CONSTITUTIONAL LAW—ELEVENTH AMENDMENT—STATES' IMMUNITY FROM MONETARY JUDGMENTS UNDER THE BANKRUPTCY CODE—*Hoffman v. Connecticut Department of Income Maintenance*, 109 S. Ct. 2818 (1989).

The eleventh amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[1] Since its ratification in 1798,[2] the eleventh amendment has been construed both broadly and narrowly.[3] Some commentators argue that the eleventh amendment only limits federal jurisdiction in suits brought against nonconsenting states based exclusively on diversity of state-citizenship jurisdiction.[4] Others, in support of state immunity, contend that the eleventh amendment bars all suits brought against nonconsenting states by citizens seeking monetary relief.[5] As part of that debate, the United States

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[1] U.S. CONST. amend. XI.

[2] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 286 (1985) (Brennan, J., dissenting) (President Adams certified the eleventh amendment's ratification four years after the resolution was announced).

[3] Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L. J. 363, 366 (1985) [hereinafter Brown, *State Sovereignty Under the Burger Court*] (the amendment might be seen as narrowly drafted, yet the Court has returned to a broader principle of state immunity).

[4] Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1060 (1983) [hereinafter Fletcher, *A Historical Interpretation of the Eleventh Amendment*] (eleventh amendment bars diversity suits, not federal question suits); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983) [hereinafter Gibbons, *Eleventh Amendment and State Sovereign Immunity*] (eleventh amendment should be strictly construed).

Diversity of state-citizenship jurisdiction refers to party-based jurisdiction based on the citizenship of the parties without regard to the subject matter of the case. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between citizens of different States. . . ."); *see also* 28 U.S.C. § 1332 (a)(1) (1988).

Federal question jurisdiction is established based on the subject matter of the case irrespective of the parties' characteristics. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Law of the United States, and Treaties made, or which shall be made, under their authority. . . ."); *see also* 28 U.S.C. § 1331 (1988) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

[5] Brown, *State Sovereignty Under the Burger Court*, *supra* note 3 at 363 ("viewing the eleventh amendment as an embodiment of state sovereignty principles is the most

Supreme Court has struggled to determine whether the eleventh amendment limits the authority of a bankruptcy court to subject a state to monetary judgments.[6]

In *Hoffman v. Connecticut Department of Income Maintenance*, the Court considered whether section 106(c) of the Bankruptcy Code[7] allows a state, that has failed to file a proof of claim[8] in a Chapter 7 proceeding, to be exposed to a monetary judgment levied against it by a bankruptcy court.[9] In finding that a bankruptcy court lacks the power to abrogate eleventh amendment immunity, the Court required that the Bankruptcy Code evince an unmistakably clear expression of congressional intent to ne-

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satisfactory means of justifying the elaborate jurisprudence it has generated"); Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1396 (1989) [hereinafter Marshall, *The Diversity Theory*] (based on historical understanding and current jurisprudence, appropriate to consider eleventh amendment as excluding suits for monetary relief brought in federal court by private citizen against state).

6 *See* Hoffman v. Conn. Dep't of Income Maintenance, 109 S. Ct. 2818 (1989).

7 *Id.* at 2821 (White, J., plurality opinion). Hoffman brought suit under § 106 asserting that § 106(c) abrogates a state 's eleventh amendment immunity when a state fails to file a proof of claim. Sections 106(a) and (b) waive states' sovereign immunity when states file a proof of claim and the claim is limited to counter-claims and setoffs. Section 106(c) subjects "governmental units" to the provisions of the Bankruptcy Code triggered by the words contained in § 106(c)(1). The *Hoffman* Court therefore considered whether § 106(c) subjects states to monetary judgments by acting as a waiver of sovereign immunity. *See* 11 U.S.C. § 106 (1988). Section 106 of the Bankruptcy Code provides that:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

Id.

8 *Hoffman*, 109 S. Ct. at 2821 (White, J., plurality opinion). A proof of claim consists of a written statement filed under oath which sufficiently sets forth a creditor's claim. 11 U.S.C. Rule 3001 (1988).

9 *Hoffman*, 109 S. Ct. at 2821 (White, J., plurality opinion). There are two types of proceedings in bankruptcy: liquidation and reorganization. A Chapter 7 proceeding provides for the liquidation of the debtor's assets. 11 U.S.C. §§ 701-766. Both Chapter 11 and 13 proceedings provide the debtor with an opportunity to reorganize and rehabilitate its assets. 11 U.S.C. §§ 1101-1174 (1988); 11 U.S.C. §§ 1301-1334 (1988).

gate the states' eleventh amendment immunity.[10] Thus, in *Hoffman*, the Court held that section 106(c) of the Bankruptcy Code does not abrogate the states' sovereign immunity; hence, no state will be subject to monetary claims in a Chapter 7 proceeding.[11]

Martin W. Hoffman, the trustee in bankruptcy for Willington Convalescent Home, Inc. (Willington) and Edward Zera instituted two separate Chapter 7 proceedings in the United States Bankruptcy Court for the District of Connecticut.[12] Hoffman instituted a "turnover" proceeding on behalf of Willington under section 542(b) of the Bankruptcy Code[13] in order to recover money due for services rendered.[14] In the second proceeding, Hoffman sought to recover taxes paid by Zera one month prior to filing for bankruptcy on the theory that such taxes constituted a voidable preference under section 547(b) of the Bankruptcy Code.[15] The State of Connecticut did not file a proof of claim in

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[10] *Hoffman*, 109 S. Ct. at 2822 (White, J., plurality opinion), citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). *See also infra* notes 73-82 and accompanying text; Dellmuth v. Muth, 109 S. Ct. 2397 (1989) *infra* notes 103-09 and accompanying text; Welch v. Texas Dep't of Highways and Pub. Transp., 107 U.S. 2941 (1987) *infra* notes 85-102 and accompanying text.

[11] *Hoffman*, 109 S. Ct. at 2824 (White, J., plurality opinion). In so doing, the Court left open the question of whether Congress under its Bankruptcy power, is empowered to abrogate states' eleventh amendment immunity by legislative enactment. *Id.* Cases dealing with congressional abrogation of sovereign immunity involve a two prong inquiry: (1) whether Congress has the power to abrogate eleventh amendment immunity, and (2) whether Congress intended to abrogate sovereign immunity. Parden v. Terminal Ry. Co., 377 U.S. 184, 187 (1964). *See infra* notes 53-61 and accompanying text.

[12] *Hoffman*, 109 S. Ct. at 2821 (White, J., plurality opinion).

[13] *Id.* A turnover proceeding requires that upon filing for bankruptcy, an entity that owes the debtor money must pay the trustee unless such money owed can be offset by a debt owed to the entity/creditor by the same debtor. *See* 11 U.S.C. § 542(b) (1988). Section 542(b) states:

> [A]n entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

Id. The exception provided for under § 553 preserves the right to offset a debt with a claim against a creditor in a bankruptcy action. *See* 11 U.S.C. § 553 (1988).

[14] *Hoffman*, 109 S. Ct. at 2821 (White, J., plurality opinion). In March 1983, Willington had performed services valued at $64,010.24 pursuant to its Medicaid contract with the State of Connecticut. *Id.* One month later, Willington ceased operations. *Id.* When it closed its doors, Willington owed the Connecticut Department of Income Maintenance $121,408.00 for excessive Medicaid payments that the state made during the course of Willington's business. *Id.* Willington, therefore, owed the state a net amount of $57,397.76. *See id.*

[15] *Id.* The Connecticut Department of Revenue Service compelled Zera to pay outstanding taxes, penalties, and interest of $2100.62 one month before he filed for bankruptcy. *Id.*; *see* 11 U.S.C. § 547(b) (1988). Section 547(b) provides that if the

either proceeding.[16]

The State of Connecticut, instead, asserted that the eleventh amendment barred Hoffman's actions and moved to dismiss.[17] The bankruptcy court denied both motions.[18] The court reasoned that section 106(c) of the Bankruptcy Code evidences an "unmistakably clear intent" by Congress to abrogate states' sovereign immunity.[19] States, therefore, are immune from actions under sections 542(b) and 547(b) of the Bankruptcy Code.[20] Further, the bankruptcy court stated that Congress had the power to limit sovereign immunity pursuant to the bankruptcy clause of Article I of the United States Constitution.[21]

On appeal to the United States District Court for the District of Connecticut, the United States intervened because of the con-

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requisite criteria are met "[T]he trustee may avoid any transfer of an interest of the debtor in property. . . ." *Id.* The five criteria of a preference action are as follows: (1) the transfer must benefit a creditor; (2) the transfer must involve the payment of the debtor's antecedent debt owed before the transfer was made; (3) the debtor must have been insolvent when the transfer was made; (4) the transfer must have occurred within 90 days of the debtor's filing for bankruptcy; and (5) the transfer must have allowed the creditor to receive more than he would have if the transfer had not been made. *Id.*

16 *Hoffman*, 109 S. Ct. at 2821 (White, J., plurality opinion). It must be noted that because no proof of claim was filed, § 106(a) and (b) were not triggered. Hoffman relied on § 106(c) of the Bankruptcy Code which does not require the filing of a proof of claim. *Id.* at 2822 (White, J., plurality opinion). *See* 11 U.S.C. § 106 (1988) *supra* note 7.

17 Matter of Willington Convalescent Home, Inc., 39 B.R. 781, 792 (Bankr. D. Conn. 1984); Matter of Zera, No. 2-83-00754, slip op. at 14 (Bankr. D. Conn. June 8, 1984); Matter of Willington Convalescent Home, Inc., 39 B.R. 781 (Bankr. D. Conn. 1984), mot. denied; *rev'd*, mot. dismiss granted, *In re* Willington Convalescent Home, Inc., 72 B.R. 1002 (D. Conn. 1987), *aff'd*, 850 F.2d 50 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 781 (1989), *aff'd sub nom.* Hoffman v. Conn. Dep't of Income Maintenance, 109 S. Ct. 2818 (1989); Matter of Zera, No. 2-83-00754, slip op. (Bankr. D. Conn. June 8, 1984), mot. denied; *rev'd*, mot. dismiss granted, *In re* Zera, 72 B.R. 997 (D. Conn. 1987), *aff'd sub nom.*, *In re* Willington Convalescent Home, Inc., 850 F.2d 50 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 781 (1989), *aff'd sub nom.* Hoffman v. Conn. Dep't of Income Maintenance, 109 S. Ct. 2818 (1989). The State of Connecticut had two choices at the beginning of each of these suits. The State could have filed a proof of claim which functions as a constructive waiver of eleventh amendment immunity, or, the state could file a motion to dismiss on the grounds that the eleventh amendment bars such actions against the state. *See supra* note 7.

18 *Id.*

19 *Willington*, 39 B.R. at 786-88; *Zera*, slip op. at 11-14.

20 *Id.*

21 *Willington*, 39 B.R. at 789-91; *Zera*, slip op. at 11. The bankruptcy clause of the United States Constitution conveys to Congress the power "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of bankruptcies throughout the United States." U.S. CONST. art. I § 8, cl. 4.

stitutional challenge to section 106 of the Bankruptcy Code.[22] The district court reversed the bankruptcy court's decision and held that section 106(c) does not clearly abrogate a state's eleventh amendment immunity.[23]

The United States Court of Appeals for the Second Circuit affirmed the district court's holding.[24] In so doing, the court of appeals reiterated that the language of section 106(c) does not expressly abrogate eleventh amendment immunity.[25]

Noting a conflict among the Second,[26] Third[27] and Seventh[28] Circuit Courts of Appeals, the United States Supreme Court

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22 *In re* Willington Convalescent Home, Inc., 72 B.R. 1002, 1012 (D. Conn. 1987); *In re* Zera, 72 B.R. 997, 1002 (D. Conn. 1987), *aff'd, In re* Willington Convalescent Home, Inc., 850 F.2d 50 (1988), *cert. granted,* 109 S. Ct. 781 (1989), *aff'd sub nom.* Hoffman v. Conn. Dept. of Income Maintenance, 109 S. Ct. 2818 (1989).

23 *In re* Willington Convalescent Home, Inc., 72 B.R. at 1012; *In re* Zera, 72 B.R. at 1001-02.

24 *In re* Willington Convalescent Home, Inc., 850 F.2d 50, 56-57 (1988), *cert. granted,* 109 S. Ct. 781 (1989), *aff'd sub nom.* Hoffman v. Conn. Dep't of Income Maintenance, 109 S. Ct. 2818 (1989).

25 *Id.* at 56-57. The court of appeals did, however, state that § 106(c) nullifies sovereign immunity only to allow for a determination of a state's interest in the debtor's estate. *Id.* at 55. The court analyzed the language of § 106(c) in two steps. First, the court noted that the introductory words ("except as provided in") of § 106(c) must be read independently of § (a) and (b). *Id.* at 54. The court, therefore, determined that while § (a) and (b) are only triggered when a state files a claim against the estate of the debtor, the application of § (c) is not confined by such a requirement. *Id.* Next, the court of appeals distinguished between the use of the words "any claim" in § 106(a) and (b) and the words "determination" of an "issue" in § 106(c)(2). *Id.* at 54. The court asserted that "claims" are more indicative of monetary relief, whereas, "issues" suggest declaratory or injunctive relief. *Id.* at 54. Sections (a) and (b) waive sovereign immunity to provide for monetary judgments against the state when a proof of claim is filed. Section (c), on the other hand, waives sovereign immunity to allow declaratory and injunctive relief when actions are brought under a provision having one of the "triggering" words. *Id.* at 55. The court of appeals held that § 106(c) does not authorize monetary recovery from a state in an action brought pursuant to § 542(b) or 547(b) of the Bankruptcy Code. *Id.* at 57.

It is interesting to note that the court of appeals was willing to consider the legislative history of § 106(c) in its analysis. *Id.* at 55-56. After considering the legislative history of § 106 however, the court determined that congressional intent to abrogate sovereign immunity was ambiguous. *Id.* at 57. Such ambiguities, in the court's view, should be resolved in favor of the state. *Id.*

26 *Id.*

27 Vazquez v. Pennsylvania Dep't of Pub. Welfare, 788 F.2d 130 (3d Cir. 1986), *cert. denied,* 479 U.S. 936 (broadly interpreted § 106(c) and rejected Pennsylvania's assertion of sovereign immunity when determining dischargeability of debts).

28 McVey Trucking, Inc. v. Secretary of State of Illinois, 812 F.2d 311 (7th Cir. 1987), *cert. denied,* 484 U.S. 895 (1987) (section 106(c) negates states' sovereign immunity in federal court action for monetary relief under § 547(b) of the Bankruptcy Code).

granted certiorari.[29] The Court held that section 106(c) does not abrogate a state's eleventh amendment immunity.[30] The eleventh amendment, therefore, barred Hoffman's actions under sections 542(b) and 547(b) of the Bankruptcy Code.[31]

There is little dispute that the eleventh amendment was specifically enacted to overrule *Chisholm v. Georgia*.[32] In *Chisholm*, the executor of a South Carolina estate, brought a breach of contract action in federal court against the State of Georgia to recover a debt for war supplies purchased in 1777.[33] Georgia argued that the United States Supreme Court could not establish jurisdiction over the action because the state, in asserting sovereign immunity, could not be compelled to cooperate with the Court.[34] Citing its article III power, the Court held that the State of Georgia could be sued in federal court by a citizen of South Carolina.[35] The Court reasoned that notwithstanding Georgia's assertion of sovereign immunity, federal jurisdiction could be established based on diversity of state-citizenship.[36]

Congressional reaction to *Chisholm* was "swift and hostile."[37] The eleventh amendment was immediately proposed, overwhelmingly passed by Congress, and quickly ratified by the

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29 Hoffman v. Conn. Dep't of Maintenance, 109 S. Ct. 781 (1989).

30 Hoffman v. Conn. Dep't of Income Maintenance, 109 S. Ct. 2818, 2824 (1989) (White, J., plurality opinion).

31 *Id.*

32 2 U.S. (2 Dall.) 419 (1793). *See also* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978) [hereinafter Field, *Part One*] ("The one interpretation of the eleventh amendment to which everyone subscribes is that it was intended to overturn *Chisholm v. Georgia*"); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (1926) (eleventh amendment was passed in response to *Chisholm*).

33 C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 47 (1972). The facts of *Chisholm v. Georgia* were never officially reported but they were circulated in various newspapers. *Id.*

34 *Id.*

35 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) at 419.

36 *Chisholm*, 2 U.S. (2 Dall.) at 425-26. *See* U.S. CONST. art. III, § 2, cl. 1, *supra* note 4. Justice Iredell, in the single dissent, argued that the Court did not establish jurisdiction directly from the Constitution and nothing in the Judiciary Act suggested that Congress intended to grant the Court jurisdiction over the states. *Id.* at 432-34 (Iredell, J., dissenting).

37 Welch v. State Dep't of Highways and Pub. Transp., 107 S. Ct. 2941, 2951 (1987) (Powell, J., plurality opinion). *See also* Marshall, *The Diversity Theory*, *supra* note 5, at 1377-78 ("reaction to *Chisholm v. Georgia* was 'swift and hostile' "). The states feared that *Chisholm* would result in a multitude of suits against the states at a time when the Union was still trying to organize and when most of the states were suffering from serious financial problems. C. JACOBS, *supra* note 33, at 56 (1972); 1 C. WARREN, *supra* note 32, at 99 (1926).

states.[38] The haste of the eleventh amendment's enactment, however, has produced great uncertainty as to the scope of sovereign immunity.[39] The urgency with which the amendment was drafted is reflected in its language.[40] While the eleventh amendment limits suits brought by out-of-state citizens against a state based on diversity of state-citizenship jurisdiction, it does not prohibit claims against a state by its own citizens under federal question jurisdiction.[41]

Nearly a century after the enactment of the eleventh amendment, the Supreme Court confronted the issue left open by the language of the eleventh amendment—whether a citizen could sue his home state.[42] In *Hans v. Louisiana*, Hans, a citizen of Louisiana, sought to obtain monetary relief in federal court, from the State of Louisiana for an overdue state-issued bond.[43] Louisiana invoked its eleventh amendment immunity in defense of the claim brought against it by Hans.[44] Hans argued that claims brought under the United States Constitution establish federal question jurisdiction without a need to consider the character of the parties.[45] Hans further argued that the eleventh amendment does not bar federal question jurisdiction because the explicit language of the amendment does not prohibit suits between a state and a citizen of that state.[46] Finally, Hans contended that

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38 *See* Marshall, *The Diversity Theory*, *supra* note 5, at 1376. *See also*, Field, *Part One*, *supra* note 32, at 536 (1978) (eleventh amendment was the first time Congress counteracted a Supreme Court decision by constitutional amendment).

39 Marshall, *The Diversity Theory*, *supra* note 5, at 1378. *See supra* notes 3-5 and accompanying text. *See also* Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 [hereinafter Baker, *Federalism*] (the Court has struggled to interpret the eleventh amendment in manner that preserves federal system); Brown, *State Sovereignty Under the Burger Court*, *supra*, note 3, at 366 (eleventh amendment case law is "unduly confusing and complex"); Fletcher, *An Historical Interpretation of the Eleventh Amendment*, *supra* note 4, at 1033 (eleventh amendment is a "baffling" Constitutional provision); Gibbons, *Eleventh Amendment and State Sovereign Immunity*, *supra* note 4, at 1891 ("eleventh amendment today represents little more than a hodgepodge of confusing and intellectually indefensible judge-made law").

40 Marshall, *The Diversity Theory*, *supra* note 5, at 1378.

41 *Id.* *See also* Fletcher, *A Historical Interpretation of the Eleventh Amendment*, *supra* note 4, at 1033 (eleventh amendment did nothing to prohibit federal court jurisdiction over suits brought by an in-state citizen against its home state).

42 Hans v. Louisiana, 134 U.S. 1, 9 (1890).

43 *Id.* at 1. The legislative act that authorized the bonds provided that interest payments would be met through an annual tax levy. Gibbons, *The Eleventh Amendment and State Sovereign Immunity*, *supra* note 4, at 2000. After nine years the state revoked the tax levy and sought to forgive the coupons. *Id.*

44 *See id.* at 10.

45 *Id.* at 9.

46 *Id.* at 10.

his claim gave rise to federal question jurisdiction pursuant to the contract clause contained in article I of the constitution because the contract clause does not confine its scope to specific parties.[47]

The *Hans* Court held that the eleventh amendment bars suits seeking monetary relief from a nonconsenting state by its own citizens.[48] Although the Court admitted that the eleventh amendment is ambiguous with regard to whether a state is subject to suit by its own citizens the court resolved that ambiguity by creating sovereign immunity in this situation.[49] The majority recognized that although there is no textual support for this type of immunity, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the state's] consent."[50] The Court reasoned that states would not have passed the amendment had they believed the amendment would permit their own citizens to bring suits against them.[51] The Court further reasoned that to allow such suits would encourage out-of-state citizens who could establish federal question jurisdiction to become citizens of the state they wish to sue, thus circumventing the states' eleventh amendment immunity.[52]

After *Hans*, this judicial expansion of state sovereign immunity flourished until *Parden v. Terminal Railway*.[53] In *Parden*, a group of Alabama citizens sued the state of Alabama under the Federal Employer's Liability Act (FELA)[54] to recover damages

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47 *See id.* at 9. *See also* Fletcher, *An Historical Interpretation of the Eleventh Amendment*, *supra* note 4, at 1039. The contract clause states that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." U.S. CONST. art. I, § 10. Further, article III of the constitution provides that "[t]he judicial power shall extend to all cases . . . arising under the constitution." *Id.* at art. III, § 2.

48 *Hans*, 134 U.S. at 21.

49 *See id.* at 10-11, 15. The *Hans* Court did, however, reaffirm that the eleventh amendment bars suits against a state by a citizen of a foreign state. *Id.* at 20.

50 *Id.* at 13 (emphasis omitted). *See also* Welch v. State Dep't of Highways and Pub. Transp., 107 S. Ct. 2941, 2952 (1987) (Powell, J., plurality opinion) (*Hans* established a broad principle of sovereign immunity).

51 *Hans*, 134 U.S. at 15. The Court stated that to construe the eleventh amendment as authorizing suits against a state by its own citizen "is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of." *Id.*

52 *See id.* at 10-11.

53 377 U.S. 184 (1964). *See also Welch*, 107 S. Ct. at 2958 (Brennan, J., dissenting) (noting the aggressive expansion of eleventh amendment sovereign immunity); *Ex Parte* New York No. 1, 256 U.S. 490, 497 (1921) (sovereign immunity was extended to admiralty actions); Edelman v. Jordan, 415 U.S. 651, 664-65 (1974) (sovereign immunity was extended to equitable relief that resembles damages).

54 *Parden*, 377 U.S. 184-85. *See* 45 U.S.C. §§ 51-60 (1982). FELA applies to states because it encompasses "any common carrier" operating in interstate commerce. *Id.* at § 51. Section 51 provides compensation for railroad employees injured in the course of employment. *Id.* Specifically, § 51 provides:

for personal injuries caused by their employer's negligence at the state-owned railroad.[55] The Court found that the commerce clause of article I of the Constitution[56] was a specific grant of legislative power that limits sovereign immunity when states are involved in interstate commerce.[57] Thus, the Court reasoned, states relinquish their sovereignty when they engage in acts regulated under the commerce clause.[58] Noting that FELA was enacted to confer benefits upon *all* railroad workers, the Court stated that to construe FELA as including a "sovereign immunity exception" would unfairly preclude railroad workers employed by a state from recovering damages for injuries sustained during the course of employment.[59] The *Parden* Court, therefore, held that Alabama could not assert sovereign immunity as a defense when it knowingly became involved in a federally-regulated railroad operating in interstate commerce.[60] Rather than overrule *Hans*, the Court distinguished the instant case, which involved a federal statute abrogating sovereign immunity, from *Hans* in which no such statute existed.[61]

A decade later, in *Employees of the Department of Public Health*

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in [] commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Id. Further, § 56 provides that "[u]nder this chapter an action may be brought in a district court of the United States. . . ." *Id.* at § 56.

55 *Parden*, 377 U.S. at 184-85.

56 *Id.* at 190-91 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 196-97 (1824)). The commerce clause provides Congress with the power "[t]o regulate Commerce . . . among the several states. . ." U.S. CONST. art. I, § 8, cl. 3.

57 *Parden*, 377 U.S. at 192.

58 *Id.* at 192. In the Court's view, congressional regulation of interstate commerce would be greatly hampered if states did not surrender some degree of sovereignty. *Id.*

59 *Id.* at 190.

60 *Id. Parden* has often been cited for the proposition that the state constructively waived its immunity when it became involved in interstate commerce. Baker, *Federalism*, *supra* note 41, at 164; Brown, *State Sovereignty under the Burger Court*, *supra* note 3, at 387; Fletcher, *A Historical Interpretation of the Eleventh Amendment*, *supra* note 4, at 1043.

61 *Parden*, 377 U.S. at 192. The Court actually reaffirmed the holding in *Hans v. Louisiana* that individuals may not sue a state without the state's consent. *Id.* The Court determined that when states voluntarily choose to participate in activities regulated by Congress, they knowingly forego their sovereign immunity defense. *Id.*

and Welfare of Missouri v. Department of Public Health and Welfare of Missouri[62] state health agency employees sought overtime pay and liquidated damages pursuant to the Fair Labor Standards Act (FLSA).[63] The employees, citizens of Missouri, sued the State of Missouri in federal court for monetary relief.[64] The Court held that Congress, by enacting FLSA, did not abrogate states' eleventh amendment immunity.[65] The Court based its holding on an analysis of the statutory language of FLSA, which, according to the Court, did not constitute "clear language" indicating a congressional intent to abrogate the states' sovereign immunity.[66]

The Court in *Employees* distinguished *Parden* on four grounds.[67] First, the Court stated that railroads are subject to federal regulation pursuant to the commerce clause, while hospitals are regulated entirely by the state.[68] Next, unlike railroads that are operated for profit, hospitals are neither operated for profit nor typically managed by private persons or corporations.[69] Moreover, the employees' only remedy under FELA was to bring suit for monetary relief, whereas FLSA afforded means other than employee suits for obtaining monetary relief.[70] Further, the Court noted that in *Parden*, the state employees sought

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62 411 U.S. 279 (1973).

63 *Id.* at 281. The purpose of FLSA is to regulate working conditions for the benefit of employees. *See* 29 U.S.C. §§ 201-19 (1988). Section 216(b) provides that an action may be brought in "any Federal or State court of competent jurisdiction" to recover unpaid overtime compensation and liquidated damages. *Id.* at § 216(b) (1988).

64 *Employees*, 411 U.S. at 281.

65 *Id.* at 285.

66 *Id.*

67 *Id.* at 281. Both *Parden* and *Employees* involved claims brought by state employees seeking monetary recovery from a state under a federal statute. *See supra* notes 53-61 and accompanying text. *See also supra* notes 62-72 and accompanying text.

68 *Id.* at 282. In *Employees*, the Court never explicitly addressed whether Congress has the power to abrogate sovereign immunity. *Id.* at 282-83.

69 *Id.* at 284.

70 *Id.* at 285. Section 216(c) provides employees a remedy by allowing the Secretary of Labor to file a complaint. 29 U.S.C. § 216(c) (1988). Specifically, § 216(c) states:

> The Secretary [of Labor] is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees . . . The Secretary [of Labor] may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.

Id. Further, § 216(b) provides that when the Secretary of Labor files a complaint, the right of an employee to bring a suit under § 216(b) is terminated. *Id.* at § 216(b).

only compensatory damages, while in *Employees*, the petitioners sought liquidated damages as well as unpaid wages.[71] Although the *Parden* Court determined that states surrendered part of their sovereignty when they ratified the commerce clause, the Court in *Employees* stated that in regulating interstate commerce, Congress could only abrogate states' sovereign immunity where such congressional purpose is clear.[72]

In 1985, the Supreme Court adopted a stricter test for determining whether Congress abrogated eleventh amendment immunity through its legislative enactments.[73] In *Atascadero State Hospital v. Scanlon*,[74] the Court found that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention *unmistakably* clear in the language of the statute."[75] In *Atascadero*, a handicapped man brought suit under section 504 of the Rehabilitation Act of 1973.[76] He alleged that the Atascadero State Hospital and the

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[71] *Employees*, 411 U.S. at 286. The Court was concerned with assessing liquidated damages against the state because it could result in large expenditures of state funds in order to comply with the statute. *Id.*

[72] *Id.* at 286-87. Justice Marshall, in his concurring opinion, attempted to distinguish eleventh amendment immunity from common law immunity. *Id.* at 287 (Marshall, J., concurring). Justice Marshall opined that common law immunity acted as an absolute bar against suits brought by a citizen against a nonconsenting state. *Id.* at 288. Justice Marshall argued that the framers of the constitution intended to incorporate common law sovereign immunity into article III of the constitution. *See id.* at 291-92. According to Justice Marshall, article III bars federal jurisdiction in a suit between a citizen and a nonconsenting state. *Id.* Justice Marshall determined that the proper forum for such a suit would be state court because the doctrine of common law immunity does not bar suits against a state in state court. *Id.* at 298 (Justice Marshall has since rejected his own theory in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 259 (1985)). *See supra* notes 77-86 and accompanying text.

In his dissent, Justice Brennan (relying on *Parden*) argued that states, by ratifying the commerce clause, surrendered their sovereign immunity and authorized Congress to compel a state to appear in federal court. *Employees*, 411 U.S. at 301. Justice Brennan also analyzed the controlling statutes in *Parden* and *Employees*. *Id.* at 302. He determined that the intent to abrogate sovereign immunity was considerably clearer in FLSA than in FELA. *Id.* Justice Brennan asserted that states must therefore, not be afforded sovereign immunity under FLSA because the language is not as clear in FLSA as in FELA. *Id.* Justice Brennan noted, however, that in *Parden* the Court found that sovereign immunity was abrogated in FELA. *Id.* Finally, Justice Brennan argued that *Hans* was a pure "sovereign immunity" case and should not be read to extend to article III or eleventh amendment federal judicial powers. *Id.* 320-21.

[73] Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). It is important to note that the Court in *Employees* required that Congress indicate its intent to abrogate sovereign immunity through "clear language." *Employees*, 411 U.S. at 285.

[74] 473 U.S. 234 (1985).

[75] *Id.* at 242 (emphasis added).

[76] *Id.* at 29 U.S.C. § 794 (1982). Section 504 of the Rehabilitation Act of 1973

California Department of Mental Health discriminated against him by refusing him employment.[77]

The *Atascadero* Court held that the eleventh amendment barred petitioner's claim.[78] The majority reasoned that because of the unique relationship between the states and the federal government,[79] an abrogation of eleventh amendment immunity requires unmistakably clear statutory language.[80] Although Congress enacted the Rehabilitation Act pursuant to its fourteenth amendment powers,[81] the Court did not perceive the language in the Rehabilitation Act as evincing an unmistakably clear congressional intent to abrogate sovereign immunity.[82]

In 1987, the Court faced an issue similar to that presented in *Parden*[83] and *Employees*,[84] in *Welch v. Texas Department of Highways and Public Transportation*.[85] Welch, an employee of the Texas Department of State Highways and Public Transportation, sued the State of Texas and the State Highway Department to recover damages for a work-related injury.[86] The employee brought suit in federal court under section 33 of the Jones Act, an act which incorporates provisions of FELA.[87]

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provides handicapped persons with protection against employment discrimination in federally-financed programs. *Id.*

77 *Atascadero*, 473 U.S. at 236.

78 *Id.* at 246.

79 *Id.* at 242. The majority quoted Powell's dissent in Garcia v. San Antonio Metropolitan Transit Authority: "The 'Constitution mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.' " *Id.* quoting 469 U.S. 528, 572 (1985).

80 *Atascadero*, 473 U.S. at 242.

81 U.S. CONST. amend. XIV, § 5. Section 5 of the fourteenth amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

82 *Atascadero*, 473 U.S. at 247.

83 *See supra* notes 53-55 and accompanying text.

84 *See supra* notes 65-66 and accompanying text.

85 107 S. Ct. 2941 (1987) (Powell, J., plurality opinion). *Welch* marks the polarization of the Court on the issue of sovereign immunity and its relationship to federal jurisdiction. *See id.* The plurality asserted that states are protected from suits in federal court by a sweeping sovereign immunity doctrine. *Id.* at 2945 (Powell, J., plurality opinion) (citing Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, 98 (1984)) (states' sovereign immunity implicit in article III bars federal jurisdiction over nonconsenting states). Alternatively, the dissent argued that state sovereign immunity should be narrowly interpreted, thus providing Congress with broad abrogation powers. *See id.* at 2958 (Brennan, J., dissenting). Justice Scalia found absolute state immunity and joined with the plurality. *See id.* at 2958 (Scalia, J., concurring).

86 *Id.* at 2944 n.1.

87 *Id.* at 2944. *See* 46 U.S.C. § 688(a) (1988). By incorporating the Federal Em-

In *Welch*, a slim majority of the Court held that Congress did not abrogate eleventh amendment immunity when they enacted FELA.[88] In so holding, the Court relied on the statutory language of the Rehabilitation Act.[89] The *Welch* Court did not decide whether Congress actually possesses abrogation powers.[90] Justice Powell, writing for the plurality, stated that the language of the Jones Act does not rise to the level of an unequivocal expression of congressional intent to abrogate sovereign immunity.[91] Thus, the Court expressly overruled the *Parden* Court's finding that the language in FELA was sufficient to abrogate sovereign immunity.[92]

The plurality reasoned that the eleventh amendment affirms the fundamental principle that states are immune from suit under article III.[93] The plurality believed that the framers of the Constitution were concerned that a sovereign might be sued in another sovereign's court without its consent.[94] The plurality, echoing the unanimous Supreme Court decision in *Hans*,[95] emphasized the importance of states' sovereign immunity in the federal system.[96] Further, the Court stated that case law subsequent to *Hans* established a basic framework of federalism in which the eleventh amendment bars suits against states by native citizens

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ployer's Liability Act, the Jones Act allows the provisions of FELA to apply to seamen. *Welch*, 107 S. Ct. at 2944. The Jones Act was enacted pursuant to the commerce clause. *See id.*

88 *Welch*, 107 S. Ct. at 2947 (Powell, J., plurality opinion).

89 *Id.*

90 *Id.* at 2946 (Powell, J., plurality opinion). It is interesting to note that *Parden* is the only case where the Court considered whether Congress actually possesses abrogation powers. Parden v. Terminal Ry., 377 U.S. 184, 190-91 (1964). *See supra* notes 53-61 and accompanying text.

91 *Welch*, 107 S. Ct. at 2947 (Powell, J., plurality opinion).

92 *See id.* at 2948 (Powell, J., plurality opinion). In the Court's view, the *Parden* Court erred in their interpretation of Congressional intent. *Id. Parden* required only that FELA contain language that states were immune from the Act's provisions, rather than an explicit intention to override eleventh amendment immunity as required by the Court since the *Atascadero* decision. *Id.*; *see also supra* notes 74-75 and accompanying text.

93 *See id.* at 2945 (Powell, J., plurality opinion).

94 *Id.* at 2947 (Powell, J., plurality opinion). After extensive historical analysis, the only determinative statement that Justice Powell could make about the intentions of the Framers and Ratifiers was that they were ambiguous. *Id.* at 2951 (Powell, J., plurality opinion). Justice Brennan espoused a similar characterization. *Id.* at 2964 (Brennan, J., dissenting).

95 *Id.* at 2952 (Powell, J., plurality opinion). *See supra* notes 48-52 and accompanying text.

96 *Id.*

without a state's consent.[97]

Writing for the dissent, Justice Brennan argued that eleventh amendment sovereign immunity only protects a state against suits brought by citizens of a foreign state where federal jurisdiction is based solely on diversity of citizenship.[98] Justice Brennan stated that because the eleventh amendment is silent with respect to suits brought against a state by citizens of that state, such a suit can be brought on the basis of federal question jurisdiction.[99] Based on this analysis, Justice Brennan concluded that the decision in *Hans* to bar a citizen from suing his home state for monetary relief was inappropriately grounded on historical materials addressing diversity cases rather than federal question cases.[100] Justice Brennan also argued that Congress is statutorily authorized to abrogate such common law immunity.[101] Justice Brennan found that by enacting FELA, Congress abolished state immunity; therefore, the State of Texas should be subject to suit by one of its own citizens.[102]

Eight days before *Hoffman* was decided, the Court reaffirmed the *Atascadero* test; statutory abrogation of eleventh amendment sovereign immunity requires unmistakably clear statutory language.[103] In *Dellmuth v. Muth*,[104] the Court held that the Education of the Handicapped Act (EHA)[105] does not abrogate state sovereign immunity.[106] In *Dellmuth*, the respondent sought, pursuant to EHA, to recover both tuition paid for his handicapped

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97 *Welch*, 107 S. Ct. at 2953 (Powell, J., plurality opinion) (citing *Monaco v. Mississippi*, 292 U.S. 313 (1934)). Relying on the doctrine of *stare decisis*, Justice Powell refuted the argument posited by the dissent that *Hans* should be overruled. *Welch*, 107 S. Ct. at 2956-57 (Powell, J., plurality opinion). To support his reliance on precedent, Justice Powell cited numerous prior decisions in support of *Hans*. *Id.* at 2956-57 n. 27 (Powell, J., plurality opinion) (citations omitted).

98 *Id.* at 2964-65 (Brennan, J., dissenting). Justice Brennan was joined by Justices Marshall, Blackmun and Stevens. *Id.*

99 *Id.* at 2965 (Brennan, J., dissenting). *See also* Field, *Part One*, *supra* note 32 at 538 ("[s]overeign immunity survives the adoption of the Constitution, then, but it is subject to modification or even abandonment by processes short of constitutional amendment").

100 *Welch*, 107 S. Ct. at 2965 (Brennan, J., dissenting).

101 *Id.* at 2969 (Brennan, J., dissenting).

102 *Id.* Justice Brennan criticized the plurality's interpretation of the framer's intentions and the historical development of the eleventh amendment. *Id.* at 2958-70.

103 *See* Dellmuth v. Muth, 109 S. Ct. 2397, 2402 (1989).

104 109 S. Ct. 2397.

105 *Id.* at 2398 (citing 20 U.S.C. § 1400 (1982)). The Education of Handicapped Act seeks to provide free and appropriate public education for handicapped children. *Id.*

106 *Dellmuth*, 109 S. Ct. at 2402.

son's private school education and attorney's fees.[107] In analyzing the statutory language of EHA, the Court reaffirmed *Atascadero* by stating that "congressional intent [to abrogate sovereign immunity] must be both unequivocal and textual."[108] The Court determined that legislative history should not be considered in determining whether Congress had intended to abrogate eleventh amendment immunity.[109]

It is against this backdrop of eleventh amendment jurisprudence that the Supreme Court decided *Hoffman v. Connecticut Department of Income Maintenance*.[110] In *Hoffman*, the Court was called upon to determine whether a bankruptcy court is empowered under section 106(c) of the Bankruptcy Code to render a monetary judgment against a state that fails to file a proof of claim in a Chapter 7 proceeding.[111] Section 106(c) provides that, "notwithstanding any assertion of sovereign immunity, a judicial determination of an issue arising under a Bankruptcy Code provision that contains the words 'creditor', 'entity' or 'governmental unit' binds governmental units."[112] In *Hoffman*, a majority of the court held that section 106(c) does not abrogate a state's eleventh amendment immunity.[113]

In a plurality opinion, Justice White concluded that the language of section 106(c) falls short of an unqualified abrogation of a state's immunity under the eleventh amendment.[114] Justice White recognized that section 542(b), the "turnover" provision, and section 547(b), the preference provision, are both triggered under section 106(c)(1) because the sections contain the words

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107 *Id.* at 2399.

108 *Id.* at 2401. *See also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). *See supra* notes 74-82 and accompanying text.

109 *Dellmuth*, 109 S. Ct. at 2401.

110 109 S. Ct. 2818 (1989).

111 *Id.* at 2821 (White, J., plurality opinion). Sections 106(a) and (b) are not applicable to petitioner's suit because no proof of claim was filed by the respondents in the two Chapter 7 proceedings. *Id.* at 2822 (White, J., plurality opinion). *See supra* notes 17-18 and accompanying text.

112 11 U.S.C. § 106(c) (1988). *See supra* note 7.

113 *Hoffman*, 109 S. Ct. at 2824 (Rehnquist, White, O'Connor, Scalia, and Kennedy).

114 *Id.* at 2822 (White, J., plurality opinion joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). *See also* Dellmuth v. Muth, 109 S. Ct. 2397, 2401 (1989) (Congressional intent to abrogate sovereign immunity must be unqualified and textual); Welch v. Texas Dep't of Highways and Pub. Transp., 107 S. Ct. 2941, 2946 (1987) (Congress must unequivocally express its intention to override States' eleventh amendment immunity in a statute).

"entity" and "creditor" respectively.[115] Justice White, however, rejected Hoffman's assertion that any Bankruptcy Code provision containing such trigger words would defeat a state's sovereign immunity defense.[116] Justice White stated that in light of the narrow sovereign immunity waivers provided for in subsections (a) and (b) of section 106, it is doubtful that Congress intended subsection (c) to act as a sweeping nullification of eleventh amendment immunity.[117]

Justice White stated that subsection 106(c)(2), which subjects governmental units to court judgments, should be read in tandem with the trigger words of subsection 106(c)(1).[118] Supporting this assertion, Justice White cited the conjunction "and" which joins clauses (1) and (2) of section (c).[119] Justice White reiterated that it was the Court's obligation "to give effect . . . to every clause and word of a statute. . ."[120] In analyzing the relationship of subsection (c)(2) to subsection (c)(1), Justice White noted that subsection 106(c)(2) authorizes a bankruptcy court to determine issues rather than claims as provided in sections 106(a) and (b).[121] Justice White interpreted the word "claim" as encompassing monetary judgments, and the word "issue" as relating to determinations which restrict governmental units.[122] Further, Justice White distinguished a "claim" from a "determination," in that the latter provides for declaratory and injunctive relief.[123] Justice White, therefore, concluded that the operative language, "determination by the [bankruptcy] court of an issue,"[124] contained in subsection 106(c)(2) suggests declaratory and injunctive relief rather than monetary recovery.[125] Hence,

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115 *Hoffman*, 109 S. Ct. at 2822 (White, J., plurality opinion).

116 *Id.*

117 *Id.* The plurality recognized that § 106(a) permits a waiver of eleventh amendment immunity only when there is a counterclaim against the governmental unit. *Id.* The plurality also noted that under § 106(b), a waiver of sovereign immunity is limited to the offset of the governmental unit's claim. *Id.*

118 *Id.*

119 *Id.* at 2822-23 (White, J., plurality opinion).

120 *Id.* at 2823 (White, J., plurality opinion) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

121 *Id.* (citing 11 U.S.C. § 101(4)(A) (1988)).

122 *Hoffman*, 109 S. Ct. at 2823 (White, J., plurality opinion). *See* 11 U.S.C. § 505(a)(1) (1988) ("the court may determine the amount or legality of any tax, any fine, or penalty relating to a tax, or any addition to tax. . . .").

123 *Id.*

124 11 U.S.C. § 106(c)(2) (1988).

125 *Hoffman*, 109 S. Ct. at 2824 (White, J., plurality opinion). *See also* Neavear v. Schweiker, 674 F.2d 1201, 1204 (7th Cir. 1982) (sovereign immunity may be waived to allow bankruptcy courts to determine the dischargeability of debts the

Justice White concluded that section 106(c) does not subject a state that failed to file a proof of claim to monetary judgments.[126]

Justice White rejected Hoffman's reliance on legislative history finding it irrelevant in determining whether the statute constitutes an express abrogation of eleventh amendment immunity.[127] According to Justice White, "[i]f congressional intent is unmistakably clear in the language of the statute, reliance on committee reports and floor statements will be unnecessary, and if it is not, *Atascadero* will not be satisfied."[128] Justice White concluded that Hoffman's actions under sections 542(b) and 547(b) were barred by eleventh amendment immunity.[129]

In his concurring opinion, Justice Scalia stated that Congress lacks the power to abrogate eleventh amendment immunity.[130] In Justice Scalia's view, Hoffman could not bring suit under the Bankruptcy Code against his home state for monetary recovery.[131] Justice Scalia also reiterated his dissenting position in *Pennsylvania v. Union Gas Co.*,[132] a case decided by the Court on the same day as *Hoffman*.[133] In both cases, Justice Scalia argued that it is inconsistent to allow suits by a citizen against his home state without that state's consent and empower Congress with the authority to abrogate that constitutional principle.[134]

Justice O'Connor filed a separate concurrence wherein she agreed with Justice Scalia that the bankruptcy clause does not empower Congress to enact a statute that overrides a state's elev-

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government is owed); Gwilliam v. United States, 519 F.2d 407, 410 (9th Cir. 1975) (bankruptcy courts able to determine type and amount of taxes due and extent of liability and indebtedness).

126 *Hoffman*, 109 S. Ct. at 2823 (White, J., plurality opinion).

127 *Id.* at 2823-24 (White, J., plurality opinion) (citing Dellmuth v. Muth, 109 S. Ct. 2397, 2401 (1989)).

128 *Id.* at 2824 (White, J., plurality opinion) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)).

129 *Id.*

130 *Id.* (Scalia, J., concurring in the judgment).

131 *Id.*

132 109 S. Ct. 2273 (1989).

133 *Hoffman*, 109 S. Ct. at 2824 (Scalia, J., concurring in the judgment); *Pennsylvania*, 109 S. Ct. at 2295 (Scalia, J., dissenting). The Supreme Court in *Pennsylvania* held that the Comprehensive Environmental Response, Compensation, and Liability Act subjects states to claims brought by their own citizens in federal court for monetary relief. *Id.* at 2286 (majority opinion). The Court further held that Congress had the power to enact such legislation pursuant to the commerce clause. *Id.* at 2286 (plurality opinion).

134 *Hoffman*, 109 S. Ct. at 2824 (Scalia, J., concurring in the judgment); *Pennsylvania*, 109 S. Ct. at 2299 (Scalia, J., dissenting).

enth amendment immunity.[135]

In a fervent dissent, Justice Marshall stated that the bankruptcy clause does empower Congress to abrogate eleventh amendment immunity.[136] Justice Marshall also argued that Congress clearly did so when they enacted section 106(c).[137] Thus, in the dissent's view citizens may sue their home states for monetary relief.[138] Justice Marshall noted that the drafters of section 106(c) were cognizant of the fact that *Atascadero* requires statutory language to evidence an unequivocal intent to abrogate sovereign immunity.[139] Justice Marshall stipulated that the drafters, aware of the *Atascadero* requirement, had carefully abrogated states' eleventh amendment immunity in three ways.[140] First, section 106(c) eliminates the use of a sovereign immunity defense.[141] Second, clause (1) of section 106(c) applies section 106(c) to states by including states in the trigger words found in other Bankruptcy Code provisions.[142] Third, clause (2) of section 106(c) binds states to orders promulgated by a bankruptcy court.[143] Justice Marshall characterized these three steps as evidencing a clear intent on the part of Congress to ensure abrogation of states' eleventh amendment immunity.[144]

Justice Marshall rejected the plurality's interpretation that

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135 *Hoffman*, 109 S. Ct. at 2824 (O'Connor, J., concurring).

136 *Id.* at 2824-25 (Marshall, J., dissenting) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). Justice Marshall was joined by Justices Brennan, Blackmun and Stevens.

137 *Id.*

138 *See Hoffman*, 109 S. Ct. at 2825 (Marshall, J., dissenting).

139 *Id.* at 2824-25 (Marshall, J., dissenting).

140 *Id.* at 2825 (Marshall, J., dissenting). The dissent noted that the plurality incorrectly viewed the three steps as a redundancy in the statute rather than as a clear expression of congressional intent. *Id.* Justice Marshall cited support for his proposition by setting out a list of cases and authorities. *Id.* at 2825 n.1 (Marshall, J., dissenting) (citing WJM, Inc. v. Massachusetts Dept. of Pub. Welfare, 840 F.2d 996, 1001 (1st Cir. 1988); McVey Trucking, Inc. v. Secretary of State of Illinois, 812 F.2d 311, 326-27 (7th Cir. 1987), *cert. denied*, 484 U.S. 895 (1987); Neavear v. Schweiker, 674 F.2d 1201, 1202-04 (7th Cir. 1982); Rhode Island Ambulance Services, Inc. v. Begin, 92 B.R. 4, 6-7 (Bankr. RI 1988); Tew v. Arizona State Retirement System, 78 B.R. 328, 329-31 (SD Fla. 1987); *cf.* Gingold v. United States, 80 B.R. 555, 561 (Bankr. ND Ga. 1987); R & L Refunds v. United States, 45 B.R. 733, 735 (Bankr. WD Ky. 1985); Gower v. Farmer Home Admin., 20 B.R. 519, 521-22 (Bankr. MD Ga. 1982): Remke, Inc. v. United States, 5 B.R. 299, 300-02 (Bankr. ED Mich. 1980). He also stated that most lower courts have determined that § 106(c) does allow for monetary judgments against a state. *Id.*

141 *Id.* at 2825 (Marshall, J., dissenting).

142 *Id.*

143 *Id.*

144 *Id.*

section 106(c) is a limited abrogation of sovereign immunity which applies only to declaratory and injunctive relief rather than monetary recovery.[145] He reasoned that it was inappropriate to analogize the word "determination" in section 106(c)(2) to the tax section of the Code—section 505(a)(1).[146] The analogy was limited, in Justice Marshall's view, because other sections of the Code did not confine the meaning of "determination" to declaratory and injunctive relief, but instead authorized "appropriate orders and judgments" to be entered upon a "determination".[147] Justice Marshall believed the Court should focus on the explicit statutory language itself rather than analogizing to other provisions to determine whether Congress had abrogated sovereign immunity.[148]

In addition, Justice Marshall also denounced the plurality's fear that an expansive interpretation of section 106(c) would result in the application of section 106(c) in a "scattershot fashion to over 100 Code provisions. . . ."[149] Justice Marshall argued that only a handful of Bankruptcy Code provisions contemplate binding a governmental unit to a monetary judgment.[150] Justice Marshall concluded that Congress intended to include monetary relief in its clear abrogation of sovereign immunity contained in section 106(c).[151]

Justice Marshall discussed the policy considerations underlying the treatment of states as 'creditors' and 'entities' for purposes of enforcing monetary judgments under limited Bankruptcy Code provisions.[152] The Justice criticized the majority for undermining these policy goals by treating states as preferred creditors.[153] Justice Marshall argued that if states were subject to the preference provision, states would be prevented from obtaining money from a financially unstable debtor.[154] Jus-

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145 *Id.*

146 *Id.* See 11 U.S.C. § 505 (1988); *see infra* note 122.

147 *Hoffman*, 109 S. Ct. at 2825 (Marshall, J., dissenting). In Justice Marshall's view, defining the word "determine" under 28 U.S.C. § 157(b)(1) (1982) is an equally compelling analogy. *Id.* Section 157(b)(1) provides that "Bankruptcy Judges may hear and determine all cases under title 11 . . . and may enter appropriate orders and judgments." *See* 28 U.S.C. § 157(b)(1) (1982).

148 *Hoffman*, 109 S. Ct. at 2825, (Marshall, J., dissenting).

149 *Hoffman*, 109 S. Ct. at 2826 (Marshall, J., dissenting); *see also* Kelly v. Robinson, 479 U.S. 36, 43 (1986) (provisions of the code must be read as a whole).

150 *Hoffman*, 109 S. Ct. at 2826 (Marshall, J., dissenting).

151 *Id.* at 2827 (Marshall, J., dissenting).

152 *Id.* at 2826-27 (Marshall, J., dissenting).

153 *Id.* at 2826 (Marshall, J., dissenting).

154 *Id.* at 2827 (Marshall, J., dissenting).

tice Marshall feared that if the preference provision did not so apply, states would prematurely coercing unstable debtors into bankruptcy.[155] Moreover, non-governmental creditors, fearing the preferred status of governmental creditors, might also exert further pressure on debtors.[156] Justice Marshall stressed that Congress enacted the turnover provisions, to promote reorganizations or provide for an equitable division of the debtor's estate.[157]

Finally, the dissent considered whether the bankruptcy clause empowers Congress to abrogate sovereign immunity.[158] Citing *Pennsylvania v. Union Gas Co.*, Justice Marshall noted that Congress has the same authority under the bankruptcy clause as under the commerce clause to abrogate the eleventh amendment immunity.[159]

Justice Stevens filed a separate dissent in which he set forth the legislative history of section 106.[160] Justice Stevens noted that after considering a complete waiver of eleventh amendment immunity, Congress enacted section 106(a) and (b) which limits eleventh amendment waivers "to compulsory counterclaims and offsets."[161] Justice Stevens stated that section 106(c) was added to provide bankruptcy courts with the power to render monetary judgments against governmental units; such authority, however, was limited to the Code sections which contain the statutory trigger words in section 106(c)(1), i.e., "creditor," "entity," and "governmental unit."[162] Justice Stevens stressed that any inconsistency in section 106 can be explained by "[t]he fact that paragraph (c) was added to the bill after paragraphs (a) and (b) had been reported out of Committee. . . ."[163]

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155 *Id.* (citing McVey Trucking, Inc. v. Secretary of State of Illinois, 812 F.2d 311, 328 (7th Cir. 1987), *cert. denied*, 484 U.S. 895 (1987)).

156 *Hoffman*, 109 S. Ct. at 2827 (Marshall, J., dissenting).

157 *Id.* (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 202-03 (1983)).

158 *Id.*

159 *Id.* at 2827 (Marshall, J., dissenting). *See* Pennsylvania v. Union Gas Co. 109 S. Ct. 2273 (1989) (commerce clause empowers Congress to abrogate eleventh amendment immunity).

160 *Id.* at 2827 (Stevens, J., dissenting). Justice Stevens was joined by Justice Blackmun. *Id.*

161 *Id.* at 2828 (Stevens, J., dissenting). Justice Stevens noted that the authors of the Code were uncertain as to the extent of Congress' power to nullify a states' eleventh amendment immunity, so they enacted the limited waivers in subsections 106(a) and (b). *Id.* (citing H.R. Rep. No. 95-595, p. 317 (1977); S. Rep. No. 95-989, p. 29 (1978)).

162 *Id.*

163 *Id.*

Justice Stevens asserted that waivers of sovereign immunity should be liberally construed in order to give effect to congressional policy goals.[164] Justice Stevens noted that section 106(c) waives the federal government's sovereign immunity as well as states' sovereign immunity.[165] He reasoned that the federal government falls within the trigger words of section 106(c)(1), therefore section 106(c) applies "notwithstanding any assertion of sovereign immunity. . . ."[166] Justice Stevens maintained that because waivers of sovereign immunity by the federal government are historically accorded liberal construction in order to effect policy goals, waivers against the states should be similarly construed.[167] Hence, Justice Stevens held that bankruptcy courts are empowered under section 106(c) to render monetary judgments against states under the Bankruptcy Code provisions containing any of the trigger words.[168]

Part of the confusion surrounding Congress' ability to abrogate states' sovereign immunity under section 106(c) stems from the Supreme Court's reliance on the *Atascadero* test.[169] Faced with the unequivocally clear language rule, the plurality's analysis of section 106(c) was strictly limited to a study of the statutory language. In faithfully adhering to this test, however, the plurality contravened the policy goals of the Code by elevating a state to the level of a preferred creditor. Henceforth, non-governmental creditors are at a disadvantage vis-a-vis their governmental counterpart in a bankruptcy proceeding.[170]

Although the Court is deferential to the plain meaning of the statute, the Court has often considered legislative history when construing the meaning of a statute, especially when attempting to reaffirm its conclusions as to the meaning of the language.[171]

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164 *Id.* at 2829 (Stevens, J., dissenting).

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 A strict application of the clear statement rule can lead courts to disallow suits that Congress intended. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1273 (1978).

170 "The clear statement rule effectively grants the Supreme Court veto power over congressional enactments when congressional intent to abrogate states' sovereign immunity is clear but the statute is not absolutely clear." *Id.*

171 Block-Lieb, *Using Legislative History To Interpret Bankruptcy Statutes*, RESNICK, BANKR. PRAC. & STRATEGY ¶ 2.01[2]. Professor Block-Lieb stated: "[m]ore often, however, courts have reffered to the circumstances of enactment to support, not contradict, a literal application of a Code provision." *Id.*

In *Hoffman*, had the plurality looked beyond the statutory language to the legislative history and congressional purpose of section 106(c), they would have confronted compelling reasons why section 106(c) was intended to abrogate the states' sovereign immunity. The legislative history specifies that Congress included the provision in order to comply with the "express waiver" requirement.[172] In fact, the legislative history of section 106(c) reaffirms Justice Marshall's position that section 106(c) was meant to subject states to the remedies of any Code provision triggered by the language of section 106(c)(1) including those remedies that provide for monetary judgments against the states. For example, the legislative history specifically refers to subjecting states to section 547(b), thus making states liable for any preferential payments from the debtor.[173] This example indicates congressional intent to authorize monetary judgments against states under section 547(b) and all other triggered code provisions providing for monetary relief.

More importantly, the Court failed to discuss what limits, if any, exist with respect to congressional authority to abrogate sovereign immunity.[174] This is a threshold question that should have been the primary focus of the Court. If Congress is not so authorized, any subsequent attempt to clarify the language would be futile. It should be noted, however, that Congress is authorized to enact legislation abrogating a state's eleventh amendment immunity to provide for monetary judgments against a state under section five of the fourteenth amendment[175] and under the commerce clause.[176] There is no reason why the bankruptcy power, a constitutionally enumerated power, should be treated differently.[177]

Even if Congress were to reconsider drafting abrogation lan-

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172 124 Cong. Rec. H32394 (daily ed. September 28, 1978) (statement of Rep. Edwards); *id.* at S32393 (daily ed. October 5, 1978) (statement of Sen. DeConcini) ("The provision [106(c)] is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. . .").

173 *See* 2 COLLIER ON BANKRUPTCY ¶ 106.04 (1990).

174 124 Cong. Rec. H32394 (daily ed. September 28, 1978) (statement of Rep. Edwards); *id.* at S32393 (daily ed. October 5, 1978) (statement of Sen. DeConcini).

175 Fitzpatrick v. Bitzer, 427 U.S. 445, 457 (1976).

176 Pennsylvania v. Union Gas, 109 S. Ct. 2273, 2284 (1989). In *Pennsylvania*, the plurality reasoned that the eleventh amendment refers only to "the judicial power" which cannot be construed to limit congressional authority. *Id.* at 2283.

177 Hoffman v. Conn. Dep't of Income Maintenance, 109 S. Ct. 2818, 2824 (1989) (Scalia, J., concurring); *id.* at 2827 (Marshall, J., dissenting). Brown, *State Sovereignty Under the Burger Court*, *supra* note 3, at 365.

guage, the majority's judgment failed to provide useful guidelines to enable drafters to determine what language the Court would consider to be an explicit abrogation of sovereign immunity. Among the factors that Congress may consider in drafting such legislation are the underlying policy goals of the Bankruptcy Code, such as the need to provide for equitable distribution of assets and the necessity to treat all creditors in a like manner.[178] Given that sovereign immunity results in a grant to the states of preferred creditor status, failure to enact a statute that explicitly abrogates state sovereignty would defeat the fundamental goals of the Bankruptcy Code.[179] Congress should revisit section 106(c) so as to unequivocally abrogate states' eleventh amendment immunity. Such congressional action should be designed to remedy any ambiguities in the language of section 106(c) as well as to implement the policy goals of the Bankruptcy Code.

Raquel Smith Colby

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178 Hoffman, 109 S. Ct. at 2826-27 (Marshall, J., dissenting).
179 *Id*