

ELEVENTH AMENDMENT IMMUNITY IN BANKRUPTCY: BREAKING THE *SEMINOLE TRIBE* BARRIER

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In many bankruptcies, a state will be included among the creditors seeking payment from the debtor; the debtor will often, in turn, have claims against the state. In this Note, Troy McKenzie analyzes the limitations on bankruptcy court jurisdiction over claims involving states as a result of the Supreme Court's interpretation of the Eleventh Amendment in Seminole Tribe v. Florida. He suggests that the courts and Congress still possess tools to minimize those limitations. First, he argues that the most important precedent on Eleventh Amendment sovereign immunity in bankruptcy, Gardner v. New Jersey, supports the conclusion that, when a state files a claim against a debtor, bankruptcy courts retain jurisdiction over any proceeding initiated by the debtor—whether transactionally related to the state's claim or not—that must be resolved in order to adjudicate the state's claim. Second, because a bankruptcy court's ability to remedy some state violations of bankruptcy law is limited when the state has not filed a claim against the debtor, McKenzie argues that Congress should give states bankruptcy-related incentives to waive their sovereign immunity in bankruptcy cases. In exchange for the preferential treatment of certain state claims afforded by the Bankruptcy Code, Congress may require states to enact a waiver of sovereign immunity in bankruptcy in the interest of securing the orderly and equitable operation of the national bankruptcy system.

INTRODUCTION

Like so many young lawyers, Jennifer Rose had accumulated more than one hundred thousand dollars in student loans during her college and law school education.¹ Deeply in debt and unable to repay those loans on her salary as a law clerk, she filed for bankruptcy.² Rose then initiated proceedings to have the bankruptcy court declare her educational debts discharged.³ The University of Missouri, to

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¹ See U.S. Dep't of Educ. v. Rose (In re Rose), 214 B.R. 372, 373 (Bankr. W.D. Mo. 1997) (providing factual background and procedural history of case).

² Rose was earning approximately thirty thousand dollars per year. Because her husband was unemployed, this was the sole support for the couple and their two young children. See *id.* at 373-74.

³ A debtor seeking discharge of student loans must prove, among other things, that repayment would be an "undue hardship." See 11 U.S.C. § 523(a)(8)(B) (1994). A separ-

which Rose owed a portion of her debts, objected, contending that because it was a state-run institution, the Eleventh Amendment barred her claim.⁴ The bankruptcy court, acknowledging that the state's sovereign immunity blocked federal jurisdiction, granted the university's motion to dismiss. Although Rose was entitled under federal law to a discharge of her debts and a "fresh start,"⁵ the court declared that its decision was mandated by the Supreme Court's interpretation of the Eleventh Amendment in *Seminole Tribe v. Florida*.⁶

Seminole Tribe represents the high-water mark of the Supreme Court's sovereign immunity jurisprudence. Although the case concerned the Indian Gaming Regulatory Act, Jennifer Rose's experience demonstrates that the reasoning of the Court's decision has spilled over into the usually placid realm of bankruptcy law. This Note considers the limitations that *Seminole Tribe* has placed on bankruptcy court jurisdiction and examines ways of minimizing or eliminating the impact of state sovereign immunity in bankruptcy proceedings.

A brief overview of bankruptcy law is helpful in understanding how *Seminole Tribe* has hampered the orderly resolution of bankruptcy cases. A typical bankruptcy case is commenced when a debtor files for protection under the Bankruptcy Code (Code).⁷ At the moment the case commences, any property owned by the debtor—wherever located—becomes part of the "bankruptcy estate."⁸ Furthermore, any activities by creditors to collect assets from the debtor are halted by the "automatic stay."⁹ A bankruptcy court may appoint a trustee to liquidate the estate and repay creditors¹⁰ or to attempt to reorganize the debtor's estate.¹¹ Any creditors seeking repayment of debts are required to file "proofs of claim" with the bank-

rate adversary action is required to claim discharge for undue hardship. See Fed. R. Bankr. P. 4007, 7001.

⁴ See *Rose*, 214 B.R. at 374.

⁵ The "fresh start" is the bankruptcy policy that a discharge will "free[] the debtor's future income from the chains of previous debts." Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393, 1393 (1985).

⁶ 517 U.S. 44 (1996).

⁷ See 11 U.S.C. § 301. The Bankruptcy Code (Code) is contained in title 11 of the United States Code.

⁸ See id. § 541. Property of the bankruptcy estate also includes voidable preferential payments or "preferences"—certain transfers of property by the debtor to creditors made before declaring bankruptcy. The Bankruptcy Code allows a trustee to recover preferential payments. See id. § 547(b), (c) (describing payments recoverable as preferences).

⁹ The "automatic stay" is the bankruptcy policy that prevents attempts by creditors to collect from the debtor once a bankruptcy petition has been filed. Actions already pending against the debtor at the time the petition is filed are also stayed. See id. § 362(a).

¹⁰ See id. § 726.

¹¹ See id. § 1104.

ruptcy court, listing the amount and type of those debts.¹² At every point in a case, the bankruptcy court is given broad powers to “issue any order, process, or judgment” in order to close the case in an efficient manner.¹³ This includes the power to levy sanctions for violations of the automatic stay by an aggressive creditor seeking to collect from the debtor,¹⁴ or to force a creditor to disgorge property of the estate it has retained illegally.¹⁵

Before *Seminole Tribe*, it was settled law that states to whom debtors owed money would be treated much like any other creditors in bankruptcy.¹⁶ Bankruptcy courts routinely forced states to turn over property of the estate to trustees in bankruptcy and awarded damages for violations of the automatic stay by states.¹⁷ In the wake of *Seminole Tribe*, however, states have been emboldened to object to the jurisdiction of bankruptcy courts on the ground that the Eleventh Amendment¹⁸ prevents the application of bankruptcy law against unconsenting states in federal court. By doing so, states assert for themselves the status of “supercreditors” in bankruptcy, able to continue collecting on debts long after other creditors have ceased doing so and able to retain property of the estate that would ordinarily be turned over to the bankruptcy court for distribution to other similarly situated creditors.

This Note will demonstrate that the courts and Congress are not without power to limit the exercise of sovereign immunity by states in bankruptcy. Part I of this Note discusses the purpose of the Eleventh Amendment and what classes of cases it bars. Part II considers Congress’s efforts to eliminate sovereign immunity in bankruptcy in order to treat states in much the same manner as any other parties in a bankruptcy proceeding, and the effect *Seminole Tribe* has had on those efforts. It concludes that the Code provision intended to abrogate state sovereign immunity in bankruptcy cannot now be applied to

¹² See *id.* § 501. The bankruptcy court may then “allow” a claim (that is, determine it to be a valid debt) or “disallow” it if certain requirements of the Code are not met. See *id.* § 502.

¹³ *Id.* § 105(a).

¹⁴ See *id.* § 362(h).

¹⁵ See *id.* § 542(a).

¹⁶ See *O’Brien v. Vermont (In re O’Brien)*, 216 B.R. 731, 736 (Bankr. D. Vt. 1998) (noting “regular and routine” enforcement of applicable bankruptcy laws against states prior to *Seminole Tribe*); *Lazar v. California State Water Resources Control Bd. (In re Lazar)*, 200 B.R. 358, 376 (Bankr. C.D. Ca. 1996) (noting that “there is a longstanding tradition in the bankruptcy courts to enforce applicable laws against the states”).

¹⁷ See, e.g., *O’Brien*, 216 B.R. at 736; *Sparkman v. Department of Revenue (In re York-Hanover Devs., Inc.)*, 181 B.R. 271 (Bankr. E.D.N.C. 1995).

¹⁸ See *infra* text accompanying note 24. The terms “sovereign immunity” and “Eleventh Amendment immunity” are used interchangeably in this Note.

the states. Part III examines ways of obtaining jurisdiction over states in bankruptcy proceedings. First, this Part will discuss the circumstances in which a court can determine that a state has waived its Eleventh Amendment immunity in a bankruptcy proceeding by filing a proof of claim. It will suggest that the constitutional standard for determining the extent of such waiver is not whether a debtor's counterclaim arises out of the same transaction or occurrence as the state's claim. Rather, the state waives its immunity with respect to any action that can fairly be said to "adjudicate" its claim. This Part also demonstrates that, even when a state has not filed a proof of claim, a bankruptcy court retains the power to resolve some matters affecting the state. Part III then concludes by showing the necessity and propriety of congressional action to encourage states to waive their Eleventh Amendment immunity in bankruptcy proceedings. By extending the benefit of preferred treatment of certain state claims in return for a limited waiver of immunity, Congress retains the ability to secure the orderly operation of a national bankruptcy system.

I

SCOPE OF THE ELEVENTH AMENDMENT

A. *History and Interpretive Difficulties*

The principle of sovereign immunity is associated with the ancient maxim that "the King can do no wrong."¹⁹ Although divine-right monarchy is currently out of fashion, this doctrine continues to apply to the states through the Eleventh Amendment. Commentators have questioned the rule-of-law implications of the Amendment,²⁰ es-

¹⁹ *Seminole Tribe v. Florida*, 517 U.S. 44, 103 n.2 (Souter, J., dissenting) (citing 1 William Blackstone, *Commentaries* *238). In fact, this notion originally was drawn from the opposite belief that he "must not, was not allowed, not entitled, to do wrong." See *id.* (internal quotation marks omitted) (quoting Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 *Harv. L. Rev.* 1, 4 (1963) (quoting Ludwik Ehrlich, *Proceedings Against the Crown (1216-1377)*, in 6 *Oxford Studies in Social and Legal History*, Pt. XII, at 42 (Paul Vinogradoff ed., 1921))).

²⁰ See, e.g., Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *Yale L.J.* 1, 3-4 (1998) (arguing that Eleventh Amendment is "in tension with" rule-of-law principles); Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 *Yale L.J.* 1683, 1685 (1997) (describing Eleventh Amendment as "embarrassment" to rule of "laws and not men"); cf. John Paul Stevens, *Is Justice Irrelevant?*, 87 *Nw. U. L. Rev.* 1121, 1128 (1993) (stating, in context of federal sovereign immunity: "The tentacles of that judge-made doctrine deposit their seeds of injustice . . . in numerous areas of litigation that have not yet completely surfaced."). But see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 *Cornell L. Rev.* 393, 460-61 n.323 (1996) (discussing rule-of-law implications of federal court efforts to circumvent Eleventh Amendment in light of its origins as attempt to limit federal court power). The ideal of "rule of law" requires that judicial remedies exist to correct violations of legal rights. See *Marbury v. Madison*, 5 U.S. (5 Cranch) 137, 163 (1803) ("The

pecially as the Supreme Court's evolving federalism jurisprudence permits states greater freedom from meaningful federal scrutiny.²¹

Adopted in reaction to the Court's decision in *Chisholm v. Georgia*,²² the Eleventh Amendment appears by its plain language to restrict only the Article III diversity jurisdiction of federal courts,²³ declaring:

government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." From this perspective, the Eleventh Amendment's conflict with rule-of-law principles is rooted in its role in determining the scope of constitutional protections. That is, the Amendment protects state autonomy by immunizing states from suits in federal court but does so by limiting the ability of private citizens to enforce basic federal rights. See Erwin Chemerinsky, *Federal Jurisdiction* § 7.1, at 388 (3d ed. 1999) (noting that expansive reading of Eleventh Amendment "effectively immunizes the actions of state governments from federal court review, even when a state violates the most fundamental constitutional rights"); see also *Alden v. Maine*, 119 S. Ct. 2240, 2289 (1999) (Souter, J., dissenting) ("[A] constitutional structure that stints on enforcing federal rights out of an abundance of delicacy toward the States has substituted politesse in place of respect for the rule of law.").

²¹ *Seminole Tribe* is part of a string of recent cases in which the Court, invoking constitutional provisions other than the Eleventh Amendment, has prevented attempts by the national government to make laws burdening states. See, e.g., *Printz v. United States*, 521 U.S. 898, 925-33 (1997) (holding that Congress may not "commandeer" state officials to execute federal law); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (limiting Congress's power to make laws applicable to states through Enforcement Clause of Fourteenth Amendment); *New York v. United States*, 505 U.S. 144, 168-69 (1992) (holding that Tenth Amendment bars federal government from directly compelling states to enact legislative provisions in furtherance of federal regulatory program).

²² 2 U.S. (2 Dall.) 419 (1793). *Chisholm* was a diversity contract suit brought by a citizen of South Carolina against the State of Georgia. A majority of the Court held that Article III abolished the common law sovereign immunity of states in federal court. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 *Stan. L. Rev.* 1033, 1055-56 (1983) (describing opinions of justices in majority). Justice Iredell's lone dissent is generally taken as the impetus for the adoption of the Eleventh Amendment. See James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 *Cornell L. Rev.* 1269, 1327-28 (1998) (detailing Iredell's dissent).

²³ See *Seminole Tribe*, 517 U.S. at 54 (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)) (acknowledging that "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts" but maintaining that Amendment stands "not so much for what it says, but for the presupposition . . . which it confirms"); cf. *Alden*, 119 S. Ct. at 2246 ("We have . . . sometimes referred to the States' immunity from suit as 'Eleventh Amendment immunity.' The phrase is convenient shorthand but . . . the sovereign immunity of the states neither derives from nor is limited by the terms of the Eleventh Amendment.").

Despite the Court's tendency to discount the plain meaning of the Eleventh Amendment, commentators generally agree that it was designed to limit diversity suits by private citizens against states in federal courts. See Fletcher, *supra* note 22, at 1060-63 (arguing that drafters of Eleventh Amendment intended to limit only state-citizen diversity jurisdiction of Article III); Vázquez, *supra* note 20, at 1694-1700 (describing scholarship supporting view of Eleventh Amendment as restriction on Article III state-citizen diversity

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.²⁴

However, nearly a century after its ratification, the Court extended the reach of the Amendment to suits by a citizen against his own state in *Hans v. Louisiana*.²⁵ *Hans* also expanded the scope of Eleventh Amendment immunity to include suits in federal court involving federal-question jurisdiction.²⁶ More recent cases articulate twin reasons for this broader view of state sovereign immunity: a concern that federal court judgments not deplete state treasuries;²⁷ and, more pointedly, the need to preserve the dignity and integrity of each state in a federal system.²⁸

jurisdiction only). But see Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 Nw. U. L. Rev. 819, 868-74 (1999) (arguing that "State" in Eleventh Amendment should be read to incorporate various immunities recognized by Framers).

Article III provides:

The judicial Power shall extend to all Cases, in Law and Equity . . . between a State and Citizens of another State.

U.S. Const. art. III, § 2, cl. 1.

²⁴ U.S. Const. amend. XI.

²⁵ 134 U.S. 1 (1890).

²⁶ See *id.* at 15. *Hans* is the first case in a long line of precedents in which the Court has interpreted the Eleventh Amendment as a broad restriction on federal court subject matter jurisdiction. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984) (holding that Eleventh Amendment is constitutional bar against even federal-question claims); *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (same); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (same). The Court has accepted, however, that states may consent to suit in federal court. See *infra* Part I.B.2. This peculiar aspect of the Court's Eleventh Amendment jurisprudence appears to conflict with the usual rule that parties cannot vest a federal court with subject matter jurisdiction by consent. See *Wisconsin Dep't of Corrections v. Schacht*, 118 S. Ct. 2047, 2055 (1998) (Kennedy, J., concurring) (suggesting instead that Eleventh Amendment immunity "bears substantial similarity to personal jurisdiction requirements"); *Chemerinsky*, *supra* note 20, § 7.6, at 431-32.

Commentators have expressed the view that the Eleventh Amendment was intended merely to reinstate the common law sovereign immunity of states after *Chisholm*. See Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 536 (1978); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 694 (1976).

²⁷ See *Alden*, 119 S. Ct. at 2245:

Private suits against nonconsenting States may threaten their financial integrity A general federal power to authorize private suits for money damages would also strain States' ability to govern in accordance with their citizens' will, for judgment creditors compete with other important needs and worthwhile ends for access to the public fisc, necessitating difficult decisions involving the most sensitive and political of judgments.

²⁸ See *Seminole Tribe*, 517 U.S. at 58 (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), for proposition that Eleventh Amendment

B. Restrictions on Eleventh Amendment Immunity

Although the Court has construed the Eleventh Amendment as guarding states against money damages sought by private parties under federal law, it has not been willing to foreclose all remedies against state actors behaving in violation of federal law. The Court has attempted with inconsistent vigor to impose some restraints on the categories of cases barred by the Eleventh Amendment, holding that it does not apply to suits brought in federal court by the United States against a state,²⁹ to nonfederal actions brought in state court,³⁰ and most importantly, to suits seeking to enjoin state officials personally from continuing violations of federal law.³¹

1. Ex parte Young Doctrine

The utility of the last form of relief (commonly referred to as the *Ex parte Young* doctrine) is often limited, however. First, an equitable remedy under *Ex parte Young* is only granted prospectively;³² an award of money damages is thus not available.³³ Second, and more

“serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties” (internal quotation marks omitted)).

²⁹ See *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 643-46 (1892).

³⁰ See *Nevada v. Hall*, 440 U.S. 410, 418-21 (1979).

³¹ See *Ex parte Young*, 209 U.S. 123, 155-56 (1908). The Court also has allowed recovery for money damages from public office holders as individual defendants. See *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974).

³² See *Edelman v. Jordan*, 415 U.S. 651, 663-71, 678 (1974) (denying injunction requiring state to give backpayments of funds improperly withheld).

³³ See *Ford Motor Co. v. Department of Treasury*, 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”). This reluctance to grant retrospective damages is consistent with the concern for the state’s fisc articulated by the Court as one of the Eleventh Amendment’s aims. See *supra* note 27 and accompanying text. Nonetheless, the Eleventh Amendment does not forbid a federal court from granting an injunction merely because compliance with the court’s order will be costly for the state. See *Quern v. Jordan*, 440 U.S. 332, 349 (1979); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (stating that *Ex parte Young* “permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury”). In *Milliken*, a federal district court entered a desegregation order that required the expenditure of state funds to achieve compliance with remedial and compensatory educational schemes. See *id.* at 273-74. In addition to the expense of the relief sought, the fact that it was admittedly compensatory in nature did not, in the Court’s view, cause a violation of the *Edelman* rule (i.e., prohibiting retrospective relief). Instead, the Court characterized the educational plan in question as one that would “operate[] prospectively to bring about the delayed benefits of a unitary school system.” *Id.* at 290. *Milliken* serves as an example of how hazy the lines between injunctive relief and money damages, prospective relief and retrospective relief, can be. See Chemerinsky, *supra* note 20, § 7.5.2, at 418-20 (discussing distinction between prospective injunctive relief and retroactive money damages in context of Eleventh Amendment).

troubling, are the complications the Court's federalism decisions have brought to this area of the law in recent years.

In dismissing the petitioners' case in *Seminole Tribe* for lack of jurisdiction, for example, the majority held that a *Young*-type injunction against state officials was inappropriate because the statutory provision in question constituted "a detailed remedial scheme" on its own that obviated the need for equitable relief.³⁴ In *Idaho v. Coeur d'Alene Tribe*,³⁵ a five-justice majority again found the *Young* doctrine inapplicable.³⁶ Thus, while the rule of *Ex parte Young* survives as a method of preventing ongoing violations of federal law by state officials, the future vitality and flexibility of the doctrine are no longer secure.³⁷ In the bankruptcy context, where a trustee or debtor might

³⁴ See *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996). The Court explained rather hastily that a *Young* injunction would be impermissible because the statutory remedy was carefully limited, therefore suggesting that Congress did not intend relief under *Ex parte Young* to be available. See *id.* at 75 ("By contrast with [the Indian Gaming Regulatory Act's] quite modest set of sanctions, an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court.").

³⁵ 521 U.S. 261 (1997). The plaintiffs sought, among other things, to enjoin state officials from taking any action in violation of tribal land rights. See *id.* at 265.

³⁶ The Court was split on the reason why. Justice Kennedy, joined by Chief Justice Rehnquist, would have required a more stringent "balancing and accommodation of state interests" before allowing any *Young*-type suit to proceed. See *id.* at 278. Justice Kennedy's interpretation of *Ex parte Young* and its progeny included the claim that a "case-by-case approach to the *Young* doctrine has been evident from the start." *Id.* at 280. Even in the case of a standard request for prospective, injunctive relief in the face of an ongoing violation of federal law, Justice Kennedy would not grant relief if there were "special factors counselling hesitation." *Id.* (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971)). Factors included in this balance are: 1) the availability of a state forum, see *id.* at 271 ("Where there is no available state forum the *Young* rule has special significance."); *id.* at 275 ("Assuming the availability of a state forum with the authority and procedures adequate for the effective vindication of federal law, due process concerns would not be implicated by having state tribunals resolve federal-question cases."); 2) the "real affront to a State of allowing a suit to proceed," *id.* at 277; and 3) "the need to prevent violations of federal law," *id.* at 269. This type of balancing is perhaps more fairly said to resemble federal court abstention doctrine than traditional *Ex parte Young* doctrine. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

Justice O'Connor's approach in *Coeur d'Alene* rejected the "case-specific analysis," 521 U.S. at 293-94, of Justice Kennedy's opinion, but nonetheless prompted Justice Souter to comment in dissent 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." *Id.* at 298. In short, even a doctrine as fundamental as *Ex parte Young* has not proven immune from continuing limitations under the Court's current federalism jurisprudence.

³⁷ See Vicki C. Jackson, *Seminole Tribe*, the Eleventh Amendment, and the Potential Evisceration of *Ex Parte Young*, 72 N.Y.U. L. Rev. 495, 546 (1997) (noting that *Coeur d'Alene* exemplifies willingness of Court to narrow availability of *Young* injunctions). But see David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. Rev. 547, 550 (1997) (stating that *Seminole Tribe* Court's limitations on *Ex parte Young* will have very little effect on "most important cases" involving constitutional and not statutory claims against state officers).

face continuing violations of the automatic stay³⁸ by state officials, the refusal of state authorities to turn over property of the estate to the bankruptcy court,³⁹ or attempts by state agencies to collect debts previously discharged,⁴⁰ the unavailability of a *Young* injunction would be a significant handicap indeed.

2. Waiver

A further limitation on the Eleventh Amendment is the doctrine of waiver.⁴¹ The Supreme Court has recognized that a state may waive its Eleventh Amendment immunity by an explicit enactment.⁴² The test for an express waiver is quite strict, however. A state statute or constitutional provision must unequivocally specify the intention to subject the state to suit in federal court.⁴³

In the absence of an explicit waiver provision, the Court has recognized that a state's consent to be sued in federal court may be inferred from affirmative conduct.⁴⁴ This doctrine reached its outer limits in *Parden v. Terminal Railway*.⁴⁵ The *Parden* Court considered whether the operation of a state-owned railroad constituted consent to suit in federal court under the Federal Employers' Liability Act (FELA).⁴⁶ The Court interpreted the general language of FELA as

³⁸ For a description of the automatic stay, see *supra* note 9.

³⁹ At the filing of a petition for relief under the Bankruptcy Code, all of the debtor's property, wherever located, is placed in a "bankruptcy estate." See 11 U.S.C. § 541(a) (1994). The Code further requires that any "entity" in possession of property of the estate must deliver it to the trustee in bankruptcy. See *id.* § 542(a). The Code defines "entity" to include states and state agencies. See *id.* § 101(15), (27).

⁴⁰ See *infra* text accompanying notes 180-82.

⁴¹ Commentators and courts have sometimes used the terms "abrogation" and "waiver" interchangeably. Properly understood, however, "abrogation" refers to congressional power to eliminate state sovereign immunity. "Waiver" refers to some voluntary action by a sovereign that removes its immunity against suit. After *Seminole Tribe*, this distinction is important because the Court now has severely limited congressional powers of abrogation. See *infra* Part II.B.

⁴² See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (stating that "[a] State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program").

⁴³ See *id.* at 241 (noting that "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one"). The state must make its intent to waive clear by "the most express language or by such overwhelming implication from the text" that no other "reasonable construction" is possible. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)).

⁴⁴ See *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (holding that state waived immunity by its voluntary appearance as claimant in court); see also *Iowa College Student Aid Comm'n v. Koehler* (In re Koehler), 204 B.R. 210, 216 (Bankr. D. Minn. 1997) (collecting cases).

⁴⁵ 377 U.S. 184 (1964).

⁴⁶ See *id.* at 184.

signifying congressional intent to include states within the Act.⁴⁷ Therefore, the Court concluded, Congress had conditioned the right to operate a railroad in interstate commerce upon acceptance of suit in federal court; the state, by so operating a railroad, constructively accepted the conditions of the Act.⁴⁸

For a number of years, *Parden* was ambiguous precedent. First, the portion of the decision allowing constructive waiver to be found in the absence of unmistakably clear language was overruled explicitly.⁴⁹ Second, while it was generally thought of as a constructive waiver case, the Court subsequently cited *Parden* as a "firm foundation" for its decision in *Pennsylvania v. Union Gas Co.*,⁵⁰ which allowed Congress to abrogate the Eleventh Amendment when acting under its commerce powers.⁵¹

In light of the overruling of *Union Gas* by *Seminole Tribe* and the recent trend in the Supreme Court's jurisprudence toward greater restrictions on congressional power to overcome state sovereign immunity unilaterally,⁵² it was not a surprise when the final blow to *Parden*'s continuing validity fell in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.⁵³ The holding in *College Savings* makes clear that Congress's ability to deem any particular state action as constructively waiving sovereign immunity is now beyond the boundaries acceptable to the Court.⁵⁴ This is not to suggest that state actions may not be considered to amount to a waiver of sovereign immunity. The inquiry, however, is now independent of Congress's intent and focuses instead on whether a state's activities unequivocally express an intent to submit to federal court jurisdiction.⁵⁵

⁴⁷ See *id.* at 189-90.

⁴⁸ See *id.* at 192 (holding that "when [the state] began operation of an interstate railroad approximately 20 years after the enactment of the FELA, [it] necessarily consented to such suit as was authorized by that Act").

⁴⁹ See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987).

⁵⁰ 491 U.S. 1, 14 (1989), overruled by *Seminole Tribe v. Florida*, 517 U.S. 44, 63-72 (1996).

⁵¹ See *Union Gas*, 491 U.S. at 19-20. Justice Brennan, writing for the plurality in *Union Gas*, utilized a theory he had advanced earlier in *Parden*—that Congress could abrogate the states' sovereign immunity because "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." See *id.* at 14 (quoting *Parden*, 377 U.S. at 191).

⁵² See *infra* Part II.B.

⁵³ 119 S. Ct. 2219, 2226-29 (1999) ("We think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it.").

⁵⁴ See *id.* at 2228.

⁵⁵ See *id.*

3. Abrogation

Out of *Parden's* "constructive waiver" theory arose the principle that Congress may, by an express enactment, abrogate the sovereign immunity enjoyed by states under the Eleventh Amendment. During the same era in which it was retreating from *Parden*, the Court held that the Fourteenth Amendment allowed Congress to limit state sovereign immunity when acting pursuant to its powers under the Enforcement Clause of the Fourteenth Amendment.⁵⁶ Subsequent cases require a clear statement of congressional intent to abrogate under the Fourteenth Amendment.⁵⁷ The Court avoided reaching the issue of whether Congress possessed powers outside the Fourteenth Amendment to effect abrogation, using the clear statement rule to defeat every case to press the question.⁵⁸ When the question was squarely presented by *Pennsylvania v. Union Gas Co.*,⁵⁹ a plurality upheld abrogation pursuant to Congress's Article I powers.⁶⁰ That ruling would prove short-lived, lasting only seven years before being overturned by *Seminole Tribe*.⁶¹

Thus, the Supreme Court has announced three rules that now govern when states are amenable to suit in federal court. First, Congress may only abrogate the states' Eleventh Amendment immunity by a clear enactment pursuant to the Enforcement Clause of the Four-

⁵⁶ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (noting that "appropriate legislation" to enforce Fourteenth Amendment may provide for private suits against states that would be impermissible in other contexts (quoting U.S. Const. amend. XIV, § 5)). However, what constitutes "appropriate legislation" under the Enforcement Clause of the Fourteenth Amendment has not been construed broadly in the Eleventh Amendment context. See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2207-09 (1999) (finding that congressional attempt to abrogate immunity via Enforcement Clause was invalid without showing of unremediated state violations of constitutional rights); cf. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (limiting congressional power under Enforcement Clause to legislation that "deters or remedies constitutional violations" of rights as determined by Court); *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000).

⁵⁷ See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) (requiring language specifically subjecting states to private suit, not simply general authorization for suit in federal court); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (requiring, for effective clear statement, "unequivocal expression" of intent to abrogate immunity); *Quern v. Jordan*, 440 U.S. 332, 342-45 (1979) (finding no explicit clear intent to abrogate on face of statute).

⁵⁸ See, e.g., *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101, 104 (1989) (holding that clear statement rule had not been satisfied without reaching issue of validity of congressional abrogation under Bankruptcy Clause); *Dellmuth v. Muth*, 491 U.S. 223, 231-32 (1989) (holding that congressional intent to abrogate was not unequivocal, thus declining to find abrogation without deciding whether unmistakably clear abrogation would have been valid).

⁵⁹ 491 U.S. 1 (1989).

⁶⁰ See *id.* at 19-20.

⁶¹ See *infra* Part II.B.1.

teenth Amendment. Second, states may waive their immunity from suit, but only by an explicit showing that they have submitted themselves to federal court jurisdiction. And, third, the standard used to judge when a state has waived its immunity is independent of whether Congress "deems" a particular activity to waive a state's immunity constructively.

II

CONGRESSIONAL ATTEMPTS TO LIMIT SOVEREIGN IMMUNITY IN BANKRUPTCY

A. *Congressional Attempts to Abrogate Sovereign Immunity—11 U.S.C. § 106*

The Bankruptcy Reform Act of 1978⁶² attempted to treat the state and federal governments much like private parties in a bankruptcy case by abrogating sovereign immunity.⁶³ The confusing theories of constructive waiver proffered at the time by the Court's sovereign immunity jurisprudence suggest the difficulties Congress faced in enacting bankruptcy laws applicable to the states. The legislation first recommended to Congress in 1973 by the Commission on the Bankruptcy Laws of the United States simply stated that the proposed Act would apply to "the United States and to every department, agency, and instrumentality thereof, and to every state and every subdivision thereof."⁶⁴ This was thought to be in accord with cases like *Parden* allowing Congress wide latitude to make federal schemes applicable to the states.

When finally passed by Congress, the 1978 Act contained a more detailed three-part sovereign immunity provision, codified as 11

⁶² Pub. L. No. 95-598, 92 Stat. 2549 (amended 1994) (codified at 11 U.S.C.).

⁶³ See 11 U.S.C. § 106 (1978) (amended 1994); *In re NVR*, 206 B.R. 831, 836 n.10 (Bankr. E.D. Va. 1997) (reciting congressional efforts to treat states much like any other private party in bankruptcy).

⁶⁴ H.R. Doc. No. 93-137, pt. 2, at 10 (1973). The 1978 Act replaced the Bankruptcy Act of 1898, which had scant provisions detailing its applicability—or nonapplicability—to governmental entities. See S. Elizabeth Gibson, *Congressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity*, 69 *Am. Bankr. L.J.* 311, 311 nn.2-3 (1995). However, Senator George F. Hoar of Massachusetts, a sponsor of the 1898 Act, addressed the question of whether the law applied to municipal corporations, as was widely assumed. See Charles Warren, *Bankruptcy in United States History* 132, 142 (1935). Hoar stated that the bill would not apply to those entities because "they are agencies of sovereignty." *Id.* Unfortunately, that comment is of limited help in divining the effect of Eleventh Amendment immunity in bankruptcy under the 1898 Act because it was settled law by that time that the Amendment generally does not apply to political subdivisions of states, such as counties or municipalities. See *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). Instead, Hoar likely was responding to concerns about involuntary bankruptcy petitions against local governments.

U.S.C. § 106.⁶⁵ Subsection (a) provided that a governmental unit filing a proof of claim against a debtor's estate would be deemed to have waived its immunity with respect to that claim. In turn, a debtor could affirmatively recover for transactionally related claims against the government.⁶⁶ Subsection (b) stated that, for claims of the debtor against the government not transactionally related to the government's claims, a debtor would be entitled to a setoff against the government's claim.⁶⁷ Lastly, subsection (c) provided that, "notwithstanding any assertion of sovereign immunity," any part of the new Code containing "creditor," "entity," or "governmental unit" applied to governmental units and that a bankruptcy court's determination of an issue arising under those parts of the Code would be binding.⁶⁸

The floor managers of the bill explained the provision as a codification of case law allowing a bankruptcy court to determine the amount and dischargeability of a debtor's tax liability, even when an objecting governmental unit had not filed a proof of claim.⁶⁹ They also maintained that it "permits the bankruptcy court to bind governmental units on other matters as well," such as a trustee's assertion of avoiding powers to recover a preferential transfer.⁷⁰

The validity of § 106(c) was challenged in *Hoffman v. Connecticut Department of Income Maintenance*.⁷¹ A splintered Supreme Court held that § 106(c) did not overcome the State's Eleventh Amendment

⁶⁵ Section 106 of the 1978 Act read as follows:

Waiver of sovereign immunity

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

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

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

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

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

11 U.S.C. § 106 (1978) (amended 1994).

⁶⁶ See Gibson, *supra* note 64, at 315.

⁶⁷ See *id.* at 315-16. For a definition and discussion of setoff in bankruptcy, see *infra* note 160 and accompanying text.

⁶⁸ See 11 U.S.C. § 106(c) (1978) (amended 1994).

⁶⁹ See Gibson, *supra* note 64, at 315.

⁷⁰ See *id.* For a discussion of a trustee's avoiding powers, see *supra* note 8.

⁷¹ 492 U.S. 96 (1989).

immunity against private suits for money damages in federal court.⁷² But the plurality rested its decision—predictably—on the failure of Congress to make its intent to abrogate “unmistakably clear in the language of the statute.”⁷³ The Court therefore construed § 106 so that “a State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes,” but would not be subjected to monetary recovery.⁷⁴

In response to *Hoffman* and a similar decision by the Court pertaining to federal sovereign immunity,⁷⁵ § 106 was amended in 1994.⁷⁶ Congress added an explicit abrogation provision as a new subsection (a)⁷⁷ in place of former subsection (c) and reworded former subsections (a) and (b) (currently denoted (b) and (c)).⁷⁸ Amended subsection (b) also made it quite clear that a governmental unit would have to file a proof of claim in order for the waiver provision to be triggered.⁷⁹ The 1994 Amendments, while intended to conform to the Supreme Court’s decisions, were called into doubt only two years after their enactment.⁸⁰

⁷² See *id.* at 104.

⁷³ *Id.* at 101 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Although this “clear statement” rule was the basis of the plurality’s opinion, Justice Scalia, concurring in the judgment only, stated curtly that Congress has no power under the Bankruptcy Clause to abrogate the states’ Eleventh Amendment immunity. See *id.* at 105 (Scalia, J., concurring). Justice O’Connor expressed her agreement with Justice Scalia’s reasoning, but joined the plurality in a separate concurring opinion. See *id.* (O’Connor, J., concurring).

⁷⁴ See *id.* at 102 (citing *Neavear v. Schweiker*, 674 F.2d 1201, 1204 (7th Cir. 1982)).

⁷⁵ See *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

⁷⁶ See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 702(b)(1), 108 Stat. 4106, 4150 (codified in scattered sections of 11 U.S.C.).

⁷⁷ See *infra* note 96 for the text of amended § 106(a).

⁷⁸ The former § 106(b) underwent no material change in statutory language, but was recodified as § 106(c). See Gibson, *supra* note 64, at 327.

⁷⁹ See 11 U.S.C. § 106(b) (1994). When Congress modified current § 106(b), the Official Comments to the Bankruptcy Reform Act of 1994 described why the subsection was changed:

Section 106(b) is clarified by allowing a compulsory counterclaim to be asserted against a governmental unit only where such unit has [actually] filed a proof of claim in the bankruptcy case. This has the effect of overruling contrary case law.

140 Cong. Rec. H10,766 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks).

While the predecessor of § 106(c) was intended to apply only when a governmental unit had filed a proof of claim, no modifications were made to the statute in 1994; the plain language therefore does not require the filing of a proof of claim. See Gibson, *supra* note 64, at 327.

⁸⁰ See *infra* Part II.B.1.

B. Congressional Abrogation in Light of Seminole Tribe

1. The Seminole Tribe Decision

After the Supreme Court's ruling in *Seminole Tribe*,⁸¹ it is all but certain that the abrogation provision in § 106 is unconstitutional because it conflicts with the states' Eleventh Amendment protection from suits for money damages by private parties seeking to vindicate federal-law rights.

The *Seminole Tribe* case arose out of congressional efforts to regulate gambling on Indian tribal lands while allowing states to have a role in controlling gaming operations.⁸² The Indian Gaming Regulatory Act (IGRA)⁸³ established detailed procedures for negotiations between states and tribes wishing to enter into a compact regulating gambling on Indian reservations.⁸⁴ The statute explicitly abrogated any claim of sovereign immunity by a state. Pursuant to the IGRA, the Seminole Tribe of Florida and the State of Florida entered into negotiations to reach a compact governing the tribe's gaming operations. When the two sides were unable to agree on whether the tribe could conduct a particular type of gambling on its reservations, negotiations broke down.⁸⁵ In 1991, the tribe sued the state and governor in federal court under the IGRA, seeking a declaratory judgment that Florida was required to negotiate, an order requiring the state to enter into an agreement with the tribe within sixty days, and the appointment of a mediator.⁸⁶ The state responded that the IGRA was an unconstitutional exercise of congressional power, and raised an Eleventh Amendment objection to the jurisdiction of the federal court. The Eleventh Circuit agreed with Florida, holding that Congress

⁸¹ 517 U.S. 44 (1996).

⁸² The Supreme Court stripped states of the authority to regulate gambling on Indian reservations in 1987. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The Indian Gaming Regulatory Act (IGRA) was, ironically, an attempt by Congress to return limited power over Indian gaming to the states. See Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1, 3 (describing IGRA's purpose).

⁸³ Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168).

⁸⁴ These procedures included a requirement that states negotiate with tribes in good faith. See 25 U.S.C. § 2710(d)(3)(A). The IGRA provided further that:

The United States district courts shall have jurisdiction over (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.

Id. § 2710(d)(7)(A).

⁸⁵ See Meltzer, *supra* note 82, at 4.

⁸⁶ See *id.* at 4-5 (describing failure of negotiations between state and tribe and complaint by tribe in federal court).

lacked the power to abrogate a state's Eleventh Amendment immunity from suit in federal court.⁸⁷

The Supreme Court affirmed the court of appeals by a five to four vote. First, the Court reaffirmed that Congress may rightfully abrogate states' Eleventh Amendment immunity only when it (1) unequivocally expresses an intent to do so, and (2) acts pursuant to a valid constitutional power capable of overriding the states' immunity.⁸⁸ The Court then proceeded to bury *Pennsylvania v. Union Gas Co.*,⁸⁹ barely seven years old, which had recognized congressional power to abrogate the states' immunity via its Article I regulatory powers. Finally, the majority struck down the statute in question, enacted pursuant to the Indian Commerce Clause,⁹⁰ as unconstitutional.⁹¹ The Court summed up the broad import of its holding: "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."⁹²

Because the Bankruptcy Clause is an Article I provision granting Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States,"⁹³ the continuing validity of those parts of the Code intended to prevent states from shielding themselves from the jurisdiction of the bankruptcy court is doubtful.⁹⁴

2. Seminole Tribe and Abrogation Under § 106

Section 106(a) of the Code has garnered the most critical attention from courts and commentators, and, in the wake of *Seminole Tribe*, is almost assuredly invalid.⁹⁵ Like its predecessor, former

⁸⁷ See *Seminole Tribe v. Florida*, 11 F.3d 1016, 1025-28 (11th Cir. 1994), aff'd, 517 U.S. 44 (1996).

⁸⁸ See *Seminole Tribe*, 517 U.S. at 53; see also Meltzer, supra note 82, at 5-6.

⁸⁹ 491 U.S. 1 (1989).

⁹⁰ U.S. Const. art. I, § 8, cl. 3.

⁹¹ See *Seminole Tribe*, 517 U.S. at 47.

⁹² Id. at 72.

⁹³ U.S. Const. art. I, § 8, cl. 4.

⁹⁴ See, e.g., *Seminole Tribe*, 517 U.S. at 77 & n.1 (Stevens, J., dissenting) (suggesting that *Seminole Tribe* decision will limit power of Congress to provide relief against state violations of bankruptcy laws); S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 Am. Bankr. L.J. 195 (1996); 2 Collier on Bankruptcy ¶ 1.06.02[1][b][ii], at 106-9 (Lawrence P. King ed., 15th ed. 1999) (noting that, although certain avenues remain for obtaining jurisdiction over states, "the consequences of *Seminole Tribe* seem to overwhelm the established balance among creditors by placing state taxing authorities outside the jurisdiction of the bankruptcy court").

⁹⁵ See infra note 97 (collecting cases holding 106(a) unconstitutional after *Seminole Tribe*); Gibson, supra note 94, at 201 (arguing that sweeping rationale of *Seminole Tribe* invalidates § 106(a)).

§ 106(c), this subsection of the Code was enacted by Congress as an attempt to provide a blanket abrogation of the sovereign immunity of the federal government and of the states.⁹⁶ With few exceptions, however, after *Seminole Tribe* courts have found § 106(a) to be flatly unconstitutional.⁹⁷ Most have reasoned that although Congress expressed a clear intent to abrogate the sovereign immunity of the states, it could not do so using its powers to enact uniform bankruptcy laws.⁹⁸

⁹⁶ 11 U.S.C. § 106(a) (1994) reads:

Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section

. . . .

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

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

The Code definition of "governmental unit" is at 11 U.S.C. § 101(27).

⁹⁷ See *Sacred Heart Hosp. v. Pennsylvania Dep't of Pub. Welfare* (In re *Sacred Heart Hosp.*), 133 F.3d 237, 243 (3d Cir. 1997) (holding that Congress manifested requisite intent to abrogate, but had no authority under Bankruptcy Clause to do so); *Department of Transp. & Dev. v. PNL Asset Management Co.* (In re *Estate of Fernandez*), 123 F.3d 241, 243 (5th Cir. 1997), amended on denial of reh'g, 130 F.3d 1138 (5th Cir. 1997) (same); *Schlossberg v. Maryland* (In re *Creative Goldsmiths*), 119 F.3d 1140, 1145 (4th Cir. 1997) (same), cert. denied, 118 S. Ct. 1517 (1998); *United States Dep't of Educ. v. Rose* (In re *Rose*), 214 B.R. 372, 375-76 (Bankr. W.D. Mo. 1997) (finding that Congress "clearly and unequivocally" expressed intent to abrogate but did not act pursuant to valid exercise of power); *In re NVR*, 206 B.R. 831, 838 (Bankr. E.D. Va. 1997) ("Since Congress thus intended in § 106(a) to abrogate the states' Eleventh Amendment immunity, the holding in *Seminole* requires this court to find it unconstitutional."). The correctness of this reasoning is bolstered by the Supreme Court's summary disposition of a case in which the court of appeals supported abrogation under § 106(a) as a valid exercise of Congress's bankruptcy powers. See *Ohio Agric. Commodity Depositors Fund v. Mahern*, 517 U.S. 1130 (1996), vacating *In re Merchants Grain*, 59 F.3d 630 (7th Cir. 1995).

⁹⁸ Attempts to distinguish the part of the Commerce Clause at issue in *Seminole Tribe* and *Union Gas* from the Bankruptcy Clause are not well founded. First, the broad language of *Seminole Tribe* makes it difficult to argue that Congress may validly abrogate the Eleventh Amendment immunity of states using any Article I power. Second, even justices with opposing views about federalism have recognized the near identity of Congress's com-

Seminole Tribe still allows for a valid abrogation of Eleventh Amendment immunity via the Enforcement Clause of the Fourteenth Amendment.⁹⁹ But courts have not been receptive to the argument that § 106(a) was enacted pursuant to the Fourteenth Amendment, and with good reason.¹⁰⁰ First, the Supreme Court has declined to elevate the right to declare bankruptcy and receive a fresh start to a constitutional level.¹⁰¹ Indeed, it has bluntly stated “[t]here is no constitutional right to obtain a discharge of one’s debts in bankruptcy.”¹⁰² Thus, it is hardly a “privilege or immunity” within the cramped meaning traditionally given that clause of the Fourteenth Amendment by

merce and bankruptcy powers. See *Hoffman v. Connecticut Dep’t of Income Maintenance*, 492 U.S. 96, 105 (1989) (Scalia, J., concurring in part and dissenting in part) (“*Union Gas* involved Congress’s powers under the Commerce Clause, but there is no basis for treating its powers under the Bankruptcy Clause any differently.”); *id.* at 111 (Marshall, J., dissenting) (“I see no reason to treat Congress’s power under the Bankruptcy Clause any differently [than its powers under the Commerce Clause]. . . .”); see also *The Federalist* No. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961) (describing Bankruptcy Clause and Commerce Clause as “intimately connected”).

⁹⁹ See *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976) (recognizing power of Congress to lift Eleventh Amendment bar pursuant to Section 5 of Fourteenth Amendment)). For a critique of the Court’s reasons for distinguishing between Article I and the Fourteenth Amendment, see Meltzer, *supra* note 82, at 21-22 .

¹⁰⁰ See *Sacred Heart Hosp.*, 133 F.3d at 244 (finding no evidence to indicate that Congress acted pursuant to Section 5 of Fourteenth Amendment when enacting amended § 106(a)); *Estate of Fernandez*, 123 F.3d at 245 (same); *Creative Goldsmiths*, 119 F.3d at 1146-47 (same); *Verniero v. Kish* (In re *Kish*), 212 B.R. 808, 817 (D.N.J. 1997) (same); *Grabscheid v. Michigan Employment Sec. Comm.* (In re *C.J. Rogers, Inc.*), 212 B.R. 265, 272-73 (E.D. Mich. 1997) (same); *NVR*, 206 B.R. at 840 (“[T]his court is unable to discern some legislative purpose or factual predicate that supports . . . an exercise of the power granted Congress by § 5 of the Fourteenth Amendment.” (internal quotation marks omitted)); *Tri-City Turf Club, Inc. v. Kentucky Racing Comm’n* (In re *Tri-City Turf Club, Inc.*), 203 B.R. 617, 620 (Bankr. E.D. Ky. 1996) (finding “no hint that Congress had in its collective mind Fourteenth Amendment concerns when it enacted Section 106(a) of the Bankruptcy Code”). An exception is *Wyoming Dep’t of Transp. v. Straight* (In re *Straight*), 209 B.R. 540, 551 (D. Wy. 1997) (“Although [the provisions of the Bankruptcy Code] are enacted pursuant to Article I, they are enforceable through the Fourteenth Amendment.” (internal quotation marks omitted)). The facts of *Straight* may provide an explanation for the court’s willingness to risk invoking the Fourteenth Amendment. The debtor ran a business certified by the state as a Disadvantaged Business Enterprise (DBE). After the debtor filed for relief under chapter 13 of the Bankruptcy Code, however, the state department of transportation removed the DBE status from her business. The bankruptcy court ruled that the DOT’s action violated the automatic stay and antidiscrimination provisions of the Code, and held the agency in contempt. See *id.* at 543-44. The impermissible “discrimination” in the relevant section of the Code, however, is based on a person’s being a debtor, not a member of a protected class traditionally recognized under the Fourteenth Amendment. See 11 U.S.C. § 525. In any event, the Tenth Circuit upheld the judgment in *Straight* on alternative grounds. See In re *Straight*, 143 F.3d 1387, 1388-89 (10th Cir.), cert. denied, 119 S. Ct. 446 (1998).

¹⁰¹ See *NVR*, 206 B.R. at 842 (citing *United States v. Kras*, 409 U.S. 434 (1973)).

¹⁰² *Kras*, 409 U.S. at 446.

the Court.¹⁰³ Second, the denial of a federal forum is not a due process violation,¹⁰⁴ and the Fourteenth Amendment does not “‘assure uniformity or the absolute correctness of state court rulings.’”¹⁰⁵

3. Seminole Tribe and Waiver Under § 106

After *Seminole Tribe*, the continuing soundness of other parts of § 106 is also in doubt.¹⁰⁶ Section 106(b) provides that a state filing a proof of claim in a bankruptcy case “is deemed to have waived sovereign immunity” with respect to transactionally related claims against the government.¹⁰⁷ Section 106(c) allows setoffs against the government’s claim for permissive counterclaims by the debtor.¹⁰⁸

Some courts passing on the constitutionality of these subsections have found that they impermissibly dictate the conditions under which a state’s participation in the bankruptcy process waives the Eleventh Amendment bar.¹⁰⁹ This objection—to § 106(b) in particular—is also

¹⁰³ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1873) (listing, among others, right to travel to seat of government, right to access seaports, and privilege of writ of habeas corpus).

¹⁰⁴ See *Creative Goldsmiths*, 119 F.3d at 1146-47.

¹⁰⁵ *NVR*, 206 B.R. at 842 (quoting *Brosten v. Scheeler*, 360 F. Supp. 608, 613 (N.D. Ill. 1973)).

¹⁰⁶ See *Creative Goldsmiths*, 119 F.3d at 1147 (“While 11 U.S.C. § 106(b) may correctly describe those actions that, as a matter of constitutional law, constitute a state’s waiver of the Eleventh Amendment, it is nevertheless not within Congress’s power to abrogate such immunity by ‘deeming’ a waiver.”); *Grabscheid v. Michigan Employment Sec. Comm.* (In re *C.J. Rogers, Inc.*), 212 B.R. 265, 270-71 (E.D. Mich. 1997) (finding that waiver provisions of § 106(b) are “functional equivalent” of abrogation); *NVR*, 206 B.R. at 839 (finding both § 106(b) and (c) unconstitutional as “attempted abrogation of the states’ constitutional immunity”); see also *AER-Aerotron, Inc. v. Texas Dep’t of Transp.*, 104 F.3d 677, 681 (5th Cir. 1997) (finding that waiver provisions of § 106(b) are “functional equivalent” of abrogation).

¹⁰⁷ 11 U.S.C. § 106(b) (1994). The provision reads in full:

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

Id. For the Code definition of “governmental unit,” see *id.* § 101(27).

¹⁰⁸ See *id.* § 106(c). The provision reads in full:

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

Id. A counterclaim is compulsory if “it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim” and is permissive if it does not arise out of the same transaction or occurrence. Fed. R. Civ. P. 13(a), (b). Rule 13 applies to proceedings in bankruptcy as Fed. R. Bankr. P. 7013.

¹⁰⁹ See, e.g., *C.J. Rogers*, 212 B.R. at 271 (“Put simply, whether Congress says ‘abrogate’ or ‘deem to be waived’ it clearly intends abrogation because either phrase has the same substantive and practical effect, namely Congress alone is determining when States will be subject to suit.”); *NVR*, 206 B.R. at 839 (“It is simply impossible for Congress, through

rooted in the principle that Congress cannot dictate to the judiciary the standard to apply in Eleventh Amendment analysis.¹¹⁰ Instead, these courts have decided independently of the statutory language the scope of waiver when a state files a proof of claim, generally relying on caselaw regarding waiver to make that determination.¹¹¹

III

ELEVENTH AMENDMENT IMMUNITY IN BANKRUPTCY AFTER *SEMINOLE TRIBE*

This Part examines the scope of state sovereign immunity in bankruptcy now that *Seminole Tribe* has rendered congressional attempts at abrogation unconstitutional. Part III.A considers the constitutional standard for determining whether a state has waived its immunity by filing a proof of claim in bankruptcy. This section demonstrates that the necessary inquiry is not whether a counterclaim or other action by a debtor or trustee against a state is “transactionally related” to a state’s claim, but rather whether it is necessary to “adjudicate” the state’s claim. It then analyzes the waiver provisions of § 106 in light of the constitutional requirements for waiver and concludes that § 106(b) and (c) do not meet those requirements. Part III.B shows that, even if a state has not filed a proof of claim in bankruptcy, bankruptcy courts still retain the ability to discharge debts owed to states during the debtor’s main bankruptcy case, and, with some complications, after the debtor’s main bankruptcy case has been closed. Finally, Part III.C argues for congressional action to reduce the effect of state sovereign immunity in bankruptcy.

A. *Constitutional Standard for Waiver when a State Files a Proof of Claim*

Those courts holding the waiver provisions embodied in § 106(b) and (c) unconstitutional have taken the implications of *Seminole Tribe* and subsequent Eleventh Amendment decisions by the Supreme

these subsections, to have served as a proxy for the states and dictated those circumstances in which the states would ‘waive’ their prerogative under the Amendment.”).

¹¹⁰ See *NVR*, 206 B.R. at 839 (“Since ‘[i]t is emphatically the province and duty of the judicial department to say what the law is,’ *Marbury* . . . , Congress cannot dictate to the judiciary the standard for assessing whether a state has waived its Eleventh Amendment immunity. This begins and ends as a matter of constitutional interpretation.”); *AER-Aerotron, Inc.*, 104 F.3d at 683 (Niemeyer, J., concurring in judgment) (“[A] state’s actions waive immunity when such actions are independently sufficient under Eleventh Amendment doctrine. Thus, although 11 U.S.C. § 106 may restate the law of Eleventh Amendment waiver, it does not establish the law on the subject.”).

¹¹¹ See, e.g., *Creative Goldsmiths*, 119 F.3d at 1147 (finding that § 106(b) may describe state’s waiver of immunity but is nonetheless unconstitutional).

Court to heart. Congress cannot dictate the standard for waiver of the states' immunity. It is thus necessary to go outside of these statutory waiver provisions to examine the constitutional standard for determining the bankruptcy court's powers when a state files a proof of claim.

1. Gardner v. New Jersey

The most significant case involving waiver of state sovereign immunity in bankruptcy dates back to 1947, when the Supreme Court rejected an Eleventh Amendment challenge by a state filing proofs of claim against an estate. In *Gardner v. New Jersey*,¹¹² the state comptroller filed claims for taxes against a bankrupt railroad in reorganization court.¹¹³ The debtor and trustee filed objections to the claims and petitioned the court for adjudication of the state's tax claims.¹¹⁴ The state opposed the petition, arguing that it amounted to a prohibited suit against the state.¹¹⁵ The Court dismissed the state's reasoning with the following statement:

It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State.¹¹⁶

Despite its direct language, *Gardner* supports contrasting views regarding the effect of filing a proof of claim in bankruptcy on a state's Eleventh Amendment immunity. One view maintains that when the Court applied the principle of waiver to sovereign immunity "respecting the adjudication of a claim," it merely decided that a bankruptcy court may allow the claim, reject it, or reduce it on its merits.¹¹⁷ Beyond that narrow jeopardy, however, the state's immunity remains unaffected. A somewhat broader view of *Gardner* would allow the court latitude to hear any transactionally related counterclaim against the state.¹¹⁸

¹¹² 329 U.S. 565 (1947).

¹¹³ See *id.* at 570.

¹¹⁴ See *id.* at 570-71.

¹¹⁵ See *id.* at 571.

¹¹⁶ *Id.* at 573-74 (citation omitted).

¹¹⁷ See *id.* at 574 (noting that "[t]he whole process of proof, allowance, and distribution" in bankruptcy is not violation of immunity if state's "claim is rejected *in toto* [or] reduced in part").

¹¹⁸ The *Gardner* court noted approvingly that the powers granted by the Bankruptcy Act included "broad authority" to "compromise any controversy arising in the administra-

Most courts, whether or not they explicitly have upheld § 106(b), have adopted the latter reading—the same transaction or occurrence test. In *In re Creative Goldsmiths*,¹¹⁹ the Fourth Circuit, while rejecting the constitutionality of § 106(b),¹²⁰ held that states waive their immunity with respect to compulsory counterclaims when they file a proof of claim in bankruptcy.¹²¹ In *In re Straight*,¹²² the Tenth Circuit agreed with the substance of the *Creative Goldsmiths* ruling, but did not strike down § 106(b), holding instead that the statute merely codifies *Gardner*.¹²³

The Eleventh Circuit in *In re Burke*¹²⁴ declined to espouse the same view of *Gardner* as the courts in *Creative Goldsmiths* and *Straight* but rather extended the waiver triggered when a state files a proof of claim to include the bankruptcy court's enforcement of a discharge injunction and the automatic stay.¹²⁵ The next section will suggest that the test to determine what affirmative steps by a state constitute a waiver in the bankruptcy context should be more permissive than a rule allowing the bankruptcy court merely to accept, reject, or reduce a state's claim purely on its merits, but different from the same transaction or occurrence test. The standard that should be applied parallels that of the Eleventh Circuit in *In re Burke*.

tion of the estate upon such terms . . . deem[ed] for the best interest of the estate." *Id.* at 581 & n.12.

While the Supreme Court has not revisited the issue in *Gardner* in any detail, it has reaffirmed the case, albeit in an offhand manner. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2228 n.3 (1999) (stating that *Gardner* "stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts").

¹¹⁹ 119 F.3d 1140 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517 (1998).

¹²⁰ See *id.* at 1147 (finding that § 106(b) "amounts to language of abrogation").

¹²¹ See *id.* at 1148. The court did go on to find that the particular counterclaim at issue was not compulsory because it did not arise out of the same transaction or occurrence supporting the state's proof of claim. See *id.* at 1149; see also *Brewer v. New York State Dep't of Correctional Servs. (In re Value-Added Communications, Inc.)*, 224 B.R. 354, 358 n.1 (N.D. Tex. 1998) (following guidance of Fourth Circuit and using "same transaction or occurrence test").

¹²² 143 F.3d 1387 (10th Cir.), cert. denied, 119 S. Ct. 446 (1998).

¹²³ See *id.* at 1392 (noting that because § 106(b) was unsatisfied in *Creative Goldsmiths*, statement of its unconstitutionality is dictum). The Tenth Circuit's view of the breadth of *Gardner* is not different from the Fourth Circuit's, however.

¹²⁴ *Georgia v. Burke (In re Burke)*, 146 F.3d 1313 (11th Cir. 1998), cert. denied, 119 S. Ct. 2410 (1999).

¹²⁵ See *id.* at 1313, 1319-20 & n.13.

2. Gardner Does Not Mandate the Same Transaction or Occurrence Test

A liberal application of the same transaction or occurrence test¹²⁶—while favorable to the general policy of allowing the bankruptcy court wide jurisdiction in matters related to the estate¹²⁷—does not comport with decisions by courts in analogous proceedings. Finding a waiver of immunity to all claims arising out of the same transaction or occurrence as the state's claim is an inappropriate standard because it is simultaneously overinclusive and underinclusive.

Such a standard is overinclusive because, if taken seriously, it allows affirmative recovery against a state.¹²⁸ In traditional adversary proceedings, the general rule is that when a governmental entity prosecutes a civil action in federal court, it waives its immunity so that a defendant may raise all counterclaims arising from the same transaction or events as the government's claim.¹²⁹ However, this principle, known as recoupment, allows the defendant to recover only up to the amount of the initial claim by the governmental entity, by way of defeating its claim.¹³⁰ The doctrine does not allow for affirmative recovery against the government.¹³¹ Recoupment has not been accepted without debate, but courts have agreed with the rule and applied it against the states.¹³²

It would be strange to provide such a protective shield for government actors in state-initiated adversary proceedings, yet allow affirmative recovery against the state in bankruptcy. By way of example, if a state filed a proof of claim on a one hundred dollar contract debt, and the trustee in bankruptcy filed a successful, transac-

¹²⁶ See Fed. R. Civ. P. 13(a).

¹²⁷ See Teresa K. Goebel, Comment, Obtaining Jurisdiction over States in Bankruptcy Proceedings After *Seminole Tribe*, 65 U. Chi. L. Rev. 911, 926-29 (1998) (arguing for liberal application of same transaction or occurrence test in order to achieve efficiency goals of bankruptcy system).

¹²⁸ The constitutionality of affirmative recovery has been questioned by at least one court. See *Iowa College Student Aid Comm'n v. Koehler* (In re Koehler), 204 B.R. 210, 219 (Bankr. D. Minn. 1997); see also Gibson, *supra* note 64, at 346-47; Gibson, *supra* note 94, at 210-11.

¹²⁹ See *United States v. Johnson*, 853 F.2d 619, 621 (8th Cir. 1988) (explaining when consent is not required for counterclaims); *Koehler*, 204 B.R. at 220 (explaining when states waive immunity with respect to counterclaims); 3 James W. Moore et al., *Moore's Federal Practice* ¶ 13.50[4] (3d ed. 1999) (same).

¹³⁰ See, e.g., *Johnson*, 853 F.2d at 621.

¹³¹ See, e.g., *Koehler*, 204 B.R. at 220.

¹³² See, e.g., *In re Monongahela Rye Liquors, Inc.*, 141 F.2d 864, 869 (3d Cir. 1944) (applying recoupment doctrine to states); *United States v. Montrose Chem. Corp.*, 783 F. Supp. 1485, 1493 (C.D. Cal. 1992) (finding that recoupment does not violate Eleventh Amendment); see also Hart & Wechsler's *The Federal Courts and the Federal System* 1098 & n.3 (Richard H. Fallon et al. eds., 4th ed. 1996).

tionally related counterclaim of one thousand dollars for damages regarding the same contract, a reading of *Gardner* as a broad application of the same transaction or occurrence test would find a waiver of sovereign immunity, *and* a recovery of nine hundred dollars to the debtor's estate. Whatever the validity of the Supreme Court's belief that the Eleventh Amendment evinces a concern for state "dignity,"¹³³ such an allowance would not preserve the alternative concern for the state fisc also proclaimed by the Court.¹³⁴ In short, a broad reading of *Gardner* does not stay within the bounds of current Eleventh Amendment jurisprudence.

Furthermore, even if courts were to prohibit affirmative recovery against states for transactionally related counterclaims, concentrating only on whether the state's and debtor's claims are transactionally related proves underinclusive in the bankruptcy context. Simply put, the same transaction or occurrence test defeats the jurisdiction of the bankruptcy court in cases where bankruptcy policy and the language of *Gardner* dictate that it should properly be exercised.

*In re C.J. Rogers, Inc.*¹³⁵ illustrates this point. A trustee in bankruptcy brought an adversary proceeding to recover allegedly preferential tax payments made to a state agency.¹³⁶ Although the agency had filed a proof of claim for unrelated additional taxes, the court ruled that it could not hear the debtor's case against the state.¹³⁷ Resting its decision on "[t]he Eleventh Amendment and this Nation's bedrock principles of comity and federalism," the court found no consent by the state to the preference action because resolving the matter was "not part of adjudicating the proofs of claim" filed by the state.¹³⁸ If it were to hold otherwise, the court declared, an improper suit against the state for money damages would be permitted.¹³⁹

This understanding of "adjudicating" is faulty but understandable because of the court's reliance on the same transaction or occurrence test. The *C.J. Rogers* court placed too much emphasis on its conclusion that the taxes for which the state agency had filed a proof of claim were not transactionally related to the allegedly preferential payment the trustee sought to recover from the state agency.¹⁴⁰ In fact, the Code provides in no uncertain terms that a bankruptcy court must

¹³³ See *supra* note 28.

¹³⁴ See *supra* note 27.

¹³⁵ 212 B.R. 265 (E.D. Mich. 1997).

¹³⁶ See *id.* at 266-67 (explaining factual and procedural background of case).

¹³⁷ See *id.* at 276 ("[T]he Court must dismiss this appeal for lack of jurisdiction because [the state agency] is immune from this suit under the Eleventh Amendment.").

¹³⁸ *Id.*

¹³⁹ See *id.* at 274 (quoting *Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947)).

¹⁴⁰ See *id.* at 275 (citing *In re Rebel Coal Co.*, 944 F.2d 320 (6th Cir. 1991)).

disallow a proof of claim from "any entity from which property is recoverable."¹⁴¹ Therefore, it was necessary for the court to determine whether the payment to the state agency was a preferential transfer. If so, the state agency's additional proofs of claim should then have been disallowed.¹⁴² Adversary proceedings necessary to make such a determination would be proper to adjudicate the state's claim.

The main flaw in *C.J. Rogers* is its reliance on the same transaction or occurrence test. Even though the court correctly applied the test, it was led astray by conflating that test with the requirements of *Gardner*. *Gardner* does not demand such a test, and, in fact, the same transaction or occurrence test is inadequate to fulfill the grant of jurisdiction allowed to bankruptcy courts by the Supreme Court in *Gardner*.

3. Proper Application of the Gardner Standard

The Eleventh Circuit's decision in *In re Burke*¹⁴³ provides an attractive, nuanced guide to the proper contours of *Gardner*. *Burke* involved two cases consolidated on appeal. In one case, the debtors filed for relief under the Code.¹⁴⁴ The Georgia Department of Revenue filed a proof of claim for unpaid income taxes.¹⁴⁵ Subsequently, the Department of Revenue mailed the debtors several "Collection Notices" demanding repayment in violation of the automatic stay provisions of the Code.¹⁴⁶ In response, the debtors filed an adversary

¹⁴¹ 11 U.S.C. § 502(d) (1994). The Code includes governmental units in the definition of "entity." See id. § 101(15). An open question is whether, for purposes of waiver, state agencies should be treated as multiple entities or part of a single entity. If state agencies are treated as part of a single entity, the decision by one agency to violate federal law by retaining a voidable preference, for example, would impact the adjudication of another agency's proof of claim. This "unitary creditor" principle has been rejected by most courts, but may regain renewed prominence as debtors or trustees in bankruptcy attempt to obtain jurisdiction over states. See Patricia L. Barsalou & Scott A. Stengel, *Ex Parte Young: Relativity in Practice*, 72 Am. Bankr. L.J. 455, 469 n.74 (1998) (discussing persistent importance of unitary creditor principle in bankruptcy context).

¹⁴² This is not to say that the estate would be entitled to recover the preferential transfer from the state. That would have the effect of transforming the trustee's action into an impermissible suit against the state for money damages. Cf. *Green v. Mansour*, 474 U.S. 64, 73 (1985) (denying declaratory relief because effect of judgment would be same as "full-fledged award of damages"). Rather, the bankruptcy court would declare whether or not the pre-petition payments made to the state were preferential transfers and then allow or disallow the proofs of claim against the estate filed by the state.

¹⁴³ 146 F.3d 1313 (11th Cir. 1998), cert. denied, 119 S. Ct. 2410 (1999).

¹⁴⁴ See id. at 1316.

¹⁴⁵ See id.

¹⁴⁶ See id. Bankruptcy Code § 362(a) provides that a bankruptcy petition acts as a stay of:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding

proceeding against the State, seeking to enforce the stay and recover costs and attorneys' fees.¹⁴⁷ The court found the substance of the debtor's action to be a motion to enforce the bankruptcy court's automatic stay order.¹⁴⁸ In sum, "[e]nforcement of this order is merely the bankruptcy court's exercise of its jurisdiction over the State in the course of adjudicating the proof of claim filed by the State."¹⁴⁹ The court thus took an appropriate view of what actions are necessary to "adjudicate" the state's claim against the estate,¹⁵⁰ because the proceedings initiated by the debtor were necessary to preserve the bankruptcy court's ability to determine the validity of the state's claim.

In the second *Burke* case, after the debtor filed for relief under the Bankruptcy Code, the Georgia Department of Revenue entered a proof of claim against the estate for unpaid back-taxes.¹⁵¹ The bankruptcy court granted a general discharge to the debtor and closed the case.¹⁵² Three months later, however, the Department of Revenue began dunning the debtors for the unpaid taxes and threatened to garnish their wages and attach their property to secure payment.¹⁵³ The debtors reopened their bankruptcy case and filed an adversary proceeding against the state, alleging violations of the bankruptcy court's

against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; . . .

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; . . .

11 U.S.C. § 362(a) (1994).

Section 362 also provides that:

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Id. § 362(h).

¹⁴⁷ See *Burke*, 146 F.3d at 1316, 1319.

¹⁴⁸ See *id.* at 1319.

¹⁴⁹ *Id.*

¹⁵⁰ That is, the power to enforce the order was necessarily implicated by the court's power to adjudicate the state's proof of claim. Cf. *Hutto v. Finney*, 437 U.S. 678, 691 (1978) (upholding lower court's award of attorneys' fees as ancillary to federal court's power to impose injunctive relief).

¹⁵¹ See *Burke*, 146 F.3d at 1315.

¹⁵² See *id.*

¹⁵³ See *id.*

discharge injunction.¹⁵⁴ The state moved to dismiss, arguing that *Seminole Tribe* barred relief.¹⁵⁵

The court of appeals concluded that the bankruptcy court retained jurisdiction over the state for purposes of enforcing its adjudication of the state's claim as discharged.¹⁵⁶ This ruling has intuitive appeal and suggests the correct reading of *Gardner*. The *Gardner* Court stated that a bankruptcy court has jurisdiction "respecting the adjudication" of a claim filed by a state.¹⁵⁷ Enforcing the bankruptcy court's disposition of that claim by discharge fits within *Gardner's* teaching.¹⁵⁸

4. *Validity of Waiver Provisions of § 106 Under Gardner*

What does this analysis of *Gardner* indicate about the constitutional status of § 106(b) and (c)? Reading the two subsections together, it is doubtful that either could withstand attack. By relying exclusively on the same transaction or occurrence test, § 106(b) is subject to the criticisms described above.¹⁵⁹ First, it openly contemplates affirmative recovery against a state for transactionally related counterclaims because § 106(c) addresses the issue of setoff separately.¹⁶⁰ Second, the language of the statute might offend a Court uncomfortable with "deemed" waivers of sovereign immunity—that is, congressional determinations of what affirmative activities by states will automatically submit them to the jurisdiction of a federal court.¹⁶¹

¹⁵⁴ See *id.* Section 524(a) of the Bankruptcy Code provides that a discharge:

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

11 U.S.C. § 524(a)(2) (1994).

¹⁵⁵ See *Burke*, 146 F.3d at 1315.

¹⁵⁶ See *id.* at 1319.

¹⁵⁷ 329 U.S. 565, 574 (1947).

¹⁵⁸ See *United States Dep't of Educ. v. Rose (In re Rose)*, 215 B.R. 755, 761 (Bankr. W.D. Mo. 1997) (holding that by filing proof of claim, state agency had waived sovereign immunity against adversary action seeking to declare debt dischargeable).

¹⁵⁹ See *supra* Part II.C.2.

¹⁶⁰ Like recoupment, setoff (or offset) can be used to reduce a governmental unit's claim, but cannot grant an affirmative recovery. See *Ossen v. Connecticut (In re Charter Oak)*, 203 B.R. 17, 24 (Bankr. D. Conn. 1996) (explaining setoff). Unlike recoupment, however, setoff does not require a counterclaim to be transactionally related—that is, the counterclaim used to offset the governmental unit's claim is permissive. See *id.* No right of setoff is created by the Bankruptcy Code; rather, the Code preserves any right of setoff created by non-bankruptcy law. See *id.* (quoting *Newberry Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1398 (9th Cir. 1996)).

¹⁶¹ See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2228 (1999) (stating:

Section 106(c) is also constitutionally suspect even though its language is less provocative. The most obvious infirmity exhibited by this subsection is that it can be triggered even though a state has *not* filed a proof of claim.¹⁶² While there is ample evidence that Congress intended both subsections (b) and (c) to be triggered only by the filing of a proof of claim,¹⁶³ the statutory language of § 106(c) was not amended in 1994 to make that clear, as it was for § 106(b).¹⁶⁴

If § 106(c) were amended to state explicitly that it is not applicable unless a governmental unit files a proof of claim, however, it would likely survive constitutional scrutiny under the *Gardner* standard. Significantly, the subsection does mandate the same transaction or occurrence test and does not allow an affirmative recovery against a state.¹⁶⁵ While some commentators have questioned whether allowing setoff for claims not transactionally related offends the Constitution,¹⁶⁶ this objection is not fatal. The *Gardner* Court specifically allowed a bankruptcy court to “compromise” claims¹⁶⁷ and to pronounce a government-filed claim “satisfied in some way other than payment in cash.”¹⁶⁸ Since setoff is based on the principle that “entities that owe each other money [may] apply their mutual debts against each other,”¹⁶⁹ there is no sound reason why satisfaction of the state’s

There is a fundamental difference between a State’s expressing unequivocally that it waives its immunity, and Congress’s expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that the State made an “altogether voluntary” decision to waive its immunity.;

see also supra note 110 and accompanying text (discussing judicial reluctance to allow Congress to dictate standard for assessing Eleventh Amendment waiver).

¹⁶² See 11 U.S.C. § 106(c) (1994).

¹⁶³ See *Iowa College Student Aid Comm’n v. Koehler* (In re Koehler), 204 B.R. 210, 219 (Bankr. D. Minn. 1997) (citing H.R. Rep. No. 95-595, at 317 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6274).

¹⁶⁴ See supra note 79. The predecessor of § 106(c) was intended to apply only when a governmental unit had filed a proof of claim, but no modifications were made to the subsection in 1994 to make this requirement clear. See Gibson, supra note 64, at 312-17, 327-29 (detailing legislative history of § 106(c) and its predecessor). Given the Supreme Court’s increasing reliance on clear statement rules in Eleventh Amendment cases, see supra note 57 and accompanying text, and decreasing reliance on legislative history in general, see William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation* 624 (2d ed. 1995), it would be difficult to persuade the Court that § 106(c) requires a proof of claim by a governmental unit.

¹⁶⁵ See 11 U.S.C. § 106(c).

¹⁶⁶ See Gibson, supra note 64, at 346-47; Gibson, supra note 94, at 210-11.

¹⁶⁷ See 329 U.S. 565, 582 (1947).

¹⁶⁸ *Id.* at 574.

¹⁶⁹ *Ossen v. Connecticut* (In re Charter Oak), 203 B.R. 17, 24 (Bankr. D. Conn. 1996) (quoting *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995)).

claim cannot be accomplished by applying the debtor's claim against it. The fact that the mutual debts are not transactionally related does not change this analysis.

*B. Eleventh Amendment Immunity When a State
Has Not Filed a Proof of Claim*

*1. Determining Dischargeability of a Debt Owed to a State
During the Debtor's Main Bankruptcy Case*

If a state has not filed a proof of claim against the bankruptcy estate, the ability of the bankruptcy court to carry out its powers under the Code is limited. In fact, the only power the court unquestionably retains is its ability to discharge a debt owed to a governmental unit.

Emboldened after *Seminole Tribe*, states have attempted to object to bankruptcy court discharge orders when states have not filed proofs of claim as a violation of the Eleventh Amendment; courts rightfully have rejected their arguments, however.¹⁷⁰ As a threshold matter, a bankruptcy case is not an adversary proceeding.¹⁷¹ Instead, a debtor submits her assets to the equitable power of the bankruptcy court to be liquidated for the benefit of creditors or to be reorganized.¹⁷² The court's powers to modify the rights of creditors—even those who choose not to participate by filing a proof of claim—arises from its jurisdiction over the debtor and the estate, not from jurisdiction over the state or other creditors.¹⁷³ While a state's legal rights may be affected by a bankruptcy proceeding, it is not "hauled into federal court against its will."¹⁷⁴

However, discharging a debt owed to a state restrains the state from collecting that debt.¹⁷⁵ Admittedly, a state is given something of a Hobson's choice: either subject itself to the jurisdiction of the court by filing a proof of claim, or refuse to file a proof of claim and lose the

¹⁷⁰ See *Texas v. Walker*, 142 F.3d 813, 819 (5th Cir. 1998) (rejecting argument that Eleventh Amendment barred bankruptcy court from discharging debt); *In re Barrett Refining Corp.*, 221 B.R. 795, 803 (Bankr. W.D. Okla. 1998) (deciding that discharge of debt is not "suit" within meaning of Eleventh Amendment).

¹⁷¹ See *Barrett Refining Corp.*, 221 B.R. at 803. Of course, there are adversary proceedings within a bankruptcy case. See 28 U.S.C. § 1334(b) (1994); Fed. R. Bankr. P. 7001. These usually involve actions to recover property of the estate or to determine the value of property. See *Barrett Refining Corp.*, 221 B.R. at 803.

¹⁷² See *Walker*, 142 F.3d at 822 (explaining nature of bankruptcy case).

¹⁷³ See *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 787 (4th Cir. 1997).

¹⁷⁴ *Walker*, 142 F.3d at 822.

¹⁷⁵ See 11 U.S.C. § 524(a)(2) (providing that discharge operates as injunction against attempts to collect on debt).

ability to collect on its debt.¹⁷⁶ Given that the Supreme Court has stated that the Eleventh Amendment exists in part “to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties,”¹⁷⁷ it might be argued that the discharge provisions of the Code are pure effrontery in light of the states’ sovereign immunity.

This argument is feeble. As one court stated in rejecting it, “a waiver of a constitutional right [does not lack] validity simply because it is the outcome of a ‘no-win’ situation.”¹⁷⁸ Furthermore, the Supreme Court has held that conditioning a state’s participation in a bankruptcy case on the filing of a proof of claim is not unconstitutional.¹⁷⁹

Even though a discharge order where a state has not filed a proof of claim does not offend the Eleventh Amendment, a debtor may face difficulty enforcing it. If a state attempts to collect on the discharged debt, the bankruptcy court cannot issue sanctions for violation of the discharge, since the state did not file a proof of claim, and sanctions could not fairly be said to relate to “adjudicating” a nonexistent claim.¹⁸⁰ Instead, the debtor may only seek an injunction against state officials under *Ex parte Young*.¹⁸¹ If the state has already seized the debtor’s funds, however, no relief can be obtained in federal court.¹⁸²

2. *Determining Dischargeability of a Debt Owed to a State After the Close of a Bankruptcy Case*

In some situations, a debtor may seek to have a debt declared discharged after the close of her bankruptcy case. The availability of relief in these cases will depend, in large part, on the nature of the proceedings required to determine dischargeability. If the debtor

¹⁷⁶ See *Walker*, 142 F.3d at 821-22 (describing state’s difficult position). This choice only appears unfair if one views the Eleventh Amendment as a “trump” that entitles states to victory in every conceivable legal fact pattern and not a “shield” that protects states from being subjected to suits for money damages without their consent.

¹⁷⁷ *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

¹⁷⁸ *O’Brien v. Vermont* (In re *O’Brien*), 216 B.R. 731, 738 (Bankr. D. Vt. 1998) (quoting *WJM, Inc. v. Massachusetts Dep’t of Pub. Welfare*, 840 F.2d 996, 1002-03 (1st Cir. 1988)).

¹⁷⁹ See *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933) (“If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.”); see also *Virginia v. Collins* (In re *Collins*), 173 F.3d 924, 930 (4th Cir. 1999); *Walker*, 142 F.3d at 822.

¹⁸⁰ See *Franchise Tax Bd. v. Lapin* (In re *Lapin*), 226 B.R. 637, 645-46 (B.A.P. 9th Cir. 1998).

¹⁸¹ See *supra* Part I.B.1.

¹⁸² The *Young* doctrine does not permit retrospective recovery. See *supra* notes 32-33 and accompanying text.

need only reopen her bankruptcy case, courts retain the power to discharge the debt just as they would in the debtor's main bankruptcy case. If adversary proceedings are required (as called for by certain portions of the Code), however, relief is not as easily obtained.

The debtor in *In re Collins*,¹⁸³ for example, filed for bankruptcy and was released "from all dischargeable debts."¹⁸⁴ More than four years later, the state—which had not filed a proof of claim in the debtor's main bankruptcy case—attempted to collect on a \$37,000 debt the debtor claimed had been discharged. When the debtor sought to reopen his bankruptcy case to determine whether or not the debt owed to the state had been discharged, the state objected that its Eleventh Amendment immunity stripped the bankruptcy court of jurisdiction.¹⁸⁵ The Fourth Circuit disagreed, holding that, because the debtor's motion to reopen his case was not a suit against the state, the state was not required to appear in federal court or be served with mandatory process.¹⁸⁶ The court in *Collins* effectively treated the debtor's motion to reopen his bankruptcy case in order to determine the validity of the state's debt as if the determination had been made explicitly in the debtor's main case.

Further complicating the ability of a debtor to secure a fresh start¹⁸⁷ are Code provisions which exclude certain debts from discharge.¹⁸⁸ The Code provision excluding some educational debts is an example.¹⁸⁹ Unlike other situations in which a debtor may simply move to reopen a bankruptcy proceeding to determine the dis-

¹⁸³ 173 F.3d 924 (4th Cir. 1999).

¹⁸⁴ *Id.* at 926.

¹⁸⁵ *See id.*

¹⁸⁶ *See id.* at 929.

¹⁸⁷ *See supra* note 5 for a description of the fresh start in bankruptcy.

¹⁸⁸ *See* 11 U.S.C. § 523 (1994). Among the debts considered nondischargeable under § 523 are certain tax liabilities, fines and penalties owed to a governmental unit, educational loans, and some consumer debts. *See id.*

¹⁸⁹ Section 523(a) prevents discharge:

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless—

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

Id. § 523(a)(8). Other nondischargeable debts include penalties owed to states. *See id.* § 523(a)(7). Section 523 lists other exceptions to discharge. *See id.* § 523.

chargeability of a debt owed to a state, this class of debts must be discharged in adversary proceedings.

In the case of Jennifer Rose that began this Note,¹⁹⁰ the bankruptcy court decided that it did not have jurisdiction to hear Rose's complaint,¹⁹¹ since a declaratory judgment to determine dischargeability when the state had not filed a proof of claim would be an impermissible suit against the state.¹⁹² Because the Code requires that an adversary proceeding be filed to determine the dischargeability of debts like those in *Rose*,¹⁹³ some debtors worthy of a fresh start will be denied relief from debts owed to a state agency that has not filed a proof of claim.

The obvious method for obtaining a determination of dischargeability in such cases—by seeking injunctive relief under *Ex parte Young*—is not unquestionably available.¹⁹⁴ In fact, the Code provision governing declarations of dischargeability at issue in *Rose* is redolent of *Seminole Tribe*.¹⁹⁵ As a general matter, the Code shows a high level of solicitude toward states by limiting the relief available when a court acts pursuant to § 106.¹⁹⁶ Given the Court's reasoning in *Seminole Tribe*, would it be acceptable to unleash "the full remedial powers of a federal court"¹⁹⁷ against a state official? Would that make

¹⁹⁰ See supra notes 1-4 and accompanying text.

¹⁹¹ See United States Dep't of Educ. v. Rose (In re Rose), 214 B.R. 372, 378 (Bankr. W.D. Mo. 1997).

¹⁹² The Supreme Court has found declaratory judgments to be equivalent to adversary proceedings barred by the Eleventh Amendment. See *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Although the distinction between the declaratory judgment in *Edelman*, which sought a determination of previous actions by the state, and a declaratory judgment in bankruptcy seeking a determination that a debt should be discharged seems sufficient to allow the latter form of relief as prospective, courts have not been willing to grant declaratory judgments against states in order to discharge debts post-bankruptcy. Instead, the fact that the Code considers declaratory judgments in bankruptcy "adversary proceedings" has been sufficient to convince courts that such actions should be dismissed as impermissible suits against states. See, e.g., In re Schmitt, 220 B.R. 68, 69 (Bankr. W.D. Mo. 1998) (deeming action to declare debts discharged "adversary proceeding").

¹⁹³ See Fed. R. Bankr. P. 7001(6).

¹⁹⁴ See supra Part I.B.1. The limitations on *Young* injunctions are especially important in cases involving the vindication of statutory, as opposed to constitutional, rights. See Currie, supra note 37, at 551 (noting that "*Seminole Tribe* may well preclude the use of *Ex parte Young* in . . . cases involving statutory rights").

¹⁹⁵ See supra notes 83-85 and accompanying text (describing statute at issue in *Seminole Tribe*).

¹⁹⁶ See, e.g., 11 U.S.C. § 106(a)(3) (1994). In particular, contempt sanctions are not mentioned and no award of punitive damages is allowed under any section made applicable to a governmental unit by § 106, and any award for costs or fees must be consistent with the limitations of 28 U.S.C. § 2412(d)(2)(A), which applies to the federal government. Section 523, the Code provision dealt with in *Rose*, is made applicable to governmental units by § 106. See id. § 106(a)(1).

¹⁹⁷ 517 U.S. at 75.

direct enforcement against the state under § 106 “superfluous?”¹⁹⁸ Why would the Code impose limitations on adversary proceedings against state actors if relief under *Ex parte Young* were contemplated as being available?

These questions expose the flourishes used by the Court—and perhaps logical inconsistency—in *Seminole Tribe*, but do not seriously undermine the applicability of *Young*-type proceedings to obtain a discharge. The Court found the law under attack in *Seminole Tribe* to be a *detailed* remedial scheme for the enforcement against a state of a statutorily created right.¹⁹⁹ A general Code provision preventing federal courts from awarding punitive damages against states cannot be characterized in that way; in fact, the same section disclaims the creation of “any substantive claim for relief or cause of action not otherwise existing under this title.”²⁰⁰ More pointedly, the Code has only two requirements for obtaining a discharge under the provision at issue in cases like *Rose*.²⁰¹ Neither could be characterized as intricate or detailed. Furthermore, there is no other mechanism to determine the dischargeability of a student debt or similarly nondischargeable debt owed to a state that is not barred by the Eleventh Amendment.²⁰²

The real difficulty with a post-bankruptcy *Young* injunction against a state attempting to collect a nondischarged debt is distinguishing this relief from an impermissible adversary action seeking a declaratory judgment of dischargeability.²⁰³ Because a court would not be construing or enforcing a prior discharge order,²⁰⁴ a *Young* proceeding would litigate the same issues in the same manner as a declaratory judgment case.

However, even courts that have dismissed declaratory judgment cases on Eleventh Amendment grounds have been careful to distinguish a *Young* proceeding. A determination of dischargeability, one court has noted, would be *res judicata* in a later proceeding to recover

¹⁹⁸ *Id.*

¹⁹⁹ See *id.* at 74 (describing “intricate procedures” in statutory provision).

²⁰⁰ § 106(a)(5).

²⁰¹ The first requirement is that the loan became due more than seven years before the filing of a bankruptcy petition. The second is that repayment would impose an undue hardship on the debtor or her dependents. See *Schmitt v. Missouri W. State College* (In re *Schmitt*), 220 B.R. 68, 73 (Bankr. W.D. Mo. 1998) (citing § 523(a)(8)(A), (B)).

²⁰² See *id.* (describing lack of other method to determine dischargeability).

²⁰³ See *Mitchell v. California Franchise Tax Bd.* (In re *Mitchell*), 222 B.R. 877, 884 (B.A.P. 9th Cir. 1998) (collecting cases applying Eleventh Amendment to suits for declaratory relief).

²⁰⁴ When a state attempts to collect a debt previously discharged, a debtor need only prove that a discharge was granted and that the state is continuing efforts to collect on the debt. § 524(a)(2), (3).

damages against the state.²⁰⁵ But the same court explicitly noted the fact that the debtor in the case had named state agencies and not state officials, thus preventing a *Young*-type injunction.²⁰⁶ Other courts have similarly dismissed complaints to declare a debt dischargeable while allowing the debtors to amend their complaints to name an appropriate state official.²⁰⁷ Thus, it appears that courts are willing to determine dischargeability in adversary proceedings so long as pleading formalities are met.²⁰⁸

C. Congressional Action to Reduce the Effect of Sovereign Immunity in Bankruptcy

1. Necessity of Congressional Action

Responding to Justice Stevens's warnings about the effect of their decision on federal court jurisdiction in bankruptcy,²⁰⁹ the *Seminole Tribe* Court asserted that other methods of assuring the states' compliance with federal law were available: a suit against a state by the federal government; a suit under the *Young* doctrine; and Supreme Court review of state court decisions under the Supremacy Clause. The first method is of dubious practicality in bankruptcy.²¹⁰ The limitations of

²⁰⁵ See *Mitchell*, 222 B.R. at 885.

²⁰⁶ See *id.* at 881 n.4.

²⁰⁷ See *Neary v. Pennsylvania* (In re *Neary*), 220 B.R. 864, 870 (Bankr. E.D. Pa. 1998); *In re Morrell*, 218 B.R. 87, 92 (Bankr. C.D. Cal. 1997); see also *Schmitt*, 220 B.R. at 74 (discussing propriety of *Young* action).

²⁰⁸ The willingness of courts to allow plaintiffs to dismiss complaints without prejudice so that the proper state officials may be substituted as defendants exposes the tendency of courts to view *Ex parte Young* as a mere fiction. Cf. *Kenneth Culp Davis, Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435, 437 (1962) (criticizing *Young* doctrine for creating fictional distinction between state and officers). This willingness does not mean that the use of a *Young* injunction by plaintiffs seeking post-bankruptcy discharges is invalid, however. Although the results of a *Young* injunction in these cases is identical to a declaratory judgment against the state itself, *Ex parte Young* recognizes the distinction between a state and its officer much as the common law distinguishes between a principal and its agent. See *Chemerinsky*, *supra* note 20, § 7.5.1, at 414. Furthermore, attacking *Ex parte Young* as purely fictitious would undermine an essential method of ensuring state compliance with federal law. See *id.* (noting that commentators have regarded doctrine of *Ex parte Young* as "indispensable" to constitutional government).

²⁰⁹ See *Seminole Tribe*, 517 U.S. at 77-78 & n.1 (Stevens, J., dissenting) ("[T]he majority's conclusion that the Eleventh Amendment shields States from being sued . . . in federal court suggests that persons harmed by state violations of federal copyright, bankruptcy, and antitrust laws have no remedy.").

²¹⁰ It would be logistically impossible for the United States government to sue states on behalf of debtors in every case in which a violation of the Code was alleged. A suit by a debtor in the name of the United States, known as a *qui tam* action, is a possible way to overcome this difficulty. The Supreme Court has recently agreed to review the constitutionality of *qui tam* suits against unconsenting states. See *United States ex rel. Stevens v.*

the second were discussed earlier.²¹¹ And an elementary analysis of the third reveals its flaws in the bankruptcy context.

Pursuing an action against states in state courts is a losing proposition. One commentator has noted that no decision by the Supreme Court unambiguously supports the proposition that a state may not invoke sovereign immunity to bar a federal law suit against it in its own courts.²¹² Furthermore, the Court has never adopted the theory that the Eleventh Amendment merely acts as a forum-selection clause for states.²¹³ And, in any event, the latest round of federalism cases appears to foreclose this option.²¹⁴

Even if states permitted federal-question suits against them in their own courts,²¹⁵ the aims of bankruptcy policy would not be satisfied. Like any judicial proceeding, a bankruptcy case strives to balance the concerns of fairness and efficiency.²¹⁶ The Code attempts to treat similarly situated creditors alike;²¹⁷ it also attempts to give debtors protection from their creditors in order to achieve a fresh start.²¹⁸ On the other hand, a major objective of national bankruptcy legislation is to preserve the estate by resolving as many issues as possible in one forum.²¹⁹ Multiple proceedings in multiple courts serve only to

Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998), cert. granted, 119 S. Ct. 2391 (1999).

²¹¹ See supra Part I.B.1.; notes 180-82 and accompanying text.

²¹² See Meltzer, supra note 82, at 57-58. Meltzer notes that many cases purporting to support a federal-law claim against a state in state court can be easily distinguished. Some were suits against state officials or municipalities, not states. See *id.* at 58. Others were based on discrimination against federal causes of action. See *id.* Still others only involved prospective relief. Meltzer also notes that the *Seminole Tribe* Court stated that it "is empowered to review a question of federal law arising from a state-court decision *where a State has consented to suit.*" *Id.* (alterations in original) (quoting *Seminole Tribe*, 517 U.S. at 71 n.14).

²¹³ That is, that the Amendment prevents a state from having to defend against private suits in federal court, not from having to defend against private suits in its own courts. See Vázquez, supra note 20, at 1700-03, 1708-14 (discussing "forum-allocation" interpretation of Amendment and shift away from this approach in *Seminole Tribe*).

²¹⁴ See *Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999) (holding that state is not required to hear federal-law suit against it in its own courts).

²¹⁵ Presumably, this could happen if states allowed bankruptcy-related claims against them to be heard in their own courts by legislation analogous to tort-claims statutes in various states.

²¹⁶ Fairness ensures that the debtor and all its creditors are equitably represented in deciding the fate of the debtor's assets. Efficiency ensures that the bankruptcy proceedings themselves do not dissipate the debtor's assets, thus hampering reorganization or reducing the creditors' recovery if reorganization is not possible.

²¹⁷ See, e.g., 11 U.S.C. § 1122 (1994) (requiring that "substantially similar" claims be treated similarly). This concern is also embodied in the "absolute priority" rule in chapter 11. See *id.* § 1129(b)(2)(B)(ii), (C)(ii) (allowing confirmation of debtor's reorganization plan only if no junior creditor is paid before more senior creditor).

²¹⁸ See supra note 5.

²¹⁹ See *Gardner v. New Jersey*, 329 U.S. 565, 577 (1947).

dissipate the bankrupt's property through administrative costs and attorneys' fees.

Unlike other situations in which the pervasive jurisdiction of the bankruptcy courts has been questioned,²²⁰ sovereign immunity does not present a trade-off between fairness and efficiency concerns.²²¹ In fact, both concerns strongly militate against limiting the powers of the bankruptcy court through vigorous application of the Eleventh Amendment by states. By allowing a state to remain beyond the grasp of the federal courts, sovereign immunity effectively renders it a supercreditor at the expense of other creditors and the debtor. And even if states could be pursued in their own courts, the time and expense of duplicative state-court litigation would negatively affect the bankrupt estate.²²² This is equally true for bankruptcy cases involving large corporations as for cases involving individual debtors.²²³

The peculiar history of bankruptcy further illustrates the importance of efficiency concerns. The first century of American independence saw at least three Bankruptcy Acts either falter in Congress or

²²⁰ See, e.g., *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989) (holding that persons who have not submitted proofs of claim in bankruptcy are entitled to jury trial); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (invalidating jurisdictional grant by Congress to bankruptcy courts as impermissible for non-Article III judges).

²²¹ Some commentators maintain that bankruptcy law also works to protect parties other than debtors and creditors, such as a local community affected by a failed business. See Alan Schwartz, *Contracting for Bankruptcy Systems*, in *The Fall and Rise of Freedom of Contract* 281, 282-83 (F.H. Buckley ed., 1999) (describing debate over whether goals of bankruptcy system include protecting interests of parties that do not hold contract-based claims against insolvent firm). It might be argued that sovereign immunity in bankruptcy is in keeping with a concern for these "other constituencies." For example, a state tax agency's ability to retain a tax payment made while a debtor company was insolvent (which would be considered a voidable transfer) guards resources that can be used to soften the blow to the local community of that company's bankruptcy. Even if bankruptcy law should protect these community interests, however, sovereign immunity is a crude tool with which to further this goal because of the potential inefficiencies it creates. It would be more sensible to introduce the interests of other constituencies into the single forum of a federal bankruptcy court than to dissipate the remaining value of a debtor's estate through wasteful litigation in numerous state courts.

²²² In bankruptcy cases seeking liquidation, multiple proceedings reduce the amount of property available for distribution to creditors. In cases seeking reorganization, multiple proceedings diminish the ability of the bankruptcy court to bring debtors and creditors together to formulate a plan of reorganization.

²²³ Large bankruptcies are more likely to involve assets and debts in multiple jurisdictions. In smaller cases involving individual debtors, a preferential payment made to a state agency, for example, may be the sole property of the estate sizeable enough to be of any value to creditors. That value would be diminished if additional state-court proceedings were needed to recover the preference.

be quickly repealed as failures.²²⁴ Administrative inefficiencies and state jealousy of federal power doomed every one.²²⁵

Lastly, another look at *Gardner* reinforces the conclusion that increased use of the state court system in bankruptcy is not the solution to a lack of federal court jurisdiction. The *Gardner* Court feared that if federal court jurisdiction were unavailable, then states could “pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals.”²²⁶ State court adjudication—even if available—would be undesirable. It would erode the ability of a single court to administer a bankruptcy case in an equitable and efficient manner, exposing debtors and creditors to the possibility of inconsistent state-court judgments.²²⁷ Thus, even if available, state courts as fora for adjudicating actions unquestionably entrusted to the bankruptcy courts before *Seminole Tribe* provide inadequate substitutes.

The only remaining method to reduce the potential effect of sovereign immunity in bankruptcy is congressional action. The previous discussion demonstrates its necessity. The open issue is what limits the Constitution imposes on Congress’s powers to craft a solution.

²²⁴ See generally Warren, *supra* note 64 (detailing fate of various bankruptcy bills throughout nineteenth century). It was not until the 1898 Bankruptcy Act that a national bankruptcy system was firmly established. Thus, Chief Justice Rehnquist’s comment in *Seminole Tribe*—attempting to refute Justice Stevens’s warning about the ramifications of the Court’s decision on bankruptcy—that “bankruptcy laws have existed practically since our Nation’s inception,” is clearly misguided. See *Seminole Tribe v. Florida*, 517 U.S. 44, 73 n.16 (1996).

²²⁵ See Warren, *supra* note 64, at 19 (noting that difficulty of gaining access to federal courts was one reason for failure of Bankruptcy Act of 1800); *id.* at 81 (explaining that small dividends paid to creditors under Bankruptcy Act of 1840 were due to expense of administration and fact that debtors had passed through state courts); *id.* at 114 (noting that one justification for repeal of Bankruptcy Act of 1867 was view that it had removed too many cases from state courts).

The Bankruptcy Act of 1898 was the first successful federal bankruptcy legislation, and its limited federal jurisdiction—again, the result of federalism concerns—was criticized for creating “manifest inefficiencies and inequities.” Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction*, 15 *Bankr. Devs. J.* 261, 269 (1999) (describing attempts by Congress to avoid problems of 1898 Act by granting more comprehensive federal jurisdiction in Code). A proceeding in state court was frequently required because of the limitations on bankruptcy courts’ jurisdiction. See 1 *Collier on Bankruptcy*, *supra* note 94, ¶ 3.01[1][b][4], at 3-9 (noting that procedural battles and wasteful litigation often resulted from jurisdictional limitations of bankruptcy courts under 1898 Act).

²²⁶ *Gardner v. New Jersey*, 329 U.S. 565, 577 (1947).

²²⁷ See *Schmitt v. Missouri W. State College (In re Schmitt)*, 220 B.R. 63, 74 (Bankr. W.D. Mo. 1998) (noting risk of inconsistent state-court determinations as to whether debts are dischargeable, or as to restructuring of obligations due).

2. *Validity of Congressional Efforts to Limit Eleventh Amendment Immunity in Bankruptcy*

In two important classes of cases, the existing law does not allow bankruptcy court jurisdiction over states. The first is when a state has not filed a proof of claim, violates the automatic stay, and successfully collects on a debt before the debtor is able to obtain a discharge. The second is when a state has not filed a proof of claim and refuses to turn over a preferential payment that is rightfully property of the estate.²²⁸ The only effective means of obtaining jurisdiction in both situations is through congressional action.

One commentator has suggested that Congress might condition certain benefits granted to states by the Bankruptcy Code on a waiver of sovereign immunity.²²⁹ There are a number of provisions in the Code that explicitly grant states privileges not enjoyed by other creditors. States are given an extension of 180 days in which to file a proof of claim in a bankruptcy proceeding.²³⁰ More importantly, state tax claims are given priority over general unsecured debts,²³¹ and tax claims arising after the commencement of a case are treated as if they occurred before the bankruptcy petition was filed.²³² Perhaps Congress should only extend these exceptions to include states that have waived, by statute, any claim of sovereign immunity in bankruptcy. In return for agreeing to be treated like any other creditor, paradoxically, a state would be granted a privileged position.²³³ In effect, Con-

²²⁸ It could be argued that a state would be required to ensure that adequate procedures are available in state courts for recovery (for instance) of a wrongfully held preferential payment. Cf. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 19 (1990) (requiring "clear and certain" state remedy for withholding of state tax in violation of federal law or Constitution). Such procedural safeguards do not, however, mean that bankruptcy courts would have jurisdiction over an action to recover a preferential payment. See *Reich v. Collins*, 513 U.S. 106, 110 (1994) (noting that Eleventh Amendment bars claim against state in federal court for refund of unlawfully withheld state tax); see also *Alden v. Maine*, 119 S. Ct. 2240, 2259 (1999) (reiterating that *Reich* does not support congressional attempts to abrogate Eleventh Amendment immunity); supra text accompanying notes 215-27 (demonstrating inadequacy of state-court adjudication in bankruptcy context). For a definition of a preferential payment, see supra note 8.

²²⁹ See Joseph F. Riga, *State Immunity in Bankruptcy After Seminole Tribe v. Florida*, 28 Seton Hall L. Rev. 29, 64 (1997) (mentioning possibility of conditioning state tax claim priority on state's voluntary waiver of immunity).

²³⁰ See 11 U.S.C. § 502(b)(9) (1994).

²³¹ See id. § 507(a)(8), (9).

²³² See id. § 502(i).

²³³ The paradox is defensible, however. It is better to sacrifice some of the fairness inherent in treating similarly situated creditors alike in order to gain the substantial efficiencies of having all parties before the court in a single bankruptcy proceeding. The aim of bankruptcy is to provide quick, efficient resolution of a debtor's financial problems. See Lynn M. Lopucki & Elizabeth Warren, *Secured Credit: A Systems Approach* 115 (noting that "when the bankruptcy system works as intended, debtors who qualify for bankruptcy

gress would offer states a "bankruptcy deal" in which states benefit (by obtaining preferential treatment of their claims in bankruptcy) and in which the national government benefits (by securing a more orderly system of bankruptcy).

The most vexing problem with such a proposal is its constitutionality. In fact, the same commentator who suggests it doubts its validity,²³⁴ arguing that the Court's retreat from *Parden* removes Congress's "bargaining room" with respect to state sovereign immunity.²³⁵ Admittedly, *Parden* is not a sound foundation upon which to build a case for the propriety of congressional action,²³⁶ but other established powers of the national government should not be overlooked.

Conditional spending power might provide an avenue for congressional action. In *South Dakota v. Dole*,²³⁷ the Supreme Court allowed Congress to withhold a portion of a state's highway funds if its drinking age was under twenty-one. In response to the objection that Congress was regulating South Dakota's affairs in violation of its sovereignty under the Tenth Amendment, the Court stated: "The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual."²³⁸

Dole does establish certain limits on the exercise of congressional power.²³⁹ The Court required that: 1) the exercise of the spending power be in pursuit of the general welfare; 2) Congress make its desire to condition the receipt of funds unambiguous; 3) the conditions required by Congress be related to particular national projects or programs; 4) other constitutional provisions do not independently provide a bar to a conditional grant of federal funds.²⁴⁰ None of these restrictions presents a categorical interdiction against Congress conditioning a state's preferred treatment in bankruptcy on waiver of its Eleventh Amendment immunity.

relief emerge with less debt or with debts due on different repayment schedules, and their creditors as a group collect at least as much as they could have in the absence of bankruptcy if the debtor had been uncooperative").

²³⁴ See Riga, *supra* note 229, at 64-65.

²³⁵ See *id.* at 66.

²³⁶ See *supra* notes 49-53 and accompanying text.

²³⁷ 483 U.S. 203 (1987).

²³⁸ *Id.* at 210 (internal quotation marks omitted) (quoting *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 144 (1947)).

²³⁹ See *id.* at 207-08.

²⁴⁰ See *id.*

For starters, courts “should defer substantially” to Congress’s judgment of the general welfare.²⁴¹ The goal of an efficient bankruptcy system would easily qualify under this test.²⁴² Second, a measure explicitly requiring waiver in bankruptcy proceedings in order for a state to receive particular benefits in the bankruptcy process contains little ambiguity. Third, the bankruptcy system is a national project in keeping with *Dole*. The federal concern proffered in *Dole* was having a uniform drinking age across the nation.²⁴³ In bankruptcy, the goal of uniformity is frustrated by state sovereign immunity.

The last requirement—that no other constitutional bar exists—is more difficult to meet on first impression because the Eleventh Amendment prevents Congress from *forcing* waiver using its Article I powers. But this apprehension stems from an incorrect reading of *Dole*. The independent constitutional bar limitation does not prevent “the indirect achievement of objectives which Congress is not empowered to achieve directly.”²⁴⁴ Rather, it prevents Congress from inducing the states to engage in activities that are unconstitutional.²⁴⁵ And there is no question that a state may waive its Eleventh Amendment immunity.²⁴⁶

Admittedly, a further problem with the use of Congress’s spending power is whether conditioning the preferred treatment of a state’s claims in bankruptcy on a limited waiver of Eleventh Amendment immunity is too coercive—that is, such a condition “might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”²⁴⁷ Concern that such an indirect inducement to the states to waive immunity is misplaced, however, because Congress would be requesting that the state perform an act (waiver of immunity in bankruptcy) in order to comply with federal law. The Supreme Court’s recent statement in *College Savings* that “the point of coercion is automatically passed . . . when what is attached to the refusal to waive is the exclu-

²⁴¹ See *id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937)).

²⁴² This is not a close question because the Constitution, created to “promote the general Welfare,” U.S. Const. preamble, grants Congress the power to establish bankruptcy laws. See U.S. Const. art. I, § 8, cl. 4.

²⁴³ See *Dole*, 483 U.S. at 208-09 (explaining that goal of safe travel on interstate highway system was frustrated by varying drinking ages among states, which provided incentive to drink and drive).

²⁴⁴ See *id.* at 210.

²⁴⁵ See *id.* at 210-11. The Court used a grant of federal funds conditioned on discriminatory state action or the use of cruel and unusual punishment as an example of the illegitimate exercise of Congress’s powers.

²⁴⁶ See *supra* Part I.B.2.

²⁴⁷ *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

sion of the State from otherwise lawful activity” is instructive.²⁴⁸ Any gratuity in the form of a preferred creditor status does not bar a state from “otherwise lawful activity.” Furthermore, the Court has made clear that “[t]he constitutional privilege of a State to assert its sovereign immunity . . . does not confer upon the State a concomitant right to disregard . . . valid federal law.”²⁴⁹ Whereas the plaintiffs in *College Savings* had contended that Congress could prevent states from engaging in *legal* interstate commerce if the states did not waive sovereign immunity, any congressional gratuity to induce a waiver of sovereign immunity in bankruptcy would merely require in return that states allow themselves to be held accountable for acts in violation of federal law.

Apart from academic criticism of its reach,²⁵⁰ the last difficulty with applying *Dole* to bankruptcy is finding the “spending” in which Congress would be engaged.²⁵¹ According preferred status to a state’s tax claims, for example, does not transfer a single dollar from the national treasury. It is, however, the extension of a type of subsidy by Congress to that state—a subsidy that only Congress can create.²⁵²

Dole is important for the analogous support it lends to the proposition that Congress may induce states to relinquish some powers in return for privileges they value more highly.²⁵³ Fortunately, it is not necessary to stretch *Dole* to reach the conclusion that a conditional benefit granted to states that waive sovereign immunity in bankruptcy is within the ambit of congressional power. *Petty v. Tennessee-Missouri Bridge Commission*²⁵⁴ also supports the proposition. In *Petty*, the Supreme Court ruled that Congress’s consent to an interstate compact was conditioned on the states involved waiving sovereign immunity from certain suits.²⁵⁵ The “gratuity” of approving the compact

²⁴⁸ 119 S. Ct. 2219, 2231 (1999).

²⁴⁹ *Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999).

²⁵⁰ See Meltzer, *supra* note 82, at 53 & nn.244, 246 (collecting and discussing scholarly work expressing unease with conditional spending cases).

²⁵¹ See *id.* at 55 (noting difficulty of associating waiver in bankruptcy with federal spending programs).

²⁵² Cf. *South Carolina v. Baker*, 485 U.S. 505, 511 n.6 (1988) (noting that law exempting state bond from federal tax is arguably “subsidy” properly judged under *Dole*, but declining to address issue of whether Spending Clause analysis actually applies); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 *Stan. L. Rev.* 1103, 1123-24 (1987) (noting that some conditional tax benefits are “essentially indistinguishable economically from conditional grants,” and arguing that Supreme Court has appeared to treat tax benefits as equivalent to spending).

²⁵³ This holds true whether or not giving state claims a preferred status in bankruptcy is or is not termed “spending.”

²⁵⁴ 359 U.S. 275 (1959).

²⁵⁵ See *id.* at 280.

could be conditioned properly on the states' waiver of sovereign immunity.²⁵⁶

Dole and *Petty* provide strong foundation for the constitutional validity of a scheme requiring waiver of sovereign immunity in return for certain benefits in bankruptcy.²⁵⁷ Whether states would be likely to enact a blanket waiver in all bankruptcy proceedings is a different matter.²⁵⁸ In practice, most states might still find it to their advantage to invoke Eleventh Amendment immunity aggressively with the expectation that other parties in bankruptcy will forego recovery in order to avoid the expense of pursuing their cases in state courts (if state-court relief is indeed available).²⁵⁹ Furthermore, state legislative enactment of an explicit waiver would likely be impeded by "political inertia."²⁶⁰ However, because states already routinely file proofs of claim in many bankruptcy cases, they might determine that waiving sovereign immunity in all bankruptcy cases is in their best interests. A proof of claim already provides a limited waiver of immunity,²⁶¹ and states would improve their position as creditors in the majority of bankruptcy cases by enacting an explicit statutory waiver.

CONCLUSION

Despite the potential breadth of its impact on the orderly operation of federal bankruptcy law, Eleventh Amendment immunity can be cabined by judicial and congressional action. Courts should properly apply *Gardner* so as to achieve jurisdiction over actions that concern the adjudication of a state's proof of claim, whether or not those

²⁵⁶ See Meltzer, *supra* note 82, at 52.

²⁵⁷ The latest round of federalism cases decided by the Court included specific mention of *Dole* and *Petty*. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2231 (1999). The Court distinguished *Dole* and *Petty* by noting that those cases involved "the denial of a gift or gratuity," which is acceptable, while the case at bar would allow Congress to impose a "sanction" if a state did not waive its immunity. See *id.*

²⁵⁸ The Supreme Court has used a stringent test in order to find an explicit waiver by states. See *supra* notes 42-43 and accompanying text.

²⁵⁹ This raises the possible objection that a proposal to benefit states that waive sovereign immunity in bankruptcy would be impermissibly nonuniform, and thus contrary to Congress's constitutional mandate to create "uniform Laws on the subject of Bankruptcies throughout the United States." See U.S. Const. art. I, § 8, cl. 4. The uniformity clause, however, allows Congress to enact nonuniform laws geographically as long as bankruptcy law operates uniformly upon given classes of creditors and debtors. See *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1531, amended on other grounds, 46 F.3d 969 (9th Cir. 1994).

²⁶⁰ See Daniel A. Farber, *The Coase Theorem and the Eleventh Amendment*, 13 *Const. Commentary* 141, 142-43 (1996) (arguing that difficulties of legislative process may impede ability of Congress and states to "bargain" over waiver of sovereign immunity).

²⁶¹ See *supra* Part III.A.

actions are transactionally related to that claim. The best view of what affirmative steps by a state constitute a waiver of sovereign immunity in the bankruptcy context is thus more permissive than a rule allowing the bankruptcy court merely to accept, reject, or reduce a state's claim on its merits, but differs from the "same transaction or occurrence" standard pronounced by several courts. The standard that should be applied parallels that of the Eleventh Circuit in *In re Burke*.

Congress should enact legislation that gives states permissible incentives, such as preferred treatment of certain state claims, to waive sovereign immunity in bankruptcy cases. Because bankruptcy law is especially concerned with fairness and efficiency, ensuring that debtors and creditors are treated equitably and that bankruptcy cases are resolved without wasteful litigation requires maintaining the ability of federal courts to safeguard the functioning of the national bankruptcy system.