American Bankruptcy Institute Law Review

Volume 3 Number 2 Winter 1995

STATE TAXPAYERS' VIEW OF SECTION 106(a) OF THE BANKRUPTCY REFORM ACT OF 1994

Congress has recently introduced section 106(a) of the Bankruptcy Reform Act of 1994, [1] which unilaterally exposes state treasuries to suit for monetary damages. [2] Yet, the Eleventh Amendment of the Constitution [3] has historically been held to represent the principle of state sovereign immunity. [4] This contradiction initially raises questions about the constitutionality of section 106(a). Closer examination of the issue may even call into doubt the viability of Eleventh Amendment doctrine.

The meaning of the Eleventh Amendment is regarded as one of the most nebulous in constitutional history. [5] Originally, the Eleventh Amendment was adopted in response to the Supreme Court's decision in *Chisholm v. Georgia*. [6] In *Chisholm*, two South Carolina citizens brought suit against the State of Georgia to collect a debt. The Supreme Court granted jurisdiction pursuant to Article III, [7] refusing to condition suit upon the defendant state's consent. [8] The response to the decision was overwhelmingly hostile; [9] mostly because states feared that this decision would open the floodgates to loyalists' and British creditors' suits on Revolutionary War debts. [10] Within five years, Congress and the states overruled *Chisholm* by passing the Eleventh Amendment, adopting the minority opinion of Justice Iredell in *Chisholm*. [11]

A century later, the Supreme Court decided *Hans v. Louisiana*, [12] cited for the proposition that in−state citizens cannot sue their states in federal court. [13] The Court reasoned that the drafters must have intended to include these suits under the Eleventh Amendment. It would be illogical to forbid suits by out−of−state citizens while allowing suits by residents. [14]

After *Hans*, the Court continued to expand the reach of the sovereign immunity doctrine, [15] but it has also created several exceptions to the rule. [16] The most notable are that a state may consent to suit in federal court, thereby waiving its sovereign immunity, [17] and that Congress may unilaterally "abrogate" a state's immunity when it legislates pursuant to certain constitutional powers. [18]

This Note examines whether Congress has the power to abrogate states' Eleventh Amendment sovereign immunity to suit when legislating pursuant to the Bankruptcy Clause. This issue will arise most often in the context of suits against state governmental units responsible for collecting taxes. [19] Typical situations include preference avoidance actions under section 547, [20] turnover actions under section 542, [21] actions to recover fraudulent conveyances under section 548, [22] and actions for violation of the automatic stay of Section 362. [23]

Part I of this Note explains the history of section 106(a) of the Bankruptcy Reform Act. Part II responds to common arguments supporting 106(a) and legislative abrogation of sovereign immunity in general. Particular attention is given to those arguments articulated in the recent case of *In re York−Hannover Developments*. [24] Part III offers an alternative analysis of the sovereign immunity issue in terms of federalism.

This Note concludes that section 106(a) is unconstitutional because it violates the principle of state sovereign immunity. It resolves the Eleventh Amendment debate by concluding that the principle of sovereign immunity, manifested by the text of the Eleventh Amendment, has constitutional significance as an aspect of our federalist governmental structure.

I. The Evolution of Section 106(a)

Prior to its amendment, section 106(a) [25] offered a waiver of sovereign immunity in bankruptcy cases which was limited to compulsory counterclaims. [26] In *Hoffman v. Connecticut Department of Income Maintenance*, [27] the Supreme Court held that the former version of section 106(c)2 [28] did not waive state sovereign immunity because Congress did not make its intention to abrogate Eleventh Amendment immunity "unmistakably clear" in the statute. [29] The Court did not address whether Congress has the power to abrogate sovereign immunity. Justices O'Connor and Scalia concurred separately, asserting that even if the language in the statute had unambiguously waived sovereign immunity, Congress has no power under the Bankruptcy Clause to do so. [30]

In 1994, Congress amended section 106 of the Bankruptcy Code [31] in response [32] to *Hoffman* and *United States v. Nordic Village, Inc.* [33] Since the passage of the new section 106(a), three courts have litigated its constitutionality. [34] The case which most fully explores the constitutional issue is *In re York−Hannover Developments*, [35] wherein the court allowed a chapter 7 trustee to avoid and recover prepetition payments made by the debtor to the North Carolina Department of Revenue as fraudulent transfers [36] under sections 548 [37] or 544(b). [38]

The plaintiffs first argued, unsuccessfully, that *Pennsylvania v. Union Gas, Inc.*, [39] which held that Congress has authority to abrogate state sovereign immunity when acting under the Commerce Clause, was wrongly decided and should be disregarded. [40] The inference was that if Congress may abrogate sovereign immunity under the Commerce Clause, there is no reason why it should not be able to do so under all of its Article I powers.

The court reasoned that since both the Fourteenth Amendment and Article I powers are plenary, the only way to find that Congress lacks the authority to create causes of action against states under the Bankruptcy Clause of Article I would be to find some other distinction between the Fourteenth Amendment and Article I. [41]

The court rejected three possible theories which would support such a distinction.

The first of these theories was that the Fourteenth Amendment could be viewed as a "limited repeal" of the Eleventh Amendment. [42] The "limited repeal" hypothesis suggested that the Eleventh Amendment may have limited Congress's Article I power to create a cause of action for money damages against a state and the Article III power of the federal courts to adjudicate such suits. [43] The court used two popular theories to rebut this ground of distinction: the "congressional abrogation theory" [44] and the "diversity theory." [45] The congressional abrogation theory states that the Eleventh Amendment limits only the federal courts, not Congress. [46] The diversity theory posits that the Eleventh Amendment does not limit federal question jurisdiction, only diversity jurisdiction. [47]

The second theory supporting a distinction between the Fourteenth and Article I powers was that Congress's power under the Fourteenth Amendment was greater than its power under Article I; in other words, that the Fourteenth Amendment is "ultra plenary." [48] In rejecting this possibility, *York−Hannover* surmised that when Congress imposes a monetary obligation on a state by exposing it to suit, it raises a Tenth Amendment issue, [49] governed by *Garcia v. San Antonio Metropolitan Transit Authority*. [50] Since the "ultraplenary" theory depends upon state sovereignty as the limit on congressional action, the *York−Hannover* court raised *Garcia*, which held that state sovereignty poses no limits when Congress acts pursuant to one of its delegated powers. [51] Cursorily, the court added that the Fourteenth Amendment language containing express limitations on state authority is insufficient grounds to distinguish it from the Commerce power. [52]

The third theory distinguishing the Fourteenth Amendment and Article I proposed that state sovereignty limits federal courts' Article III power to issue enforceable orders where Congress has subjected unconsenting states to suit in federal court. [53] This theory suggests that the Fourteenth Amendment "uniquely displace[s] state sovereignty's limit upon the jurisdiction of the federal courts." [54] *York−Hannover* stated that state sovereignty could not possibly limit federal courts' Article III powers because the principle of sovereign immunity is based on comity and not constitutionally mandated. [55] The court noted that if state sovereignty were a constitutional limitation on the judiciary, "*all* suits against states − including suits to enjoin federal constitutional violations−would be barred." [56]

Since the *York−Hannover* court found no difference between Article I and the Fourteenth Amendment in terms of Congress's ability to abrogate state immunity, it held that Congress possesses the power to grant causes of action against states pursuant to the Bankruptcy Clause. [57]

II. Discussion of Section 106(a) and the Eleventh Amendment

This Part will address arguments supporting section 106(a) and abrogation legislation generally, using the *York−Hannover* analysis as a starting point.

A. Pennsylvania v. Union Gas, Co. [58]

Pennsylvania v. Union Gas, Co.

held that Congress has the power to abrogate Eleventh Amendment sovereign immunity when acting under the Commerce Power. [59] Both *York−Hannover* and *In re Merchants Grain, Inc.*, [60] rejected plaintiffs' arguments that it was wrongly decided. [61] *Merchants Grain* held *Union Gas* dispositive of the issue of section 106(a)'s constitutionality, stating that if "the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers." [62]

Union Gas

has received much criticism because it seems disingenuous. [63] The Court cited two *waiver* cases [64] as precedent for upholding complete congressional abrogation of sovereign immunity when acting under its Commerce power. [65] Worse, it held that Congress may take such action, yet purportedly retained the holding of *Hans v. Louisiana*, which expanded Eleventh Amendment sovereign immunity to protect a state from suit by its own citizens. [66] These inconsistencies are not compensated for by the plurality's reasoning. [67]

Although *Union Gas* is Supreme Court authority, *York−Hannover* and *Merchant's Grain* may not have been compelled to follow it. *Union Gas* was decided by a plurality, [68] and is, therefore, nonbinding. [69] Even if it were binding authority, *Union Gas* is paradoxical. [70] Justice Scalia, dissenting, protested that the Supreme Court's reaffirmation of *Hans v. Louisiana*, and simultaneous holding that Congress may abrogate state sovereign immunity when it acts pursuant to its Commerce power, is a principle "too much at war with itself to endure." [71]

B. Distinguishing the Fourteenth Amendment from Article I

The *York−Hannover* court recognized a possible justification for striking down section 106(a), which enacted a congressional abrogation of state immunity under the Bankruptcy Clause, while retaining Congress's right to expose states to suit when acting pursuant to the Fourteenth Amendment. [72] The justification lay in distinguishing the Fourteenth Amendment power from Congress's power under Article I. [73] This section will critically examine the three arguments which the *York−Hannover* court rejected.

1. The "Limited Repeal" Theory

The "limited repeal" argument depends upon whether the Eleventh Amendment limits Congress's Article I and Article III powers. [74] The first line of reasoning used by the court to reject "limited repeal" was that the Eleventh Amendment limits only the federal courts, not Congress, known as the "congressional abrogation theory." [75] The court's second argument was that the Eleventh Amendment does not limit federal question jurisdiction, but only diversity jurisdiction, commonly referred to as the "diversity theory." [76]

a. Congressional Abrogation Theory

The argument (known as the congressional abrogation theory) that the Eleventh Amendment limits only the federal courts [77] is weak. [78] First, the text of the Eleventh Amendment does not support this distinction. [79] The amendment provides that the "judicial power" does not extend to certain suits. [80] Under *Marbury v. Madison*, [81] Congress may not vest federal courts with jurisdiction exceeding the Constitution's definition of "the Judicial power." [82] Second, the words "shall be construed" do not imply anything. [83] If Congress passes a jurisdictional statute permitting suits against states, the courts must "construe" the statute to permit such causes of action. [84]

The congressional abrogation theory erroneously suggests that there is something peculiar to congressional power to confer jurisdiction which distinguishes it from "some prior, self−executing stage of the federal judicial power." [85] The federal courts have no jurisdiction until Congress confers it, [86] and when Congress confers jurisdiction to the federal courts, it is constrained by Article III. [87]

b. Diversity Theory

The diversity theory, which suggests that the Eleventh Amendment does not prohibit abrogation of suit in federal question cases, [88] is also problematic. The operative words in the amendment are "[t]he judicial power shall not be construed to extend to *any* suit in law and equity." [89] The diversity theory contradicts this express language by construing the judicial power to extend to some of those cases listed. [90]

The *York−Hannover* court argued that at the time of *Chisholm v. Georgia* and the passage of the Eleventh Amendment, the question of whether states could be subject to suit on federal claims in federal court was undecided. [91] The fact that there was no statutory basis for federal jurisdiction at the time of the Eleventh Amendment's passage does not suggest that the Framers of either the Constitution or of the Eleventh Amendment acceded to jurisdiction over suits for monetary relief against the states. [92] In fact, Justice Iredell's dissent in *Chisholm*, which was adopted in the Eleventh Amendment, [93] stated that even if federal claims against states were allowed, his "opinion [was] strongly against any construction of the Constitution, which will admit, under any circumstances, a compulsive suit against a state for the recovery of money." [94]

Moreover, the noncognizance argument is an anomalous way to analyze constitutional provisions. [95] Generally, the Supreme Court considers the Framers' overall purpose in passing a constitutional provision. [96] Likewise, in this case, the Framers' intent to protect state treasuries from suit in federal court, while retaining some limited federal jurisdiction, should govern. [97]

Finally, the diversity theory is an accountability−driven construction of the Eleventh Amendment. [98] Its proponents postulate that the Framers could not have intended constitutional violations perpetrated by states to go unredressed. [99] This argument incorrectly assumes that shielding states from suit for monetary damages by private individuals is inconsistent with the enforcement of federal law as it pertains to states. [100] In reality, it is not difficult to reconcile these ideas; the Court had been doing this up until 1989, by prospectively enforcing federal law against officers employed by states. [101]

Section 106(a) is a remedial provision that allows individuals to sue state governments for violations of the Bankruptcy Code, not for violations of the Constitution. There is no need to put state treasuries at the mercy of individuals. The government is already bound by the provisions of the automatic stay and discretionary stays issued under section 105. [102] In addition, courts have contempt powers to protect individuals from an overreaching governmental agency. [103] Moreover, most of the violations committed by government entities occur because of the complexity of the Code or the difficulties of communication within large bureaucracies, rather than from intentional disregard of the law. [104] Thus, the Eleventh Amendment, contrary to *York−Hannover's* conclusion, appears to have limited Congress's Article I powers and Article III federal question jurisdiction. One may reasonably conclude that there was a restriction for the Fourteenth Amendment to "repeal," thus satisfying the first basis for distinction between Congress's power under Article I and under the Fourteenth Amendment. [105]

2. The Eleventh Amendment as "Subconstitutional"

The obvious difficulty with arguing that the Eleventh Amendment constitutionalizes sovereign immunity is the existence of well−established Supreme Court doctrine permitting a state to waive [106] its immunity. Many critics of Eleventh Amendment doctrine propose that the principle of sovereign immunity be interpreted as "subconstitutional" [107] or as a sort of "constitutional common law." [108] Proponents of this view contend that all of the Supreme Court's decisions not to assert federal jurisdiction over states were based on principles of comity, and were not based in constitutional law. [109] Justice Stevens has pointed out that "[t]he theme which emerges from [the Eleventh Amendment] cases . . . is one of balancing state and federal interests. [110]

What tends to be forgotten in the debate, is that the issue, at base, is really about federalism. [111] This Note contends that sovereign immunity is an aspect of state autonomy and should be given deference as an essential component of our governmental structure, as created in the Constitution. [112] This idea is illustrated in *New York v. United States*. [113] In *New York*, the Supreme Court relied on the principle of state autonomy exemplified by the Tenth Amendment, rather than upon the text of the Tenth Amendment, to strike down a federal law which forced states to enact and enforce specific legislation. [114] Justice O'Connor was concerned with preserving state autonomy, a fundamental component of federalist structure. [115] Viewing sovereign immunity as a constitutional aspect of federalism offers the flexibility required to balance coherently national and state interests in resolving an Eleventh Amendment issue, without degrading the principle of sovereign immunity to the status of prudential consideration. The difficulty posed by state waiver of a constitutional provision is eliminated, since state autonomy is not compromised when the state makes the decision to subject itself to suit.

3. The Fourteenth Amendment as "*Ultraplenary*"

York−Hannover [116]

and *McVey* [117] argue that the Fourteenth Amendment is not an "ultraplenary" grant of power, but rather, that the language in the Fourteenth Amendment fails to distinguish it from Congress’s power under any other constitutional grant.

In support of this assertion, the *York−Hannover* and *McVey* courts argue that the language in the Fourteenth Amendment tending to show that it was meant to affect state sovereignty differently from other constitutional provisions is meaningless.

York−Hannover

and *McVey* also noted that the Tenth Amendment bars Congress from imposing an obligation on the states to spend public funds if the states have not delegated plenary power to Congress in a given area. However, *McVey* continued, where Congress acts under one of its delegated plenary powers, "state sovereignty generally imposes no limits on Congress’s ability to impose obligations on the states." [118] Therefore, the issue is identical to that in *Garcia v. San Antonio Metropolitan Transit Authority*, [119] in which the Supreme Court considered the ability of Congress, acting under the plenary power given by the Commerce Clause, to impose a monetary obligation on a state by requiring it to pay overtime wages to public workers. [120]

a. "Ultraplenary" Language in the Fourteenth Amendment

The courts' first argument, that the language in the Fourteenth Amendment [121] tending to show that it is "ultraplenary" is meaningless, [122] is insupportable. The Fourteenth Amendment was added in order to alter the balance of power between the Federal Government and the States. [123] It was enacted after Article I and is "aimed squarely at sovereignty." [124] Indeed, the Amendment contains express limitations on state authority. [125] Such restrictions on state power are absent in all other constitutional provisions, indicating that Congress's power to enforce legislation against states under the Fourteenth Amendment is clearly greater than under its other constitutional powers. *Fitzpatrick v. Bitzer*, [126] which established that Congress may abrogate state immunity under its Fourteenth Amendment power, stated that when Congress acts pursuant to section 5 of the Fourteenth Amendment, it exercises authority under a section of a constitutional Amendment "whose other sections by their own terms embody limitations on state authority." [127] Thus, the hypothesis that the Fourteenth Amendment is an "ultraplenary" grant of power is strongly supported by its text and by case law, supplying yet another basis for distinguishing Congress's Fourteenth Amendment power from its Article I power.

b. Analyzing Garcia v. San Antonio Metropolitan Transit Authority

York−Hannover

argued that *Garcia v. San Antonio Metropolitan Transit Authority* [128] controlled the issue of whether Congress has the authority to abrogate state immunity under the Bankruptcy Clause in the Constitution. [129] *Garcia* held that the judiciary would not interfere with legislative action imposing monetary obligations upon state governments unless the political process did not adequately protect the states. [130] This Note argues that *Garcia's* holding should be limited (if not overruled) for two reasons. First, because it is based on the false assumption that the political process protects state interests and second, because its holding is overbroad. [131]

i. Political Safeguards Do Not Work

The main assumptions upon which *Garcia* relied to support the theory that the political process ensures protection of state governmental interests was borrowed from Herbert Wechsler [132] and Jesse Choper. [133] This assumption equates the interests of states with those of their residents, rather than with the interests of state governmental institutions. [134] Following from this assumption, Professor Wechsler surmised that if a majority of voters in a majority of states want local control, their wishes will be effectuated regardless of the preferences of the majority of national citizens. [135]

Contrary to Professor Wechsler's basic assumption, modern voters tend *not* to identify with state interests and the positions of state officials. [136] This is partly due to the attenuation of state party organizations. [137] In addition, members of Congress develop independent constituencies, such as farmers, businessmen, laborers, or environmentalists, which generally support national initiatives. [138] Most congressmen tend to focus on issues through the lens of federal, rather than state policy, [139] leading one commentator to declare that "Congress faces a conflict of interest whenever its legislation presents an assertion of federal power the states argue infringes on their sovereign." [140]

Legislation abrogating states' immunity for money damages demonstrates the failure of political safeguards. In the passage of section 106(a), the public record shows no evidence of consultation with representatives of states' interests [141] until after the bill was passed out of committee. [142] From May 16, 1991 to August 17, 1994, the Subcommittee on Economic and Commercial Law of the House Judiciary Committee and the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee conducted hearings on the bankruptcy reform bill. [143] No debate of H.R. 2057, the future section 106, took place until an August 17, 1994 oversight hearing, [144] in which the only substantive discussion of H.R. 2057 consisted of a statement by a representative of the National Bankruptcy Conference strongly endorsing broad abrogation of state and federal sovereign immunity. [145] The mere fact that state concerns about legislation subjecting state treasuries to damage suits, a topic of significance to states, were not even mentioned in the discussions leading up to passage of this bill until the very last minute, tends to indicate, not only that the federal "political process" is not serving states' interests effectively, but also that the institutional linkages between state and national government do not serve states as well as they should. [146]

ii. Garcia's Overbreadth

The second problem with *Garcia* is its overbreadth. Professor Wechsler wrote that the Framers employed three main devices to preserve the ends of federalism:

> They preserved the states as separate *sources* of authority and organs of administration − a point on which they hardly had a choice.
>
> They gave the states a role of great importance in the composition and selection of the central government.
>
> They undertook to formulate a *distribution* of authority between the nation and the states, in terms which gave some scope at least to legal processes for its enforcement. [147]

Professor Wechsler suggested that the judiciary should not intervene in questions regarding the distribution of authority between the state and national government because "[t]he actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority." [148] He did not say that the judiciary should refrain from intervening in cases involving the preservation of states as "sources of authority." *Garcia*,

purportedly relying on Professor Wechsler's thesis, ignored this distinction. [149]

The interests that constitute the states as separate sources of authority involve fundamental decisions, such as, "how the state legislature is chosen, how often it meets, where it meets, how government agencies are structured, and how the internal machinery of the state's delivery of services is organized." [150] A state must have the ability to function as a sovereign; the ability to carry out "its responsibility to represent and be accountable to its citizens." [151] By ignoring this aspect of the states' role, *Garcia* poses a threat to their existence.

III. The Federalism Approach

This Note proposes that the concept of the State as a `separate source of authority', as opposed to the state in terms of formal power distribution, [152] is a sensible standard to apply to the sovereign immunity issue. Where congressional legislation unduly interferes with a state's ability to function as a sovereign; with its ability to carry out "its responsibility to represent and be accountable to its citizens," [153] it is invalid. [154]

A fundamental aspect of the State as a 'source of authority' is control over "how the internal machinery of the state's delivery of services is organized." [155] As one commentator notes, "independent state initiation of spending programs, such as unemployment compensation insurance and income assistance to dependent families, has furthered the states' function as 'laboratories for experimentation' within our federal system." [156]

Section 106 applies retroactively [157] to allow private individuals, who are not accountable for their actions, to force states into a federal bankruptcy courts "anywhere in the country to defend enforcement and collection activities that may have been fully legal when they occurred" [158] for money damages under sixty sections of the Code.

The *perceived* imposition, [159] of significant monetary obligations on state treasuries by section 106(a)'s broad exposure to liability, will force states to reallocate their public resources accordingly, and, in this way, effectively reorganize state fiscal priorities. [160] Revenue raising, in anticipation of the effect of section 106(a) liability on the amount of taxes that will be collected and retained, [161] and reallocation of money to hire and train state attorneys general to defend bankruptcy suits, are examples of how states will respond to anticipated costs of section 106(a). [162] In these ways, congressional abrogation of state immunity undermines the states' ability to control how they organize the delivery of services to residents.

Moreover, section 106(a)'s interference with the states "as sources of authority" will cause state taxpayers, whose state taxes are raised or whose state provided services are cut, to blame state officials, not the federal officials ultimately responsible. [163] This result obtains whenever Congress compels a state to act or to make expenditures because of the constitutional structure of our government. [164] This situation arises because of the nature of our political structure. The "Constitution divides authority between federal and state governments for the protection [and liberty] of *individuals*," not of states as entities. [165] The federal and state governments were created to check each other by virtue of their competition 'for the affections of the people.' [166] If the purpose of the Constitution is to be served, there must be "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." [167] Those citizens must have some way of knowing which level of government to hold accountable for a particular act or failure to function. [168] Congressional abrogation of state sovereign immunity under statutes such as section 106(a) defeats the ability of taxpayers to discern which level of government to hold accountable for the fiscal consequences. [169]

Conclusion

This Note emphasizes the importance of considering the effect section 106(a), a congressional abrogation of state immunity, may have on federal−state governmental structure and on state and national accountability. This Note concludes that sovereign immunity has constitutional status derived from the provisions in the Constitution outlining our structure of government. This approach reduces most, if not all, of the inconsistencies associated with Eleventh Amendment doctrine. Treating sovereign immunity as a constitutional principle will enable Supreme Court to return to the pre−1989 understanding that a state may waive its immunity by express or implied consent, but Congress may not unilaterally abrogate state sovereign immunity. A state which waives its own immunity is actually, as well as

apparently, responsible for the fiscal consequences of its actions, but when Congress acts unilaterally under the Bankruptcy Code to abrogate state immunity, state autonomy is compromised. *Fitzpatrick v. Bitzer*, which held that Congress may abrogate state immunity under the Fourteenth Amendment, is consistent with this theory, as the Fourteenth Amendment's language and history indicates an intent to alter the constitutional balance of power between the Federal Government and the states.

More significantly, this Note suggests that provisions such as section 106(a) have a potentially detrimental effect on federal and state governmental accountability. When Congress imposes monetary obligations, in the form of causes of action, on state governments, it forces states to reprioritize their budgets. State taxpayers, whose state provided services are cut or whose state taxes are raised, will look to state officials, who are not actually responsible for these consequences, while overlooking federal officials, who are. Such confusion defeats the purpose of a two−tiered system of government.

This Note justifies application of two theories supporting the argument that Congress's power to abrogate state sovereign immunity under the Fourteenth Amendment exceeds it power to do so under Article I, specifically, the Bankruptcy Clause. First, that the Fourteenth Amendment acted as a limited repeal of the Eleventh Amendment restriction on Congress's power to grant causes of action against states. Second, that the Fourteenth Amendment may be considered ultraplenary, or superior to Congress's power under the Bankruptcy Clause. In conclusion, this Note argues, section 106(a) of the Bankruptcy Reform Act of 1994, wherein Congress attempted to unilaterally create causes of action against states under the Bankruptcy Clause, is unconstitutional.

Loren F. Levine

FOOTNOTES:

[1] 11 U.S.C. § 106(a) (1994). The new § 106 abrogates sovereign immunity with respect to monetary damages and other remedies for sixty sections, including those intended to give the debtor a fresh start. *See* Leonard H. Gerson, *Bankruptcy Reform Act Limits Sovereign Immunity Defense*, N.Y.L.J., Dec. 19, 1994, at 1 (examining strengths and weaknesses of new § 106).Back To Text

[2] Gerson, supra note 1.Back To Text

[3] U.S. Const. amend. XI. The Eleventh Amendment states: "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." Id. The language of the Eleventh Amendment bears little resemblance to most interpretations associated with it. John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1891 (1983) (remarking that inconsistencies of Eleventh Amendment doctrine have earned it recognition as "a hodgepodge of confusing and intellectually indefensible judge−made law"). Back To Text

[4] Blatchford v. Native Village, 501 U.S. 775, 779 (1991) (citing Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 472 (1987) (plurality opinion)) ("[W]e [understand] the Eleventh Amendment to stand . . . for the presupposition . . . that the states entered the federal system with their sovereignty intact; that judicial authority in Article III is limited by this sovereignty . . ."); Hans v. Louisiana, 134 U.S. 1, 11−14 (1890) (reciting history of Eleventh Amendment).Back To Text

[5] *See* Gibbons, supra note 3, at 1891. Back To Text

[6] 2 U.S. (2 Dall.) 419 (1793); *see* Hans, 134 U.S. at 11 (noting that the decision "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States").Back To Text

[7] U.S. Const. art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases, . . . to Controversies . . . between a State and Citizens of another State." Id. Back To Text

[8] Chisholm, 2 U.S. (2 Dall.) at 476−79. Back To Text

[9] *See* Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation*: *Separation of Powers Issues in* Controversies About Federalism, 89 Harv. L. Rev. 682, 683 (1976) (citing Gerald Gunther, Cases and Materials on Constitutional Law 49 (9th ed. 1975)) (stating that Georgia's House of Representatives, incensed by the *Chisholm* decision, passed a law making any attempt to carry out the decision a felony punishable by hanging without the benefit of clergy).Back To Text

[10] Lawrence C. Marshall, Fighting the Words of The Eleventh Amendment, 102 Harv. L. Rev. 1342, 1356−57 (1989)[hereinafter Marshall, *Fighting the Words*]; Tribe, supra note 9, at 683. Other motives included the desire to avoid suits seeking restitution of confiscated Loyalist property and the desire to retain lands placed in the public domain by legislative fiat. Id. at 683 n. 5; *see also* Clyde E. Jacobs, The Eleventh Amendment and Sovereign Immunity 57−62, 178 n.72 (1972). Back To Text

[11] Tribe, supra note 9, at 684. Subsequent decisions demonstrate that the Eleventh Amendment repudiates judicial interpretation of article III as a self−executing abrogation of state sovereign immunity, "thereby reinstating the original understanding that the states surrendered sovereign immunity only to the extent inherent `in the acceptance of the constitutional plan.'" Id.; Hans v. Louisiana, 134 U.S. 1, 12 (1890) (noting that the Eleventh Amendment codified Justice Iredell's dissent). Back To Text

[12] 134 U.S. 1 (1890).Back To Text

[13] Id. at 20. In *Hans*, a citizen of Louisiana sued the state for its alleged failure to pay interest on its bonds in violation of the Contracts Clause. Id. at 1; *see also* Marshall, Fighting the Words, supra note 10, at 1342. Back To Text

[14] Hans, 134 U.S. at 15.Back To Text

[15] The Court was guided by Alexander Hamilton in The Federalist, No. 81:

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States.

The Federalist, No. 81, at 487−88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).Back To Text

[16] *E.g.*, Edelman v. Jordan, 415 U.S. 651 (1974) (distinguishing between permissible prospective relief and impermissible retroactive relief, the latter requiring payment of funds from state treasury); Ex Parte Young, 209 U.S. 123, 167 (1908) (holding that federal court can enjoin state official from enforcing unconstitutional regulation−since regulatory act was illegal, official acted without authority). Before 1989, the term "abrogation" had been used to express "Congress' exercise of its power when coupled with a pre−existing, constitutionally−based *separate* waiver of State immunity." Brief of Amicus Curiae Supporting Respondents at 8, Seminole Tribe v. Florida, 11 F.3d 1016 (11 Cir. 1994), cert. granted, 115 S. Ct. 932 (1995).Back To Text

[17] Consent may be implied by a state's voluntary appearance in court and defense on the merits. Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1906); Clark v. Barnard, 108 U.S. 436, 447−48 (1883). Additionally, consent may be implied when the state legislature "passes a general law whose text leaves no room for any other reasonable construction than that the state intends to waive its constitutional sovereign immunity and consents to be sued in federal court." Ron S. Chun, Avoiding a Jurassic Dinosaur Run Amok: Circumventing Eleventh Amendment Sovereign Immunity To Remedy Violations Of The Automatic Stay, 98 Com. L.J. 179, 200 (1993). A waiver may be triggered by an activity of a state entity by which it impliedly consents to be sued in federal court. Anton Motors, Inc. v. Montgomery County (In re Anton Motors, Inc.), 177 B.R. 58, 62 (Bankr. D. Md. 1995). For example, when a state files a claim in a bankruptcy case, as to a counterclaim by the bankruptcy estate arising out of the same transaction or occurrence, it waives its immunity. Id. (citing 11 U.S.C. § 106(b) (1994)). A state may also consent by voluntarily

engaging in federally regulated activities. Parden v. Terminal Ry., 377 U.S. 184, 190 (1964) (holding that Alabama consented to suit under the Federal Employer's Liability Act by operating a railroad). The vitality of *Parden* has been called into serious question by subsequent cases. *See* Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 149−50 (1981) (per curiam) (following *Edelman* holding that monetary relief not available against state in federal court where no state consent given); Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 469 (1987) (overruling *Parden* in part, stating that Congress may abrogate state immunity only when its intention is clearly stated in statute); Edelman v. Jordan, 415 U.S. 651, 673 (1974) (stating that consent language must be expressly stated clearly and unambiguously); Employees of the Dep't of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 286−87 (1973) (stating that *Parden* extends only to cases where clear consent is given); *see also* 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, 1042−43 (1983) (summarizing law of state waiver and consent).Back To Text

[18] This Note suggests that the only true abrogation case decided by the Supreme Court is Pennsylvania v. Union Gas, Inc., 491 U.S. 1, 20 (1989). Before 1989, the term "abrogation" had been used to express "Congress' exercise of its power coupled with a pre−existing, constitutionally−based *separate* waiver of immunity." *See* Brief of Amicus Curiae Supporting Respondents at 9, Seminole Tribe v. Florida, 11 F. 3d 1016 (11 Cir. 1994), cert. granted, 115 S. Ct. 932 (1995). The word "abrogation" is used in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), but the Supreme Court in that case repeatedly stated that Congress's authority to remove states' immunity pursuant to § 5 of the Fourteenth Amendment was derived from a "separate constitutionally−based surrender of State immunity." Id. at 8. The Court reasoned that, since the other sections of the Fourteenth Amendment contain limitations on state power, and since the Constitution grants Congress plenary authority under § 5, Congress may, in determining "appropriate legislation" to enforce the Fourteenth Amendment provisions, provide for private suits against the states. Id. at 453−56. *Union Gas* tries to fit into the waiver line of cases by stating that the states "consented" to relinquish their immunity to Congress all at once when they ratified the Constitution containing the Commerce Clause. Union Gas, 491 U.S., at 20. Back To Text

[19] *See, e.g.*, 140 Cong. Rec. H10752, H10772 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks) (noting that new § 106 prevents Federal and State governments from seizing property of bankrupt taxpayers and then asserting sovereign immunity as a shield in actions for violations of automatic stay). Back To Text

[20] 11 U.S.C. § 547 (1994). The purpose of the avoidance powers "allow the trustee to recover for the benefit of the estate certain prepetition transfers of the debtor's property. . . The avoidable preference power in 11 U.S.C. § 547 maximizes the return to the unsecured creditors by bringing estate assets back into the estate for every one to share in and dissuades creditors from opting out of the collective debt−collection action once it is on the horizon." C. Richard McQueen & Jack F. Williams, Tax Aspects of Bankruptcy Law and Practice § 14.01 (2d ed., 1994). Back To Text

[21] 11 U.S.C. § 542 (a) (1994) (providing that entity shall deliver property of debtor's estate to trustee and account for its value).Back To Text

[22] Id. § 548(a) (1994). Section 548 permits the trustee to avoid a transfer of debtor's interest or incurred obligations if they were made with intent to delay, hinder or defraud creditors; if debtor received less than reasonably equivalent consideration; if debtor was insolvent, engaged in business with unreasonably small capital, or intended to incur debts he could not repay. Back To Text

[23] Id. § 362 (providing that bankruptcy petition operates as a stay of judicial and administrative acts and proceedings against debtor or debtor's estate where claims arose before commencement of case); *see* McQueen & Williams, supra note 20, § 5.10, at 14.01 (observing that automatic stay provisions have a significant effect on taxing authorities seeking to assess and collect taxes, and seeking to resolve tax claims).Back To Text

[24] 181 B.R. 271 (Bankr. E.D.N.C. 1995).Back To Text

[25] Pub. L. No. 95−598, § 106, 92 Stat. 2549, 2555 (1978). Back To Text

[26] Id. The former § 106 provided that:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of the section and notwithstanding any assertion of sovereign immunity−
>
> (1) a provision of this title [11 U.S.C.S. §§ 101 et seq.] that contains "creditor," "entity" or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

Id. The House Judiciary Report accompanying this section stated, "Congress does not . . . have the power to waive sovereign immunity completely with respect to claims of a bankrupt estate against a State." H.R. Rep. No. 595, 95th Cong., 2d Sess. 76 (1977), *reprinted in* 1978 U.S.C.C.A.N. 2549, 2555. This legislative history indicates that Congress believed that an abrogation of state sovereign immunity would be unconstitutional. Id.Back To Text

[27] 492 U.S. 96 (1989). In *Hoffman*, the Court denied a bankruptcy trustee recovery of preferential tax payments under § 542(b) and money under a Connecticut Medicaid contract pursuant to § 547(b). The Court found that the State did not waive its immunity by filing a proof of claim in the debtors' Chapter 7 proceedings. Despite the fact that § 106(c)(1) subjects "governmental units" to provisions of the Bankruptcy Code containing "trigger" words, and §§ 547(b) and 542(b) contain those trigger words, Congress did not make its intention to abrogate Eleventh Amendment sovereign immunity "unmistakably clear in the language of the statute." Hoffman, 492 U.S. at 101 (quoting Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 474 (1987); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); Dellmuth v. Muth, 491 U.S. 223, 227−28 (1989)). The trigger words set forth in the former version of § 106 were "creditor," "entity," and "governmental units." Section 542(b) provided that "an entity" was required to pay to the trustee a debt that is the property of the estate, 11 U.S.C. § 542(b) (1984) (current version at 11 U.S.C. § 542(b) (1994)), and § 547(b) provided that a trustee could, under certain circumstances, avoid the transfer of property to "a creditor." Id. § 547(b) (1986) (current version at 11 U.S.C. § 547(b) (1994)). Back To Text

[28] *See* supra note 26. Back To Text

[29] Hoffman, 492 U.S. at 101−02.Back To Text

[30] Id. at 105 (O'Connor, J., concurring and Scalia, J., concurring). The remaining four Justices dissented on the grounds that the statute was unambiguous and that Congress had the power to waive state sovereign immunity, citing Pennsylvania v. Union Gas, 491 U.S. 1 (1989), as authority. Id. at 106−11 (Marshall, J., dissenting). Justices Stevens and Blackmun added that the legislative history supported a reading of the statute that waived States' immunity with regard to monetary liability. Id. at 111−13 (Stevens, J., dissenting).Back To Text

[31] 11 U.S.C. § 106 (1994). The amended version of § 106(a) provides:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

Id. § 106(a). Under § 106(a)(3), an individual plaintiff may not recover punitive damages. Id. § 106(a)(3). However, governmental units may still be held liable for punitive damages, if they waive sovereign immunity under § 106(b) or (c). *E.g.*, Flynn v. IRS (In re Flynn), 169 B.R. 1007, 1020 (Bankr. S.D. Ga. 1994) (awarding debtor $10,000 in punitive damages for willful violation of automatic stay by IRS, which waived its sovereign immunity under § 106(a) (now § 106(b)), *aff'd in part, rev'd in part*, 185 B.R. 89 (S.D. Ga. 1995). In addition, § 106(a) says the "court may issue against a governmental unit an . . . order or judgment for costs or fees under this title . . . consistent with the provisions and limitations of section 2412(d)(2)(A), the Equal Access to Justice Act." 11 U.S.C. § 106(a)(3) (1994).Back To Text

[32] *See* 140 Cong. Rec. H10752, H10766 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks) (explaining that "Congress intended to make the provisions of title 11 that encompassed the words `creditor,' `entity,' or `governmental unit' applicable to the States). Congress also intended to make the States subject to money judgment, contrary to the holdings in *Hoffman* and *Nordic Village*. Id.Back To Text

[33] 503 U.S. 30 (1992). In *Nordic Village*, the Court denied a trustee recovery of tax payments made by a corporate officer who used a Chapter 11 debtor's funds to pay for his personal federal tax liability, even though the misappropriation occurred while the corporation was under jurisdiction of the bankruptcy court. Id. at 31, 39. The Supreme Court denied recovery on the grounds that the language of § 106(c) did not "unequivocally express" a waiver of the federal government to monetary damages, as required by prior case law. Id. at 33−34 (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. King, 395 U.S. 1, 4 (1969))). Back To Text

[34] *E.g.*, In re Merchants Grain, 59 F.3d 630 (7th. Cir. 1995); Sparkman v. Florida Dep't of Revenue (In re York−Hannover Devs.), 181 B.R. 271 (Bankr. E.D.N.C. 1995); Stern v. Massachusetts Alcohol Beverage Control Comm'n (In re J.F.D. Enters., Inc.), 183 B.R. 342 (Bankr. D. Mass. 1995).Back To Text

[35] 181 B.R. 271 (Bankr. E.D.N.C. 1995).Back To Text

[36] York−Hannover, 181 B.R. at 272. Back To Text

[37] 11 U.S.C. § 548 (1994) (allowing trustee to avoid fraudulent transfer).Back To Text

[38] Id. § 544 (1994) (providing that trustee has power of creditor under state law to avoid any voidable transfer of property or obligation incurred by debtor).Back To Text

[39] 491 U.S. 1 (1989). Back To Text

[40] York−Hannover, 181 B.R. at 273 (citing Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, 115 S. Ct. 932 (1995)). In dicta, *Seminole* suggested that the result reached by the "badly fractured" *Union Gas* Court would probably be decided differently if addressed by "a majority of the present Court." Id. at 273 n.3 (citing Seminole, 11 F.3d at 1026−27). The court stated that "a fair reading of *Union Gas* is one that would limit Congress' abrogation powers to laws passed under the Interstate Commerce Clause." Id. (citing Seminole, 11 F.3d at 1027). Back To Text

[41] York−Hannover, 181 B.R. at 275−76. The court adopted the lengthy analysis in McVey Trucking, Inc. v. Secretary of Illinois (In re McVey Trucking, Inc.), 812 F.2d 311 (7th Cir.), cert. denied, 484 U.S. 895 (1987), overruled by, Hoffman v. Connecticut Dep't of Income Maintenance, 494 U.S. 96 (1989). *Hoffman* overruled the result in *McVey*, but not its holding as to the constitutionality of Congress's power to abrogate state sovereign immunity. Hoffman, 492 U.S. at 104. Back To Text

[42] York−Hannover, 181 B.R. at 276.Back To Text

[43] McVey, 812 F.2d. at 316.Back To Text

[44] *See, e.g.*, John E. Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413 (1975) (providing historical overview of basis for congressional abrogation theory). Back To Text

[45] *See* Marshall, Fighting the Words, supra note 10, at 1347; George D. Brown, *Has the Supreme Court Confessed Error on the Eleventh Amendment?* Revisionist Scholarship and State Immunity, 68 N.C. L. Rev. 867, 872 (1990); William P. Marshall, The Diversity Theory of the Eleventh Amendment: A Critical Evaluation, 102 Harv. L. Rev. 1372, 1372 (1989) [hereinafter Marshall, *The Diversity Theory*] (discussing diversity theory). Back To Text

[46] York−Hannover, 181 B.R. at 276. For good descriptions of this theory, see Fletcher, supra note 17, at 1113−18; Marshall, Fighting the Words, supra note 10, at 1348; William P. Marshall, The Eleventh Amendment, Process Federalism and the Clear Statement Rule, 39 DePaul L. Rev. 345 (1990) [hereinafter Marshall, *Process Federalism*]; Marshall, The Diversity Theory, supra note 45, at 1372. Back To Text

[47] *See* York−Hannover, 181 B.R. at 276 (stating that Eleventh Amendment may have been adopted to limit diversity jurisdiction but not federal jurisdiction). Back To Text

[48] Id. If the Fourteenth Amendment were a greater source of congressional power than Article I, it would explain why Congress could abrogate state sovereign immunity under the Fourteenth Amendment and not under the Bankruptcy Clause in Article I. However, this hypothesis could be true only if state sovereignty, as distinct from the Eleventh Amendment, is the force limiting congressional power. Id. Back To Text

[49] Id. at 277. Back To Text

[50] 469 U.S. 528 (1985). In *Garcia*, the Supreme Court held that "the test of congressional power to impose financial burdens on a state is simply whether the Constitution has ‘divested [the States] of their original powers and transferred those powers to the Federal Government.'" York−Hannover, 181 B.R. at 277 (Bankr. E.D.N.C. 1995) (citing *McVey*, 812 F.2d at 320 (quoting *Garcia*, 469 U.S. at 549)). The court rationalized that "if under its plenary powers Congress may impose monetary obligations on the States directly, it may also impose monetary burdens through the indirect means of creating a cause of action for a money judgment enforceable against a state." Id. (citing McVey, 812 F.2d at 320).Back To Text

[51] York−Hannover, 181 B.R. at 277 (alteration in original) (citing *McVey*, 812 F.2d at 320−21). Back To Text

[52] Id. Back To Text

[53] Id. at 277.Back To Text

[54] Id. at 276. This hypothesis "assumes that Congress has Article I authority to create a cause of action for a money judgment against an unconsenting state, and asks whether state sovereignty restricts the federal judiciary’s Article III power to issue an enforceable order in such a case." Id. at 277.Back To Text

[55] Id. Back To Text

[56] York−Hannover, 181 B.R. at 277 (citing *McVey*, 812 F.2d at 323).Back To Text

[57] Id. at 278. Finally, the court mentioned various policy reasons supporting its decision−that holding § 106(a) unconstitutional would "severely impair" Congress’s ability to regulate bankruptcies and would make the state a preferred creditor in every bankruptcy, leading to an "'increase of bankruptcies and a distortion of the system of preferences that Congress has carefully crafted.'" Id. (citing McVey, 812 F.2d at 328).Back To Text

[58] 491 U.S. 1 (1989).Back To Text

[59] Id. at 19. In *Union Gas*, Union Gas Company's predecessors operated a coal gasification plant, which made coal tar near a creek in Pennsylvania. Id. at 1. The State acquired easements in the plant's property, and, while excavating, struck a deposit of coal tar which seeped into the creek. Id. The Environmental Protection Agency found the tar to be a hazardous substance and made the area a Superfund site. Id. The State and Federal Government cleaned the area and the Federal Government reimbursed the State for cleanup costs and sued Union Gas to recoup those costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9604, 9600. Id. *Union Gas*, in turn, filed a third−party complaint against the State, asserting, *inter alia*, that the state was an "owner and operator" of the site under § 107(a) of CERCLA, and therefore, liable. Id. Back To Text

[60] 59 F.3d 630 (7th Cir. 1995).Back To Text

[61] York−Hannover, 181 B.R. at 273−75; Merchants Grain, 59 B.R. at 634−35.Back To Text

[62] Merchants Grain, 59 B.R. at 635.Back To Text

[63] *See, e.g.*, Vicki C. Jackson, One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term, 64 S. Cal. L. Rev. 51, 56 (1990) (attacking *Union Gas* as incoherent). Back To Text

[64] Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 475−76 (1987); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 252 (1985).Back To Text

[65] Union Gas, 491 U.S. at 15.Back To Text

[66] Id. at 7. Back To Text

[67] The Court compared abrogation under the Commerce power to that under the Fourteenth Amendment, but disregarded the fact that Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), relied on the amendment's express limitations on state power. Union Gas, 491 U.S. at 15−17. The Court stated that the Fourteenth Amendment did not alter the constitutional balance by making arguments about the chronology of constitutional events−whether sovereign immunity came before the Eleventh Amendment or after. Id. at 17−18. By taking this line of reasoning, the Court was able to evade all substantive issues. Ultimately, the Court relied on the fact that the Commerce Clause is a plenary grant of power. Id. at 19−20.

> Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.

Id. Back To Text

[68] Union Gas, 491 U.S. at 3−4 (showing five separate opinions and majority only for Parts I and II). Part I dealt with the facts and procedural history of the case, id. at 5−6, and Part II held that Congress made its intent to override state sovereign immunity "unmistakably clear" in the language of CERCLA. Id. at 7−15. Part III of Justice Brennan's opinion, which concluded that Congress has the authority to override the Eleventh Amendment when legislating pursuant to the Commerce Clause, id. at 15, gained only three other votes; those of Justices Marshall, Blackmun and Stevens. Id. at 3.Back To Text

[69] *See* Horton v. California, 496 U.S. 128, 128 (1990) (stating that plurality opinion by Supreme Court is nonbinding); Texas v. Brown, 460 U.S. 730, 736 (1983) (noting that plurality opinion is not binding authority). On the issue of the constitutionality of congressional abrogation in CERCLA, Justice White stated:

> This brings me to the question whether Congress has the constitutional power to abrogate the States' immunity. In that respect, I agree with the conclusion reached by Justice Brennan in Part III of his opinion,

that Congress had the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning.

Union Gas, 491 U.S. at 57 (citations omitted). That was all Justice White wrote. *See* id. It is unclear what part of Justice Brennan's rationale Justice White supported. Back To Text

[70] *See* Saul Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1489 (W.D. Mich. 1992) (stating that Union Gas rests on "shaky ground") (citing Poarch Bank, 776 F.Supp.at 558), appeal dismissed, 5 F.3d 147 (6th Cir. 1993); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 558 (S.D. Ala. 1991) (noting that Union Gas stands on "shaky ground"), aff'd, 11 F.3d 1016 (11th Cir. 1994), cert. granted, 115 S. Ct. 932 (1995).Back To Text

[71] Union Gas, 491 U.S. at 45 (Scalia, J., dissenting). Back To Text

[72] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (establishing Congress's right to abrogate state immunity when acting under § 5 of Fourteenth Amendment).Back To Text

[73] In re York−Hannover, 181 B.R. at 275.Back To Text

[74] *See* supra notes 42−47 and accompanying text.Back To Text

[75] *See* supra notes 44, 46 and accompanying text.Back To Text

[76] *See* supra notes 45, 47 and accompanying text. The fact that this court simultaneously offers both theories is evidence that neither is itself very strong. Marshall, Fighting the Words, supra note 10, at 1350. There are way too many "unanswered questions and incongruities" to support either as fact. Id. Back To Text

[77] This theory is advocated by Professors Nowak and Tribe. *See generally* Nowak, supra note 44; Tribe, supra note 9. Back To Text

[78] Brown, supra note 45, at 876. Professors Tribe and Nowak premise their support for the "congressional abrogation" theory on the assumption that Congress is the national institution most likely to show concern for the states and to protect them. Id.; *see generally*, Lawrence H. Tribe, American Constitutional Law (2d ed. 1988). Prof. Nowak believes that the Eleventh Amendment ensured that the decision to subject states to suits must come from *Congress*, "the only governmental entity which shares a dual responsibility to the state and federal systems and is accountable at both levels." Nowak, supra note 44, at . This Note will demonstrate that this assumption is flawed. *See* infra notes 128−51 and accompanying text.Back To Text

[79] *See* Vicki C. Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1, 44 n. 180 (1988) (arguing that Constitution does not require state sovereign immunity in federal question cases).Back To Text

[80] Brown, supra note 45, at 876 (citing U.S. Const. amend. XI). "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." U.S. Const. amend. XI. Back To Text

[81] 5 U.S. (1 Cranch) 137 (1803). Back To Text

[82] Marshall, Fighting the Words, supra note 10, at 1348; *see also* Verlinden B.V. v. Central Bank, 461 U.S. 480, 491 (1983) (citing Hodgson v. Bowerbank, 5 U.S. (5 Cranch.) 303 (1809); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1923)) (holding that "[c]ongress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution"); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590−91 (1949) (rejecting argument that Congress may vest federal courts with jurisdiction over cases other than those fitting article III's definition of "Judicial power"). Back To Text

[83] Id. at 1348 n. 26 (stating that Congress indicated that "the Court's interpretation of Article III allowing suits against the states, while tenable, was to be abandoned in favor of the opposite construction").Back To Text

[84] Brown, supra note 45, at 876. Back To Text

[85] Id.Back To Text

[86] *See* id. (citing Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850)). Back To Text

[87] Id. at 876−77 (citing Jackson, supra note 79, at 43). "One abiding lesson of *Marbury* is that Congress cannot extend the jurisdiction of the federal courts beyond the boundaries provided by the Constitution, as construed by the courts." Jackson, supra note 79, at 43.Back To Text

[88] The diversity theory suggests that the Eleventh Amendment precludes federal jurisdiction over suits against states only when diversity of citizenship is the sole basis of federal jurisdiction. Marshall, Fighting the Words, supra note 10, at 1342−43.Back To Text

[89] U.S. Const. amend. XI (emphasis added).Back To Text

[90] Marshall, Fighting the Words, supra note 10, at 1347; *see also* Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1520 (1987) (advocating diversity theory). Back To Text

[91] *See* Brown, supra note 45, at 872. There was no statutory basis for federal jurisdiction, and it was not until 1875 that general federal question jurisdiction was provided. Act of March 3, 1875, ch. 137, 18 Stat., pt. 3, at 470. Federal question jurisdiction was briefly provided in the Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802). The court also claimed that there were no federal laws granting causes of action against states. Marshall, The Diversity Theory, supra note 45, at 1381. Thus, the *York−Hannover* judge reasoned, the motivation of the Framers was to prevent only *Chisholm*−type, not federal question suits. Back To Text

[92] Marshall, The Diversity Theory, supra note 45, at 1387. The only persons expressing support for state liability for monetary relief were Randolph and Justice Wilson, who took part in the *Chisholm* majority opinion. The fact that *Chisholm* was immediately overruled strongly suggests that these views were unacceptable. Id. at 1387−88.

The debate on the Eleventh Amendment has been waged largely in terms of history, yet the historical record is uncertain. "Both sides can marshal quotations from the Framers to support their respective positions. All this proves is that the Framers' disagreed on this issue." Erwin Chemerinsky, Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988−89 Term, 39 DePaul L. Rev. 321, 342 (1990). *See also* Fletcher, supra note 17, at 1037 ("History and law frequently make an awkward marriage, for legal analysis typically selects and molds historical facts to serve its own purposes to a degree that is unknown to conventional history."). Back To Text

[93] *See* supra note 11 and accompanying text.Back To Text

[94] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 448−49 (1793) (Iredell, J., dissenting); *see also* Marshall, The Diversity Theory, supra note 45, at 1387−88 (stating that *Chisholm* itself involved a federal provision, the Judiciary Act of 1789, Ch. 20, 1 Stat. 73 (1789), which granted jurisdiction). The Eleventh Amendment's overruling of *Chisholm*, then, implies that states are protected from suits based on federal question jurisdiction. *See* id. at 1388. It has been argued, however, that *Chisholm* was brought under diversity jurisdiction, Fletcher, supra note 17, at 1045, and that the *Chisholm* claim was actually a common law claim. Id. at 1070.Back To Text

[95] Marshall, The Diversity Theory, supra note 45, at 1383; Gregory Bassham, Original Intent and the Constitution: A Philosophical Study 91−107 (1992) (pointing out that originalism's allure is not its rationality, but rather, that it lends an aura of legitimacy). The downsides of this interpretive tool are that it requires the judge to play historian, a role in which they are usually untrained, that history−based interpretations are subject to becoming "hostage to changing

historiographic fashions," thus, "`original intent' becomes a recipe for weather−vane jurisprudence." Id. at 95. Back To Text

[96] Brennan, Address, Construing the Constitution, 19 U.C. Davis L. Rev. 2, 7 (1985) ("A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right."). This mode of interpretation is necessitated by the need for a "living Constitution." Bassham, supra note 95.

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it."

Weems v. U.S., 217 U.S. 349, 373 (1910). Thus, in almost all areas of constitutional law there is precedent which varies from "original intent." Bassham, supra note 95, at 98.Back To Text

[97] Marshall, Fighting the Words, supra, note 10, at 1355 (stating that areas where jurisdiction over states is retained include suits by other states, by foreign governments, and by federal government). In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall said of the purpose of the Eleventh Amendment:

> It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislators.

Id. at 406. Back To Text

[98] *See, e.g.,* Amar, supra note 90, at 1474−77.

> By reading the Eleventh Amendment's "state sovereign immunity" restrictions on federal *judicial* power to go far beyond the Tenth's "residuary state sovereignty" restrictions on federal *legislative* power, the Court has created a curious category of cases in which Congress may pass laws operating directly on states that can be enforced (if at all) only in state courts.

Id.Back To Text

[99] *See* York−Hannover, 181 B.R. at 277; Amar, supra note 90, at 1441 (stating that federal courts had power to prevent states from passing bills of attainder or ex post facto laws).Back To Text

[100] Marshall, The Diversity Theory, supra note 45, at 1386.Back To Text

[101] *E.g., Ex parte* Young, 209 U.S. 123, 166−67 (1908) (holding that federal court may enjoin state official in its official capacity); *see also* Edelman v. Jordan, 415 U.S. 651, 678 (1974) (holding that prospective relief is available even when state is real party in interest). Back To Text

[102] 11 U.S.C. § 105 (1994) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").Back To Text

[103] *See* Hutto v. Finney, 437 U.S. 678, 690−91 (1978) (stating that courts may impose financial penalties against state officials); Colon v. Hart (In re Colon), 114 B.R. 890, 892 (Bankr. E.D. Pa. 1990), appeal dismissed, 123 B.R. 719 (E.D. Penn.), aff'd on other grounds, 941 F.2d 242 (3d Cir. 1991) (stating that attorneys fees may be collected against a governmental entity when it has violated 11 U.S.C. § 362(a) (1994)); *see also* Letter from William T. Pound, Executive Director of the National Conference of State Legislatures to Rep. Jack Brooks, House Chairman (Sept. 28,

1994) (on file with author). Back To Text

[104] *See* Letter from Heidi Heitkamp, Attorney General, North Dakota, Chair, Bankruptcy and Taxation Working Group to Rep. Jack Brooks, House Chairman (September 27, 1994) (on file with author). Back To Text

[105] *See* supra notes 42−47 and accompanying text (discussing limited repeal argument).Back To Text

[106] *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) (stating that where state waives immunity Eleventh Amendment does not bar action); Parden v. Terminal Railway of Ala. Docks Dep't, 377 U.S. 184, 186 (1964) (holding that state immunity may be waived by state's implied consent); Clark v. Barnard, 108 U.S. 436, 447−48 (1883) (stating that state's immunity may be waived at any time). Back To Text

[107] York−Hannover, 181 B.R. at 271, 277 (Bankr. E.D.N.C. 1995) (citing *McVey*, 812 F.2d at 320) ("[T]here are not certain elements of state sovereignty which the Constitution makes impervious to Congress'splenary powers."); McVey, 812 F.2d at 321 (concluding that where Congress may create cause of action for money damages, state sovereignty does not bar federal court from enforcing it); Pennsylvania v. Union Gas, 491 U.S. 1, 25 (1989) (Stevens, J., concurring) (recommending denigration of sovereign immunity so that it is merely prudential consideration); Jackson, supra note 79; *see also* William Burnam, Taming the Eleventh Amendment Without Overruling Hans v. Louisiana, 40 Case W. Res. L. Rev. 931, 933 (1989−90) (suggesting that *Hans v. Louisiana* was really common law state sovereign immunity case).Back To Text

[108] Henry Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975). Monaghan suggests the existence of "a substructure of substantive, procedural and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress." Id. at 2−3.Back To Text

[109] *See, e.g.*, York−Hannover, 181 B.R. at 277; McVey, 812 F.2d at 321−22; Union Gas, 491 U.S. at 25 (Stevens, J., concurring) ("Several of this Court’s decisions make clear that much of our state immunity doctrine has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment.").Back To Text

[110] Union Gas, 491 U.S. at 27 (Stevens, J., concurring). Back To Text

[111] Daniel Elazar wrote that federalism has to do with the constitutional diffusion of power so that the constituting elements in a federal arrangement share in the processes of common policy making and administration by right, while the activities of the common government are conducted in such a way as to maintain their respective integrities. Federal systems do this by constitutionally distributing power among general and constituent governing bodies in a manner designed to protect the existence and authority of all. Daniel Elazar, Exploring Federalism 56 (1987); *see also* George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 Colum. L. Rev. 332, 403−04 (1994); Walter Harwell Bennett, American Theories of Federalism (1964); Edward McWhinney, Comparative Federalism: States Rights and National Power (2d ed. 1965). Back To Text

[112] U.S. Const. Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."); Id. § 2 ("The House of Representatives shall be composed of Members chosen . . . by the People of the several States. . . . " and "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . each State shall have at Least one Representative . . ."); Id. § 3 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . and each Senator shall have one Vote."); Id. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . ."); Id. amend. XVII ("The Senate . . . shall be composed of two Senators from each State, elected by the people thereof . . . and each Senator shall have one vote."). Back To Text

[113] 112 S. Ct. 2408 (1992). Back To Text

[114] Id. at 2418 ("The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology."). Back To Text

[115] Id. (stating that Tenth Amendment directs Court to determine whether incident of state sovereignty is adequately protected).Back To Text

[116] 181 B.R. 271 (Bankr. E.D.N.Y. 1995).Back To Text

[117] 812 F.2d 311 (7th Cir.), cert. denied, 484 U.S. 895 (1987), overruled by, Hoffman v. Connecticut Dep't of Inc. Maintenance, 492 U.S. 96 (1989). Back To Text

[118] McVey, 812 F.2d at 320.Back To Text

[119] 469 U.S. 528 (1985).Back To Text

[120] Id.Back To Text

[121] U.S. Const. amend. XIV, § 1. Back To Text

[122] *See* Pennsylvania v. Union Gas, 491 U.S. 1, 17−18 (1989) (contending that ultraplenary argument was invalid based on chronological argument). This comment views the chronology issue as irrelevant, since no one could say for certain when the concept of sovereign immunity first appeared. Back To Text

[123] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 453−54 (1976) (stating that Fourteenth Amendment clearly contemplates limitation on state sovereignty); City of Rome v. United States, 446 U.S. 156, 179 (1980) (noting that Civil War amendments were "specifically designed as expansion of federal power and on intrusion of state sovereignty"). Back To Text

[124] Brown, supra note 45, at 886 (asserting that Fourteenth Amendment is intended to regulate state governments, both substantively and procedurally). The idea that the Fourteenth Amendment is aimed at state sovereignty, while "Article I powers affect state sovereignty indirectly by giving Congress the potential authority to displace states in some fields". Id. This was rejected by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985), when it overruled National League of Cities v. Usery, 426 U.S. 833 (1976). Id. at 886−87. Back To Text

[125] Section 1 provides that,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

U.S. Const. amend. XIV, § 1, cl. 1.Back To Text

[126] 427 U.S. 445 (1976).Back To Text

[127] Id. at 456. Back To Text

[128] 469 U.S. 528 (1985) (dealing with conflict between Tenth Amendment principle of state autonomy and power of Congress to regulate interstate commerce under Commerce Clause).Back To Text

[129] In re York−Hannover Devs., 181 B.R. 271, 277 (Bankr. E.D.N.Y. 1995). Back To Text

[130] Garcia, 469 U.S. at 552. Before *Garcia,* the Supreme Court vacillated several times on the federalism issue, unsure of how to balance the needs for national uniformity and a central source of accountability with the necessity of preserving states as "sovereign entities." Id. ("Any substantive restraint on the exercise of Commerce Clause powers

must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'") (citing Jesse Choper, Judicial Review and the National Political Process 175−84 (1961); La Pierre, *The Political safeguards of Federalism Redux*: *Intergovernmental Immunity and the States as Agents of the Nation*, 60 U. Wash. U. L.Q. 779, 787 (1982); and Wechsler, *The Political Safeguards of Federalism, in* Principles, Politics, and Fundamental Law 558 (1961)). The first case to seriously grapple with the issue was National League of Cities v. Usery, 126 U.S. 833 (1976), which created the first real override of otherwise authorized congressional power, holding that the federal government could not interfere with "traditional state functions." Id. at 852. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), derived a three part test from *National League of Cities*. Under *Hodel*, a successful claim that commerce power legislation is invalid under the Tenth Amendment must establish that the law: (1) regulates the "States as States," (2) addresses matters that are "indisputably 'attributes of state sovereignty,'" and (3) directly impairs the ability of the states "to structure integral operations in areas of traditional governmental functions." Id. at 286−87. There were problems with administering the test, however, and Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982), more or less abandoned it. Id. at 754 n.18. Shortly afterward, *Garcia* explicitly overruled *National League of Cities*, out of frustration with the unworkable "traditional government functions" test. Garcia, 469 U.S. at 546−47. The Court did not think that constitutional limitations on the commerce power could be determined by relying on "a priori definitions of state sovereignty." Id. at 548. Instead, the Court held that the political safeguards inherent in the structure of the Federal Government would adequately protect the states' interests, and that the Court would not intervene unless the State could demonstrate a politically significant failure in the legislative process. Id. at 554−56.Back To Text

[131] In addition, there is evidence that the Supreme Court has become disenchanted with its holding. Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) (finding that federal age−discrimination law did not override mandatory−retirement provision of state constitution, imposed "plain statement rule" to ascertain that Congress intended to override the states' "substantial sovereign powers under our constitutional scheme"); New York v. United States, 112 S. Ct. 144, 161 (1992) (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)) (holding that the Federal Government may not "commandeer the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program"); U.S. v. Lopez, 115 S. Ct 1624, 1634 (1995) (holding that states' police power under Tenth Amendment overrode Congress's power under Interstate Commerce Clause to regulate gun possession near public schools). The (London) Economist noted that it appeared as if the Supreme Court had partly repudiated *Marbury v. Madison*, in favor of a rule of "parliamentary supremacy in respect to the boundaries of federalism," by seeming to suggest that "the principle of judicial review does not apply to questions of federalism when congress acts under the commerce clause." William Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709, 1721 (1985) (quoting *Nine for the Seesaw*, The Economist, Mar. 2, 1985, at 21.). Back To Text

[132] *See* Wechsler, *supra* note 130, at 558 (1961); Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954) [hereinafter Wechsler, *Political Safeguards*].Back To Text

[133] Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 171−259 (1980) (restating and extending Wechsler's ideas of what is now known as "process jurisprudence" or "process federalism"). *See also* Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 Sup. Ct. Rev. 341, 367−68 (stating that both *Garcia* and *National League of Cities'* views of federalism are flawed, making development of theory of federalism along lines of process jurisprudence impossible). Back To Text

[134] Carol F. Lee, *The Political Safeguards of Federalism*? Congressional Responses to Supreme Court Decisions on State and Local Liability, 20 Urb. Law. 301, 305 (1988) (citing Wechsler, "*Political Safeguards*", supra note 132, at 549) (noting that Wechsler described "political safeguards of federalism" as "intrinsic" and "inherent" because voters would elect members of Congress who shared their views). Back To Text

[135] Political Safeguards, supra note 132, at 547−48.Back To Text

[136] Lewis B. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 862−63 (1979); Zoe Baird, State Empowerment After Garcia, 18 Urb. Law. 491, 504 n. 64 (1986) (arguing for judicial role in preserving the system of divided powers). The Supreme Court, in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), in response to an argument that the Constitution emanated not from the people but from the "sovereign and independent states," and that, therefore, the federal government had only the powers delegated to it by the states, stated:

> It is true, they assembled [in convention] in their several States−where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. . . . But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

Id. at 403; *see also* William R. Denny, Note, *Breakdown of the Political Safeguards of Federalism*: *A Response to* Garcia v. San Antonio Metropolitan Transit Authority, J.L. & Pol. 749, 755−60 (1987) (elaborating on how influences such as national media, decline of political parties, advent of open primaries, national interest groups, and Seventeenth Amendment have reduced effectiveness of political process as safeguard of States' interests).Back To Text

[137] Factors which combine to diminish the importance of the state political organization are the use of money in politics, W. Keefe & M. Ogul, The American Legislative Process: Congress and the States 104−07 (6th ed. 1985) (indicating that funding is often provided by political action committees and private contributors, instead of political parties, making the political party less influential as representative of state); Frank J. Sorouf, Inside Campaign Finance: Myths and Realities 46 (Yale University Press, 1992) [hereinafter Myths and Realities] (noting that most PACs are "national organizations operating in a national political arena on behalf of issues and interests that are largely national in scope."), the changing use of the media in campaigns, Frank J. Sorauf, Party Politics in America 78−79 (4th ed. 1980) [hereinafter Party Politics] (observing that through media, candidate can communicate directly with electorate and can effectively remove political party as central vehicle for election), the phenomenon of "celebrity success" in politics, and the substitution of welfare state programs for community service functions of the neighborhood political organization, Kaden, supra note 136, at 862. PACs contribute to influence governmental decisions, by purchasing access to legislators. Myths and Realities, *supra*, at 164. "Now that PACs increasingly give to secure legislative access . . . [w]e no longer talk of PAC attempts to penetrate electoral politics but of their part in the traditional struggle of interests in American legislatures. Almost imperceptibly, but fundamentally, the debate has shifted from influence in election outcomes to influence over legislative outcomes." Id. Back To Text

[138] Kaden, supra note 136, at 862−63; Myths and Realities, *supra* note 137, at 48. ("Jewish, Greek, Nisei, Chinese, and other ethnic communities, pleased and flattered that one of their own runs for high office, open their checkbooks to help office−seeking sons and daughters regardless of state borders."); Rapaczynski, supra, note 133, at 393 (noting that primary constituencies of national representatives may even be same ones that support extension of federal power to disadvantage of states). Study of the political process has shown that when states do succeed in obtaining remedial legislation, their success is due more to "the configuration of political forces in particular cases" than to political safeguards. Lee, supra note 134, at 335. Institutional linkages also help to secure some access and attention for state and local concerns." Id. at 335−36. These are the only methods of gaining access available to state government, since states do not have well−funded political action committees to contribute to the campaigns of incumbent congressmen. Id. at 336−37.Back To Text

[139] Lee, supra note 134, at 338. George A.Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 Colum. L. Rev. 331, 409 (1994) ("Members of Congress, desiring political credit for the passage of legislation, may vigorously sponsor initiatives in Congress that could just as easily be undertaken at the state level; their task then is to produce a sufficient legislative coalition in support of their measures."); *see also* Baird, supra note 136, at 505−06. Back To Text

[140] Baird, supra note 136, at 504. Changes in the state electoral process such as judicial limitation of state control of congressional apportionment, *see* Kaden, supra note 136, at 860; Stephen L. Smith, Comment, *State Autonomy After* Garcia: *Will the Political Process Protect States' Interests*?, 7 Iowa L. Rev. 1527, 1543 (1986) (citing Kaden, supra note 136, at 859) (stating that state control over voter qualifications enhanced localism by excluding minority

interests, and state control of apportionment placed a disproportionate number of representatives from choice areas, thus, before industrialism, Congress tended to leave many matters to state control), and the expansion of the electorate. Id. at 1544−45. While the Fourteenth Amendment protections against conditioning suffrage on literacy or affluence has had beneficial effect for disenfranchised groups, "the mechanism for that protection−federal power−has the effect of decreasing state control of its own election processes," thus, "dilut[ing] state autonomy by usurping states' abilities to structure their own legislative remedies for particular problems. Id. *See also* Rapaczynski, supra note 133, at 393 (remarking that ever since the adoption of the Seventeenth Amendment there has been an increase in federal regulation of states, through commands or conditional spending, making operation of state government dependent on federal decisions).Back To Text

[141] The National Association of Attorneys General (NAAG) and National Conference of State Legislatures represented the interests of the state government. Letter from Heidi Heitkamp, supra note 104 (arguing that complete abrogation of sovereign immunity is "unnecessary and ill−considered" and that § 106 should be clarified only to apply to "compulsory counterclaims of debtor arising out of same transaction as claim actually filed by government."); Letter from William T. Pound, supra note 103 (opposing amendment of § 106). Back To Text

[142] *See* H.R. Rep. No. 883, 103d Cong., 2d Sess. (1995). One may surmise that the bill was essentially a *fait accompli* by the time representatives of state government learned of its consideration. *See* Letter from Heidi Heitkamp, supra note 104; Letter from William T. Pound, supra note 103.Back To Text

[143] 1994 Congressional Information Service, CIS Annual Index to Congressional Publications and Legislative Histories 344−49.Back To Text

[144] *Bankruptcy Reform*: *Hearings on H.R. 5116 Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. 15−16 (1994) (statement of Mr. Berman of California); H.R. Rep. No. 883, 103d Cong., 2d Sess. (1995) (indicating that full Committee of Judiciary met to markup H.R. 5116 on September 29, 1994, which was amended and subsequently agreed upon by voice vote). Despite eleventh hour notification, the NAAG tried to work some compromise on behalf of state interests. It succeeded only in altering the final bill with regard to the scope of damages available. Thus, the original version of § 113, H.R. 5116, 103d Cong., 2d Sess. (Oct. 4, 1994), stated that "(a) Notwithstanding an assertion of sovereign immunity, except as provided in subsection (d)−(1) all provisions of this title shall apply to governmental units . . . (3) the court may issue and enforce any order, process, or judgment against a governmental unit, *including an order or judgment awarding a money recovery, to the same extent as against any other entity*." Id. (emphasis added). The October 20 version, as modified, stated: "(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: (1) Sections 105, 106, 107, . . . (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*. . . . " 11 U.S.C. 106 (1994). There was no debate of the constitutionality of § 106(a).Back To Text

[145] *See* Bankruptcy Reform: Hearings, supra note 144, at 15−16.Back To Text

[146] Lee, supra note 134, at 333−35. Back To Text

[147] Wechsler, Political Safeguards, supra note 132, at 543−44 (emphasis added).Back To Text

[148] Id. at 544; Baird, supra note 136, at 508. Back To Text

[149] Baird, supra note 136, at 508. Back To Text

[150] Id. at 509. Back To Text

[151] New York v. United States, 112 S. Ct 2408, 2429 (1992). Another commentator put it slightly differently, stating that the states must be preserved in their "political functions," referring to

> [t]he states[’] . . . role as autonomic power centers−and thus power bases−that are not subject to hierarchical control from the center. They can thus sustain and reflect interests at odds with those having hegemony at the national level, in the media, and in Congress. These differing interests may at times be a function of local conditions . . . But they may also simply be a function of the fact that States have different constituencies and thus provide bases for the rise of independent politicians and of candidates with views diverging from the dominant national constituencies.

Paul J. Mishkin, *The Current Understanding of the Tenth Amendment*, *in* Federalism and the Judicial Mind: Essays on American Constitutional Law and Politics 156−57 (Henry N. Schreiber ed. 1992).Back To Text

[152] Wechsler, *Political Safeguards*, *supra* note 132, at 543−44 (emphasis added).Back To Text

[153] *See* supra notes 148−52 and accompanying text.Back To Text

[154] This idea is consistent with the recent holding in United States v. Lopez, 115 S. Ct. 1624 (1995), which drew a line on Congress’s ability to regulate pursuant to the Commerce power where the regulation intruded upon a state’s police power and its control of public education. In his concurrence, Justice Kennedy stated that:

> Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

Id. at 1638−39 (Kennedy, J., concurring) (citations omitted).Back To Text

[155] Baird, supra note 136, at 509 (explaining that other interests that constitute states as separate sources of authority involve fundamental decisions, such as, "how the state legislature is chosen, how often it meets, where it meets, how government agencies are structured"); *see also* Kerr−McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 198 (1985) (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)) (stating that it has long been recognized by the Supreme Court that the power to finance public services is an "essential attribute of self−government"). Back To Text

[156] Joel H. Swift, *Fiscal Federalism*: *Who Controls the States’ Purse Strings*?, 63 Temp. L. Rev. 251, 253 (1990) (citation omitted). *See also* Lopez, 115 S. Ct. at 1641 (1995) (noting that Gun−Free School Zones Act prevents states from experimenting in area of local expertise); San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49−50 (1973) (advocating local innovation in education); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (cautioning against impeding experimentation except when unreasonable or arbitrary).Back To Text

[157] 11 U.S.C. § 702(b)(2)(B) (1994) ("The amendments made by sections 113 . . . shall apply with respect to cases commenced under Title 11 of the United States Code before, on, and after the date of the enactment of the Act.").Back To Text

[158] Brief of Amicus Curiae for State of Florida, at 14 n. 3, Seminole Tribe v. Florida, 11 F.3d 1016 (1994), cert. granted, 115 S. Ct. 932 (1995) (No. 94−12).

> The difficulties this imposes on state governments is exacerbated by the short notice periods in bankruptcy cases and the financial strains of defending out−of−state litigation. As such, the States are highly vulnerable to frivolous or bad faith filings by parties who challenge *bona fide* actions of the state simply in the hope that the States will be unable to defend themselves adequately.

Id.Back To Text

[159] The actual cost which § 106(a) would impose on state treasuries may be overly burdensome, but that relies on empirical cost determinations, the evidence for which is not yet available. Costs will result from having to defend litigation and from being ordered to repay preferences under § 547(b), or fraudulent postpetition transfers under § 549. In contrast, before § 106 was amended, if the state had not filed a proof of claim, it could retain such transfers. *See generally* Steven M. Richman, More Equal Than Others: State Sovereign Immunity Under the Bankruptcy Code, 21 Rutgers L.J. 603 (1990) (describing pre−statute state of affairs). Less obvious costs will result from court ordered nonmonetary sanctions on states. Back To Text

[160] Letter from William T. Pound, supra note 103. ("The decision to abrogate or waive sovereign immunity means that Congress is making a decision to allocate resources away from programs and services for the general welfare in order to satisfy judgments of individual claimants and their attorneys."). Back To Text

[161] For example, previously, when a state received a preferred transfer, the state was immune from suit and retained the entire amount unless it had waived its immunity, as by filing a proof of claim. *See* Richman, supra note 159, at 609 (recognizing sovereign immunity's role). Now, however, § 106(a), creates uncertainty for state treasuries, since they are probably not aware of the status of monies received, and are liable to lose all but a fraction of such transfers. Id. at 627−29.Back To Text

[162] Hess v. Port Auth. Trans−Hudson Corp., 115 S. Ct. 394, 410 (1995) (O'Connor, J., dissenting (citing Hutsell v. Sayre, 5 F.3d 996, 999 (6th Cir. 1993), cert. denied, 114 S. Ct 1071 (1994)) (recognizing that "If a State were vulnerable at any time to retroactive damage awards in federal court, its ability to set its own agenda, to control its own internal machinery, and to plan for the future−all essential perquisites of sovereignty−would be grievously impaired"); Plaintiffs' Steering Comm. v. Tourism Co. (In re San Juan Dupont Plaza Hotel Fire Litigation), 888 F.2d 940, 943−944 (1st Cir. 1989)) (finding government−sponsored company immune from damage suits because of Eleventh Amendment immunity). This author does not see why the same reasons should not persuade against congressional abrogation of state immunity (other than when it is acting under the Fourteenth Amendment). Back To Text

[163] This situation is not unlike that held unconstitutional in New York v. United States, 112 S. Ct. 2408 (1992).

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York . . . do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre−empted by federal regulation.

Id. at 2424 (citing Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 61−62 (1988); D. Bruce La Pierre, Political Accountability in the National Political Process−The Alternative to Judicial Review of Federalism Issues, 80 Nw. U. L. Rev. 577, 639−665 (1985)); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in part and dissenting in part) (noting uncertainty in political accountability when congress compels state agencies to act).Back To Text

[164] *E.g.*, New York v. United States, 112 S. Ct. 2408, 2424 (1992) (stating that accountability is lost when Congress compels state government to make expenditure).Back To Text

[165] Id. at 2431 (emphasis added); Lopez, 115 S. Ct. 1624, 1638 (Kennedy, J., concurring). Back To Text

[166] *See* The Federalist No. 46, at 294 (Clinton Rossiter ed. 1961) (declaring that People have ultimate authority). Back To Text

[167] Lopez, 115 S. Ct. at 1638 (Kennedy, J., concurring).Back To Text

[168] Id. (claiming that otherwise political responsibility would be illusory). As Professor Kaden put it:

> [a]s Congress increasingly implements national policy by directing the governmental activity of the states, the people in whom sovereignty ultimately resides are left without a clear sense of the persons they may call to account−the national legislators who conceived and ordered a program, or the state officials charged with its implementation. And as the states find their resources and energies increasingly consumed in meeting obligations imposed by the national government, they confront a system federalism more coopting than cooperative, in which the basic values of pluralism, creativity, participation, and liberty are progressively undermined.

Kaden, supra note 136, at 868.Back To Text

[169] Thus, it begs the question to argue that the state taxing authority should be treated as any private creditor. The state's money is the *public's* money.Back To Text