (unit of state may be given protection of Eleventh Amendment if money to pay judgment would come from state treasury). Bankruptcy Code § 106(a) expressly allows suits against municipalities. 11 U.S.C. § 101(27) (1994), quoted *supra* at note 252.
- 335 *See* discussion *infra* at notes 351-352 and accompanying text.
- 336 *See infra* note 625.

- 337 See cases cited *supra* at note 331.
- 338 See Honorable Samuel L. Bufford, *Seminole Tribe May Not Apply to Bankruptcy Courts*, 30 No. 10 BANKR. CT. DEC. (LRP) 1 (Mar. 25, 1997) (suggesting that the Eleventh Amendment may not apply because bankruptcy courts are “Article I” courts, but noting that he has not decided if this argument is valid); see also Honorable Leif M. Clark, *Karen Cordry's Bias on Sovereign Immunity Undercuts Her Analysis*, 30 No. 18 BANKR. CT. DEC. (LRP) 5 (May 27, 1997) (suggesting that Judge Bufford's approach may be valid, but only if Congress created true Article I courts, which bankruptcy courts are not).
- 339 See U.S. CONST. amend. XI.
- 340 Bufford, *supra* note 338, at 1 (arguing that the Eleventh Amendment applies only to Article III courts and not to courts that Congress creates under Article I (which he argues includes bankruptcy courts), Article II (which includes administrative courts), or Article IV (which includes territorial courts)). Karen Cordry, bankruptcy counsel to the National Association of Attorneys General, argues that these other Articles are not applicable to suits against states because Article II courts deal primarily with court martial actions, which would not be brought against a state, and territories in which Article IV courts are created have no immunity until they become states, at which time they gain the benefit of the Eleventh Amendment. Karen Cordry, *Seminole: There's No Easy Escape*, 30 No. 14 BANKR. CT. DEC. (LRP) 1 (Apr. 22, 1997).
- 341 The arguments in this discussion apply equally to federal bankruptcy law questions and non-bankruptcy federal and state law questions that relate to a bankruptcy case.
- 342 See also Clark, *supra* note 338, at 5 (arguing that bankruptcy courts are not Article I courts, they are adjuncts to the Article III district courts; but suggesting that Judge Bufford's approach might work if Congress created a true Article I court to hear bankruptcy matters). Cf. *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61-75, 102 S. Ct. 2858, 73 L. Ed. 2d 598, 6 Collier Bankr. Cas. 2d (MB) 785, Bankr. L. Rep. (CCH) ¶ 68698 (1982) (discussing the province of legislative courts).
- 343 See 28 U.S.C. § 151(a) (1978) (superseded).
- 344 See 28 U.S.C. § 1471 (a, b, c) (1978) (superseded).
- 345 Cf. U.S. CONST. art. III, § 1.
- 346 Bankruptcy judges were (and are) appointed by the Courts of Appeals, rather than by the President with confirmation by the Senate; they were (and are) appointed for only fourteen-year terms, rather than for life; they were (and are) subject to recall by the judicial council of the circuit for incompetence, misconduct, neglect of duty or physical or mental disability, rather than solely by impeachment; and they were (and are) subject to salary adjustment. See 28 U.S.C. §§ 152, 153 (a, b), 154 (1994 & Supp. II 1996).
- 347 See *Marathon*, 458 U.S. 50. Under *Marathon*, if a non-Article III court adjudicates judicial rather than public rights, the adjudication must occur in coordination with and subject to review by an Article III court. *Id.*
- 348 28 U.S.C. § 157 (1994).
- 349 *Id.*
- 350 See generally 1 COLLIER ON BANKRUPTCY ¶ 1.02[2], 1-15 (15th ed. rev. 1996); 1 GINSBERG & MARTIN ON BANKRUPTCY §§ 1.02[D], 1-23 - 1-29, 1.03 [A], 1-34 - 1-37 (4th ed. 1996 & Supp. 1997).
- 351 See 28 U.S.C. 1334(a), (b) (1994); see also *id.* § 157 (c).
- 352 See 28 U.S.C. § 157(a) (1994); see, e.g., COLLIER, *supra* note 350, at ¶ 3.04[1], 3-59 (“Section 157(d) is an attempt to insulate the 1984 legislation against successful constitutional attack.”).
- 353 U.S. CONST. art. III, § 2, cl. 1.
- 354 See 28 U.S.C. § 1331 (1994 & Supp. II 1996) (“The district courts shall have original jurisdiction of all civil actions arising under the ... laws ... of the United States.”); cf. *id.* § 1334(a, b) (bankruptcy jurisdiction); *id.* 157(a) (referral of bankruptcy jurisdiction to the bankruptcy courts).
- 355 *Id.* § 157(d). For example, the District Court for the District of Arizona *sua sponte* withdrew the entire bankruptcy cases for the subsidiaries of Lincoln Savings & Loan Co., which had been pending before Bankruptcy Judge Sarah Sharer Curley.
- 356 See, e.g., Bufford, *supra* note 338, at 1.
- 357 See FED. R. BANKR. P. 5011.
- 358 See, e.g., *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101, 24 Bankr. Ct. Dec. (CRR) 1139, 29 Collier Bankr. Cas. 2d (MB) 1341, Bankr. L. Rep. (CCH) ¶ 75459, 123 A.L.R. Fed. 681 (2d Cir. 1993), cert. dismissed, 511 U.S. 1026, 114 S. Ct. 1418, 128 L. Ed. 2d

88 (1994); *Holland America Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999, 13 Bankr. Ct. Dec. (CRR) 1256, 13 Collier Bankr. Cas. 2d (MB) 1462, Bankr. L. Rep. (CCH) ¶ 70874 (5th Cir. 1985).

- 359 See generally COLLIER, *supra* note 350, at ¶ 3.04[1], 3-60 - 3-61; GINSBERG & MARTIN, *supra* note 350, § 1.03[C], at 1-54 - 1-55.
- 360 Cf. Bufford, *supra* note 338, at 1 (acknowledging that the primary complication in his argument is that 28 U.S.C. § 1334 grants bankruptcy jurisdiction to the district courts, which clearly are subject to the Eleventh Amendment, but suggesting that the Eleventh Amendment's bar nevertheless is inapplicable if the matter is referred to the bankruptcy courts; also arguing that nothing prohibits the "district court referring a case to someone else who has greater powers than the district court itself"). The problem with Judge Bufford's reasoning is that the bankruptcy court derives all of its powers from the district court. Consequently, it cannot have greater powers than the district court.
- 361 Significantly, bankruptcy courts may not hear personal injury tort or wrongful death matters, 28 U.S.C. § 157(b)(5), and may not enter final orders in non-core matters that are related to a bankruptcy case, unless the parties consent, 28 U.S.C. § 157(c) (1994). Moreover, the district court may withdraw the reference from the bankruptcy court at any time. See *supra* notes 355-359.
- 362 *Marathon* made clear that the powers delegated to the bankruptcy courts do not merely involve the adjudication of "public rights" but include private rights, and therefore are judicial powers. See *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63-75, 102 S. Ct. 2858, 73 L. Ed. 2d 598, 6 Collier Bankr. Cas. 2d (MB) 785, Bankr. L. Rep. (CCH) ¶ 68698 (1982). This aspect of bankruptcy jurisdiction has not changed. Bankruptcy judges still adjudicate private judicial rights. The judges, however, are now subject to greater coordination and oversight by the Article III district courts. Cf. *id.* at 76-87.
- 363 *Marathon*, 458 U.S. 50.
- 364 See Gibson, *supra* note 231, at 325 n.92 (noting that the bankruptcy court is not a court of the United States).
- 365 U.S. CONST. art. I, § 8, cl. 4.
- 366 See Act of Apr. 4, 1800 (Bankruptcy Act of 1800), ch. 19, 2 Stat. 19, repealed by Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.
- 367 The Bankruptcy Act of 1800, by its terms, was to be effective for five years. It was repealed, however, after only three and one-half years. The next federal bankruptcy law was not enacted until thirty-eight years later, in 1841. It was repealed in 1843, a little more than one year after it became effective (in 1842). The third federal bankruptcy law, enacted twenty-five years later, in 1867, lasted slightly longer, eleven years. See *id.*; Act of Aug. 19, 1841 (Bankruptcy Act of 1841), ch. 9, 5 Stat. 440, repealed by Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; Act of Mar. 2, 1867 (Bankruptcy Act of 1867), ch. 176, 14 Stat. 517, repealed by Act of June 7, 1878, ch. 170, 20 Stat. 99.
- 368 After the Bankruptcy Act of 1867 was repealed, ten years passed before Congress finally enacted the first long-lasting bankruptcy law, the Bankruptcy Act of 1898 ("Bankruptcy Act"). See Nelson Act, ch. 541, 30 Stat. 544 (1898), amended by Chadler Act, ch. 575, 52 Stat. 840 (1938), repealed by Bankruptcy Reform Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549. The Bankruptcy Act remained in force (although with significant amendments and restructurings along the way) for eighty years, until 1978, when it was superseded by the Bankruptcy Code ("Bankruptcy Code"). The Bankruptcy Code, as amended, remains in force today. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; 11 U.S.C. §§ 101 - 1330 (as amended) (1994 & Supp. II 1996).
- 369 Cordry, *supra* note 340, at 1 (arguing that neither the drafters of the Eleventh Amendment nor the states could have contemplated providing for immunity in bankruptcy courts, because neither could have foreseen that Congress would create a hybrid such as the bankruptcy courts).
- 370 See, e.g., Cordry, *supra* note 340, at 1 (arguing that courts from *Hans* through *Seminole* read the Eleventh Amendment as exemplifying a broad principle of immunity with which the states entered the union and which the states waived only with respect to suits by the federal government and other states; this "axiom of our constitutional system" was "retained as an inherent, albeit unstated, part of our federal system that pre-existed the Eleventh Amendment and is not limited by the terms of that Amendment"); Letter from Donald McCabe, Pension Benefit Guaranty Corporation, reprinted in *More Reaction to Judge Bufford's Defense Against Seminole Tribe*, 30 No. 15 BANKR. CT. DEC. (LRP) 13 (Apr. 29, 1997) (arguing that Judge Bufford's contention that the Eleventh Amendment does not apply in bankruptcy court is contrary to the broad scope of the Eleventh Amendment, as recognized in *Hans* and *Seminole*, and to states' rights, as preserved in *Marathon*).
- 371 See *infra* Part IV.A.2 (discussing what constitutes a "suit against a state" in the bankruptcy context).
- 372 U.S. CONST. amend. XI. For a discussion of what constitutes a suit against the state in the bankruptcy context, see generally *State of Tex. By and Through Bd. of Regents of University of Texas System v. Walker*, 142 F.3d 813, 32 Bankr. Ct. Dec. (CRR) 826, 126 Ed. Law Rep. 92 (5th Cir. 1998); *State of Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 31 Bankr. Ct. Dec. (CRR) 475 (4th Cir. 1997); cf. *In re State of New York*, 256 U.S. 490, 41 S. Ct. 588, 65 L. Ed. 1057 (1921) (holding that the Eleventh Amendment applies in admiralty; issue was not whether the case was a "suit," but rather whether the suit was in law or equity).
- 373 *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

- 374 *Id.* at 407-412; *see also* *Weston v. City Council*, 27 U.S. (2 Peters) 449, 464 (1829) (reasoning that a suit involves adversarial litigation in a court of justice in which an individual seeks to obtain a remedy); *cf.* *Ex parte Milligan*, 71 U.S. 2, 18 L. Ed. 281 (1866) (reasoning that “action,” “suit” and “cause” are interchangeable in a legal sense); *In re Adoption of a Minor*, 136 F.2d 790 (App. D.C. D.C. Cir. 1943) (reasoning that “proceeding” is broader than “action”). For a detailed analysis of *Cohens*, *see* Jackson, *supra* note 91, at 13-25.
- 375 *See Cohens*, 19 U.S. (6 Wheat.) at 412.
- 376 *In re Barrett Refining Corp.*, 221 B.R. 795, 803, 32 Bankr. Ct. Dec. (CRR) 937 (Bankr. W.D. Okla. 1998) (citing *Cohens*, 19 U.S. (6 Wheat.) at 407-12).
- 377 *See, e.g., State of Missouri v. Fiske*, 290 U.S. 18, 54 S. Ct. 18, 78 L. Ed. 145 (1933).
- 378 *See* 28 U.S.C. § 1334 (a), (b), (d) (1994).
- 379 *See generally* 11 U.S.C. §§ 701-728 (1994). Only individual debtors are entitled to retain exempt property. *Id.* § 522. Also, in a liquidation case, only individual debtors receive a discharge. A business debtor that liquidates has no continuing operations and, therefore, no need for a discharge or its attendant protection from future collection efforts. *See id.* § 727.
- 380 *See generally id.* §§ 1101-1330 (Chapter 11 reorganization, chapter 12 adjustment of the debts of a family farmer, Chapter 13 adjustment of the debts of an individual with regular income). The timing and scope of the discharge in these types of cases varies. Compare *id.* §§ 1141, 1228, 1328.
- 381 *Cf. Barrett*, 221 B.R. at 803-04 (applying the *Cohens* factors to conclude that a bankruptcy case is not a suit).
- 382 *See* 11 U.S.C. § 342; FED. R. BANKR. P. 2002. In *Cohens*, the Court noted that the party who obtains a judgment is given notice of the writ of error:
[b]ut this notice is not a suit, nor has it the effect of process. If the party chooses not to appear, he cannot be brought into Court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his nonappearance, but the judgment is to be reexamined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.
19 U.S. (6 Wheat.) at 411.
- 383 *See* 11 U.S.C. §§ 1141, 1228, 1328; *cf. Cohens*, 19 U.S. (6 Wheat.) at 411.
- 384 *See generally id.* §§ 1141, 1228, 1328.
- 385 *See, e.g., In re Platter*, 140 F.3d 676, 679, Bankr. L. Rep. (CCH) ¶ 77659 (7th Cir. 1998) (holding that the state commenced action in federal bankruptcy court by filing an adversary proceeding to determine the dischargeability of a debt; rejecting the state's argument that the filing of the bankruptcy case itself was akin to the filing of a suit against the state and that the state's adversary proceeding was akin to a compulsory counterclaim, which would not waive the state's immunity); *State of Tex. By and Through Bd. of Regents of University of Texas System v. Walker*, 142 F.3d 813, 820, 32 Bankr. Ct. Dec. (CRR) 826, 126 Ed. Law Rep. 92 (5th Cir. 1998) (holding that the debtor's discharge and assertion of the discharge injunction against the state invoked no Eleventh Amendment consequences; rejecting the state's argument that the filing of the bankruptcy case itself constituted a suit against the state); *Barrett*, 221 B.R. at 803-04 (applying *Cohens*' six factors and concluding that a bankruptcy case does not involve a suit). Although *Gardner v. State of N.J.*, 329 U.S. 565, 67 S. Ct. 467, 91 L. Ed. 504 (1947), is often cited for the proposition that a bankruptcy case is not a suit, its holding is much narrower. *See infra* notes 441-447 and accompanying text.
- 386 *See* 11 U.S.C. § 505(a)(1), (b) (1994)
- 387 *Id.* §§ 503, 507.
- 388 *Id.* § 523.
- 389 *Id.* § 506.
- 390 *Id.* §§ 522(f), 544, 545.
- 391 *Id.* § 362.
- 392 *Id.* § 524.
- 393 *Id.* § 363.
- 394 *Id.* §§ 505(1)(b), 542.
- 395 *Id.* § 547.

- 396 *Id.* § 1141.
- 397 *Id.* § 365.
- 398 See 28 U.S.C. § 1334(b) (1994) (bankruptcy jurisdiction over civil matters relating to a bankruptcy case). The bankruptcy court may enter a final order in a non-core civil proceeding related to a bankruptcy case only with the parties' consent. Absent consent, the bankruptcy court issues a report and recommendation to the district court for *de novo* review. See *id.* § 157(c).
- 399 See *In re Barrett Refining Corp.*, 221 B.R. 795, 802-03, 32 Bankr. Ct. Dec. (CRR) 937 (Bankr. W.D. Okla. 1998); cf. *State of Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 786-87, 31 Bankr. Ct. Dec. (CRR) 475 (4th Cir. 1997) (noting, in *dicta*, that an adversary proceeding against the state would cause the bankruptcy court to issue summons for the state to appear and would be a suit against the state for Eleventh Amendment purposes).
- 400 This discussion does not consider independent actions that may be determined by the bankruptcy court only with the parties' consent. See 28 U.S.C. § 157(c) (1994). For example, independent cases in which the debtor has asserted non-bankruptcy state or federal law claims against a state in state or federal court may be removed to the district court and referred to the bankruptcy court. See 28 U.S.C. 1452 (1994). Similarly, the debtor may assert independent, non-bankruptcy state or federal law claims against the state in bankruptcy court if the claims are related to the bankruptcy case. See *id.* § 1334(b).
- 401 See, e.g., Mark Browning, "Flaws" in DOJ's Seminole Defense, 30 No. 5 BANKR. CT. DEC. (LRP) 1 (Feb. 18, 1997).
- 402 See FED. R. BANKR. P. 7001.
- 403 See FED. R. BANKR. P. 9014.
- 404 See FED. R. BANKR. P. 2002.
- 405 See, e.g., cases cited *supra* at note 331.
- 406 Cases that do consider whether a proceeding is a "suit" include *In re Platter*, 140 F.3d 676, 679, Bankr. L. Rep. (CCH) ¶ 77659 (7th Cir. 1998); *State of Tex. By and Through Bd. of Regents of University of Texas System v. Walker*, 142 F.3d 813, 820, 32 Bankr. Ct. Dec. (CRR) 826, 126 Ed. Law Rep. 92 (5th Cir. 1998); *Antonelli*, 123 F.3d at 786-87; *Barrett*, 221 B.R. 795; and *Gardner v. State of N.J.*, 329 U.S. 565, 67 S. Ct. 467, 91 L. Ed. 504 (1947).
- 407 *Platter*, *Walker*, *Antonelli*, *Barrett*, and *Gardner* deal only with the determination and discharge of claims, which presents the easiest case for determining whether a proceeding involves a "suit" against the state. See discussion *infra* at notes 413-451 and accompanying text.
- 408 See *infra* notes 458-487 and accompanying text (discussing adversary proceedings).
- 409 See 11 U.S.C. § 362 (1994). If the state is listed as a creditor on the debtor's schedule of liabilities, the state will receive notice of the stay. See *id.* § 342(a); FED. R. BANKR. P. 1007, 2002.
- 410 See 11 U.S.C. § 362(a).
- 411 See *id.* § 362(d). The state's request for relief from the stay may constitute a waiver of immunity with respect to issues necessary to the court's ruling on the motion.
- 412 *Id.* § 362(c).
- 413 See FED. R. BANKR. P. 4004, 7001(4) (requiring a complaint to object to the debtor's discharge); see also 11 U.S.C. § 727.
- 414 See 11 U.S.C. §§ 725-26 (order of distribution); see also *id.* §§ 503, 507 (priority of distribution).
- 415 See *id.* §§ 1123, 1129, 1222, 1225, 1322, 1325.
- 416 See *id.* §§ 1128, 1224, 1324.
- 417 See *id.* §§ 1126, 1225(a)(5)(A), 1325(a)(5)(A).
- 418 See *id.* §§ 1141, 1227, 1228, 1327, 1328.
- 419 See *id.* § 524.
- 420 *State of Tex. By and Through Bd. of Regents of University of Texas System v. Walker*, 142 F.3d 813, 32 Bankr. Ct. Dec. (CRR) 826, 126 Ed. Law Rep. 92 (5th Cir. 1998).

- 421 *See id.* at 815.
- 422 *See id.* at 816.
- 423 *See id.*
- 424 *See id.* at 820-21.
- 425 *See id.* at 822-23 (holding that the debtor's discharge and assertion of the discharge injunction against the state invoke no Eleventh Amendment consequences); *see also* *In re Burkhardt*, 220 B.R. 837 (Bankr. D.N.J. 1998) (holding that the Eleventh Amendment did not prohibit the court from confirming an unopposed Chapter 13 plan that would discharge a state's debt; reasoning that confirmation and discharge do not involve a suit against the state); *In re Ranstrom*, 215 B.R. 454 (Bankr. N.D. Cal. 1997) (holding that the state was immune from a money judgment, but the court could determine whether the state's claims had been discharged); *cf. In re Burke*, 146 F.3d 1313, 32 Bankr. Ct. Dec. (CRR) 1147, Bankr. L. Rep. (CCH) ¶ 77755 (11th Cir. 1998) (holding that states that filed proofs of claim waived immunity for purposes of the discharge injunction and automatic stay). Note that, if the debtor failed to list the state as a creditor and the state had neither notice nor actual knowledge of the bankruptcy case, the state's claim probably would not be discharged. *See* 11 U.S.C. § 523(a)(3) (1994).
- 426 *State of Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 31 Bankr. Ct. Dec. (CRR) 475 (4th Cir. 1997) (holding that an order confirming a plan of reorganization, which provided that certain transfers would be exempt from state taxes, binds a taxing authority that had notice of the plan confirmation hearing; the taxing authority would be prohibited from collaterally attacking the plan's provisions; reasoning that plan confirmation does not involve a suit against the state).
- 427 *See id.* at 786-87.
- 428 *See id.* at 786-87.
- 429 *See id.* at 787.
- 430 *See id.*
- 431 *See* 11 U.S.C. §§ 501, 502 (1994); FED. R. BANKR. P. 3001-3008.
- 432 *See* 11 U.S.C. § 502.
- 433 *See id.* §§ 503, 507.
- 434 *See id.* § 342; FED. R. BANKR. P. 2002(a)(7).
- 435 *See* FED. R. BANKR. P. 3003(b).
- 436 *See* 11 U.S.C. § 501; FED. R. BANKR. P. 3003(c).
- 437 *See* 11 U.S.C. § 501; FED. R. BANKR. P. 3002(a), 3003(b), (c).
- 438 *See* 11 U.S.C. § 502(a).
- 439 *See* discussion *infra* at Part IV.B.1. In theory, a debtor could simply list the claim as disputed, even if it is not, in order to force the state to file a claim and, thereby, waive immunity. The debtor would, however, be subject to sanctions and criminal penalties for presenting a false oath. *See* 18 U.S.C. § 152 (1994 & Supp. 1996).
- 440 *See, e.g., In re Barrett Refining Corp.*, 221 B.R. 795, 811-12, 32 Bankr. Ct. Dec. (CRR) 937 (Bankr. W.D. Okla. 1998).
- 441 *Gardner v. State of N.J.*, 329 U.S. 565, 67 S. Ct. 467, 91 L. Ed. 504 (1947).
- 442 *Id.* at 570.
- 443 *Id.* at 570 -71.
- 444 *Id.* at 572-81
- 445 *Id.* at 573.
- 446 *Id.*

- 447 *Id.* at 573-74.
- 448 *In re Barrett Refining Corp.*, 221 B.R. 795, 32 Bankr. Ct. Dec. (CRR) 937 (Bankr. W.D. Okla. 1998).
- 449 *Id.* at 798, 801.
- 450 *Id.* at 803-04, 808-11; *see also In re Stoecker*, 202 B.R. 429, 30 U.C.C. Rep. Serv. 2d (CBC) 1044 (Bankr. N.D. Ill. 1996), decision *aff'd*, 1998 WL 641363 (N.D. Ill. 1998) (holding that immunity did not preclude the court from determining debtor's objection to state's late-filed tax claim); *cf. People of State of New York v. Irving Trust Co.*, 288 U.S. 329, 53 S. Ct. 389, 77 L. Ed. 815 (1933) (state is bound by order setting bar date for filing claims); *State of N.J. v. Mocco*, 206 B.R. 691 (D.N.J. 1997) (reasoning that the state is not excused from the provisions of the Bankruptcy Code and rules that require the state to file a proof of claim and complaint to determine dischargeability; holding that the claim is discharged where the state had not filed a claim or a complaint to determine dischargeability).
- 451 *See, e.g., In re Psychiatric Hospitals of Florida, Inc.*, 216 B.R. 660, 661 (M.D. Fla. 1998) (holding that the debtor's motion to determine tax liability was not a suit against the state because it did not seek monetary or injunctive relief against the state and it named the state property appraiser only because the appraiser had previously valued the property that the debtor was asking the court to reevaluate); *see also Clerk of Circuit Court for Anne Arundel County v. NVR Homes, Inc.*, 222 B.R. 514 (E.D. Va. 1998) (holding that the debtor's motion to declare certain real property transfers to be exempt from taxation was not a suit against the state).
- 452 *See also Cordry, supra* note 340, at 1 (noting that any determination in state court must be brought to bankruptcy court for allowance, estimation and allocation anyway).
- 453 *See discussion infra* at notes 458-487 and accompanying text (discussing adversary proceedings as "suits").
- 454 *See supra* note 420-430.
- 455 *See, e.g., In re Ranstrom*, 215 B.R. 454 (Bankr. N.D. Cal. 1997) (holding that state was immune from money judgment for violation of the automatic stay, but the court could determine whether state's claims had been discharged; debtor had filed adversary proceeding to determine dischargeability of state's tax claims). Note that, in this case, there was a question whether the claim was dischargeable. *See infra* notes 477-485 and accompanying text.
- 456 *In re Neary*, 220 B.R. 864 (Bankr. E.D. Pa. 1998) (holding that court may not hear adversary proceeding to determine dischargeability of taxes and for violation of stay); *In re TriCity Turf Club, Inc.*, 203 B.R. 617, 30 Bankr. Ct. Dec. (CRR) 81 (Bankr. E.D. Ky. 1996) (holding that court had no jurisdiction to consider debtor's adversary proceeding against state for violation of automatic stay); *In re Lush Lawns, Inc.*, 203 B.R. 418, 29 Bankr. Ct. Dec. (CRR) 1311 (Bankr. N.D. Ohio 1996) (holding that court had no jurisdiction to consider debtor's adversary proceeding against state for violation of automatic stay); *In re Martinez*, 196 B.R. 225 (D.P.R. 1996) (holding that the court had no jurisdiction to determine the debtor's action against the state for violation of the stay)
- 457 *See Ranstrom*, 215 B.R. 454 (holding that state was immune from money judgment for violation of the automatic stay, but the court could determine whether state's claims had been discharged).
- 458 *Cf., e.g., Gardner v. State of N.J.*, 329 U.S. 565, 67 S. Ct. 467, 91 L. Ed. 504 (1947); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).
- 459 *See discussion infra* at Part IV.B.1
- 460 *See* FED. R. BANKR. P. 7003, 7004, 7005, 7010, Official Bankruptcy Form No. 16C, 16D; *see generally* FED. R. BANKR. P. Part VII.
- 461 Bankruptcy Rule 7001 establishes an exclusive list of 10 types of adversary proceedings. *See* FED. R. BANKR. P. 7001. The discussion in the text omits 5 of these items. Two of these items are omitted because they might be commenced by, not against, a state. *See* FED. R. BANKR. P. 7001(4) (proceeding to object to or revoke discharge); 7001(5) (proceeding to revoke order of confirmation). A third item would apply only if the debtor and state are co-owners of property. *See* FED. R. BANKR. P. 7001(3) (proceeding to sell the interest of the debtor and a co-owner in property). The fourth, subordination of the state's claims other than in a Chapter 11 plan, occurs rarely. *See* FED. R. BANKR. P. 7001(8). As to the final item, determination of a removed cause of action, *see infra* note 463; FED. R. BANKR. P. 7001(10).
- 462 *See* 11 U.S.C. §§ 547, 548 (1994).
- 463 *See, e.g., Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 109 S. Ct. 2818, 106 L. Ed. 2d 76, 26 Soc. Sec. Rep. Serv. 175, 19 Bankr. Ct. Dec. (CRR) 514, 20 Collier Bankr. Cas. 2d (MB) 1204, Bankr. L. Rep. (CCH) ¶ 72856 (1989) (barring adversary proceeding to recover preferential transfer and for "turnover" of amounts due under Medicaid contract); *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 31 Bankr. Ct. Dec. (CRR) 1246, 32 Collier Bankr. Cas. 2d (MB) 238, Bankr. L. Rep. (CCH) ¶ 77604 (3d Cir. 1998), as amended, (Feb. 19, 1998) (barring adversary proceeding to recover amounts due under medical assistance program contract); *AER-Aerotron, Inc. v. Texas Dept. of Transp.*, 104 F.3d 677, 30 Bankr. Ct. Dec. (CRR) 264, 37 Collier Bankr. Cas. 2d (MB) 512, Bankr. L. Rep. (CCH) ¶ 77244 (4th Cir. 1997) (holding that the court had no jurisdiction to consider the debtor's breach of contract action against the state where the state had not waived immunity; also holding that a written payment

demand did not constitute a proof of claim or a waiver of immunity); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 31 Bankr. Ct. Dec. (CRR) 218, 38 Collier Bankr. Cas. 2d (MB) 574, Bankr. L. Rep. (CCH) ¶ 77457 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517, 140 L. Ed. 2d 670 (U.S. 1998) (barring an adversary proceeding to recover a preferential transfer); *In re ABEPP Acquisition Corp.*, 215 B.R. 513, 31 Bankr. Ct. Dec. (CRR) 1195, 39 Collier Bankr. Cas. 2d (MB) 358, Bankr. L. Rep. (CCH) ¶ 77591 (Bankr. 6th Cir. 1997) (barring an adversary proceeding to recover a tax overpayment); *O'Brien v. Agency of Natural Resources (In re O'Brien)*, 216 B.R. 731 (Bankr. D. Vt. 1998); *see also infra* note 456 (discussing cases in which the trustee or debtor sought to recover sanctions for automatic stay violations).

464 *See* 11 U.S.C. § 541 (1994).

465 *See* 28 U.S.C. § 1334(e) (1994).

466 *See Hoffman*, 492 U.S. 96; *Matter of Guiding Light Corp.*, 213 B.R. 489, 31 Bankr. Ct. Dec. (CRR) 655 (Bankr. E.D. La. 1997) (barring an adversary proceeding by the debtor against the state seeking turnover of Medicaid payments withheld from the debtor; but allowing the suit to proceed against state officials for prospective injunctive relief); *see also Sacred Heart*, 133 F.3d 237 (holding that the Eleventh Amendment bars an action to recover amounts due under a medical assistance program contract).

467 *See In re Zywiczyński*, 210 B.R. 924, 31 Bankr. Ct. Dec. (CRR) 133, 38 Collier Bankr. Cas. 2d (MB) 632 (Bankr. W.D.N.Y. 1997) (holding that the Eleventh Amendment does not bar the court from determining whether a certificate of deposit held by a bank and claimed by the state is subject to turnover).

468 *See Zywiczyński*, 210 B.R. at 932-33; *see also In re ABEPP Acquisition Corp.*, 215 B.R. 513, 31 Bankr. Ct. Dec. (CRR) 1195, 39 Collier Bankr. Cas. 2d (MB) 358, Bankr. L. Rep. (CCH) ¶ 77591 (Bankr. 6th Cir. 1997) (holding that the trustee can not avoid the constraints of the Eleventh Amendment by arguing that the action is simply an action to turn over a “res” held by the state rather than an action against the state).

469 *See Zywiczyński*, 210 B.R. at 933 & n.18.

470 *See Guiding Light*, 213 B.R. at 491-92; *Zywiczynski*, 210 B.R. 927-29.

471 *See generally* discussion *infra* at Part IV.B.4.

472 *See, e.g., Gardner v. State of N.J.*, 329 U.S. 565, 67 S. Ct. 467, 91 L. Ed. 504 (1947).

473 *See, e.g., Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 33 Collier Bankr. Cas. 2d (MB) 1159, Bankr. L. Rep. (CCH) ¶ 76549 (4th Cir. 1995); *Matter of Penrod*, 50 F.3d 459, 26 Bankr. Ct. Dec. (CRR) 1195, 33 Collier Bankr. Cas. 2d (MB) 263, Bankr. L. Rep. (CCH) ¶ 76423 (7th Cir. 1995).

474 *Gardner*, 329 U.S. 565.

475 *See supra* notes 441-447; *see also In re Fennelly*, 212 B.R. 61 (D.N.J. 1997) (rejecting state's immunity claim with respect to debtor's attempt to avoid state's lien through provision of a plan because state had waived immunity by filing a claim).

476 *See In re Barton Industries, Inc.*, 104 F.3d 1241, 30 Bankr. Ct. Dec. (CRR) 269, 31 U.C.C. Rep. Serv. 2d (CBC) 883 (10th Cir. 1997); *In re Be-Mac Transport Co., Inc.*, 83 F.3d 1020, 29 Bankr. Ct. Dec. (CRR) 69, 36 Collier Bankr. Cas. 2d (MB) 128 (8th Cir. 1996); *Matter of Penrod*, 50 F.3d 459, 26 Bankr. Ct. Dec. (CRR) 1195, 33 Collier Bankr. Cas. 2d (MB) 263, Bankr. L. Rep. (CCH) ¶ 76423 (7th Cir. 1995) (holding that lien was extinguished where creditor participated in the plan and the plan provided distribution on the creditor's claim); *cf. Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 33 Collier Bankr. Cas. 2d (MB) 1159, Bankr. L. Rep. (CCH) ¶ 76549 (4th Cir. 1995) (holding that adversary proceeding is required to determine validity of lien where creditor does not participate in the case); *see also In re Andersen*, 215 B.R. 792, 794 (Bankr. 10th Cir. 1998) (authorizing a dischargeability determination under a plan rather than in an adversary proceeding); *see generally* Eric S. Richards, *Due Process Limitations on the Modification of Liens Through Bankruptcy Reorganization*, 71 Am. Bankr. L.J. 43 (1997).

477 *See* 11 U.S.C. § 523 (1994). On discharge and dischargeability, *see generally* GINSBURG, *supra* note 350, at Part XI.

478 *See* 11 U.S.C. § 523 (a)(2, 4, 6, 15), (c) (requiring the filing of a timely complaint for debts that arise from acts such as fraud, false pretenses, defalcation, larceny, embezzlement, willful and malicious injury, and certain debts that arise from a divorce or separation).

479 *See id.* § 523(c).

480 *See State of N.J. v. Mocco*, 206 B.R. 691 (D.N.J. 1997) (holding that the state is not excused from the provisions of the Bankruptcy Code and Bankruptcy Rules that require the state to file a proof of claim and complaint to determine dischargeability; where the state had not filed a claim or a complaint to determine dischargeability, the claim was discharged).

481 *See* 11 U.S.C. § 523(a) (1, 3, 5, 7-14, 16-18) (1994).

482 *See id.* § 523.

- 483 See *infra* Part IV.B.1.
- 484 See *id.* § 523(a) (1), (c); FED. R. BANKR. P. 7001(6), 4004; see generally GINSBURG, *supra* note 350, at Part XI. If the state sues in state court, the debtor might seek to reopen the bankruptcy case or remove the matter to the district court to determine dischargeability. See *id.* ¶ 11.07[A], [B].
For example, the debtor might file an adversary proceeding to determine the dischargeability of a student loan debt. Such a debt is dischargeable only if the debt first became due more than seven years before the bankruptcy filing, or if excepting the debt from discharge would impose an “undue hardship” upon the debtor or the debtor’s dependents. See 11 U.S.C. § 523(a)(8)(A, B) (1994). The Higher Education Amendments of 1998 eliminated the seven-year exception for cases filed on or after October 7, 1998. See Pub. E. 105-244 (H.R. 6, 112 Stat. 1581). The debtor might prefer to have the bankruptcy court determine the “undue hardship” issue, rather than leave the issue to a less experienced state court judge. Also, the bankruptcy court may provide the logical forum for relief if the state is using only non-judicial means to collect the student loan debt. In a Chapter 13 case, the debtor might avoid the problem of suing the state by including a finding of “undue hardship” in its plan of reorganization. Although an adversary proceeding normally is required to determine dischargeability, at least one court has held that the “undue hardship” finding may be made under a Chapter 13 plan. See *In re Andersen*, 215 B.R. 792, 794 (Bankr. 10th Cir. 1998) (not involving a claim by a state). Cf. *supra* note 476.
- 485 See *In re Schmitt*, 220 B.R. 68 (Bankr. W.D. Mo. 1998) (student loan); *In re Neary*, 220 B.R. 864 (Bankr. E.D. Pa. 1998) (taxes); *In re Kish*, 212 B.R. 808, Bankr. L. Rep. (CCH) ¶ 77512 (D.N.J. 1997) (holding that the court lacked jurisdiction to consider the debtor’s adversary proceeding to determine the dischargeability of motor vehicle offense surcharges and that state did not waive immunity by filing a motion to dismiss or by seeking judgment in its favor); *In re Martinez*, 196 B.R. 225, 36 Collier Bankr. Cas. 2d (MB) 680 (D.P.R. 1996) (debtor sought sanctions after state filed tax lien with respect to debts discharged under confirmed plan), e.g. *In re Schmitt*, 220 B.R. 68, 32 Bankr. Ct. Dec. (CRR) 690 (Bankr. W.D. Mo. 1998); *In re Rose*, 214 B.R. 372, 31 Bankr. Ct. Dec. (CRR) 906, 122 Ed. Law Rep. 472 (Bankr. W.D. Mo. 1997) (debtor filed complaint against state to determine dischargeability of state’s claim); see also *State of Tex. By and Through Bd. of Regents of University of Texas System v. Walker*, 142 F.3d 813, 821, 32 Bankr. Ct. Dec. (CRR) 826, 126 Ed. Law Rep. 92 (5th Cir. 1998).
- 486 See FED. R. BANKR. P. 7001(7).
- 487 See, e.g., *State of N.J. v. Mocco*, 206 B.R. 691, 693 (D.N.J. 1997) (noting, in *dicta*, that the Eleventh Amendment bars suits seeking damages or injunctive relief); see generally *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (“[A] suit ... is barred regardless of whether it seeks damages or injunctive relief.”; noting that a suit against the sovereign is one that would require an expenditure from the treasury, interfere with public administration, or restrain the sovereign from acting); cf. *Walker*, 142 F.3d 813 (holding that the discharge of a state’s debt is not a suit against the state even though it arguably enjoins the state from collecting the debt). See discussion *infra* at Part IV.B.4 concerning suits seeking injunctive relief against state officials.
- 488 See 11 U.S.C. §§ 364, 1121(d); FED. R. BANKR. P. 3003(c)(3), 4001(c).
- 489 See 11 U.S.C. §§ 361, 363; FED. R. BANKR. P. 4001.
- 490 See *supra* notes 381, 408-457 and accompanying text.
- 491 See discussion *supra* notes 317-322 and accompanying text.
- 492 See, e.g., cases cited *infra* note 536.
- 493 See 11 U.S.C. § 106(a) (1994). The DOJ set forth its argument in a brief filed in *In re NVR, L.P.*, 206 B. R. 831 (Bankr. E.D. Va. 1997), *aff’d*, 222 B.R. 514 (E.D. Va. 1998), and several other bankruptcy cases. See “United States’ Memorandum of Law in Support of the Constitutionality of 11 U.S.C. § 106” filed January 8, 1997 in *In re NVR, L.P.*, Case No. 92-11704-T, Bankr. E.D. Va. (on file with author) (hereinafter, “DOJ Brief”); see also *DOJ Intervenes in Seminole Case*, 30 No. 2 BANKR. CT. DEC. (LRP) 1 (Jan. 12, 1997) (discussing the DOJ’s arguments).
In *NVR*, the estate had paid \$9 million in transfer taxes to six states in connection with property transfers made during the bankruptcy case. Section 1146 of the Bankruptcy Code exempts from state transfer tax any transfers that facilitate a plan of reorganization. See 11 U.S.C. § 1146 (1994). After *NVR*’s plan of reorganization was confirmed, *NVR* sued the states to recover the tax payments. Two states, which together owed \$6 million in refunds, refused to pay. The bankruptcy court held that *NVR* was not liable for the taxes. The Supreme Court issued the *Seminole* decision the next day. The two states promptly moved for reconsideration, and the United States moved to intervene. See DOJ Brief, *supra* at 1-2. The court rejected the DOJ’s argument that the Fourteenth Amendment authorized abrogation under § 106(a). The court held that abrogation under § 106(a) was unconstitutional, and that waiver and setoff under §§ 106(b) and (c) were unconstitutional attempts to avoid the Eleventh Amendment’s prohibition on congressional abrogation. See *In re NVR L.P.*, 206 B.R. 831, 30 Bankr. Ct. Dec. (CRR) 843 (Bankr. E.D. Va. 1997), *aff’d*, 222 B.R. 514 (E.D. Va. 1998) (also rejecting an argument that “*in rem*” jurisdiction of the bankruptcy courts under 28 U.S.C. § 1334(e), which vests in the district courts exclusive jurisdiction over property of the bankruptcy estate, created an exception to the Eleventh Amendment). Sections 106(b) and (c) are discussed *infra* at Part IV.B.1.
- 494 DOJ Brief, *supra* note 493, at 8 (arguing that the Bankruptcy Clause of Article I combined with the Privileges and Immunities Clause of the Fourteenth Amendment empowers Congress to abrogate states’ immunity).

- 495 DOJ Brief, *supra* note 493, at 4.
- 496 DOJ Brief, *supra* note 493, at 15.
- 497 *Id.* at 15 (arguing that states may not infringe on rights granted to national citizens). The DOJ, drawing upon the Court's reasoning in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) ¶ 10999 (1976), notes that the Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) reallocated power between the states and the federal government. Under this reallocation, states' sovereignty became subordinate to "national citizenship." DOJ Brief, *supra* note 493, at 10-12 (citing *City of Rome v. U.S.*, 446 U.S. 156, 179, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980)).
- 498 *See id.* at 12-16 (addressing the scope of the Privileges and Immunities Clause and Section 5 of the Fourteenth Amendment).
- 499 *See, e.g.*, *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 45 U.S.P.Q.2d (BNA) 1001 (3d Cir. 1997) (Patent Remedy Act); *Genentech, Inc. v. Regents of University of California*, 143 F.3d 1446, 126 Ed. Law Rep. 621, 46 U.S.P.Q.2d (BNA) 1586 (Fed. Cir. 1998), reh'g denied, en banc suggestion declined, (Aug. 5, 1998) (Patents); *CSX Transp., Inc. v. Board of Public Works of State of W.Va.*, 138 F.3d 537 (4th Cir. 1998), cert. denied, 1998 WL 313246 (U.S. 1998) (Railroad Revitalization & Regulatory Reform Act); *Doe v. University of Illinois*, 138 F.3d 653, 124 Ed. Law Rep. 812 (7th Cir. 1998) (Title IX); *Darne v. State of Wis., Department of Revenue*, 137 F.3d 484, 21 Employee Benefits Cas. (BNA) 2569 (7th Cir. 1998) (Employee Retirement Income Security Act); *Marie O. v. Edgar*, 131 F.3d 610, 122 Ed. Law Rep. 943 (7th Cir. 1997) (Individuals with Disabilities Education Act); *Amos v. Maryland Dept. of Public Safety and Correctional Services*, 126 F.3d 589, 24 A.D.D. 51, 7 A.D. Cas. (BNA) 454 (4th Cir. 1997), cert. granted in part, judgment vacated, 118 S. Ct. 2339, 141 L. Ed. 2d 710, 8 A.D. Cas. (BNA) 480 (U.S. 1998) (Americans With Disabilities Act); *Hurd v. Pittsburg State University*, 109 F.3d 1540, 117 Ed. Law Rep. 95, 73 Fair Empl. Prac. Cas. (BNA) 1448, 70 Empl. Prac. Dec. (CCH) ¶ 44615 (10th Cir. 1997) (Age Discrimination in Employment Act); *Bryant v. New Jersey Dept. of Transp.*, 1 F. Supp. 2d 426 (D.N.J. 1998) (Title VI); *Beasley v. Alabama State University*, 3 F. Supp. 2d 1304, 127 Ed. Law Rep. 239 (M.D. Ala. 1998) (Title IX); *Velasquez v. Frapwell*, 994 F. Supp. 993, 125 Ed. Law Rep. 650, 157 L.R.R.M. (BNA) 2690 (S.D. Ind. 1998) (Uniformed Services Employment and Reemployment Rights Act); *see also infra* notes 521-536 (discussing other cases in which courts considered whether abrogation was proper under the Fourteenth Amendment).
- 500 "The constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit that jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law." DOJ Brief, *supra* note 493, at 15 (quoting *Kalb v. Feuerstein*, 308 U.S. 433, 439, 60 S. Ct. 343, 84 L. Ed. 370 (1940)).
- 501 *Id.*
- 502 U.S. CONST. art. I, § 8, cl. 4.
- 503 *See infra* note 625.
- 504 *See Varner v. Illinois State University*, 150 F.3d 706, 128 Ed. Law Rep. 96, 135 Lab. Cas. (CCH) ¶ 33700 (7th Cir. 1998) (reasoning that, to determine whether Congress had the power to abrogate a state university's immunity through legislation "validly enacted" pursuant to § 5 "enforcement power," courts "were required to consider two questions:" first, "whether Congress in applying the [legislation] to the States, did so pursuant to its § 5 powers, and if so, (2) whether the [legislation] is within Congress's § 5 powers, as interpreted by the Supreme Court in *City of Boerne v. Flores*.")) (citing *City of Boerne v. Flores*, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 74 Fair Empl. Prac. Cas. (BNA) 62, 70 Empl. Prac. Dec. (CCH) ¶ 44785 (U.S. 1997)); *see also Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966) (establishing a three-part test; the first component of which is whether the statute can be regarded as an enactment to enforce the Fourteenth Amendment, the other two components of which consider whether the statute is "appropriate" legislation under the Fourteenth Amendment).
- 505 *See Varner*, 1998 WL 407011, at *5-6 (reasoning that the "appropriate question" is whether the objectives of the specific legislation at issue were "within Congress' power under the Fourteenth Amendment") (quoting *Doe v. University of Illinois*, 138 F.3d 653, 660, 124 Ed. Law Rep. 812 (7th Cir. 1998)); *id.* ("the rule remains that Congress need not use magic words to exercise its enforcement power under § 5 of the Fourteenth Amendment") (quoting *Goshtasby v. Board of Trustees of University of Illinois*, 141 F.3d 761, 768, 76 Fair Empl. Prac. Cas. (BNA) 1179 (7th Cir. 1998)); *id.* at 6 ("the constitutionality of action taken by Congress does not depend on recitals of power which it undertakes to exercise") (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S. Ct. 421, 92 L. Ed. 596 (1948)); *Franks v. Kentucky School for the Deaf*, 142 F.3d 360, 363, 126 Ed. Law Rep. 70, 1998 FED App. 124P (6th Cir. 1998) (reasoning that the proper inquiry is "whether the Congress actually had the authority to adopt the legislation pursuant to that provision, not whether Congress correctly guessed the source of its authority;" this involves an "objective" inquiry, "namely, whether Congress could have enacted the legislation at issue pursuant to a constitutional provision granting it the power abrogate") (quoting *Crawford v. Davis*, 109 F.3d 1281, 1283, 117 Ed. Law Rep. 90, 70 Empl. Prac. Dec. (CCH) ¶ 44579 (8th Cir. 1997)); *id.* (concluding that, if Congress had the authority to abrogate as an objective matter, "whether it also had the specific intent to legislate pursuant to that authority is irrelevant") (quoting *Crawford*, 109 F.3d at 1283); *Wheeling & Lake Erie R. Co. v. Public Utility Com'n of Com. of Pa.*, 141 F.3d 88, 92 (3d Cir. 1998) (reasoning that "when determining the sources of Congress's authority to legislate, we may look beyond the expressed constitutional basis in a statute's preamble or legislative history"); *Crawford*, 109 F.3d at 1283 (reasoning that "[b]ecause Congress need not expressly invoke the authority of a specific constitutional provision to act pursuant to it," the second prong of the *Seminole* test "requires us to make an objective inquiry" into "whether Congress could have enacted the legislation at issue pursuant to a constitutional provision granting it the power to abrogate;" concluding that Congress

must have the power to abrogate as an objective matter but that Congress's specific intent to abrogate based on that authority is irrelevant); *see also Doe*, 138 F.3d at 659; *Timmer v. Michigan Dept. of Commerce*, 104 F.3d 833, 840, 72 Fair Empl. Prac. Cas. (BNA) 1471, 69 Empl. Prac. Dec. (CCH) ¶ 44543, 133 Lab. Cas. (CCH) ¶ 33503, 1997 FED App. 15P (6th Cir. 1997); *E.E.O.C. v. Wyoming*, 460 U.S. 226, 243-44 n.18, 103 S. Ct. 1054, 75 L. Ed. 2d 18, 4 Employee Benefits Cas. (BNA) 1033, 31 Fair Empl. Prac. Cas. (BNA) 74, 31 Empl. Prac. Dec. (CCH) ¶ 33364 (1983).

- 506 *Cf. Varner*, 1998 WL 407011 at *6-8.
- 507 *Wilson-Jones v. Caviness*, 99 F.3d 203, 3 Wage & Hour Cas. 2d (BNA) 929, 132 Lab. Cas. (CCH) ¶ 33450, 1996 FED App. 343P (6th Cir. 1996), opinion amended on denial of reh'g, 107 F.3d 358, 3 Wage & Hour Cas. 2d (BNA) 1501 (6th Cir. 1997) (employees sued the Ohio Civil Rights Commission under the Fair Labor Standards Act).
- 508 *Id.* at 209 (quoting *Katzenbach*, 384 U.S. at 651, and noting that only the first *Katzenbach* factor provides any real guidance in analyzing whether a statute was enacted pursuant to § 5 of the Fourteenth Amendment).
- 509 *Id.*
- 510 *Id.* at 210 (holding that there was no logical connection between the Fourteenth Amendment and the Fair Labor Standards Act).
- 511 *See, e.g., In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 244, 31 Bankr. Ct. Dec. (CRR) 1246, 32 Collier Bankr. Cas. 2d (MB) 238, Bankr. L. Rep. (CCH) ¶ 77604 (3d Cir. 1998), as amended, (Feb. 19, 1998) (applying “rationally related test” and reasoning that “there must be something about the act connecting it to recognized Fourteenth Amendment aims”) (quoting *Wilson-Jones*, 99 F.3d at 210)); *see also cases cited infra* at note 537.
- 512 *See American Federation of State, County and Mun. Employees, AFL-CIO v. Com. of Va.*, 949 F. Supp. 438, 3 Wage & Hour Cas. 2d (BNA) 1191 (W.D. Va. 1996), *aff'd*, 145 F.3d 182, 4 Wage & Hour Cas. 2d (BNA) 1110, 135 Lab. Cas. (CCH) ¶ 33686 (4th Cir. 1998); *Taylor v. Com. of Va.*, 951 F. Supp. 591, 3 Wage & Hour Cas. 2d (BNA) 1199 (E.D. Va. 1996); *see also Franks v. Kentucky School for the Deaf*, 142 F.3d 360, 126 Ed. Law Rep. 70, 1998 FED App. 124P (6th Cir. 1998) (holding that Congress had power to apply Title IX to the states because the Fourteenth Amendment and Title IX both proscribe gender discrimination in education); *Crawford v. Davis*, 109 F.3d 1281, 117 Ed. Law Rep. 90, 70 Empl. Prac. Dec. (CCH) ¶ 44579 (8th Cir. 1997).
- 513 *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966).
- 514 *Goshtasby v. Board of Trustees of University of Illinois*, 141 F.3d 761, 767, 76 Fair Empl. Prac. Cas. (BNA) 1179 (7th Cir. 1998) (quoting *Katzenbach*, 384 U.S. at 650; the Court first articulated this test in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819) in the context of the Necessary and Proper Clause; *Katzenbach* extended the test to the Fourteenth Amendment); *see also Autio v. AFSCME*, Local 3139, 140 F.3d 802, 7 A.D. Cas. (BNA) 1706 (8th Cir. 1998), reh'g en banc granted, opinion vacated, (July 7, 1998) (applying the *Katzenbach* test); *Wheeling*, 141 F.3d 88 (applying the *Katzenbach* test).
- 515 *City of Boerne v. Flores*, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 74 Fair Empl. Prac. Cas. (BNA) 62, 70 Empl. Prac. Dec. (CCH) ¶ 44785 (U.S. 1997).
- 516 *Id.* at 2164; *see also CSX Transp., Inc. v. Board of Public Works of State of W.Va.*, 138 F.3d 537, 540 (4th Cir. 1998), cert. denied, 1998 WL 313246 (U.S. 1998) (noting, in *dicta*, that “the power granted to Congress by Section Five of the Fourteenth Amendment is limited to the promulgation of remedial or preventive legislation that enforces the provisions of the Fourteenth Amendment”); *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (“Congress may only ‘enforce’ the provisions of the Amendments and may do so only by ‘appropriate legislation’”).
- 517 117 S.Ct. at 2164.
- 518 *See Varner v. Illinois State University*, 150 F.3d 706, 128 Ed. Law Rep. 96, 135 Lab. Cas. (CCH) ¶ 33700 (7th Cir. 1998) (noting that *Boerne* rejected *Katzenbach*'s substantive “ratchet” theory under which Congress could expand the substantive rights contained in § 1 of the Fourteenth Amendment).
- 519 *See Coolbaugh v. State of La. on Behalf of Louisiana Dept. of Public Safety & Corr. on Behalf of Louisiana Dept. of Motor Vehicles*, 136 F.3d 430, 435, 7 A.D. Cas. (BNA) 1730 (5th Cir. 1998), reh'g en banc denied, (May 11, 1998) and cert. denied, 1998 WL 289414 (U.S. 1998) (reasoning that “Congress is authorized to adopt legislation that remedies or prevents unconstitutional conduct;” that there must be a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end;” and that this “proportionality inquiry” has “two primary facets: the extent of the threatened constitutional violations, and the scope of the steps provided in the legislation to remedy or prevent such violations”) (quoting *City of Boerne*, 117 S.Ct. at 2164)); *Varner*, 1998 WL 407011 (applying congruence and proportionality test to determine whether statute deters or remedies unconstitutional conduct); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 359, 45 U.S.P.Q.2d (BNA) 1001 (3d Cir. 1997) (reasoning that “Congress' power to legislate under section five is quite broad,” but “is not without boundaries;” that legislation to enforce the substantive provisions of the Fourteenth Amendment, particularly the Due Process Clause, “must not create new substantive rights, but instead must provide a method of protecting against violations of those rights already extant;” or may “serve the broader purposes of the Due Process Clause;” that “[t]he Due Process Clause itself sets out the boundaries of what rights it protects: the conduct must involve action by a state; it must deprive an individual of life, liberty or property; and the

deprivation must occur without due process of law;” and that these three requirements are “at the core of what the [legislation] must remedy to be valid under the Fourteenth Amendment.”).

- 520 See *Goshtasby v. Board of Trustees of University of Illinois*, 141 F.3d 761, 767-769, 76 Fair Empl. Prac. Cas. (BNA) 1179 (7th Cir. 1998).
- 521 See *Franks v. Kentucky School for the Deaf*, 142 F.3d 360, 126 Ed. Law Rep. 70, 1998 FED App. 124P (6th Cir. 1998) (applying the objective inquiry test but no clear test to determine “appropriate legislation”); *Crawford v. Davis*, 109 F.3d 1281, 117 Ed. Law Rep. 90, 70 Empl. Prac. Dec. (CCH) ¶ 44579 (8th Cir. 1997) (applying the objective inquiry test but no clear test to determine “appropriate legislation”); *Lam v. Curators of the University of Missouri at Kansas City Dental School*, 122 F.3d 654, 120 Ed. Law Rep. 948 (8th Cir. 1997) (following *Crawford*); *Thorpe v. Virginia State University*, 6 F. Supp. 2d 507, 128 Ed. Law Rep. 114 (E.D. Va. 1998) (applying the *Katzenbach* test); *but see Litman v. George Mason University*, 5 F. Supp. 2d 366, 127 Ed. Law Rep. 790 (E.D. Va. 1998) (applying the objective inquiry test and holding that Title IX was not enacted pursuant to Fourteenth Amendment).
- 522 See *Wheeling & Lake Erie R. Co. v. Public Utility Com'n of Com. of Pa.*, 141 F.3d 88 (3d Cir. 1998); *but see Union Pacific R. Co. v. Burton*, 949 F. Supp. 1546, 143 A.L.R. Fed. 703 (D. Wyo. 1996) (holding that the Fourteenth Amendment does not justify abrogation, but not expressly adopting a test to determine the scope of the Fourteenth Amendment).
- 523 See *Autio v. AFSCME, Local 3139*, 140 F.3d 802, 7 A.D. Cas. (BNA) 1706 (8th Cir. 1998), reh'g en banc granted, opinion vacated, (July 7, 1998); *Coolbaugh*, 136 F.3d 430; *Muller v. Costello*, 997 F. Supp. 299 (N.D.N.Y. 1998); *Martin v. State of Kan.*, 978 F. Supp. 992, 7 A.D. Cas. (BNA) 973 (D. Kan. 1997); *Wallin v. Minnesota Dept. of Corrections*, 974 F. Supp. 1234, 25 A.D.D. 370 (D. Minn. 1997), *aff'd*, 153 F.3d 681, 8 A.D. Cas. (BNA) 1012 (8th Cir. 1998); *Niece v. Fitzner*, 941 F. Supp. 1497, 19 A.D.D. 289, 7 A.D. Cas. (BNA) 1143 (E.D. Mich. 1996). One of these courts applied the *Katzenbach* test (*see Autio*), one applied the *Boerne* test (*Coolbaugh*), and the others did not apply any clear test to determine the scope of Congress's Fourteenth Amendment abrogation powers (*see Muller, Martin, Wallin, Niece*).
- 524 See *Garrett v. Board of Trustees of University of Alabama in Birmingham*, 989 F. Supp. 1409, 7 A.D. Cas. (BNA) 1247 (N.D. Ala. 1998); *Nihiser v. Ohio E.P.A.*, 979 F. Supp. 1168, 7 A.D. Cas. (BNA) 751 (S.D. Ohio 1997). *Nihiser* applied the *Katzenbach* test; *Garrett* did not apply a clear test.
- 525 See *College Savings Bank*, 131 F.3d 353 (applying the *Boerne* test).
- 526 See *Garrett*, 989 F. Supp. 1409 (no clear test).
- 527 See *Velasquez v. Frapwell*, 994 F. Supp. 993, 125 Ed. Law Rep. 650, 157 L.R.R.M. (BNA) 2690 (S.D. Ind. 1998) (holding that the Fourteenth Amendment does not allow abrogation; applying the *Katzenbach* test); *Palmatier v. Michigan Dept. of State Police*, 981 F. Supp. 529, 156 L.R.R.M. (BNA) 2765 (W.D. Mich. 1997) (holding that the Fourteenth Amendment does not allow abrogation; not applying any clear test to determine the scope of the Fourteenth Amendment).
- 528 See *Rodriguez v. Texas Com'n of Arts*, 992 F. Supp. 876, 45 U.S.P.Q.2d (BNA) 1953 (N.D. Tex. 1998).
- 529 See *Hodgson v. Mississippi Dept. of Corrections*, 963 F. Supp. 776 (E.D. Wis. 1997).
- 530 See *Rowlands v. Pointe Mouillee Shooting Club*, 959 F. Supp. 422, 27 Env'tl. L. Rep. 21167 (E.D. Mich. 1997) (holding that the Fourteenth Amendment does not allow abrogation; not applying any clear test to determine the scope of the Fourteenth Amendment).
- 531 See *Vazquez Morales v. Estado Libre Asociado de Puerto Rico*, 967 F. Supp. 42 (D.P.R. 1997).
- 532 See *Abril v. Com. of Virginia*, 145 F.3d 182, 4 Wage & Hour Cas. 2d (BNA) 1110, 135 Lab. Cas. (CCH) ¶ 33686 (4th Cir. 1998); *Balgowan v. State of N.J.*, 115 F.3d 214, 3 Wage & Hour Cas. 2d (BNA) 1703, 37 Fed. R. Serv. 3d (LCP) 1265 (3d Cir. 1997); *Close v. New York*, 123 F.3d 31 (2d Cir. 1997); *Mills v. State of Me.*, 118 F.3d 37, 3 Wage & Hour Cas. 2d (BNA) 1802, 134 Lab. Cas. (CCH) ¶ 33585 (1st Cir. 1997); *Moad v. Arkansas State Police Dept.*, 111 F.3d 585, 3 Wage & Hour Cas. 2d (BNA) 1540, 133 Lab. Cas. (CCH) ¶ 33521 (8th Cir. 1997); *Raper v. State of Iowa*, 115 F.3d 623, 3 Wage & Hour Cas. 2d (BNA) 1727, 133 Lab. Cas. (CCH) ¶ 33546 (8th Cir. 1997); *Bergemann v. State of R.I.*, 958 F. Supp. 61, 3 Wage & Hour Cas. 2d (BNA) 1495 (D.R.I. 1997); *Digiore v. State of Ill.*, 962 F. Supp. 1064, 3 Wage & Hour Cas. 2d (BNA) 1542, 133 Lab. Cas. (CCH) ¶ 33543 (N.D. Ill. 1997); *Frazier v. Courter*, 958 F. Supp. 252, 3 Wage & Hour Cas. 2d (BNA) 1662, 134 Lab. Cas. (CCH) ¶ 33592 (W.D. Va. 1997); *Palotai v. University of Maryland College Park*, 959 F. Supp. 714, 118 Ed. Law Rep. 89 (D. Md. 1997); *Whalen v. State of Ariz.*, 962 F. Supp. 1218 (D. Ariz. 1997); *Adams v. State of Kan.*, 934 F. Supp. 371, 3 Wage & Hour Cas. 2d (BNA) 626, 132 Lab. Cas. (CCH) ¶ 33475 (D. Kan. 1996), *aff'd*, 116 F.3d 489, 3 Wage & Hour Cas. 2d (BNA) 1792, 133 Lab. Cas. (CCH) ¶ 33549 (10th Cir. 1997); *American Federation of State, County and Mun. Employees, AFL-CIO v. Com. of Va.*, 949 F. Supp. 438, 3 Wage & Hour Cas. 2d (BNA) 1191 (W.D. Va. 1996), *aff'd*, 145 F.3d 182, 4 Wage & Hour Cas. 2d (BNA) 1110, 135 Lab. Cas. (CCH) ¶ 33686 (4th Cir. 1998); *Arnold v. State of Ark.*, 957 F. Supp. 185 (E.D. Ark. 1996); *Blow v. State of Kan.*, 929 F. Supp. 1400, 3 Wage & Hour Cas. 2d (BNA) 627, 132 Lab. Cas. (CCH) ¶ 33445 (D. Kan. 1996), *aff'd*, 116 F.3d 489, 3 Wage & Hour Cas. 2d (BNA) 1792, 133 Lab. Cas. (CCH) ¶ 33549 (10th Cir. 1997); *Chauvin v. State of La. and Dept. of Wildlife and Fisheries*, 937 F. Supp. 567, 3 Wage & Hour Cas. 2d (BNA) 927, 132 Lab. Cas. (CCH) ¶ 33457 (E.D. La. 1996); *Close v. State of N.Y.*, 3 Wage & Hour Cas. 2d (BNA) 856, 1996 WL 481550 (N.D.N.Y. 1996), *judgment aff'd*, 125 F.3d 31, 4 Wage & Hour Cas. 2d (BNA) 108, 134 Lab. Cas. (CCH) ¶ 33580 (2d Cir. 1997); *Moad v. Arkansas State Police Dept.*, 1996 WL 819805 (E.D. Ark. 1996), *judgment aff'd*, 111 F.3d 585, 3 Wage & Hour Cas. 2d (BNA) 1540, 133 Lab. Cas. (CCH) ¶ 33521 (8th Cir. 1997); *Rehberg v. Department of Public*

Safety, 946 F. Supp. 741, 3 Wage & Hour Cas. 2d (BNA) 1149, 133 Lab. Cas. (CCH) ¶ 33526 (S.D. Iowa 1996), *aff'd*, 117 F.3d 1423 (8th Cir. 1997); Taylor v. Com. of Va., 951 F. Supp. 591, 3 Wage & Hour Cas. 2d (BNA) 1199 (E.D. Va. 1996); Walden v. Florida Dept. of Corrections, 975 F. Supp. 1330, 135 Lab. Cas. (CCH) ¶ 33644 (N.D. Fla. 1996). Of these cases, several applied the *Katzenbach* test (*see Digiore, Whalen, Taylor, Long*), a few added the rational or logical connection test (*see AFCSME, Taylor, Digiore*), and the rest did not any clear test to determine whether FLSA abrogation was proper under the Fourteenth Amendment (*see Palotai, Raper, Balgowan, Blow, Chauvin, Close, Moad, Walden, Adams, Arnold*).

- 533 *See Varner*, 1998 WL 407011; *Perdue v. City University of New York*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998); *Ussery v. State of La. Through Dept. of Health and Hospitals*, 962 F. Supp. 922, 77 Fair Empl. Prac. Cas. (BNA) 1192 (W.D. La. 1997), decision *aff'd* and remanded, 150 F.3d 431, 77 Fair Empl. Prac. Cas. (BNA) 1198 (5th Cir. 1998); *but see Larry v. Board of Trustees of University of Alabama*, 975 F. Supp. 1447, 121 Ed. Law Rep. 673 (N.D. Ala. 1997) (holding that the Equal Pay Act was not enacted pursuant to a valid exercise of power under § 5). With the exception of *Varner*, none of these cases applied any clear test to determine the scope of Congress's Fourteenth Amendment abrogation powers.
- 534 *See Goshtasby*, 141 F.3d 761; *Hurd v. Pittsburg State University*, 109 F.3d 1540, 117 Ed. Law Rep. 95, 73 Fair Empl. Prac. Cas. (BNA) 1448, 70 Empl. Prac. Dec. (CCH) ¶ 44615 (10th Cir. 1997); *Hines v. Ohio State University*, 3 F. Supp.2d 859 (S.D. Ohio 1998); *Pease v. University of Cincinnati Medical Center*, 6 F. Supp. 2d 706 (S.D. Ohio 1998); *Young v. Pennsylvania House of Representatives, Republican Caucus*, 994 F. Supp 282 (M.D. Pa. 1998); *Hodgson v. University of Texas Medical Branch at Galveston*, 953 F. Supp. 168, 116 Ed. Law Rep. 599, 73 Fair Empl. Prac. Cas. (BNA) 108 (S.D. Tex. 1997); *Mete v. New York State Office of Mental Retardation and Developmental Disabilities*, 984 F. Supp. 125, 77 Fair Empl. Prac. Cas. (BNA) 355 (N.D.N.Y. 1997); *Pietraszewski v. Buffalo State College*, 1997 WL 436763 (W.D.N.Y. 1997); *Simpson v. Texas Dept. of Criminal Justice*, 975 F. Supp. 921, 74 Fair Empl. Prac. Cas. (BNA) 1754 (W.D. Tex. 1997); *Ullman v. Rector and Visitors of University of Virginia*, 1997 WL 134557 (W.D. Va. 1997). *Goshtasby* applied both the *Katzenbach* and *Boerne* tests, several of the district courts applied the *Katzenbach* test (*see Young, Simpson*), one applied the objective inquiry test (*see Pease*), but the others did not apply any clear test to determine the scope of Congress's Fourteenth Amendment abrogation powers (*see Hines, Hodgson, Mete, Pietraszewski*).
- 535 *See Goshtasby*, 141 F.3d 761; *Hall v. Missouri Highway and Transp. Com'n*, 995 F. Supp. 1001 (E.D. Mo. 1998); *Bechtel v. New York State Banking Dept.*, 1997 WL 667784 (W.D.N.Y. 1997); *Humenansky v. Board of Regents of the University of Minnesota*, 958 F. Supp. 439, 117 Ed. Law Rep. 606, 73 Fair Empl. Prac. Cas. (BNA) 1004 (D. Minn. 1997), *aff'd*, 152 F.3d 822, 77 Fair Empl. Prac. Cas. (BNA) 679 (8th Cir. 1998); *MacPherson v. University of Montevallo*, 938 F. Supp. 785, 113 Ed. Law Rep. 301, 71 Fair Empl. Prac. Cas. (BNA) 1318, 69 Empl. Prac. Dec. (CCH) ¶ 44327 (N.D. Ala. 1996), *aff'd*, 139 F.3d 1426, 8 A.D. Cas. (BNA) 1, 125 Ed. Law Rep. 341, 76 Fair Empl. Prac. Cas. (BNA) 1201, 73 Empl. Prac. Dec. (CCH) ¶ 45419 (11th Cir. 1998). *Goshtasby* applied both the *Katzenbach* and *Boerne* tests. None of the other courts applied a clear test to determine the scope of Congress's Fourteenth Amendment powers.
- 536 *See In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 31 Bankr. Ct. Dec. (CRR) 1246, 32 Collier Bankr. Cas. 2d (MB) 238, Bankr. L. Rep. (CCH) ¶ 77604 (3d Cir. 1998), as amended, (Feb. 19, 1998) (applying the logical connection test); *Matter of Estate of Fernandez*, 123 F.3d 241, 31 Bankr. Ct. Dec. (CRR) 601, 38 Collier Bankr. Cas. 2d (MB) 1249, Bankr. L. Rep. (CCH) ¶ 77514 (5th Cir. 1997), amended on denial of reh'g, 130 F.3d 1138 (5th Cir. 1997); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 31 Bankr. Ct. Dec. (CRR) 218, 38 Collier Bankr. Cas. 2d (MB) 574, Bankr. L. Rep. (CCH) ¶ 77457 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517, 140 L. Ed. 2d 670 (U.S. 1998); *In re Elias*, 218 B.R. 80, 32 Bankr. Ct. Dec. (CRR) 2, 39 Collier Bankr. Cas. 2d (MB) 782 (Bankr. 9th Cir. 1998); *In re Kish*, 212 B.R. 808, Bankr. L. Rep. (CCH) ¶ 77512 (D.N.J. 1997); *In re Burkhardt*, 220 B.R. 837 (Bankr. D.N.J. 1998); *In re Neary*, 220 B.R. 864, 32 Bankr. Ct. Dec. (CRR) 737, Bankr. L. Rep. (CCH) ¶ 77715 (Bankr. E.D. Pa. 1998); *In re Perez*, 220 B.R. 216, 32 Bankr. Ct. Dec. (CRR) 612 (Bankr. D.N.J. 1998); *In re C.J. Rogers, Inc.*, 212 B.R. 265, Unempl. Ins. Rep. (CCH) ¶ 22195 (E.D. Mich. 1997); *In re Morrell*, 218 B.R. 87, 32 Bankr. Ct. Dec. (CRR) 147 (Bankr. C.D. Cal. 1997); *In re Mueller*, 211 B.R. 737 (Bankr. D. Mont. 1997); *In re NVR L.P.*, 206 B.R. 831, 30 Bankr. Ct. Dec. (CRR) 843 (Bankr. E.D. Va. 1997), *aff'd*, 222 B.R. 514 (E.D. Va. 1998); *In re Rose*, 214 B.R. 372, 31 Bankr. Ct. Dec. (CRR) 906, 122 Ed. Law Rep. 472 (Bankr. W.D. Mo. 1997); *In re Tri-City Turf Club, Inc.*, 203 B.R. 617, 30 Bankr. Ct. Dec. (CRR) 81 (Bankr. E.D. Ky. 1996). For cases that hold § 106(a) to be unconstitutional but do not expressly consider whether the Fourteenth Amendment applies, *see supra* note 331.
- 537 *See, e.g., Sacred Heart*, 133 F.3d 237; *Elias*, 218 B.R. 80; *Burkhardt*, 220 B.R. 837; *Neary*, 220 B.R. 864; *Perez*, 220 B.R. 216; *C.J. Rogers*, 212 B.R. 265; *Mueller*, 211 B.R. 737; *NVR*, 206 B.R. 831; *Tri City Turf Club*, 203 B.R. 617; *cf. Kish*, 212 B.R. 808 (applying the *Boerne* congruence and proportionality test).
- 538 *See Barsalou, supra* note 563 at 608 n. 142 (discussing the rational relation requirement).
- 539 Meltzer, *supra* note 82, at 49-50 (noting, also, that *Seminole* raises hard questions concerning the scope of § 5 of the Fourteenth Amendment).
- 540 *See Sacred Heart*, 133 F.3d 237, 244-45 (3d Cir. 1998); *Kish*, 212 B.R. 808, 817.
- 541 *See, e.g., Browning, supra* note 322, at 1 (arguing that the Fourteenth Amendment argument is contrary to “common sense,” and that the DOJ should look beyond bankruptcy law; also noting that “[t]here is not even a statutory right to have all bankruptcy issues heard exclusively in federal bankruptcy court, much less a constitutional right”; and that the DOJ's bankruptcy focus ignores the fact of concurrent bankruptcy jurisdiction and is myopic because the Fourteenth Amendment arguments would apply equally to privileges under other statutes such as the FLSA, Clean Water Act, Railroad Revitalization Act, and would in effect repeal the Eleventh Amendment); Cordry, *supra* note 340, at 1 (arguing that bankruptcy cannot be a privilege of citizenship when one need

not be a person let alone a citizen to file bankruptcy; also arguing that the privileges and immunities clause has never been construed so broadly as to include all federal law); Clark, *supra* note 338, at 5 (arguing that Cordry's analysis is too simplistic, but agreeing that the Fourteenth Amendment argument is not viable); Paskay, *supra* note 323, at 12 (“It is not without doubt, however, that while this approach [*i.e.*, abrogation under the Fourteenth Amendment] may save the 1994 Amendment of Section 106, one would be less than candid not to admit that this may be an impermissible stretch of the scope of the Fourteenth Amendment.”); Joseph E. Miller, III, *Abrogating Sovereign Immunity Pursuant to Its Bankruptcy Clause Power: Congress Went Too Far!*, 13 BANKR. DEV. J. 197, 233(1996) (arguing that extending the Privileges and Immunities Clause to permit abrogation under the Bankruptcy Code is too great a “stretch”); *see also* Field, *supra* note 19, at 15-16 (suggesting that *Seminole* may invalidate the parts of the bankruptcy statute that allow individuals to sue states to enforce federal law, because the bankruptcy statute was not “enacted or enactable under” the Fourteenth Amendment).

- 542 *See In re Straight*, 209 B.R. 540 (D. Wyo. 1997), judgment aff'd, 143 F.3d 1387, 32 Bankr. Ct. Dec. (CRR) 877, Bankr. L. Rep. (CCH) ¶ 77719 (10th Cir. 1998); *In re Burke*, 203 B.R. 493, 497, 30 Bankr. Ct. Dec. (CRR) 62, 37 Collier Bankr. Cas. 2d (MB) 453 (Bankr. S.D. Ga. 1996) (reasoning that the Fourteenth Amendment allows Congress to enact laws to prevent states from abridging the privileges and immunities of citizenship, which include the right to bankruptcy relief); *In re Headrick*, 200 B.R. 963 (Bankr. S.D. Ga. 1996); *see also In re Southern Star Foods, Inc.*, 190 B.R. 419, 28 Bankr. Ct. Dec. (CRR) 324 (Bankr. E.D. Okla. 1995) (decided prior to *Seminole*).
- 543 *See In re Burke*, 146 F.3d 1313, 32 Bankr. Ct. Dec. (CRR) 1147, Bankr. L. Rep. (CCH) ¶ 77755 (11th Cir. 1998) (consolidated appeal of *Headrick* and *Burke*); *In re Straight*, 143 F.3d 1387, 32 Bankr. Ct. Dec. (CRR) 877, Bankr. L. Rep. (CCH) ¶ 77719 (10th Cir. 1998).
- 544 *See Seminole*, 517 U.S. at 77 (Stevens, J., dissenting).
- 545 *Cf. Browning*, *supra* note 322, at 10 (“One thing is certain: sorting out *Seminole's* impact in the bankruptcy field will take years and years of litigation, for there are many issues of uncertain outcome and plenty of room for reasonable minds to differ on those issues.”).
- 546 This discussion assumes that the trustee or debtor is a “citizen,” within the meaning of the Eleventh Amendment. *See, e.g., In re Lazar*, 200 B.R. 358, 376, 29 Bankr. Ct. Dec. (CRR) 888 (Bankr. C.D. Cal. 1996) (reasoning that the trustee is not a federal agent acting on behalf of the United States).
- 547 *See Seminole*, 517 U.S. at 117, 121, nn.14, 16.
- 548 Waiver and consent are distinguished *infra* at Parts IV.B.1.a. and IV.B.1.b. The circumstances in which waiver and consent occur are beyond the scope of this Article.
- 549 *See infra* note 655; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45, 49 Fair Empl. Prac. Cas. (BNA) 1664, 50 Empl. Prac. Dec. (CCH) ¶ 39067 (1989).
- 550 *See, e.g., Hans v. Louisiana*, 134 U.S. 1, 17, 10 S. Ct. 504, 33 L. Ed. 842 (1890); Christopher L. Lafuse, *Beyond Blatchford v. Native Village of Noatak: Permitting the Indian Tribes to Sue the States Without Regard to the Eleventh Amendment Bar*, 26 VAL. U. L. REV. 639, 651-53 (1992); John Burns Taylor, *Express Waiver of Eleventh Amendment Immunity*, 17 GA. L. REV. 513, 515-520 (1983).
- 551 *See supra* note 14.
- 552 *See, e.g., In re 995 Fifth Ave. Associates, L.P.*, 963 F.2d 503, 22 Bankr. Ct. Dec. (CRR) 1420, 26 Collier Bankr. Cas. 2d (MB) 1162, Bankr. L. Rep. (CCH) ¶ 74546 (2d Cir. 1992).
- 553 *See, e.g., Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990) (“States may consent to suit in federal court.”); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 473, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987) (“If a State waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment.”); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) ¶ 35329 (1985) (“[I]f a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action.”); *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985) (“Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms ...”); *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (holding that the mere fact that a state participates in a federal program is not sufficient to establish consent to suit in federal court); *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 280, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) ¶ 8566, 70 Lab. Cas. (CCH) ¶ 32876 (1973) (“[A]n unconsenting State is immune from suits brought in federal courts”); *Hans v. Louisiana*, 134 U.S. 1, 17, 10 S. Ct. 504, 33 L. Ed. 842 (1890) (“Undoubtedly a state may be sued by its own consent ...”); *Clark v. Barnard*, 108 U.S. 436, 2 S. Ct. 878, 27 L. Ed. 780 (1883); *but cf. Employees*, 411 U.S. at 298, 310, 321-22 (Brennan, J., dissenting) (suggesting that consent may be permissible when the suit is by the state's own citizens, which is beyond the scope of the Eleventh Amendment, but that there is an open question whether the Eleventh Amendment bars federal court jurisdiction over a suit against a state by another state's citizens, even when the state has consented).

- 554 See, e.g., cases cited *infra* at note 608; see also Gibson, *supra* note 322, at 202, 208-212 (“[T]he Eleventh Amendment prohibits suit against unconsenting states only; if a state is found to have consented to such litigation in federal court, the suit may proceed.”).
- 555 See *Seminole*, 517 U.S. 44; cf. *State of Missouri v. Fiske*, 290 U.S. 18, 54 S. Ct. 18, 78 L. Ed. 145 (1933) (defining Eleventh Amendment immunity as a personal privilege); see discussion *supra* at notes 304-305 and accompanying text, *infra* at notes 617-619 and accompanying text. If states’ immunity in federal court either arose from the same source as states’ immunity in state court (*i.e.*, common law) or arose from a different source (*i.e.*, the Constitution) but was identical in nature to common law immunity (*i.e.*, a privilege), then traditional common law concepts of consent and waiver would apply in federal court actions to the same extent that they apply in state court actions.
- 556 The phrase “limited waiver” is coined here to distinguish “constructive waiver.”
- 557 See discussion *supra* at notes 140-162 and accompanying text; *infra* at notes 569-589 and accompanying text.
- 558 See *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 946-47, 84 Ed. Law Rep. 665, 27 U.S.P.Q.2d (BNA) 1241 (Fed. Cir. 1993), reh’g denied, en banc suggestion declined, (Sept. 23, 1993) (“The general rule, although not without debate, is that when a governmental entity has waived its immunity from federal judicial authority by taking legal action in federal court, the person charged can raise all counterclaims that arise from the same transaction or events.”); *U.S. v. Montrose Chemical Corp. of California*, 788 F. Supp. 1485, 1493, 35 Env’t. Rep. Cas. (BNA) 1089, 22 Env’t. L. Rep. 21333 (C.D. Cal. 1992) (“A state waives its Eleventh Amendment and sovereign immunities as to compulsory recoupment counterclaims by filing a complaint in federal court.”); *U.S. v. Mottolo*, 605 F. Supp. 898, 910, 22 Env’t. Rep. Cas. (BNA) 1529, 15 Env’t. L. Rep. 20444 (D.N.H. 1985) (“Filing suit as a plaintiff constitutes a waiver of Eleventh Amendment immunity as well as sovereign immunity with respect to any counterclaim asserted by a defendant which arises out of the same event underlying the State’s claim and which is asserted defensively in recoupment for the purpose of diminishing the State’s recovery.”); *Federal Savings & Federal Sav. & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1017 (7th Cir. 1969) (waiver by the federal government); see also Gibson, *supra* note 231, at 346 n.259 (collecting authorities); Gibson, *supra* note 322, at 209 (characterizing the rule as arising from lower federal courts that conclude “on the basis of rather limited Supreme Court authority, that a state that brings a claim in federal courts waives its Eleventh Amendment immunity from suit with respect to any recoupment claim that the defendant may assert against it”).
- 559 See *Mottolo*, 605 F. Supp. at 910 (collecting cases); *Federal Savings*, 419 F.2d at 1017; *United States v. Iron Mountain Mines, Inc.*, 882 F. Supp. 1432, 1453 (E.D. Cal. 1995); *Burgess v. M/V Tamano*, 382 F. Supp. 351, 356 n.6, 1974 A.M.C. 302 (D. Me. 1974); see also Gibson, *supra* note 322, at 209-10.
- 560 See generally 11 U.S.C. § 502 (1994) and cases cited *infra* note 608. The state might also take action in bankruptcy court by filing an adversary proceeding.
- 561 See, e.g., *Gardner v. State of N.J.*, 329 U.S. 565, 67 S. Ct. 467, 91 L. Ed. 504 (1947); see also *Clark v. Barnard*, 108 U.S. 436, 448, 2 S. Ct. 878, 27 L. Ed. 780 (1883); see generally discussion *supra* at notes 439-451 and accompanying text..
- 562 See 11 U.S.C. § 106 (b), (c) (1994). Common law recoupment involves defenses that arise from the same contract, transaction or occurrence. Common law setoff, in contrast, involves obligations between the same parties that arise from different contracts, transactions or occurrences. Cf. *Uniform Commercial Code* § 9-318.
- 563 See 11 U.S.C. § 106(b) (1994); cf. FED. R. CIV. P. 13(a) (requiring party to assert as compulsory counterclaim any claim that “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim”). See also *In re Value-Added Communications, Inc.*, 224 B.R. 354 (N.D. Tex. 1998). For a discussion of § 106(b), see generally Patricia L. Barsalou, *Defining the Limits of Federal Court Jurisdiction Over States in Bankruptcy Court*, 28 ST. MARY’S L.J. 575, 615-17 (1997); Gibson, *supra* note 231, at 316. Note that § 106(b) subjects the state only to claims that are property of the estate, and not to the claims of non-debtor parties, even if they arise from the same transaction. Section 106(b) leaves open several issues that are beyond the scope of this Article, including whether a claim by one state agency waives immunity with respect to counterclaims against other state agencies. See, e.g., Gibson, *supra* note 231, at 323, 335-36 (arguing that waiver applies only to the same state agency because § 106(b) applies only to counterclaims against “such governmental unit”). The 1994 Amendments to § 106(b) clarified that waiver occurs only when the state files a claim, rather than when the state merely holds a claim. See, e.g., *AER-Aerotron, Inc. v. Texas Dept. of Transp.*, 104 F.3d 677, 30 Bankr. Ct. Dec. (CRR) 264, 37 *Collier Bankr. Cas. 2d* (MB) 512, *Bankr. L. Rep.* (CCH) ¶ 77244 (4th Cir. 1997) (letters filed with clerk of court do not meet requirement of filing proof of claim for purposes of waiver under § 106(b)); see generally Gibson, *supra* note 231 (discussing issues that arose under the prior version of § 106(b) and analyzing the 1994 Amendments); see also *id.* at 316, 335 & nn. 171-172 (arguing that, after the 1994 Amendments, a claim must be evidenced by a formal proof of claim, an informal proof of claim is inadequate).
- 564 11 U.S.C. § 106(b) (1994). Unlike the abrogation rule of § 106(a), the recoupment rule of § 106(b) is not subject to a punitive damage limitation. See *id.* § 106(a),(b); cf. *id.* § 505 (providing for affirmative recovery of certain tax refunds from the state). See also Gibson, *supra* note 231, at 334-35 (noting that counterclaims allowed under § 106(b) are not limited to bankruptcy causes of actions, and are not subject to the limitations imposed under § 106(a) with respect to the Equal Access to Justice Act and punitive damages); cf. Browning, *supra* note 322, at 11 (arguing that, even if the state files a claim, it is not clear that the trustee may pursue an action under § 505(a)(2)(B), which allows affirmative monetary recovery); Mark Browning, Letter to Editor, reprinted in *More On the Seminole Tribe Case*, 29 No. 3 BANKR. CT. DEC. (LRP) 5 (July 2, 1996) (noting that § 505(a)(2)(B) envisions affirmative monetary relief in the form of a tax refund paid out of state treasury; arguing that states will usually file a proof of claim and thereby waive the immunity defense to a § 505 determination).

- 565 See 11 U.S.C. §§ 505(a)(2)(B) (tax refunds), 547(b) (1994) (preferential transfers). *Cf.* Browning, *supra* note 322, at 11 (noting that, if a Chapter 7 debtor's assets are insufficient to pay tax claims, the state may choose not to file a claim if there is a risk of a dispute).
- 566 See 11 U.S.C. § 106(c) (1994) (providing for deemed waiver for purposes of setoff but not affirmative recovery for claims arising from different transactions); *see also* Gibson, *supra* note 231, at 336-37 (noting that § 106(c) only allows setoff, but applies to any counterclaims, not simply counterclaims arising from the same transaction as the state's claim).
- 567 See, e.g., *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1148, 31 Bankr. Ct. Dec. (CRR) 218, 38 Collier Bankr. Cas. 2d (MB) 574, Bankr. L. Rep. (CCH) ¶ 77457 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517, 140 L. Ed. 2d 670 (U.S. 1998), cert. denied, 118 S. Ct. 1517 (1998):
 The Eleventh Amendment, which applies only to suits “commenced or prosecuted against one of the United States,” presents no bar to a state affirmatively entering a federal forum voluntarily to pursue its own interest. But it would violate the fundamental fairness of judicial process to allow a state to proceed in federal court and at the same time strip the defendant of valid defenses because they might be construed to be affirmative defenses against the state. When a state authorizes its officials voluntarily to invoke federal process in a federal forum, the state thereby consents to the federal forum's rules of procedure and may not invoke sovereign immunity to protect itself against the interposition of defenses to its action. The scope of these available defenses and the state's concomitant waiver of immunity is a question of federal law and procedure, but well-established principles of sovereign immunity dictate that this waiver be narrowly construed. [citation omitted] For this reason, we hold that to the extent a defendant's assertions in a state-instituted federal action, including those made with regard to a state-filed proof of claim in a bankruptcy action, amount to a compulsory counterclaim, a state has waived any Eleventh Amendment immunity against that counterclaim in order to avail itself of the federal forum.
Id. (vacating and remanding with instructions to dismiss trustee's action to avoid preferential transfer because it did not arise out of the same transaction as the state's proof of claim; therefore the state had not waived immunity as to that action).
 While 11 U.S.C. § 106(b) may correctly describe those actions that, as a matter of constitutional law, constitute a state's waiver of the Eleventh Amendment, it is nevertheless not within Congress' power to abrogate such immunity by “deeming” a waiver. Rather, in the absence of a constitutional authorization, it lies solely within a state's sovereign power to waive its immunity voluntarily and to consent to federal jurisdiction. Only if it waives such immunity may a private citizen sue the state in federal court.
Id. at 1147 (holding that § 106(b) is unconstitutional because it amounts to Congressional abrogation); *see also* AER-Aerotron, Inc. v. Texas Dept. of Transp., 104 F.3d 677, 681-83, 30 Bankr. Ct. Dec. (CRR) 264, 37 Collier Bankr. Cas. 2d (MB) 512, Bankr. L. Rep. (CCH) ¶ 77244 (4th Cir. 1997) (Niemeyer, J. concurring) (suggesting that Congress has no authority to enact a provision under which state is deemed to waive immunity in federal court); *In re NVR L.P.*, 206 B.R. 831, 30 Bankr. Ct. Dec. (CRR) 843 (Bankr. E.D. Va. 1997), aff'd, 222 B.R. 514 (E.D. Va. 1998) (holding that §§ 106(b) and 106(c) are unconstitutional attempts to avoid the Eleventh Amendment); Barsalou, *supra* note 563, at 615-17 (concluding that §§ 106(b) and 106(c) may be unconstitutional to the extent that they allow actions other than compulsory counterclaims asserted defensively against the state); Browning, *supra* note 322, at 10-11 (noting that because §§ 106(b) and 106(c) go beyond defensive compulsory counterclaims they raise the question whether Congress has authority to define the scope of waiver; arguing that § 106(b) may be unconstitutional to the extent it allows recovery beyond the traditional test established for states waiving immunity by filing suit in federal court; § 106(c) raises similar uncertainty); Gibson, *supra* note 231, at 346 (noting that the state may waive federal court immunity with respect to compulsory counterclaims but only for the purpose of reducing the state's claim, not for affirmative recovery against the state; arguing that §§ 106(b) and 106(c) are constitutionally suspect to the extent that they allow counterclaims beyond these limitations, unless “constructive waiver” remains valid); Gibson, *supra* note 322, at 210-11 (concluding that §§ 106(b) and 106(c) can be applied constitutionally to some counterclaims if the state files a claim, but that § 106(b) is unconstitutional to the extent it allows recovery other than to reduce the state's claim and § 106(c) is unconstitutional to the extent it allows setoff other than for compulsory counterclaims); *id.* at 201-02 (“[E]xcept to the extent that a state's filing of a proof of claim in a bankruptcy case can be deemed to constitute waiver of its Eleventh Amendment immunity, Congress exceeded its authority in authorizing counterclaims and setoffs to be asserted against states in bankruptcy court.”) (footnotes omitted); *Koehler v. Iowa College Student Aid Comm'n (In re Koehler)*, 204 B.R. 210, 219 (Bankr. D. Minn. 1997) (holding that state's filing of counterclaim in action against state for violation of stay constitutes affirmative action by state which waives state's immunity with respect to defensively asserted compulsory counterclaims by the debtor; collecting cases; also suggesting that § 106(b) may be unconstitutional to the extent it allows affirmative recovery, and § 106(c) may be unconstitutional to the extent it allows recovery for claims arising from other transactions); *id.* at 220 (discussing recoupment, arguing that *Seminole* does not undermine recoupment jurisdiction; concluding that the filing of a counterclaim constitutes affirmative action just as filing a complaint would for purposes of recoupment theory). Cases that upheld the bankruptcy waiver rule prior to *Seminole* include *In re 995 Fifth Ave. Associates, L.P.*, 963 F.2d 503, 508-09, 22 Bankr. Ct. Dec. (CRR) 1420, 26 Collier Bankr. Cas. 2d (MB) 1162, Bankr. L. Rep. (CCH) ¶ 74546 (2d Cir. 1992); *WJM, Inc. v. Massachusetts Dept. of Public Welfare*, 840 F.2d 996, 1002-03, 17 Bankr. Ct. Dec. (CRR) 468, Bankr. L. Rep. (CCH) ¶ 72203 (1st Cir. 1988).
- 568 See *Special Report: Seminole: What it Means/Possible Defenses*, 29 No. 8 BANKR. CT. DEC. (LRP) 1, 11-12 (8/13/96) (“If we apply the full Eleventh Amendment jurisprudence, a lot of our favorite concepts — consent to jurisdiction by filing a claim, jurisdiction by ambush — run up against the Eleventh Amendment, which says a waiver can only be made by someone with clear authority to do so.”) (quoting Daniel Amory); Browning, *supra* note 322, at 10, 27 (arguing that the filing of a proof of claim or other pleading in federal court cannot constitute a waiver unless the state official who filed the claim has the authority to waive the state's immunity; acknowledging that, if the official has no authority to waive immunity, the claim is not authorized either); *cf.* *Creative Goldsmiths*, 119 F.3d at 1147-48 (noting that court must look first to state law to determine if state has waived; only if an authorized state official filed suit does that court then look to federal law to determine the scope of waiver; “a state's consent to be sued in federal court must be clearly intended by its state law and implemented by an officer acting properly under that law”); *Koehler*, 204 B.R. at 220 (explaining why authority is not necessary).

- 569 In practice, courts have rarely recognized constructive waiver. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 673 (“Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.”); *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 1998 WL 156678 (N.D. Ill. 1998) (“Constructive waiver is generally disfavored by the courts.”); *Close v. State of N.Y.*, 3 Wage & Hour Cas. 2d (BNA) 856, 1996 WL 481550 (N.D.N.Y. 1996), judgment aff’d, 125 F.3d 31, 4 Wage & Hour Cas. 2d (BNA) 108, 134 Lab. Cas. (CCH) ¶ 33580 (2d Cir. 1997); *Hoeffner v. University of Minnesota*, 948 F. Supp. 1380, 1394 (D. Minn. 1996) (“[T]he rarity of a State’s constructive waiver of its Eleventh Amendment immunity cannot be overstated.”); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.6 at 410 (2d ed. 1994) (“[C]onstructive waiver of Eleventh Amendment immunity is virtually nonexistent.”).
- 570 Gibson, *supra* note 322, at 211 (citing CHEMERINSKY, *supra* note 569, § 7.6 at 410).
- 571 *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964) (overruled by, *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987)). *See* discussion *supra* at notes 140-146 and accompanying text; *see generally* Field, *supra* note 136, at 1218-27 (discussing *Parden* and the doctrine of conditional consent).
- 572 *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (holding that “[t]he mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal court”); *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 284-86, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) ¶ 8566, 70 Lab. Cas. (CCH) ¶ 32876 (1973) (holding that a constructive waiver of Eleventh Amendment immunity should only be found, if at all, in those circumstances where there is an explicit statement by Congress that it intended to expose the states to liability in federal court if they engaged in a particular activity, and the activity itself was of a sort that a state might voluntarily elect to implement; but noting that a state cannot be deemed to have waived its immunity if it is engaged in an important or core government function); *see also Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Ass’n*, 450 U.S. 147, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981); *see generally College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 362-63, 45 U.S.P.Q.2d (BNA) 1001 (3d Cir. 1997) (discussing the manner in which the courts have modified the *Parden* doctrine).
- 573 *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 478, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987).
- 574 *See Abril v. Com. of Virginia*, 145 F.3d 182, 4 Wage & Hour Cas. 2d (BNA) 1110, 135 Lab. Cas. (CCH) ¶ 33686 (4th Cir. 1998); *Chavez v. Arte Publico Press*, 139 F.3d 504, 125 Ed. Law Rep. 316, 46 U.S.P.Q.2d (BNA) 1541 (5th Cir. 1998); *AER-Aerotron, Inc. v. Texas Dept. of Transp.*, 104 F.3d 677, 30 Bankr. Ct. Dec. (CRR) 264, 37 Collier Bankr. Cas. 2d (MB) 512, Bankr. L. Rep. (CCH) ¶ 77244 (4th Cir. 1997); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 45 U.S.P.Q.2d (BNA) 1001 (3d Cir. 1997); *Close v. State of N.Y.*, 125 F.3d 31, 4 Wage & Hour Cas. 2d (BNA) 108, 134 Lab. Cas. (CCH) ¶ 33580 (2d Cir. 1997); *Digiore v. State of Ill.*, 962 F. Supp. 1064, 3 Wage & Hour Cas. 2d (BNA) 1542, 133 Lab. Cas. (CCH) ¶ 33543 (N.D. Ill. 1997); *In re Kish*, 212 B.R. 808, 815, Bankr. L. Rep. (CCH) ¶ 77512 (D.N.J. 1997); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400, 115 Ed. Law Rep. 699, 42 U.S.P.Q.2d (BNA) 1487 (D.N.J. 1996), aff’d, 131 F.3d 353, 45 U.S.P.Q.2d (BNA) 1001 (3d Cir. 1997); *American Federation of State, County and Mun. Employees, AFL-CIO v. Com. of Va.*, 949 F. Supp. 438, 3 Wage & Hour Cas. 2d (BNA) 1191 (W.D. Va. 1996), aff’d, 145 F.3d 182, 4 Wage & Hour Cas. 2d (BNA) 1110, 135 Lab. Cas. (CCH) ¶ 33686 (4th Cir. 1998); *In re NVR L.P.*, 206 B.R. 831, 849 n.35, 30 Bankr. Ct. Dec. (CRR) 843 (Bankr. E.D. Va. 1997), aff’d, 222 B.R. 514 (E.D. Va. 1998); *see also Barsalou, supra* note 563, at 613-14 nn. 154-60 (questioning continued viability of constructive waiver doctrine); Gibson, *supra* note 322, at 211 (noting that the Supreme Court in *Welch* overruled the part of *Parden* that allowed Congress to abrogate states’ immunity without unmistakably clear language; arguing that even though § 106 contains unmistakably clear language, *Welch* and *Edelman* suggest that constructive waiver may no longer be valid).
- 575 *Digiore v. State of Ill.*, 962 F. Supp. 1064, 1075-76, 3 Wage & Hour Cas. 2d (BNA) 1542, 133 Lab. Cas. (CCH) ¶ 33543 (N.D. Ill. 1997) (holding that the state did not constructively waive its Eleventh Amendment immunity for purposes of the Fair Labor Standards Act by contracting with the federal government to furnish services under federally funded drunk driver enforcement and speeding traffic accident reduction programs because the activities were an essential function of state government; reasoning that “[T]he difference between constructive waiver and abrogation is purely semantic. What Congress is prohibited from doing by abrogation, it should not be permitted to accomplish through the back door of waiver.”); *American Federation of State, County and Mun. Employees, AFL-CIO v. Com. of Va.*, 949 F. Supp. 438, 442, 3 Wage & Hour Cas. 2d (BNA) 1191 (W.D. Va. 1996), aff’d, 145 F.3d 182, 4 Wage & Hour Cas. 2d (BNA) 1110, 135 Lab. Cas. (CCH) ¶ 33686 (4th Cir. 1998) (holding that the state did not implicitly waive its Eleventh Amendment immunity for purposes of the Fair Labor Standards Act by employing individuals to work in state operated prisons and mental health facilities; reasoning that implied waiver would allow Congress to do indirectly that which it could not do directly; *i.e.*, abrogate states’ Eleventh Amendment immunity).
- 576 *See supra* note 228.
- 577 *See Chavez v. Arte Publico Press*, 139 F.3d 504, 507-08, 125 Ed. Law Rep. 316, 46 U.S.P.Q.2d (BNA) 1541 (5th Cir. 1998) (holding that Congress cannot condition states’ activities that are regulable by federal law upon the states’ implied consent to being sued in federal court; reasoning that *Seminole* disavowed the reasoning of both the plurality opinion and Justice White’s concurrence in *Union Gas*, which was based on *Parden*, and that *Seminole* incorporated much of the reasoning of Justice Scalia’s dissent in *Union Gas*, which explicitly called on the Court to overrule *Parden*; also reasoning that *Seminole* prohibits Congress from using Article I to expand judicial power under Article III); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400,

- 418-20, 115 Ed. Law Rep. 699, 42 U.S.P.Q.2d (BNA) 1487 (D.N.J. 1996), aff'd, 131 F.3d 353, 45 U.S.P.Q.2d (BNA) 1001 (3d Cir. 1997) (holding that Congress may not use its Article I powers to condition a state's participation in a particular market or industry on that state's waiver of Eleventh Amendment immunity; reasoning that *Parden* was based upon the "surrender" of sovereignty theory explicitly rejected by the Court in *Seminole*, and that Congress may not achieve indirectly through "waiver" what it cannot do directly through express abrogation) (declining to embrace the district court's holding that *Seminole* implicitly overruled *Parden*); *In re Kish*, 212 B.R. 808, 815, Bankr. L. Rep. (CCH) ¶ 77512 (D.N.J. 1997) (repeating its previous holding in *College Savings* that *Seminole* impliedly overruled *Parden*); see also *AER-Aerotron*, 104 F.3d at 683 (Niemeyer, J., concurring in the judgment) (arguing that waiver of Eleventh Amendment immunity requires unequivocal consent; Congress cannot waive states' immunity; "I do not mean to suggest that the statute [§ 106(b)] incorrectly describes those actions which constitute a state's waiver of sovereign immunity. But such actions constitute a waiver of immunity not because Congress in § 106 has said so. *Seminole Tribe* held that Congress' Article I powers are irrelevant to an Eleventh Amendment waiver. Instead, a state's actions waive immunity when such actions are independently sufficient under Eleventh Amendment immunity doctrine. Thus, although 11 U.S.C. § 106 may restate the law of Eleventh Amendment waiver, it does not establish the law on the subject.").
- 578 See, e.g., *Abril v. Com. of Virginia*, 145 F.3d 182, 4 Wage & Hour Cas. 2d (BNA) 1110, 135 Lab. Cas. (CCH) ¶ 33686 (4th Cir. 1998) (reserving decision and assuming the viability of the *Parden* doctrine despite judicial speculation that it has been impliedly overruled in *Seminole*); *AER-Aerotron*, 104 F.3d at 681 (declining "to offer conjecture as to what ramifications *Seminole* might have with regard to Congress's power to define the circumstances under which a State is deemed to have waived its Eleventh Amendment immunity"); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 365, 45 U.S.P.Q.2d (BNA) 1001 (3d Cir. 1997) (reasoning that "a court of appeals should be reluctant to hold that the Supreme Court implicitly has overruled its own decision when the Court had an opportunity to overrule the decision explicitly and did not do so"); *Close v. State of N.Y.*, 125 F.3d 31, 4 Wage & Hour Cas. 2d (BNA) 108, 134 Lab. Cas. (CCH) ¶ 33580 (2d Cir. 1997).
- 579 See *Beasley v. Alabama State Univ.*, 3 F. Supp.2d 1325 (M.D. Ala. 1998) (holding that state university voluntarily waived its immunity by accepting federal education funds conditioned upon Title IX's clear statement that accepting such funds would be a waiver); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998) (holding that state public service commission constructively waived immunity under the Telecommunications Act of 1996 by voluntarily participating in a federal telecommunications regulatory scheme); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, No. 97 C 2225, 97 C 4096, 1998 WL 156678, *8 (N.D. Ill. Mar. 31, 1998) (holding that state commerce commission waived immunity); *In re Barrett Refining Corp.*, 221 B.R. 795, 810-12, 32 Bankr. Ct. Dec. (CRR) 937 (Bankr. W.D. Okla. 1998) (holding that state constructively consented to the jurisdiction of the bankruptcy court by filing its proof of claim; stating among other reasons that the clear and unmistakable language in § 106 expresses the intent of Congress that if a state files a claim in a bankruptcy case, it waives immunity); cf. *In re Koehler*, 204 B.R. 210, 30 Bankr. Ct. Dec. (CRR) 176, 37 Collier Bankr. Cas. 2d (MB) 460, Bankr. L. Rep. (CCH) ¶ 77275 (Bankr. D. Minn. 1997) (holding that state student aid commission did not waive immunity under §§ 106(b) and (c) of the Bankruptcy Code because it did not file a proof of claim, but it did waive immunity to the extent that the debtor's damages would be equal to or less than the commission's counterclaim for the underlying debt).
- 580 See, e.g., *Beasley v. Alabama State University*, 3 F. Supp. 2d 1304, 127 Ed. Law Rep. 239 (M.D. Ala. 1998) (noting that *Parden* was overruled "to the extent that its holding conflicts with the requirement that Congress unequivocally state its intent to abrogate states' eleventh amendment immunity in a statute"); *In re Koehler*, 204 B.R. 210, 217-18, 30 Bankr. Ct. Dec. (CRR) 176, 37 Collier Bankr. Cas. 2d (MB) 460, Bankr. L. Rep. (CCH) ¶ 77275 (Bankr. D. Minn. 1997) (noting that "under *Welch*, a federal statute may still be used to waive a state's Eleventh Amendment immunity," although constructive waiver may only be found where there exists an "unequivocal indication that the state intends to consent to federal jurisdiction that would otherwise be barred by the Eleventh Amendment").
- 581 See *Illinois Bell*, 1998 WL 156678, at *5-7 (noting that although *Seminole* focussed on abrogation rather than waiver, it "explicitly reaffirmed the 'proposition that the States may waive their sovereign immunity,'" and concluding that the limitations *Seminole* placed on Congress's ability to abrogate states' immunity are "entirely independent from the well-established exception to Eleventh Amendment immunity known as waiver"); see also *Beasley v. Alabama State University*, 3 F. Supp. 2d 1304, 127 Ed. Law Rep. 239 (M.D. Ala. 1998).
- 582 See, e.g., *In re Elias*, 218 B.R. 80, 86, 32 Bankr. Ct. Dec. (CRR) 2, 39 Collier Bankr. Cas. 2d (MB) 782 (Bankr. 9th Cir. 1998) (holding that state tax board did not consent to jurisdiction or waive its Eleventh Amendment immunity in an adversary proceeding commenced by a Chapter 7 trustee to determine the debtor's state tax liability); *In re C.J. Rogers, Inc.*, 212 B.R. 265, 273-74, Unempl. Ins. Rep. (CCH) ¶ 22195 (E.D. Mich. 1997) (holding that state agency did not waive its immunity with respect to the Chapter 7 trustee's preferential transfer action, even though the state agency filed proofs of claim in bankruptcy case, because the state had not by declaration or legislation waived its immunity and had not filed a general appearance in federal court); *Micosukee Tribe of Indians of Florida v. U.S.*, 980 F. Supp. 448, 460 (S.D. Fla. 1997) (rejecting argument that state water management district constructively waived its Eleventh Amendment immunity by operating a flood control and water management project in conjunction with the Army Corps of Engineers); *Mulverhill v. State*, 4 Wage & Hour Cas. 2d (BNA) 15, 134 Lab. Cas. (CCH) ¶ 33610, 1997 WL 394817 (N.D.N.Y. 1997) (holding that state did not waive its Eleventh Amendment immunity pursuant to the Fair Labor Standards Act simply by being an employer); *Hodgson v. Mississippi Dept. of Corrections*, 963 F. Supp. 776, 786-87 (E.D. Wis. 1997) (holding that state department of corrections did not waive its Eleventh Amendment immunity when it joined an interstate compact by enacting the Uniform Act for Out-Of-State Parolee Supervision); *Hoefner v. University of Minnesota*, 948 F. Supp. 1380, 1394 (D. Minn. 1996) (holding that state university did not waive its Eleventh Amendment immunity by participating in a federally regulated experimental drug-manufacturing program).
- 583 *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 45 U.S.P.Q.2d (BNA) 1001 (3d Cir. 1997).

- 584 *Id.* at 363; *see also* *In re Barrett Refining Corp.*, 221 B.R. 795, 813, 32 Bankr. Ct. Dec. (CRR) 937 (Bankr. W.D. Okla. 1998) (“[T]he test for “constructive consent” has two prongs: 1) Congress must have stated in clear and unmistakable language the intent that the state will be liable in federal court if the state participates in the federally regulated conduct and 2) the state voluntarily engages in the federally regulated conduct.”); *AER-Aerotron*, 104 F.3d at 681 (“We realize that the power to define waiver can become the functional equivalent of the power to abrogate. Indeed, defining waiver as anything less than ‘the sort of voluntary choice which we generally associate with the concept of constitutional waiver’ permits Congress to do indirectly what it perhaps could not do otherwise.” (quoting *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 296, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) ¶ 8566, 70 Lab. Cas. (CCH) ¶ 32876 (1973) (Marshall, J., dissenting))); cases cited *supra* at note 572; *see generally* Field, *supra* note 136, at 1218-27 (discussing imputing consent from the state’s participation in essential governmental services).
- 585 *See* 11 U.S.C. § 106(b), (c) (1994).
- 586 *Id.*
- 587 *See Barrett*, 221 B.R. at 813-14 (noting that constructive waiver was an alternate holding because the court found that the Eleventh Amendment did not apply to the discharge of the state’s claim); *Koehler*, 204 B.R. 210; *cf. AER-Aerotron*, 104 F.3d 677; *Elias*, 218 B.R. 80; *C.J. Rogers*, 212 B.R. 265; *contra Kish*, 212 B.R. 808.
- 588 *See* Gibson, *supra* note 322, at 211 (suggesting that the Court may not be willing to find that the filing of a proof of claim constitutes a voluntary waiver if it is the only means by which the state can collect on its claim); *but see In re Lazar*, 200 B.R. 358, 380-81, 29 Bankr. Ct. Dec. (CRR) 888 (Bankr. C.D. Cal. 1996) (reasoning that the filing of a claim is a voluntary act that waives immunity, relying on pre-*Seminole* authorities and considering the issue in the context of waiver generally, rather than constructive waiver); Karen Cordry, *State Governments in the Bankruptcy Courts After Seminole: Are They the New 800 Pound Gorillas?*, 28 No. 23 BANKR. CT. DEC. (LRP) 1, 9 (May 14, 1996) (arguing that § 106(b) and § 106(c) are more likely than § 106(a) to be upheld as conditions exacted in exchange for a state receiving the benefits of federal bankruptcy law, such as participation in the bankruptcy distribution); *see generally* Field, *supra* note 136, at 1222-28 (discussing what constitutes consent and voluntariness in the context of constructive consent).
- 589 *See supra* note 579; *cf. cases cited supra* note 577-582.
- 590 *See generally Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) ¶ 35329 (1985) (state may waive by statute or constitutional provision or by otherwise waiving).
- 591 Because the state is not obligated to forego immunity, it may impose conditions on the scope of its consent, such as statutes of limitations. *See, e.g., Santee Sioux Tribe of Nebraska v. State of Neb.*, 121 F.3d 427, 431 (8th Cir. 1997).
- 592 For example, Hawai’i has consented to suit (i) without a jury in all contract claims against the state (*see H.R.S. § 661-1* (1993)), (ii) in all tort actions covered by insurance, to the limit of the insurance policy (*see H.R.S. § 661-11* (1993)), (iii) in all tort actions based upon the torts of state employees, except that the state does not waive liability for pre-judgment interest or punitive damages in such suits, and the state waives immunity only for those suits filed within a short limitations period (*see H.R.S. §§ 662-2, 662-4* (1993)), and (iv) based upon certain claims of Native Hawai’ians (*see H.R.S. §§ 673-1 - 673-5; 674-16 - 674-20* (1993)). The federal government may also waive its immunity from suit by a term in a federal statute. *See, e.g., Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S. Ct. 2957, 92 L. Ed. 2d 250, 41 Fair Empl. Prac. Cas. (BNA) 85, 40 Empl. Prac. Dec. (CCH) ¶ 36193 (1986); *U.S. v. Nordic Village Inc.*, 503 U.S. 30, 112 S. Ct. 1011, 117 L. Ed. 2d 181, 22 Bankr. Ct. Dec. (CRR) 1022, 26 Collier Bankr. Cas. 2d (MB) 9, Bankr. L. Rep. (CCH) ¶ 74435B, 92-1 U.S. Tax Cas. (CCH) ¶ 50109, 69 A.F.T.R.2d (P-H) ¶ 92-687 (1992) (holding that former Bankruptcy Code § 106 did not evidence a clear Congressional intent by the federal government to waive immunity in bankruptcy cases).
- 593 *See, e.g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 n.9, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Atascadero*, 473 U.S. at 241; *Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Ass’n*, 450 U.S. 147, 150, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981); *Edelman v. Jordan*, 415 U.S. 651, 677 n.19, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459, 65 S. Ct. 347, 89 L. Ed. 389 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54, 64 S. Ct. 873, 88 L. Ed. 1121 (1944); *Chandler v. Dix*, 194 U.S. 590, 591-92, 24 S. Ct. 766, 48 L. Ed. 1129 (1904); *Smith v. Reeves*, 178 U.S. 436, 441, 20 S. Ct. 919, 44 L. Ed. 1140 (1900); *Mueller v. Thompson*, 133 F.3d 1063, 4 Wage & Hour Cas. 2d (BNA) 558, 134 Lab. Cas. (CCH) ¶ 33637 (7th Cir. 1998); *Mescalero Apache Tribe v. State of N.M.*, 131 F.3d 1379, 1384, 39 Fed. R. Serv. 3d (LCP) 1300 (10th Cir. 1997); *State of Mont. v. Gilham*, 127 F.3d 897, 902-03 (9th Cir. 1997), opinion amended and superseded, 133 F.3d 1133 (9th Cir. 1998); *Santee Sioux Tribe of Nebraska v. State of Neb.*, 121 F.3d 427 (8th Cir. 1997); *V-1 Oil Co. v. Utah State Dept. of Public Safety*, 131 F.3d 1415, 1421 (10th Cir. 1997); *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 403 (7th Cir. 1996); *cf. In re Holoholo*, 512 F. Supp. 889 (D. Haw. 1981) (state’s statutory waiver of immunity for torts of employees waives immunity in both state and federal courts); *see also* Browning, *supra* note 322, at 11 (concluding that the fact that the state consented to suit in its own courts does not mean that a nonbankruptcy case can be removed to federal bankruptcy court under 28 U.S.C. § 1452, the bankruptcy removal statute that allows all pending litigation to be removed to one forum).
- 594 *See* discussion *supra* at 565-566 and accompanying text.

- 595 *Seminole*, 517 U.S. at 72. U.S. CONST. art. III, § 1, cl. 2 (“the Judicial power of the United States shall not be construed to extend”).
- 596 See *Seminole*, 517 U.S. at 54; *Fairport Intern. Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1082, 1997 FED App. 38P (6th Cir. 1997), cert. granted, judgment vacated, 118 S. Ct. 1558, 140 L. Ed. 2d 790 (U.S. 1998); *Estate of Ritter by Ritter v. University of Michigan*, 851 F.2d 846, 848, 48 Ed. Law Rep. 61 (6th Cir. 1988).
- 597 See *Gibson*, *supra* note 322, at 201 (because states’ “immunity” in federal court is constitutionally compelled by the Eleventh Amendment rather than federal common law, Congress cannot abrogate states’ immunity by statute); *Hovenkamp*, *supra* note 13, at 2245 (arguing that *Seminole* had to make immunity a constitutional principle in order to prevent abrogation because Congress can abrogate common law doctrines); see also discussion *supra* note 137; *infra* Part IV.B.2.
- 598 Article III provides an “exclusive catalogue of permissible federal court jurisdiction.” *Seminole*, 517 U.S. at 63-66.
- 599 See *id.* at 72 (noting that the Court’s reasoning is part of its holding).
- 600 See, e.g., *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 310, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) ¶ 8566, 70 Lab. Cas. (CCH) ¶ 32876 (1973) (Brennan, J., dissenting) (“The literal wording [of the Eleventh Amendment] is ... a flat prohibition against the federal judiciary’s entertainment of suits against even a consenting State brought by citizens of another State of by aliens.”); *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S. Ct. 162, 79 L. Ed. 338 (1934) (“lack of federal jurisdiction cannot be waived”); *CHEMERINSKY*, *supra* note 569, at § 5.1, 249 (“consent is never adequate to permit federal jurisdiction where none would otherwise exist”); *Massey*, *supra* note 91, at 63-64 (discussing the anomaly of allowing consent if the Eleventh Amendment poses a jurisdictional bar).
- 601 See *supra* note 553.
- 602 See discussion *supra* notes 91-130 and accompanying text.
- 603 See, e.g., *Edelman v. Jordan*, 415 U.S. at 677-68; *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 466-67 (1945); see also *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99-100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (referring to the Eleventh Amendment as a jurisdictional bar and noting that state can consent to suit in federal court but not elaborating the nature of the jurisdictional bar); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682, 102 S. Ct. 3304, 73 L. Ed. 2d 1057, 1983 A.M.C. 144 (1982) (referring to the Eleventh Amendment as jurisdictional); *Sullivan v. Barnett*, 139 F.3d 158, 179 (3d Cir. 1998), cert. granted, 1998 WL 334030 (U.S. 1998) and cert. denied, 1998 WL 334421 (U.S. 1998) and cert. denied, 1998 WL 423909 (U.S. 1998) (holding that the jurisdictional nature of the Eleventh Amendment allows the court to raise the issue *sua sponte*; decided after *Seminole*); *V-1 Oil Co. v. Utah State Dept. of Public Safety*, 131 F.3d 1415, 1419 (10th Cir. 1997) (holding that court could consider Eleventh Amendment at any time, even *sua sponte*); *Suarez Corp. Industries v. McGraw*, 125 F.3d 222, 227 (4th Cir. 1997) (same); *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 4 (2d Cir. 1993) (same); *Charley’s Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987) (same); but see *Bouchard Transp. Co. v. Florida Dept. of Environmental Protection*, 91 F.3d 1445, 1448, 1996 A.M.C. 2889 (11th Cir. 1996) (stating that the “Eleventh Amendment is not jurisdictional in the sense that courts must address the issue *sua sponte*.”); see also *infra* notes 616-617 and accompanying text.
- 604 *Edelman*, 415 U.S. at 677-68; see *Ford Motor*, 323 U.S. at 466-67 (“The Eleventh Amendment declares a policy and sets forth a limitation on federal judicial power of such compelling force that this Court will consider the issue arising under the Amendment in this case even though urged for the first time in this Court.”). Post-*Seminole* cases expressing a similar view include *In re Platter*, 140 F.3d 676, 679, *Bankr. L. Rep.* (CCH) ¶ 77659 (7th Cir. 1998) (“Eleventh Amendment is sufficiently jurisdictional that a state may raise it at any time”); *State of Tex. By and Through Bd. of Regents of University of Texas System v. Walker*, 142 F.3d 813, 819 n.7, 32 *Bankr. Ct. Dec.* (CRR) 826, 126 Ed. Law Rep. 92 (5th Cir. 1998) (“Because of the strong federalism concerns behind the Eleventh Amendment, we may properly consider the issue even at this stage of the proceeding.”); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1144, 31 *Bankr. Ct. Dec.* (CRR) 218, 38 *Collier Bankr. Cas.* 2d (MB) 574, *Bankr. L. Rep.* (CCH) ¶ 77457 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517, 140 L. Ed. 2d 670 (U.S. 1998).
- 605 See, e.g., *Field*, *supra* note 13, at 516 n.8 (suggesting that jurisdiction by consent is permissible because the Eleventh Amendment is not a jurisdictional bar in that respect but is a jurisdictional bar in other respects; for example, as a jurisdictional bar it is preserved on appeal even though it was not raised in the lower court).
- 606 See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23-26, 109 S. Ct. 2273, 105 L. Ed. 2d 1, 29 *Env’t. Rep. Cas.* (BNA) 1657, 19 *Env’t. L. Rep.* 20974 (1989) (overruled by, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 *Collier Bankr. Cas.* 2d (MB) 1199, 42 *Env’t. Rep. Cas.* (BNA) 1289, 67 *Empl. Prac. Dec.* (CCH) ¶ 43952 (1996)); see also *Seminole*, 517 U.S. at 79-83 (Souter, J., dissenting).
- 607 See, e.g., *Field* *supra* note 13, at 543 (suggesting that interpreting the Eleventh Amendment to impose a limit on federal courts’ jurisdiction would be problematic because courts allow states to consent to jurisdiction in federal courts and normally jurisdiction in suits beyond the courts’ judicial powers cannot be conferred by a party’s consent, citing *Louisville & N.R. Co. v. Mottley*, 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 126 (1908), arguing that the interpretation that avoids this problem is to read the Eleventh Amendment as simply making common law immunity possible); *id.* at 545 n.98 (“If sovereign immunity were regarded simply as an established common law doctrine, Congress could modify it.”); cf. *Field*, *supra* note 19, at 7 (suggesting that *Seminole*’s characterization of

Eleventh Amendment immunity as constitutionally required only affects Congress's authority to abrogate immunity because the Court has consistently held that states may waive immunity in federal court).

- 608 See, e.g., *DeKalb County Division of Family and Children Servs. v. Platter* (*In re Platter*), 140 F.3d 676 (7th Cir. 1998) (holding that when state avails itself of bankruptcy court by filing an adversary proceeding, Eleventh Amendment does not apply); *In re Burke*, 146 F.3d 1313, 32 Bankr. Ct. Dec. (CRR) 1147, Bankr. L. Rep. (CCH) ¶ 77755 (11th Cir. 1998) (holding that, by filing proof of claim, state waived Eleventh Amendment immunity for purposes of recovery of attorney's fees incurred in enforcing the automatic stay and discharge injunction against the state); *In re Straight*, 143 F.3d 1387, 32 Bankr. Ct. Dec. (CRR) 877, Bankr. L. Rep. (CCH) ¶ 77719 (10th Cir. 1998) (holding that state waived immunity with respect to claims against one state department for sanctions for violating the automatic stay when two other state agencies filed claims); *AER-Aerotron, Inc. v. Texas Dept. of Transp.*, 104 F.3d 677, 30 Bankr. Ct. Dec. (CRR) 264, 37 Collier Bankr. Cas. 2d (MB) 512, Bankr. L. Rep. (CCH) ¶ 77244 (4th Cir. 1997) (holding that state did not waive immunity where it did not file claim); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 31 Bankr. Ct. Dec. (CRR) 218, 38 Collier Bankr. Cas. 2d (MB) 574, Bankr. L. Rep. (CCH) ¶ 77457 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517, 140 L. Ed. 2d 670 (U.S. 1998) (vacating and remanding with instructions to dismiss trustee's action to avoid preferential transfer because it did not arise out of the same transaction as the state's proof of claim; therefore the state had not waived immunity as to that action); *In re Del Mission Ltd.*, 98 F.3d 1147, 1152, 29 Bankr. Ct. Dec. (CRR) 1155, 36 Collier Bankr. Cas. 2d (MB) 1658, Bankr. L. Rep. (CCH) ¶ 77176, 36 Fed. R. Serv. 3d (LCP) 512 (9th Cir. 1996) (holding that when state filed proof of claim under former § 106(a), now § 106(b), it waived immunity with respect to compulsory counterclaims by the debtor); *In re Martinez*, 196 B.R. 225, 36 Collier Bankr. Cas. 2d (MB) 680 (D.P.R. 1996) (holding that territory, which is treated as a state for Eleventh Amendment purposes, did not waive immunity where it had not filed a claim); *Koehler v. Iowa College Student Aid Comm'n* (*In re Koehler*), 204 B.R. 210 (Bankr. D. Minn. 1997) (holding that state's filing of counterclaim in action against state for violation of stay constitutes affirmative action by state which waives state's immunity with respect to defensively asserted compulsory counterclaims by the debtor); *In re Charter Oak Associates*, 203 B.R. 17, 29 Bankr. Ct. Dec. (CRR) 1318, 37 Collier Bankr. Cas. 2d (MB) 321 (Bankr. D. Conn. 1996) (holding that filing a proof of claim did not waive state's immunity with respect to trustee's claim because it was not a compulsory counterclaim, but did allow setoff); *In re Lush Lawns, Inc.*, 203 B.R. 418, 29 Bankr. Ct. Dec. (CRR) 1311 (Bankr. N.D. Ohio 1996) (holding that court had no jurisdiction over action against state for violation of the automatic stay where state had not filed claim or otherwise participated in the proceeding and therefore had not waived immunity); *In re York-Hannover Developments, Inc.*, 201 B.R. 137, 29 Bankr. Ct. Dec. (CRR) 1066 (Bankr. E.D.N.C. 1996) (holding that state had not waived immunity where it had not filed proof of claim or otherwise participated in the case); *In re Lazar*, 200 B.R. 358, 29 Bankr. Ct. Dec. (CRR) 888 (Bankr. C.D. Cal. 1996); *In re Sacred Heart Hosp. of Norristown*, 199 B.R. 129, 29 Bankr. Ct. Dec. (CRR) 661, Bankr. L. Rep. (CCH) ¶ 77074 (Bankr. E.D. Pa. 1996), order rev'd, 204 B.R. 132 (E.D. Pa. 1997), aff'd, 133 F.3d 237, 31 Bankr. Ct. Dec. (CRR) 1246, 32 Collier Bankr. Cas. 2d (MB) 238, Bankr. L. Rep. (CCH) ¶ 77604 (3d Cir. 1998), as amended, (Feb. 19, 1998); see also *Gardner v. State of N.J.*, 329 U.S. 565, 573-74, 67 S. Ct. 467, 91 L. Ed. 504 (1947) (filing proof of claim for taxes subjected state to adjudication of objections to that claim); *In re Operation Open City, Inc.*, 170 B.R. 818, 25 Bankr. Ct. Dec. (CRR) 1659, Bankr. L. Rep. (CCH) ¶ 76090 (S.D.N.Y. 1994) (holding that a post-petition setoff by the state sufficiently asserted a claim to trigger waiver with respect to compulsory counterclaims; decided prior to *Seminole* and to the 1994 amendments); cf. Gibson, *supra* note 322, at 215 ("Moreover, suits against states can still be maintained in state courts, where the Eleventh Amendment is inapplicable, and, with the states' consent, bankruptcy proceedings may be brought against them in federal court.").
- 609 *Gorka by Gorka v. Sullivan*, 82 F.3d 772 (7th Cir. 1996).
- 610 *Id.* at 774; see 28 U.S.C. § 1452 (removal of cases to federal court).
- 611 *Id.* at 774-75.
- 612 *Id.* at 775.
- 613 *Seminole*, 517 U.S. at 72 (emphasis added)
- 614 *Seminole*, 517 U.S. at 70, n.13; see also discussion *infra* at Part IV.B.2 (concerning suit in state court to enforce federal bankruptcy law).
- 615 This discussion omits a fourth possibility, which is that the Court could have avoided analyzing the Eleventh Amendment entirely by concluding that IGRA constitutes an impermissible regulation of the states in violation of the Tenth Amendment. This approach, which has been advanced by leading constitutional law scholars, may have obviated many of the problems raised by *Seminole*. It cannot, however, be reconciled with *Seminole's* actual holding. See Monaghan, *supra* note 91, at 116-20 (arguing that the Court could have avoided the Eleventh Amendment issues in *Seminole* by either placing Indian tribes beyond the scope of the Eleventh Amendment as separate sovereigns, distinguishing the Indian Commerce Clause from the Interstate Commerce Clause, or invalidating IGRA as an infringement of states' rights under the Tenth Amendment); Field, *supra* note 19, at 11-15 (noting that the Tenth Amendment concerns areas in which Congress cannot regulate states at all whereas the Eleventh Amendment concerns areas in which Congress generally has power to regulate states but may not regulate states by means of subjecting states to private suits in federal court; suggesting that the Court could have invalidated IGRA under the Tenth Amendment without causing the problems created by the Court's Eleventh Amendment rationale).
- 616 See *Union Pacific R. Co. v. Burton*, 949 F. Supp. 1546, 1550-51, 143 A.L.R. Fed. 703 (D. Wyo. 1996).
- 617 See *In re PEAKSolutions Corp.*, 168 B.R. 918, 922 (Bankr. D. Minn. 1994).

- 618 See *State of Missouri v. Fiske*, 290 U.S. 18, 24, 54 S. Ct. 18, 78 L. Ed. 145 (1933) (“Immunity from suit under the Eleventh Amendment is a personal privilege which may be waived.”); *Clark v. Barnard*, 108 U.S. 436, 447, 2 S. Ct. 878, 27 L. Ed. 780 (1883) (“The 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 ...”); see also *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284, 26 S. Ct. 252, 50 L. Ed. 477 (1906) (“such immunity is a privilege which may be waived”); *Hans v. Louisiana*, 134 U.S. 1, 17, 10 S. Ct. 504, 33 L. Ed. 842 (1890).
- 619 See FED. R. CIV. P. 12(h)(1); cf. cases cited *supra* at note 603.
- 620 This discussion focusses only on federal bankruptcy law causes of action because there should be no doubt that the state may use its traditional immunity as a defense to a state law cause of action filed in state court, even if that action was commenced in bankruptcy court as an action related to the bankruptcy case, and then transferred to state court.
- 621 See, e.g., Barsalou, *supra* note 563, at 611-12 (concluding that suit may be brought in state court under 28 U.S.C. § 1334(b), but not analyzing whether a state's consent is required for suit in state court); *id.* at 620-22 (arguing that sovereign immunity should not protect a state from suit in state court to enforce federal law); Browning, *supra* note 322, at 1 (“The Eleventh Amendment is concerned not with whether an action can be maintained against a State, but rather where the action can be maintained - *i.e.*, not in federal court.”); Cordry, *supra* note 588, at 10 (“[T]he most straightforward way, of course, for the trustees and debtors to obtain the remedies they seek is to simply gather up their courage and to venture out into state court.”); *id.* at A10 (“Many states have well-established procedures similar to the Federal Court of Claims, whereby it [sic] has waived its immunity and allowed claims to be filed against it. *If so*, there is no reason why those procedures should not be adequate.”) (emphasis added); *id.* (acknowledging that she does not know whether a state must allow itself to be sued in its own courts if the state has not waived immunity); Cordry, *supra* note 340, at 1 (“To require that some additional matters be litigated in state court instead of bankruptcy court signals neither the death knell of the Code nor the impossibility of providing effective relief for debtors.”); Gibson, *supra* note 322, at 215 (“Moreover, suits against states can still be maintained in state courts, where the Eleventh Amendment is inapplicable, and, with the states' consent, bankruptcy proceedings may be brought against them in federal court.”).
- 622 See generally Barsalou, *supra* note 563, at 605-06; Clark, *supra* note 350, at 5; Field, *supra* note 19, at 16 (suggesting that, although Congress could subject states to suit in state court for violations of federal law, the federal forum may be more desirable, particularly if state court judges are elected and must try a state official); William A. Frazell, *State Courts and Bankruptcy — Applying the Rooker-Feldman Doctrine*, 14-APR. AM. BANKR. INST. J. 12 (April 1997); Gibson, *supra* note 322, at 204; but cf. *In re Lazar*, 200 B.R. 358, 376, 29 Bankr. Ct. Dec. (CRR) 888 (Bankr. C.D. Cal. 1996) (*Seminole* may require a return to state court proceedings, which were common under the former Bankruptcy Act); Cordry, *supra* note 340, at 1 (noting that many matters are tried outside of bankruptcy courts, including under mandatory and discretionary abstention, remand of removed matters, and arguing that actions against the states are just one more; suing in state court does not make relief against states impossible).
- 623 See 11 U.S.C. § 362 (1994).
- 624 See *id.* § 547.
- 625 See 28 U.S.C. § 1334(b) (1994) (concurrent jurisdiction); cf. *id.* § 1334(a) (original and exclusive jurisdiction over cases under title 11); see also *Matter of Brady, Texas, Mun. Gas Corp.*, 936 F.2d 212, 218, 21 Bankr. Ct. Dec. (CRR) 1531, Bankr. L. Rep. (CCH) ¶ 74121 (5th Cir. 1991); Browning, *supra* note 322, at 1 (“Put simply, there is not even a statutory right to have all bankruptcy issues heard exclusively in federal bankruptcy court, much less a constitutional right.”). Certain dischargeability matters must be raised in the bankruptcy court; however, these would be actions against the debtor, not against the state. See 11 U.S.C. § 523(c).
- 626 For an in depth analysis of this question see Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).
- 627 See 11 U.S.C. § 362 (1994).
- 628 See *id.* § 547.
- 629 See, e.g., *Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 112 S. Ct. 560, 116 L. Ed. 2d 560, 15 O.S.H. Cas. (BNA) 1465 (1991) (noting that the Eleventh Amendment does not apply in state court); *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 297-98, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) ¶ 8566, 70 Lab. Cas. (CCH) ¶ 32876 (1973) (Marshall, J., concurring) (noting that constitutional limitations on the federal judicial power do not apply in state court).
- 630 See, e.g., Monaghan, *supra* note 91, at 125 (arguing that, if a state does not consent to suit in federal court, the case will be removed to state court because “[i]n large measure, the Eleventh Amendment operates only as a forum selection clause.”); see also *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 297-98, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) ¶ 8566, 70 Lab. Cas. (CCH) ¶ 32876 (1973) (Marshall, J., concurring) (arguing that citizens can sue states in state court if law makes states liable and provides for suit in state court; implying but not expressly stating that states would have no immunity in state court; referring to the Court's holding that the Eleventh Amendment barred suit in federal court because Congress had not effectively abrogated states' immunity as “nothing more than a regulation of the forum in which these petitioners may seek a remedy for asserted denial of their rights”); Field, *supra* note 13, at 547 (suggesting the Marshall's concurrence allows suit in state court without states' consent); but cf. *infra*

note 697 (noting that Justice Marshall joined the dissent in *Will*, which seemed to imply that the state's consent would be required for a suit to proceed in state court); *see generally* Vazquez, *supra* note 626, at 1700-1714 (analyzing the forum-allocation approach to states' federal question immunity; arguing the *Seminole* rejected this approach in favor of an immunity-from-liability approach).

- 631 Traditional immunity refers to pre-constitutional common law sovereign immunity, which in some states may be embodied in, or limited or modified by a state's constitution or statutes.
- 632 *See generally* *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 115-16, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) ¶ 43952 (1996) (Souter, J., dissenting); *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979) (states are immune from suit in their own courts, but not in other states' courts; immunity in another state's courts arises only if the other state agrees to grant it as a matter of comity); *see also* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Margaret G. Stewart, *The State as an Unwilling Defendant: Reflections on Nevada v. Hall*, 59 NEB. L. REV. 246 (1980).
- 633 *See* Jackson, *supra* note 91, at 78-80.
- 634 U.S. CONST. art. VI, § 2.
- 635 The reference to state court judges in the Supremacy Clause suggests that federal laws may be enforced in state court. *Id.*; *see* *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 367-70, 110 S. Ct. 2430, 110 L. Ed. 2d 332, 60 Ed. Law Rep. 358 (1990).
- 636 *See, e.g.*, Barsalou, *supra* note 563, at 620-22 & nn.177-184 (arguing that if state courts have jurisdiction, they must accept suit; that common law immunity is not a bar because the Supremacy Clause prohibits states from evading federal law simply because the federal law conflicts with state law and requires that state rules of judicial administration be neutral and not favor one party over others; and that sovereign immunity violates this rule because it protects the state only, citing *Felder v. Casey*, 487 U.S. 131, 163, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), and *Martinez v. State of Cal.*, 444 U.S. 277, 284, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980)); Field, *supra* note 13, at 547-48 (the argument that Congress cannot abrogate states' immunity in states' own courts assumes that there is a constitutional right to immunity; but she argues that there is no constitutional right to immunity); Meltzer, *supra* note 82, at 57-60 (federal law requires states to provide retroactive relief in state court; the Eleventh Amendment is not applicable in state court; federal law trumps state law under the Supremacy Clause; therefore, state sovereign immunity laws are invalid against congressional regulation; but no decision expressly holds that states may not invoke sovereign immunity in their own courts in suits to enforce federal law); Vazquez, *supra* note 626, at 1779, 1794.
- 637 U.S. CONST. art. I, § 8.
- 638 U.S. CONST. amend. X.
- 639 *See, e.g.*, Jackson, *supra* note 91, at 82-84; *Employees*, 411 U.S. at 297 (Marshall, J., concurring).
- 640 *See, e.g.*, Amar, *supra* note 74, at 489-90; Meltzer, *supra* note 82, at 10-13; Jackson, *supra* note 91, at 44-51.
- 641 *See* discussion *infra* at notes 644-697, 715-730 and accompanying text.
- 642 *See* discussion *infra* at notes 698-706 and accompanying text.
- 643 *See* Field, *supra* note 13, at 546-47; Fletcher, *supra* note 87, at 1124-27; Hovenkamp, *supra* note 13, at 2240 (the early debate was concerned that if a broad federal court immunity doctrine applied to both diversity and federal question actions, all citizens would have to sue the states in state court on federal question actions, where the state would probably assert immunity as a defense); Meltzer, *supra* note 82, at 57-60; ORTH, *supra* note 109, at 142-43.
- 644 *See* *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45, 49 Fair Empl. Prac. Cas. (BNA) 1664, 50 Empl. Prac. Dec. (CCH) ¶ 39067 (1989); *Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 112 S. Ct. 560, 116 L. Ed. 2d 560, 15 O.S.H. Cas. (BNA) 1465 (1991).
- 645 *See* *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332, 60 Ed. Law Rep. 358 (1990).
- 646 *See* discussion *infra* at notes 715-730 and accompanying text.
- 647 42 U.S.C. § 1983 (1994).
- 648 *Id.*
- 649 *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45, 49 Fair Empl. Prac. Cas. (BNA) 1664, 50 Empl. Prac. Dec. (CCH) ¶ 39067 (1989).
- 650 *Id.* at 60.

- 651 *Id.* at 64, 71.
- 652 *Id.* at 62-63.
- 653 *Id.* at 63-64.
- 654 *Id.* at 65 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).
- 655 *Id.* at 67.
The principle is elementary that a State cannot be sued in its own courts without its consent. *Memphis & C. R. Co. v. State of Tenn.*, 101 U.S. 337, 339, 25 L. Ed. 960 (1879). It is an “established principle of jurisprudence” that the sovereign cannot be sued in its own courts without its consent. *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529, 15 L.Ed 991 (1858). *Id.*
- 656 *Id.* at 67. The Court also noted prior cases in which the Court had held that § 1983 was not designed to override well-established common law immunities or defenses. *Id.* at 67.
- 657 *Id.* at 66.
- 658 *Id.*
- 659 *See also* Meltzer, *supra* note 82, at 12-13 (noting, in a different context, that the general rule that federal statutes do not regulate states absent a clear statement is overridden by the creation of a clear private right of action against the states); *cf.* *Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 112 S. Ct. 560, 116 L. Ed. 2d 560, 15 O.S.H. Cas. (BNA) 1465 (1991) (holding that the Federal Employers’ Liability Act creates a cause of action against a state-owned railroad) (discussed *infra* at notes 685-697).
- 660 *Will*, 491 U.S. at 63-64. The four-justice dissent sharply criticized the majority’s reliance on the Eleventh Amendment. *See id.* at 71 (Brennan, J., dissenting, joined by Justices Marshall, Blackmun and Stevens) (arguing that states are persons within the meaning of § 1983 and that the Court should not apply the Eleventh Amendment’s clear statement rule to a matter of statutory interpretation).
- 661 *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) ¶ 10999 (1976).
- 662 *See supra* Part IV.A.3.
- 663 *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332, 60 Ed. Law Rep. 358 (1990).
- 664 *Id.* at 365-66.
- 665 *Id.* at 359; *see also id.* at 365 & n. 13.
- 666 *Will*, 491 U.S. at 71 & n. 10.
- 667 *Id.* at 67 n. 7, 70.
- 668 *Howlett*, 496 U.S. at 365.
- 669 *Id.* at 360.
- 670 *Id.* Florida’s waiver statute did not extend to § 1983 claims. *Id.* The state supreme court denied review. *Id.*
- 671 *Id.* at 381-83.
- 672 *Id.* at 369-75.
- 673 *Id.* at 374-83; *see also* *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292, 296 (Tenn. 1991) (“[T]he United States Supreme Court did not hold in *Howlett v. Rose* that a state court must adjudicate a claim made under § 1983 that a federal court would not be required (or permitted) to entertain.”).
- 674 *See, e.g.*, *Barsalou*, *supra* note 563, at 620-622 & nn. 180-184; *Gibson*, *supra* note 344, at 207-08 (arguing that *Howlett* “makes clear that a state claim of sovereign immunity will not be permitted to prevent the enforcement of a federal cause of action otherwise maintainable in state court.”).
- 675 *Hill v. Department of Corrections, State of Fla.*, 513 So. 2d 129 (Fla. 1987).
- 676 *Id.*; *see Howlett*, 496 U.S. at 361-65.

- 677 *Howlett*, 496 U.S. at 365.
- 678 *Id.* at 365-66.
- 679 *Id.* at 365.
- 680 See *Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 213, 112 S. Ct. 560, 116 L. Ed. 2d 560, 15 O.S.H. Cas. (BNA) 1465 (1991) (O'Connor, J., dissenting) (“If States are not within the contemplated category of defendants, then States could not consent to suit, because they cannot ‘create a cause of action ... against an entity whom Congress has not subjected to liability.’”) (quoting *Howlett*, 496 U.S. 356, 376); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 85, 109 S. Ct. 2304, 105 L. Ed. 2d 45, 49 Fair Empl. Prac. Cas. (BNA) 1664, 50 Empl. Prac. Dec. (CCH) ¶ 39067 (1989) (Brennan, J., dissenting, joined by Justices Marshall, Blackmun and Stevens) (“If States are not “persons” within the meaning of § 1983, then they may not be sued under that statute regardless of whether they have consented to suit. Even if, in other words, a State formally and explicitly consented to suits against it in federal or state court, no § 1983 plaintiff could proceed against it because States are not within the statute's category of possible defendants.”); see also *id.* at 86 (“The question whether States are “persons” under § 1983 is separate and distinct from the question whether they may assert a defense of common law sovereign immunity.”).
- 681 See, e.g., *Hilton*, 502 U.S. at 197; *Employees*, 411 U.S. at 287; *Welch*, 483 U.S. 468 (overruling *Parden's* holding that FELA abrogated states' immunity but not overruling *Parden's* holding that FELA created a cause of action against the states); see Field, *supra* note 136, at 1206, 1242 (noting that *Employees* established that Congress could create a cause of action against states without subjecting states to private citizen suits in federal court). The Tenth Amendment will also bar some regulation of states even if a statute purports to bind the states. See, e.g., *National League of Cities v. Uesry*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245, 22 Wage & Hour Cas. (BNA) 1064, 12 Empl. Prac. Dec. (CCH) ¶ 10996, 78 Lab. Cas. (CCH) ¶ 33390 (1976) (overruled by, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016, 27 Wage & Hour Cas. (BNA) 65, 36 Empl. Prac. Dec. (CCH) ¶ 34995, 102 Lab. Cas. (CCH) ¶ 34633 (1985)).
- 682 See *Will*, 491 U.S. at 85-87 (Brennan, J., dissenting); *Hilton*, 502 U.S. at 213-14 (O'Connor, J., dissenting) (arguing that the mere creation of a cause of action does not subject a state to suit without its consent; the state may not be sued without its consent; not clearly indicating whether Congress, by a clear statement, could abrogate states' state court immunity); *contra* Gibson, *supra* note 322, at 205-07 (relying on *Hilton* to conclude that once Congress creates a remedy against the states, the Supremacy Clause requires state courts to enforce that remedy; implying that states' consent is not required).
- 683 See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) ¶ 10999 (1976).
- 684 The Bankruptcy Code creates causes of action against states by including states within the definitions of “creditor” and “entity.” See 11 U.S.C. § 101(10), (15) (1994). Provisions of the Bankruptcy Code that apply to “entities” include, for example, the automatic stay (§ 362), and turnover of property to the estate (§ 542). *Id.* §§ 362, 542. Creditors are subject to a variety of actions, including, for example, actions to recover preferential transfers. *Id.* § 547. Section 106(a) of the Bankruptcy Code purports to abrogate states' immunity, although it has been held to be unconstitutional to the extent that it attempts to abrogate states' immunity from suit in federal court. *Id.* § 106(a); see *supra* note 331. Interestingly, § 106 does not refer to Eleventh Amendment immunity; rather, it states that “[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated” 11 U.S.C. § 106(a).
- 685 *Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 112 S. Ct. 560, 116 L. Ed. 2d 560, 15 O.S.H. Cas. (BNA) 1465 (1991); see Vazquez, *supra* note 626, at 1713-14.
- 686 502 U.S. at 199.
- 687 *Id.* at 201-03.
- 688 *Id.* at 201-03; see *Parden*, 377 U.S. 184 (1964).
- 689 *Id.* at 203-06; see *Welch*, 483 U.S. 468 (1987) (holding that the Jones Act (which incorporates FELA's remedial scheme) does not abrogate the states' Eleventh Amendment immunity).
- 690 *Id.* at 206-07.
- 691 *Id.* at 207 (citing *Howlett*, 496 U.S. 356, 367-68).
- 692 See *supra* note 674.
- 693 *Id.* at 202-03.
- 694 *Hilton*, 502 U.S. at 202-05
- 695 *Id.* at 203, 205-06; *Parden*, 377 U.S. 184.

- 696 *Hilton*, 502 U.S. at 203.
- 697 See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 85-87, 109 S. Ct. 2304, 105 L. Ed. 2d 45, 49 Fair Empl. Prac. Cas. (BNA) 1664, 50 Empl. Prac. Dec. (CCH) ¶ 39067 (1989) (Brennan, J., dissenting) (joined by Justices Marshall, Blackmun and Stevens). These Justices would have held that § 1983 created a cause of action against the states. They would have remanded for a determination whether the state could assert sovereign immunity as a defense in state court. Among the issues this inquiry would raise would be whether the state had waived its sovereign immunity, whether the state could waive immunity with respect to a state law cause of action but refuse to waive immunity for a nearly identical federal law cause of action, and whether Congress could abrogate immunity. *Id.* See also Meltzer, *supra* note 82, at 59 (suggesting that the anticommandeering principle of *New York v. U.S.*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120, 34 Env't. Rep. Cas. (BNA) 1817, 22 Env't. L. Rep. 21082 (1992), might prevent Congress from forcing state courts to enforce federal law against states).
- 698 See generally *Hans v. Louisiana*, 134 U.S. 1, 15, 10 S. Ct. 504, 33 L. Ed. 842 (1890); see also *Chisholm*, 2 U.S. (2 Dall.) 419 (Iredell, J., dissenting) (arguing that the judicial power did not contemplate suits unknown to law and forbidden by law).
- 699 See generally *Hans*, 134 U.S. 1.
- 700 See *supra* note 672, 691 and accompanying text.
- 701 This same broad concept has been expressed in other cases as well. See Meltzer, *supra* note 82, at 57-60 (noting that *Howlett's* broad supremacy argument echoes earlier statements in *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57-58, 32 S. Ct. 169, 56 L. Ed. 327 (1912) and *Testa v. Katt*, 330 U.S. 386, 393, 67 S. Ct. 810, 91 L. Ed. 967, 172 A.L.R. 225 (1947), but these cases involved suits against private parties or local government or considered the issue of state discrimination against federal law as compared to state law rights of action; other cases stating similar concepts dealt only with prospective relief versus officials, e.g., *General Oil Co. v. Crain*, 209 U.S. 211, 28 S. Ct. 475, 52 L. Ed. 754 (1908); similarly, although *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454, 18 Employee Benefits Cas. (BNA) 2377, 74 A.F.T.R.2d (P-H) ¶ 94-7071 (1994), stated that a state's refusal to provide a refund remedy for taxes obtained under an unconstitutional statute violates the Fourteenth Amendment notwithstanding state traditional sovereign immunity, this comment was *dictum* because sovereign immunity was not the basis for the state's refusal to provide procedural relief, and the claim was based on the Constitution, not a federal statute).
- 702 See *Howlett*, 496 U.S. at 369-72.
- 703 See U.S. CONST. art. IV, § 1.
- 704 See *infra* notes 705-06.
- 705 See, e.g., *Karchefske v. Department of Mental Health*, 143 Mich. App. 1, 371 N.W.2d 876 (1985), judgment vacated, 429 Mich. 879, 415 N.W.2d 866 (1987); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 104 N.M. 302, 720 P.2d 1243, 33 Ed. Law Rep. 858 (Ct. App. 1986), cert. quashed, 104 N.M. 201, 718 P.2d 1349, 34 Ed. Law Rep. 613 (1986); *Kapil v. Association of Pennsylvania State College and University Faculties*, 504 Pa. 92, 470 A.2d 482, 15 Ed. Law Rep. 1179 (1983); *Kristensen v. Strinden*, 343 N.W.2d 67 (N.D. 1983); *DeBleecker v. Montgomery County, Md.*, 292 Md. 498, 438 A.2d 1348, 115 L.R.R.M. (BNA) 4461 (1982); *Woodbridge v. Worcester State Hospital*, 384 Mass. 38, 423 N.E.2d 782 (1981).
- 706 See, e.g., *Ortega v. Port of Portland*, 147 Or. App. 489, 936 P.2d 1037 (1997); *State Dept. of Highways and Public Transp. v. Dopyera*, 834 S.W.2d 50, 1993 A.M.C. 2985 (Tex. 1992); *Morris v. Massachusetts Maritime Academy*, 409 Mass. 179, 565 N.E.2d 422, 65 Ed. Law Rep. 147, 1991 A.M.C. 1161 (1991); *Port of Houston Authority v. Guillory*, 814 S.W.2d 119 (Tex. App. Houston 1st Dist. 1991), writ granted, (May 6, 1992) and judgment aff'd, 845 S.W.2d 812 (Tex. 1993), reh'g of cause overruled, (Mar. 3, 1993); *State, Dept. of Public Safety v. Brown*, 794 P.2d 108 (Alaska 1990); *Trinity River Authority v. Williams*, 689 S.W.2d 883 (Tex. 1985); *Lyons v. Texas A and M University*, 545 S.W.2d 56 (Tex. Civ. App. Houston 14th Dist. 1976), writ refused n.r.e., (Apr. 6, 1977); *Mossman v. Donahay*, 46 Ohio St. 2d 1, 75 Ohio Op. 2d 1, 346 N.E.2d 305, 22 Wage & Hour Cas. (BNA) 905, 79 Lab. Cas. (CCH) ¶ 33445 (1976); *Weppeler v. School Bd. of Dade County*, 311 So. 2d 409, 22 Wage & Hour Cas. (BNA) 264, 77 Lab. Cas. (CCH) ¶ 33273 (Fla. Dist. Ct. App. 3d Dist. 1975); *Board of Com'rs of Port of New Orleans v. Splendour Shipping & Enterprises Co., Inc.*, 273 So. 2d 19 (La. 1973); *Gross v. Washington State Ferries*, 59 Wash. 2d 241, 367 P.2d 600 (1961) *Maloney v. State*, 3 N.Y.2d 356, 165 N.Y.S.2d 465, 144 N.E.2d 364 (1957).
- 707 *Jacoby v. Arkansas Dept. of Educ., Vocation and Technical Educ. Div.*, 331 Ark. 508 962 S.W.2d 773, 4 Wage & Hour Cas. 2d (BNA) 686, 135 Lab. Cas. (CCH) ¶ 33658 (1998).
- 708 *Id.* at 514-15
- 709 *Id.* at 513-19.
- 710 Professor Vazquez argues that *Seminole* does not view the Eleventh Amendment as “a mere forum-allocation principle.” Rather, he argues that the “consent to suit” language in *Seminole* indicates immunity-from-liability. “This suggests that a state may avoid the exercise of federal judicial power simply by refusing to consent to a suit against it in its own courts ... in other words, that the Court understands the Eleventh Amendment to establish that nothing in the Constitution requires or authorizes the courts (or gives Congress the power to require the courts) to award damages against states for the violation of their federal obligations to

individuals. States are free to award such damages if they wish, but they are not required to do so by federal law.” Vazquez, *supra* note 626, at 1690.

- 711 See *Seminole*, 517 U.S. at 54, 72 (“unconsenting states”); *id.* at 71, n.14 (“where a state has consented to suit”).
- 712 *Id.* at 71 n.16
- 713 See Vazquez, *supra* note 626, at 1713-1720.
- 714 See *id.* 71, n.14 (suggesting that the Supreme Court may review a federal law determination made by a state court in a case in which the state consented to be sued in the state court); *id.* at 157-58 (Souter, J., dissenting) (arguing that abrogation in federal court is necessary because if Congress cannot abrogate states’ Eleventh Amendment immunity from suit in federal court, then individuals will have to sue states in state court, where the states will assert traditional immunity).
- 715 See Gibson, *supra* note 322, at 195, 204-05 (conceding that *Seminole* suggests that the state’s consent is needed for suit in state court, but arguing that *Hilton* and *Howlett* suggest that the Supremacy Clause allows Congress to create a federal remedy against the states that is enforceable in state court notwithstanding state sovereign immunity); Monaghan, *supra* note 91, at 122-26 (arguing that the Eleventh Amendment is simply a forum-selection clause). For an analysis of forum-allocation versus immunity-from-liability arguments, see generally Vazquez, *supra* note 626 (arguing that there is a forum-allocation line of cases and an immunity-from-liability line; concluding that *Seminole* falls in the latter); see also Field, *supra* note 13, at 547 (suggesting that, in *Parden*, the Court seemed to accept the assertion that a state court would not hear a federal question suit; in *Hans*, the Court suggested that the consequence of federal court immunity would be to leave to the state legislature the option to waive immunity or not in state court); *Hans*, 134 U.S. at 20-21 (“But to deprive the legislature of the power of judging what that honor and safety may require, even at the expense of temporary failure to discharge the public debts, would be attended with greater evils that such a failure can cause.”); *Parden*, 377 U.S. at 190 n.8.
- 716 *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990).
- 717 *Id.* at 22.
- 718 *Id.*
- 719 *Id.* at 31.
- 720 *Id.* at 39 (quoting *Atchison, T. & S.F. Ry. Co. v. O’Connor*, 223 U.S. 280, 285, 32 S. Ct. 216, 56 L. Ed. 436, 3 A.F.T.R. (P-H) ¶ 2861 (1912)).
- 721 *Id.* at 31.
- 722 *Id.* at 30-31.
- 723 *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454, 18 Employee Benefits Cas. (BNA) 2377, 74 A.F.T.R.2d (P-H) ¶ 94-7071 (1994).
- 724 *Id.* at 108-09.
- 725 *Id.* at 109-10.
- 726 *Id.* at 111-13.
- 727 *Id.* at 111.
- 728 See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821), discussed *supra* notes 373-375 and accompanying text.
- 729 See *McKesson*, 496 U.S. at 26 (“Respondents first ask us to hold that, though the Florida courts accepted jurisdiction over this suit which sought monetary relief from various state entities, the Eleventh Amendment nevertheless precludes our exercise of appellate jurisdiction in this case. We reject respondents’ suggestion.”) (emphasis added). The state in *Reich* apparently consented as well; otherwise the suit could not have gone forward in the state court. See *Reich*, 513 U.S. 106.
- 730 See Amar, *supra* note 53, at 1484-92; Jackson, *supra* note 91, at 3, 50-51.
- 731 *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 365-66, 110 S. Ct. 2430, 110 L. Ed. 2d 332, 60 Ed. Law Rep. 358 (1990).
- 732 See *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979); see generally Stewart, *supra* note 632.

- 733 See, e.g., Meltzer, *supra* note 82, at 11-12; Jackson, *supra* note 91, at 32-39.
- 734 See *Seminole*, 517 U.S. at 71, n.14. Note that this rule only applies to Supreme Court review, not to actions commenced in lower federal court that challenge state court rulings. As to the latter, see generally Frazell, *supra* note 622 (considering circumstances in which federal courts may review state court determinations of federal law); see also *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).
- 735 See *supra* Part IV.B.2; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821). The *Cohens* rule, which allowed Supreme Court review in actions commenced by the state, subsequently was expanded to include actions in which the state consented to suit. See generally Jackson, *supra* note 91, at 13-39, 26-27 (discussing *Cohens* and the implications of federal courts' appellate review of a federal question determined in a state court proceeding involving the state); see also *Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1853).
- 736 See Field, *supra* note 13, at 549 n. 117
- 737 Ex parte *Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). In *Young*, a federal court enjoined the state attorney general from enforcing the penalties specified in a state statute pending the court's determination whether the statute violated the Constitution. The attorney general ignored the injunction and was jailed for contempt of court. *Id.* at 126-41.
- 738 *Id.* at 166-67. See generally Louis L. Jaffe, *Suits Against Governments and Officers Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 S. CT. REV. 149; Vicki C. Jackson, *Seminole Tribe the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. Rev. 495 (1997).
- 739 See, e.g., Amar, *supra* note 53, at 1478-79 (identifying *Young* as an example of the Court's limitation of Eleventh Amendment immunity through "various doctrinal gymnastic and legal fictions"); Barsalou, *supra* note 563, at 584 (referring to *Young* as a legal fiction) Fletcher, *supra* note 87, at 1040-41 (identifying *Young* as one of the most important fiction developed to avoid the effect of the broad constitutional prohibition against suing states in federal court); LOW & JEFFRIES, *supra* note 117, at 871 (suggesting that *Young* rests on "fictional tour de force"); Vazquez, *supra* note 626, at 1728 (noting that *Young's* "authority stripping" rationale rests on a fiction); see also Burnham, *supra* note 87, at 983-90 & n.22 (noting that the conduct enjoined is state action and that a *Young*-type suit is in reality against the state itself).
- 740 See *Young*, 209 U.S. at 150-54; see also Ex parte *Ayers*, 123 U.S. 443, 8 S. Ct. 164, 31 L. Ed. 216 (1887); *Hagood v. Southern*, 117 U.S. 52, 6 S. Ct. 608, 29 L. Ed. 805 (1886); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824); Gibson, *supra* note 322, at 212; Hovenkamp, *supra* note 13, at 2246; Jackson, *supra* note 738, at 511 ("a state official who acts in violation of superior federal law was not authorized by the State to do so because, as a constitutional matter, the State cannot so authorize"); LOW & JEFFRIES, *supra* note 117, at 871 (noting that *Young* strips an official of "representative character"); Vazquez, *supra* note 626, at 1728 (arguing the *Young's* "authority-stripping" rationale rests on a fiction that is necessary to give life to the Supremacy Clause; the suit is really against the state but because the states lack power to authorize officials to violate federal law, the official who does so does not act in the name of the state).
- 741 See *Young*, 209 U.S. at 150; see also *Fiedler v. State of N.Y.*, 925 F. Supp. 136 (N.D.N.Y. 1996) (holding that *Young* does not apply where the citizens did not sue individual state officials); Gibson, *supra* note 322, at 213-215 & nn.125-26, 129, 139 (arguing that the Eleventh Amendment's bar applies to suits against state officials acting in their official capacities because such a suit is truly against and imposes liability on the state).
- 742 See *Edelman v. Jordan*, 415 U.S. 651, 664-65, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (holding that a monetary award against a state official is indistinguishable from an award against state, because it will be paid from the state treasury; *Young* does not permit suit); see also *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1996 FED App. 253P (6th Cir. 1996), cert. denied, 117 S. Ct. 1082, 137 L. Ed. 2d 217 (U.S. 1997) (holding that *Young* does not apply if the state official is not threatening to enforce the allegedly unconstitutional statute); *Daniels v. Wadley*, 926 F. Supp. 1305, 51 Soc. Sec. Rep. Serv. 147 (M.D. Tenn. 1996), vacated in part, 145 F.3d 1330 (6th Cir. 1998) (holding that *Young* allows a suit to proceed against state officials for injunctive relief, but cannot be used to compel reimbursement of money already paid to the state); cf. *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459, 65 S. Ct. 347, 89 L. Ed. 389 (1945); *Cory v. White*, 457 U.S. 85, 102 S. Ct. 2325, 72 L. Ed. 2d 694 (1982) (the Eleventh Amendment is not limited to money damages, it also prohibits injunctive relief against the states); see also Amar, *supra* note 53, at 1479; Barsalou, *supra* note 563, at 584; Cordry, *supra* note 588, at 9; Fletcher, *supra* note 87, at 1041-42 & n.33, 1119-20; Gibson, *supra* note 322, at 213; LOW & JEFFRIES, *supra* note 117, at 871 & n.2; Vazquez, *supra* note 626, at 1686, 1727-30. Several commentators have identified the unavailability of retroactive relief under *Young* as a major limitation on the rule of law and on the ability to enforce federal law against the states. See, e.g., Meltzer, *supra* note 82, at 47-48 (discussing the need for retroactive as well as prospective relief against states); Vazquez, *supra* note 626, at 1692 (proposing that *McKesson* be reinterpreted, but that "its most important insight" which is "its recognition of the importance of retrospective relief for the violation of constitutional rights" be preserved: Professor Vazquez would reinterpret *McKesson* to determine that there is a constitutional right to damages from state officials who have violated the constitution, "rather than from the states themselves, a right of action having its source in the Supremacy Clause, rather than the Due Process Clause.").
- 743 Vazquez, *supra* note 626, at 1728; Cordry, *supra* note 588, at 9.

- 744 See *Seminole*, 517 U.S. at 73-75; cf. *id.* at 175-76 (Souter, J., dissenting) (“No clear statement of intent to displace the doctrine of *Ex parte Young* occurs in IGRA ...”). Some commentators fear that *Seminole* imposes a major limitation on *Young* and that the Court may further whittle away *Young* in order to protect the states. See, e.g., Jackson, *supra* note 738 (arguing that *Seminole* may substantially limit the scope of *Young*). Others argue that *Seminole*'s treatment of *Young* has little impact (particularly in bankruptcy cases), or is simply wrong. See, e.g., Barsalou, *supra* note 563, at 584 & n.40; Gibson, *supra* note 322, at 213-15 (arguing that *Seminole* is inconsistent with developed law under which a private party may seek prospective injunctive relief against a state official for a violation of federal law, and that, notwithstanding *Seminole*'s limitation, *Young* would still allow suit against a state official in bankruptcy court to enjoin the state official from collecting a discharged debt because § 106, which allows suit against a state, does not establish a “carefully crafted and intricate remedial scheme”); Meltzer, *supra* note 82, at 33-46.
- 745 See, e.g., *In re Lazar*, 200 B.R. 358, 29 Bankr. Ct. Dec. (CRR) 888 (Bankr. C.D. Cal. 1996) (warning states that they should not precipitate suits against state officials by refusing to consent to suit in bankruptcy court); Browning, *supra* note 322, at 10 (noting that state officials are unlikely to put themselves at personal risk by violating the automatic stay).
- 746 Barsalou, *supra* note 563, at 592-99 (identifying actions that can proceed against the states after *Seminole*); Browning, *supra* note 322, at 10 (arguing that the trustee may enforce the injunctive relief imposed by the automatic stay against state officials, but may not recover money from the state for a violation; also arguing that, if property was seized in violation of the stay, and is identifiable, then perhaps the equitable remedy of turnover may be available); Cordry, *supra* note 588, at 9 (arguing that the stay is enforceable with respect to state actions against the bankruptcy estate's property, that bankruptcy court rulings concerning the allow-ability and priority of claims, the confirmation of the plan and dischargeability are “controlling,” and that if the state ignores the stay and continues its attempts to collect, the state official may be enjoined from collecting, and the state court can determine dischargeability); *id.* at 10 (arguing that the trustee cannot recover from the state treasury for pre-petition or post-petition transactions, but perhaps can impose contempt sanctions against a state official); Gibson, *supra* note 322, at 202 (noting that *Seminole* creates an “asymmetry” because only states, not other creditors, including other governmental units, have immunity from actions such as preferences, stay violations, and determination of the validity and priority of liens); Paskay, *supra* note 323, at 3 (arguing that the disallowance of a tax claim or determination of the debtor's tax liability may proceed because these actions do not impose any liability on the state for a monetary judgment); *Special Report, Seminole: What It Means/Possible Defenses*, 29 No. 8 BANKR. CT. DEC. (LRP) 1, 10 (8/13/96) (noting that some commentators suggest that self-executing sections, such as § 724(b) concerning the priority of liens, and § 546 concerning the invalidation of liens, might be enforced under *Young*).
- 747 See 11 U.S.C. § 547(c) (1994).
- 748 See *id.* § 505.
- 749 See, e.g., Meltzer, *supra* note 82, at 7-8 (noting that *Young* does not allow unlimited suits against state officials).
- 750 See *supra* note 70.
- 751 See generally 28 U.S.C. §§ 581-589a (1994); see also Browning, *supra* note 564 at 5 (dismissing the Siegel/Meltzer idea of having the United States Trustee sue on behalf of the estate; citing *California v. Sierra Summit, Inc.*, 409 U.S. 844, 109 S.Ct. 2228 (1989), which held that states could tax liquidation sales even though states cannot tax the federal government because the tax would not be viewed as a tax on the bankruptcy court or trustee); Cordry, *supra* note 621, at 10 (arguing that the trustee is not the United States).
- 752 On *qui tam*, see generally Jefferson D. Reynolds, *Defanging Environmental Law: Extracting Citizen Suit Provisions Under Seminole Tribe v. Florida*, 12 J. NAT. RESOURCES & ENVTL. L. 71 (1997); Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869 (1997); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989).
- 753 See Jonathan R. Siegel, *The Hidden Source of Congress' Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995); Meltzer, *supra* note 82, at 65.
- 754 Siegel, *supra* note 753; Meltzer, *supra* note 82, at 55-57; see also Gibson, *supra* note 322, at 203 n.63 (federal government suit against state is allowed even though the money recovered will be paid over to a private individual, who would be barred under the Eleventh Amendment from suing the state directly).
Siegel admits that this plan may not work in bankruptcy because, “if a state is simply the creditor of the bankrupt party, it has not thereby violated any of his or her federal rights. There would therefore be no cause of action against the state that the United States could pursue by engaging the services of a private attorney.” Siegel, *supra* note 753, at 570 n.146. Professor Meltzer, however, argues that “Siegel suggests that his approach may be inapt in bankruptcy, as ordinarily the bankrupt estate's claim against a state does not rest on federal law But since the bankruptcy power authorizes federal legislation governing the administration of state law claims in bankruptcy, I don't see any distinctive constitutional difficulties in this area.” Meltzer, *supra* note 82, at 65 n.264).
- 755 Siegel, *supra* note 753, at 568; Meltzer, *supra* note 82, at 55-57
- 756 Siegel, *supra* note 753, at 568.
- 757 *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991).

- 758 See *id.* at 785-86; see also Cordry, *supra* note 588, at 10 (arguing that suit by the trustee as the United States is questionable in light of *Blatchford*); *Readers Write About Seminole Decision and Forum Shopping*, 29 No. 13 BANKR. CT. DEC. (LRP) 5 (Sept. 17, 1996) (in letter to editor, Browning rejects the argument that the trustee acting as agent for the bankruptcy estate can be transformed into an agent for the federal government; arguing that this would exalt form over substance); Vazquez, *supra* note 626, at 1792 (noting that *Blatchford* refutes ability of federal government to allow private parties to sue the state in the federal government's name and retain the damages awarded); see also Siegel, *supra* note 753, at 568 (acknowledging that *Blatchford* may make this impossible); Meltzer, *supra* note 82, at 55-57 & n.261 (suggesting that this idea may be viable but noting that *Blatchford* may raise questions concerning the ability of the United States to delegate to a private party its exemption from the restrictions that immunity poses on suing states).
- 759 See Meltzer, *supra* note 82 at 55-57 (suggesting that the United States trustee be appointed as the trustee or co-trustee; acknowledging the real party in interest problem and noting that the Court may deem it a sham because the estate is the real party in interest).
- 760 See Vazquez, *supra* note 626, at 1792 (arguing that the Seigel approach would only work if the federal obligations had broad public impact and if public interest organizations were willing to take on such suits, but would not work where only a discrete category of individuals would benefit).
- 761 See, e.g., Meltzer, *supra* note 82, at 61 (agreeing that no technique to impose liability on the states for a violation of federal law is without legal or practical problems).

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