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Eleventh Amendment Immunity of a State in Bankruptcy Cases: A New Jurisprudential Approach

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Introduction

A.

The Problem

The Supreme Court's 1996 decision in *Seminole Tribe of Florida* v. *Florida* [1] (hereinafter "*Seminole Tribe*"), has had an important impact on the exercise of bankruptcy jurisdiction over claims against or that otherwise affect a state. [2] Before *Seminole Tribe*, few questions were raised as to the ability of bringing a suit against a state in the bankruptcy court, despite the apparent immunity from federal suits afforded to the states by the Eleventh Amendment, because Bankruptcy Code section 106 abrogated their immunity. [3] Then, in *Seminole Tribe*, a non−bankruptcy case, the Supreme Court held that Congress did not have the Constitutional power to abrogate the states' Eleventh Amendment immunity by means of a statute enacted pursuant to the Indian Commerce Clause set forth in Article I, Section 8, Clause 3 of the Constitution. [4]

The question whether the Eleventh Amendment has an impact on bankruptcy was raised by Justice Stevens' dissenting opinion in *Seminole Tribe*, where he argued that the majority's ruling against abrogation would prevent enforcement of federal bankruptcy law against a state. [5] The majority opinion in *Seminole Tribe*, however, did not expressly rule on or analyze whether Congress has the constitutional power to abrogate the states' immunity from suit in the bankruptcy courts. [6] While the decision has generated keen interest in Eleventh Amendment issues as they pertain to the bankruptcy courts, as well as numerous lower court opinions, a sound Eleventh Amendment jurisprudence for bankruptcy has not emerged from the cases. It is thus presently unclear whether and to what extent a state may be sued in the bankruptcy court and bound by a determination of issues involving property of the estate.

B. The Thesis

The thesis of this article is that a state does not have Eleventh Amendment immunity [7] from a suit brought in a bankruptcy court to adjudicate issues involving "property of the estate," as defined by Bankruptcy Code section 541(a). [8] Legal precedent and sound policy support the conclusion that Congress has the power to abrogate the states' Eleventh Amendment immunity from such suits, and validly exercised such power by enacting section 106 of the Bankruptcy Code. [9] Congress' power to abrogate the states' immunity may be grounded on the Fourteenth Amendment to the Constitution, which provides that no state shall deprive any person of property without due process of law. [10] The Fourteenth Amendment also empowers Congress to enact laws to enforce its provisions. [11] The use of the Bankruptcy Code provisions to protect the rights of debtors and creditors in the property of the estate furthers an explicit objective of the Fourteenth Amendment. [12]

Article I, Section 8, Clause 4 of the Constitution may provide an independent basis for abrogation of the states' Eleventh Amendment immunity. Although under *Seminole Tribe* Congress may generally lack the

power to abrogate the states' Eleventh Amendment immunity by an enactment pursuant to Article I, Section 8, [13] the power to do so may exist if grounded on an *exclusive* legislative power conferred on Congress. [14] One such exclusive power is granted by Article I, Section 8, Clause 4, which authorizes Congress to establish uniform bankruptcy laws throughout the country. [15] Since the federal bankruptcy power is exclusive, it would be repugnant to the structure of the Union and federal law to permit states to impede federal bankruptcy proceedings through immunity from suit in the bankruptcy courts. [16] For this reason, the Eleventh Amendment should not be construed to provide the states immunity from suit in the bankruptcy courts for the purpose of enforcing provisions of the Bankruptcy Code or to preclude bankruptcy courts from expressing jurisdiction over property of the estate.

Even if the states' Eleventh Amendment immunity has not been constitutionally abrogated, a state may nevertheless be subject to the jurisdiction of a bankruptcy court if it files a proof of claim in a bankruptcy case. [17] A state gains its right to participate in distributions of property of the estate by filing a proof of claim. [18] If a state invokes the jurisdiction of the court by filing a proof of claim, its Eleventh Amendment immunity thus should not bar the bankruptcy court from exercising jurisdiction to adjudicate disputes involving property of the estate. [19]

Strong policy reasons support the conclusion that Congress has the constitutional power to abrogate the states' Eleventh Amendment immunity and, also that a state subjects itself to the jurisdiction of a bankruptcy court by filing a proof of claim. [20] If a bankruptcy court cannot exercise its jurisdiction over property of the estate because of an Eleventh Amendment plea by a state, proceedings in a bankruptcy case that involve a state would have to be bifurcated between the bankruptcy court and state courts. [21] The result would be added burden, expense, and uncertainty for the parties, increased demands on judicial resources, and delays in the administration of bankruptcy cases. [22] Under a bifurcated system, issues of bankruptcy law would be decided by non−bankruptcy state courts across the country, leading to conflicting decisions, rather than a unified bankruptcy law as decreed by Article I, Section 8 of the Constitution.

A state would not be harmed by being required to litigate in bankruptcy court disputes with trustees, debtors and other parties in interest. Such a requirement is not offensive to state sovereignty and would not interfere with the proper functioning of state government. These goals of the Eleventh Amendment would not be undercut if the jurisdiction of the bankruptcy courts extends to the states with respect to claims under the Bankruptcy Code or involving property of the estate.

C. The Intersection of the Eleventh Amendment and Bankruptcy Jurisdiction

The ancient doctrine of sovereign immunity has its roots in the maxim that "the King can do no wrong." [23] A state not only has common law sovereign immunity from suit in its *own* courts, but also is immunized by the Eleventh Amendment from suit in a *federal* court. [24] The Eleventh Amendment has been relatively dormant over its 200 year history following its enactment, in 1798, on the heels of *Chisholm v. Georgia*. [25] But since the Supreme Court's 1996 decision in *Seminole Tribe* there has been intense interest in the scope of the states' Eleventh Amendment immunity, both in general, and specifically regarding the extent to which the Eleventh Amendment immunizes a State from suit in a bankruptcy court. [26]

Seminole Tribe

was not a bankruptcy case. It held that Congress did not have the constitutional power to abrogate the states' Eleventh Amendment immunity from suit in a federal court by means of a statute enacted pursuant to its legislative power granted by the Indian Commerce Clause of Article I, Section 8 of the Constitution. [27] Because of passing references to the bankruptcy law in the majority opinion and one of the dissenting opinions in *Seminole Tribe* and since Article I, Section 8 is also the predicate for bankruptcy legislation, many courts in post−*Seminole Tribe* cases have struggled with whether the Eleventh Amendment immunizes a state from suit in a bankruptcy court. [28]

Congress enacted Bankruptcy Code section 106 in 1978, and amended it in 1994, to abrogate the states' Eleventh Amendment immunity from suit in the courts of bankruptcy on a broad range of claims. [29] Since the decision in *Seminole Tribe*, however, section 106 has generally succumbed to constitutional challenges predicated on the Eleventh Amendment in the bankruptcy and appellate courts. [30] The courts have generally viewed section 106 as an enactment grounded on Article I, Section 8 of the Constitution, and thus subject to the holding of *Seminole Tribe*, which invalidated the abrogation provision of a non−bankruptcy statute enacted pursuant to Article I, Section 8 enactment. [31] Under *Seminole Tribe's* analysis, the only constitutional predicate for abrogation of Eleventh Amendment immunity may be the Fourteenth Amendment. [32] The post−*Seminole Tribe* cases generally conclude that the Bankruptcy Code does not have a Fourteenth Amendment source, and is instead grounded on the express legislative grant contained in Article I, Section 8 empowering Congress to enact uniform laws relating to bankruptcy.

The Supreme Court has not as yet ruled on whether the Bankruptcy Code can abrogate Eleventh Amendment immunity. It is commonly thought, however, that *Seminole Tribe* rules out statutory abrogation by means of an Article I, Section 8 enactment. [33] While a Fourteenth Amendment source for abrogation by the Bankruptcy Code has also been soundly rejected by the weight of post−*Seminole Tribe* appellate authority, [34] it cannot be assumed that the Supreme court will reject that analysis. The Supreme Court has surprised the bench and the bar on more than one occasion by rejecting a rule that has been overwhelmingly followed by the lower courts. [35] In addition to the basic question yet to be answered by the Supreme Court whether the Bankruptcy Code validly abrogates the States' Eleventh Amendment immunity, there are also other important questions as to whether there are any valid judicially crafted exceptions to the Eleventh Amendment. [36]

If states and their agencies are immune from bankruptcy jurisdiction, the administration of many bankruptcy cases and the rights of debtors and creditors could be adversely affected by uncertainty, increased cost and delay. Since a sound Eleventh Amendment bankruptcy jurisprudence was not provided by the Supreme Court in *Seminole Tribe*, or by lower courts since the *Seminole Tribe* was handed down, this article suggests rules of decision that recognize the need for the complete adjudication of issues concerning property of a debtor estate in a single court. There are two basic goals of the bankruptcy law: equality of distribution for creditors, [37] and a "fresh start" for the debtor. [38] In order to achieve these bankruptcy goals, all issues relating to "property of the estate" must be resolved, and their expeditious and economical resolution requires a single forum. [39] Eleventh Amendment immunity impedes those goals.

An underlying objective of the Eleventh Amendment is to retain the dignity of the states and not to subject them to the indignities of the coercive processes of federal tribunals in suits brought by private parties. [40] The Eleventh Amendment was also designed to prevent lawsuits by private parties from interfering with the functioning of a state government. [41] Eleventh Amendment immunity from suit in a bankruptcy court is not necessary to maintain the goals of this Amendment. A state is not subject to indignity by requiring it, along with other claimants, to litigate in bankruptcy court over the ownership of estate property or the priority of liens upon such property. Nor would the functioning of state government be impaired by requiring that a state be a litigant in bankruptcy court proceedings designed to determine the rights of all parties in interest in the *res*.

D. Petitions for Certiorari

The impact of *Seminole Tribe* on bankruptcy jurisdiction is concrete. Nevertheless, since deciding that case in 1996 the Supreme Court has declined to resolve Eleventh Amendment bankruptcy issues. Shortly after its decision in *Seminole Tribe*, the Supreme Court granted certiorari in *Ohio Agricultural Commodity Depositors Fund v. Mahern*, [42] vacated the decision below, and remanded the case to the Seventh Circuit for reconsideration in light of its decision in *Seminole Tribe*. [43] The Court directed the Seventh Circuit to consider whether the abrogation of a state's Eleventh Amendment immunity by section 106 of the Bankruptcy Code was unconstitutional. The question sent back by the Court was whether a state's Eleventh Amendment immunity can be abrogated by Congress only by an exercise of its powers pursuant to the Fourteenth Amendment of the Constitution, not by legislation enacted pursuant to Article I. The remand, however, does not necessarily indicate the Court's view. Just as the grant of certiorari is not a basis for predicting the result, a

remand to consider a particular question also is not a basis upon which to predict the outcome when the Court is finally presented with the issue. [44]

The Supreme Court also declined an invitation to rule on a critical Eleventh Amendment issue of significance to bankruptcy cases, by denying certiorari in *Wyoming Department of Transportation v. Straight*. [45] In this case, the district court ruled that Article I Section 8 is a source of congressional authority to abrogate Eleventh Amendment immunity, but on appeal the Tenth Circuit affirmed the result on the limited ground that by filing a proof of claim, a state waived its Eleventh Amendment immunity. [46] More recently, certiorari was denied in *In re Magnolia Venture Capital Corp.* [47] In this case, the petitioner contended that a bankruptcy proceeding is "*in rem*," and that under non−bankruptcy precedents of the Court, there is an "*in rem*" exception to the Eleventh Amendment. [48] The Court denied certiorari in that case on March 1, 1999.

The Supreme Court granted certiorari, in two non−bankruptcy cases that could yield a meaningful Eleventh Amendment bankruptcy jurisprudence. Both cases have the same title: *College Savings Bank v. Florida Prepaid Post−Secondary Education Expense Board*. The first *College Savings Bank* [49] case ("*College I*") was a Lanham Act action against a state agency for alleged unfair competition. The second *College Savings Bank* [50] case ("*College II*") was a patent infringement case brought by the same plaintiff. In *College I*, the Third Circuit held that the Lanham Act did not constitutionally abrogate the defendant state agency's Eleventh Amendment immunity from suit in a federal district court. [51] By contrast, the Federal Circuit in *College II* held that the abrogation provision of the Patent Remedy Act could be sustained under the Fourteenth Amendment because that statute implemented the Fourteenth Amendment's protection of property rights. [52] The significance of *College II* is that the statute before the Federal Circuit there was enacted pursuant to Article I, Section 8 of the U.S. Constitution, which is also the source of Congress' legislative power to enact bankruptcy laws. Accordingly, the Supreme Court may now provide insight through the *College Savings Bank* cases, into whether the Bankruptcy Code's provision in section 106 abrogating sovereign immunity may be sustained on a Fourteenth Amendment abrogation theory.

I. Questions Posed by the Eleventh Amendment

States and state agencies are often major players in bankruptcy cases as creditors seeking recoveries from debtors' estates on tax and other claims, as defendants from whom trustees and debtors seek monetary recovery, and as parties to dischargeability litigation. [53] As a result of *Seminole Tribe* and its progeny, a host of issues now dot the bankruptcy landscape and have produced conflicting lines of case law:

> Does Bankruptcy Code section 106 constitutionally abrogate a state's Eleventh Amendment immunity from suit in a federal court? [54]
>
> If section 106 is unconstitutional, could a provision be added to the bankruptcy jurisdictional provisions in Title 28 of the United States Code, or to the present Bankruptcy Code, that would constitutionally abrogate a state's Eleventh Amendment immunity from suit? [55]

What types of relief may be granted against a state by a bankruptcy court? [56]

> Can a bankruptcy court determine the amount of a debtor's tax liability to a state pursuant to Bankruptcy Code section 505?
>
> Can a tax or other debt owed to a state be discharged by a bankruptcy court? [57]
>
> If both a state and a debtor in bankruptcy claim an interest in property, can a bankruptcy court adjudicate their ownership or other interests in the *res*? [58]
>
> Can a bankruptcy court enjoin a state official from violating a provision of the Bankruptcy Code, such as the discharge injunction under Code section 524(a)(2)? [59]

Can a bankruptcy court enjoin a state from violating the automatic stay by taking steps to collect a debt of the debtor? [60]

Can a bankruptcy court confirm a plan of reorganization that "writes down" a state−held secured claim to the value of its collateral over the state's claim of Eleventh Amendment immunity? [61]

Is the nature of the Eleventh Amendment jurisdictional so as to preclude a bankruptcy court from exercising its subject matter jurisdiction even if the state has expressly waived its Eleventh Amendment immunity? [62]

Does a state submit to the jurisdiction of a bankruptcy court by filing a proof of claim? [63]

What action or inaction by a state will waive its Eleventh Amendment immunity, and what state officers are authorized to grant a waiver? [64]

If a state is deemed to waive its Eleventh Amendment immunity by filing a proof of claim, to what extent is such a waiver effective and to what liabilities does it extend? [65]

Until the Supreme Court provides answers to these questions, bankruptcy litigation will be complicated and cause uncertainties in cases in which a state is a party in interest. It may be difficult in such cases for a debtor to obtain a complete discharge, or to confirm a chapter 11 plan of reorganization. Answers do not lie with Congress, but with the Supreme Court. The source of the relationship between bankruptcy jurisdiction and the Eleventh Amendment is the Constitution itself; Congress cannot amend the Constitution. [66]

Lower courts have attempted to address the quandary of issues resulting from *Seminole Tribe*, but neither a rule of law, nor even a consensus as to a theory, has emerged from the case law. [67] The lower courts have offered a few creative theories to support the inapplicability of the Eleventh Amendment to bankruptcy proceedings, but thus far have not articulated a sound jurisprudence for Eleventh Amendment issues in bankruptcy cases. [68] A recent decision by a district court, *In re Chen*, [69] summed up the current state of affairs. That court characterized "the body of jurisprudence which has developed analyzing the sovereign immunity conferred upon the States by the Eleventh Amendment as a shifting morass of confusion which posed a 'daunting intellectual challenge to wade through the quagmire of cases analyzing the issue of Eleventh Amendment sovereign immunity.'" [70]

II. The Scope of the Eleventh Amendment: In General

A. The States' Eleventh Amendment and Common Law Immunity

For the federal government, sovereign immunity is a judge−made doctrine tracing its roots to pre−colonial English law. [71] According to this doctrine, the United States cannot be sued without its consent. [72] When given by the federal government, consent is generally expressed by Congress in a statute that states that the United States or a designated agency may "sue or be sued." [73] To be effective, the consent must be "unequivocally expressed" by Congressional act. [74]

With respect to the states, the Eleventh Amendment generally prohibits a federal court from exercising jurisdiction over any suit against a state or a state agency unless (a) by statute, the state has consented to be sued in a federal court, (b) the state has waived its immunity, or (c) such immunity has been constitutionally abrogated by Congress. [75] It is well settled that a state's Eleventh Amendment immunity may be abrogated by a Congressional act grounded on the Fourteenth Amendment. [76] The theory permitting Congress to abrogate Eleventh Amendment immunity is that the Fourteenth Amendment, which was enacted with the approval of the states and restricts the states, overrides the Eleventh Amendment, which was an earlier enactment. [77] Consequently, Congressional action taken pursuant to the Fourteenth Amendment does not run afoul of the states' immunity under the Eleventh Amendment. There is a serious question, however, whether the

Bankruptcy Code's abrogation provision, section 106, is a Fourteenth Amendment grounded statute which effectively abrogates the states' Eleventh Amendment immunity, an issue discussed in Section IV infra.

Like the federal government, a state also has inherent sovereign immunity under common law from suit in its *own* courts. [78] Sovereign immunity of a state is different than its Eleventh Amendment immunity. The Eleventh Amendment immunizes a state from being sued in a *federal* court, whereas a state's inherent sovereign immunity only immunizes it from being sued in the courts of its own state. [79] It is commonplace for a state by statute or a provision of its constitution to waive its inherent sovereign immunity from suit in its own courts, although that is not always the case. [80]

B. The "State Officer" Doctrine

Although the literal language of the Eleventh Amendment immunizes a state from suit in a federal court only if it is brought by a citizen of *another* state, [81] the Supreme Court has broadly applied the Eleventh Amendment as a bar to all suits brought in a federal court against a non−consenting state by a citizen of *that* state. [82] Despite the broad interpretation given by the Supreme Court to the Eleventh Amendment, under the doctrine of *Ex parte Young* [83] the Eleventh Amendment has been narrowed so as not to preclude suit in a federal court against a state officer, as distinguished from the state itself, when necessary to ensure that the officer's conduct will in the future comply with federal law. [84] Under this doctrine, a trustee or debtor may be able to obtain an injunction against a state official who is acting in violation of federal law. Such an injunction is unavailable, however, if the action complained of is not ongoing. [85]

Since both the majority opinion [86] and Justice Stevens' dissent [87] in *Seminole Tribe* cited with approval the Court's earlier decision in *Ex parte Young*, the "state officer" injunction doctrine has survived *Seminole Tribe*. [88] On the other hand, in a decision handed down after *Seminole Tribe* the Supreme Court, in *Idaho v. Coeur d'Alene Tribe of Idaho,* [89] denied injunctive relief sought under the doctrine of *Ex parte Young* in a non−bankruptcy action against state officials. The injunction sought in that case was akin to determining ownership. [90] *Couer d'Alene Tribe* should be viewed in light of the Court's concern that extending the doctrine of *Ex parte Young* to a case involving governance – in that case over certain Indian tribal land – would have resulted in the state's loss of regulatory control. [91] That decision should thus not be viewed as a rejection of the "state officer" doctrine. [92]

Wisconsin Department of Corrections v. Schacht

, [93] illustrates the complexity of procedural as well as substantive issues regarding suits against state officers. In that case a former employee of a state who had been discharged, brought an action in a state court against state officials in their personal and official capacities. [94] After the state officials removed the action to a federal district court, that court dismissed the claims against the officers in their *official* capacities based upon their Eleventh Amendment defense, and granted summary judgment to the officers dismissing the claims against them in their *personal* capacities. [95] On appeal, the Seventh Circuit vacated the district court's judgment and remanded the case to state court, holding that the Eleventh Amendment precluded the district court from exercising any subject matter jurisdiction whatever in the case. [96]

On the subsequent appeal to the Supreme Court in *Schacht*, however, the Court vacated the decision of the Court of Appeals. [97] It held that the claims against the state officials in their personal capacities could be severed from those subject to the Eleventh Amendment immunity of the state officials in their official capacities, and permitted the suit to continue in the district court against the state officials in their personal capacities. [98] The Supreme Court did not consider whether the state waived its Eleventh Amendment immunity altogether by removing the action from state court to federal district court, which would have allowed all claims in the case to be resolved in a single proceeding in federal court rather than bifurcating the claims between the federal and state court. [99]

III. Congressional Power to Abrogate Immunity

A. Abrogation in General

Neither the Eleventh Amendment nor any other provision of the Constitution expressly confers on Congress the power to abrogate a state's Eleventh Amendment immunity from suit in a federal court. [100] Nevertheless, the Supreme Court has ruled that Congress does have the power to abrogate Eleventh Amendment immunity under a two−part test. [101] The first prong of this test requires that the abrogating statute express Congress' unequivocal intent to abrogate Eleventh Amendment immunity. [102] The second prong requires that Congress act pursuant to a valid exercise of its constitutional power. [103] It is the second prong of the test that has generated grave uncertainty with respect to Bankruptcy Code section 106, the statute which Congress enacted to abrogate the states' Eleventh Amendment immunity from suit in the bankruptcy courts. [104]

By enacting section 106, Congress clearly intended to abrogate Eleventh Amendment immunity – that statute, as amended in 1994, expressly declared that it "abrogated" sovereign immunity of all governmental units. [105]

B. Abrogation by Means of Article I, Section 8

Congress assumed that in enacting section 106 it had the constitutional authority to abrogate a state's Eleventh Amendment immunity by an exercise of its legislative power under Article I, Section 8, Clause 4 to enact uniform bankruptcy laws, and Congress further assumed that it could exercise such power by means of legislation, such as section 106, that unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity. [106] The question not answered by *Seminole Tribe*, a non−bankruptcy case, and which remains to be answered by the Supreme Court with respect to section 106, is whether section 106 is a valid exercise of Congressional power under the Constitution.

Taking the lead from *Seminole Tribe*, lower courts have generally held that section 106's abrogation of Eleventh Amendment immunity is unconstitutional on the theory that Congress did not have the power to do so pursuant to Article I, Section 8. [107] Nevertheless, reasonable arguments can be made in support of the conclusion that states are not immune from bankruptcy proceedings. Under one analysis, Congress has the constitutional power under Article I, Section 8 to determine the process for administering bankruptcy cases, including the adjudication of disputes over property of the estate. Since a state is not compelled to become a party to such process, its Eleventh Amendment immunity should not be a bar to the exercise of jurisdiction by a bankruptcy court. In light of the Supreme Court's analysis in *Seminole Tribe* rejecting Article I, Section 8 as a basis for abrogation by a Commerce Clause statute, it would be a surprise if the Supreme Court were to hold that Congress had the power under Article I, Section 8 to abrogate the states' Eleventh Amendment immunity by means of the provisions of section 106 of the Bankruptcy Code. In view of the strong policy reasons favoring abrogation in the bankruptcy context, however, the Supreme Court could sustain section 106. [108] In doing so, it would not be the first time that the Supreme Court has surprised the bench and the bar. [109] The Court could be influenced to sustain section 106 in order to avoid the complexity, uncertainty, cost and delay that could result by bifurcating bankruptcy litigation between federal and state courts as a result of rejecting the abrogation of the state's Eleventh Amendment immunity with respect to proceedings in the bankruptcy courts.

C. Abrogation by Means of the Fourteenth Amendment [110]

In *Seminole Tribe*, the Supreme Court made it clear that Congress may abrogate the Eleventh Amendment immunity of a state by means of a statute enacted pursuant to the Fourteenth Amendment in order to accomplish a purpose of that amendment, but held that the statute before the Court regulating Indian commerce, which, like the Bankruptcy Code, was enacted pursuant to Article I, Section 8, did not validly abrogate a state's Eleventh Amendment immunity from a suit to enforce that statute. [111] Moreover, the Court in *Seminole Tribe* expressly overruled *Pennsylvania v. Union Gas Co.*, [112] which only seven years earlier had upheld the abrogation of Eleventh Amendment immunity by means of an enactment pursuant to Article I of the Constitution.

The authority of Congress under the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity has long been recognized by decisions of the Supreme Court, such as *Fitzpatrick v. Bitzer* [113] and *Pennsylvania v. Union Gas Co.*, [114] although the Supreme Court expressly overruled *Pennsylvania v. Union Gas Co.* on other grounds in *Seminole Tribe*. [115] As recently stated by the Third Circuit in *College I*, a Lanham Act action for unfair competition predicated on alleged misstatements by the defendant state agency, in which the Supreme Court has granted *certiorari*: "Thus, since *Seminole Tribe*, section 5 of the Fourteenth Amendment has been the sole basis for Congress to abrogate the states' immunity under the Eleventh Amendment." [116]

In an independent action having the same name, *College II*, the Federal Circuit sustained an abrogation statute. [117] As in the case of *College I*, the Supreme Court has granted certiorari in *College II*. In *College II*, the plaintiff brought an action for patent infringement against a state agency. In overruling an Eleventh Amendment immunity plea, the Federal Circuit held that the abrogation of the state's Eleventh Amendment immunity by means of the Patent Remedy Act was not unconstitutional even though that statute was enacted pursuant to Congress' authority to enact patent legislation conferred by Article I, Section 8, Clause 8 of the Constitution. That provision of Article I authorizes the enactment of legislation "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [118] The court held that abrogation by means of the Patent Remedy Act was constitutional because that statute implemented substantive provisions of the Fourteenth Amendment. The Federal Circuit pointed out that abrogation by means of the Fourteenth Amendment does not run afoul of the Eleventh Amendment. The reason is that the Fourteenth Amendment, which gives Congress enforcement power in Section 5, is itself a limitation on the authority of the states, and that the Fourteenth Amendment alters the relationship of the states and the United States as originally structured by the Constitution. [119]

In *College II*, the Federal Circuit addressed whether the Fourteenth Amendment was in fact a predicate for the Patent Remedy Act's abrogation provision, and thus a basis for abrogation of the state agency's claimed immunity from the patent infringement suit in the United States district court. On this point, the Federal Circuit first pointed to the Senate and House Committee Reports that expressly invoked the Fourteenth Amendment as authority for enacting the Patent Remedy Act, but noted that such recitals by the Congressional Committees are not necessarily enough to link an abrogation statute to the Fourteenth Amendment. Under the court's analysis, the test to determine if the enforcement power in Clause 5 of the Fourteenth Amendment has been validly invoked so as to support abrogation, is whether the statute in question is a rational means to effectuate the substantive provisions of the Fourteenth Amendment. [120]

The test for whether the Fourteenth Amendment supports a particular abrogation statute has also been provided by a clear statement by the Supreme Court, ergo in a footnote, in *EEOC v. Wyoming*:

> It is in the nature of our review of congressional legislation defended on the basis of Congress's powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection," *see, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 476−478, 100 S. Ct. 2758, 2773−2774, 65 L. Ed.2d 902 (1980) (BURGER, C.J.), "[t]he ... constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Lloyd W. Miller Co., 333 U.S. 138, 144, 68 S. Ct. 421, 424, 92 L. Ed. 596 (1948). [121]

The Supreme Court expanded this test for Fourteenth Amendment abrogation in *City of Boerne v. Flores*, [122] where the Court stated that the exercise of legislative power to support a Fourteenth Amendment abrogation must be remedial in nature so as to advance a purpose of that Amendment.

The lower courts have followed *EEOC v. Wyoming's* approach to abrogation by holding that an abrogating statute need not use the words "Fourteenth Amendment" or "Section 5." [123] The Federal Circuit in *College II* did not require these magic Fourteenth Amendment words. The court held in that patent infringement suit that

the Fourteenth Amendment provided constitutional underpinning for the abrogation of the defendant state agency's Eleventh Amendment immunity by means of a statute enacted by Congress pursuant to its Article I, Section 8 legislative power. [124] Under the court's analysis, state immunity may be abrogated in order to protect persons from deprivations of property without due process of law, and protecting a privately−held patent, a property right, from infringement by a state is a legitimate object of protection under the Fourteenth Amendment. [125]

Protection of property of a debtor estate being administered in a bankruptcy case is also a legitimate objective under the Fourteenth Amendment. Protection by Congress of the rights of the debtor and its creditors in that property from claims by states falls within the scope of that Amendment. Because protection of property of the estate is a legitimate Fourteenth Amendment objective, an Article I bankruptcy statute abrogating sovereign immunity should be valid. The Bankruptcy Code's protection of property of the estate is not merely tangentially connected to the Fourteenth Amendment. In the case of a bankruptcy estate, discernible property rights are involved and are a prime object of protection under the Fourteenth Amendment. A rejection of Fourteenth Amendment grounded abrogation of immunity of the states from suit in the bankruptcy courts would impinge on property rights protected by the Bankruptcy Code.

If states were immune from litigating ownership and priority issues in a bankruptcy court, serious complications would exist as to whether property of the estate could be sold, and as to distribution of the bankruptcy estate. Delays would be experienced and assets could deteriorate in the interim if ownership and priority had to be litigated in a bankruptcy court and separately in state court with respect to claims by a state. Immunity of the states would thus impair the property rights of debtors and creditors. Fourteenth Amendment protection of rights in property of a debtor estate is a legitimate Congressional objective which supports a Fourteenth Amendment grounded abrogation of Eleventh Amendment immunity from bankruptcy proceedings. As stated in *Fitzpatrick v. Bitzer*, "[t]he Eleventh Amendment, and the principle of state sovereignty that it embodies, are necessarily limited by . . . the Fourteenth Amendment." [126]

Virtually all lower courts in post−*Seminole Tribe* cases have ruled that the Fourteenth Amendment is the only predicate upon which Congress may abrogate such immunity, and that as an Article I statute, the Bankruptcy Code cannot abrogate Eleventh Amendment immunity in reliance on the Fourteenth Amendment. [127] One district court, however, in *Wyoming Department of Transportation v. Straight*, ruled that Congress can abrogate a state's sovereign immunity from suit in a bankruptcy court by means of an exercise of its Article I, Section 8 bankruptcy power. [128] In holding that Article I abrogation was available, the district court in *Straight* explained:

> The Bankruptcy Code is intended to provide all American citizens with the following: the privilege of efficient liquidation or other use and ratable distribution of a debtor's assets, or (to put it another way) with immunity from the inefficient liquidation or use and inequitable distribution of a debtor's assets which may obtain under State laws; the privilege of discharge, or (to put it another way) with immunity from oppressive debt collection which may obtain under State laws; liberty from economic bondage, and protection against undue loss of value of property in exigent financial circumstances; and fair and efficient determination of all of the above, according to the process due in a national court of equitable jurisdiction, without regard to persons or to any special privileges save those considered by Congress to be justified as a matter of policy. [129]

The same result was reached in *In re Burke*. [130] In that case, the bankruptcy court reasoned that since Congress had the power to create uniform bankruptcy laws to protect debtors, such debtor protections are privileges and immunities of federal citizenship that may be protected by Congress pursuant to its Fourteenth Amendment power. [131]

Despite the virtually uniform rejection of the abrogation of the states' immunity from suit in the bankruptcy courts in the post−*Seminole Tribe* cases, the Supreme Court could sustain abrogation on the basis of both precedent and sound policy. The Court could recognize that rights exist in property of the estate that must be

dealt with to accomplish a full resolution of a bankruptcy case, and hold that they are protected by the bankruptcy laws from imposition by all parties, including the states. Most bankruptcy cases revolve around some aspect of "property of the estate," including the collection of assets, the assertion of claims, the allowance of claims, treatment of assets in plans of reorganization, and distributional issues concerning the validity and priority of liens. Immunity should be subject to abrogation by a bankruptcy statute to protect property rights.

Property rights are one of the very objects that the Fourteenth Amendment was enacted to protect. [132] The abrogation of Eleventh Amendment immunity of the states from suit in a bankruptcy court could thus be sustained under a Fourteenth Amendment analysis with respect to proceedings in bankruptcy courts involving property of the estate. A holding that a bankruptcy related statute abrogating the state's Eleventh Amendment immunity with respect to disputes over property of the debtor estate would also be supported by sound policy. [133] The bankruptcy courts provide a single forum for the resolution of all disputes involving property of the estate, whereas bifurcated jurisdiction between the bankruptcy and state courts would result in uncertainty, protracted proceedings, additional expense for debtors and creditors, and an added burden on the courts. [134]

The abrogation of Eleventh Amendment immunity with respect to a claim affecting "property of the estate" is consistent with the original model for the Constitution structured by the Founding Fathers to establish the relationship between the states and the United States. Under that model, the United States' power was to be paramount to that of the states in those instances in which the Constitution granted *exclusive* power to the United States. In this regard, Federalist Paper No. 32 stated that, in forming the union between the states and the federal government, the state governments were to retain all the rights of sovereignty that they had had before the union was formed, except as *exclusively* delegated by the states to the United States. [135] A class of powers to be delegated exclusively to the United States was those which, if the states retained similar authority, "would be absolutely and totally contradictory and repugnant." [136] One example of paramount federal authority given by Federalist Paper No. 32 was the proposed provision of the Constitution "to establish an uniform rule of naturalization throughout the United States," which, like the provision for enacting "uniform laws on the subject of bankruptcies," was an exclusive grant of federal power to Congress. [137] Both powers were later enacted under Article I, Section 8. Congress' authority to enact such laws was exclusive, since to be "uniform," Congress' authority to enact such laws had to be "exclusive." [138] Otherwise, there could not be a uniform rule.

The theme of federal legislative supremacy in those instances in which exclusive power was to be delegated under the Constitution by the states to the United States, was repeated in Federalist Paper No. 82 dealing with the respective jurisdiction of the state courts and the new federal courts. [139] In this regard, No. 82 stated the following basic constitutional rule governing those instances in which *exclusive* authority (i.e., over bankruptcy) is granted to the United States:

> The principles established in a former paper teach us that the States will retain all *pre−existing* authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the States; or where an authority is granted to a Union with which a similar authority in the States would be utterly incompatible ... I shall lay it down as a rule that the State courts will *retain* the jurisdiction they now have unless it appears to be taken away in one of the enumerated modes. [140]

It is clear under the design of the Constitution that the states were not to intrude into the field of bankruptcy. Congress was given the exclusive power to create a complete and effective system for the adjudication of bankruptcy proceedings.

Shortly after the adoption of the Constitution, the Supreme Court offended the states by its decision in *Chisholm v. Georgia*, in which it held that the State of Georgia could be hauled into federal court in a diversity action for breach of contract. [141] The action was for assumpsit, a common law form of pleading for

breach of contract. The action was not grounded on any federal law, but was a plain vanilla contract claim for failure to pay for goods purchased by the State of Georgia. The adoption of the Eleventh Amendment followed three years later as a response to *Chisholm v. Georgia*. [142]

The Eleventh Amendment provides that the judicial power of the United States, conferred on the federal courts by Article III of the Constitution, shall not be construed to extend to "any suit in law or equity" against a state. [143] That broad language, however, responded to the narrow holding in *Chisholm v. Georgia* authorizing a common law contract action to be maintained against a state in a federal court. In light of the narrow holding of *Chisholm v. Georgia*, the Eleventh Amendment was designed to immunize a state from federal suits on common law claims, rather than suits grounded on federal statutes enacted pursuant to the exclusive legislative authority of Congress. [144]

The literal language of the Eleventh Amendment illuminates the notion that states should not be immune from federal suits to enforce federal statutes enacted under Congress' exclusive Article I, Section 8, Clause 4 authority. As written, the Eleventh Amendment immunizes a state only with respect to suits against the state brought by a citizen of *another* state. [145] In *Hans v. Louisiana*, [146] the Court extended the literal language of the Eleventh Amendment by holding that a state had constitutional immunity from suit brought in a federal court by one of its *own* citizens. Although *Hans* broadened a state's immunity so as preclude suits by all citizens wherever located, it did not purport to expand the Eleventh Amendment with respect to the nature of causes of action with respect to which the states have immunity. It is evident that the Eleventh Amendment was written solely to limit federal jurisdiction over a state predicated on the basis of diversity of citizenship. [147] Diversity jurisdiction would not exist in a suit against a state by one of its own citizens. The Amendment's language extending immunity to a suit against a state by a citizen of *another* state thus impliedly restricts it to diversity actions. State immunity from diversity jurisdiction was the very purpose of the Eleventh Amendment's response to *Chisholm v. Georgia*, a common law breach of contract action against the State of Georgia brought in a federal court under its diversity jurisdiction. [148]

The Constitution, as originally enacted, contemplated that, in recognition of the sovereignty of the states, a state would not be amenable to suit in a federal court for the recovery of a debt of the state. As stated in Federalist Paper No. 81:

> [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre−existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable. [149]

The relationship of the states to the federal government under the Constitution preserves states' immunity from suits to collect debt in federal courts but not their immunity from suits in federal courts on federal claims. The Constitution's retention of state immunity from federal action based upon common law claims was the reason why the decision in *Chisholm v. Georgia* was a shock to the states. [150] In this light, the Eleventh Amendment should be narrowly construed not to immunize a state from proceedings in a federal court predicated on a federal statute enacted by Congress to legislate in a field over which the constitution has granted it exclusive legislative power, such as bankruptcy.

The theory of the Constitution was that federal bankruptcy law would be paramount to the rights of the states. The history of the Eleventh Amendment does not establish that its adoption was intended to change this paramount position of federal bankruptcy law.

IV. The Scope of Eleventh Amendment Immunity Under Seminole Tribe and Its Progeny

A. Seminole Tribe

Prior to the Supreme Court's decision in *Seminole Tribe*, courts gave little credence to contentions by states that they had Eleventh Amendment immunity from suits against them in the bankruptcy courts. [151] *Seminole Tribe* changed all that.

Although *Seminole Tribe*, which was not a bankruptcy case, does not directly answer whether the Eleventh Amendment confers immunity on a state from suit on a bankruptcy claim in a bankruptcy court, the Supreme Court's majority opinion [152] and statements in Justice Stevens' dissent [153] have a significant bearing on the Eleventh Amendment bankruptcy court issue. The majority opinion – which overturned an abrogation of Eleventh Amendment immunity by means of an exercise of Congress' Article I power under the Constitution's Indian Commerce Clause – did not resolve, or even raise, the question whether the Eleventh Amendment barred the assertion of a bankruptcy claim against a state or state agency in a bankruptcy court. What *Seminole Tribe* held is that the Eleventh Amendment precluded Congress from abrogating a state's constitutional immunity from suit in a federal court by means of a statute enacted pursuant to the commerce Clause in Article I, Section 8. [154]

In *Seminole Tribe*, the impact of the Eleventh Amendment on suits against states in bankruptcy courts was first brought to the fore in Justice Stevens' dissent, which characterized the majority opinion as suggesting that "persons harmed by state violations of federal copyright, *bankruptcy* and anti−trust laws have no remedy." [155] The majority discussed bankruptcy and other federal laws only in response to Justice Stevens' concern about the enforcement of these bodies of federal law. [156]

The majority's response in *Seminole Tribe* played down Justice Stevens' conclusion that its holding prohibited an exercise of federal jurisdiction to enforce federal laws against states, by stating in broad strokes that the dissent's conclusion was "exaggerated both in its substance and in its significance." [157] The majority minimized the impact of its decision on the enforcement of the bankruptcy and other federal laws by asserting that there are existing methods to ensure a state's compliance with federal law. The Court, however, did not point to any meaningful method for enforcement. [158] One method offered by the Court was predicated on its prior decisions holding that the Eleventh Amendment does not preclude a party from obtaining review by the Supreme Court of orders and judgments of the highest court of a state, even though a state is an adverse party to the appeal. [159] Based upon that precedent, the Court in *Seminole Tribe* stated that a means for ensuring compliance by a state with federal law is the availability of review by the Supreme Court of a state court judgment where the state has itself consented to be sued in its own courts (if it has in fact waived its own common law sovereign immunity from such suit). [160] Such method, however, hardly suffices as a meaningful remedy for enforcing federal bankruptcy claims. A party would first have to sue a state in a state court, then appeal to the highest state court, and hope that certiorari would be granted by the Supreme Court. Not only would this method be beyond the financial ability of most parties, but it would probably not result in Supreme Court review of state court judgments.

It is unclear from the majority decision in *Seminole Tribe* what the Court had in mind with respect to an exercise of bankruptcy jurisdiction against a state. [161] A majority of the Justices, when actually faced with the issue in the future, could rule either that the states' Eleventh Amendment immunity from suit in the bankruptcy courts has been abrogated by Bankruptcy Code section 106, or invoke other theories to hold that the Eleventh Amendment is not a bar to maintaining bankruptcy grounded proceedings against the states in federal courts.

B. The Eleventh Amendment Bars "Suits"

Since *Seminole Tribe* was decided in 1996, numerous federal appellate courts have read the Supreme Court's opinion as a bar to suits against states in the bankruptcy courts on bankruptcy causes of action. [162]

A number of other courts, however, have suggested that the assertion of a bankruptcy claim does not constitute a "suit" within the meaning of the Eleventh Amendment. [163] By its literal language, the Eleventh Amendment only immunizes a state from "suit" in a federal court. For example, *In re Barrett Refining Corp.*, [164] the court, citing *Gardner v. New Jersey*, [165] indicated that the assertion of a bankruptcy claim against a state after the state has filed a proof of claim, is not a "suit" even though the bankruptcy process for the proof and allowance of a claim can result in the complete disallowance of the state's claim or according it a priority lower than it claims. [166] The same notion was expressed by the Fifth Circuit in *Texas v. Walker*, [167] where the court, also relying on *Gardner v. New Jersey*, held that if a state files a proof of claim the state cannot utilize Eleventh Amendment immunity to bar a complete adjudication of all issues that may involve the claim. [168] The theory of *Gardner v. New Jersey* is that by filing a proof of claim, "[t]he State is seeking something from the debtor. No judgment is sought against the State." [169]

In *Texas v. Walker*, the court held that a state's Eleventh Amendment immunity does not overcome a discharge injunction. [170] In explaining the court's holding, Circuit Judge Edith H. Jones first laid out the countervailing arguments that have been made to support Eleventh Amendment immunity in discharge cases:

> The argument for an Eleventh Amendment bar would assert that although the State was not a named defendant in Walker's bankruptcy case, it was an indirect party because its legal rights were adjudicated and altered (albeit without its knowledge) when the bankruptcy court discharged Walker's debt. *Cf.* Regents of Univ. of Cal., 519 U.S. at 904−905, 117 S. Ct. at 904−05 (holding that the "underlying Eleventh Amendment question" is the state's "potential legal liability," not whether any award of damages would actually come from the state's coffers); Kish v. Verniero, 212 B.R. 808, 814 n.5 (D.N.J. 1997) (citing *Regents of University of California v. Doe* and stating that "the relevant inquiry for Eleventh Amendment purposes is whether a state's potential legal rights are affected"). If Walker's discharge was valid, then the State was enjoined in perpetuity from collecting that debt. *See* 11 U.S.C. § 524(a)(2). This can be viewed as both subjecting the state to the indignity of the coercive powers of a federal court, *see* Seminole, 517 U.S. at 56−58, 116 S. Ct. at 1124, and significantly altering the legal rights of the state, *see* Regents of Univ. of Cal., 519 U.S. at 430−31, 117 S. Ct. at 904.

Put another way, discharging a debt owed to the state either restrains the state from acting by enjoining it from collecting the debt, or compels the state to act by forcing it to file a proof of claim in bankruptcy court in order to collect the debt. The state is thus presented with a Hobson's choice: either subject yourself to federal court jurisdiction or take nothing. If the state acts, it is potentially forced to waive its sovereign immunity by filing a proof of claim in the bankruptcy court. If the state does nothing, it is permanently barred from collecting its debt and from recovering a pro rata share of the debtor's estate. It can be argued that the Eleventh Amendment should prevent a state from being forced to make such a choice. [171]

Judge Jones then explained why a discharged debtor's assertion of the discharge injunction does not constitute a "suit" against a state within the meaning of the Eleventh Amendment:

> Its key assumption is the equation of a bankruptcy case with a suit *against* the state, but this assumption is flawed. In a bankruptcy case, in its simplest terms, a debtor turns over his assets, which constitute the estate, for liquidation by a trustee for the benefit of creditors according to their statutory priorities. Bankruptcy law modifies the state's collection rights with respect to its claims against the debtor, but it also affords the state an opportunity to share in the collective recovery. Bankruptcy operates by virtue of the Supremacy Clause and without forcing the state to submit to suit in federal court. *See* Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1997) ("While resolution of an adversary proceeding against a state depends on court jurisdiction over that state, the power of the bankruptcy court to enter an order confirming a plan ... derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates.").

From this standpoint, Walker's entitlement to assert his discharge against the state's claims invoked no Eleventh Amendment consequences. The state never was hauled into federal court against its will in the bankruptcy. [172]

It is theoretically possible that certain types of bankruptcy claims asserted against a state may not fall within the category of a "suit" against the state for Eleventh Amendment purposes, [173] although under the seminal decision of Chief Justice Marshall in *Cohens v. Virginia*, [174] a claim for the recovery of money from a state falls squarely within that Court's definition of a "suit." Moreover, a claim to recover money from a state is nonetheless a "suit" because its recovery is sought in a bankruptcy court. [175]

In *Missouri v. Fiske*, [176] a case seldom cited in the post−*Seminole Tribe* decisions, the Supreme Court considered the threshold question as to what constitutes a "suit" against a state for Eleventh Amendment purposes. It drew on the two century old decision in *Cohens v. Virginia*, to explain that a suit is the "pursuit of some claim, demand or request . . . [or] the prosecution of some demand in a court of justice . . . [or] to demand something by the institution of process in a court of justice . . .. [A suit involves] process sued out by [the] individual against the state, for the purpose of establishing some claim against it by the judgment of a court . . .." [177]

More recently, *Clerk of the Circuit Court v. NVR Homes, Inc.* [178] dealt with whether certain motions filed in a bankruptcy case constituted a "suit" within the meaning of the Eleventh Amendment. In that case, the debtor had engaged in the post−petition buying and selling of real property and paid the required transfer and recording fees to several states. Thereafter, the debtor sought refunds of these fees from two states by motions filed against the states in the bankruptcy court, which the states opposed on Eleventh Amendment grounds. The court, citing *Maryland v. Antonelli Creditors' Liquidating Trust*, [179] held that the motions did not constitute "suits" against the state taxing authorities within the meaning of the Eleventh Amendment. [180] Its theory was that the motions merely sought a clarification of a confirmed plan of reorganization, which had not been objected to by the states, and that the bankruptcy court's granting of the motions was an exercise of its continuing jurisdiction over the debtor and the confirmed plan. [181] A seemingly contrary result was reached, however, in *In re Mitchell*, where the Bankruptcy Appellate Panel of the Ninth Circuit held that an adversary proceeding to determine the dischargeability of a debt is a "suit" within the meaning of the Eleventh Amendment. [182]

The anti−Eleventh Amendment forces were also joined in *In re Doiel* by the United States Department of Justice. [183] The Department contended in that case that a debtor's adversary proceeding to determine the dischargeability of his income tax debt, for the return of moneys collected after the discharge was granted, and for an order restraining a state from continuing to levy upon his income, was not a "suit" within the meaning of the Eleventh Amendment. While rejecting the Department's no−suit contention, the court held out a glimmer of hope that a debtor's complaint that merely seeks a determination that a state−held debt is dischargeable, may not be subject to an Eleventh Amendment defense. [184] The theory is that such a proceeding does not seek affirmative relief as such against a state, but rather is a procedure to establish that the debtor would have a defense to a post−discharge collection action brought by a state predicated on the theory that the debt in question is excepted from the discharge. In that light, it can be said that a complaint to determine dischargeability is not a "suit" against a state within the meaning of the Eleventh Amendment. In rejecting the Department's contention that section 106(a) is constitutional, and overruling its claim that the dischargeability proceeding was not a "suit," the court in *Doiel* stated:

> To begin, the complaint filed by the Debtor requests far more than a determination of whether the debts owed to the Appellee were dischargeable. The Debtor specifically "requests that the Court herein enter a judgment finding that the obligations of the Defendant are dischargeable in bankruptcy. Plaintiff further requests return of monies levied on by Defendant from Plaintiff since the bankruptcy discharge. Plaintiff further requests this Court to issue an order restraining this Defendant from continuing to enforce and levy upon his income until the questions of the dischargeability of the debts to the Defendant in this matter is determined by this Court." Complaint at 2. The Eleventh Amendment to the Constitution prohibits suits "in

> law or equity" brought in federal court against a State by individual citizens. U.S. Const. Amend. XI. Further, in *Seminole* the Supreme Court reiterated the principal that "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity." Id., 517 U.S. 44, 116 S. Ct. at 1124. "The Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury,' Hess v. Port Authority Trans−Hudson Corp., 513 U.S. 30, 48, 115 S. Ct. 394, 130 L. Ed.2d 245 (1994); it also serves to void 'the indignity of subjecting a state to the coercive process of judicial tribunals at the insistence of private parties' [185]

The delineation of what constitutes a "suit" for Eleventh Amendment purposes remains for resolution by the Supreme Court, along with a host of other Eleventh Amendment bankruptcy jurisdiction issues.

C. Is There an "In Rem" Exception to the Eleventh Amendment Immunity of States?

Because of the expansion under *Seminole Tribe* of the Eleventh Amendment immunity of states and its vigor in subsequent bankruptcy cases, a few lower courts have attempted in post−*Seminole Tribe* cases to preserve the reach of bankruptcy jurisdiction over claims against states by advancing an "*in rem*" theory to support an exception to the Eleventh Amendment. [186] In the face of a substantial body of case law that has developed since the *Seminole Tribe* holding that Congress did not constitutionally abrogate the Eleventh Amendment immunity of states from suit in bankruptcy courts by enacting section 106 of the Bankruptcy Code, some courts have attempted to preserve bankruptcy jurisdiction over states by holding that the Eleventh Amendment immunity of a state is not available to bar an *in rem* proceeding against the state in a bankruptcy court.

Under the "*in rem*" theory, if a bankruptcy court is exercising *in rem* jurisdiction with respect to property of the estate that is in dispute, the Eleventh Amendment would not bar an exercise of jurisdiction by a bankruptcy court to determine the dispute, even though the court's determination would terminate or otherwise adversely affect the rights of a state in the property. [187] Such an "*in rem*" exception to the Eleventh Amendment has been recognized in several post−*Seminole Tribe* decisions of appellate and bankruptcy courts, including *Maryland v. Antonelli Creditors' Liquidating Trust*, [188] *In re Barrett Refining Corp.*, [189] and *In re O'Brien*. [190] In a sense, the court in *Texas v. Walker*, [191] relying on *Gardner v. New Jersey*, [192] also applied a theory akin to the "*in rem*" theory by ruling that where a state files a proof of secured claim, the bankruptcy court, notwithstanding an Eleventh Amendment plea, can adjudicate all collateral interests, not merely issues over the claim itself. [193] As the court stated in *Gardner v. New Jersey*, "[t]he whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*," which can be adjudicated notwithstanding an Eleventh Amendment plea if a state has filed a proof of claim. [194]

The "*in rem*" theory was also applied by the court in *In re Zywiczynski*, [195] a bankruptcy case in which neither the bankruptcy trustee nor the state had possession of the property at issue, a bank certificate of deposit. Over the objection of the state, the *Zywiczynski* court held that the Eleventh Amendment did not preclude a bankruptcy court from ordering a turnover to the trustee of the certificate of deposit or the proceeds thereof in a bank's possession, even though the state might subsequently become entitled to the proceeds should certain events occur. [196] The court pointed out that the money in question was not owned by the state, but only claimed by it, and ruled that the certificate of deposit constituted "property of the estate" and was subject to a turnover. The underlying theory of the court was that its decision merely determined the right to possession at that time of the certificate of deposit, but was not an adjudication of ownership rights. [197]

Another court applied a limited endorsement of the "*in rem*" theory to proceedings in bankruptcy courts. As indicated in *In re Mitchell*, [198] some courts have recognized *in rem* bankruptcy jurisdiction: (1) to enable a discharged debtor to assert a discharge order as an affirmative defense to a state's collection claim; [199] (2) for an adjudication of dischargeability where the state filed an adversary proceeding, thereby giving rise to a "constructive" waiver, as in *In re* Platter; [200] or (3) to allow the issuance of an order "confirming a chapter 11 plan to which the State did not object," as in *Maryland v. Antonelli Creditors' Liquidating Trust*. [201]

In the alternative, other courts have flatly rejected the notion of an "*in rem*" exception to the Eleventh Amendment. [202] Further, the United States Department of Justice argued (unsuccessfully) for an "*in rem*" exception to the Eleventh Amendment in *In re* Doiel. [203]

After a post−*Seminole Tribe* line of cases adopting an "*in rem*" exception to the Eleventh Amendment developed in the lower courts, the Supreme Court rendered its decision in a 1998 *in rem* admiralty case, *California v. Deep Sea Research, Inc.* [204] That case, by analogy, arguably supports an exercise of *in rem* bankruptcy jurisdiction against a state or state agency as an exception to the Eleventh Amendment. In *Deep Sea*, the Court, based upon admiralty precedents dating back to 1809, concluded that the Eleventh Amendment does not bar an exercise of *in rem* admiralty jurisdiction with respect to property not in the possession of a state, and ruled that competing claims to ownership of such property as between a state and a private party could be determined in a federal district court if the state was not in possession of it. [205] From this holding, it can be argued that an exercise of *in rem* bankruptcy jurisdiction should not be defeated by means of the Eleventh Amendment unless the state itself has actual possession of the *res*. In *Deep Sea*, however, the Court spoke only about admiralty jurisdiction and, unlike its opinions in *Seminole Tribe* two years earlier, which referred to bankruptcy, the Court did not allude to the relevance of its Eleventh Amendment pronouncement regarding *in rem* admiralty proceedings to actions in federal courts against states grounded on bankruptcy or other federal statutory claims. [206]

The Supreme Court was later asked to link its holding in *Deep Sea* that in admiralty cases there is an "*in rem*" exception to the Eleventh Amendment to bankruptcy cases by a petition for certiorari filed in *Magnolia Venture Capital Corp. v. Prudential Securities, Inc.*, but the Supreme Court denied it. [207] In that case, a debtor filed an adversary proceeding for a turnover of property of the estate. A state claiming an interest in the property, moved to intervene to seek a dismissal of the adversary proceeding based on its Eleventh Amendment immunity. [208] Reversing the district court's denial of the state's Eleventh Amendment motion to dismiss, the Fifth Circuit held that a state's immunity precluded the state from determining the rights of the several parties to the property, even though the state was not in possession of the property. [209]

An early decision of the Supreme Court, *Missouri v. Fiske*, rejected an *in rem* exception to the Eleventh Amendment. [210] There, the Court addressed whether a federal court's exercise of *in rem* jurisdiction over specific property trumps a state's Eleventh Amendment immunity. The Court indicated that a state's immunity under the Eleventh Amendment is not vitiated simply because the suit in federal court is an *in rem* proceeding. As stated by the Supreme Court in *Missouri v. Fiske*: "[t]he fact that a suit in a federal court is *in rem*, or *quasi in rem*, furnishes no ground for the issue of process against a non−consenting State." [211] In that case, the Court reversed an injunction against the state issued below by a federal district court. The injunction had prohibited the state from proceeding with its state court action to collect inheritance taxes imposed by state law. In support of its holding, the Court stated that absent a waiver or consent by the state, a federal "court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit," including an *in rem* or *quasi in rem* suit. [212]

The final part of the decision in *Missouri v. Fiske* impliedly backtracked from its express rejection of an "*in rem*" exception to the Eleventh Amendment. The Court ruled that if the federal court action involved in that case determined the ownership of the property as between a life tenant and remainderman (that was at the heart of the inheritance tax dispute with the state), the federal right arising from the federal court's ownership decree was available as a defense to the state's proceeding in state court to collect inheritance taxes. [213] That ruling appeared to treat the federal action determining ownership as an *in rem* proceeding. Thus, the judgment would be binding on the state in the state court tax litigation, notwithstanding its Eleventh Amendment immunity. Despite the relevance of *Missouri v. Fiske* to the question whether the Eleventh Amendment bars a bankruptcy court from exercising *in rem* jurisdiction against a non−consenting state, the cases currently dealing with the *in rem* bankruptcy issue have rarely cited *Missouri v. Fiske*.

D. *Dischargeability Litigation*

An important issue as to the impact of the Eleventh Amendment on bankruptcy proceedings is whether Eleventh Amendment immunity of a state precludes a bankruptcy court from determining the dischargeability of a debt owed by a debtor to the state. A discharge is one of the most important and basic rights of a debtor under the bankruptcy law, for it is essential to gain a fresh start. [214]

In *Texas v. Walker*, [215] and a number of other cases, [216] courts are of the opinion that the Eleventh Amendment does not preclude a bankruptcy court from determining the dischargeability of a state's claim against the debtor under certain situations. In *Texas v. Walker*, in an opinion written for the Fifth Circuit by Judge Edith H. Jones, a bankruptcy expert in her own right, it was squarely held that the Eleventh Amendment did not prevent the discharge of a debt owed to a state, even where the state did not participate in the bankruptcy case. The court pointed out that its holding only meant that the discharge could be raised by the debtor as a defense to a later suit initiated by the state to collect the discharged debt. The Court further explained that the assertion of a discharge is not tantamount to seeking affirmative relief, such as an injunction against further efforts to collect the discharged debt. The court also pointed out that while a discharge operates as an injunction against collection of the discharged debt by virtue of Bankruptcy Code section 524(a)(2), the statutory discharge does not constitute a "suit" against the state despite the fact that it is triggered only after a bankruptcy case is commenced and that a discharge is aimed at creditors, including the state. [217]

The issue is not free from doubt. Courts have ruled otherwise, holding that the Eleventh Amendment precludes a debtor's initiation of a dischargeability proceeding against a state in a bankruptcy court. Several courts have dismissed complaints against states for such relief. [218]

In *In re Mitchell*, the Bankruptcy Appellate Panel of the Ninth Circuit held that the Eleventh Amendment barred a bankruptcy court from determining a debtor−taxpayer's adversary proceeding seeking both a determination of dischargeability of a tax debt to a state and a recovery for damages based upon the state's violation of the debtor's rights in a post−discharge assessment of tax. [219] Nevertheless, the court in *Mitchell* did, [220] to some extent, endorse the applicability of "*in rem*" bankruptcy jurisdiction, permitting the assertion of a discharge order as an affirmative defense to a collection claim, as allowed in *Texas v. Walker*. [221]

Nondischargeability issues are among the numerous unresolved Eleventh Amendment bankruptcy questions.

V. Waiver of Eleventh Amendment Immunity by Filing a Proof of Claim or Taking Other Action

A. In General

If a state has Eleventh Amendment immunity from bankruptcy proceedings and if its immunity has not been abrogated, the next question is whether the Eleventh Amendment immunity of a state may be waived by the state. This depends on whether the Eleventh Amendment is a jurisdictional provision that precludes an exercise of subject matter jurisdiction by a court. If it is, jurisdiction over a state cannot be created by consent, [222] and a state's waiver would be ineffectual to confer consent on a bankruptcy court. If, alternatively, the Eleventh Amendment merely provides a defense to the state, its defense is subject to waiver. [223]

The Eleventh Amendment's language is cast in terms of a limitation on the power of the federal courts granted pursuant to Article III of the Constitution. In this regard, the Eleventh Amendment states: "[t]he Judicial power of the United States shall not be construed to extend to any suit ... against one of the United States." [224] If the Article III judicial power of the federal courts does not extend to a suit against a state, one conclusion is that a bankruptcy court lacks subject matter jurisdiction to entertain a suit against a state, even with the state's consent.

The courts are not uniform in their conclusion as to whether the Eleventh Amendment is jurisdictional or merely grants the states a defense. This issue remains unsettled. In a recent Supreme Court case, *Wisconsin Department of Corrections v. Schacht*, Justice Kennedy, in a concurring opinion, noted that the "hybrid nature of the jurisdictional bar erected by the Eleventh Amendment ... bears substantial similarity to personal jurisdiction requirements," but "is more consistent with ... the federal courts' subject matter jurisdiction." [225]

Moreover, the notion that the Eleventh Amendment is jurisdictional is supported by the established rule that a state can assert an Eleventh Amendment claim for the first time on appeal. [226]

It is well settled that a state, however, by engaging in an activity that could cause it to incur liability under a federal statute, "consents" to be sued in a federal court on a claim to enforce such liability and thereby gives up its Eleventh Amendment immunity. [227] Under that analysis, the Eleventh Amendment is not jurisdictional, but merely provides to a state a waivable defense. [228] Against this background, the lower courts in post−*Seminole Tribe* decisions have split on the issue whether the Eleventh Amendment is an immutable bar to the jurisdiction of the federal courts under Article III, or is subject to waiver. [229]

If, as is likely in view of the Supreme Court's decisions in *Katchen v. Landy*, [230] *Gardner v. New Jersey*, [231] and *Granfinanciera*, [232] the Supreme Court ultimately holds that by filing a proof of claim a state waives its Eleventh Amendment immunity, at least to some degree, it will remain for the Court to establish a test to determine the scope of such waiver. A key question is whether the waiver that results from filing a proof of claim merely extends to permit the assertion of a compulsory counterclaim against a state arising out of the same facts or transaction, or more broadly permits other monetary claims against the state.

The pressure from within the bankruptcy community will be to adopt a rule giving broad effect to a waiver that results from the filing of a proof of claim. [233]

B. Post−Seminole Tribe Cases on Waiver

A state can consent to an exercise of federal jurisdiction in at least three ways. First, a waiver of Eleventh Amendment immunity may result, at least to some extent, from a voluntary appearance by the state. [234] As to the scope of such a waiver, the court in *In re Barrett Refining Corp.*, [235] concluded that once a state files a proof of claim and participates in a case, it fully waives its immunity, a proposition that appears to be flawed. [236] Indeed the Tenth Circuit, in *Duke v. Department of Agriculture*, [237] a case decided before *Barrett* in that Circuit, rejected the plaintiffs' assertion "that the state waived Eleventh Amendment immunity by engaging in activities and entering contracts subject to federal regulation." [238] In *Magnolia Venture Capital Corp. v. Prudential Securities, Inc.*, the Fifth Circuit, in accord with the Tenth Circuit's decision in *Duke v. Department of Agriculture*, [239] suggested that a State Department of Economic and Community Development did not impliedly waive its Eleventh Amendment immunity either because it moved to intervene in a debtor's adversary proceeding to establish that the state had no lien on, or interest in, funds held by a third party, or by reason of a venue clause contained in a pre−bankruptcy agreement between the state and the debtor. [240] The venue clause provided: "Venue in any such dispute, *whether in federal or state court*, shall be laid in Hinds County, Mississippi." [241] The Fifth Circuit side−stepped the debtor's contention that the reference to a federal court in the venue agreement waived the state's Eleventh Amendment immunity, and held that there was no waiver because the Mississippi State Department, which was the party to the proceeding, lacked specific express authorization to waive the state's Eleventh Amendment immunity, stating:

> The authorities discussed above lead us to conclude that a state, through its constitution, statutes, or court decisions, must expressly authorize a state agency or representative to waive the state's Eleventh Amendment immunity. Such authority cannot be implied from the circumstances. Although the district court's conclusion that the state implicitly authorized the waiver of its Eleventh Amendment right has a logical and equitable tug, no Mississippi authority supports this determination. Given the reluctance of courts generally to find a waiver of Eleventh Amendment immunity and the strong general rule that authority to make an effective waiver must be express, we conclude that the district court erred in determining that MDECD had authority to waive Mississippi's Eleventh Amendment immunity. [242]

A second means for waiver of a state's Eleventh Amendment immunity is by a provision in a state statute. [243] As a third means to waive the Eleventh Amendment, some courts have suggested that a state may waive its immunity by "constructive" consent. [244] For example, "constructive" consent could result from a state's participation in a federal program that provides financial benefits to the state or possibly from its participation

in a bankruptcy case. [245] Other action by a state might also effect a waiver of its Eleventh Amendment immunity. As stated by Justice Kennedy in *Wisconsin Department of Corrections v. Schacht*, [246] a state's voluntary intervention in a federal court action to assert its own claim constitutes a waiver of its Eleventh Amendment immunity. In *Schacht*, Justice Kennedy reviewed some of the Supreme Court's waiver precedents.

As the Court recognized in Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273, 284, 26 S. Ct. 252, 256, 50 L. Ed. 477 (1906), "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."

An early decision of this Court applied this principle in holding that a State's voluntary intervention in a federal court action to assert its own claim constituted a waiver of the Eleventh Amendment. Clark v. Barnard, 108 U.S. 436, 447−448, 2 S. Ct. 878, 882−884, 27 L. Ed. 780 (1883); see also Employees of Dept. of Public Health and Welfare of Mo v. Department of Public Health and Welfare of Mo., 411 U.S. 279, 294, n. 10, 93 S. Ct. 1614, 1623, n. 10, 36 L. Ed.2d 251 (1973) (Marshall, J., concurring in result) (citing *Clark v. Barnard* with approval); Petty v. Tennessee−Missouri Bridge Comm'n, 359 U.S. 275, 276, 79 S. Ct. 785, 787, 3 L. Ed.2d 804 (1959) (same); Missouri v. Fiske, 290 U.S. 18, 24−25, 54 S. Ct. 18, 20, 78 L. Ed. 145 (1933) (same). The Court also found a waiver of the Eleventh Amendment when a State voluntarily appeared in bankruptcy court to file a claim against a common fund. Gardner v. New Jersey, 329 U.S. 565, 574, 67 S. Ct. 467, 472, 91 L. Ed. 504 (1947). [247]

The theory of waiver based upon "constructive" consent, as exemplified by *Parden v. Terminal Railway*, [248] is not supported by more recent cases. It is doubtful that a state's mere defensive participation in defending a suit in a bankruptcy court will effect a general waiver of its Eleventh Amendment immunity for all purposes. Under the more recent test for waiver of Eleventh Amendment immunity, such waiver can result only from "the most express language," [249] or language that will "leave no room for any other reasonable construction." [250]

Nevertheless, applying the principle that a party cannot have it both ways, some courts have held that when a state initiates an adversary proceeding in a bankruptcy court, "it steps outside the bounds of Eleventh Amendment protection," as was ruled in *In re Platter*. [251] In that case, after a state agency brought an adversary proceeding to determine the non−dischargeability of a debt, the court held that it could not thereafter seek Eleventh Amendment protection when it did not like the result. [252]

C. Effect of Filing a Proof of Claim

Despite the generally applicable strict waiver standard, courts have held that by filing of a proof of claim in a bankruptcy case – which a state must do in order to share in distributions from the estate – a state "waives" its Eleventh Amendment immunity. [253] Generally, courts do agree on this issue. However, they disagree as to whether such a "waiver" extends only to "compulsory" counterclaims, or broadly subjects the state to suit in the bankruptcy court on all types of claims. [254]

In *In re Burke*, in an expansive holding, the Eleventh Circuit, relying on *Gardner v. New Jersey*, [255] an oft−cited decision of the Supreme Court, ruled that by filing a proof of claim for unpaid income taxes, the state waived its immunity from enforcement of a discharge injunction and the automatic stay by a bankruptcy court based on the state's efforts to collect the discharged tax debts. [256] Likewise, in *In re Rose*, [257] the court held that by filing a proof of claim, a state waived its Eleventh Amendment immunity with respect to a dischargeability proceeding brought by the debtor. In an expansive decision, another court held in *In re Straight*, [258] that the filing of a proof of claim by a state agency not only waives Eleventh Amendment immunity as to that agency, but also waives the immunity of the state as a whole. [259]

Courts have, however, reached diametrically opposed results, however, on Eleventh Amendment waiver issues. In a decision that was 180 degrees away from the Fifth Circuit's decision in *In re Burke*, [260] the Ninth

Circuit Appellate Panel, in *In re Lapin*, [261] held that Eleventh Amendment immunity barred a bankruptcy court from imposing sanctions against the California Franchise Tax Board, an agency of the State, for violation of a discharge injunction. In *In re Lapin*, the debtor listed the State Board as a creditor, but the Board did not participate in the bankruptcy case. After the debtor was discharged and the case was closed, the State Board attempted to collect a tax, the debtor's liability as to which had been discharged. The debtor then reopened the bankruptcy case and sought a contempt order for the State Board's violation of the discharge injunction. The Bankruptcy Appellate Panel of the Ninth Circuit held that the Eleventh Amendment immunized the State Board. Under the court's analysis, the debtor's remedy was either to seek prospective injunctive relief against state officials in a federal court within the framework of *Ex parte Young*, [262] or to sue for damages in a state court. [263] (Although the State Agency in that case had not filed a proof of claim, the *Lapin* decision appears not to have turned on that fact.)

In backtracking from its *dicta* regarding *Ex parte Young*, however, the court in *In re Lapin* pointed out that it was unlikely that an *Ex parte Young* proceeding against an officer of the State Agency would have been successful in that case, since the state had already seized the money in question. Thus there was no need for prospective relief, as required for applicability of the *Ex parte Young* doctrine. As a result, therefore, the debtor's only recourse to enforce the discharge injunction was to sue the state's Franchise Tax Board in a state court for damages. [264]

Other courts have substantially narrowed the scope of a state's waiver of immunity that results from filing a proof of claim. In a restrictive approach, the court in *In re Mitchell*, [265] ruled that by filing a proof of claim for one type of past due tax, a state does not waive its Eleventh Amendment immunity with respect to a proceeding determining a different type of tax. [266] Similarly, in *In re Creative Goldsmiths of Washington, D.C.*, the court held that by filing a proof of claim to collect sales and withholding taxes, a state did not waive immunity; to a trustee's suit to avoid a preferential payment of income taxes to the state or constitute a consent to an exercise of federal jurisdiction that binds all other state agencies. [267]

The court in *In re Value−Added Communications, Inc.* [268] held that the filing of a proof of claim by the New York Public Service Commission did not waive the Eleventh Amendment immunity of the New York State Department of Correction regarding the trustee's proceeding in the bankruptcy court to recover (from that Department) alleged preferential and improper post−petition transfers. In that case, the debtor had provided inmate telephone service to the Department, pursuant to a contract. On appeal from the bankruptcy court's denial of a motion to dismiss (granted on the state's claim to Eleventh Amendment immunity), the district court concluded that a waiver of immunity by one state agency does not waive the immunity of another agency, except to the extent that the claim against the other agency arises out of the same transaction or occurrence. The court nevertheless remanded the proceeding to the bankruptcy court to determine, under the facts, whether the Department of Correction had waived its Eleventh Amendment immunity by sending a number of post−petition demand letters to the debtor. [269]

Some courts have held that the filing of a proof of claim by a state is not a general waiver of its Eleventh Amendment immunity for all purposes, but does extend to all proceedings relating to the state's filed proof of claim. [270] As stated by *In re Burke*:

> The Supreme Court's decision in *Gardner* establishes that, by filing a proof of claim in the debtor's respective bankruptcy proceedings, the State waived its sovereign immunity for purposes of the adjudication of those claims. We hold that this waiver includes the bankruptcy court's enforcement of the discharge injunction and the automatic stay in the instant cases. We believe that the enforcement of the bankruptcy court's orders in both of the instant cases falls easily within the waiver of immunity "respecting the adjudication of the claim" found by the Supreme Court in *Gardner*, 329 U.S. [467,] 574 [1941]. [271]

Other courts have restricted the effect of the filing of a proof of claim by holding that by such filing, a state only waives its Eleventh Amendment immunity with respect to "compulsory" counterclaims against the state. [272]

The notion that the filing of a proof of claim by a state does not, fully waive its Eleventh Amendment immunity is sound and supported by common sense. By definition, a waiver is the *voluntary* relinquishment of a known right. If a creditor (including a state in its creditor capacity) desires to participate in distributions to be made pursuant to a chapter 11 plan of reorganization, or in liquidating distributions in a chapter 7 case, the creditor can do so only by filing a proof of claim. Absent such a filing, the creditor cannot receive the distribution made in a bankruptcy case. It is clear, therefore, that by filing a proof of claim a state does not demonstrate an intent to relinquish its Eleventh Amendment immunity, but merely a desire to participate with other creditors in distributions to be made in the bankruptcy case. [273]

By holding that the filing of a proof of claim extinguishes a state's Eleventh Amendment immunity forces a state to make a "Hobson's choice": the state must either relinquish the right to participate in distributions in order to preserve its immunity from suit in the bankruptcy court, or file a proof of claim and surrender its Eleventh Amendment immunity. [274] Thus, no inference should be drawn from a state's filing of a proof of claim that it intends to waive its Eleventh Amendment immunity. The extinguishment of a state's Eleventh Amendment immunity due to such filing has nothing to do with the notion of waiver. It is patent that such a filing triggers a rule of law that terminates the state's Eleventh Amendment immunity from suit in the particular case. The policy objective of courts that apply such a "waiver" analysis is to enable the bankruptcy courts to exercise broad jurisdiction over the claims of all creditors, including states, so that all questions can be resolved in a single forum. [275]

D

. The "Claims−Allowance" Process

With the advent of the 1978 Bankruptcy Code and related title 28 bankruptcy jurisdiction provisions, the subject matter jurisdiction of the courts of bankruptcy was broadly expanded to encompass all proceedings "related to" a bankruptcy case, as well as those "arising under" the Bankruptcy Code and "arising in" a bankruptcy case. [276] The 1978 bankruptcy structure discarded the requirement, under the former Bankruptcy Act of 1898 (as amended), that a plenary action in a non−bankruptcy federal or state court had to be brought to assert a claim that did not fall within the narrow concept of "summary" jurisdiction. The change was made for the reason, among others, that the pre−Code structure requiring proceedings in a bankruptcy case to be conducted in the bankruptcy courts (if within their "summary" jurisdiction) and all others by plenary proceedings in non−bankruptcy federal and state courts, led to delay, uncertainty, inconsistency in the law, and increased expense. [277] These are among the very considerations that should result in the formation of an Eleventh Amendment bankruptcy jurisprudence under which the states' Eleventh Amendment immunity may be abrogated with respect to claims involving property of the estate. [278]

Cases decided since the enactment of the Bankruptcy Code draw on the Supreme Court's *dicta* in *Katchen v. Landy*, an old Act case, to support the conclusion that a creditor waives various rights by filing a proof of claim. [279] In *Katchen v. Landy*, the Court held that an affirmative recovery for the amount of a preferential payment could be recovered from a creditor who filed a proof of claim by bringing a "summary" proceeding in the bankruptcy court under the former Bankruptcy Act, rather than an otherwise required plenary suit in a non−bankruptcy court. [280] In the summary proceeding, the trustee was not limited to asserting the preference as a mere defense to defeat the claim. In so holding, the Supreme Court ruled that the summary jurisdiction conferred by Congress on the bankruptcy courts pursuant to Article I, Section 8 legislative power, overrode the creditor's Seventh Amendment right to a jury trial, that the creditor would have had if the trustee had been required to bring a plenary action to recover the preference in a non−bankruptcy court. The Court's premise for its holding was that, as stated in *Gardner v. New Jersey*: "[t]he whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res* . . .." [281] In *Gardner*, the court was moved by a policy of expedition to have all related litigation tried in one court. [282]

Under the holding of *Katchen v. Landy*, a creditor had a "Hobson's choice." If the creditor did not file a proof of claim in the bankruptcy case, and was then sued by the trustee in a plenary action, the creditor would have a right to trial by jury, but could not share in distributions made in the bankruptcy case. If, however, the same

issue arose in the bankruptcy court, in which the "claims−allowance process" triggered by the creditor's filing of a proof of claim, the preference action would be "triable in equity" without a jury, but the creditor would not lose entitlement to distributions. [283] As stated by the Court:

> Petitioner contends, however, that this reading of the statute violates his Seventh Amendment right to a jury trial. But although petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, Schoenthal v. Irving Trust Co., 287 U.S. 92, 53 S. Ct. 50, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity. The Bankruptcy Act, passed pursuant to the power given to Congress by Art. I, Section 8, of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*. [284]

In *Katchen v. Landy* the court recognized that the "*res*" – the estate created by the commencement of a bankruptcy case – must be dealt with by a bankruptcy court to the fullest extent of its judicial power. [285] This principle is the foundation for the broad jurisdiction of the bankruptcy courts over all property of the estate. Congress has provided in 28 U.S.C. § 1334(e) that the property of the estate is within the exclusive jurisdiction of the courts of bankruptcy. [286] By filing a proof of claim, a state should be deemed to have submitted itself to the broad jurisdiction of the bankruptcy court over all controversies relating to the *res*, but no more. The holding of *Katchen v. Landy* tends to support the conclusion that by filing a proof of claim, a state relinquishes its Eleventh Amendment immunity with respect to all disputes involving property of the estate. For many years, at least since the Supreme Court's decision in *Katchen v. Landy*, the courts have had difficulty in deciding whether a creditor's filing of a proof of claim in a bankruptcy case waived the creditor's rights. [287] One reason for this difficulty is that the opinion in *Katchen v. Landy* is difficult to understand. Its holding is clear, but the steps in its logic are blurred.

Several years before *Katchen v. Landy* was decided, the Supreme Court in *Gardner v. New Jersey*, held that if a state filed a proof of claim, it thereby waived its Eleventh Amendment immunity regarding the adjudication of its claim in the bankruptcy court and all rights relating thereto. [288] In *Gardner v. New Jersey*, the Court held that where a state has filed a proof of claim, the Eleventh Amendment did not immunize the state from an adjudication by the bankruptcy court of the validity and priority of competing liens. In deciding that a state may waive its Eleventh Amendment immunity, the Court recognized that the adjudication of all issues relating to a claim in the bankruptcy court was vital to the administration of bankruptcy cases. [289] The waiver of Eleventh Amendment immunity in *Gardner v. New Jersey* not only extended to the claim upon which the state sought a distribution, but also to the lien itself which, but for the filing of the proof of claim, would ordinarily "ride through" the bankruptcy. [290]

The Supreme Court in *Gardner v. New Jersey*, in an opinion by the then bankruptcy scholar of the Court, Justice Douglas, explained that where a proof of claim is filed by a state, it is the state that seeks something from the debtor rather than the debtor from the state. Justice Douglas concluded from this, as did the court in *Katchen v. Landy*, that the "claims−allowance process" broadly entitles the debtor estate to recover affirmative relief against the creditor, not merely to enable the debtor estate to defend against the creditor's filed proof of claim. In overruling the Eleventh Amendment assertion in *Gardner v. New Jersey*, Justice Douglas stated:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. Wiswall v. Campbell, 93 U.S. 347, 351, 23 L. Ed. 923. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have

had respecting the adjudication of the claim. [291]

It does not automatically follow as a matter of logic that because a state files a proof of claim, a debtor or trustee may recover an affirmative judgment against the state in the face of an Eleventh Amendment plea. It is clear that if a state files a proof of claim, the trustee or debtor must have the right to defend against that claim. [292] An affirmative recovery on a counterclaim against the state, however, is not necessary to defeat the state's claim. A counterclaim for an affirmative monetary recovery from a state closely resembles the bringing of an action in a federal district court for such relief against a state. A logical basis, however, for awarding affirmative relief against a state in the face of its Eleventh Amendment immunity claim is that when a bankruptcy court conducts the process for the proof and allowance of claims of creditors – whether or not a state has filed a proof of claim – such process is "an adjudication of interests claimed in a *res*," as stated in *Gardner v. New Jersey*, [293] and *Katchen v. Landy*. [294] The theory for precluding an Eleventh Amendment plea with respect to claims within the broad scope of the "claims allowance process" is justified by the policy to centralize all bankruptcy litigation in a single court. The theory of *Gardner v. New Jersey* for limiting Eleventh Amendment immunity where a state has filed a proof of claim was recently followed in an opinion written by Judge Edith H. Jones for the Fifth Circuit in *Texas v. Walker*. [295]

Although *Katchen v. Landy* was decided under a fundamentally different statute than the Bankruptcy Code and resolved an unrelated issue, the Supreme Court relied heavily on that decision in *Granfinanciera, S.A. v. Nordberg*, in holding that by filing a proof of claim a creditor waived its right to a trial by jury. [296] The notion that a waiver, at least of some rights, results from a filing of a proof of claim, is thus ingrained in the bankruptcy law. More recently, in *In re Hooker Investments, Inc.*, [297] the Second Circuit held that a creditor was not entitled to an extension of a bar date fixed by the Bankruptcy Court as the outside date by which creditors had to file proofs of claim or forfeit the right to participate in distributions, even though the filing of a proof of claim would effect a waiver of the creditor's Seventh Amendment right to a jury trial.

Other courts have narrowed the scope of the waiver that results from the filing of a proof of claim. Most courts hold that such filing is in the nature of an affirmative suit by the state against the debtor's estate. [298] As such, it is appropriate to permit the debtor or trustee to assert defenses to defeat the state's claim, because the defenses are part of the merits of the lawsuit commenced by the state's filing of its proof of claim. Whether an affirmative recovery on a "mandatory" counterclaim should be permitted to be asserted against a state presents another issue. A counterclaim for an affirmative monetary recovery against a state is not an inherent part of the merits of the claim asserted by the state when it files a proof of claim. [299] The assertion of a counterclaim for affirmative recovery, particularly when it is unrelated to the state's proof of claim, runs head−on into the Eleventh Amendment.

A number of cases have analyzed the effect of the filing of a proof of claim within the context of the "claims−allowance process." Notable among them is *Germain v. Connecticut National Bank*. [300] In that case, the Second Circuit, distinguishing *Katchen v. Landy*, concluded that the filing of a proof of claim does not automatically waive the creditor's right to a jury trial with respect to all claims in issue, but only as to those which are part of the "claims−allowance process," referred to in the definition of a "core" proceeding under 28 U.S.C. § 157(b)(2)(B). [301] According to *Germain*, that process is limited to claims by a debtor or trustee that would result in the disallowance of the creditor's claim against the estate, and would not include claims that would merely augment the value of the estate. In this regard, the Second Circuit in *Germain* highlighted the limited extent of the waiver that results from the filing of a proof of claim:

> We conclude that neither precedent nor logic supports the proposition that either the creditor or the debtor automatically waives all right to a jury trial whenever a proof of claim is filed. For a waiver to occur, the dispute must be part of the claims−allowance process or affect the hierarchical reordering of creditors' claims. Even there the right to a jury trial is lost not so much because it is waived, but because the legal dispute has been transformed into an equitable issue. [302]

Under the Second Circuit's analysis in *Germain*, the creditor's right to a jury trial is not lost because of the notion that the filing of a proof of claim waives that right, but rather because the filing of a proof of claim transforms a creditor's claim from an issue triable by a jury at law into an equitable issue triable by the court without a jury.

The importance, for Eleventh Amendment purposes, of the Second Circuit's analysis in *Germain* is that the filing of a proof of claim does not waive any right – no waiver at all results from the filing of a proof of claim. [303] Consequently, under the theory of *Germain*, a state should not lose its Eleventh Amendment immunity solely because it has filed a proof of claim. Under the "claims−allowance process" approach, a threshold analysis is required in each particular case to determine whether a dispute at issue is actually within the "claims−allowance process." [304] If it falls within the claims−allowance process, the claimant, including a state as a claimant, should be subject to the bankruptcy court's jurisdiction and its Eleventh Amendment defense overruled. Thus, where a state files a proof of claim, a dispute over allowability or priority of its claim should *not* be subject to an Eleventh Amendment defense. On the other hand, any claim for *other* relief against a state that does not fall within the "claims−allowance process" may be subject to an Eleventh Amendment plea (unless its immunity has been constitutionally abrogated), and its immunity should not be lost by reason of its filing of a proof of claim. It is not enough to bring a claim within the "claims−allowance" process under the theory of *Germain* that a debtor or trustee's claim would, if successful, "augment the estate." [305] Such a claim, like the lender liability claim of the trustee in *Germain*, is not part of the "claims−allowance process." [306] Thus the filing of a proof of claim by a state should not "waive" its Eleventh Amendment immunity with respect to a claim of that type.

The issue whether the filing of a proof of claim by a state will effect a waiver of its Eleventh Amendment immunity (a) for all purposes, (b) only with respect to "mandatory" counterclaims arising out of the same facts or transactions that are the subject of the state's proof of claim, or (c) not at all, will continue to produce a multitude of theories and disparate results until these issues are resolved by the Supreme Court. As of this writing in March 1999, the Supreme Court has declined to grant certiorari on the issue whether the filing of a proof of claim constitutes a waiver of a state's Eleventh Amendment immunity. [307]

A rule balancing the need for the administration of a bankruptcy case in a single forum, with the Eleventh Amendment immunity of the states from suit in a federal court, should be resolved in favor of according the broadest possible consequences to the filing of a proof of claim by a state. As observed by the National Bankruptcy Review Commission in its Final Report dated October 20, 1997, a single bankruptcy forum to handle all bankruptcy claims is required to promote a cost−effective and speedy process for the rehabilitation of individual and business debtors. [308] State sovereignty is not offended by a principle under which a bankruptcy court can determine all disputes involving the *res* and resolve the competing claims and interests of all creditors, including a state with respect to property of the estate. [309] Additional demands are not made on a state's treasury, nor is there any interference in the functioning of a state government, by a principle under which all bankruptcy related disputes are adjudicated in a bankruptcy court. [310]

If a state invokes the jurisdiction of a bankruptcy court by filing a proof of claim or commences an adversary proceeding or contested matter proceeding, the efficient administration of a bankruptcy case requires that all disputes arising out of the state of facts or transaction that is the subject of such filing, should be determined in one lawsuit. [311] This principle applies equally to all creditors, including a state.

VI. Bifurcation of Jurisdiction; Common Law Immunity

Courts have suggested that the Eleventh Amendment may require the bifurcation of proceedings in bankruptcy cases between a bankruptcy court and a state court. [312] Under that analysis, if the Eleventh Amendment were to bar a proceeding from being conducted in a bankruptcy court to recover on a claim of a particular type, such as recovering a money judgment against a state, the proceeding would have to be brought in a state court. [313]

In this regard, it is important to recognize that the abrogation or waiver of a state's Eleventh Amendment immunity, or its grant of consent to federal jurisdiction, does not necessarily waive the state's own non−Eleventh Amendment (common law) sovereign immunity from suit in its own courts.

As stated in *Magnolia Venture Capital Corp. v. Prudential Securities, Inc.*,:

> ". . . it is important to keep in mind that a state may waive its common law sovereign immunity without waiving its Eleventh Amendment immunity under federal law. Port Authority Trans−Hudson Corp. v. Feeney, 495 U.S. 299, 306, 110 S. Ct. 1868, 1873 (1990); *see also* In re Allied Signal, Inc., 919 F.2d 277, 280 n.4 (5th Cir. 1990). Thus, a state may consent to being sued in its own courts, while still retaining Eleventh Amendment immunity from suit in federal court. *See, e.g.*, Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assoc., 450 U.S. 147, 150, 101 S. Ct. 1032, 1034 (1981) (state's general waiver of sovereign immunity did not constitute waiver by state of Eleventh
>
> Amendment immunity); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54−55, 64 S. Ct. 873, 877 (1944) (same); Sherwinski v. Peterson, 98 F.3d 847, 851−52 (5th Cir. 1996) (same). [314]

The Supreme Court has itself recognized that the federal law requirement that a state court "treat federal law as the law of the land does not necessarily include within it a requirement that the state create a court competent to hear the case in which the federal claim is presented." [315] The Supreme Court in its 1990 decision in *Howlett v. Rose,* [316] however, expressly left unanswered the question whether "States need to establish courts to entertain [federal] claims." [317] In *In re O'Brien,* [318] the bankruptcy court, relying on the Supreme Court's decision in *Hilton v. South Carolina Public Railways Commission,* [319] abstained from entertaining a preference proceeding against a state. The bankruptcy court in *In re O'Brien,* in stating that a preference action could be commenced against a state in a state court, assumed that the state would not have a common law sovereign immunity defense available in its own courts. [320]

The *Hilton* ruling by the Supreme Court was premised on its conclusion that there was an "implied waiver" by the state of its Eleventh Amendment immunity under the facts of that case. It was not a holding that a state does not have immunity in a state court action brought to redress a federally−created claim. [321] Nor did the Supreme Court in *Seminole Tribe* determine whether a state has common law sovereign immunity in a state court action brought to enforce a federal claim. [322] This issue remains unresolved by the Supreme Court. If a state has not waived its Eleventh Amendment immunity and suit is brought against it in a state court on a bankruptcy claim, the trustee or debtor, in order to prevail, may have to establish that the state's common law sovereign immunity from suit in its own court has either been abrogated or waived.

Since some states have not waived their own common law sovereign immunity, a party could lack a remedy in any court, although such a result would be contrary to the Fourteenth Amendment requirement of due process of law, the Supremacy Clause, and also the basic maxim that "if there is a right, there is a remedy." There is no express provision in the Bankruptcy Code that clearly purports to waive the common law sovereign immunity of the states from suit in their own courts, although section 106 could be read to do so. [323] In this connection, the Supreme Court of Maine has held that Congress cannot waive a state's sovereign immunity from suit on a federal claim in its own courts. [324]

A further complexity that would be posed by splitting jurisdiction between the bankruptcy and state courts with respect to bankruptcy proceedings is presented by the decision of the Ninth Circuit in *In re Gruntz*. [325] In that case, a chapter 13 debtor was convicted of failing to pay monthly child support payments in a prosecution by the district attorney for Los Angeles County, California. His conviction was affirmed by the California Supreme Court, which rejected his assertion that the prosecution violated the automatic stay in his bankruptcy case. The debtor then brought a proceeding in the bankruptcy court challenging the conviction as void because of the asserted stay violation. [326] The bankruptcy court held that the debtor was collaterally estopped by the state court's decision from challenging his conviction. Following an affirmance by the district court, the Ninth Circuit reversed, holding that the California state courts had no jurisdiction to determine whether the criminal

prosecution violated the automatic stay since the bankruptcy courts have exclusive jurisdiction to adjudicate automatic stay issues. [327] The proceeding in the California courts was treated by the Ninth Circuit as one brought by the county prosecuting authorities, who do not have Eleventh Amendment immunity, [328] rather than by the state, which would have asserted immunity in such a proceeding in the bankruptcy court.

Under statutes of this type in force in other states, the state is the party to the suit, rather than a governmental subdivision as in *Gruntz*. [329] In such circumstances, because of the Eleventh Amendment, the state could be expected to assert that it is not amenable to a suit in the bankruptcy court to determine whether the automatic stay has been violated. Since, according to *Gruntz*, the state courts lack jurisdiction to determine whether the automatic stay has been violated, and the state itself could be immune from suit in the bankruptcy court, no court might be able to determine whether a state court prosecution violates the automatic stay. Abrogation of Eleventh Amendment immunity grounded on the Fourteenth Amendment is clearly appropriate to protect the life and liberty of a debtor under that Amendment.

Conclusion

The bankruptcy system has not been broken by *Seminole Tribe*, but it is wounded. If the Supreme court ultimately applies *Seminole Tribe* to exclude or drastically limit an exercise of bankruptcy jurisdiction over claims against, or which otherwise affect, a state or state agency, the complexion of such bankruptcy cases will have to change so as to reflect a new model for the bankruptcy process. In that event, the resolution of disputes with a state or its agencies may have to take place in a state forum. This would be an unfortunate result, however. The bifurcation of bankruptcy jurisdiction would delay the completion of liquidation and reorganization cases, generate uncertainty for debtors and creditors, and increase the administrative costs incurred by estates and their creditors.

A new Eleventh Amendment jurisprudence is needed to enable the courts of bankruptcy to determine all bankruptcy related disputes involving property of the estate. The problem would be resolved if the Supreme Court holds that bankruptcy legislation abrogating Eleventh Amendment immunity with respect to property of the estate is constitutional either by reason of Article I, Section 8 or the power of Congress under the Fourteenth Amendment. The Eleventh Amendment bankruptcy dilemma would also be minimized to the extent that it is ultimately held by the Supreme Court that a state subjects itself to broad jurisdiction in the bankruptcy court by filing a proof of claim or otherwise actively participating in the bankruptcy case.

FOOTNOTES:

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[1] 517 U.S. 44 (1996).Back To Text

[2] *See* Patricia L. Barsalou, *Defining the Limits of Federal Court Jurisdiction Over States in* Bankruptcy Court, 28 St. Mary's L.J. 575, 605−606 (1997) (analyzing effect of *Seminole Tribe* on Bankruptcy Code and federal jurisdiction); Patricia L. Barsalou & Scott A. Stengel, *Ex Parte Young: Relativity in* Practice, 72 Am. Bankr. L.J. 455, 462−63 (1998) (characterizing main thrust of *Seminole Tribe* as being its impact on Congress' ability to enact statutes affecting federal court jurisdiction over private suits against state); Joseph F. Riga, *State Immunity in* Bankruptcy After Seminole Tribe v. Florida, 28 Seton Hall L. Rev. 29, 58−63 (1997) (stating need for legislative action authorizing federal government to sue states on debtor's behalf). A compendium of scholarly articles on the impact of the Eleventh Amendment on bankruptcy cases is to be published in the Spring of 1999 in the 1999−2000 Ann. Surv. Bankr. L. (West Group).Back To Text

[3] *See* Texas v. Walker, 142 F.3d 813, 820 & n.8 (5th Cir. 1998) (stating that case law prior to *Seminole Tribe* allowed a private party to have state debt discharged); Sacred Heart Hosp. v. Pennsylvania (In re Sacred Heart Hosp.), 133 F.3d 237, 242 (3d Cir. 1998) (recognizing two sources of authority allowing abrogation of state sovereign immunity available prior to *Seminole Tribe*); Wilson−Jones v. Caviness, 99 F.3d 203, 206 (6th Cir. 1996) (noting that in cases prior to *Seminole Tribe* most circuit courts raised issue of state's immunity at their own discretion).Back To Text

[4] *See* Seminole Tribe, 517 U.S. at 72−73 (finding that article I of Constitution cannot be used to circumvent eleventh amendment protections of states by abrogating their immunity).Back To Text

[5] *See* id. at 77 (Stevens, J., dissenting) (recognizing holding's possible major impact on bankruptcy law).Back To Text

[6] *See* Justin V. Switzer, Note, *Did They Really Think This Over?* Seminole Tribe v. Florida and the Bankruptcy Code, 34 Hous. L. Rev. 1243, 1257−58 (1997) (asserting that majority in *Seminole Tribe* failed to address Congress' power to abrogate states' immunity under bankruptcy clause). *But see* Hon. Leif M. Clark, Bankruptcy, 29 Tex. Tech L. Rev. 355, 357 (1998) (noting one case's assertion that *Seminole Tribe* did address bankruptcy cases); Stephen W. Sather et al., *Borrowing from the Taxpayer: State and Local Tax Claims in* Bankruptcy, 4 Am. Bankr. Inst. L. Rev. 201, 229−30 (1996) (contending that court in *Seminole Tribe* answered question of Congress' ability to legislate abrogation of state immunity under bankruptcy clause).Back To Text

[7] *See* U.S. Const. amend. 11 (providing that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").Back To Text

[8] 11 U.S.C. § 541(a) (1994) (listing items considered "property of the estate" for cases commenced under §§ 301, 302, or 303 of title 11).Back To Text

[9] *See* id. at § 106(a) (waiving sovereign immunity of states as applied to various sections of Bankruptcy Code). Additionally, see the following pre−Seminole Tribe decisions: Employment Dev. Dep't v. Joseph (In re HPA Assocs.), 191 B.R. 167, 173−74 (B.A.P. 9th Cir. 1995) (recognizing § 106 and its amendments as constitutional exercise of power); and Sparkman v. Florida Dep't of Revenue (In re York−Hannover Devs., Inc.), 181 B.R. 271, 278 (Bankr. E.D.N.C. 1995) (finding § 106 as constitutional exercise of Congress' power to abrogate states' sovereign immunity).Back To Text

[10] U.S. Const. amend. XIV, § 1 (providing, "no state shall ... deprive any person of life, liberty, or property, without due process of law").Back To Text

[11] Id. at § 5 (providing, "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article").Back To Text

[12] *See* Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996) (identifying fourteenth amendment as proper authority for Congress to abrogate states' sovereign immunity); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (recognizing fourteenth amendment as constitutionally acceptable means of abrogating states' sovereign immunity). *But see* United States v. Nebraska (In re Doiel), 228 B.R. 439, 443 (D.S.D. 1998) (listing numerous cases finding Congress cannot abrogate states' immunity under fourteenth amendment).Back To Text

[13] *See* Seminole Tribe, 517 U.S. at 72−73 (dismissing suit against state for lack of jurisdiction).Back To Text

[14] *See* id. at 55−56 (arguing framers of Indian Gaming Regulatory Act purposely delegated exclusive powers to Congress with purpose of abrogating state immunity); County of Monroe v. Florida, 678 F.2d 1124, 1132 (2d Cir. 1982) (showing uncertainty as to whether Congress can always abrogate state immunity under

delegated powers); Jennings v. Illinois Office of Educ., 589 F.2d 935, 941−43 (7th Cir. 1979) (holding war powers prevail over states' eleventh amendment defense). *See generally* U.S. Const. art. I, § 8 (conferring legislative power on Congress).Back To Text

[15] *See* U.S. Const. art. I, § 8, cl. 4 (granting Congress' power "[t]o establish uniform laws on the subject of Bankruptcies throughout the United States.").Back To Text

[16] *See* Seminole Tribe, 517 U.S. at 77 (Stevens, J., dissenting) (stating that majority opinion leaves those who sue states in bankruptcy court without remedy). *But see* In re Merchants Grain, Inc., 59 F.3d 630, 635 (7th Cir. 1995) (stating that "Congress has the authority to abrogate the states' immunity from suit when legislating pursuant to Article I"), *vacated sub nom.* Ohio Agric. Commodity Depositors Fund v. Mahern, 517 U.S. 1130 (1996); McVey Trucking, Inc. v. Secretary of Illinois (In re McVey Trucking, Inc.), 812 F.2d 311, 327 (7th Cir. 1987) (finding that state can be sued for money damages in federal court under Bankruptcy Code).Back To Text

[17] *See* 11 U.S.C. § 106(b) (1994) (providing that state sovereign immunity is waived when state files proof of claim in bankruptcy proceeding); Schlossberg v. Maryland (In re Creative Goldsmiths), 119 F.3d 1140, 1148 (4th Cir. 1997) (asserting that state can waive immunity by filing counterclaim), cert. denied, 118 S. Ct. 1517 (1998); Ashbrook v. Block, 917 F.2d 918, 923 (6th Cir. 1990) (asserting that governmental unit waives immunity from liability when it files proof of claim).Back To Text

[18] *See* 11 U.S.C. § 726(a) (stating that to participate in distribution of property of estate, one must timely file proof of claim before distribution); § 502 (providing for allowance of creditors' claims). *See, e.g.*, Illinois Dep't of Revenue v. Raleigh (In re Stoecker), 179 B.R. 532, 536 (N.D. Ill. 1994) (stating that if state files proof of claim it can participate in distribution of property of estate); In re Burruss, 65 B.R. 407, 409 (Bankr. D. Md. 1986) (stating that filing proof of claim entitles governmental unit to receive distribution of property of estate).Back To Text

[19] See infra Section VI.Back To Text

[20] *See* 11 U.S.C. § 106(b) (noting that state sovereign immunity is waived when state files proof of claim in bankruptcy proceeding); *see also* Creative Goldsmiths, 119 F.3d at 1148 (concluding that by filing proof of claim state waived immunity from counterclaim); Ashbrook, 917 F.2d at 923 (stating that governmental entity waives immunity when it files proof of claim).Back To Text

[21] *See* Pennhurst St. Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984) (observing that invoking the eleventh amendment may result in bifurcation of federal claims). *But see Bankruptcy Reform Act of 1978: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Judiciary*, 95th Cong. 832 (1977) (statement of Charles A. Horsky, Chairman, National Bankruptcy Conference) [hereinafter Horsky Statement] (stating that one goal of Bankruptcy Act is that all claims relating to case be resolved in single court).Back To Text

[22] *See* Horsky Statement, supra note 21, at 832 (stating that if bankruptcy court does not have jurisdiction to resolve all matters of case, delay and unnecessary expense results); *see also* Richard H. Fallon, The Ideologies of Federal Court Law, 74 Va. L. Rev. 1141, 1198 & n.267 (1988) (noting that bifurcation might be excessively expensive and difficult to administer procedurally).Back To Text

[23] *See* Nixon v. Fitzgerald, 457 U.S. 731, 766 (1982) (recognizing doctrine of sovereign immunity traces its roots back to ancient maxim "king can do no wrong"); Owen v. City of Independence, 445 U.S. 622, 647 (1980) (observing that maxim "king can do no wrong" embodies doctrine of sovereign immunity); Pierson v. Ray, 386 U.S. 547, 565 (1967) (noting maxim "king can do no wrong" represents sovereign immunity concept).Back To Text

[24] *See* Reich v. Collins, 513 U.S. 106, 109 (1994) (noting that states enjoy sovereign immunity in state and federal courts); Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993) (stating that eleventh amendment immunity covers states when in federal court); Edelman v. Jordan, 415 U.S. 651, 662−63 (1974) (noting that Supreme Court has "consistently held" states are immune to suit in federal court under eleventh amendment).Back To Text

[25] 2 U.S. (2 Dall.) 419 (1793) (stating that state may be sued in federal court). This decision has been overruled by the Eleventh Amendment. *See also* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 381−82 (1798) (noting eleventh amendment's displacement of *Chisolm*); 1999−2000 Annual Survey of Bankruptcy Law, pt. 1 (forthcoming Spring 1999) (providing compendium of scholarly articles that present history of eleventh amendment and its impact on bankruptcy cases).Back To Text

[26] *See, e.g.*, Georgia Dep't of Revenue v. Burke (In re Burke), 146 F.3d 1313, 1317−19 (11th Cir. 1998) (inquiring into scope of state sovereign immunity in bankruptcy context); In re Barrett Refining Corp., 221 B.R. 795, 804−05 (Bankr. W.D. Okla. 1998) (applying *Seminole Tribe* analysis to state sovereign immunity question in bankruptcy proceeding); O'Brien v. Vermont Agency of Nat'l. Resources (In re O'Brien), 216 B.R. 731, 735 (Bankr. D. Vt. 1998) (analyzing extent of state sovereign immunity in bankruptcy cases).Back To Text

[27] *See* Seminole Tribe v. Florida, 517 U.S. 44, 46 (1996) (holding that Congress lacked authority under Indian commerce clause to abrogate state's eleventh amendment sovereign immunity); *see also* U.S. Const. art. I, § 8, cl. 3 (authorizing Congress to regulate commerce with Indian Tribes).Back To Text

[28] *See, e.g.*, Burke, 146 F.3d at 1317−19 (discussing whether eleventh amendment confers sovereign immunity upon state in bankruptcy proceedings); Barrett Refining Corp., 221 B.R. at 804−05 (inquiring into extent of state sovereign immunity in bankruptcy cases); O'Brien, 216 B.R. at 735−36 (weighing whether eleventh amendment sovereign immunity applies to states in bankruptcy matters).Back To Text

[29] *See Bankruptcy Reform Act of 1994: Hearings Before the Subcomm. on Economic and Commercial Law of the Comm. of the Judiciary*, 103d Cong. 38 (1994) (observing when governmental units can waive sovereign immunity under 1994 reforms to § 106); H.R. Rep. No. 595, at 317 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6274 (noting that state waives immunity by filing claim, according to § 106); S. Rep. No. 989, at 29−30 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5815−16 (stating that pursuant to § 106, state waives immunity by filing claim); 124 Cong. Rec. H1089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6440 (observing § 106 enables bankruptcy court to assert jurisdiction over governmental units).Back To Text

[30] *See, e.g.*, Department of Transp. & Dev. v. PNL Asset Mgt. Co. (In re Fernandez), 130 F.3d 1138, 1139 (5th Cir. 1997) (holding § 106 to be unconstitutional abrogation of state eleventh amendment immunity); Grabsdeid v. Michigan Employment Sec. Comm'n, 212 B.R. 265, 269 (E.D. Mich. 1997) (reasoning that, under *Seminole Tribe*, § 106 is unconstitutional abrogation of state immunity under eleventh amendment); Snyder v. Nebraska (In re Synder), 228 B.R. 712, 716 (Bankr. D. Neb. 1998) (concluding that § 106 is unconstitutional under eleventh amendment).Back To Text

[31] *See, e.g.*, Department of Transp. & Dev. v. PNL Asset Mgt. Co. (In re Fernandez), 123 F.3d 241, 243 (5th Cir. 1997) (rejecting argument that § 106 is constitutional exercise of bankruptcy power under article I, § 8), *amended on denial of rehearing by*, 130 F.3d 1138 (5th Cir. 1997); Synder, 228 B.R. at 715 (stating that since Bankruptcy Code was enacted under article I, § 8 of the Constitution, § 106 is unconstitutional under *Seminole Tribe*); Rose v. United States Dep't of Educ. (In re Rose), 214 B.R. 372, 375 (Bankr. W.D. Mo. 1997) (observing reasoning of *Seminole Tribe* renders § 106 unconstitutional).Back To Text

[32] *See* Seminole Tribe, 517 U.S. at 45 (stating that Congress can abrogate state immunity only under fourteenth amendment and not commerce clause, thus overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (concluding that eleventh amendment

immunity may be overcome by fourteenth amendment).Back To Text

[33] *See* Chavez v. Arte Publico Press, 157 F.3d 282, 293 (5th Cir. 1998) (Wisdom, J., dissenting) (explaining that principle allowing states to waive eleventh amendment immunity is completely unrelated to abrogation doctrine as explained in *Seminole Tribe*); Fernandez, 123 F.3d at 243 (stating that article I powers cannot be used to circumvent eleventh amendment restrictions on federal judicial power); Gehrt v. University of Ill. at Urbana−Champaign Coop. Extension Serv., 974 F. Supp. 1178, 1192 (C.D. Ill. 1997) (discussing that before Seminole Tribe, Supreme Court held that Congress had constitutional authority to abrogate eleventh amendment immunity under § 5 of fourteenth amendment and under commerce clause).Back To Text

[34] *See* Sacred Heart Hosp. v. Pennsylvania Dep't of Pub. Welfare (In re Sacred Heart Hosp.), 133 F.3d 237, 244 (3d Cir. 1998) (stating that Congress may not abrogate state's sovereign immunity pursuant to bankruptcy clause under § 1 of fourteenth amendment); Hurd v. Pittsburgh State Univ., 109 F.3d 1540, 1542 (10th Cir. 1997) (discussing how *Seminole Tribe* left untouched case law relying on fourteenth amendment as authority for abrogation).Back To Text

[35] *See, e.g.*, Toibb v. Radloff, 501 U.S. 157, 165 (1991) (stating that although structure and legislative history of chapter 11 indicate it was intended primarily for business debtors, there is no ongoing business requirement under chapter 11 and such requirement will not be imposed by court); Northern Pipeline Co. v. Marathon Pipe Line, 458 U.S. 50, 88 (1982) (holding that bankruptcy−related jurisdictional provisions of Bankruptcy Act of 1978 were unconstitutional under article III).Back To Text

[36] The Eleventh Amendment immunizes a state and its agencies from suit in a federal court, but does not extend immunity to governmental subdivisions, such as towns and counties, unless a judgment in the case would result in payment from the treasury of the state itself. The Supreme Court has stated that, as a general rule, political subdivisions of a state, such as towns and counties, do not enjoy Eleventh Amendment immunity. *See* Hess v. Port Auth. Trans−Hudson Corp., 513 U.S. 30, 47 (1994) (stating that cities and counties do not enjoy eleventh amendment immunity); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (noting that bar of eleventh amendment to suit in federal courts does not extend to counties and similar municipal corporations).Back To Text

[37] *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 563 (1994) (Souter, J., dissenting) (stating that policies of obtaining maximum and equitable distribution for creditors and ensuring fresh start for debtors are at core of federal bankruptcy laws); Young v. Higbee Co., 324 U.S. 204, 210 (1945) (stating historically, one prime purpose of bankruptcy law has been to bring about ratable distribution among creditors of bankrupts' assets).Back To Text

[38] *See* United States v. Kras, 409 U.S. 434, 448−49 (1973) (discussing provisions of Bankruptcy Act that enable debtor to have new start with minimum effort and financial obligation); Meltzer v. C. Buck Lecraw & Co., 402 U.S. 954, 958 (1971) (stating that bankruptcy is designed to permit man to make new start unhampered by overwhelming debts).Back To Text

[39] *See* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report 898−99 (1997) [hereinafter Commission Report] (explaining that providing single forum governed by single set of procedural rules ensures uniform treatment of every type of claimant); s*ee also* infra note and accompanying text.Back To Text

[40] *See* Seminole Tribe v. Florida, 517 U.S. 44, 96 (1996) (noting that eleventh amendment preserves state's dignity); Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146, (1993) (stating that purpose of eleventh amendment was "to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties" (quoting In re Ayers, 123 U.S. 443, 505 (1887)).Back To Text

[41] *See* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 280 (1973) (recognizing established principle that states are immune from suits brought in federal court by its own citizens or citizens of another state).Back To Text

[42] 517 U.S. 1130, 1130 (1996) (granting certiorari and remanding case to seventh circuit for further consideration in light of *Seminole Tribe*).Back To Text

[43] *See* id.Back To Text

[44] The *Ohio Agricultural* case became moot after the remand before a decision on reconsideration by the seventh circuit, and thus will not reach the Supreme Court for a resolution on the issue of whether § 106 is unconstitutional.Back To Text

[45] Wyoming Dep't of Transp. v. Straight (In re Straight), 143 F.3d 1387, 1392 (10th Cir. 1998), cert. denied, 119 S. Ct. 446 (1998) (indicating that filing proof of claim by state agency not only waived eleventh amendment immunity for agency, but also waived immunity of state). Contrary rulings on the scope of a waiver have been made by a number of other courts. *See* infra notes − and accompanying text (discussing various views on state waiver issue).Back To Text

[46] Straight, 143 F.3d at 1392 (affirming district court decision and holding that Wyoming waived its eleventh amendment immunity by filing proofs of claim).Back To Text

[47] Magnolia Venture Capital Corp. v. Prudential Sec., Inc. (In re Magnolia Venture Capital Corp.), 151 F.3d 439 (5th Cir. 1998), cert. denied, 119 S. Ct. 1115 (1999). Certiorari was also denied in Texas v. Walker, 142 F.3d 813 (5th Cir. 1998), cert. denied, 119 S. Ct. 865 (1999), and in Schlossberg v. Maryland (In re Creative Goldsmiths), 119 F.3d 1140 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517 (1998).Back To Text

[48] *See* Magnolia, 151 F.3d at 441 (setting forth petitioner's arguments); infra Section V.C.Back To Text

[49] College Sav. Bank v. Florida Prepaid Post−Secondary Educ. Expense Bd., 131 F.3d 353 (3d Cir. 1997), cert. granted, 119 S. Ct. 790 (1999).Back To Text

[50] College Sav. Bank v. Florida Prepaid Post−Secondary Educ. Expense Bd., 148 F.3d 1343 (Fed. Cir. 1998), cert. granted, 119 S. Ct. 790 (1999).Back To Text

[51] College Sav. Bank, 131 F.3d at 356 (holding that immunity was not waived through appearance in instant litigation).Back To Text

[52] College Sav. Bank, 148 F.3d at 1349 (holding patent protection equivalent to protection of property which comports with fourteenth amendment).Back To Text

[53] *See* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 96−97 (1989) (discussing bankruptcy case where government was defendant); New Jersey v. Chen (In re Chen), 227 B.R. 614, 615 (D.N.J. 1998) (noting New Jersey as plaintiff/appellant in dischargeability action); Weiskopf v. New York Job Dev. Auth. (In re J.T.L. Supermarket Corp.), 145 B.R. 3, 3 (Bankr. N.D.N.Y. 1992) (recognizing New York Development Authority as creditor of debtor based on fraudulent conveyance claim).Back To Text

[54] *See* Florida Dep't of Revenue v. Sparkman (In re York−Hannover Dev., Inc.), 190 B.R. 62, 65 (E.D.N.C. 1995) (ruling, prior to Supreme Court's decision in *Seminole Tribe*, that § 106 constitutionally abrogates state's eleventh amendment right from suit in federal court). *But see* Sacred Heart Hosp. v. Pennsylvania Dep't of Pub. Welfare (In re Sacred Heart Hosp.), 133 F.3d 237, 244 (3d Cir. 1998) (holding that § 106 is unconstitutional abrogation of states' eleventh amendment immunity); United States v. Nebraska, Dep't of Revenue (In re Doiel), 228 B.R. 439, 449 (D.S.D. 1998) (finding § 106 unconstitutional where it attempts to abrogate state immunity).Back To Text

[55] *See* Koehler v. Iowa College Student Aid Comm'n (In re Koehler), 204 B.R. 210, 214 (Bankr. D. Minn. 1997) (holding that Congress has power to abrogate immunity under § 5 of fourteenth amendment); Mather v. Okla. Employment Sec. Comm'n (In re Southern Star Foods, Inc.), 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995) (stating that Congress must have power to abrogate state immunity in order to further ideals of Constitution as whole). *But see* Elias v. United States (In re Elias), 218 B.R. 80, 87 (B.A.P. 9th Cir. 1997) (ruling that Congress does not have power to pass general legislation abrogating state sovereign immunity under § 5 of fourteenth amendment).Back To Text

[56] *See* National Concrete v. Guerra Constr. Co. (In re Guerra), 142 B.R. 826, 829−30 (N.D. Ill. 1992) (noting bankruptcy court can order monetary payment from state to private claimant absent state consent). *But see* Hindes v. FDIC, 137 F.3d 148, 150 (3d Cir. 1998) (noting types of relief available are those which will prevent ongoing violation of federal laws by state officials); Arid Waterproofing v. Department of Gen. Servs. (In re Arid Waterproofing), 175 B.R. 172, 175 (Bankr. E.D. Pa. 1994) (asserting that states are immune from litigation seeking monetary relief by eleventh amendment).Back To Text

[57] *See* Texas v. Walker, 142 F.3d 813, 820 (5th Cir. 1998), cert. denied, 119 S. Ct. 865 (1999) (holding that eleventh amendment does not bar discharge of debt owed to state in bankruptcy when state takes no part in proceeding, as debtor not barred from raising discharge as defense in later suit by state seeking recovery of same debt); Brooks Fashion Stores v. Michigan Employment Sec. Comm'n, 124 B.R. 436, 442 (Bankr. S.D.N.Y. 1991) (ruling that bankruptcy court is not precluded from discharging debt owed to state agency when state fails to file proof of claim).Back To Text

[58] *See* Gardner v. United States (In re Gardner), 913 F.2d 1515, 1517−18 (10th Cir. 1990) (holding bankruptcy court has jurisdiction to determine interest in property between spouses, but not between prevailing spouse and state); ALPA Corp. v. IRS (In re ALPA Corp.), 11 B.R. 281, 282 (Bankr. D. Utah 1981) (noting bankruptcy court has jurisdiction to determine ownership of even seized property). *But see* Ross v. Marrero (In re Dilbert, Bankcroft & Ross Co.), 117 F.3d 160, 179 (5th Cir. 1997) (reversing bankruptcy court award of proceeds of property sale to government).Back To Text

[59] *See* Missouri v. United States Bankr. Court (In re Missouri), 647 F.2d 768, 776 (8th Cir. 1981) (holding that bankruptcy court possessed power to enjoin state officials from interfering with assets in possession of bankruptcy court); NLRB v. Jonas (In re Bel Air Chateau Hosp. Inc.), 611 F.2d 1248, 1251 (9th Cir. 1979) (concluding that bankruptcy court may enjoin state agency when party shows necessity for stay pursuant to § 362). *But see* Howard v. Allard, 122 B.R. 696, 701 (W.D. Ky. 1991) (holding that lower court could not issue permanent injunction against state official in case at hand).Back To Text

[60] *See* In re Mims, 209 B.R. 746, 748 (Bankr. M.D. Fla. 1997) (enjoining prosecutor from commencing criminal charge for bad checks in attempt to collect debt); Padgett v. Latham (In re Padgett), 37 B.R. 280, 284 (Bankr. W.D. Ky. 1983) (enjoining prosecution for bad check issued by debtor as attempt to collect debt). *But see* Holder v. Dotson, 26 B.R. 789, 793 (Bankr. M.D. Tenn. 1982) (denying request to enjoin state from criminally prosecuting under bad check statute for collection of bad debt).Back To Text

[61] *See* Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1997) (noting that it was not beyond bounds of bankruptcy court to confirm plan with state creditor's claim "written down," regardless of immunity objection); Oklahoma v. Crook (In re Crook), 966 F.2d 539, 544 (10th Cir. 1992) (confirming plan in case in which state held mortgage over state immunity objection). *But see* In re NVR L.P., 206 B.R. 831, 844 (Bankr. E.D. Va. 1997) (stating that plan confirmation is "suit" for purposes of immunity).Back To Text

[62] *See* Walker, 142 F.3d at 820 (stating eleventh amendment jurisdictionally bars suit in federal court by private individual debtor against non−consenting state); Ellenberg v. Board of Regents of Univ. Sys. (In re Midland Mechanical Contractors, Inc.), 200 B.R. 453, 458 (Bankr. N.D. Ga. 1996) (finding means of obtaining jurisdiction over state is through waiver). *But see* Ohio v. Madeline Marie Nursing Homes #1 & #2, 694 F.2d 449, 458 (6th Cir. 1982) (recognizing that eleventh amendment does not wholly bar bankruptcy

courts jurisdictionally, so long as state waives immunity with express language). Back To Text

[63] *See* Gardner v. New Jersey, 329 U.S. 565, 574−78 (1947) (holding that by filing proof of claim, state waives its eleventh amendment immunity); S.G. Phillips Constructors, Inc. v. City of Burlington (In re S.G. Phillips Constructors, Inc.), 45 F.3d 702, 707 (2d Cir. 1995) (noting that city had submitted to bankruptcy court jurisdiction by filing proof of claim); *cf.* In re Barrett Refining Corp., 221 B.R. 795, 810 (Bankr. W.D. Okla. 1998) (stating that filing proof of claim waived whatever sovereign immunity state had); French v. Georgia Dep't of Revenue (In re Abepp Acquisition Corp.), 215 B.R. 513, 518 (B.A.P. 6th Cir. 1997) (noting filing of proof of claim submitted state to jurisdiction for that claim only).Back To Text

[64] *See* Magnolia Venture Capital Corp. v. Prudential Sec., Inc. (In re Magnolia Venture Capital Corp.),151 F.3d 439, 442 (5th Cir. 1998), cert. denied, 119 S. Ct. 1115 (1999) (declining to rule on whether provision pledge agreement for federal court venue could be sufficient to act as waiver); *see also* Ford Motor Co. v. Indiana Dep't of Treasury, 323 U.S. 459, 467 (1945) (considering who has authority to waive immunity for state); *cf.* Estate of Porter v. Illinois, 36 F.3d 684, 690 (7th Cir. 1994) (stating "state officials can only waive a state's Eleventh Amendment immunity if they are specifically authorized to do so by the state's constitution, statutes, or decisions"); Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986) (indicating that waiver authority must be expressly provided granted state to specific person in order for that person to have authority to waive).Back To Text

[65] *See* Georgia Dep't of Revenue v. Burke (In re Burke), 146 F.3d 1313, 1317 (11th Cir. 1998) (ruling that state waived immunity by filing proof of claim); DeKalb County Div. of Family and Children Servs. v. Platter (In re Platter), 140 F.3d 676, 679 (7th Cir. 1998) (holding that state removed itself from eleventh amendment's protection by voluntarily participating in bankruptcy case). *But see* Schlossberg v. Maryland (In re Creative Goldsmiths, Inc.), 119 F.3d 1140, 1149 (4th Cir. 1997) (holding that even when state filed proof of claim, it did not waive eleventh amendment immunity from adversary proceeding in bankruptcy court).Back To Text

[66] *See* In re Young, 141 F.3d 854, 859 (8th Cir. 1998) (discussing that Congress cannot amend Constitution through ordinary legislation); United Transp. Union v. I.C.C., 891 F.2d 908, 915 (D.C. Cir. 1989) (stating that Congress cannot amend Constitution by mere legislation).Back To Text

[67] *See* supra notes − and accompanying text (discussing conflicting case law driven by *Seminole Tribe* decision).Back To Text

[68] *See* Scarborough v. Michigan Collection Div. (In re Scarborough), 229 B.R. 145, 149−51 (Bankr. W.D. Mich. 1999) (summarizing various court opinions concerning state immunity since *Seminole Tribe* case); *see also* Grabscheld v. Michigan Employment Sec. Comm'n (In re C.J. Rogers, Inc.), 212 B.R. 265, 272−73 (E.D. Mich. 1997) (arguing that since Bankruptcy Code is not logically related to fourteenth amendment, under *Seminole*, § 106(a) is unconstitutional); In re Burkhardt, 220 B.R. 837, 841 (Bankr. D.N.J. 1998) (finding that since *Seminole*, Congress' only power to abrogate state sovereign immunity flows from commerce clause and fourteenth amendment).Back To Text

[69] New Jersey v. Chen (In re Chen), 227 B.R. 614, 623 (Bankr. D.N.J. 1998) (concluding that because New Jersey had voluntarily entered general appearance in bankruptcy court it waived its eleventh amendment immunity, and the court could determine dischargeability of chapter 7 debtor's debt of unemployment compensation that debtor received while working part−time).Back To Text

[70] Id. at 621−22 (noting lower court's opinion about subsequent *Seminole Tribe* interpretation).Back To Text

[71] *See* Barsalou & Stengel, supra note , at 457 (stating sovereign immunity derived from English common law premise that king could do no wrong); Richard H. Seamon, Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance, 43 Vill. L. Rev. 155, 218 (1998) (mentioning that as long tradition, English law has presupposed that neither king nor Parliament were capable of wrongdoing (quoting William Blackstone, Commentaries on Laws of England (1783)); Jeremy

Travis, Rethinking Sovereign Immunity After Bivens, 57 N.Y.U. L. Rev. 597, 604 (1982) (noting modern views of sovereign immunity can be traced to 13th century England).Back To Text

[72] *See* FDIC v. Meyer, 510 U.S. 471, 475 (1994) (stating "absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit"); United States v. Mitchell, 463 U.S. 206, 212 (1983) (referencing Tucker Act as consensual waiver by federal government of its right not to be sued); United States v. Testan, 424 U.S. 392, 399 (1976) (noting that waiver of sovereign immunity cannot be implied, but not expressly given before plaintiff can sue federal government).Back To Text

[73] *See, e.g.*, 12 U.S.C. § 341 (1994) (giving express statutory waiver of sovereign immunity through "sue or be sued" language in Federal Reserve Bank statute); 16 U.S.C. § 450ss−4 (1994) (giving express waiver of sovereign immunity for park conservation agency); 19 U.S.C. § 1920 (1994) (stating Secretary of Commerce may "sue or be sued").Back To Text

[74] *See* United States v. Nordic Village, 503 U.S. 30, 33 (1992) (stating that waivers of government's sovereign immunity must be "unequivocally expressed" to be effective at all); Magnolia Venture Capital Corp. v. Prudential Sec., Inc. (In re Magnolia Venture Capital Corp.), 151 F.3d 439, 443 (5th Cir. 1998), cert. denied, 119 S. Ct. 1115 (1999) (extolling Supreme Court doctrine of "unequivocally expressed" waivers of sovereign immunity, as fundamental to all eleventh amendment cases); In re NVR L.P., 206 B.R. 831, 849 (Bankr. E.D. Va. 1997) (stating "constructive consent is not a doctrine commonly associated with surrender of constitutional rights" (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974))); Pennhurst St. Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (stating that courts should only give effect to state's waiver of sovereign immunity where such waiver is express and without room for any other "reasonable construction").Back To Text

[75] *See* Edelman, 415 U.S. at 673 (noting that sovereign immunity is retained if there is lack of express waiver or congressional action to contrary); *see also* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989) (referring to "notwithstanding any assertion of sovereign immunity" language in § 106(a) as narrow waiver of sovereign immunity in particular cases).Back To Text

[76] *See* Blatchford v. Native Village of Noatak, 501 U.S. 775, 787 (1991) (noting United States Supreme Court first acknowledged congressional power to abrogate state immunity under the fourteenth amendment in 1976); infra notes − and accompanying text.Back To Text

[77] *See* Rome v. United States, 446 U.S. 156, 178 (1980) (noting that fourteenth amendment was designed as intrusion upon state sovereignty); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (finding that eleventh amendment is limited by powers of § 5 of fourteenth amendment).Back To Text

[78] *See* Magnolia Venture Capital Corp., 151 F.3d at 443 (noting that under Mississippi law, when state agencies are authorized to waive state immunity by legislature it constitutes waiver of inherent sovereign immunity for breach of contract claims); *see also* Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (finding that clear statement of waiver is required to compel states to entertain damages suits against them in their own state courts).Back To Text

[79] *See* Will, 491 U.S. at 65 (noting that states have same immunity in their courts as federal government has in federal courts); Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857) (restating established principle that sovereign, including state, cannot be sued in its own courts without consent).Back To Text

[80] *See* infra notes , (giving examples of state waivers of sovereign immunity).Back To Text

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

[82] *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 44 (1996) (stating "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a state's] consent" (quoting Hans v.

Louisiana, 134 U.S. 1, 13 (1890))); Hans, 134 U.S. at 15 (1890) (discussing absurdity of eleventh amendment bar only applying to suits brought by citizens of another state or foreign state); *see also* Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (noting doctrine of sovereign immunity is rooted in recognition that states maintain certain attributes of sovereignty, including sovereign immunity).Back To Text

[83] 209 U.S. 123, 159 (1908) (discussing relationship of state official to sovereign immunity of state that she represents). *See also* Edelman v. Jordan, 415 U.S. 651, 663 (1974) (noting *Young* as "watershed case" in which suit could be brought against state official with no bar by eleventh amendment); Green v. Mansour, 474 U.S. 64, 67 (1986) (discussing exception created by *Ex Parte Young* in assertion that suit challenging constitutionality of state official's action in enforcing state law is not one against the state).Back To Text

[84] *See* Young, 209 U.S. at 159 (explaining use of name of state to enforce an unconstitutional act to injury of complainants is proceeding which does not affect state in its sovereign or governmental capacity); *see also* Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 684 (1982) (stating eleventh amendment does not bar all actions against officers of state).Back To Text

[85] The Supreme Court has also restricted the eleventh amendment by holding that an appeal to it from a state court judgment is not a "suit" against the state. McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 167, 190 (1990).Back To Text

[86] Seminole Tribe v. Florida, 517 U.S. 44, 73 (1996)Back To Text

[87] Id. at 102, 121.Back To Text

[88] *See* id. at 72 & n.16 (noting that "an individual may obtain injunctive relief under *Ex parte Young* in order to remedy a state officer's ongoing violation of federal law"); id. at 102 (Stevens, J., dissenting) (noting that *Young* doctrine is still good law).Back To Text

[89] 521 U.S. 261 (1997).Back To Text

[90] *See Coeur d'Alene* Tribe of Idaho, 521 U.S. at 281 (noting that case is "the functional equivalent of a quiet title action"); *see also* California v. Deep Sea Research, Inc., 118 S. Ct. 1464, 1472 (1998) (citing *Coeur d'Alene Tribe* and stating that it was dispute over title to property); MacDonald v. Village of Northport, 164 F.3d 964, 971 (6th Cir. 1999) (noting that *Coeur d'Alene Tribe* was quiet title action).Back To Text

[91] *See Coeur d'Alene* Tribe, 521 U.S. at 282−83 (stating that granting tribe relief would "extinguish State's control" and "divest the State of sovereign control" over vast portions of its land); City of Chicago v. International College of Surgeons, 522 U.S. 156, 185−86 (1997) (Ginsburg, J., dissenting) (noting that *Coeur d'Alene Tribe* stands for strong interest states have in maintaining administrative and regulatory control within their jurisdictions); Marie v. Edgar, 131 F.3d 610, 617 & n.13 (7th Cir. 1997) (noting that there were "important [state] sovereignty interests at stake in" *Coeur d'Alene Tribe*).Back To Text

[92] *See Coeur d'Alene* Tribe, 521 U.S. at 269, 287 (noting that *Ex parte Young* is still valid, yet "inapplicable" to this case); id. at 288, 291 (O'Connor, J., concurring) (noting that *Ex parte Young* is still good law, but is "not properly invoked here"); Wheeling & Lake Erie Ry. Co. v. Public Utility Comm'n, 141 F.3d 88, 91 (3d Cir. 1998) (noting continuing validity of *Ex parte Young*).Back To Text

[93] 116 F.3d 1151 (7th Cir. 1997), vacated, 524 U.S. 381 (1998).Back To Text

[94] *See* Schacht, 118 S. Ct. at 2050.Back To Text

[95] *See id*. (noting district court's conclusion that Schacht received due process and that dismissal did not violate fourteenth amendment).Back To Text

[96] *See* Schacht, 116 F.3d 1152−53 (ordering district court to remand case to state court as district court lacked original jurisdiction).Back To Text

[97] *See* Schacht, 118 S. Ct. at 2054 (vacating circuit court decision and remanding case to district court for adjudication of unbarred claims).Back To Text

[98] *See id*. (concluding that "federal court cannot hear the barred claim...[b]ut that circumstance does not destroy removal jurisdiction over the remaining claims").Back To Text

[99] *See id*. (stating that issue of whether state waived all immunity by removal is "a question we have not decided"); *id*. (Kennedy, J., concurring) (noting that Supreme Court "neither reached nor considered the argument that" state waived all immunity by consenting to removal); *see also* 11 U.S.C. § 1441(a) (1994) (stating that defendant may remove from state court to federal district court any "civil action of which the district courts of the United States have original jurisdiction"); Carnegie−Mellon Univ. v. Cohill, 484 U.S. 343, 349 & n.6 (1988) (reiterating *Hurn* rule that single cause of action with both federal and state grounds may be tried in federal court); Hurn v. Oursler, 289 U.S. 238, 246 (1933) (stating that in "case where two distinct grounds in support of a single cause of action are alleged, only one of which presents a federal question the federal court . . . may . . . retain and dispose of the case upon the nonfederal ground").Back To Text

[100] *See* Pennhurst St. Sch. & Hosp. v. Halderman, 465 U.S. 89, 97−98 (1984) (noting that Constitution does not grant Congress express power to abrogate state immunity pursuant to eleventh amendment); Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) (recognizing sovereign immunity of states under Constitution); Hans v. Louisiana, 134 U.S. 1, 15 (1890) (stating that Constitution does not give Congress power to abrogate state immunity from suits in federal court).Back To Text

[101] *See, e.g.*, Green v. Mansour, 474 U.S. 64, 68 (1985) (recognizing that Congress can abrogate state's eleventh amendment immunity if it acts pursuant to valid exercise of power granted by Constitution and clearly expresses its intent to abrogate state immunity); Pennhurst, 465 U.S. at 99 (noting Congress has ability to abrogate eleventh amendment state immunity); Sacred Heart Hosp. v. Pennsylvania Dep't of Pub. Welfare (In re Sacred Heart Hosp.), 133 F.3d 237, 245 (3d Cir. 1998) (concluding that Bankruptcy Code provision purporting to abrogate state eleventh amendment immunity was unconstitutional after applying two−part test).Back To Text

[102] *See* Green, 474 U.S. at 68 (requiring that Congress express unequivocal intent to abrogate state immunity in abrogating statute); Pennhurst, 465 U.S. at 99 (observing that for federal statute to abrogate state immunity, Congress must express its intent to abrogate in clear, unambiguous terms); Quern v. Jordan, 440 U.S. 332, 343 (1979) (stating that Congress must indicate clear purpose to abrogate state immunity in order for abrogation measure to succeed).Back To Text

[103] *See* Seminole Tribe v. Florida, 517 U.S. 44, 56 (1996) (recognizing that Congress must act in accordance with one of its constitutional powers to abrogate state immunity); Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 473−74 (1987) (noting abrogating act must be passed pursuant to constitutional provision granting such power to Congress); Green, 474 U.S. at 68 (stating that to abrogate state immunity, Congress must act pursuant to valid exercise of its power under Constitution).Back To Text

[104] *See* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 99−100 (1989) (noting uncertainty as to whether Bankruptcy Code § 106 is valid exercise of constitutional power by Congress); Kish v. Verniero (In re Kish), 212 B.R. 808, 815−16 (D.N.J. 1997) (weighing whether Bankruptcy Code § 106 was promulgated pursuant to some constitutional provision); Wyoming Dep't of Transp. v. Straight (In re Straight), 209 B.R. 540, 548−58 (D. Wyo. 1997) (discussing whether Congress acted pursuant to valid exercise of constitutional power by enacting § 106 of Bankruptcy Code).Back To Text

[105] Bankruptcy Code § 106(a) expressly "abrogated" sovereign immunity as to governmental units of all levels (i.e., federal, state, and local), which covered the abrogation of the state's Eleventh Amendment immunity with respect to the broad array of claims of the type enumerated in specified sections of the Bankruptcy Code. 11 U.S.C. § 106(a) (1994). Section 106(b) did not use the term "abrogate," but instead shifted to the notion that by filing a proof of claim, a government "is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. § 106(a). Such a "deemed waiver" by Congress is not a voluntary act of a state. Therefore, notwithstanding § 106(b)'s use of the term "waiver," that provision is akin to abrogation. *See* id.Back To Text

[106] *See* Sacred Heart Hosp., 133 F.3d at 244 (observing that Congress enacted Bankruptcy Code § 106 pursuant to authority granted by bankruptcy clause); Department of Transp. & Dev. v. PNL Asset Management Co. (In re Fernandez), 123 F.3d 241, 245 (5th Cir. 1997) (stating Bankruptcy Code § 106 was enacted under Constitution's bankruptcy clause).Back To Text

[107] *See, e.g.*, Schlossberg v. Maryland (In re Creative Goldsmiths), 119 F.3d 1140, 1145 (4th Cir. 1997) (ruling Bankruptcy Code § 106 unconstitutional); In re NVR L.P., 206 B.R. 831, 838 & n.18 (Bankr. E.D. Va. 1997) (noting that majority of courts have found Bankruptcy Code § 106 unconstitutional). *See also* infra note and accompanying text.Back To Text

[108] *See* Straight, 209 B.R. at 551 (discussing policies served by Bankruptcy Code and need to permit abrogation of state immunity so as to honor those policies); Daris v. United States Postal Serv. (In re Leeth Constr., Inc.), 170 B.R. 684, 688 (Bankr. D. Ariz. 1994) (recognizing policy behind Bankruptcy Code § 106 is to prevent government from benefiting from claim without opening itself up to liability on valid counter−claim); Illinois Dep't of Transp. v. Madison County Econ. Opportunity Comm'n (In re Madison County Econ. Opportunity Comm'n), 53 B.R. 541, 542−43 (Bankr. S.D. Ill. 1985) (noting § 106 of Bankruptcy Code attempts to prevent government from collecting on claim while avoiding counter−claim liability).Back To Text

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

[110] *See* U.S. Const. amend. XIV, §§ 1, 5, which state in relevant part:

> Section 1 − ... 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 the laws.
>
> Section 5 − The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.Back To Text

[111] *See* Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996). The Court noted that the Fourteenth Amendment expanded federal power such that it encroached validly on state sovereignty and Eleventh Amendment immunity, enabling Congress to abrogate state immunity granted by the Eleventh Amendment, provided certain requirements are met. *See* id. at 59.Back To Text

[112] *See* id. at 65−66 (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)) because it caused confusion among lower courts attempting to apply its holding and because it was in discord with settled understanding of eleventh amendment).Back To Text

[113] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that fourteenth amendment limits state immunity conferred by eleventh amendment).Back To Text

[114] *See* supra note and accompanying text. See also Wheeling & Lake Erie Ry. Co. v. Public Utility Comm'n, 141 F.3d 88, 92 (3d Cir. 1998), which, in discussing that *Seminole Tribe* overruled *Union Gas Co.*, highlighted that after the decision in *Seminole Tribe*, the governing principle is that "the only remaining source of Congressional power to abrogate states' Eleventh Amendment immunity is the Fourteenth Amendment."Back To Text

[115] *See* Seminole Tribe, 517 U.S. at 45 (expressly overruling *Union Gas Co.*). *But see* supra note 117.Back To Text

[116] College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353, 358 (3d Cir. 1997), cert. granted, 119 S. Ct. 790 (1999) (finding only basis for abrogating state sovereign immunity under eleventh amendment is by means of § 5 of fourteenth amendment). *See also* Wheeling, 141 F.3d at 92 (noting § 5 of fourteenth amendment is sole remaining source of congressional power with which to abrogate state immunity); Bryant v. New Jersey Dep't of Transp., 1 F. Supp.2d 426, 432 (D.N.J. 1998) (stating Congress can only turn to § 5 of fourteenth amendment to abrogate state sovereign immunity).Back To Text

[117] *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 148 F.3d 1343 (Fed. Cir. 1998), cert. granted, 119 S. Ct. 790 (1999).Back To Text

[118] U.S. Const. art. I, § 8, cl. 8.Back To Text

[119] *See* Seminole Tribe, 517 U.S. at 59 (noting that fourteenth amendment operates to alter pre−existing balance of power between state and federal government); College Savings Bank, 148 F.3d at 1348 (stating that fourteenth amendment expanded federal power at expense of state autonomy, and fundamentally altering balance of federal and state power originally in Constitution).Back To Text

[120] *See* College Savings Bank, 148 F.3d at 1347−50 (addressing whether legislation enacted by Congress was appropriate use of enforcement power by determining whether legislation itself was rational means of effectuating substance of fourteenth amendment).Back To Text

[121] EEOC v. Wyoming, 460 U.S. 226, 243 (1983).Back To Text

[122] 117 S. Ct. 2157, 2164 (1997) (stating that courts have described Congress' power under § 5 as remedial); College Savings Bank, 148 F.3d at 1349 (following theory of *City of Boerne v. Flores*).Back To Text

[123] *See, e.g.*, Anderson v. State Univ., No. 98−7025, 1999 WL 92319, at *3−4 (2d Cir. Feb. 24, 1999).Back To Text

[124] *See* College Savings Bank, 148 F.3d at 1349.Back To Text

[125] *See* id.Back To Text

[126] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). *But see* Schlossberg v. Maryland (In re Creative Goldsmiths), 119 F.3d 1140, 1146 (4th Cir. 1997) (asserting that in passing Bankruptcy Reform Act of 1994, Congress exercised its article I bankruptcy power and did not act pursuant to fourteenth amendment); In re NVR L.P., 206 B.R. 831, 840 (Bankr. E.D. Va. 1997) (discussing lack of legislative history supporting contention that enactment of § 106 of Bankruptcy Code in 1978 was predicated on § 5 of fourteenth amendment and, in fact, was premised solely on Congress' bankruptcy power under article I of Constitution). A discussion of the abrogation issue is also set forth in the Commission Report, supra note , at 912−13.Back To Text

[127] *See* In re Mitchell, 222 B.R. 877, 881 (B.A.P. 9th Cir. 1998) (explaining that Bankruptcy Code cannot abrogate states' sovereign immunity since it was not enacted pursuant to fourteenth amendment); *see also* Goshtasby v. Board of Trustees, 141 F.3d 761, 769 (7th Cir. 1998) (noting power of Congress under

fourteenth amendment to abrogate non−consenting state's eleventh amendment immunity if congressional act is remedial in nature by providing remedy for constitutional violation); Oregon Shortline R.R. Co. v. Department of Revenue, 139 F.3d 1259, 1265−67 (9th Cir. 1998) (stating since decision in *Seminole Tribe*, fourteenth amendment is only available provision for abrogation of non−consenting state's eleventh amendment immunity, specifically stating that abrogation may be based upon equal protection clause of fourteenth amendment). See also In re Barrett Refining Corp., 221 B.R. 795, 808 (Bankr. W.D. Okla 1998), and In re Snyder, 228 B.R. 712, 716 (Bankr. D. Neb. 1998), which cite cases for and against the proposition that a state's Eleventh Amendment immunity may be abrogated by congressional action pursuant to Article I of the Constitution.Back To Text

[128] Wyoming Dep't of Transp. v. Straight (In re Straight), 209 B.R. 540, 551 (D. Wyo. 1997), aff'd, 143 F.3d 1387 (10th Cir. 1998), cert. denied, 119 S. Ct. 446 (1998). While the district court ruled that Article I is source of congressional authority for Congress to abrogate a state's Eleventh Amendment immunity, the tenth circuit affirmed on the limited ground that by seeking benefits under the Bankruptcy Code through filing a proof of claim, the state waived its Eleventh Amendment immunity from suit in the bankruptcy court. *See* Straight, 143 F.3d at 1388−89.

In *Wyoming Dep't of Transportation* the petition for certiorari, which was denied, posed the question whether § 106(b) of the Bankruptcy Code violates the Eleventh Amendment by providing, in essence, that a state's filing of a proof of claim waives its immunity. The Supreme Court, however, denied certiorari on November 9, 1998, leaving that waiver issue unresolved. *See* Straight, 119 S. Ct. 446; infra note and accompanying text (discussing whether filing proof of claim constitutes waiver); *see also* In re Southern Star Foods, Inc., 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995) (arguing that laws enacted "pursuant to Article I" are enforceable "through the Fourteenth Amendment" prior to *Seminole Tribe* case).Back To Text

[129] Straight, 209 B.R. at 551.Back To Text

[130] Burke v. Georgia (In re Burke), 203 B.R. 493, 497 (Bankr. S.D. Ga. 1996) (explaining that article I gives Congress power to enact uniform bankruptcy laws, and fourteenth amendment authorizes Congress to create federal rights of action against states to enforce provisions of Bankruptcy Code notwithstanding states' eleventh amendment immunity). By filing a proof of claim for unpaid taxes, the state waived its Eleventh Amendment immunity, and the waiver extended to enforcement of the discharge injunction and automatic stay. *See* id.Back To Text

[131] *See* id.; *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (finding that fourteenth amendment gives Congress right to pass laws that prevent abridgement of citizens' privileges and immunities by states and allowing for private actions against states).Back To Text

[132] See U.S. Const. amend. XIV, that states, in relevant part, "an individual may not be deprived of life, liberty, or property without due process of law." *See, e.g.*, Jennings v. Lombardi, 70 F.3d 994, 995 (8th Cir. 1995) (noting that fourteenth amendment prohibits states from depriving person of property).Back To Text

[133] *See* H.R. Rep. No. 95−595, at 43−48 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6004−08 (revealing congressional intent to grant comprehensive jurisdiction to bankruptcy courts so that they might deal effectively and expeditiously with all matters connected with bankruptcy estate). Back To Text

[134] *See* Coken v. Pan Am. World Airways (In re Pan Am. Corp.), 950 F.2d 839, 845 (2d Cir. 1991) (stating that Congress' purpose in enacting Bankruptcy Act was to eliminate confusion, delay and ineffectiveness caused by multiplicity of forums); Gonzales v. Parks, 830 F.2d 1033, 1035 (9th Cir. 1987) (discussing that if allowed to attack bankruptcy petitions in state court, it would threaten uniformity of federal bankruptcy as required by the United States Constitution).Back To Text

[135] *See* Seminole Tribe v. Florida, 517 U.S. 44, 146 (1996) (quoting Alexander Hamilton discussing alienation of state sovereignty (quoting The Federalist No. 32, at 200 (Alexander Hamilton))).Back To Text

[136] *See* id.Back To Text

[137] *See* Department of Transp. & Dev. v. PNL Asset Management Co. (In re Fernandez), 123 F.3d 241, 244 (5th Cir. 1997) (stating that federal government has power to establish uniform bankruptcy laws (citing to The Federalist Paper, No. 42, at 271 (James Madison))).Back To Text

[138] *See* U.S. Const. art. I, § 8 (emphasizing that all duties, imposts and excises shall be uniform throughout the United States).Back To Text

[139] *See* The Federalist No. 82, at 492 (Alexander Hamilton).Back To Text

[140] Id. *See* Hendrix v. Page, 640 N.E.2d 1081, 1083 (Ind. Ct. App. 1994) (stating that Constitution vests jurisdiction over bankruptcy matters to federal courts and not state courts).Back To Text

[141] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 420−21 (1793) (stating that Constitution vests jurisdiction in Supreme Court over state, as defendant, at suit of private citizen of another state). *See, e.g.*, Better Gov't. Bureau, Inc. v. McGraw, 904 F. Supp. 540, 548 (S.D.W.V. 1995) (mentioning breach of contract claim that was allowed by *Chisholm* court)Back To Text

[142] *See* Palotai v. University College Park, 959 F. Supp. 714, 720 (D.M.D. 1997) (stating that *Chisholm* resulted in adoption of eleventh amendment); Montana v. Gilham, 932 F. Supp. 1215, 1220 (D. Mont. 1996) (stating that eleventh amendment was enacted as result of decision in *Chisholm*).Back To Text

[143] U.S. Const. amend. XI, which states: "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."Back To Text

[144] *See* Edelman v. Jordan, 415 U.S. 651, 652 (1974) (recognizing that eleventh amendment places no bar on federal question suits); Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 847 (1824) (Marshall, C.J.) (stating that eleventh amendment exempts states from suits by citizens of other states, or aliens, but makes no mention of exemption for cases that arise under statute); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 407 (1821) (Marshall, C.J.) (noting eleventh amendment's purpose to bar suits at common law, but not "strip the government of the means of protecting, by the instrumentality of its court, the Constitution and laws from active violation").Back To Text

[145] *See* supra note .Back To Text

[146] 134 U.S. 1 (1890).Back To Text

[147] *See* Atascadero St. Hosp. v. Scanlon, 473 U.S. 234, 283−89 (1985) (Brennan, J., dissenting) (arguing that later plain meaning and legislative history of eleventh amendment shows that its purpose was to grant state immunity in diversity cases); *see also* Pennsylvania v. Union Gas, 491 U.S. 1, 31 (1988) (Scalia, J., dissenting) (conceding that plain meaning of eleventh amendment extends state immunity to diversity cases alone).Back To Text

[148] *See* Seminole Tribe v. Florida, 517 U.S. 44, 289 (1996) (Souter, J. dissenting) (analyzing purpose of eleventh amendment as response to *Chisholm*); Scanlon, 473 U.S. at 289 (Brennan, J., dissenting) (concluding from extensive legislative history that eleventh amendment was limited in its application to diversity cases). *But see* Pennhurst St. Sch. & Hosp. v. Halderman, 465 U.S. 89, 97−98 (1983) (asserting that despite literal language of eleventh amendment, its immunity applies to non−diversity cases); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 420−21 (1793) (concluding that Constitution vests jurisdiction over state in federal courts if party to suit of another state's citizen).Back To Text

[149] The Federalist No. 81, at 488 (Alexander Hamilton).Back To Text

[150] *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting) (noting quick pace with which eleventh amendment replaced *Chisholm*); Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1933) (recognizing that response from states to *Chisholm* decision was impetus for passage of eleventh amendment); Hans v. Louisiana, 134 U.S. 1, 11 (1890) (relating shocks caused by *Chisholm* decision).Back To Text

[151] See the following pre−*Seminole Tribe* decisions: Employment Dev. Dep't v. Joseph (In re HAP Ass'n), 191 B.R. 167, 172 (B.A.P. 9th Cir. 1995) (stating that consensus among courts is that § 106 is valid unless Supreme Court invalidates it); In re Merchants Grain, Inc., 59 F.3d 630, 637 (7th Cir. 1994) (reading § 106 as effective congressional abrogation of eleventh amendment); and Stern v. Massachusetts Alcohol Beverages Control Comm'n (In re J.F.D. Enter.), 183 B.R. 342, 353−55 (Bankr. D. Mass. 1995) (discussing state of affairs before *Seminole Tribe* decision, that validated abrogation power of § 106).Back To Text

[152] *See* Seminole Tribe, 517 U.S. at 73 & n.16.Back To Text

[153] *See* id. at 77 & n.1.Back To Text

[154] *See* id. at 53; *see also* Richard Lieb, *Bankruptcy After Seminole Tribe – New Currents of Legal Thought,* Norton Bankr. L. Adviser, August 1998 at 1, 4 (discussing *Seminole Tribe* holding and its effect on bankruptcy law and policy).Back To Text

[155] Seminole Tribe, 517 U.S. at 77 & n.1 (1996) (emphasis added).Back To Text

[156] *See* id. at 72−73 & n.16.Back To Text

[157] Id.Back To Text

[158] *See* id.Back To Text

[159] *See* McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 26−31 (1900) (discussing Supreme Court's historic exercise of jurisdiction to hear cases concerning national laws); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405 (1821) (stating that appellate jurisdiction of Supreme Court is not suspended by eleventh amendment when it comes to issues regarding Constitution, laws and treaties of United States); *cf.* Edelman v. Jordan, 415 U.S. 651, 678 (1974) (stating that while Supreme Court has jurisdiction, remedy is limited by eleventh amendment); Wheeling & Lake Erie Ry. Co. v. Public Util. Comm'n, 141 F.3d 88, 91 (3d Cir. 1998) (stating that "Eleventh Amendment immunity can properly be raised for the first time on appeal").Back To Text

[160] *See* Seminole Tribe, 517 U.S. at 77 & n.14. *See also* infra note and accompanying text (discussing states' waiver of sovereign immunity from suit in own court).Back To Text

[161] *See* Seminole Tribe, 517 U.S. at 73 & n.16. See also Willis v. Oklahoma (In re Willis), Nos. 98−7144, 98−72426 1999 WL 115997, at *2 (Bankr. E.D. Okla.) (stating that since *Seminole Tribe*, courts have been divided over question the authority under which Congress enacted § 106). *But see* Scarborough v. Michigan Collection Div. (In re Scarborough), 229 B.R. 145, 149−50 (Bankr. W.D. Mich 1999) (relating that majority of courts have invalidated § 106 because its authority is derived from article 1 of Constitution, and thus is contrary to *Seminole Tribe*).Back To Text

[162] *See, e.g.*, Sacred Heart Hosp. v. Pennsylvania Dep't of Pub. Welfare (In re Sacred Heart Hosp.), 133 F.3d 237, 245 (3d Cir. 1998) (holding that Congress may not abrogate states' sovereign immunity under article I powers, and Bankruptcy Code § 106(a) was not enacted under fourteenth amendment; thus, § 106 is unconstitutional, barring any lawsuit against states); In re NVR L.P., 206 B.R. 831, 843 (Bankr. E.D. Va. 1997) (ruling that "§ 106 is unconstitutional to the extent that Congress purported to employ it as a means by which to abrogate the several states' immunity under the Eleventh Amendment"); Sparkman v. Florida Dep't

of Revenue (In re York−Hannover Developments, Inc.), 201 B.R. 137, 141 (Bankr. E.D.N.C. 1996) (concluding that "Bankruptcy Clause [under Article 1 of the Constitution] did not authorize Congress to abrogate state sovereign immunity under 11 U.S.C. § 106(a)," and dismissing the case).Back To Text

[163] *See* In re Barrett Refining Corp., 221 B.R. 795, 803−04 (Bankr. W.D. Okla. 1998) (ruling that bankruptcy proceeding is not within the definition of "suit" due to lack of adverse parties, injury or deprivation of rights).Back To Text

[164] 221 B.R. 795 (Bankr. W.D. Okla. 1998).Back To Text

[165] 329 U.S. 565, 574 (1947).Back To Text

[166] *See* Barrett Refining Corp., 221 B.R. at 802.Back To Text

[167] For a further discussion of Texas v. Walker, 142 F.3d 813 (5th Cir. 1998), see infra note and accompanying text.Back To Text

[168] *See* Walker, 142 F.3d at 823 (asserting that when state files claim, it waives right to sovereign immunity).Back To Text

[169] Gardner, 329 U.S. at 574.Back To Text

[170] *See* Walker, 142 F.3d at 820 (holding that eleventh amendment does not prevent the discharge of debt).Back To Text

[171] *Id.* at 821−22.Back To Text

[172] *Id.* at 822 (emphasis added).Back To Text

[173] *See* 1 Norton Bankruptcy Law & Practice § 14:17, 14−61−64 (William L. Norton, Jr. et al. eds., 2d ed. 1997); *see also* Lieb, *supra* note 154, at 3.Back To Text

[174] 19 U.S. (6 Wheat.) 264, 407−08 (1821).Back To Text

[175] *See* Cohens, 19 U.S. at 408−09 (stating that suits may be brought by citizens against state to recover debt, damage, or the like).Back To Text

[176] 290 U.S. 18, 26−27 (1933) (discussing amendment is restricted to suits to obtain money judgments).Back To Text

[177] Fiske, 290 U.S. at 26−27. *See also* infra notes − and accompanying text (discussing *Missouri v. Fiske*).Back To Text

[178] 222 B.R. 514, 520 (E.D. Va. 1998) (framing issue for appeal as whether debtor's request for declaration over contested matter constitutes "suit" for purposes of eleventh amendment).Back To Text

[179] 123 F.3d 777, 786 (4th Cir. 1997) (stating that confirmation order was not in suit against state because no state was named as defendant and there was no service of process; rather, state was only served with proposed plan notice).Back To Text

[180] *See* NVR Homes, Inc., 222 B.R. at 520 (noting that fundamental attributes of "suit" include naming some party as defendant and serving process). NVR bought residential lots and sold them for a profit after improving them. More importantly, however, NVR's post−petition buying was carried out pursuant to the bankruptcy court's granting of their petition. Afterwards, they requested a declaratory judgment exempting

their real property transfers from taxation. *See* id. at 516−518.Back To Text

[181] *See* id. (describing NVR's motion as request for clarification and stating court's authority came from its jurisdiction over NVR and its plan, rather than jurisdiction over state).Back To Text

[182] Mitchell v. California Franchise Tax Bd. (In re Mitchell), 222 B.R. 877 (B.A.P. 9th Cir. 1998) (opining that Congress understood proceedings involving tax liability and dischargeability as being "suits" and subject to eleventh amendment). For a discussion of the impact of the Eleventh Amendment on non−dischargeability proceedings, see infra Section V.D. at note .Back To Text

[183] United States v. Nebraska Dep't of Revenue (In re Doiel), 228 B.R. 439, 441−42 & n.1 (D.S.D. 1998) (describing eleventh amendment arguments advanced by government).Back To Text

[184] *See* id. at 441 & n.1 (noting that debtor requested judgment that debts are dischargeable in bankruptcy, rather than simple request to determine if debts were dischargeable).Back To Text

[185] *See* id. at 441 & n.1.Back To Text

[186] *See* 28 U.S.C. § 1334(e) (1994) (granting *in rem* subject matter jurisdiction to bankruptcy courts over "property of the estate"); *see also* infra notes − and accompanying text (discussing cases that applied *in rem* exception to eleventh amendment).Back To Text

[187] *See* Lieb, supra note 154, at 1 (stating that eleventh amendment was violated if federal action requires personal jurisdiction over the state, but not by *in rem* proceeding); Adam L. Rosen, *Fallout From Seminole Tribe. Is the In rem Exception to Sovereign Immunity Expanding*, Bankr. Strategist, Feb. 1999, at 8 (noting that bankruptcy court jurisdiction trumps states' eleventh amendment immunity because by *in rem* jurisdiction, court is determining claims and interests in and to property of estate). The bankruptcy court has inherent jurisdiction over property of the estate. *See* id. Back To Text

[188] 123 F.3d 777, 786−87 (4th Cir. 1997) (stating that bankruptcy court power comes from jurisdiction over debtors and their estates, not over states or creditors).Back To Text

[189] 221 B.R. 795, 808 (Bankr. W.D. Okla. 1998) (opining 11 U.S.C. § 106 is not unconstitutional "because Eleventh Amendment does not apply to bankruptcy cases, for they are not suits under the Eleventh Amendment," and recognizing possible *in rem* exception to it).Back To Text

[190] O'Brien v. Vermont Agency of Natural Resources (In re O'Brien), 216 B.R. 731, 737 (Bankr. D. Vt. 1998) (noting court's *in rem* jurisdiction over debtor's property allows determination of claims against states). Although the Bankruptcy Court in *In re O'Brien* recognized an "*in rem*" exception to the Eleventh Amendment, the court abstained from considering a preference action against Vermont, indicating that suit should instead be brought against the state on such bankruptcy claim in the state courts of Vermont rather than prosecuted in the bankruptcy court. *See also* Lieb, supra note 154, at 1−8 (discussing "*in rem*" exception to eleventh amendment).Back To Text

[191] 142 F.3d 813, 823 (5th Cir. 1998) (stating that granting of discharge in bankruptcy does not offend eleventh amendment based on Supreme Court precedent holding that federal bankruptcy court can affect states' lien interests).Back To Text

[192] 329 U.S. 565, 574 (1947) (stating "process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res").Back To Text

[193] *See* Walker, 142 F.3d at 820−23 (discussing authority of bankruptcy court in face of with eleventh amendment protection).Back To Text

[194] Gardner, 329 U.S. at 574. See Walker, 142 F.3d at 823 (quoting exact language from *Gardner* to support absence of eleventh amendment immunity); *see also* Georgia Dep't of Revenue v. Burke (In re Burke), 146 F.3d 1313, 1318 (11th Cir. 1998) (noting that state can consent to federal jurisdiction through conduct absent express consent).Back To Text

[195] Horowitz v. Zywiczynski (In re Zywiczynski), 210 B.R. 924, 931−33 (Bankr. W.D.N.Y. 1997) (analyzing bankruptcy courts' adjudicatory authority despite eleventh amendment plea). *See also* Janet A. Flaccus, Pre−Petition and Post−Petition Mortgage Foreclosures and Tax Sales and the Faulty Reasoning of the Supreme Court, 51 Ark. L. Rev. 25, 92−93 (1998) (discussing *Zywiczynski* facts and noting that eleventh amendment does not preclude bankruptcy court from adjudicating whether certificate of deposit was subject to "turnover order"); Teresa K. Goebal, *Obtaining Jurisdiction over States in* Bankruptcy Proceedings After Seminole Tribe, 65 U. Chi. L. Rev. 911, 937 (1998) (citing *Zywiczynski* to illustrate bankruptcy courts' jurisdiction over state ordering turnover of property in possession).Back To Text

[196] *See* Zywiczynski, 210 B.R. at 927−29, 933 (concluding that court inquiry concerning turnover of property was permissible under eleventh amendment).Back To Text

[197] *See* id. at 925 (reasoning that it is "only the right to possession that may be adjudicated here, not ownership rights").Back To Text

[198] Mitchell v. California Franchise Tax Bd. (In re Mitchell), 222 B.R. 877, 883 (B.A.P. 9th Cir. 1998) (noting use of *in rem* theory to reject state' argument).Back To Text

[199] *See* Mitchell, 222 B.R. at 883 (noting implication of *in rem* jurisdiction in response to discharge order raised as affirmative defense); *see also* Walker, 142 F.3d at 820 (analyzing discharge raised as affirmative defense pursuant to *in rem* jurisdiction). Back To Text

[200] DeKlab County Div. of Family & Children Servs. v. Platter (In re Platter), 140 F.3d 676, 679 (7th Cir. 1998) (concluding that state waives eleventh amendment immunity when it initiates adversary proceeding); *see also* Department of Transp. and Dev. v. PNL Asset Management Co. (In re Fernandez), 123 F.3d 241, 245 (5th Cir. 1997) (noting states' choice to participate in bankruptcy proceeding waived eleventh amendment immunity). Issues concerning waiver of immunity are discussed in Section VI, infra in text commencing at note .Back To Text

[201] 123 F.3d 777, 786−87 (4th Cir. 1997) (explaining power of bankruptcy court to enter order continuing plan rooted in *in rem* jurisdiction). *See also* Mitchell, 222 B.R. at 883 (re−stating that *in rem* jurisdiction covers confirmation orders); Clerk of the Circuit Court v. NVR Homes, Inc., 222 B.R. 514, 520 (E.D. Va. 1998) (noting bankruptcy court's authority to enter confirmation order derives from its *in rem* jurisdiction).Back To Text

[202] *See, e.g.*, French v. Georgia Dep't of Revenue (In re ABEPP Acquisition Corp.), 215 B.R. 513, 517 (B.A.P. 6th Cir. 1997) (rejecting such application); *see also, e.g.*, United States v. Nordic Village, Inc., 503 U.S. 30, 38 (1992) (stating "we have never applied an *in rem* exception to the sovereign immunity bar against monetary recovery, and have suggested that no such exception exists").Back To Text

[203] United States v. Nebraska Dep't of Revenue (In re Doiel), 228 B.R. 439, 441 & n.1 (D.S.D. 1998) (finding argument of authority based on *in rem* jurisdiction is without merit).Back To Text

[204] 118 S. Ct. 1464, 1473 (1998) (reasoning that eleventh amendment provides no bar to federal court jurisdiction concerning *in rem* admiralty action).Back To Text

[205] *See* Deep Sea Research, Inc., 118 S. Ct. at 1472−73 (tracing prior admiralty decisions and upholding federal courts' *in rem* jurisdiction in admiralty cases over *res* not in sovereign's possession); *see also* Sea Services v. Florida, 156 F.3d 1151, 1153 (11th Cir. 1998) (applying *Deep Sea Research* holding even where

sovereign did not possess *res*); Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344, 1349 (11th Cir. 1998) (same).Back To Text

[206] A careful reading of *Deap Sea Research* reveals no reference by the Supreme Court to matters outside admiralty.Back To Text

[207] Magnolia Venture Capital Corp. v. Prudential Sec., Inc. (In re Magnolia Venture Capital Corp.), 151 F.3d 439 (5th Cir. 1998), cert. denied, 119 S. Ct. 1115 (1999).Back To Text

[208] *See* id. at 441 (setting forth facts culminating in states' motion to dismiss based on eleventh amendment immunity).Back To Text

[209] *See* id. at 443−45 (discussing importance of upholding eleventh amendment immunity derived by federalism concerns). *See generally* In re Havens, Nos. 97−35225, 97−32086, 97−33355, 97−39522, 1998 WL 960258, at *10 (Bankr. D.N.J. Dec. 9, 1998) (discussing pervasive quality of eleventh amendment immunity under *Magnolia*).Back To Text

[210] Missouri v. Fiske, 290 U.S. 18, 28 (1933) (denying issuance of process against non−consenting state regardless of whether jurisdiction in case is *in rem* or *quasi in rem*).Back To Text

[211] Fiske, 290 U.S. at 28. *See also* United States v. Nordic Village, Inc., 503 U.S. 30, 38 (1992) (explaining "we have never applied an *in rem* exception to the sovereign−immunity bar against monetary recovery, and have suggested that no such exception exists"); United States v. Nebraska Dep't of Revenue (In re Doiel), 228 B.R. 439, 441 & n.1 (D.S.D. 1998) (refusing to recognize *in rem* exception to eleventh amendment immunity).Back To Text

[212] Fiske, 290 U.S. at 28. *See also* In re New York, 256 U.S. 490, 497 (1920) (describing fundamental principal of jurisprudence that state may not be sued without its consent); Georgia v. Jessup, 106 U.S. 458, 462 (1882) (observing that state cannot be party to suit without its consent).Back To Text

[213] *See* Fiske, 290 U.S. at 29 (stating that "there is a federal right to have effect given to the decree, [and] that federal right can be specifically set up and claimed in the proceeding in the state court").Back To Text

[214] *See* 11 U.S.C. § 727 (1994) (providing for grant of discharge in chapter 7); Handeen v. LeMaire (In re LeMaire), 898 F.2d 1346, 1355 (8th Cir. 1990) (Magill, J., dissenting) (stating that "very essence of bankruptcy [is] to provide a debtor with a fresh start" (quoting Handeen v. LeMaire (*In re* LeMaire), 883 F.2d 1373, 1380 (8th Cir. 1989))); Walker v. M&M Dodge, Inc. (In re Walker), 180 B.R. 834, 840 (Bankr. W.D. La. 1995) (describing discharge as legal embodiment of "fresh start"); Bartlett v. Giquere (In re Bartlett), 168 B.R. 488, 499 (Bankr. D.N.H. 1994) (noting public policy importance of providing debtor with fresh start).Back To Text

[215] 142 F.3d 813, 822−23 (5th Cir. 1998), cert. denied, 119 S. Ct. 864 (1999) (explaining eleventh amendment should not force state to choose between waiving sovereign immunity or becoming permanently barred from recovering share of debtor's estate). *See* supra, text accompanying notes − (setting out countervailing arguments made in *Walker* in support of eleventh amendment immunity in discharge cases and then explaining why discharge injunction does not constitute "suit" within meaning of eleventh amendment).Back To Text

[216] *See generally* Aer−Aerotron, Inc. v. Texas Dep't of Transp., 104 F.3d 677, 680−81 (4th Cir. 1997) (declining to determine eleventh amendment issue because court found state did not file proof of claim as requirement under § 106 of Bankruptcy Reform Act of 1992); California Employment Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1152 & n.6 (9th Cir. 1996) (stating California waived its sovereign immunity when it filed claim for underlying disputed taxes); In re Fennelly, 212 B.R. 61, 64 (D.N.J. 1997) (following majority rule that filing proof of claim constitutes waiver of state's sovereign immunity); In re

Martinez, 196 B.R. 225, 229 (D.P.R. 1996) (stating that federal court has jurisdiction over case where state is party if state waives its immunity or Congress validly abrogates states' immunity); In re Lush Lawns, Inc., 203 B.R. 418, 421 (Bankr. N.D. Ohio 1996) (explaining that "bankruptcy court cannot acquire jurisdiction over a state unless the state waives its sovereign immunity by filing a proof of claim in the case or otherwise participates in a proceeding"); Sparkman v. Florida Dep't of Revenue (In re York−Hannover Devs., Inc.), 201 B.R. 137, 142 (Bankr. E.D.N.C. 1996) (explaining that while state can waive sovereign immunity, Florida did not do so because it neither filed proof of claim nor participated in proceeding); Schulman v. California State Water Resources Control Bd. (In re Lazar), 200 B.R. 358, 379 (Bankr. C.D. Cal. 1996) (finding as unpersuasive California's three arguments: it did not waive sovereign immunity because claims were filed by state agencies; there was no voluntary waiver since "state was compelled to file a claim" in order "to participate in the distribution of the bankruptcy estate"; and § 106 is unconstitutional in light of *Seminole*).Back To Text

[217] *See* Walker, 142 F.3d at 822−23 (concluding that bankruptcy law should protect state's claim from being discharged because state was never notified, never had chance to file timely claim, and granting bankruptcy discharge does not offend eleventh amendment); *see also* Dekalb County Div. of Family and Children Servs. v. Platter (In re Platter), 140 F.3d 676, 680 (7th Cir. 1998) (quoting *Antonelli Creditors' Liquidating Trust* in coming to same conclusion)); Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1997) (stating that state's decision not to appear in federal court means "foregoing any challenge to the federal court's actions").Back To Text

[218] *See* Elias v. United States (In re Elias), 218 B.R. 80, 86 (B.A.P. 9th Cir. 1998) (holding once state invokes eleventh amendment immunity from suit in federal court, bankruptcy court has no jurisdiction over state until state consents to jurisdiction); Neary v. Pennsylvania Dep't of Revenue (In re Neary), 220 B.R. 864, 868−71 (Bankr. E.D. Pa. 1998) (dismissing claim on eleventh amendment grounds despite lack of available state forum); Morrell v. California Franchise Tax Bd. (In re Morrell), 218 B.R. 87, 90 (Bankr. C.D. Cal. 1997) (denying debtor's claim that § 106 abrogates state's sovereign immunity and reaffirming principle that federal court has no jurisdiction to hear cases where state is party unless state waives its eleventh amendment immunity).Back To Text

[219] *See* Mitchell v. California Franchise Tax Bd. (In re Mitchell), 222 B.R. 877, 884, 888 (B.A.P. 9th Cir. 1998) (explaining eleventh amendment extends to suits seeking declaratory judgment as well as suits for money damages); *see also* Schlossberg v. Maryland (In re Creative Goldsmiths), 119 F.3d 1140, 1147 (4th Cir. 1997) (stating Congress not empowered to use bankruptcy clause to circumvent eleventh amendment's restrictions); Grabscheid v. Michigan Employment Sec. Comm'n (In re C.J. Rogers, Inc.), 212 B.R. 265, 269−73 (E.D. Mich. 1997) (explaining that while there was congressional intent to abrogate eleventh amendment, Congress did not have such power under fourteenth amendment); In re NVR L.P., 206 B.R. 831, 851 (Bankr. E.D. Va., 1997) (giving great deference to state's right to refuse federal jurisdiction).Back To Text

[220] *See* supra text accompanying note (discussing *Mitchell*).Back To Text

[221] *See* Mitchell, 222 B.R. at 883 (explaining *in rem* jurisdiction has been successfully applied to "reject States' arguments that they are not subject to discharge order, which was subsequently asserted as an affirmative defense"); *see also* Walker, 142 F.3d at 820 (explaining that discharge may be raised affirmatively by debtor against state's suit on underlying debt).Back To Text

[222] *See* 1 Norton Bankruptcy Law & Practice § 4:1, at 4−3−4 (William L. Norton, Jr. et al. eds., 2d ed. 1997) (explaining that subject matter jurisdiction cannot be established by consent). *See, e.g.*, Magnolia Venture Capital Corp. v. Prudential Sec., Inc. (In re Magnolia Venture Capital Corp.), 151 F.3d 439, 445 (5th Cir. 1998), cert. denied, 119 S. Ct. 1115 (1999) (declining to find that state waived its eleventh amendment immunity in federal court by waiving its right in state court when it authorized state agency to make contracts); Martin v. First Nat'l Bank (In re Butcher), 829 F.2d 596, 600−01 (6th Cir. 1987) (explaining that Bankruptcy Code does not extend or limit jurisdiction of bankruptcy courts, so if complaint is not filed within

time limit, court lacks subject matter jurisdiction to hear action).Back To Text

[223] *See* Georgia Dep't of Revenue v. Burke (In re Burke), 146 F.3d 1313, 1320 (11th Cir. 1998) (holding that Georgia waived its eleventh amendment immunity to extent of attorney's fees incurred by debtor in enforcing bankruptcy court's automatic stay and discharge injunction); In re Havens, 229 B.R. 613, 624 (Bankr. D.N.J. 1998) (explaining that state "may waive it[s] sovereign immunity under general principles of waiver"); Ellenberg v. Board of Regents (In re Midland Mechanical Contractors, Inc.), 200 B.R. 453, 458 (Bankr. N.D. Ga. 1996) (declaring that court lacks jurisdiction over matter since state did not waive its immunity and Congress failed to validly abrogate state's eleventh amendment immunity).Back To Text

[224] U.S. Const. amend. XI.Back To Text

[225] Wisconsin Dep't of Corrections v. Schact, 118 S. Ct. 2047, 2055 (1998).Back To Text

[226] *See* Patsy v. Board of Regents, 457 U.S. 496, 515−16 & n.19 (1982) (noting eleventh amendment defense may be raised for first time on appeal); Sosna v. Iowa, 419 U.S. 393, 398 (1975) (noting state's failure to raise sovereign immunity in lower court does not bar it from raising issue for first time even in Supreme Court); Edelman v. Jordan, 415 U.S. 651, 678 (1974) (observing that failure to raise eleventh amendment immunity in lower court does not bar state from raising it on appeal); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467 (1945) (noting that state's immunity defense can be raised on appeal for first time); *see also* Gunther v. Atlantic Coastline R.R. Co., 200 U.S. 273, 284 (1906) (stating state may be sued in federal court with its consent); Clark v. Barnard, 108 U.S. 436, 447 (1883) (concluding that state may waive its jurisdictional privilege by appearance).Back To Text

[227] *See* Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 473−74 (1987) (noting exceptions to eleventh amendment immunity are: consenting to suit in federal court, which must be done by express language or by such overwhelming implications from; or by express act of Congress enforcing substantive provisions of fourteenth amendment); Parden v. Terminal Railway, 377 U.S. 184, 195 (1964) (describing that asserted waiver arose from state's commission of act for which Congress provided for suit under commerce clause). The Supreme Court overruled *Parden* in the *Welch* case only "to the extent *Parden* is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." Welch, 483 U.S. at 478. *See also* In re Barrett Refining Corp., 221 B.R. 795, 812−13 (Bankr. W.D. Okla. 1998) (discussing ability of state to constructively consent to court's jurisdiction by partaking in activity that subjects it to suit in federal court).Back To Text

[228] *See* Parden, 377 U.S. at 196 (stating eleventh amendment immunity waivable when state subjects itself to federal regulation); *see also* Welch, 483 U.S. at 474 (noting eleventh amendment immunity to suit is waivable defense); Barrett, 221 B.R. at 808 (reasoning that eleventh amendment immunity can be waived by at least three different ways).Back To Text

[229] *Compare* New Jersey v. Chen (In re Chen), 227 B.R. 614, 620 (D.N.J. 1998) (ruling that by filing adversary proceeding to determine dischargeability of debt owed to it by debtor, state sought aid of federal court to resolve merits of its claim, and thereby filed "a general appearance in the Bankruptcy Court," by which "it waived its Eleventh Amendment immunity with respect to the claim presented"), *with* Franchise Tax Bd. v. Lapin (In re Lapin), 226 B.R. 637, 644 (B.A.P. 9th Cir. 1998) (finding that "Congress lacked the power to abrogate the states' sovereign immunity by enacting § 106.").Back To Text

[230] 382 U.S. 323, 335 (1966) (concluding that Bankruptcy Act does confer summary jurisdiction on bankruptcy courts over trustee's counterclaims to recover preferences).Back To Text

[231] 329 U.S. 565, 573−74 (1947) (opining that state waives any immunity it may have had by filing claim for adjudication by bankruptcy court).Back To Text

[232] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 & n.14 (1989) (reasoning that party invocation of bankruptcy court's power to adjudicate rights subjects party to that court's jurisdiction).Back To Text

[233] *See Sovereign Immunity: State Waived Eleventh Amendment Immunity by Filing Proofs of Claim*, Bankruptcy L. Daily (BNA), at D−3 (June 24, 1998) (noting tension between case law regarding extent of waiver as result of filing of proof of claim).Back To Text

[234] *See* In re Barrett Refining Corp., 221 B.R. 795, 808−812 (Bankr. W.D. Okla. 1998) (discussing cases on point that set forth ways state may waive its immunity under eleventh amendment).Back To Text

[235] 221 B.R. at 808−14 (describing various ways state may waive immunity).Back To Text

[236] *Compare* Barrett, 221 B.R. 795, 810 (stating that it fully waives state immunity after filing proof of claim and participating in bankruptcy proceeding) *with* Section VI.D., infra (discussing scope of "claims−allowance process" and impact of filing of proof of claim).Back To Text

[237] 131 F.3d 1407 (10th Cir. 1997).Back To Text

[238] Duke, 131 F.3d at 1408−09.Back To Text

[239] 131 F.3d at 1408−09 (finding state did not impliedly waive its eleventh amendment immunity by entering into contracts subject to federal regulation).Back To Text

[240] Magnolia Venture Capital Corp. v. Prudential Sec., Inc. (In re Magnolia Venture Capital Corp.), 151 F.3d 439, 440−42 (5th Cir. 1998), cert. denied, 119 S. Ct. 1115 (1999) (suggesting that state did not impliedly waive its eleventh amendment immunity by intervening in adversary proceeding or by agreeing to venue clause designating federal court venue in pre−bankruptcy agreement).Back To Text

[241] Id. at 442 (emphasis added).Back To Text

[242] Id. at 445.Back To Text

[243] *See* In re Barrett Refining Corp., 221 B.R. 795, 812 (Bankr. W.D. Okla. 1998) (discussing state's ability to waive its eleventh amendment immunity by precise language in statute).Back To Text

[244] *See* id. at 812 (explaining state may constructively consent to waive immunity by engaging in federally regulated conduct where Congress has clearly stated that participation will subject state to federal liability); *see also* Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 478 (1987) (deciding that any waiver of eleventh amendment immunity must be expressed by Congress in clear language).Back To Text

[245] *See* Gardner v. New Jersey, 329 U.S. 565, 574 (1947) (stating that when state files claim for funds in bankruptcy case, it waives immunity); Gunter v. Atlantic Coast Line R.R. Co., 200 U.S. 273, 284 (1906) (noting that when state voluntarily enters lawsuit, its immunity is waived); 995 Fifth Ave. Assocs. v. New York Dep't of Taxation and Fin. (In re 995 Fifth Ave. Assocs.), 963 F.2d 503, 507 (2d Cir. 1992) (stating that state's affirmative participation in suit waives its immunity); Barrett, 221 B.R. at 812 (discussing constructive consent of waiver by state participation in federal program).Back To Text

[246] 118 S. Ct. 2047 (1998).Back To Text

[247] Id. at 2055−56 (Kennedy, J., concurring).Back To Text

[248] 377 U.S. 184, 197 (1964) (asserting that immunity does not exist when state enters into areas subject to congressional regulation).Back To Text

[249] Schlossberg v. Maryland (In re Creative Goldsmiths), 119 F.3d 1140, 1147 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517 (1998) (quoting from *Atascadero St. Hosp. v. Scanlon*, 473 U.S. 234, 239−40 (1985)).Back To Text

[250] Magnolia Venture Capital Corp. v. Prudential Sec., Inc. (In re Magnolia Venture Capital Corp.), 151 F.3d 439, 442, 444 (5th Cir. 1998), cert. denied, 119 S. Ct. 1115 (1999) (applying this strict standard, fifth circuit held that provision in pledge agreement stating that venue over action would be "*in federal or state court*" would be laid in designated county, did not constitute waiver of state's eleventh amendment immunity from suit in federal court (quoting Port Auth. Trans−Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990))).Back To Text

[251] Dekalb County Div. of Family and Children Servs. v. Platter (In re Platter), 140 F.3d 676, 679 (7th Cir. 1998); *see also* New Jersey v. Chen (In re Chen), 227 B.R. 614, 617 (D.N.J. 1998) (explaining that by filing non−dischargeability complaint, state was held to have "voluntarily" entered general appearance, thereby waiving its eleventh amendment immunity).Back To Text

[252] *See* Platter, 140 F.3d at 680 (stating that after waiving immunity by entering suit voluntarily, state can not go back and claim immunity when unhappy with outcome).Back To Text

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

[254] *See* United States v. Nordic Village, Inc., 503 U.S. 30, 39 (1992) (stating that waiver is only applicable to compulsory counterclaims not monetary relief); Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 102 (1989) (construing § 106(c) as disallowing monetary recovery from states); Platter, 140 F.3d at 679 (asserting that waiver is applicable when no monetary relief against state is involved).Back To Text

[255] 329 U.S. 565, 574 (1947) (stating that when states assert rights to funds immunity is waived).Back To Text

[256] Georgia Dep't of Revenue v. Burke (In re Burke), 146 F.3d 1313, 1318 (11th Cir. 1998) (noting that state may consent to federal court jurisdiction through affirmative conduct).Back To Text

[257] Rose v. United States Dep't of Education (In re Rose), 215 B.R. 755, 761 (Bankr. W.D. Mo. 1997) (deciding that when state files claim expecting favorable result, it must be bound to any unfavorable results).Back To Text

[258] Wyoming Dep't of Transp. v. Straight (In re Straight), 143 F.3d 1387 (10th Cir. 1998), cert. denied, 119 S. Ct. 446 (1998). *See supra* note and accompanying text (discussing this case).Back To Text

[259] Where Eleventh Amendment immunity is asserted, the party claiming the waiver must demonstrate that the state agency and the person acting for it were authorized under state law to waive its immunity from suit in the federal court. *See* Magnolia Venture Capital Corp. v. Prudential Sec., Inc. (In re Magnolia Venture Capital Corp.), 151 F.3d 439, 444−45 (5th Cir. 1998). "[T]he state's waiver must be accomplished by someone to whom that power is granted under state law." Id. at 444. *See also* Franchise Tax Bd. v. Lapin (In re Lapin), 226 B.R. 637, 642 (B.A.P. 9th Cir. 1998) (finding that where state did not file proof of claim in bankruptcy proceeding, state did not waive immunity); Schlossberg v. Maryland (In re Creative Goldsmiths), 119 F.3d 1140, 1147 (4th Cir. 1997) (stating that absent authorization from constitution, states have power to voluntarily waive immunity). *See generally* Ford Motor Co. v. Treasury Dep't, 33 U.S. 459, 467 (1945) (ruling that appearance in suit by state attorney general would waive state's immunity if attorney general had authority under state law to waive state's immunity).Back To Text

[260] Burke, 146 F.3d 1313.Back To Text

[261] Lapin, 226 B.R. at 646 (noting that injunction would not be satisfactory remedy for debtor due to fact that Lapin would not be able to recover previously seized funds).Back To Text

[262] *See also* supra note and accompanying (discussing *Ex parte* Young, 28 S.Ct 441 (1908)).Back To Text

[263] *See* Lapin, 226 B.R. at 646 (discussing alternative action in state court). *See generally* S. Elizabeth Gibson, *Sovereign Immunity in* Bankruptcy: The Next Chapter, 70 Am. Bankr. L.J. 195, 203−08 (1996) (discussing availability of state proceedings for remedy).Back To Text

[264] *See* Lapin, 226 B.R. at 647 (discussing remedies against state officials).Back To Text

[265] Mitchell v. California Franchise Tax Bd. (In re Mitchell), 222 B.R. 877 (9th Cir. B.A.P. 1998). *See also* supra note and accompanying text (discussing ninth circuit's holding in *Mitchell* baring action requesting both federal and state relief).Back To Text

[266] *See* id. at 887.Back To Text

[267] *See* Schlossberg v. Maryland (In re Creative Goldsmiths), 119 F.3d 1140, 1149 (4th Cir. 1997), cert. denied 118 S. Ct. 1517 (1998) (discussing powers of Maryland Attorney General's powers as expansive, but do not include waiver of state's eleventh amendment immunity).Back To Text

[268] Brewer v. New York State Dep't of Correctional Serv. (In re Value−Added Communications, Inc.), 224 B.R. 354, 359 (N.D. Tex. 1998) (finding several reasons for recovering post−petition transfers).Back To Text

[269] *See* id. at 359 (stating that possibility of alternative basis for finding waiver).Back To Text

[270] *See* Creative Goldsmiths, 119 F.3d at 1149 (concluding that state's filing of proof of claim for one type of tax due did not waive its eleventh amendment immunity as to other claims); WJM, Inc. v. Massachusetts Dep't of Pub. Welfare, 840 F.2d 996, 1002−03 (1st Cir. 1988) (stating that state made partial waiver of its eleventh amendment immunity by filing proofs of claim against chapter 11 debtor and was only exposed to debtor's claim arising out of those same transactions as state's proofs of claim); United States Dep't of Educ. v. Rose (In re Rose), 227 B.R. 518, 523 (W.D. Mo. 1998) (providing that "every court to address the matter" has found that when states file proof of claim they waives their eleventh amendment immunity in regards to debt constituting claim).Back To Text

[271] Georgia Dep't of Revenue v. Burke (In re Burke), 146 F.3d 1313, 1319 (11th Cir. 1998). *See supra* notes −, *and* infra − (discussing *Gardener v. New Jersey*).Back To Text

[272] *See* French v. Georgia Dep't of Revenue (In re ABEPP Acquisition Corp.), 215 B.R. 513, 518 (B.A.P. 6th Cir. 1997) (concluding that state−filed proof of claim amounted to compulsory counterclaim and state waived its eleventh amendment immunity against counter claims in order to have state claim heard in federal court); *see also* Creative Goldsmiths, 119 F.3d at 1143 (finding that by filing proof of claim state waives its eleventh amendment immunity with respect to claims against it that arise from same transaction or occurrence as are subject of state's filed proof of claim); Value−Added Communications, Inc., 224 B.R. at 359 (finding state waiver but remanding for further inquiry).Back To Text

[273] *See* Rose, 227 B.R. at 523 (noting that federal agency, on behalf of state agencies, filed claim to recover over $100,000 of debtor's student loans); *see also* New Jersey v. Chen (In re Chen), 227 B.R. 614, 623 (D.N.J. 1998) (observing that state filed claim to recover over $4,500 in unemployment compensation fraudulently received by debtor); In re Fennelly, 212 B.R. 61, 61 (D.N.J. 1997) (finding state agency filed claim to protect $14,103 in motor vehicle surcharges levied against debtors).Back To Text

[274] *See* Creative Goldsmiths, 119 F.3d at 1148 (noting that state has waived any eleventh amendment immunity against counterclaims in order to avail self of federal forum to pursue claim); *Chen*, 227 B.R. at 623 (concluding that once state voluntarily entered bankruptcy proceeding, it waived its eleventh amendment immunity with respect to that claim); Schulman v. California Water Resources Control Bd. (In re Lazar), 200 B.R. 358, 380 (Bankr. C.D. Calif. 1996) (stating that state as creditor can elect to file claim in order to

participate in distribution process or ignore bankruptcy case altogether).Back To Text

[275] *See, e.g.*, Chen, 227 B.R. at 622−23 (discussing state's waiver of eleventh amendment immunity); Lazar, 200 B.R. at 380 (discussing options of state creditor and effect upon eleventh amendment immunity).Back To Text

[276] *See* 1 Norton Bankruptcy Law & Practice § 4:21, at 4−136−62 (William L. Norton, Jr. et al. eds., 2d ed. 1997) (discussing core proceedings of bankruptcy jurisdiction); id. § 4:38, at 4−225−34 (describing arising under and arising in requirements); id. § 4:39, at 4−234−62 (describing "related to" requirement).Back To Text

[277] *See* id. § 4:14, at 64−65 (explaining that congressional grant of complete jurisdiction in bankruptcy courts sought to avoid needless delay and costs suffered under pre−1978 system); *see also* Torkelsen v. Maggio, 72 F.3d 1171, 1177 (3d Cir. 1996) (noting that Congress attempted to centralize bankruptcy jurisdiction and expedite administration of bankruptcy cases with enactment of 1978 Reform Act); Hays & Co. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 885 F.2d 1149, 1159 (3d Cir. 1989) (explaining that inherent confusion and inefficiency in summary/plenary distinction was "the evil the Reform Act was designed to address"). The Supreme Court, however, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84−85 (1982), struck down the more efficient jurisdictional scheme of the 1978 Act, holding that the power the 1978 Act purported to delegate to Article I bankruptcy judges violated Article III of the Constitution. In reaction to this holding, Congress enacted the 1984 Act which established the bankruptcy court as a unit of the district court to which the district court may refer any case or proceeding. *See* Torkelsen, 72 F.3d at 1177.Back To Text

[278] *See* 11 U.S.C. § 541(a) (1993) (listing different types of property which would comprise estate). For the discussion on congressional power to abrogate state immunity, see supra Section IV, beginning at note (explaining that Congress has power to abrogate eleventh amendment immunity if satisfies two−part test).Back To Text

[279] *See* Katchen v. Landy, 382 U.S. 323, 334 (1966) (stating that "creditor who offers a proof of claim and demands its allowance is bound by what is judicially determined" and therefore surrenders certain rights). *See also* Gardner v. New Jersey, 329 U.S. 565, 574 (1947) (explaining that when state files claim in bankruptcy court it waives any immunity it may have had in adjudication of such claim); Wiswall v. Campbell, 93 U.S. 347, 351 (1876) ("It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure.").Back To Text

[280] *See* Katchen, 382 U.S. at 334 (explaining that once bankruptcy court has addressed preference issue there is nothing for adjudication in plenary suit).Back To Text

[281] *See* id. at 329 (quoting Gardner, 329 U.S. at 574).Back To Text

[282] *See* Gardner, 329 U.S. at 574 (emphasizing the importance of "orderly and expeditious proceedings") (citation omitted). *See also* Katchen, 382 U.S. at 329 (explaining that reconsideration of claims should occur during summary proceedings "and not by the slower and more expensive processes of a plenary suit"); Wiswall, 93 U.S. at 350 (emphasizing necessity of "quick and summary disposal of questions arising in the progress of [a] case").Back To Text

[283] *See* Katchen, 382 U.S. at 336 (noting that proceedings in bankruptcy court are inherently proceedings in equity); *see also* Barton v. Barbour, 104 U.S. 126, 133 (1881) (stating that it is "[a] fundamental principle that the right of a trial by jury, considered an absolute right, does not extend to cases of equity jurisdiction").Back To Text

[284] Katchen, 382 U.S. at 336.Back To Text

[285] *See* id. at 329−30 (emphasizing that bankruptcy courts have summary jurisdiction to adjudicate all controversies relating to property within their actual or constructive possession); *see also* Alexander v. Hillman, 296 U.S. 222, 242 (1935) (explaining that courts of equity "decide all matters in dispute and decree complete relief" in all cases to which they have jurisdiction).Back To Text

[286] 28 U.S.C. § 1334(e) (1993) (explaining that district court has exclusive jurisdiction over property of estate).Back To Text

[287] The *Katchen* court, in simplistic terms, held that by filing a proof of claim, a creditor "consented" to the summary jurisdiction of the bankruptcy courts under the Bankruptcy Act. The creditor was then subject to a trustee's counterclaim to recover a voidable preference without proceeding in a plenary action in a non−bankruptcy court, which would have been required in the absence of the filing of a proof of claim. *See* Katchen, 382 U.S. at 329−30.Back To Text

[288] *See* Gardner v. New Jersey, 329 U.S. 565, 574 (1947) (providing that "[w]hen the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim" (quoting New York v. Irving Trust Co., 288 U.S. 329, 333 (1933)); *see also* Gunter v. Atlantic Coast Line R.R. Co., 200 U.S. 273, 284 (1906) (noting that state cannot invoke prohibitions of eleventh amendment when it voluntarily becomes party to cause); Clark v. Barnard, 108 U.S. 436, 447−48 (1883) (stating that immunity from suit under eleventh amendment is personal privilege which may be waived).Back To Text

[289] *See* Gardner, 329 U.S. at 574 (asserting that claims should be submitted to bankruptcy courts otherwise "orderly and expeditious proceedings would be impossible").Back To Text

[290] *See* id. at 578 (stating that court had authority to deal with state's lien); *see also* 11 U.S.C. § 506(d) (1994) (providing that lien is void "[t]o the extent that [it] secures a claim against debtor that is not an allowed secured claim"); Dewshup v. Timm, 502 U.S. 410, 418−19 (1992) (concluding that liens pass through bankruptcy unaffected pursuant to § 506(d)).Back To Text

[291] Gardner, 329 U.S. at 573−74.Back To Text

[292] *See* Katchen, 382 U.S. at 329 (noting that trustee "is enjoined to examine all claims and to present his objections"); Gardner, 329 U.S. at 573 (explaining that it is bankruptcy court's duty to pass on objections by debtor); Wiswall v. Campbell, 93 U.S. 347, 349 (1876) (stating that court may examine claim upon application by debtor).Back To Text

[293] 329 U.S. at 573−74 (describing that in adjudication of *res* state offers proof of claim and demands allowance while court entertains objections to such claim).Back To Text

[294] 382 U.S. at 329−30 (stating that bankruptcy courts have summary jurisdiction to adjudicate conflicts relating to *res* within possession).Back To Text

[295] 142 F.3d 813, 823 (5th Cir. 1998) (examining decision in *Gardner* then applying its principles to preclude use of eleventh amendment immunity by state). See supra notes −, , , , and accompanying text.Back To Text

[296] *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 64 (1989) (finding that failure to file claim entitles debtor to jury trial).Back To Text

[297] First Fidelity Bank, N.A. v. Hooker Invs., Inc. (In re Hooker Invs., Inc.), 937 F.2d 833, 840 (2d Cir. 1991) (stating that observance of bar date may be required even when method of fact finding regarding merits of claim limit availability of jury trial).Back To Text

[298] *See* Georgia Dep't of Revenue v. Burke (In re Burke), 146 F.3d 1313, 1318−19 (11th Cir. 1998) (observing by filing claim state wishes to participate in bankrupt's assets which is action against bankrupt); In re NVR L.P., 206 B.R. 831, 851 (E.D. Va. 1997) (noting state's filing of claim is consent to adjudication of claim against debtor).Back To Text

[299] *See* United States v. Nordic Village, Inc., 503 U.S. 30, 38 (1992) (stating that filing proof of claim does not automatically waive government's immunity from monetary relief); Hoffman v. Connecticut (In re Willington Convalescent Home, Inc.), 850 F.2d 50, 54 (2d Cir. 1988) (stating that immunity being waived under affirmative monetary recoveries is limited to certain triggering events). *But see* Brooks Fashion Stores, Inc. v. Michigan Employment Sec. Comm'n (In re Brooks Fashion Stores Inc.), 125 B.R. 436, 442 (Bankr. S.D.N.Y. 1991) (noting that in absence of state filing proof of claim, debtor is precluded from affirmative monetary recovery).Back To Text

[300] Germain v. Connecticut Nat'l Bank, 988 F.2d 1323, 1330 (2d Cir. 1993) (finding that after filing proof of claim preference claims will be part of allowance or disallowance process but lender liability claims will not be part of such process).Back To Text

[301] *See* id. at 1330 (stating that courts can't assume creditor has waived it's right to jury trial for those actions incidental to present bankruptcy action such as wrongful death or tort actions). *See generally* 28 U.S.C. § 157(b)(2)(B) (1994) (stating that wrongful death or personal injury cases against the estate are not part of core proceedings).Back To Text

[302] Germain, 988 F.2d at 1330.Back To Text

[303] *See* id. at 1330 (noting that right to jury trial is lost not so much because it is waived, but because legal dispute has been transformed into equitable issue); *see also* Billing v. Ravin, Greenberg & Zackin, P.A., 22 F.3d 1242, 1251 (3d Cir. 1994) (discussing decision in *Germain*, noting right to jury trial is not waived but lost due to "conversion of a legal dispute to an equitable one"); Carter v. Schott (In re Carter Paper Co., Inc.), 220 B.R. 276, 286 (Bankr. M.D. La. 1998) (noting that filling claim evokes equitable jurisdiction of bankruptcy court thus removing right of jury trial). Back To Text

[304] *See* First Fidelity Bank v. Hooker Invs., Inc. (In re Hooker Invs., Inc.), 937 F.2d 833, 838 (2d Cir. 1991) (discussing that filing claims against estate triggers claims allowance process); Keller v. Blinder (In re Blinder Robinson & Co.) 135 B.R. 892, 896 (D. Colo. 1991) (finding that filing of customer claim was not enough to meet requirement of being creditor claim to trigger claims allowance process); Carter Paper Co., Inc., 220 B.R. at 282−83 (asserting that claim must be part of bankruptcy process for claims−allowance process to begin).Back To Text

[305] Germain, 988 F.2d at 1327 (asserting that trustee's request for compensation for damage to estate doesn't affect allowance of claims).Back To Text

[306] Id. (stating that claims which do not affect allowance of creditors' claims will not be part of process). *See also* Granfinanciera v. Nordberg, 492 U.S. 33, 56 (1989) (stating that breach of contract claims, which augment estates, are suits for state law not bankruptcy); Sure−Snap Corp. v. State St. Bank and Trust Co., 948 F.2d 869, 873 (2d Cir. 1991) (stating that there is no presumption that lender liability claims exist in allowance of claims process).Back To Text

[307] *See* Wyoming Dep't of Transp. v. Straight (In re Straight), 143 F.3d 1387, 1392 (10th Cir. 1998) (stating that in filing proof of claim in bankruptcy, state has waived its immunity).Back To Text

[308] *See* Commission Report, supra note , 898−99 (discussing bankruptcy policy after *Seminole Tribe*); supra note 39 and accompanying text.Back To Text

[309] *See* McVey Trucking Inc., v. Secretary of Illinois (In re McVey Trucking, Inc.), 812 F.2d 311, 323 (7th Cir. 1987) (stating that under plenary powers given to Congress, state sovereignty will not cause limitations on such powers); In re Barrett Refining Corp., 221 B.R. 795, 802−03 (Bankr. W.D. Okla. 1998) (asserting that state sovereignty does not limit federal courts in exercising jurisdictional power in bankruptcy cases); *see also* Michael W. Silberman, Far−Reaching Changes: The Future Expansions of Personal Jurisdiction Over Foreign Defendants Under the Federal Rules of Bankruptcy Procedure, 11 Bankr. Dev. J. 819, 832 (1995) ("[B]ankruptcy is a federally−created right, the sovereign power in a bankruptcy proceeding is that of the United States. Therefore, when the bankruptcy court exercises jurisdiction, there are 'no concerns of encroaching upon the sovereignty of another state'") (citations omitted).Back To Text

[310] *See* Publicker Indus. Inc. v. United States (In re Cuyahoga Equip. Corp.), 980 F.2d 110, 117 (2d Cir. 1992) (stating that Bankruptcy Code favors efficient administration of all claims in bankruptcy court); Shugrue v. Air Line Pilots Assoc., Int'l (In re Ionosphere Clubs, Inc.), 922 F.2d 984, 989 (2d Cir. 1990) (stating that disputes concerning estate in bankruptcy should be handled in bankruptcy court in order to have efficient reorganization); In re Egeria Societa Per Azioni Di Navigazione, 26 B.R. 494, 496 (Bankr. E.D. Va. 1983) (stating that bankruptcy−related disputes are under jurisdiction of bankruptcy court).Back To Text

[311] *See* United States v. Aquavella, 615 F.2d 12, 22 (2d Cir. 1980) (stating that where claims are connected, for fairness, along with efficiency, they should be tried in one suit); Harris v. Steinem, 571 F.2d 119, 123 (2d Cir. 1978) (stating that where claims are logically connected, they should be heard in one suit); *see also* supra notes and .Back To Text

[312] *See* Port Authority Trans−Hudson Corporation v. Feeney, 495 U.S. 299, 306 (1990) (asserting that when state is voluntarily in its own court, it has not waived eleventh amendment immunity); O'Brien v. Vermont Agency of Natural Resources (In re O'Brien), 216 B.R. 731, 737 (Bankr. D. Vt. 1998) (stating that Bankruptcy Code allows for claims against state to be heard in that state court).Back To Text

[313] This was the practical result of the decision in the case, Franchise Tax Bd. v. Lapin (In re Lapin), 226 B.R. 637, 642−46 (9th Cir. B.A.P. 1998) (discussing constitutional background of state sovereign immunity).Back To Text

[314] Magnolia Venture Capital Corp. v. Prudential Sec., Inc. (In re Magnolia Venture Capital Corp.), 151 F.3d 439, 443 (5th Cir. 1998), cert. denied, 119 S. Ct. 1115 (1999).Back To Text

[315] Howlett v. Rose, 496 U.S. 356, 372 (1990) (discussing availability of state law sovereign immunity defense to school board in action brought in state court).Back To Text

[316] 496 U.S. at 378 & n.20. *See also* Ellen A. Peters, Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System, 73 N.Y.U. L. Rev. 1065, 1080−82 (1998). The author, Hon. Ellen A. Peters, a Senior Justice of the Supreme Court of Connecticut, indicates that it is unclear from constitutional history whether it was intended that Congress has the authority to enlarge the jurisdiction of state courts so as to compel them to adjudicate federal claims.Back To Text

[317] *See* Howlett, 496 U.S. at 383 (discussing precedent which holds that state power to determine limits of state court jurisdiction is subject constitutional restrictions). Back To Text

[318] O'Brien v. Vermont Agency of Natural Resources (In re O'Brien), 216 B.R. 731 (Bankr. D. Vt. 1998).Back To Text

[319] 502 U.S. 197, 212−14 (1991) (concluding that Federal Employee's Liability Act creates cause of action against state owned railroad that is enforceable in state court).Back To Text

[320] *See* O'Brien, 216 B.R. at 737 (stating that sovereign immunity did not apply to instant proceeding).Back To Text

[321] *See* Hilton, 502 U.S. at 200 (stating that by entering business of operating railroads, states waive eleventh amendment immunity from suit in federal court).Back To Text

[322] *See* Seminole Tribe v. Florida, 517 U.S. 44, 44 (1996) (finding that eleventh amendment dictates that each state is "sovereign entity in our federal system and that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a state's] consent'").Back To Text

[323] Section 106 of the Bankruptcy Code provides that 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." *See also* Sacred Heart Hosp. v. Pennsylvania Dep't of Pub. Welfare (In re Sacred Heart Hosp.), 133 F.3d 237, 245 (3d Cir. 1998) (concluding that Bankruptcy Code provision abrogates state eleventh amendment immunity); Grabscheid v. Michigan Employment Sec. Comm'n (In re C.J. Rogers, Inc.), 212 B.R. 265, 271 (E.D. Mich. 1997) (stating that statute abrogates state immunity). Back To Text

[324] *See* Alden v. Maine, 715 A.2d 172, 175 (Me. 1998), cert. granted, 119 S. Ct. 443 (1998) (stating that "[i]f Congress does not have the power to abrogate state sovereign immunity with respect to federal causes of action brought in federal courts, as the *Seminole Tribe* case clearly held, then that limitation on congressional power may not be circumvented simply by moving to a state court. Accordingly, we conclude that sovereign immunity protects the State from defending this federal cause of action [for violation of the Fair Labor Standards Act] in its own courts.").Back To Text

[325] Gruntz v. County of Los Angeles (In re Gruntz), 166 F.3d 1020, 1029 (9th Cir. 1999) (concluding that "neither collateral estoppel nor *Rooker−Feldman* doctrine precludes the bankruptcy court from determining whether Gruntz's state court criminal prosecutions were void because they violated the automatic stay"). Back To Text

[326] *See* id. at 1022−23 (noting that defendant Gruntz sought declaratory and injunctive relief).Back To Text

[327] *See* id. at 1028−29 (finding that determinations regarding applicability of automatic stay in bankruptcy are exclusively within federal court's domain).Back To Text

[328] *See* id. 1022−23 (stating that Los Angeles County's District Attorney's Office was prosecuting authority that first had contact with defendant Gruntz); *see also* supra note (discussing eleventh amendment immunizing state agencies from being sued in federal court).Back To Text

[329] *See* Gruntz, 166 F.3d at 1022−23 (stating that initially, defendant Gruntz was charged with violating Cal. Penal Code § 270 – Failure to Support Dependent Children).Back To Text