State Immunity in Bankruptcy After Seminole Tribe v. Florida

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I. INTRODUCTION

Governmental immunity, in its strongest form, forgives the sovereign its "legal irresponsibility" by excusing it from suit in court. It is an odd notion for a democratic system of government. And yet, a resilient core of conservative Justices has been carrying on a "love affair" with the concept of sovereign immunity and, particularly, state sovereign immunity for many years. The Court has advanced and reaffirmed many times the theory that state sovereign immunity was written into the Constitution by the Eleventh Amendment. In the face of this jurisprudence, Congress finds its job of regulating "our vast national economy" increasingly more difficult. The bankruptcy venue is no exception. The recent Supreme Court decision in *Seminole Tribe v. Florida*, holding that Congress is not empowered by its Article I plenary powers to abrogate the states' Eleventh Amendment immunity, has placed sizable obstacles in the path of efficient bankruptcy administration. Considering the frequency with which the states are named as defendants or respondents in bankruptcy cases, the repercussions of this case are many. The possible responses to it, however, are not.

In Section II of this article, I review certain seminal Eleventh Amendment Supreme Court cases to provide a brief overview of the evolution of state sovereign immunity. Next, in Section III, I review

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* J.D., 1989, Boston College Law School; LL.M., 1997, New York University School of Law. I would like to thank Lawrence P. King, Peter E. Meltzer, and Colleen C. Maher for their helpful comments on earlier drafts of this paper. Thanks also to Christopher Eisgruber and Larry Kramer for suggestions regarding discrete constitutional law issues concerning my topic.

1. "As to the states, legal irresponsibility was written into the Eleventh Amendment..." *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388 (1939) (emphasis added).

2. See CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY vii, 150-64 (1972); *see also* *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1143 (1996) (Stevens, J., dissenting) (noting that the doctrine of state sovereign immunity is "particularly unsuitable for incorporation into the law of this democratic Nation," and justifying its existence on the grounds that it preserves the "dignity" of the states is an "embarrassingly insufficient' rationale for the rule." (quoting Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 151 (1993) (Stevens, J., dissenting))).


4. See U.S. CONST. amend. XI; *infra* Section II.


7. *See infra* Section III.B.

8. *See infra* Section II.
specifically those bankruptcy cases decided by the Court that contribute to the development of the immunity issue. In this section I also analyze the Seminole Tribe case. Although Seminole Tribe was not a bankruptcy case, its obvious ramifications for bankruptcy practice make its consideration with other bankruptcy cases appropriate. Finally, in Section IV, I question whether attempting to circumvent Seminole Tribe in bankruptcy can be squared with recent scholarship endeavoring to identify a normative justification for bankruptcy law and define limits on its proper application. Determining that it can, I then consider certain responses to the state immunity problem in bankruptcy. I conclude that none of these measures for neutralizing Seminole Tribe appear up to the task. Certainly none of these measures will restore the states to a position of full accountability in the bankruptcy process.

II. A BRIEF HISTORY OF THE SUPREME COURT'S STATE SOVEREIGN IMMUNITY JURISPRUDENCE

The Supreme Court’s approach to state immunity has always been highly political. Not surprisingly, opinions on the subject are inconsistent and hard to reconcile. By the latter half of this century, however, certain attributes of state immunity have emerged even if their legal and historical predicates are uncertain.

A. Article III of the Constitution and Chisholm v. Georgia

Article III, section 2 of the United States Constitution provides that:

The judicial power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ["Federal Question" Clause];—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a

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9 See infra Section III.A.
10 See infra Section III.B.
11 See infra Section IV.A.
12 See infra Sections IV.B., IV.C.
14 See HOWARD FINK & MARK V. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 137 (1984) (asserting that “[t]he case law of the eleventh amendment is replete with historical anomalies, internal inconsistencies, and senseless distinctions.”); JACOBS, supra note 2, at 150 (explaining that “[j]udicial defense of sovereign immunity has been, at best, episodic and equivocal.”); see also Pennsylvania v. Union Gas Co., 491 U.S. 1, 25 (1989) (Stevens, J., concurring) (lamenting “the Court’s inability to develop a coherent doctrine of Eleventh Amendment immunity . . . .”)

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Party; — to Controversies between two or more States; — between a
State and Citizens of another State ["Citizen-State Diversity"
Clause]; — between Citizens of different States; — between Citizens of
the same State claiming Lands under Grants of different States, — and
between a State, or the Citizens thereof, and foreign States, Citizens
or Subjects. 15

Given the tenor of the times at ratification (as evidenced by the great
federalist debate itself), it is not hard to understand why the Citizen-State
Diversity Clause gave anti-federalists a cause for concern. This concern
seemed founded when the Court decided Chisholm v. Georgia16 in 1793.
In that case, a citizen of South Carolina filed a common-law assumpsit
action against the State of Georgia for the nonpayment of a debt.17
Georgia objected, raising its common law sovereign immunity as a bar to
the suit.18 The majority19 concluded that Article III abolished the states’
common law sovereign immunity in federal court and permitted Chish-
olm’s suit to proceed.20

Justice Iredell, at the time the most junior member of the Court,
filed a dissenting opinion that is commonly believed to provide the basis
for the Eleventh Amendment.21 Although not without some inconsis-
tency, the dissent advanced the proposition that a state’s common-law
sovereign immunity should be recognized by federal courts as a matter of
comity unless clearly withdrawn by an act of Congress: “My opinion
being, that even if the constitution would admit of the exercise of such a
power [i.e., federal court jurisdiction over a Citizen-State Diversity ac-
tion], a new law is necessary for the purpose, since no part of the exist-
ing law applies . . . .”22 Turning to the Judiciary Act of 1789, which

16 2 U.S. (2 Dall.) 419 (1793).
17 See id. at 419-20, 428-29.
18 See id. at 419. Consistent with its position, Georgia refused to take part in oral
argument before the Court. See id.
19 It is difficult to summarize the “position” of the majority as each Justice on the
Court, consistent with existing practice, filed an opinion “seriatim” in reverse order of
seniority. See id. at 429. For a brief personal history of the Justices of the Court and
their respective roles in the ratification debate, see JACOBS, supra note 2, at 50-51.
20 See Chisholm, 2 U.S. (2 Dall.) at 451, 453 (opinion of Justice Blair); id. at 458,
463-66 (opinion of Justice Wilson); id. at 466-69 (opinion of Justice Cushing); id. at 472,
476, 478, 479 (opinion of Chief Justice Jay); id. at 480 (order of the Court).
21 See id. at 429-50 (Iredell, J., dissenting); see also Seminole Tribe v. Florida, 116
S. Ct. 1114, 1133 (1996) (Stevens, J., dissenting) (noting that “Justice Iredell[’s] . . . dis-
sent provided the blueprint for the Eleventh Amendment.”).
22 Chisholm, 2 U.S. (2 Dall.) at 449 (Iredell, J., dissenting). Justice Iredell saw
nothing in the law that illustrated Congress’s intention to withdraw the states’ sovereign
immunity. “I conceive, that all the courts of the United States must receive . . . all their
authority . . . from the legislature only. This appears to me to be one of those
codified federal jurisdiction at that time, Justice Iredell saw no evidence that Congress intended to abolish the states’ common-law sovereign immunity.23 Because the Act instructed federal courts to exercise their jurisdiction in accordance with “principles and usages of law,” Justice Iredell quite sensibly concluded that state common-law sovereign immunity was one of those principles for which the federal court must account.24 In order to arrive at Justice Iredell’s conclusion, one need not assume that sovereign immunity is beyond the reach of Congress to affect, although the dissent has been interpreted as advancing that very proposition.25

Cases . . . in which an article of the Constitution [i.e., the Citizen-State Diversity Clause of Article III] cannot be effectuated without the intervention of the legislative authority.” Id. at 432 (Iredell, J., dissenting). Justice Iredell continued:

The authority [of the federal courts] extends only to the decision of controversies in which a State is a party, and providing laws necessary for that purpose. That surely can refer only to such controversies in which a State can be a party; in respect to which, if any question arises, it can be determined . . . in no other manner than by a reference either to pre-existent laws, or laws passed under the Constitution and in conformity to it. Id. at 436 (Iredell, J., dissenting). “[A]s the law stands at present, [this action against the state] is not maintainable; whatever opinion may be entertained, upon the construction of the Constitution, as to the power of Congress to authorize such a one.” Id. at 437 (Iredell, J., dissenting). See generally id. at 432-50 (Iredell, J., dissenting) (providing further reasoning for his conclusions). Accord John V. Orth, The Truth About Justice Iredell’s Dissent in Chisholm v. Georgia (1793), 73 N.C. L. Rev. 255, 263-66 (1994).

Despite the uniformity of Justice Iredell’s thesis, in an admirably restrained response to the majority’s editorializations, Justice Iredell argued somewhat inconsistently that the Constitution might bar outright suits against nonconsenting states:

So much, however, has been said on the Constitution, that it may not be improper to intimate, that my present opinion is strongly against any construction of it, which will admit, under the circumstances, a compulsive suit against a state for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power. This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial.

Chisholm, 2 U.S. (2 Dall.) at 449-50 (Iredell, J., dissenting) (emphasis added); cf. Jacoby, supra note 2, at 51 (describing Justice Iredell’s parting shot as a diversion from what was to that point a “model of self-restraint.”).

23 See Chisholm, 2 U.S. (2 Dall.) at 433-37 (Iredell, J., dissenting); see also supra note 22 and accompanying text.

24 See Chisholm, 2 U.S. (2 Dall.) at 436-37 (Iredell, J., dissenting).
It follows, therefore, unquestionably, I think, that looking at the act of Congress, which I consider is on this occasion the limit of our authority (whatever further might be constitutionally, enacted) we can exercise no authority in the present instance consistently with the clear intention of the act, but such as a proper State Court would have been at least competent to exercise at the time the act was passed.

Id. 25 See Pennsylvania v. Union Gas Co., 491 U.S. 1, 37-38 (1989) (Scalia, J., concur-
Whatever Justice Iredell had in mind, there is no doubt that Chisholm reignited the concerns of the anti-federalists, and led to the adoption of the Eleventh Amendment.  

B. The Eleventh Amendment and Hans v. Louisiana

The Eleventh Amendment is narrowly tailored, seemingly in response to the specific facts of the Chisholm case: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Amendment certainly divests the federal courts of jurisdiction over cases formerly arising under the Citizen-State Diversity Clause. But what effect does the Eleventh Amendment impose upon a
suit by a citizen against his or her own state? Was it intended that the Eleventh Amendment, despite its language, extend to that situation as well, or did the drafters of the Amendment purposefully exclude that procedural posture?

In 1890, the Court answered this question in its controversial decision in *Hans v. Louisiana*.\(^\text{28}\) Hans, a citizen of Louisiana, filed suit against his own state alleging that Louisiana had impaired its agreement with him contrary to the Contracts Clause of the Constitution.\(^\text{29}\) Thus, unlike *Chisholm*, the *Hans* case involved a suit by a citizen against his own state (a situation not covered by the express language of the Eleventh Amendment), and, more important to present purposes, concerned a federal question. Despite these significant, distinguishing characteristics, the Court concluded that the suit could not be maintained in federal court without Louisiana’s consent.\(^\text{30}\) Although the Court acknowledged that the actual language of the Eleventh Amendment did not compel its conclusion, the Court chose to recognize a broader immunity in order to avoid the “anomaly” of permitting a citizen to do that which a noncitizen could not.\(^\text{31}\)


\(^{29}\) See *Hans*, 134 U.S. at 1-3; see also U.S. CONST. art. I, § 10, cl. 1.

\(^{30}\) See *Hans*, 134 U.S. at 15-21. The case involved a civil war debt owed by Louisiana to Hans. See Gibbons, supra note 13, at 1976-77; Orth, supra note 22, at 257. Some have speculated that the Court chose to read an expansive immunity into the Eleventh Amendment rather than order the debt paid and face the inevitable challenge to the federal government’s supremacy when Louisiana refused. See Gibbons, supra note 13, at 1974, 2000 (asserting that the court needed to avoid “the humiliation of seeing its political authority compromised” and that “the justices needed a way to let the South win the repudiation war.”); cf. Coehns v. Virginia, 19 U.S. (6 Wheat.) 264, 406-07 (1821) (suggesting that the Eleventh Amendment was passed to assuage the fears of heavily indebted states that their creditors might sue them in federal court). But cf. JACOBS, supra note 2, at 4 (arguing that “the rather simplistic view that the purpose of the [Eleventh] amendment was to relieve the states of an enforceable obligation to pay their debts seems scarcely tenable in the light of various factors, including the strong support it received from creditor-oriented Federalist majorities in Congress and in a number of state legislatures.”).

\(^{31}\) See *Hans*, 134 U.S. at 10. In response to Hans’s argument that the express language of the Eleventh Amendment was no barrier to a suit by a citizen against his or her
In recent cases, the Court has divided over the basis of the *Hans* decision. The conservative Justices have argued that *Hans* stands for the proposition that the Eleventh Amendment, despite its language, incorporates a broader, constitutionally mandated state immunity. The opposing camp, on the other hand, has argued that there is no more a recognition of a constitutional mandate in *Hans* than in Justice Iredell's *Chisholm* dissent. Instead, these Justices have suggested that the *Hans* decision, which was based on the *Chisholm* dissent, only reaffirmed the notion that state common-law immunity, not otherwise subsumed by the Eleventh Amendment, should be respected by the federal courts as a matter of comity in the absence of an act of Congress to withdraw it. This view left the door open for the argument that Congress could abrogate that portion of the states' common-law sovereign immunity existing within the common law but outside the express terms of the Eleventh Amendment. Putting aside this congressional abrogation issue for the time being, *Hans* at least settled an old question by deciding that a state's immunity barred suits against it in federal court by its own citizens. It also added something new, namely, that this immunity extended to suits involving a federal question as well.

own state, the Court responded:

> It is true, the amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States . . . .

*Id.* Compare *Seminole Tribe*, 116 S. Ct. at 1154 (Souter, J., dissenting) (disagreeing that *Hans*'s position would have created an anomalous situation because the Eleventh Amendment is no bar to suits by citizens or noncitizens when a federal question is involved) with *Jacobs*, supra note 2, at 94 (declaring that "[i]t is unlikely that objections toimpleading a state at the original suit of a citizen of another state or of a foreigner would have been any less vigorous if the basis for the asserted jurisdiction had been the existence of a federal question.").


33 *See supra* notes 21-26 and accompanying text.


35 *Hans* is, at best, ambivalent on this point. *See Hans*, 134 U.S. at 12, 18, 21.
C. Adjusting State Sovereign Immunity After Hans: Ex parte Young, Waiver, and Other Limitations

1. The Young Doctrine

With the State's victory in Hans, and a state immunity of such immense proportions that it seemed at odds with the Supremacy Clause, the pendulum began to swing the other way. The major adjustment came in the guise of the Young doctrine, announced by the Court in its 1908 decision in Ex parte Young. According to the doctrine, a suit can be maintained against an officer of a state in order to enjoin him or her from enforcing an unconstitutional statute or from exceeding his or her authority. The suit is deemed to be one against the officer as an indi-

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36 See Seminole Tribe, 116 S. Ct. at 1178 (Souter, J., dissenting).
37 Actually, most of the restrictions on the Eleventh Amendment were placed there much earlier by Chief Justice Marshall. See Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 847-53 (1824) (noting that the Eleventh Amendment does not apply if the state is not the nominal defendant, for example, when a suit is brought against a state officer on the basis of constitutionally defective authorization); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406, 412 (1821) (explaining that the Eleventh Amendment does not limit federal appellate review of federal question cases); United States v. Peters, 9 U.S. (5 Cranch) 115, 139-40, 141 (1809) (declaring that the Eleventh Amendment is no impediment to a suit in which the state is not a party even when the state has a significant interest in the outcome). At the time, these restrictions were neither welcomed nor considered necessary by many who feared a powerful federal judiciary and the erosion of state sovereignty. See generally Jacobs, supra note 2, at 75-105. In any event, the principle of Osborn that permitted certain suits against state officers was not called upon with any regularity or frequency until the turn of the twentieth century. See id. at 106-07.


39 See Young, 209 U.S. at 155-56. Individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action. Id.; see also Philadelphia Co. v. Stimson, 223 U.S. 605, 619-20 (1912) (noting that governmental immunity does not protect an officer of the government from personal liability when that officer "act[s] in excess of his authority or under an authority not validly conferred."). The rule of the Young case is narrow indeed. While the decision in Philadel-
individual, not as a representative of the state.\textsuperscript{40} Of course, it may not be easy to determine when a state officer is acting as an individual rather than in an official capacity.\textsuperscript{41} The Court had already made this determination decidedly easier, however, in its 1887 decision in \textit{In re Ayers}\textsuperscript{42} where it held, in a rather bootstrap fashion, that

\begin{quote}
[i]f . . . an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.\textsuperscript{43}
\end{quote}

The injunction against a state officer can be prohibitive or affirmative,\textsuperscript{44} but it must be forward-looking.\textsuperscript{45} An award of money damages for past wrongs is thus not available under the doctrine.\textsuperscript{46} Quizzically, it does not matter that obeying a prospective injunction will require an offi-

\textit{phia Co.} certainly expanded the scope of the exception, the parameters of this liberalization are not clearly defined. Thus, a narrow understanding of the \textit{Young} doctrine is plausible. Cf. John Rosenbloom, Comment, \textit{The Elusive Eleventh Amendment and the Perimeters of Federal Power}, 46 U. Colo. L. Rev. 211, 229-30, 233 n.147 (1974) (arguing that “[t]he usefulness of the fiction of a suit against officers in their individual capacities is confined to the narrow class of cases where either of the two requirements is shown [i.e., unconstitutional statute or ultra vires conduct] and only prospective relief is sought.”). The Court’s application of the \textit{Young} doctrine thus far has not been overly exacting, however, and relief under it is apparently available to remedy any violation of federal law. \textit{See, e.g.}, Green v. Mansour, 474 U.S. 64, 68 (1985) (suggesting that the \textit{Young} doctrine is an available remedy to any continuing violation of federal law). \textit{But cf. infra} notes 49-60 and accompanying text (discussing recent efforts by the Court to constrict the \textit{Young} doctrine).

\textsuperscript{40} See \textit{Young}, 209 U.S. at 159-60.
\textsuperscript{41} See \textit{id.} at 150-52 where the Court considered certain cases predating \textit{Young} in which it struggled with this distinction.
\textsuperscript{42} 123 U.S. 443 (1887).
\textsuperscript{43} \textit{Id.} at 507; accord \textit{Young}, 209 U.S. at 159-60.
\textsuperscript{44} \textit{Compare Young}, 209 U.S. at 148, 168 (ordering state official not to act) with Quern v. Jordan, 440 U.S. 332, 346-49 (1979) (ordering state official to take future action).
\textsuperscript{45} See Edelman v. Jordan, 415 U.S. 651, 677 (1974); \textit{see also Quern}, 440 U.S. at 337-38.
\textsuperscript{46} See \textit{Ford Motor Co. v. Indiana Treasury Dep’t}, 323 U.S. 459, 464 (1945) (explaining that “when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.”); see also \textit{Edelman}, 415 U.S. at 677. Yet it is entirely possible that money damages may be the only practical way of addressing the wrong done the complainant. See \textit{Atascadero}, 473 U.S. at 256 n.9 (Brennan, J., dissenting); \textit{see also Bivens v. Six Unknown Federal Narcotics Agents}, 403 U.S. 388, 410 (1971) (declaring that “[f]or people in [complainant’s] shoes, it is damages or nothing.”).
It is hard to rationalize this inconsistent treatment of the consequences of direct and indirect impact on the state treasury.\(^4\)

Although the *Young* doctrine is based upon a somewhat shaky legal fiction,\(^4\) it has served reasonably well as a necessary counterbalance to *Hans*'s expansive interpretation of state sovereign immunity.\(^5\) It is important to note, however, that the *Young* doctrine has been applied only in cases implicating the Fourteenth Amendment.\(^6\) It certainly is possible that the Court will refuse to apply the doctrine outside of this context.

Indeed, recent pronouncements of the Court are aimed at reining in the scope of the *Young* doctrine generally. For example, in *Seminole Tribe*, the Court indicated that it would not grant *Young*-type relief when Congress has already included a specific remedy in the statute in question—even when the provided remedy is unavailable to the plaintiff.\(^7\) Although this decision limited the universe of cases where the *Young* doctrine applies, it did not alter how the doctrine is to be applied.\(^8\) In a subsequent opinion, however, the Court threatened to take the next step and disrupt the application of the *Young* doctrine as well.

The Court granted certiorari in *Idaho v. Coeur d'Alene Tribe of Idaho*\(^9\) specifically to revisit the *Young* issue. Although a majority of the Court agreed that the Coeur d’ Alene Tribe was not entitled to relief under the *Young* doctrine, the plurality could not agree on a reason. Justice Kennedy delivered the opinion of the Court in sections I, II-A, and III of

\(^{47}\) See Milliken v. Bradley, 433 U.S. 267, 289-90 (1977); see also Edelman, 415 U.S. at 667-68 (recognizing that “fiscal consequences [are a] necessary result of compliance with decrees which by their terms [are] prospective in nature.”).

\(^{48}\) See FINK & TUSHNET, supra note 14, at 138-40.

\(^{49}\) See Justice Brennan's criticism of the *Young* fiction in *Atascadero*, 473 U.S. at 256-57 & nn.8-10 (Brennan, J., dissenting).

\(^{50}\) See Green v. Mansour, 474 U.S. 64, 68 (1985) (“[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of the law.”).

\(^{51}\) See *Jacobs*, supra note 2, at 132-43 and accompanying text. *But see* Prout v. Starr, 188 U.S. 537, 543 (1903) (arguing that the judicial power of the United States must be available to citizens who are affected by the passage of state laws that disregard the provisions of the Fourteenth Amendment or any of the other antecedent plenary powers).

\(^{52}\) See *Seminole Tribe* v. Florida, 116 S. Ct. 1114, 1132-33 (1996) (explaining that “the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter . . .”).

\(^{53}\) Accord *Idaho v. Coeur d' Alene Tribe*, 117 S. Ct. 2028, 2048 (1997) (Souter, J., dissenting) (noting that in *Seminole Tribe*, “[t]he Court left the basic tenets of *Ex parte Young* untouched . . .”).

\(^{54}\) 117 S. Ct. 2028 (1997).
his opinion. The Justice’s controversial re-interpretation of Young jurisprudence, however, appears in sections II-B, II-C, and II-D of his opinion, in which only Chief Justice Rehnquist joined.

Refusing to apply the Young doctrine reflexively, Justice Kennedy noted that the Court properly should balance “the need to prevent violations of federal law” against the need to “ensure that the doctrine of sovereign immunity remains meaningful.” Thus, even in the face of a violation of federal law and a request for prospective, injunctive relief only, Justice Kennedy would not grant relief under Young if the perceived “affront” to state sovereignty is intolerable.

This case-by-case approach garnered the criticism of not only Justice Souter and the more liberal contingent of the Court, but also a trio of conservative Justices led by Justice O’Connor. Given the deep division of the Court, it is difficult to predict what sort of influence Coeur d’Alene will have. Justice Souter, at any rate, lamented that “the effect of the [principal and concurring] opinions is to redefine and reduce the substance of federal subject-matter jurisdiction to vindicate federal rights.”

2. State Waiver of Immunity

In a rather offhand manner, the Supreme Court decided for the first time that a state could waive its sovereign immunity and consent to suit in federal court in the 1883 case of Clark v. Barnard. The proposition, although not rigorously analyzed, has been repeated often and has become entrenched as a result. According to the Court, the waiver of

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55 See id. at 2034 (noting that “[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings.”).
56 Id.
57 Id. at 2038. See, e.g., id. at 2040-43 (observing that “navigable waters uniquely implicate sovereign interests.”).
58 See generally id. at 2048 (Souter, J., dissenting) (stating that “[t]he principal opinion would redefine the [Young] doctrine, from a rule recognizing federal jurisdiction to enjoin officials from violating federal law to a principle of equitable discretion as much at odds with Young’s result as with the foundational doctrine on which Young rests.”). Justices Stevens, Ginsburg and Breyer joined Justice Souter’s opinion.
59 See generally id. at 2045 (O’Connor, J., concurring) (declaring that “the approach [taken in the principal opinion] unnecessarily recharacterizes and narrows much of our Young jurisprudence.”). Justices Scalia and Thomas joined Justice O’Connor’s opinion.
61 108 U.S. 436, 447 (1883) (holding that “[t]he 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 . . .”).
62 See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) (asserting that “[a] State may effectuate a waiver of its constitutional immunity by a state statute or
state immunity must be "unequivocal." A state may waive its immunity in its constitution, in a statute, or by voluntary submission to federal court jurisdiction. A state's consent to suit in its own courts, however, is not evidence of consent to suit in federal court. Nor will a state be deemed to have consented constructively to suit in federal court, although Congress may be permitted to condition a state's participation in a federal program upon waiver of that state's immunity. If the terms of Congress's condition and its intent that the states be subject to suit in federal court are unmistakably clear, then a state's participation in such a program may constitute a waiver of its immunity.

3. Other Limitations on State Immunity

Other limitations that had already been established by the Court were called upon more frequently as the nation entered the twentieth century. For example, the Court concluded that sovereign immunity did not extend to political subdivisions of the state. And it had been established for some time that the Eleventh Amendment was no impediment to constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program.

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64 See Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1906); see also supra notes 61-62 and accompanying text.
66 See Edelman, 415 U.S. at 673 (finding that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.").
68 See Atascadero, 473 U.S. at 239-40, 246-47.
69 See Atascadero, 473 U.S. at 239-40, 246-47.
federal court appellate review of cases involving a federal question.\textsuperscript{70} Although most of the Eleventh Amendment exceptions crafted by the Court were at war with each other or themselves,\textsuperscript{71} their development and expansion gave witness to the growing realization that access to the federal courts was needed given our increasingly national economy.\textsuperscript{72}

D. Abrogation of the States' Immunity From Suit in Federal Court

Despite this judicial activity regarding the question of state sovereign immunity and the Eleventh Amendment, the Court was not squarely faced with (or, perhaps more accurately, avoided) the question of congressional abrogation of that immunity until long after \textit{Hans} was decided.\textsuperscript{73} The Court finally confronted this issue in the 1976 civil rights


\textsuperscript{71}For example, the \textit{Young} doctrine, which has been applied only in the Fourteenth Amendment context, entangles the Eleventh and Fourteenth Amendments in an insoluble knot. See supra note 51 and accompanying text. It is axiomatic that a violation of the Fourteenth Amendment requires state action. But the \textit{Young} doctrine teaches that the violation is deemed an act of an individual, not the state. Thus, it should not be possible to use the \textit{Young} doctrine to rectify a violation of the Fourteenth Amendment. See \textit{Florida Dep't of State v. Treasure Salvors, Inc.}, 458 U.S. 670, 685 (1982) (explaining that "[t]here is a well-recognized irony in \textit{Ex parte Young}; unconstitutional conduct by a state officer may be 'state action' for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh."); \textit{see also JACOBS, supra note 2, at 143-44 (commenting on the Fourteenth Amendment/Young paradox).} Similarly, it is unclear how the Eleventh Amendment can be construed as a limitation on federal court subject matter jurisdiction and still be subject to waiver at the states' discretion. \textit{Compare Edelman}}, 415 U.S. at 677-78 (noting that "it has been well settled... that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court"), \textit{and supra notes} 61-68 (commenting on Eleventh Amendment immunity waiver generally), with \textit{American Fire & Cas. Co. v. Finn}, 341 U.S. 6, 17-18 (1951); \textit{Louisville & Nashville R.R. v. Mottley}, 211 U.S. 149, 152 (1908); \textit{Minnesota v. Hitchcock}, 185 U.S. 373, 382 (1902) (explaining that parties cannot confer subject matter jurisdiction on a federal court if otherwise absent). \textit{But cf. Employees v. Missouri Dep't of Pub. Health & Welfare}, 411 U.S. 279, 294 n.10 (1973) (Marshall, J., concurring) (reasoning that "it may be that the recognized power of States to consent to the exercise of federal judicial power over them is anomalous in light of present-day concepts of federal jurisdiction. Yet, if this is the case, it is an anomaly that is well established as a part of our constitutional jurisprudence." -- i.e., a page of history is worth a volume of logic). Finally, there is no good reason why a "thoroughgoing interpretation of the Eleventh Amendment" recognizes the states as immune but not municipal subdivisions, or why either should be subject to appellate jurisdiction in federal court. \textit{See Atascadero}}, 473 U.S. at 256 n.8 (Brennan, J., dissenting); \textit{see also FINK & TUSHNET, supra note} 14, at 140; \textit{JACOBS, supra note} 2, at 13-39.

\textsuperscript{72}See \textit{JACOBS, supra note} 2, at 132-33. For an interesting theory on the correlation between the ebbs and flows of history and the changing complexion of Eleventh Amendment jurisprudence, see Orth, \textit{supra note} 22, at 263-66.

\textsuperscript{73}See \textit{Welch v. Texas Dep't of Highways & Pub. Transp.}, 483 U.S. 468, 475 (1987); \textit{Oneida County v. Oneida Indian Nation}, 470 U.S. 226, 252 (1985) (illustrating...
The case of Fitzpatrick v. Bitzer. The Court concluded that Congress could enact laws under the authority of the Fourteenth Amendment that permitted citizens to sue a state in federal court: "[W]e think that the Eleventh Amendment[] and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment." Such authority, however, was not to be assumed in a cavalier manner. Congress's intention to make the states subject to such suits had to be expressed in unmistakably clear language in the statute. The Fitzpatrick case did not completely answer the abrogation question. Certainly Congress's lawmaking authority is not contained in the Fourteenth Amendment alone nor, for that matter, exclusively in those amendments that follow the Eleventh Amendment. If, however, Article III—as limited by the Eleventh Amendment (in the Hans sense, not in its literal sense)—sets "forth the exclusive catalog of permissible federal court jurisdiction," then it may be argued that laws enacted pursuant to Article I, or any of the other antecedent plenary powers, are bounded by the Hans notion of narrow federal jurisdiction, regardless of any broader enforcement scheme that Congress may attempt to enact. The Fourteenth Amendment cases can be distinguished on the basis that the adoption of the Fourteenth Amendment, well after the adoption of the Eleventh Amendment, "fundamentally altered the balance of state and federal power struck by the Constitution." Thus, even after Fitzpatrick, it was still possible to argue that the grants of power contained in Article I are inherently limited by the unhappy fact that Article I was ratified before the Eleventh Amendment.

how the Court avoided ruling on the abrogation issue by assuming, without deciding, that the power exists).


See id. at 456; cf. Ex parte Virginia, 100 U.S. 339, 346 (1879) (foretelling future suits based on the Fourteenth Amendment).

Fitzpatrick, 427 U.S. at 456.


Seminole Tribe v. Florida, 116 S. Ct. 1114, 1125 (1996). Justice Brennan criticized this distinction, noting that "the lower courts have rightly concluded that it makes no sense to conceive of § 5 [of the Fourteenth Amendment] as somehow being an 'ultraplenary' grant of authority." Union Gas, 491 U.S. at 17.

In a bankruptcy case from the Eastern District of Oklahoma, the court made the curious argument that laws enacted pursuant to the authority of Article I can be enforced against the states by riding on the coattails of the Fourteenth Amendment. See Mather v. Oklahoma Employment Sec. Comm'n (In re Southern Star Foods, Inc.), 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995). The court advanced the novel proposition that the Bankruptcy Code, though enacted pursuant to the Article I Bankruptcy Clause, is nonetheless
Although not directly deciding whether Congress could abrogate a state’s sovereign immunity in some context other than the Fourteenth Amendment, the Court came tantalizingly close to reaching this decision in *Parden v. Terminal Railway Co.*

_Parden_ raised the issue of whether Congress could enact a law under the authority of the Commerce Clause that expressly subjected the states to suit in federal court.

A slim majority, led by Justice Brennan, decided the case on at least two (and more likely three) alternate grounds that are sewn together as if components of one argument:

Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA [Federal Employers’ Liability Act], necessarily consented to such suit as was authorized by that Act [the constructive waiver ground]. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads [the ratification ground]; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit [the waiver as a condition of participation ground].

Although _Parden_ is generally thought of as a waiver case, Justice Brennan advanced the theory that the states surrendered a portion of their sovereign immunity when they ratified the Constitution. By so doing, the Justice argued, the states empowered Congress to create rights of ac-

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82 See id. at 184, 187, 189-90.
83 Id. at 192. It is important to note the distinction between the outright authority to abrogate state immunity as a consequence of ratification, and the notion that Congress can condition state participation within a federal sphere upon the state’s waiver of immunity. The distinction is not carefully drawn in _Parden_, but it may be relevant after _Seminole Tribe_. See infra Section IV.B.2.
84 See _Parden_, 377 U.S. at 191-92; accord United States v. California, 297 U.S. 175, 184 (1936) (asserting that “[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.”).
tion against them in the context of the Commerce Clause.\textsuperscript{85} It is this premise that served as the foundation for the Court's next step.\textsuperscript{86}

That step was taken by the Court in 1989 when it announced its decision in \textit{Pennsylvania v. Union Gas Co.}\textsuperscript{87} When asked if Congress could create a cause of action for money damages against the states in the context of an environmental clean-up statute enacted pursuant to the Commerce Clause, a badly fractured plurality answered in the affirmative.\textsuperscript{88} Justice Brennan authored an opinion and entered the judgment of the Court.\textsuperscript{89} Citing \textit{Parden} as laying the "firm foundation" for the Court's conclusion, Justice Brennan once again espoused the theory that the states surrendered their sovereign immunity concerning matters arising under the Commerce Clause when they ratified the Constitution.\textsuperscript{90} The Eleventh Amendment, Justice Brennan argued, did not give that immunity back.\textsuperscript{91}


\textsuperscript{86} \textit{Parden} very nearly did not last that long. In \textit{Welch v. Texas Department of Highways & Public Transportation}, the Court overruled \textit{Parden} "[t]o the extent that [it] is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language . . . ." 483 U.S. 468, 478 (1987). The power to abrogate—the ratification ground—was left un disturbed. Also left undisturbed was the waiver as a condition of participation ground. See \textit{id.} at 478 n.8 (stating that "we have no occasion in this case to consider the validity of the additional holding in \textit{Parden}, that Congress has the power to abrogate the States' Eleventh Amendment immunity under the Commerce Clause to the extent that the States are engaged in interstate commerce.").

\textsuperscript{87} 491 U.S. 1 (1989).

\textsuperscript{88} See \textit{id.} at 5.

\textsuperscript{89} Although the judgment commanded a majority due to the swing vote of Justice White, no single rationale, including Justice Brennan's, received more than four votes. See \textit{id.}

\textsuperscript{90} See \textit{id.} at 14; see also \textit{id.} at 22 (concluding that "in approving the commerce power, the States consented to suits against them based on congressionally created causes of action.").

\textsuperscript{91} See \textit{id.} at 18 (explaining that "[t]he language of the Eleventh Amendment gives us no hint that it limits congressional authority; it refers only to 'the judicial power' and forbids 'constru[ing]' that power to extend to the enumerated suits—language plainly intended to rein in the Judiciary, not Congress."). In an interesting concurrence, Justice Stevens agreed that Congress could abrogate state immunity but not in contravention of the express language of the Eleventh Amendment. See \textit{id.} at 23-24 (Stevens, J., concurring). In other words, Justice Stevens implied that suits (even federal question suits) between the states and noncitizens are forever out of the reach of federal courts because a statute can never overrule the express provisions of the Constitution. Justice Stevens would return to this theme in his \textit{Seminole Tribe} dissent. See \textit{Seminole Tribe v. Florida}, 116 S. Ct. 1114, 1141-42 (1996) (Stevens, J., dissenting). State immunity from suits not
In a vigorous dissent, Justice Scalia argued that the immunity guaranteed by the Eleventh Amendment goes "beyond its precise terms" and includes the very notion of sovereign immunity as understood by the Framers at the time of ratification. Justice Scalia put little stock in Justice Brennan's consent by ratification theory: "The suggestion that [state ratification of the Constitution] is the kind of consent our cases had in mind when reciting the familiar phrase, 'the States may not be sued without their consent,' does not warrant response." Finally, Justice Scalia asserted that the limitations placed on Article III by the Eleventh Amendment would be meaningless if Congress could exceed them merely by enacting laws under the Commerce Clause. That, the Justice concluded, "is not the regime the Constitution establishes."

III. STATE SOVEREIGN IMMUNITY AND THE BANKRUPTCY CODE

A. Section 106 of the Bankruptcy Code and Hoffman v. Connecticut Department of Income Maintenance

Congress intended to make states and other governmental entities subject to suit in the bankruptcy court through section 106 of the Bankruptcy Code. At the time the Code was first enacted, section 106 read as follows:

(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—

within the narrow scope of the express language of the Eleventh Amendment, however, is respected only as a matter of comity, the Justice argued, and within the confines of that penumbral immunity, "it [is] readily apparent that congressional abrogation is entirely appropriate." Union Gas, 491 U.S. at 27, 28.

See Union Gas, 491 U.S. at 31-33 (Scalia, J., concurring in part and dissenting in part).

92 See id. at 39.
93 See id. at 40.
94 Id.
95 Id.
(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. 98

Subsections (a) and (b) are enigmatic. They are commonly referred to as "waivers" of sovereign immunity, compared with subsection (c), which has been called an "abrogation" of sovereign immunity. 99 And yet, the very nature of a waiver assumes a conscious act by the waiving party. It is perhaps more accurate to think of subsections (a) and (b) as a codification of the type of conduct by a governmental entity that will be construed by a court as a waiver of that entity's immunity. 100 In any event, these subsections unanimously had been held to pass constitutional muster. 101

Subsection (c) was likewise thought to pass constitutional muster. At the time the Code was enacted, the Court had not yet ruled out congressional abrogation of state immunity, but rather, required only that it be done in an unmistakably clear fashion. Certainly Congress thought section 106(c) clear enough to support an affirmative, monetary award against a state:

The provision indicates that the use of the term "creditor," "entity," or "governmental unit" in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. . . .

98 11 U.S.C. § 106 (1988) (amended 1994). Even this first enacted version of section 106 did not represent the first incarnation of the immunity waiver. Several proposed versions were considered before this version. These varied widely from an absolute abrogation of sovereign immunity in bankruptcy, to a very narrow waiver that was only operative if the state filed a proof of claim. For a complete history of the early stages of the evolution of section 106, see Gillman v. Board of Trustees (In re T & D Management Co.), 40 B.R. 781, 784-87 (Bankr. D. Utah 1984).


100 Viewed in this way, subsections (a) and (b) somewhat resemble the conditional waiver introduced in Parden. See supra notes 81-86 and accompanying text. Due to the conservative Justices' current control of the Court, it is not clear whether Congress will be permitted to condition participation in a federal sphere on a state's waiver of its immunity. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 42-44 & n.1 (1989) (Scalia, J., concurring in part and dissenting in part) (voicing skepticism that conditioning participation in a federal program on the waiver of immunity is any different than an unconstitutional abrogation of immunity); see also infra Section IV.B.2.

[S]ubsection (c) is not limited to [court actions concerning a debtor’s tax liability], but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit; contrary language in the House report to H.R. 8200 is thereby overruled.10

Unfortunately, subsection (c) was not drafted as clearly as it might have been.103 Unlike subsections (a) and (b), subsection (c) made no reference to a “claim” or other term suggesting affirmative relief, thereby leaving the door open for the argument that the subsection did not sanction monetary relief from governmental entities.104 Despite the availability of the argument, and Supreme Court cases demanding the utmost clarity from Congress when it chooses to abrogate state immunity,105 there was near unanimity among the lower courts that section 106(c) permitted the trustee to sue the state in bankruptcy court for affirmative, monetary relief.106 In Hoffman v. Connecticut Department of Income Maintenance,107 however, the District Court for the District of Connecticut, the Second Circuit, and eventually, the Supreme Court all bucked this trend and held that section 106(c) did not permit an individual to sue a nonconsenting state for money damages in bankruptcy court.108

The Hoffman Court was unable to agree on a rationale for its judgment. Justice White announced the judgment of the Court and delivered an opinion concluding that the language of section 106(c) did not contain an unmistakably clear abrogation of state sovereign immunity.109 Point-

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103 See Nordic Village, 503 U.S. at 34 (complaining that “[n]ext to these models of clarity [subsections (a) and (b)] stands subsection (c).”).

104 See, e.g., Inslaw, Inc. v. United States (In re Inslaw, Inc.), 76 B.R. 224, 234 (Bankr. D.D.C. 1987) (representing an early, and unsuccessful, attempt by a governmental entity to argue that section 106(c) permitted injunctive relief only).

105 See supra note 77 and accompanying text.

106 See McVey Trucking, Inc. v. Secretary of State (In re McVey Trucking, Inc.), 812 F.2d 311, 323, 327 (7th Cir. 1987); Rhode Island Ambulance Servs., Inc. v. Begin (In re Rhode Island Ambulance Servs., Inc.), 92 B.R. 4, 6-7 (Bankr. D.R.I. 1988); see also Steven M. Richman, More Equal Than Others: State Sovereign Immunity Under the Bankruptcy Code, 21 RUTGERS L.J. 603, 609-17 (1990); supra note 31 and accompanying text.


108 See Hoffman, 72 B.R. at 1002. The district court’s decision was unfairly criticized as being “rather bizarre.” See Inslaw, 76 B.R. at 236 n.25. Of course, the district court was vindicated by the Supreme Court’s eventual affirmance.

109 See Hoffman, 492 U.S. at 104.
ing to the narrow waivers of subsections (a) and (b) by comparison, Justice White thought the wide-open language of subsection (c) "more indicative of declaratory and injunctive relief than of monetary recovery." Justice White would not look to the legislative history, which clearly spelled out a congressional intent at odds with his opinion. The Justice explained his refusal as a "lose/lose" situation for a sloppy Congress: "If congressional intent is unmistakably clear in the language of the statute, reliance on committee reports and floor statements will be unnecessary, and if not, Atascadero will not be satisfied." By deciding the case on the clarity of abrogation issue, the Court avoided the question of whether Congress had the authority to abrogate state immunity under its bankruptcy power. Nonetheless, the authority issue was lurking not far behind as the concurring opinions and a dissent each advanced views on that subject.

Not pleased with the Supreme Court's refusal to interpret section 106 in conformity with its intent, Congress rewrote section 106 in 1994 so that there could be no doubt that sovereign immunity was unequivocally abrogated through the amended subsection (c) (now, section 106(a)):

This section would effectively overrule two Supreme Court cases that have held that the States and Federal Government are not

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110 Id. at 102. Justice White explained that:
We believe that § 106(c)(2) operates as a further limitation on the applicability of § 106(c), narrowing the type of relief to which the section applies. Section 106(c)(2) is joined with subsection (c)(1) by the conjunction "and." It provides that a "determination" by the bankruptcy court of an "issue" "binds governmental units." This language differs significantly from the wording of §§ 106(a) and (b), both of which use the word "claim," defined in the Bankruptcy Code as including a "right to payment." Nothing in § 106(c) provides a similar express authorization for monetary recovery from the States.

Id. (citation omitted).

111 But see United States v. Nordic Village, Inc., 503 U.S. 30, 45-46 & n.14 (1992) (Stevens, J., dissenting) (complaining that the Court's fanatical insistence on clarity "burdens the Congress with unnecessary reenactments of provisions that were already plain enough when read literally.").

112 Hoffman, 492 U.S. at 104 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)).

113 See id. at 104. A few years later, the Court likewise decided that the abrogation in section 106(c) did not clearly permit actions for monetary damages against the federal government either. See Nordic Village, 503 U.S. at 39.

114 See Hoffman, 492 U.S. at 105 (O'Connor, J., concurring) (stating that "I agree with Justice Scalia that Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause...."); id. at 105 (Scalia, J., concurring) (expressing the same opinion); id. at 111 (Marshall, J., dissenting) (concluding that Congress has the authority to abrogate state immunity under the Bankruptcy Clause just as it does under the Commerce Clause).
deemed to have waived their sovereign immunity by virtue of enacting section 106(c) of the Bankruptcy Code. In enacting section 106(c), Congress intended to make provisions of title 11 that encompassed the words “creditor,” “entity,” or “governmental unit” applicable to the States. Congress also intended to make the States subject to a money judgment. But the Supreme Court in Hoffman... held that even if the State did not file a claim, the trustee in bankruptcy may not recover a money judgment from the State notwithstanding section 106(c) . . . .

This amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief. It is the Committee’s intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waving the sovereign immunity of the States and the Federal Government in this regard.115

The new section 106 now reads as follows:

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

(1) [60 Bankruptcy Code sections, including sections 544, 547, and 548]

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery . . . .

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

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.116

It is difficult to imagine a clearer, more unequivocal expression of intent to abrogate state sovereign immunity. The Supreme Court would

no longer have this side issue upon which to strike down the statute. The authorization question, at last, would be joined.

B. Seminole Tribe v. Florida

With the retirement of four of the five Justices making up the *Union Gas* plurality and a conservative core of Justices left largely intact, there would be no holding back the expansive view of the Eleventh Amendment. And soon enough, an opportunity to make that view the law presented itself in *Seminole Tribe v. Florida*.\(^{117}\) Although the case did not involve a statute enacted pursuant to the Bankruptcy Clause, it sounded the death knell for section 106(a) as it pertains to the states just as surely as if the case addressed that very provision.

Chief Justice Rehnquist wrote for the Court. The statute in question was the Indian Gaming Regulatory Act enacted by Congress pursuant to the Indian Commerce Clause of Article I.\(^{118}\) After acknowledging that the Act contained an unequivocal abrogation of state immunity,\(^{119}\) and that “no principled distinction” could be made between the Indian Commerce Clause and the Commerce Clause, which was the subject of *Union Gas*,\(^{120}\) the Court recognized that it would either have to uphold the Act under the reasoning of *Union Gas* or overrule that case. It chose the latter, concluding that “*Union Gas* was wrongly decided and that it should be, and now is, overruled.”\(^{121}\) Not surprisingly, the majority based its decision on an expansive reading of the Eleventh Amendment: “‘[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition... which it confirms.’”\(^{122}\) Citing to *Hans*, the Court argued that federal jurisdiction over nonconsenting states was never contemplated by the Founding Fathers and that the states did not surrender their sovereign immunity when they ratified the Constitution.\(^{123}\) The Court’s conclusion almost reads as if it were directed at section 106 of the Bankruptcy Code:

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area... that is under the exclusive control of the Federal

\(^{118}\) See id. at 1119.
\(^{119}\) See id. at 1123-24.
\(^{120}\) See id. at 1127.
\(^{121}\) Id. at 1128.
\(^{122}\) Id. at 1122 (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)); see also id. at 1129-30.
\(^{123}\) See Seminole Tribe, 116 S. Ct. at 1122-23.
Government. Even when the Constitution vests in Congress complete
lawmaking authority over a particular area, the Eleventh Amendment
prevents congressional authorization of suits by private parties
against unconsenting states. The Eleventh Amendment restricts the
judicial power under Article III, and Article I cannot be used to cir-
cumvent the constitutional limitations placed upon federal jurisdic-
tion.\textsuperscript{124}

The Court did not rest here, however, but further eroded existing
limitations on the Eleventh Amendment by restricting the application of
the \textit{Young} doctrine.\textsuperscript{125} Noting that Congress had provided a specially
tailored and narrow remedy in the Gaming Act (a remedy that the Court
emasculated in the first half of its opinion), the Court refused to supple-
ment those remedies with judicially created ones.\textsuperscript{126} Ironically, at two
separate places in the majority's opinion, the Court cited to \textit{Young} as a
remedy still available to those who wish to enforce federal law against
the states.\textsuperscript{127}

The ramifications of this decision were not lost on Justice Stevens
who noted in his dissent that because "federal courts have exclusive ju-
risdiction over cases arising under [many] federal laws, the majority's
conclusion that the Eleventh Amendment shields States from being sued
under them in federal court suggests that persons harmed by state viola-
tions of federal copyright, \textit{bankruptcy}, and antitrust laws have no rem-
edy."\textsuperscript{128} Both Justices Stevens and Souter filed long dissenting opinions

\textsuperscript{124} \textit{Id.} at 1131-32 (emphasis added) (footnote omitted).
\textsuperscript{125} \textit{See id.} at 1132-33; \textit{see also supra} notes 36-60 and accompanying text.
\textsuperscript{126} \textit{See Seminole Tribe}, 116 S. Ct. at 1132-33. Recognizing that the \textit{Young} doctrine is
instrumental to the balancing of the sometimes competing interests of the states and the
federal government, Justice Souter quite fairly wondered why the majority did not apply
"the rule recognized in our previous cases, which have insisted on a clear statement be-
fore assuming a congressional purpose to 'affec[t] the federal balance.'" \textit{Id.} at 1180-81
(Souter, J., dissenting) (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).
\textsuperscript{127} \textit{See id.} at 1131 nn.14, 16.
\textsuperscript{128} \textit{Id.} at 1134 n.1 (Stevens, J., dissenting) (emphasis added). The effect of the \textit{Seminole Tribe}
decision on federal copyright and antitrust law is of a different nature than its
effect on the Bankruptcy Code because the scope of the abrogation of state immunity in
the bankruptcy context is unlike the abrogation under those other statutory schemes. The
Bankruptcy Code is not an insular, substantive federal law in the same way as the copy-
right and antitrust statutes. Rather, it gives rise to an environment of sorts within which
not only Bankruptcy Code causes of action, but also other federal law and state law
causes of action, are collected and litigated before a federal bankruptcy judge. Prior to
\textit{Seminole Tribe}, section 106(a) purported to eliminate state sovereign immunity not just to
Bankruptcy Code causes of action or even to other federal causes of action, but to all ac-
tions that could be brought in bankruptcy court. Thus, in bankruptcy, states lost their
immunity from suit on state law causes of action that, outside of bankruptcy, they may
well have enjoyed. Depending on a state's local immunity policy, \textit{Seminole Tribe} can be
defended as correcting this disparity. But \textit{see infra} notes 144-146 and accompanying text
(discussing widespread movement among the states to abolish their own immunity in their
in which each reviewed the political and legal climate at the time of the
ratification of the Constitution and the adoption of the Eleventh Amend-
ment and each concluded, rather convincingly, that the majority’s theory
that the Eleventh Amendment incorporates some ethereal and expansive
common law sovereign immunity is without historical precedent.125

Although not directly addressing section 106 of the Bankruptcy
Code, it seems plain enough that section 106(a) cannot be reconciled with
the Court’s decision in Seminole Tribe. Indeed, those few cases that have
considered the issue have acknowledged this foregone conclusion.130

129 See Seminole Tribe, 116 S. Ct. at 1134-41 (Stevens, J., dissenting); id. at 1146-78
(Souter, J., dissenting); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 258-
302 (1985) (Brennan, J., dissenting). See generally Jacobs, supra note 2, at 1-40, 150-
64. The majority chided Justice Souter for his lengthy and in-depth historical analysis,
asserting that his “undocumented and highly speculative extralegal explanation of the de-
cision in Hans is a disservice to the Court’s traditional method of adjudication.” Semin-
ole Tribe, 116 S. Ct. at 1130. Yet, when that “traditional method of adjudication” sus-
tains legal theories that are premised on a mistaken understanding of history, the
majority’s methodology hardly seems preferable to the dissent’s.

130 See Light v. California (In re Light), 87 F.3d 1320, 1996 WL 341112, at *1-2 (9th
Cir. June 20, 1996) (unpublished disposition) (“Notwithstanding this clear textual waiver
of the States’ sovereign immunity, the Supreme Court’s recent decision, Seminole
Tribe[,] . . . forecloses any argument that §106 of the Bankruptcy Code abrogates the
States’ sovereign immunity.”); accord In re Martinez, 196 B.R. 225, 230 (D.P.R. 1996);
Sparkman v. Florida Dep’t of Revenue (In re York Hannover Devs., Inc.), 201 B.R. 137,
140-42 (Bankr. E.D.N.C. 1996); Burke v. Georgia (In re Burke), 200 B.R. 282, 285-86
(Bankr. S.D. Ga. 1996); Sacred Heart Hosp. v. Pennsylvania Dep’t of Welfare (In re Sac-
(E.D. Pa. 1997); cf., Ohio Agric. Commodity Depositors Fund v. Mahern (In re Mer-
chants Grain, Inc.), 116 S. Ct. 1411 (1996), remanding and vacating judgment, In re
Merchants Grain, Inc., 59 F.3d 630, 636 (7th Cir. 1995) (vacating the Seventh Circuit’s
judgment that Congress could abrogate state sovereign immunity upon the authority of the
Bankruptcy Clause and remanding back to the circuit for further consideration in light of
Seminole Tribe).

Commentators have already begun predicting which Bankruptcy Code provisions
and powers will be unsettled by Seminole Tribe. See Mark Browning & Patricia L. Bar-
salou, Seminole Tribe of Florida v. Florida: A Closer Look, 15 AM. BANKR. INST. J. 10,
38 (1996) (predicting new limitations on the bankruptcy courts’ ability to fix tax liability
under section 505 and to sell assets free and clear of a state’s lien under section 363); see
also Stephen W. Sather, et al., Borrowing From the Taxpayer: State and Local Tax
Claims in Bankruptcy, 4 AM. BANKR. INST. L. REV. 201, 231 (1996) (questioning
whether the bankruptcy courts will be able to subordinate state claims under section
510(c) after Seminole Tribe).
IV. RESPONSES TO SEMINOLE TRIBE

A. The Propriety of Efforts to Circumvent Seminole Tribe in Bankruptcy

Certainly the Supreme Court's Eleventh Amendment jurisprudence, and the Seminole Tribe decision specifically, are not above criticism. Although one might expect some countermeasure aimed at neutralizing the effect of Seminole Tribe in bankruptcy, it is proper to decide initially whether, as a normative matter, it is appropriate to attempt to circumvent Seminole Tribe only in bankruptcy and not in other areas of the law. In other words, should bankruptcy policy be concerned with correcting constitutional wrong turns taken by the Supreme Court?

Professor, and now Dean, Thomas Jackson has explored this issue in his important work on bankruptcy's "few and elegant," but nonetheless limited, principles.131 Jackson argues that bankruptcy law is intended to address the common pool problem132 by creating a collective process whereby the going concern premium of the debtor's assets may be preserved for the benefit of the creditors as a group.133 "The single most fruitful way to think about bankruptcy is to see it as ameliorating a common pool problem created by a system of individual creditor reme-

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132 A common pool problem exists when a group of similarly situated parties with entitlements to an inadequate resource race against one another to satisfy their own entitlements first even though they are better off as a group if they proceed in a cooperative fashion. Such a circumstance represents a classic prisoner's dilemma. See generally WILLIAM POUNDSTONE, PRISONER'S DILEMMA (1992). It is easy to see how a group of creditors all proceeding against a debtor and its limited assets may be viewed as giving rise to a common pool problem. Jackson provides an accessible description of the common pool problem and its application to an insolvent debtor. See JACKSON, supra note 131, at 10-17.
133 See JACKSON, supra note 131, at 25 (asserting that "everyone seems to [accept the view] that bankruptcy law . . . exists as a response to a common pool problem."); see also id. at 7-17, 209-10. Despite Jackson's assertion to the contrary, which was offered at a time when the assertion might have been easier to defend, recent scholarship has called into question the common pool justification of bankruptcy. See Barry E. Adler, Financial and Political Theories of American Corporate Bankruptcy, 45 STAN. L. REV. 311, 313-14 (1993) (arguing that parties can more efficiently address the common pool problem in their contracts). Compare JACKSON, supra note 131, at 7 (explaining that "[b]ankruptcy law and policy have been subject to long-standing debate. This debate is not so much about whether bankruptcy law should exist at all but about how much it should do.") (emphasis added), with Adler, supra, at 313-14, Michael Bradley & Michael Rosenzweig, The Untenable Case for Chapter 11, 101 YALE L.J. 1043, 1050 (1992), and James W. Bowers, Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution, 26 GA. L. REV. 27, 72-76 (1991) (questioning the need or desirability of a corporate reorganization procedure in the bankruptcy law).
Accordingly, special bankruptcy rules are justified only when they are necessary to convert the individual remedy race to a collective process.\textsuperscript{135} On the other hand, bankruptcy should not be concerned with questions of relative entitlement that have nothing to do with the common pool problem. Instead, distribution should be governed by applicable nonbankruptcy (often state) law.\textsuperscript{136} If rules found only in bankruptcy law permit a creditor to elevate the priority of its claim above the level it would enjoy under a nonbankruptcy regime, such an arbitrage would create a perverse incentive to institute a bankruptcy proceeding for reasons other than the collective good.\textsuperscript{137} Thus, Jackson argues that a rule of law, even if misguided, should be respected in bankruptcy unless it otherwise interferes with the collective remedy.\textsuperscript{138} If the rule is to be corrected at all, it should be amended across the board in deference to nonbankruptcy policy.\textsuperscript{139} Trying to fix the problem only in bankruptcy invites self-serving creditor conduct—the very problem that bankruptcy law seeks to avoid.\textsuperscript{140}

Turning to the \textit{Seminole Tribe} decision, it is readily apparent that the case cannot be legislatively overruled. Short of a constitutional amendment—or perhaps, a reconstitution of the Supreme Court—there is no way to overrule the Court’s interpretation of the Eleventh Amendment.

\textsuperscript{134} See \textit{Jackson}, \textit{supra} note 131, at 16-17.
\textsuperscript{135} See id. at 21-28, 68-74, 125-28.
\textsuperscript{136} See id. at 21-67.
\textsuperscript{137} This theme pervades Jackson’s book:

\[\text{[T]he establishment of new entitlements in bankruptcy conflicts with the collectivization goal. Such changes create incentives for particular holders of rights in assets to resort to bankruptcy in order to gain for themselves the advantages of those changes, even when a bankruptcy proceeding would not be in the collective interest of the investor group. These incentives are predictable and counterproductive because they reintroduce the fundamental problem that bankruptcy law is designed to solve: individual self-interest undermining the interests of the group. These changes are better made generally instead of in bankruptcy only.}\]

\textit{Id.} at 21; \textit{see also} Theodore Eisenberg, \textit{Bankruptcy Law in Perspective}, 28 U.C.L.A. L. REV. 953, 958 (1981) (declaring that “[e]very rule that differs from state law will provide to someone relative advantage in bankruptcy over their [sic] position outside bankruptcy.”).
\textsuperscript{138} See \textit{Jackson}, \textit{supra} note 131, at 26 (asserting that “[e]ven though a nonbankruptcy rule may suffer from infirmities such as unfairness or inefficiency, if the nonbankruptcy rule does not undermine the advantages of a collective proceeding relative to the individual remedies that exist given those entitlements, imposing a different bankruptcy rule is a second-best and perhaps a counterproductive solution.”).
\textsuperscript{139} \textit{See id.} at 25-27 & n.10; \textit{see also supra} note 137 and accompanying text.
\textsuperscript{140} See \textit{Jackson}, \textit{supra} note 131, at 25-27 & n.10; \textit{see also supra} note 137 and accompanying text.
either inside or outside of bankruptcy law.\textsuperscript{141} Moreover, a rule that applies both inside and outside of bankruptcy law seems to offer no perverse incentive to institute a bankruptcy procedure for reasons other than the collective good. For two reasons, however, this is not the case in the context of sovereign immunity and bankruptcy law. First, both the legislature and the courts—although unable to overrule \textit{Seminole Tribe}—may be able to limit the repercussions of the case in the bankruptcy context. Such efforts to minimize the repercussions of the case likewise might create an improper incentive to file bankruptcy. The second concern is that the rule of \textit{Seminole Tribe}, even if applied identically both inside and outside of bankruptcy law, may lead to inconsistent results because of the different ways that a state’s immunity operates in federal court versus state court. In other words, by not tweaking the rule of \textit{Seminole Tribe} in the bankruptcy context, a perverse incentive to file bankruptcy petitions may be permitted to continue. Thus, we must analyze both the rule of \textit{Seminole Tribe} and section 106 of the Bankruptcy Code (as initially contemplated by Congress) in order to see which one creates the perverse incentive and which one remedies it.

If section 106 of the Bankruptcy Code duplicates the operation and limits of state immunity in state law bankruptcy analogues—i.e., liquidations, stock transfers or assignments for the benefit of creditors—then efforts to circumvent \textit{Seminole Tribe} in bankruptcy law are justifiable. This argument provides a slight twist to Jackson’s analysis, but is necessitated by the role of sovereign immunity in our dual system of federalism. Jackson argues that special bankruptcy rules that differ from state rules should be avoided in most cases.\textsuperscript{142} Conversely, I suggest that special rules in bankruptcy may be necessary to mimic the process outside of bankruptcy. When bankruptcy law contains “harmful” special rules referred to by Jackson, or lacks “beneficial” special rules defended here, the end result is the same: A creditor (in my example, the state) is given a perverse incentive to favor a bankruptcy proceeding even if creditors, as a group, are not better served as a result.\textsuperscript{143}

\textsuperscript{141} Jackson recognizes that in order to overrule unfair or inefficient rules, it is first necessary to determine whether “Congress has such power under the Constitution.” \textit{Jackson, supra} note 131, at 27 n.13.

\textsuperscript{142} \textit{See supra} notes 135-140 and accompanying text.

\textsuperscript{143} It is perhaps uncommon (even unheard of) for a state to commence, or participate in, the commencement of an involuntary bankruptcy proceeding, although there is nothing in the Bankruptcy Code to prevent a state from doing so. \textit{See} 11 U.S.C. § 101(15) (1994) (defining “entity” to include governmental units); 11 U.S.C. § 303(b) (1994) (stating that an involuntary bankruptcy proceeding may be commenced when three or more “entities” file a petition); \textit{cf. In re Butcher}, 32 B.R. 572, 573-74 (Bankr. E.D. Tenn. 1983) (acknowledging that a governmental unit may constitute an “entity” for purposes of filing an involuntary bankruptcy proceeding under 11 U.S.C. § 303(b)). It is
Interestingly enough, the abrogation of immunity in section 106 operates similarly to the law of many local jurisdictions. Despite the recent rash of Supreme Court decisions reaffirming and expanding state immunity, the trend among the states themselves has been to limit or even abolish state immunity in their own courts. This is particularly true for tort claims, which are likely to constitute a significant percentage of the claims held by individual debtors against the states. If a debtor would be permitted to sue its state outside of bankruptcy, then the same result should follow in bankruptcy.

There appears to be another compelling justification for a section 106-type provision in bankruptcy law. Any solution to the common pool important to note that even if the state is not responsible for commencing the bankruptcy proceeding, its immunity will nonetheless interfere with the collectivization goal of bankruptcy by preventing the realization of an asset—the debtor's claim against the state—to the detriment of the creditor body as a whole.

... “That the sentiment against [sovereign immunity] is widespread is evidenced by both national and state legislation waiving immunity from suit and enlarging governmental liability.” JACOBS, supra note 2, at 164; see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1044-46, 1055 (5th ed. 1984); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 830 (4th ed. 1994). Chief Justice Jay undoubtedly would have been pleased with this development: “I wish the state of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens.” Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 478 (1793).

Despite the growing trend among the states to limit or abolish their immunity, the condition of that immunity undoubtedly will vary from state to state. This raises an interesting question: How should a bankruptcy rule duplicate this state of affairs? A default rule that approximates the condition of state immunity in most jurisdictions may be acceptable if the cost of its discrepancies is not as great as the cost of devising and applying a more exact rule. Cf. JACKSON, supra note 131, at 130, 147 (commenting generally on rules of administrative convenience). A federal rule that calls for the application of the applicable state rule is also an option. Although the Constitution’s proscription against nonuniform bankruptcy law may seem to foreclose the latter, the Supreme Court has rejected such a strict interpretation of the Bankruptcy Clause. See U.S. CONST. art. I, § 8, cl. 4; see also Hanover Nat’l Bank v. Moyses, 186 U.S. 181, 188-90 (1902); Eisenberg, supra note 137, at 955.

See KEETON ET AL., supra note 144, at 1055 (declaring that “[t]he most striking feature of the tort law of governmental entities today is that the immunities, once almost total, have been largely abolished or severely restricted at almost all levels . . . .”).

The fact that the state is likely to face both state and federal causes of action in bankruptcy does not change the analysis. Outside of bankruptcy, the states are likely to be amenable to both types of suit as well—state causes of action because of the growing trend among the states to abolish their immunity in their own courts, and federal causes of action because, regardless of local immunity policy, the Supremacy Clause and a carefully drawn federal statute require as much. See Hilton v. South Carolina Pub. Rys. Comm’n, 502 U.S. 197, 207 (1991) (illustrating that the Supremacy Clause may overcome state immunity); infra notes 199-216 and accompanying text (discussing the possibility that the states may be sued in their own courts on federal causes of action even if they would be immune from such suits in federal court).
problem may require it. As noted above, Jackson’s bankruptcy paradigm countenances special rules in bankruptcy if they are necessary to convert a system of individual remedy to a collective process.147 Thus, the automatic stay can be justified because it bars individual action while the collective remedy is implemented.148 Quite apart from individual state immunity policy, section 106 as originally contemplated by Congress may have been justified on the ground that it permitted enforcement of the stay against governmental entities in bankruptcy court in the same way that section 362 may be enforced against all other creditors.149 Indeed, one of the most troubling repercussions of the Seminole Tribe decision is that there may now be no way of enforcing the automatic stay against the states.

The rule of Seminole Tribe, then, actually leaves the states better off inside of bankruptcy than outside of it. This situation is fraught with the perverse incentive problem noted by Jackson and justifies attempts to circumvent the rule inside bankruptcy.

B. Measures Requiring Legislative Intervention

Because Seminole Tribe concludes that the Eleventh Amendment “constitutionalized” state sovereign immunity, and effectively put it out of the reach of the antecedent plenary powers of Congress, there is no direct legislative solution to the section 106 dilemma.150 Indirect legislative solutions do not appear to be more promising.

1. Authorizing the Federal Government To Sue the States On Behalf of the Debtor

Congress could attempt to exploit the fact that the Eleventh Amendment does not bar suits against the states by the United States even

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147 See supra notes 135-140 and accompanying text.
149 Of course, section 106 purports to do a great deal more than permit the enforcement of the stay against the states. As argued above, however, these additional consequences may have been defensible as well. See supra notes 142-146 and accompanying text.
150 Justice Stevens explained in dissent:
[A]fter deciding that Congress had not made sufficiently explicit its intention to withdraw the state sovereign immunity defense in certain bankruptcy actions, Congress understandably concluded that it could correct the confusion by amending the relevant statute to make its intentions to override such a defense unmistakably clear. Congress will no doubt be surprised to learn that its exercise in legislative clarification, which it undertook for our benefit, was for naught because the Constitution makes it so.
in the absence of state consent. If, for example, an agency of the federal government were given concomitant standing with the debtor to prosecute the debtor's claims against the state, the Eleventh Amendment obstacle might be avoided.

A similar proposal, not specifically addressing the bankruptcy situation, was suggested by Jonathan Siegel in his article on Congress's authority to abrogate sovereign immunity. Siegel's argument proceeds in three steps, starting from the "settled proposition" that the states are not immune from suits by the United States, moving to suits against the states by individuals in the name of the United States, and arriving at the expedient of suits against the states by individuals in their own names. For the purposes of this article, discussion can be limited to the initial phase of Siegel's argument.

151 This frequently stated principle of constitutional law is beyond question. See United States v. Texas, 143 U.S. 621, 646 (1892) (asserting that "[t]he submission to judicial solution of controversies arising between [the states and the United States], 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' . . . but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty." (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819))); accord West Virginia v. United States, 479 U.S. 305, 311 (1987) (explaining that "States have no sovereign immunity as against the Federal Government . . . ."); Employees v. Missouri Pub. Health Dep't, 411 U.S. 279, 286 (1973) (declaring that "suits by the United States against a State are not barred by the Constitution."); United States v. Mississippi, 380 U.S. 128, 140 (1965) (finding that "nothing in this or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States.").

152 The Office of the United States Trustee, a branch of the Department of Justice, provides one example. Such an adversarial role, however, would seem inconsistent with the tenor of the U.S. Trustee's general duty of oversight. See 28 U.S.C. §586(a) (1994) (listing duties of United States Trustees).

153 Chief Justice Rehnquist suggested something like this in Seminole Tribe. See Seminole Tribe, 116 S. Ct. at 1131 n.14 (proffering that "the Federal Government can bring suit in federal court against a State . . . .") (citations omitted).

154 See Jonathan R. Siegel, The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity, 73 Tex. L. Rev. 539, 556-64 (1995). Although Siegel's paper was written prior to Seminole Tribe, he anticipated the Court's attack on Congress's power to abrogate state immunity, taking his cue from Justice Scalia's dissent in Union Gas. See id. at 539-42, 549-50.

155 See id. at 552-56 (noting that the states enjoy no immunity from suits by the United States).

156 See id. at 556-64 (describing suits against states by individuals in the name of the United States, called *qui tam* actions).

157 See id. at 564-69 (explaining thesis that suits against states by individuals in their own names should be permitted).

158 Siegel's reason for continuing on from the first step is based on the very sensible observation that relying on the federal government to vindicate individual rights under the many federal statutory schemes would be prohibitively expensive, and therefore, unlikely. See id. at 556 & n.100. To be sure, a process by which a bankruptcy debtor could prosecute its own causes of action against the states despite *Seminole Tribe* would be far
Using the Veterans' Reemployment Rights Act\(^{159}\) to illustrate, Siegel argues that Congress could authorize the United States to sue any state for violation of the Act, collect and pay into the treasury a penalty equal to the amount the wronged veteran could have recovered but for state immunity from suit, and then authorize an appropriation from the treasury to be paid to that veteran equal to the amount recovered by the United States.\(^{160}\)

Much earlier, New Hampshire and New York unsuccessfully attempted to sidestep the Eleventh Amendment in a similar manner.\(^{161}\) Both states enacted laws permitting their citizens to “assign” individual claims against sister states to New Hampshire or New York respectively, for collection.\(^{162}\) The citizens were required to pay all costs of collection, received the full amount of any recovery, and in the case of New Hampshire’s law, could authorize a compromise of the claim.\(^{163}\) The Court “without a doubt” recognized that the plaintiff states were superior to a system that relies on the United States Trustee or another federal agency to accomplish the same thing. Yet, the United States Trustee’s significant participation in bankruptcy cases under the existing statutory scheme makes the burden of additional responsibilities easier to shoulder. In any event, Siegel’s third step is probably constitutionally infirm notwithstanding its practical appeal:

\[\text{Respondents assert that [the federal statute at issue] represents not an abrogation of the States’ sovereign immunity, but rather a } \text{delegation... of the Federal Government’s exemption from state sovereign immunity. We doubt, to begin with, that that sovereign exemption can be delegated—even if one limits the permissibility of delegation... to persons on whose behalf the United States itself might sue. The consent, “inherent in the convention,” to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person’s benefit is not consent to suit by that person himself.}\]

Blatchford v. Native Village of Noatak, 501 U.S. 775, 785-86 (1991). Siegel’s efforts to distinguish Blatchford are not convincing. See Siegel, supra note 154, at 568-69 (arguing that a suit by an individual as a more convenient derivation of the qui tam action is not tantamount to the delegation of the federal government’s exemption from state immunity). But cf. Morgan Mahon, Comment, The Eleventh Amendment and Retroactive Welfare Benefits, 36 U. Pitt. L. Rev. 78, 94 (1974) (posing that “the United States could vindicate [the] individual’s right if it sued the State... . It seems that similar results would issue from suits either by the United States or by the individual in most cases, thus the difference in procedure is attributable only to the theoretical differences between the types of suits, which indicates perhaps that the differences are no longer worth recognizing.”).


\(^{160}\) See Siegel, supra note 154, at 553.


\(^{162}\) In both cases, the statutes were passed so that these northern states could assist their citizens in the collection of Reconstruction bonds issued by the southern states. See id. at 76-79.

\(^{163}\) See id. at 76-79, 89.
"nothing more nor less than ... mere collecting agent[s] of the owners of the bonds and coupons, and while the suits are in the name of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them." The Eleventh Amendment, therefore, barred prosecution of the suits. Thus, if the efforts of New Hampshire and New York were nothing more than subterfuge, the question must be asked: How is Siegel's proposition any different?

Siegel differentiates the federal version of this maneuver on two grounds. First, he argues that, unlike New Hampshire and New York who, according to the author, "were attempting to assert causes of action not really theirs," the federal government would have an actual right of action against the offending states as a result of a proposed Congressional enactment. Second, Siegel claims that "[r]egardless of who really owns the cause of action involved, the United States has the power to regulate, via federal law, a state's behavior toward individuals." Both of these arguments are offered to support Siegel's implicit distinction—that the federal government, unlike the states, would have a tangible interest in the prosecution and result of suits against the states. Perhaps this is so, but Siegel's analysis lacks rigor and demands a closer look.

As an initial matter, the United States may have to do more than point to statutory authority permitting it to sue the states. After all, New York and New Hampshire brought suit under ostensibly valid statutory authority as well. Like state laws, federal legislation is subject to the strictures of the Constitution. So why were New Hampshire and New York forbidden to sue Louisiana on behalf of their citizens? Quite simply, these states had no interest in the causes of action they were authorized to prosecute—there was simply no controversy between the states for the federal courts to resolve. Substituting the United States as the plaintiff does not change the analysis. For example, in United States

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164 Id. at 89.
165 See id. at 91; see also Hawaii v. Standard Oil Co., 405 U.S. 251, 258-59 n.12 (1972); North Dakota v. Minnesota, 263 U.S. 365, 374-76 (1923).
166 See Siegel, supra note 154, at 554.
167 See id.
169 See id. at 91 (holding that "in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens."); see also U.S. Const. art. III, § 2, cl. 1.
v. Minnesota, the United States brought suit against Minnesota seeking the cancellation of certain patents issued to the state concerning land upon which the Chippewa Indians held a superior claim. Minnesota argued that the real parties in interest were the Indians:

[Minnesota's] first proposition is that the suit is essentially one brought by the Indians against the State, and therefore is not within the original jurisdiction of this court. In support of the proposition it is said that the United States is only a nominal party—a mere conduit through which the Indians are asserting their private rights, —that the Indians are the real parties in interest and will be the sole beneficiaries of any recovery, and that the United States will not be affected whether a recovery is had or denied.

The Court's response is illuminating: "It must be conceded that, if the Indians are the real parties in interest and the United States only a nominal party, the suit is not within this Court's original jurisdiction." Notably, the Court cited, among other authorities, New Hampshire v. Louisiana as support for this statement. Although the Court did conclude that the United States had a direct interest in the suit, the fact remains that such an interest must be present to support jurisdiction.

Admittedly, satisfying this prerequisite may not be too difficult in most cases. Still, even if one assumes a casual "interest" nexus, the

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171 270 U.S. 181 (1926).
172 See id. at 191-92. The United States did not bring suit pursuant to a federal statute, but rather, out of a sense of obligation stemming from its treaty with the Chippewas. See id. Had the United States relied upon statutory authority, the analysis nonetheless would have been the same, although the result may have been easier to reach.
173 Id. at 193.
174 Id. (emphasis added).
175 See id. at 193 (citing New Hampshire v. Louisiana, 108 U.S. 76 (1883) and North Dakota v. Minnesota, 263 U.S. 365 (1923)); see also supra notes 161-165 and accompanying text.
177 See also Minnesota v. Hitchcock, 185 U.S. 373, 388 (1902) (concluding that the United States was not merely a nominal party suing on behalf of an Indian tribe, but was in fact a party with a substantial interest in the outcome of the suit); accord Dunlop v. Rhode Island, 398 F. Supp. 1269, 1271 (D.R.I. 1975) (finding that the United States had an interest in prosecuting a suit under the Fair Labor Standards Act "to redress a wrong being done to the public good." (quoting Wirtz v. Jones, 340 F.2d 901, 905 (5th Cir. 1965))). The need to defend federal standing is seen outside the Eleventh Amendment context as well. For example, parties frequently questioned the federal government's standing to sue on behalf of individuals when the presence of the United States as a party was the sole basis for federal court jurisdiction. See Erickson v. United States, 264 U.S. 246, 248-49 (1924); United States Fidelity & Guar. Co. v. Kenyon, 204 U.S. 349, 356-59 (1907).
178 For example, in the United States v. Minnesota case, the Court found that the United States had a "real and direct" interest in the dispute because "in many respects," the federal government was the guardian of the American Indians. See Minnesota, 270
United States's interest in pursuing the personal, state law claims of bankruptcy debtors is not immediately obvious.\textsuperscript{179} Resorting to the Constitution's proscription against nonuniform bankruptcy laws does not supply the necessary federal interest. The Supreme Court's interpretation of "uniform" as used in the Bankruptcy Clause is not stringent,\textsuperscript{180} so the state's preferred status vis-a-vis other creditors does not appear to offend the Constitution.

Perhaps a more promising argument in favor of federal standing is based on the normative theory of bankruptcy law discussed above. The Constitution empowers Congress to enact uniform bankruptcy legislation.\textsuperscript{181} Congress's purpose in enacting such a law is to establish a collective remedy in response to the common pool problem, which gives the federal government an interest in seeing that parties are not permitted to opt out of that process—thereby securing more than their appropriate share of the debtor's assets or shielding their own liability to the debtor from the claims of the debtor's creditors.\textsuperscript{182} Whether this theoretical interest in the debtor's ability to sue the states in bankruptcy court is sufficiently "real and direct" to satisfy a court is unclear, and perhaps, doubtful.\textsuperscript{183}

\textsuperscript{179} Cf. Siegel, supra note 154, at 569 n.146 (making the overbroad suggestion that federal prosecution of a debtor's claims against the states in bankruptcy cannot be viewed as a vindication of that debtor's federal rights). It is perhaps easier to see a federal interest when the subject of the debtor's claims arises out of the Bankruptcy Code itself as would be the case in a preference suit, 11 U.S.C. § 547 (1994), or in an action to rectify a violation of the automatic stay, 11 U.S.C. § 362 (1994). If the United States actually purchased the debtor's claims against the states (or otherwise took a complete assignment of them), its interest in the adjudication of those claims would be iron clad, although the bankruptcy court's jurisdiction to resolve the claim undoubtedly would be lost. Cf. South Dakota v. North Carolina, 192 U.S. 286, 310-12 (1904) (allowing a state that took title to an individual's bonds to sue another state); Hitchcock, 185 U.S. at 388 (allowing the United States to sue a state where the federal government had a direct interest in the suit). This implausible scenario, however, does not warrant further consideration.


\textsuperscript{181} See U.S. Const. art. I, § 8, cl. 4.

\textsuperscript{182} See supra Section III.A.

\textsuperscript{183} Theoretical and fairly attenuated federal interests, however, have carried the day in the past. See, e.g., United States Fidelity & Guar. Co. v. Kenyon, 204 U.S. 349, 356-57 (1907) (finding that the federal government's interest in the construction of public works is subserved when contractors working on such projects or supplying needed materials are assured of prompt and due payment); University of New Mexico, 731 F.2d at 706 (holding that despite the absence of any treaty creating fiduciary duties on the part of the United States, "Congress has 'pervasive authority, rooted in the Constitution, to control [Native American] tribal property.'" (quoting Delaware Tribal Bus. Comm. v. Weeks,
2. Conditioning State Participation in Bankruptcy On Waiver of Immunity

Congress may also consider reordering or conditioning the states' bankruptcy claim priorities. For example, it may condition state tax claim priority on a state's voluntary waiver of its immunity. Daniel A. Farber seems to have had a conditional participation in mind when he wrote his short comment on *Seminole Tribe.* Extrapolating from Ronald Coase's "brilliant insight" that even without traditional rules of tort liability, economically efficient resolutions of tort disputes will occur, Farber argues that bargaining renders legal rules irrelevant and results in efficient outcomes. In the Eleventh Amendment context, Farber notes that Eleventh Amendment immunity can be waived by the states. Furthermore, he argues that Congress can offer incentives for such waivers. Because the mechanisms of a bargain exist, Farber sees no reason why an agreement between the states and the United States on the immunity issue could not be achieved. He concludes that "[i]t follows from the Coase Theorem that, if Congress wants to eliminate immunity more than the state wants to keep it, then it will be eliminated—regardless of whether the Constitution recognizes sovereign immunity or gives Congress the power to abrogate immunity." Thus, Farber suggests that *Seminole Tribe* was correctly decided for all the wrong reasons.

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430 U.S. 73, 83 (1977)).

184 Whether the bankruptcy priority for unsecured state taxes creates a perverse incentive as previously discussed is an interesting question whose answer must await another day. For the purposes of my analysis, I assume that bankruptcy priorities in favor of the states are appropriate. See 11 U.S.C. § 507(a)(8) (1994) (granting priority to allowed, unsecured tax claims of governmental units).


187 See Farber, supra note 185, at 142.

188 See id.


190 See Farber, supra note 185, at 142.

191 Id. In support of the decision, the author argues that the rule of *Seminole Tribe* minimizes transaction costs because Congress is better able to "bribe" the states into giving up their immunity than the states are able to "bribe" Congress to leave them immune in a world where Congress has the power to abrogate immunity. See id. at 143.

192 See id. at 143 & nn.6-7. It is curious that no economic critique is leveled against the rule of sovereign immunity itself. The operation of the rule interferes with the unimpeded bargaining of individual claimants and state defendants. If this artificial barrier to efficient bargaining was removed outright, the question of Congress's efficient bargain
There is, unfortunately, a "transaction cost" that Farber has not taken into account—namely, Justice Scalia. Before the conservatives commanded the Court, Justice Scalia, in his concurring and dissenting opinion in *Union Gas*, questioned whether conditioning participation in federal programs on a waiver of state immunity can ever be appropriate:

*Parden* is the only case in which we have held that the Federal Government can demand, as a condition to its permission of state action regulable under the Commerce Clause, the waiver of state sovereign immunity . . . .

In *Peyton v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), we said that a condition of suability of the Bridge Commission, which we interpreted Congress to have attached to its approval of the interstate compact creating the Commission, was accepted by the States when they implemented the compact. That was an alternative holding, since we also found that the terms of the compact itself made the Commission suable. Obviously, moreover, what Congress may exact with respect to new entities created by compacts that the States have no constitutional power to make without its explicit consent may be greater than what it may exact in other contexts.

Two terms ago, in *Welch*, we overruled *Parden* insofar as that case spoke to the clarity of language necessary to constitute such a demand. We explicitly declined to address, however, the continuing validity of *Parden*’s holding that the Commerce Clause provided the constitutional power to make such a demand. I would drop the other shoe.

There are obvious and fatal difficulties in acknowledging such a power if no Commerce Clause power to abrogate state sovereign immunity exists. All congressional creations of private rights of action attach recovery to the defendant’s commission of some act, or possession of some status, in a field where Congress has authority to regulate conduct. Thus, *all* federal prescriptions are, insofar as their prospective application is concerned, in a sense conditional, and—to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability—can be redescribed as invitations to "waiver." . . . At bottom, then, to acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State’s action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sover-

with the states to waive immunity would become moot. Compare Matthew L. Spitzer, Note, An Economic Analysis of Sovereign Immunity in Tort, 50 S. CAL. L. REV. 515, 548 (1977) (concluding that the government should be able to be sued in tort) with Werner Z. Hirsch, Law and Economics: An Introductory Analysis 242-43 (2d ed. 1988) (arguing that a limited rule of sovereign immunity is justified in order to attract talented people to government service).
eign immunity in the exercise of its Article I powers... There is little more than a verbal distinction between saying that Congress can make the Commonwealth of Pennsylvania liable to private parties for hazardous-waste cleanup costs on sites that the Commonwealth owns and operates, and saying the same thing but adding at the end "if the Commonwealth chooses to own and operate them." If state sovereign immunity has any reality, it must mean more than this.\footnote{Pennsylvania v. Union Gas Co., 491 U.S. 1, 42-44 & n.1 (1989) (Scalia, J., concurring in part and dissenting in part) (citations omitted) (footnote omitted).}  

Of course now, according to Seminole Tribe, Congress does not have authority to abrogate state immunity under the Commerce Clause. This, coupled with the fact that Justice Scalia now represents the voice of the majority, does not bode well for the future success of legislation that conditions state participation in a federal sphere on waiver. By eliminating the bargaining room recognized by Farber, Justice Scalia would force an inefficient resolution to the immunity issue, thereby harming the states contrary to his intended goal of protecting them.

C. Measures Not Requiring Legislative Initiative

1. Judicial Options

One can always wait passively for a reconstitution of the Supreme Court and the possibility of a new interpretation of the Eleventh Amendment to resolve this dilemma. This seemed to be Justice Stevens's hope in predicting that "the better reasoning in Justice Souter's far wiser and far more scholarly opinion [in Seminole Tribe] will surely be the law one day."\footnote{Seminole Tribe v. Florida, 116 S. Ct. 1114, 1145 (1996) (Stevens, J., dissenting).}

A more proactive approach might call upon the Young doctrine. If a state or state agency violates the automatic stay or the discharge injunction, for example, a Young-type suit might lie against an appropriate state official. Whether the debtor can do anything to get back property taken by a state in violation of the automatic stay is unclear.\footnote{But see Land v. Dollar, 330 U.S. 731, 737-39 (1947) (acknowledging that states may be required to return segregated, identifiable property pursuant to an injunction).} The specter of damages and other possible sanctions against a state officer individually, however, may make Code violations less attractive even when the court is without authority to reach property of the debtor once in the hands of the state.\footnote{In the context of the debate over corporate limited liability, some commentators similarly have argued that a rule that holds a firm's management responsible for the torts committed by the firm would provide adequate incentive to avoid excessive risk taking by the firm. See Paul Halpern, et al., An Economic Analysis of Limited Liability in Corpora-}
Recall that the Court in *Seminole Tribe* indicated that it would not grant relief based on the *Young* doctrine when Congress had already included a specific, definite remedy in the statute in question. This gloss will surely limit the utility of the *Young* doctrine in the future. The Bankruptcy Code, however, which generally leaves it to the bankruptcy courts to devise appropriate remedies for Code violations, does not appear to implicate this concern. Whether *Young*-type suits in bankruptcy will survive the case-by-case balancing test of *Coeur d' Alene* is less clear.

The debtor also might consider suing a state defendant in its own courts. State immunity from suit in local courts has been narrowed drastically over the past several decades. Furthermore, with regard to causes of action arising out of the Code itself, a debtor may be permitted to bring such suits against the states in their own courts notwithstanding an assertion of sovereign immunity. This "anomalous" result was sanctioned by the Court in *Hilton v. South Carolina Public Railways Commission*. In that case, Hilton, an individual, attempted to sue the State of South Carolina in federal district court under the Federal Employers' Liability Act (FELA). While the case was pending in the district court, the Supreme Court announced its *Welch v. Texas Department of Highways and Public Transportation* decision. The Welch Court held that Congress had not expressed an unmistakably clear intention to subject states to suit in federal court in the Jones Act, which incorporates the remedial scheme of FELA. Reasonably believing that South Carolina would be immune from his suit as a result, Hilton voluntarily dismissed his complaint in federal court and refiled his action in a South Carolina state court. The state trial and appellate courts all held that FELA did not authorize suits against the states in their own courts. The Supreme Court granted certiorari.

In a majority opinion joined by an interesting cross-section of the Court, Justice Kennedy concluded that Hilton's suit could be maintained

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197 See supra notes 52, 125-127 and accompanying text.
198 See supra notes 53-60 and accompanying text.
199 See supra notes 144-146 and accompanying text.
201 502 U.S. 197, 206 (1991). This result was hinted at by the Court in *General Oil Co. v. Crain*, 209 U.S. 211, 226-27 (1908).
202 See *Hilton*, 502 U.S. at 199.
204 See id. at 476.
205 See *Hilton*, 502 U.S. at 199-200.
206 See id. at 200-01.
207 See id. at 201.
in state court. Noting that the Court had already concluded in \textit{Parden} that FELA applied to the states, the majority thought the resolution of the \textit{Hilton} case was simply a matter of stare decisis. The Court was not troubled by the partial overruling of \textit{Parden} by \textit{Welch}, which held that FELA did not contain a sufficiently clear abrogation of state immunity for purposes of suit in federal court. That portion of the \textit{Parden} decision holding that FELA applied to the states was still good law, and thus, the Court noted, neither the Eleventh Amendment nor the question of abrogation applied to Hilton’s suit in \textit{state} court.

The majority’s opinion is somewhat oblique, although the dissent spelled out quite plainly the ramifications of the majority’s conclusion:

> The clear statement rule, the Court says, was required in \textit{Welch} because the Eleventh Amendment was implicated. In \textit{Will}, by contrast, use of the clear statement rule was somewhat discretionary, because the issue in that case was a question of statutory interpretation in which the Constitution was \textit{not} implicated. Because this case involves state sovereign immunity in state court, not federal court, and the Eleventh Amendment does not by its terms apply, the Court holds that the clear statement rule in this “nonconstitutional” context can be trumped by \textit{stare decisis} …

From this standpoint, it makes little sense to apply the clear statement rule to congressional enactments that make the States liable to damages suits in federal courts, but not to apply the clear statement rule to congressional enactments that make the States liable to damages suits in their own courts. Sovereign immunity, a crucial attribute of separate governments, is infringed in both cases. The suggested dichotomy makes even less sense if we consider the remarkable anomaly that these two canons of statutory construction create: a statutory scheme in which \textit{state} courts are the exclusive avenue for obtaining recovery under a \textit{federal} statute.

Thus, \textit{Hilton} advances the remarkable proposition that Congress can subject states to suit under a federal statute in their own courts even if the states would be immune from suit under the same statute in the federal courts. Apart from the fact that this conclusion is hard to reconcile

\textsuperscript{208} See \textit{id.} at 207. The majority consisted of Justice Kennedy, who delivered the opinion of the Court, Chief Justice Rehnquist, and Justices White, Stevens, and Souter. \textit{See id.} at 198.

\textsuperscript{209} See \textit{id.} at 201-03.

\textsuperscript{210} See \textit{id.} at 204-05.

\textsuperscript{211} See \textit{Hilton}, 502 U.S. at 204-07.

\textsuperscript{212} See \textit{id.} at 209-10 (O’Connor, J., dissenting) (citation omitted).

\textsuperscript{213} See \textit{Amar}, \textit{supra} note 28, at 1476-77 & nn.209-10. What is perhaps most startling about the opinion is that its blueprints were drawn up by Justice Brennan in the dissent to the Court’s decision in \textit{Will} v. \textit{Michigan Dep’t of State Police}, 491 U.S. 58, 74-77 (1989).
with earlier Court pronouncements on this issue, the direction of this case seems very much at odds with the Court’s approach to state sovereign immunity generally. But because the majority included a number of conservative Justices, including Chief Justice Rehnquist who authored the Seminole Tribe decision, the precedent seems to be in no immediate danger of reversal.

Because section 106 of the Bankruptcy Code unquestionably establishes Congress’s intent to make the states responsive to numerous causes of action under the Code, it would appear that the states cannot rely on their common law sovereign immunity to frustrate such suits by debtors in state court. When the debtor wishes to pursue in state court a Bankruptcy Code cause of action or a state cause of action against which the state has no immunity, a bankruptcy court might permit such a suit to go forward under § 1334 of title 28 of the United States Code, or under section 305 of the Bankruptcy Code. This process may be slower—a concern if the state has violated the automatic stay and its infraction is ongoing or interferes with the debtor’s reorganization—and will frustrate the bankruptcy policy of speedy and collective estate administration. It is not, in the end, a practical or attractive alternative.

(Brennan, J, dissenting). At the time, the conservative Justices were unanimously opposed to Justice Brennan's thesis.

See Howlett v. Rose, 496 U.S. 356, 365 (1990). The Howlett Court declared that [t]he anomaly identified by the State Supreme Court, and by the various state courts which it cited, 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.

Id. (footnote omitted). The Will Court noted that because a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.

See supra Sections I-II.

See S. Elizabeth Gibson, Sovereign Immunity in Bankruptcy: The Next Chapter, 70 AM. BANKR. L. J. 195, 206-07 (1996); see also Howlett, 496 U.S. at 383 (declaring that “as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage.”).

2. Sections 106(b) and (c) of the Bankruptcy Code

As a practical matter, the states will often subject themselves to the Bankruptcy Court's jurisdiction when they file proofs of claim in bankruptcy cases.\(^{218}\) When this occurs, section 106(b) (compulsory counterclaim waiver) and section 106(c) (permissive counterclaim waiver) will come into play.

Pursuant to section 106(b), when a state files a proof of claim,\(^{219}\) it is deemed to have waived its sovereign immunity with respect to all claims belonging to the debtor that arose out of the same transaction or occurrence as the state's claim.\(^{220}\) Case law interpreting "transaction or occurrence" for the purposes of Federal Rule of Civil Procedure 13(a) can be used by analogy when making the similar determination under section 106(b).\(^{221}\) Generally, a court will look to see if there is a "logical relationship" between the two claims.\(^{222}\) In the past, this test has been applied flexibly.\(^{223}\) Now that section 106(a) has been undermined, the courts should apply the test even more liberally.

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\(^{218}\) This will most often occur when the state has a tax claim against the debtor.

\(^{219}\) There was some debate surrounding the old version of section 106(b)—then section 106(a)—about whether that version of the statute contemplated the filing of a proof of claim by the state or whether the state could "waive" its immunity merely by holding a claim against the estate, even when not yet asserted. Compare 995 Fifth Ave. Assoc. v. New York Dep't of Taxation & Fin. (In re 995 Fifth Ave. Assoc.), 963 F.2d 503, 509 n.1 (2d Cir. 1992); In re Dillon, 148 B.R. 852, 854 (Bankr. E.D. Tenn. 1992), and Unicare Homes, Inc. v. Four Seasons Care Ctrs., Inc. (In re Four Seasons Care Ctrs., Inc.), 119 B.R. 681, 685 (Bankr. D. Minn. 1990) (filing of proof of claim required), with Sullivan v. Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1153 (9th Cir. 1991); Official Committee of Unsecured Creditors v. New York Dep't of State (In re Operation Open City, Inc.), 170 B.R. 818, 822-23 (S.D.N.Y. 1994); Mims v. United States (In re Craftsmen, Inc.), 163 B.R. 88, 91 (Bankr. N.D. Tex. 1993), and Inslaw, Inc. v. United States (In re Inslaw, Inc.), 76 B.R. 224, 229 (Bankr. D.D.C. 1987) (filing of proof of claim not required).

\(^{220}\) Cf. Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989) (asserting that "[n]either § 106(a) nor § 106(b) provides a basis for petitioner's actions here, since respondents did not file a claim in either Chapter 7 proceeding."). The debate has been legislatively settled. The revised version of section 106(b) expressly requires the filing of a proof of claim by the state. See 11 U.S.C. § 106(b) (1994); accord In re Martínez, 196 B.R. 225, 229-30 (D.P.R. 1996); Employment Dev. Dep't v. Joseph (In re HPA Assocs.), 191 B.R. 167, 171-72 (B.A.P. 9th Cir. 1995).


\(^{222}\) See WJM, Inc. v. Massachusetts Dep't of Pub. Welfare, 840 F.2d 996, 1005 & n.12 (1st Cir. 1988).


\(^{223}\) See, e.g., United States v. Pullman Constr. Indus., Inc., 153 B.R. 539, 541-42 (N.D. Ill. 1993); United States Lines (S.A.) v. United States (In re McLean Indus.), 132
Section 106(b) is by no means above challenge. To the extent that it is interpreted as conditioning state participation in the bankruptcy process on the waiver of immunity, such a statutory design has drawn the criticism of at least one influential member of the Court, as discussed above. Even under a traditional waiver analysis, section 106(b) may be seen as an unwarranted extension of state liability. In the past, the Supreme Court has held that a state effects a limited waiver of its immunity when it files a claim in the bankruptcy court. Indeed, filing a claim in bankruptcy court would have probably effected such a waiver of immunity even without section 106. But the states' exposure appears limited to a defensive response by the debtor: "The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash." The lower courts have so limited the scope of similar waivers by claim assertion, permitting only an offset of the claims of the respondent that arose from the same transaction or occurrence as the state's claim. Allowing affirmative recovery by the debtor, as section 106(b) does, subjects the states to greater exposure than the courts have allowed in the past.

While section 106(b) by its terms is therefore rather more liberal than existing precedents, one court has argued that a state waives its sovereign immunity completely when it files a proof of claim in a bankruptcy


224 See 995 Fifth Ave. Assoc., 963 F.2d at 508; WJM, Inc. v. Massachusetts Dep't of Pub. Welfare, 840 F.2d 996, 1003 (1st Cir. 1988) (concluding that Congress may condition participation in a federal program on a waiver of state immunity if its intention to do so is clear).

225 Compare supra notes 81-86, 173-81 and accompanying text (discussing conditional waiver and its detractors) with supra note 224 and accompanying text.


229 Accord Gibson, supra note 216, at 209-11; Browning, supra note 130, at 10 & n.7.
Although this theory was initially unpopular and seemed to render the express but narrow provisions of sections 106(b) and 106(c) superfluous, other bankruptcy courts now appear to accept this theory. It is, however, simply not consistent with Supreme Court precedent.

Section 106(c) permits the debtor, notwithstanding any assertion of sovereign immunity by a state, to “offset” against a claim or interest of that state all claims belonging to the debtor. Although the debtor cannot obtain affirmative, monetary relief under this provision, the debtor is not limited by the transaction or occurrence requirement. Unlike section 106(b), section 106(c) does not expressly require the state to have filed a proof of claim. It is hard to imagine how simply holding a claim against an entity that happens to become a bankruptcy debtor can

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232 The pioneering bankruptcy court’s response to this criticism is not convincing. See Sacred Heart, 199 B.R. at 135. This response, however, is somewhat reminiscent of a similar justification offered by the Hoffman dissent in support of its interpretation of the interaction among former sections 106(a), (b) and (c). See Hoffman v. Connecticut Dep’t of Income Maintenance, 492 U.S. 96, 113 (1989) (Stevens, J., dissenting).


234 See Gardner v. New Jersey, 329 U.S. 565, 574 (1947) (asserting that “[w]hen the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting adjudication of the claim.”) (emphasis added).


236 See id. The elimination of the transaction or occurrence requirement in subsection (c), like the affirmative recovery permitted under subsection (b), represents a liberalization of the narrow attributes and consequences of similar waivers under nonbankruptcy precedents. See supra note 228 and accompanying text; see also Gibson, supra note 216, at 210.

237 See 11 U.S.C. § 106(c) (1994); see also supra note 219 and accompanying text.
rise to the level of a constitutional waiver of state sovereign immunity.\footnote{\textit{See supra} notes 61-68 and accompanying text.} It is thus likely that the courts will require, as a prerequisite, the filing of a proof of claim by the state or, at least, sufficient participation by the state in the bankruptcy case such that there is a clear waiver of immunity by conduct.\footnote{\textit{Cf.} Town \& Country Home Nursing Servs., Inc. (\textit{In re} Town \& Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1153 (9th Cir. 1991) (finding waiver by conduct); United States v. Inslaw, Inc., 113 B.R. 802, 811-12 (D.D.C. 1989) (same).}

A few open questions remain regarding subsections (b) and (c) that may well be decided in favor of debtors given the new regime that so heavily favors the states. First, assuming that it is proper to grant a debtor affirmative relief against a state,\footnote{\textit{See supra} notes 224-229 and accompanying text.} should a court permit the debtor to recover its transaction or occurrence claim under section 106(b) and then make the state resort to the claims process to secure payment of its own claim (often at pennies on the dollar)? Alternatively, should a court offset the two claims and allow affirmative recovery of the excess amount only? One court has held that the debtor is only entitled to the difference between the two claims.\footnote{\textit{See United States v. McPeck}, 910 F.2d 509, 513 (8th Cir. 1990).} Intuitively, this seems like the correct result. If netting is required under nonbankruptcy law in analogous situations, the same result should follow in bankruptcy.\footnote{\textit{But see supra} note 227 and accompanying text (noting that the Supreme Court has suggested that a state’s claim that has been filed in a bankruptcy case can be subordinated by the bankruptcy judge).} Without any concrete answers in the Bankruptcy Code or the legislative history, however, a bankruptcy court has some discretion to enlarge further the consequences of a state waiver by claim.

Similarly, how should the court apply a debtor’s claims against the state if the debtor holds several claims, some of which arise out of the same transaction or occurrence that gave rise to the state’s claim and others that do not? The debtor will wish to offset the unrelated claims first, thereby reserving the transaction or occurrence claims for subsequent application. In this way, the transaction or occurrence claims will more likely exceed any residual state claims remaining after the initial offset, thus supporting a money judgment for the debtor. The Bankruptcy Code does not suggest a proper ordering of claims. In light of the tenuous basis of section 106(b)’s affirmative relief aspect, however, a court may hesitate to maximize the debtor’s recovery any further.\footnote{\textit{See supra} notes 224-229 and accompanying text.}

Because states are represented in bankruptcy cases by their various agencies, a question has surfaced regarding the filing of a claim by one
state agency and whether that waives the immunity of other agencies and indeed the state itself. When section 106(b) is at issue, with its transaction or occurrence requirement, the question is moot.\textsuperscript{244} This is not the case for section 106(c). Furthermore, it is certainly not the case if one subscribes to the "claim as complete waiver" theory described above.\textsuperscript{245} In the section 106(c) context, most courts have interpreted the filing of a claim in bankruptcy by a single state agency as a waiver of immunity for the entire state and all of its other agencies.\textsuperscript{246} Again, with the deck stacked so heavily in the state's favor, this trend is likely to continue among the lower courts.

V. CONCLUSION

There is no question that \textit{Seminole Tribe} has added a large measure of uncertainty to bankruptcy proceedings involving states. Certainly carving out special preferences for a particular creditor group is antithetical to the notion that bankruptcy is a collective process aimed at ameliorating the common pool problem.\textsuperscript{247} The system will surely adjust to the consequences of \textit{Seminole Tribe}, as far as it is able, in an attempt to regain lost balance. It is not clear, however, that any measure will neutralize the advantages given to the states in \textit{Seminole Tribe}.\textsuperscript{248} It will be interesting to see how the bankruptcy courts, debtors, and other creditors react to the states' newly acquired status. It will be even more interesting to see how aggressively the states take advantage of it.


\textsuperscript{245} \textit{See supra} notes 230-234 and accompanying text. Indeed, one of the critical flaws of the "claim as complete waiver" theory is that there is no substantive reason to apply it only to § 106(c) and not to § 106(b). If applied to the latter, however, it would write out of the statute the "transaction or occurrence" test Congress saw fit to include. \textit{Accord Sacred Heart Hosp. v. Pennsylvania Dep't of Welfare (In re Sacred Heart Hosp.)}, 204 B.R. 132, 140-41 (E.D. Pa. 1997).


\textsuperscript{247} \textit{See supra} Section III.A.

\textsuperscript{248} Indeed, one rather panicked commentator has gone so far as to predict the resurrection of the old Act injunctions as a way of keeping the states in check. \textit{See} \textit{Browning, supra} note 130, at 10.