FEDERAL POWERS AFTER *SEMINOLE TRIBE*: CONSTITUTIONALLY BANKRUPT

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I. INTRODUCTION

In *Seminole Tribe v. Florida*,[1] the United States Supreme Court held that Congress cannot use its powers under Article I of the Constitution[2] to abrogate

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1. Seminole Tribe v. Florida, 517 U.S. 44 (1996).
2. U.S. CONST. art. I.

sovereign immunity of the States guaranteed by the Eleventh Amendment.[3] In the context of the federal bankruptcy process, this decision altered the balance of legislative and judicial powers between the federal government and the States in a manner never contemplated by the Framers of the Constitution,[4] thereby distorting the uniform laws on bankruptcy[5] by allowing states to obtain property without being subject to the provisions of the Bankruptcy Code.[6] Subsequent to *Seminole Tribe*, a split of authority has developed concerning the constitutionality of Code section 106(a),[7] which expressly abrogated governmental sovereign immunity.[8] Consequently, a major dilemma exists in bankruptcy cases involving states as creditors.[9] This Article will show that (1) the Supreme Court erred in its holding in *Seminole Tribe* and in its failure to overrule *Hans v. Louisiana*;[10] and (2) even if the

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3. *Id.* amend. XI; *see* Seminole Tribe v. Florida, 517 U.S. at 72-73.

4. Justice Souter stated in his dissent to *Seminole Tribe*: "[T]he Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right." Seminole Tribe v. Florida, 517 U.S. at 100 (Souter, J., dissenting).

5. *See* U.S. CONST. art. I, § 8, cl. 4.

6. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1330) (1994)), *as amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as amended in various sections of 11 U.S.C.); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in various sections of 11 U.S.C.); Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (codified as amended in various sections of 11 U.S.C.); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Treasury Postal Service and General Government Appropriations Act of 1991, Pub. L. No. 101-509, 104 Stat. 1389 (codified as amended in various sections of 28 U.S.C.); Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-121, 107 Stat. 1153 (codified as amended in various sections of 28 U.S.C.); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320934, 108 Stat. 1796, 2135 (codified as amended in various sections of 92 U.S.C.); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in various sections of 11 U.S.C.); Religious Liberty and Charitable Contributions Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (codified as amended in various sections of 11 U.S.C.); Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (codified as amended in various sections of 11 U.S.C.); Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended in various sections of 11 U.S.C.) [hereinafter Code].

7. 11 U.S.C. § 106(a); *see infra* notes 38, 51.

8. 11 U.S.C. § 106(a).

9. A 1996 state bankruptcy survey revealed that, at that time, states held tax claims in bankruptcy cases of approximately $3.6 billion. *See State Bankruptcy Survey Results*, BANKR. CT. DECISIONS WEEKLY NEWS & COMMENT, Nov. 19, 1996, at A1.

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

holding in *Seminole Tribe* were correct, section 106(a) is valid under the Fourteenth Amendment to the United States Constitution.[11]

II. SECTION 106 AND ITS HISTORY

Section 106 is titled "Waiver of sovereign immunity," and subsection (a) states:

> Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
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> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
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> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.
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> (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.
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> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.[12]

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11. *See* U.S. CONST. amend. XIV. This Article also will discuss enforcement of Code provisions against a state in a bankruptcy court based on waiver of Eleventh Amendment sovereign immunity. *Id.* amend. XI; *see infra* notes 61-75 and accompanying text.

12. 11 U.S.C. § 106(a). Under the Code,

> "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

Id. § 101(27).

The original version of this section, enacted in 1978, was struck down by the United States Supreme Court because it was not sufficiently express in abrogating the States' Eleventh Amendment sovereign immunity.[13] Therefore, in 1994, Congress redrafted section 106 to make its intent to abrogate sovereign immunity unmistakably clear.[14]

III. THE *SEMINOLE TRIBE* DECISION

In 1996, the Supreme Court held in *Seminole Tribe* (a case involving the Indian Commerce Clause[15]):

> Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.[16]

In support of its decision, the Supreme Court reasoned that antecedent provisions of the Constitution, such as Article I, Section 8, cannot be used to limit Eleventh Amendment sovereign immunity.[17]

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13. U.S. CONST. amend. XI; *see* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 104 (1989) (plurality opinion). The Court also reached a similar conclusion with regard to the federal government, not covered by the Eleventh Amendment. *See* United States v. Nordic Village, Inc., 503 U.S. 30, 39 (1992).

14. The legislative history of section 106 as amended states:

> This section would effectively overrule two Supreme Court cases that held that the States and Federal Government are not deemed to have waived their sovereign immunity by virtue of enacting [section 106(a)'s predecessor]. . . . This amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief. It is the Committee's intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving the sovereign immunity of the States and the Federal Government in this regard.

140 CONG. REC. H10,766 (daily ed. Oct. 4, 1994).

15. U.S. CONST. art. I, § 8, cl. 3.

16. Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996) (footnote omitted). *But see* Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609, 616-17 (1st Cir. 1996) (allowing congressional abrogation of Eleventh Amendment sovereign immunity pursuant to Congress's Article I war powers after *Seminole Tribe*).

17. "As the dissent in *Union Gas* made clear, *Fitzpatrick* cannot be read to justify 'limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution.'" Seminole Tribe v. Florida, 517 U.S. at 66 (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 42 (1989) (Scalia, J., dissenting)).

In *Seminole Tribe*, the Supreme Court applied a two-prong test for ascertaining the validity of congressional abrogation of state sovereign immunity.[18] First, Congress's intent to abrogate sovereign immunity must have been unequivocally expressed; second, Congress must have acted "pursuant to a valid exercise of power."[19] The Supreme Court specifically noted Congress's power under Section 5 of the Fourteenth Amendment[20] to abrogate Eleventh Amendment state sovereign immunity.[21]

IV. THE ELEVENTH AMENDMENT

The Eleventh Amendment resulted from a national reaction to the decision in *Chisholm v. Georgia*,[22] which held that citizens of another state could sue a state in federal court based on diversity of citizenship.[23] In that case, the Court permitted suit by a citizen of South Carolina against the State of Georgia on a Revolutionary War debt.[24] Consequently, states feared massive liability on similar claims brought in federal court.[25] Shortly thereafter, in 1798, the Eleventh Amendment was passed and ratified in order to preclude suits in federal court by citizens of one state against another state. The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United States by Citizens of another State*, or by Citizens or Subjects of any Foreign State."[26]

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18. *Id.* at 55.

19. *Id.* (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

20. Section 5 of the Fourteenth Amendment (the Enforcement Clause) provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

21. *See* Seminole Tribe v. Florida, 517 U.S. at 65; *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976) (noting that "[t]he legislation considered [in the cases cited] was grounded on the expansion of Congress's powers—with corresponding diminution of state sovereignty . . .").

22. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

23. *See id.* at 420.

24. *Id.*

25. *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1923) ("While this opposition to the Court's decision was to some extent based on divergencies of political theories as to State sovereignty, the real source of the attack on the *Chisholm Case* was the very concrete fear of the 'numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc., that will introduce such a series of litigation as will throw every State in the Union into the greatest confusion.' In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States . . . ." (footnotes omitted)); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405-06 (1821) (noting that fear that large debts of the States might be prosecuted in federal courts brought about enactment of the Eleventh Amendment).

26. U.S. CONST. amend. XI (emphasis added). The Supreme Court consistently has interpreted the Eleventh Amendment as a constitutional limitation on federal judicial power. *See, e.g.*,

It is clear from the plain language of the Eleventh Amendment that it was intended to apply only to suits in federal court founded on diversity of citizenship.[27] However, in 1890, the Supreme Court ruled in *Hans v. Louisiana*[28] that the Eleventh Amendment also applies to suits in federal court based on federal question jurisdiction,[29] even though there is no language in the Amendment to that effect[30] and even though general federal question jurisdiction did not become a permanent part of federal judicial power until 1875,[31] which was seventy-seven years after the Eleventh Amendment's ratification.[32]

The Supreme Court subsequently permitted congressional abrogation of the States' Eleventh Amendment immunity in two situations. In *Fitzpatrick v. Bitzer*,[33] the Court allowed abrogation of the Eleventh Amendment immunity where Congress validly acted pursuant to its enforcement powers under the Fourteenth Amendment.[34] Similarly, in *Pennsylvania v. Union Gas Co.*,[35] the Court permitted abrogation under

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Seminole Tribe v. Florida, 517 U.S. at 72-73; Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984); Edelman v. Jordan, 415 U.S. 651, 678 (1974). It should be noted, however, that Eleventh Amendment immunity applies only to the States, not federal or municipal governmental units. *See* U.S. CONST. amend. XI; *see also* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524, at 130 (2d ed. 1984) (stating the general rule that "the Eleventh Amendment will not bar [actions against counties, municipalities, municipal agencies, or their officers because] these entities are not considered arms of the state").

27. Diversity of citizenship jurisdiction in federal court is authorized in the Constitution by Article III, Section 2, which states in relevant part: "The judicial Power shall extend to all Cases, in Law or Equity . . . to Controversies between two or more States;—between a State and Citizens of another State;— between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, *amended by* U.S. CONST. amend. XI (stating in relevant part that federal Judicial power does not extend to suits against a state commenced by citizens of another state).

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

29. *See id.* at 18-19.

30. *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 (1987).

31. *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 878-79 (4th ed. 1996). General federal question jurisdiction existed briefly from 1801 to 1802, but was eliminated due to the political fortunes of the Federalists. *See id.* at 879.

32. It should be noted that the Court carved out an exception to the rule in *Hans* where a state officer acts in violation of federal rights and the plaintiff seeks injunctive or declaratory relief, but not money damages from the state's treasury. *See Ex parte* Young, 209 U.S. 123, 168 (1908); *see also* Edelman v. Jordan, 415 U.S. 651, 664 (1974) (explaining the *Young* Doctrine); *In re* Lapin, 226 B.R. 637, 646 (B.A.P. 9th Cir. 1998) (stating that the *Young* Doctrine can be used to prevent post-discharge collection efforts by a state); *In re* Schmitt, 220 B.R. 68, 74 (Bankr. W.D. Mo. 1998) (stating that actions under the *Young* Doctrine are "appropriate" for determinations of dischargeability "in order to uphold the Congressional intent").

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

34. *See id.* at 456.

35. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (plurality opinion), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

Congress's Article I Commerce Clause power.[36] In *Seminole Tribe*, however, the Court, by a five-four vote, overruled *Union Gas* and held that Congress cannot abrogate sovereign immunity using its Article I powers.[37]

V. SPLIT OF AUTHORITY CONCERNING THE CONSTITUTIONALITY OF SECTION 106(a)

In the wake of *Seminole Tribe*, most courts have held that Code section 106(a)'s abrogation of the States' Eleventh Amendment immunity is unconstitutional.[38] For example, in *In re Creative Goldsmiths*,[39] the Fourth Circuit held that a

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36. *See id.* at 19-20.

37. Seminole Tribe v. Florida, 517 U.S. at 72-73.

38. *See, e.g.*, *In re* Sacred Heart Hosp., 133 F.3d 237, 242-43 (3d Cir. 1998) (holding section 106 unconstitutional and rejecting Fourteenth Amendment arguments); *In re* Fernandez, 123 F.3d 241, 246 (5th Cir. 1997) (same), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); *In re* Creative Goldsmiths, 119 F.3d 1140, 1145-46 (4th Cir. 1997) (holding section 106 unconstitutional and finding no general waiver by state's filing of a proof of claim), *cert. denied sub nom.* 118 S. Ct. 1517 (1998); *In re* Light, 87 F.3d 1320, No. 94-16995, 1996 WL 341112, at *1 (9th Cir. June 20, 1996) (unpublished disposition) (holding section 106 unconstitutional), *cert. denied sub nom.* 117 S. Ct. 976 (1997); *In re* Lapin, 226 B.R. 637, 644-46 (B.A.P. 9th Cir. 1998) (holding that sovereign immunity barred contempt citation against state entity for violation of discharge injunction); *In re* Elias, 218 B.R. 80, 87 (B.A.P. 9th Cir. 1998) (holding section 106 unconstitutional and rejecting privileges and immunities argument); *In re* ABEPP Acquisition Corp., 215 B.R. 513, 517 (B.A.P. 6th Cir. 1997) (rejecting *in rem* exception, finding no waiver, and rejecting *Young* argument); *In re* Justice, 224 B.R. 631, 635 (Bankr. S.D. Ohio 1998) (holding that Congress's effort to abrogate state sovereign immunity through enactment of section 106 invalid); *In re* Burkhardt, 220 B.R. 837, 843-44 (Bankr. D.N.J. 1998) (holding section 106 unconstitutional to the extent that it purports to abrogate state sovereign immunity); *In re* Kish, 212 B.R. 808, 817 (D.N.J. 1997) (holding section 106 unconstitutional and rejecting Fourteenth Amendment arguments); *In re* Martinez, 196 B.R. 225, 230 (Bankr. D.P.R. 1996) (concluding in dicta that section 106 is unconstitutional); *In re* Christie 222 B.R. 64, 68 (Bankr. D.N.J. 1998) (holding that bankruptcy court has no jurisdiction over state entity); *In re* Morrell, 218 B.R. 87, 91 (Bankr. C.D. Cal. 1997) (holding section 106 unconstitutional and rejecting privileges and immunities argument); *In re* Ranstrom, 215 B.R. 454, 456 (Bankr. N.D. Cal. 1997) (concluding in dicta that a money judgment against a state would be prohibited by the Eleventh Amendment, but allowing a dischargeability proceeding to continue); *In re* Rose, 214 B.R. 372, 377 (Bankr. W.D. Mo. 1997) (holding section 106(a) unconstitutional); *In re* Louis;Harris, 213 B.R. 796, 798 (Bankr. D. Conn. 1997) (dismissing debtor's contempt motion against state judicial officers on Eleventh Amendment grounds); *In re* Guiding Light Corp., 213 B.R. 489, 492 (Bankr. E.D. La. 1997) (holding section 106(a) unconstitutional on the authority of *Fernandez*, but allowing *Young* claim to proceed); *In re* Mueller, 211 B.R. 737, 743 (Bankr. D. Mont. 1997) (holding section 106(a) unconstitutional and rejecting Fourteenth Amendment argument); *In re* Zywiczynski, 210 B.R. 924, 927 (Bankr. W.D.N.Y. 1997) (noting implication in dicta that section 106 is unconstitutional after *Seminole Tribe*, but holding that the Eleventh Amendment did not bar court's inquiry into whether a certificate of deposit not owned but claimed by the state was subject to turnover); *In re* NVR L.P., 206 B.R. 831, 840 (Bankr. E.D. Va. 1997) (holding section 106 unconstitutional and rejecting Fourteenth Amendment arguments), *aff'd in part and rev'd in part sub nom.* Clerk v. NVR Homes, Inc., 222 B.R. 514, 518 (E.D. Va. 1998) (holding that contested matter regarding exemption of real property from recordation

bankruptcy trustee's suit against the State of Maryland to avoid a debtor's alleged preferential transfers in payment of income tax[40] was barred by the Eleventh Amendment.[41] Similarly, in *In re Estate of Fernandez*,[42] the Fifth Circuit held that a suit against the State of Louisiana under the Code's turnover provision[43] by a judgment creditor with a lien on the debtor's property was barred by the Eleventh Amendment.[44] In another case, the Third Circuit held that a debtor's suit against an agency of the Commonwealth of Pennsylvania based on a Code provision allegedly tolling the period for filing medical assistance program claims[45] was barred by the Eleventh Amendment.[46] Finally, in an unpublished opinion, the Ninth Circuit held that the Eleventh Amendment precluded a debtor's suit against the State Bar of California[47] for damages based on alleged violations of the automatic stay,[48] the permanent injunction arising upon discharge,[49] and the Code's provision protecting debtors from discrimination.[50]

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taxes under reorganization plan not a "suit" under Eleventh Amendment); *In re* Koehler, 204 B.R. 210, 215-16 (Bankr. D. Minn. 1997) (holding section 106(a) unconstitutional and noting that state's filing of a counterclaim waived Eleventh Amendment immunity as to claims arising out of the same transaction or occurrence); *In re* Tri-City Turf Club, Inc., 203 B.R. 617, 620 (Bankr. E.D. Ky. 1996) (holding section 106(a) unconstitutional and rejecting Fourteenth Amendment arguments); *In re* Lush Lawns, Inc., 203 B.R. 418, 421 (Bankr. N.D. Ohio 1996) (same); *In re* Charter Oak Assocs., 203 B.R. 17, 21 (Bankr. D. Conn. 1996) (holding section 106(a) unconstitutional); *In re* York-Hannover Dev., Inc., 201 B.R. 137, 141 (Bankr. E.D.N.C. 1996) (holding section 106(a) unconstitutional as an exercise of Congress's bankruptcy power, and noting but not reaching Fourteenth Amendment argument); *In re* Midland Mechanical Contractors, Inc., 200 B.R. 453, 457-58 (Bankr. N.D. Ga. 1996) (holding section 106(a) unconstitutional, and finding no waiver while suggesting state legislature must act for waiver to be effective).

39. *In re* Creative Goldsmiths, 119 F.3d 1140 (4th Cir. 1997), *cert. denied sub nom.* 118 S. Ct. 1517 (1998).

40. Section 106(a) abrogates state sovereign immunity with respect to preference actions brought pursuant to Code section 547(b). 11 U.S.C. § 106(a) (1994).

41. *See In re* Creative Goldsmiths, 119 F.3d at 1143.

42. *In re* Estate of Fernandez, 123 F.3d 241 (5th Cir. 1997), *amended by* 130 F.3d 1138 (5th Cir. 1997).

43. Section 106(a) abrogates state sovereign immunity with respect to turnover actions brought pursuant to Code section 542(a). *See* 11 U.S.C. § 106(a).

44. *See In re* Estate of Fernandez, 123 F.3d at 246.

45. Section 106(a) abrogates state sovereign immunity with respect to the tolling provision contained in Code section 108(a). *See* 11 U.S.C. § 106(a).

46. *See In re* Sacred Heart Hosp., 133 F.3d 237, 245 (3d Cir. 1998).

47. *In re* Light, 87 F.3d 1320, No. 94-16995, 1996 WL 341112, at *2 (9th Cir. June 20, 1996) (unpublished disposition) (holding section 106 unconstitutional), *cert. denied sub nom.* 117 S. Ct. 976 (1997).

48. *See* 11 U.S.C. § 362(a), (h).

49. *See id.* § 524(a)(2).

50. *See id.* § 525(a).

On the other hand, some courts have held that section 106(a) is constitutional.[51] For example, in *In re Straight*,[52] the district court in Wyoming held that a debtor's suit against the Wyoming Department of Transportation for damages based upon alleged violation of the automatic stay[53]—postpetition decertification of the debtor's business as a "Disadvantaged Business Enterprise"—was not barred by the Eleventh Amendment because section 106(a) is a constitutional abrogation of Eleventh Amendment sovereign immunity under the Privileges and Immunities Clause of the Fourteenth Amendment.[54] Likewise, in the consolidated cases of *In re Burke*[55] and *In re Headrick*,[56] a district court for the Southern District of Georgia held that the debtors' suits for damages based on alleged violations of the permanent discharge injunction[57] and the automatic stay[58] were not barred by the Eleventh Amendment because section 106(a) is constitutional under the Privileges and

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51. *See, e.g.*, *In re* Straight, 209 B.R. 540, 548-55 (D. Wyo. 1997) (holding section 106 constitutional as a valid enactment pursuant to the Fourteenth Amendment and finding waiver by state's filing of a proof of claim), *aff'd on other grounds*, 143 F.3d 1387, 1392 (10th Cir.) (affirming on basis of waiver), *cert. denied sub nom.* 119 S. Ct. 446 (1998); *In re* Barrett Ref. Corp., 221 B.R. 795, 805 (Bankr. W.D. Okla. 1998) (holding section 106(a) constitutional because a bankruptcy case is not a "suit" barred by the Eleventh Amendment); *In re* O'Brien, 216 B.R. 731, 738 (Bankr. D. Vt. 1998) (holding that section 106 is not unconstitutional because it abrogates a state's sovereign immunity in state court); *In re* Burke, 203 B.R. 493, 497 (Bankr. S.D. Ga.) (holding section 106(a) constitutional under Privileges and Immunities Clause of the Fourteenth Amendment), *denying motion to amend* 200 B.R. 282, 287 (Bankr. S.D. Ga. 1996) (finding waiver by state's filing of a proof of claim), *aff'd* No. CV197-42 (S.D. Ga. July 23, 1997), *aff'd on other grounds by* 146 F.3d 1313, 1319-20 (11th Cir. 1998) (affirming on basis of waiver); *In re* Headrick, 200 B.R. 963, 965-69 (Bankr. S.D. Ga. 1996) (holding section 106 constitutional under Privileges and Immunities Clause of the Fourteenth Amendment and finding waiver by a state's filing of a proof of claim), *motion to amend denied by* 203 B.R. 805 (Bankr. S.D. Ga. 1996), *aff'd* No. CV197-43 (S.D. Ga. July 23, 1997), *aff'd on other grounds sub nom. In re* Burke, 146 F.3d 1313, 1319-20 (11th Cir.) (affirming on basis of waiver), *petition for cert. filed*, 67 U.S.L.W. 3394 (U.S. Dec. 1, 1998) (No. 98-90).

In a pre-*Seminole Tribe* case, the Seventh Circuit held that section 106(a) was constitutional. *See In re* Merchants Grain, Inc., 59 F.3d 630, 637 (7th Cir. 1995). However, the Supreme Court vacated and remanded the Seventh Circuit's opinion in light of *Seminole Tribe*. *See* Ohio Agric. Commodity Depositors Fund v. Mahern, 517 U.S. 1130, 1130 (1996).

52. *In re* Straight, 209 B.R. 540 (D. Wyo. 1997), *aff'd on other grounds*, 143 F.3d 1387, 1392 (10th Cir.) (affirming on basis of waiver), *cert. denied sub nom.* 119 S. Ct. 446 (1998).

53. *See* 11 U.S.C. § 362(a), (h).

54. *In re* Straight, 209 B.R. at 555.

55. *In re* Burke, 200 B.R. 282 (Bankr. S.D. Ga.), *motion to amend denied by* 203 B.R. 493 (Bankr. S.D. Ga. 1996).

56. *In re* Headrick, 200 B.R. 963 (Bankr. S.D. Ga. 1996), *motion to amend denied by* 203 B.R. 805 (Bankr. S.D. Ga. 1996), *aff'd* No. CV197-43 (S.D. Ga. July 23, 1997), *aff'd on other grounds sub nom. In re* Burke, 146 F.3d 1313, 1319-20 (11th Cir.) (affirming on basis of waiver), *petition for cert. filed*, 67 U.S.L.W. 3394 (U.S. Dec. 1, 1998) (No. 98-90).

57. *See* 11 U.S.C. § 524(a)(2).

58. *See id.* § 362(a), (h).

Immunities Clause.[59] Both *Straight* and the consolidated appeals of *Burke* and *Headrick* were recently affirmed on the basis of waiver without reaching the constitutionality of section 106(a).[60]

VI. WAIVER OF ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

Thus, in thoroughly analyzing the impact of the Eleventh Amendment on federal judicial power, it is also necessary to examine the well-established common-law principle of waiver.[61] More specifically, the Supreme Court recently noted: "[A] state can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it. The Amendment, in other words, enacts a sovereign immunity from suit, *rather than a non-waivable limit on the federal judiciary's subject-matter jurisdiction.*"[62] Similarly, the Seventh Circuit stated: "Unlike other forms of subject-matter jurisdiction, sovereign immunity can, for example, be waived by consent."[63] Even in *Seminole Tribe*, the Court acknowledged that, "this Court is empowered to review a question of federal law arising from a state court decision where a State has consented to suit."[64]

In the context of bankruptcy, many courts have determined that the filing of a proof of claim by an authorized state official constitutes a waiver of Eleventh Amendment sovereign immunity concerning claims arising out of the same transaction.[65] For example, the Ninth Circuit reasoned:

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59. *See In re* Burke, No. CV197-43 (S.D. Ga. July 23, 1997), *aff'g* 203 B.R. 805 and 203 B.R. 493.

60. *In re* Burke, 146 F.3d 1313 (11th Cir. 1998); *In re* Straight, 143 F.3d 1387 (10th Cir.), *cert. denied sub nom.* 119 S. Ct. 446 (1998).

61. In addition, Code section 106(b) provides a statutory waiver of sovereign immunity. *See In re* Straight, 143 F.3d at 1389-90 (affirming the use of section 106(b) to find waiver on the basis that section 106(b) codifies an "existing equitable circumstance" where waiver occurs). Section 106(b) states:

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

11 U.S.C. § 106(b).

62. Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028, 2033 (1997) (emphasis added).

63. Benning v. Board of Regents, 928 F.2d 775, 777 n.2 (7th Cir. 1991) (citation omitted).

64. Seminole Tribe v. Florida, 517 U.S. 44, 71 n.14 (1996) (citation omitted).

65. *See, e.g.*, *In re* Straight, 143 F.3d at 1387; *In re* Burke, 146 F.3d at 1313; *In re* Barrett Ref. Corp., 221 B.R. 795, 811-15 (Bankr. W.D. Okla. 1998) (finding waiver by state's filing of a proof of claim as an alternative to the court's conclusion that a bankruptcy case is not a "suit" implicating the Eleventh Amendment); *In re* Fennelly, 212 B.R. 61, 63 (D.N.J. 1997) (finding waiver by state's filing of a proof of claim and failing to consider the constitutionality of section 106); *In re* Value-Added Communications, Inc., 216 B.R. 547, 550 (Bankr. N.D. Tex. 1997) (finding waiver of Eleventh Amendment immunity and failing to decide the constitutionality of section 106); *In re* Stoecker, 202 B.R. 429, 447-48 (Bankr. N.D. Ill. 1996) (holding that the Eleventh Amendment is not implicated by

> At the time the State filed a claim for the underlying disputed taxes, a governmental unit waived its sovereign immunity by filing a proof of claim against the bankruptcy estate. This waiver is effective for claims arising out of the same transaction or occurrence brought in response to the claims filed by the government. Accordingly, the state has waived its sovereign immunity in the instant case.[66]

Stated another way by the Supreme Court in *Gardner v. New Jersey*:[67] "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."[68] In that case, the Court found that a New Jersey statute authorized the state comptroller to file a claim in the bankruptcy case and that, as a result of the filing, New Jersey waived its sovereign immunity under the Eleventh Amendment.[69]

Analogously, the Supreme Court consistently has held that the filing of a claim in a bankruptcy case constitutes a waiver of the claimant's right to a trial by jury under the Seventh Amendment.[70] In *Langenkamp v. Culp*,[71] the Court reiterated:

> In *Granfinanciera* we recognized that by filing a claim against a bankruptcy estate the creditor triggers the process of "allowance and disallowance of claims," thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*. As such, there is no Seventh Amendment right to a jury trial. . . . Accordingly, "a creditor's

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determination of debtor's tax liability on objection to state's claim; finding waiver by state's filing of a proof of claim even if tax liability determination implicates the Eleventh Amendment), *aff'd*, No. 97-C-414, 1998 WL 641363 (N.D. Ill. Sept. 11, 1998).

Other courts have utilized similar reasoning to find waiver where a state agency objected to confirmation of a Chapter 11 plan, *In re* White, 139 F.3d 1268, 1271 (9th Cir. 1998), and where a state university entered into a contract with a federal agency regarding higher education loans by which the university consented to federal regulation. *In re* Innes, 207 B.R. 953, 957 (Bankr. D. Kan. 1997). Likewise, without calling it "waiver," the Seventh Circuit concluded that because a state's filing of an adversary proceeding in a bankruptcy case is analogous to filing a proof of claim, the "state removes itself from the Eleventh Amendment's protection." *In re* Platter, 140 F.3d 676, 679 (7th Cir. 1998) (citation omitted).

66. *In re* Del Mission Ltd., 98 F.3d 1147, 1152 n.6 (9th Cir. 1996) (citations omitted).
67. Gardner v. New Jersey, 329 U.S. 565 (1947).
68. *Id.* at 574.
69. *See id.*
70. *See, e.g.*, Langenkamp v. Culp, 498 U.S. 42, 45 (1990); Katchen v. Landy, 382 U.S. 323, 336 (1966).
71. Langenkamp v. Culp, 498 U.S. 42 (1990).

> right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate."[72]

Therefore, it is clear that both the Seventh Amendment right to a trial by jury and Eleventh Amendment sovereign immunity are constitutional protections that can be waived by filing a proof of claim in a bankruptcy case. Nonetheless, there is some authority which does not apply waiver in circumstances in which the relevant state legislature has not expressly authorized the state official who filed the claim to waive sovereign immunity.[73] The effect of the latter interpretation of waiver is to permit a state to participate in the distribution of the assets of a bankruptcy estate and, unlike any other creditor in the case, not be governed by the provisions of the Code in the bankruptcy court.[74] This result is anomalous because even though (under this view) a state is deemed not to have waived its sovereign immunity by filing a proof of claim in the bankruptcy case, it is being allowed to participate as a creditor absent any apparent jurisdiction of the bankruptcy court.[75] This theory misconstrues the principle of waiver, accords the state a superpriority never intended by Congress, makes the bankruptcy process unworkable and inequitable, and is constitutionally infirm.

VII. UNWORKABLE ADMINISTRATION OF THE FEDERAL BANKRUPTCY SYSTEM WITHOUT STATE PARTICIPATION

The administration and adjudication of bankruptcy cases absent bankruptcy court jurisdiction over the States as major creditors[76] would be impracticable, costly, and contrary to the intent of the Framers of the Constitution and Congress. More specifically, applying the uniform laws on bankruptcy contained in the Code fairly and efficiently often requires, for example, enforcement of the automatic stay,[77] the

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72. *Id.* at 44-45 (citations omitted) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 57-59 (1989)).

73. *In re* Midland Mechanical Contractors, Inc., 200 B.R. 453, 458 & n.4 (Bankr. N.D. Ga. 1996). The Supreme Court in *Gardner v. New Jersey* does not appear to have required this finding in order for the filing of a claim by an authorized state official to constitute a waiver. *See* Gardner v. New Jersey, 329 U.S. at 574. If this requirement existed, it is highly unlikely that a waiver would ever occur. *But cf. In re* Platter, 140 F.3d 676, 679 (7th Cir. 1998) (suggesting that a finding of waiver is unnecessary where a state files a proof of claim or an adversary proceeding in a bankruptcy case).

74. For a discussion of the enforcement of Code provisions against a state in state court, see *infra* notes 97-105 and accompanying text.

75. A state should not have it both ways—either it waives its sovereign immunity and gets paid on its claim, or it chooses to retain its immunity and does not receive any distribution because it is not within the bankruptcy court's jurisdiction.

76. A 1996 bankruptcy survey revealed that, at that time, states were creditors in nearly 363,000 bankruptcy cases. *See State Bankruptcy Survey Results*, *supra* note 9, at A1.

77. Section 362(a), providing for the automatic stay, states:

permanent discharge injunction[78] and the turnover provision;[79] trials to recover preferences[80] and fraudulent transfers;[81] proof[82] and allowance[83] of claims; sale of

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> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> (4) any act to create, perfect, or enforce any lien against property of the estate;
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 U.S.C. § 362(a) (1994).

78. Section 524(a), providing for the permanent discharge injunction, states:

> A discharge in a case under this title—
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and
> (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

Id. § 524(a).

79. Section 542(a) and (b), providing for turnover of estate property, states:

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

Id. § 542(a)-(b).

80. Section 547(b), making preferential transfers avoidable, states:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Id. § 547(b).

81. Section 548(a), making fraudulent transfers avoidable, states:

The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)

(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)

(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in a business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

property free and clear of state interests;[84] and a confirmation process that binds the States.[85] Consequently, a rule that permits the States to opt out of the federal bankruptcy forum would be, at the very least, disruptive, and, in reality, not feasible.

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

Id. § 548(a).

82. Section 501(a), (b), and (c), providing for filing proofs of claims or interests, states:

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

Id. § 501(a)-(c).

83. Section 502(a), (b), and (c), providing for allowance of claims or interests, states:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—[listing nine exceptions].

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

Id. § 502(a)-(c).

84. Section 363(f), providing for sale of property free and clear of other interests, states:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankrutpcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Id. § 363(f).

85. Section 1141 setting forth the effects of confirmation, states:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity

In this regard, the Supreme Court has stated:

> The federal government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be *impossible* and a fundamental purpose of the Bankruptcy Act would be frustrated.[86]

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security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)

(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) the confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

Id. § 1141.

86. New York v. Irving Trust Co., 288 U.S. 329, 333 (1933) (citation omitted) (emphasis added). *A fortiori*, a fundamental purpose of the Code would be frustrated inasmuch as one of its primary goals was the creation of a single federal bankruptcy forum. *See infra* notes 101-03 and accompanying text.

Recently, this analysis was echoed as follows: "Our national bankruptcy system . . . may be in grave danger if the states cannot be bound by orders issued by the federal courts under bankruptcy law."[87] Significantly, in *Seminole Tribe*, Justice Stevens prophesied this unnecessary dilemma: "As federal courts have exclusive jurisdiction over cases arising under these federal laws, the majority's conclusion that the Eleventh Amendment shields States from being sued under them in federal court suggests that persons harmed by state violations of federal copyright, bankruptcy, and antitrust laws have no remedy."[88]

In the same case, Chief Justice Rehnquist, writing for the majority, responded to Justice Stevens' prediction by alluding to the *Young* Doctrine[89] as a potential remedy and by stating the following: "[T]here is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States."[90] However, with all due respect, the Supreme Court is wrong. First, the *Young* Doctrine only serves as a cure where injunctive or declaratory relief is sought against a state official.[91] Thus, it provides no relief where money damages are sought,[92] such as in the instance of a voidable preference[93] or fraudulent transfer.[94] Second, in the words of one bankruptcy judge: "We, like every bankruptcy judge we know, regularly and routinely enforced applicable bankruptcy law against the States prior to *Seminole* . . . ."[95] Similarly, another bankruptcy judge observed: "As a factual matter, we have seen that [Chief] Justice Rehnquist was simply wrong insofar as bankruptcy is concerned: there is a longstanding tradition in the bankruptcy courts, dating back to 1979, of allowing the bankruptcy courts to enforce applicable law against the states."[96]

Therefore, if states are not parties in the bankruptcy case, there is no solution other than bringing these purely bankruptcy-type actions in state court.[97] This procedure is unworkable. Undoubtedly, it will result in unwarranted delays,

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87. *In re* NVR L.P., 206 B.R. 831, 843 n.25 (Bankr. E.D. Va. 1997), *aff'd in part and rev'd in part sub nom.* Clerk v. NVR Homes, Inc., 222 B.R. 514, 518 (E.D. Va. 1998) (holding that contested matter regarding exemption of real property from recordation taxes under reorganization plan is not a "suit" under the Eleventh Amendment).

88. Seminole Tribe v. Florida, 517 U.S. 44, 77-78 n.1 (1996) (Stevens, J., dissenting).

89. *See supra* note 32; *see also* 13 WRIGHT ET AL., *supra* note 26, § 3524, at 151-59 (discussing the *Young* Doctrine).

90. Seminole Tribe v. Florida, 517 U.S. at 73 n.16.

91. *See* Edelman v. Jordan, 415 U.S. 651, 663-67 (1974).

92. *See id.* at 663-64.

93. *See* 11 U.S.C. § 547(b) (1994).

94. *See id.* § 548(a).

95. *In re* O'Brien, 216 B.R. 731, 736 (Bankr. D. Vt. 1998).

96. *In re* Lazar, 200 B.R. 358, 376 (Bankr. C.D. Cal. 1996).

97. *See In re* NVR L.P., 206 B.R. 831, 843 (Bankr. E.D. Va. 1997), *aff'd in part and rev'd in part sub nom.* Clerk v. NVR Homes, Inc., 222 B.R. 514 (E.D. Va. 1998); *cf.* Testa v. Katt, 330 U.S. 386, 394 (1947) (noting that state courts must adjudicate federal claims properly before them).

inordinate expense involving distant state courts throughout the nation, loss of assets of the bankruptcy estate, clouded title concerning sale of estate property, and difficulty in confirming and enforcing Chapter 11 plans that do not bind the States.[98] In addition, the duplication of judicial resources and the lack of bankruptcy law expertise of state judges[99] compel trying these issues in the bankruptcy court as Congress intended.[100]

VIII. CONGRESS'S PURPOSES FRUSTRATED BY STATE IMMUNITY

It is incontrovertible that immunizing states from participation in the bankruptcy court frustrates two of the principal goals of Congress in enacting the Code and the accompanying jurisdictional legislation in 1978. One of these objectives was the creation of a single federal bankruptcy forum having the jurisdiction to hear almost all issues arising in or related to the bankruptcy case,[101] the reason for which is explained in the Code's legislative history:

> One of the primary purposes of bankruptcy administration and certainly the primary purpose as far as creditors are concerned is the prompt liquidation of the bankrupt's estate and the payment of dividends. The split personality of the present act, however, which often requires litigation by receivers and trustees in various State and Federal courts—not the bankruptcy court—involving "controversies" often result[s] in distribution to creditors being delayed for months and sometimes years. The Bankruptcy Act creates rights in the trustee (sec. 60, 67, and 70) yet the trustee absent consent of the adverse party often cannot litigate those rights in the forum of the bankruptcy court. He is relegated instead to State and Federal courts where delays of up to 2 and 3 years are not uncommon.[102]

Similarly, a recent bankruptcy court opinion cautioned: "While one of the principal reforms of the Bankruptcy Code was to eliminate this balkanization of

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98. *See* Gardner v. New Jersey, 329 U.S. 565, 574 (1947); *In re* NVR L.P., 206 B.R. at 843 n.25. *But cf.* Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1997) (distinguishing plan confirmation orders from adversary proceedings).

99. For example, in Virginia, the state district courts have jurisdiction over preference complaints involving amounts up to $15,000. *See* VA. CODE ANN. § 16.1-77(1) (Michie cum. Supp. 1997). These judges also try routine traffic cases. *See* VA. CODE ANN. § 16.1-123.1.1 (Michie repl. Vol. 1996).

100. *Cf. In re* NVR L.P., 206 B.R. at 843 ("[I]t is doubtful that a party in bankruptcy proceedings will be denied a hearing before some competent tribunal, though possibly not one with the expertise necessary to ensure the *most* uniform treatment under the Code.").

101. *See* 28 U.S.C. § 1334 (1994). However, the district court, not the bankruptcy court, has jurisdiction to try personal injury tort and wrongful death claims. *See id.* § 157(b)(5).

102. 1 ALAN N. RESNICK & EUGENE M. WYPYSKI, *Commission to Study Bankruptcy Laws of 1968, in* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 25 (1979) (statement of Clive W. Bare, referee in bankruptcy).

bankruptcy jurisdiction, the *Seminole* case may require a limited return to this practice, absent an appropriate waiver."[103] The effects of reverting to this pre-Code procedure inevitably will be increased delay and expense in bankruptcy cases, which are precisely the evils sought to be avoided in 1978. Moreover, returning to the pre-Code system of dual jurisdiction may deter bankruptcy trustees from bringing actions in state courts throughout the nation to recover transfers of property of the bankruptcy estate because of the burdens of distance, expense, and time.

Another goal of the Code circumvented by immunizing states, thereby giving them a superpriority, is that of treating similarly situated creditors equally. As the legislative history explains:

> The purpose of the preference section is two-fold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter "the race of diligence" of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section—that of equality of distribution.[104]

Exempting states from actions in the bankruptcy court to recover preferential transfers clearly defeats this express legislative purpose. As stated by Justice Brennan in an earlier non-bankruptcy case: "[T]he Court has put the federal judiciary in the unseemly position of exempting the States from compliance with laws that bind every other legal actor in our Nation."[105]

IX. *HANS V. LOUISIANA* SHOULD BE OVERRULED

Inasmuch as the mandate of *Seminole Tribe* is unworkable in the context of the bankruptcy process, an immediate resolution is required. The most obvious solution is to overrule *Hans v. Louisiana*.[106] In this regard, the Supreme Court has stated: "When governing decisions are *unworkable* or are *badly reasoned*, this Court has never felt constrained to follow precedent. Our willingness to reconsider our earlier

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103. *In re* Lazar, 200 B.R. 358, 376 (Bankr. C.D. Cal. 1996).
104. H.R. REP. No. 95-595, at 177-78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6138.
105. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 248 (1985) (Brennan, J., dissenting).
106. Hans v. Louisiana, 134 U.S. 1 (1890).

decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible."[107]

A careful examination of the *Hans* decision reveals that not only is it unworkable in bankruptcy, but it also is badly reasoned. More specifically, the plain language of the Eleventh Amendment clearly refers to diversity jurisdiction because it mirrors the language of the Citizen-State Diversity Clause contained in the Constitution. The Diversity Clause in Article III provides: "The judicial Power shall extend to all Cases, in Law and Equity . . . to Controversies between two or more States;—*between a State and Citizens of another State*;—between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[108] Likewise, the Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United States by Citizens of another State*, or by Citizens or Subjects of any Foreign State."[109] As Justice Souter aptly explained: "The history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses" and "[t]he great weight of scholarly commentary agrees."[110]

As discussed earlier, the Eleventh Amendment was a political reaction to *Chisholm*, a suit based on diversity of citizenship,[111] not federal question jurisdiction, which did not even exist at the time of the ratification of the Eleventh Amendment.[112] Moreover, in understanding how badly reasoned the *Hans* decision was, it is helpful to refer to Justice Stevens' concurring opinion in *Union Gas*, where "he explained how it has come about that we have two Eleventh Amendments, the one ratified in 1795, the other (so-called) invented by the Court nearly a century later in *Hans v.*

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107. Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (internal quotations and citations omitted) (emphasis added).

108. U.S. CONST. art. III, § 2 (emphasis added).

109. *Id.* amend. XI (emphasis added).

110. Seminole Tribe v. Florida, 517 U.S. at 110 & n.8 (Souter, J., dissenting). For example, Professor Jackson, cited in Justice Souter's dissent, argues that the Eleventh Amendment does not "supply, or imply, a constitutional immunity for states as to claims arising under federal law." Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 4 (1988). She, like many other scholars, reasons that the language of the Amendment does not reach federal question cases. *See id.* at 44-51. Moreover, she argues that the exceptions to the Eleventh Amendment recognized by the Court call into question the validity of the *Hans* doctrine. *See id.* at 7; *see also supra* text accompanying notes 28-29. These exceptions include the *Young* Doctrine, *see supra* note 32; waiver, *see supra* notes 61-75 and accompanying text; and Supreme Court review of state court decisions involving federal questions that are barred from federal district courts by the Eleventh Amendment under *Hans*. *See* Jackson, *supra*, at 5-6.

111. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 420 (1793); *see also supra* notes 22-25 and accompanying text.

112. *See supra* note 31.

Louisiana."[113] Therefore, *Hans* should be overruled, and the Eleventh Amendment should not apply to cases raising federal questions.

X. *SEMINOLE TRIBE* SHOULD BE OVERRULED BECAUSE OF THE "PLAN OF THE CONVENTION"

Similarly, the Supreme Court's decision in *Seminole Tribe* is both unworkable and badly reasoned in the context of bankruptcy. In that case, the Supreme Court held:

> Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.[114]

This conclusion is overly broad and erroneous because it is clear that the Framers of the Constitution intended to grant Congress the exclusive authority under Article I to enact uniform laws on bankruptcy,[115] and this power should not be affected by the Eleventh Amendment. A careful examination of the Court's Eleventh Amendment jurisprudence reveals that the Court's extension of the Eleventh Amendment bar to federal question cases in *Hans* rested on the fact that the States entered the Union with some of their sovereignty intact, including a sovereign immunity from suit in federal court "unless [a state] has consented to suit, either expressly or in the 'plan of the convention.'"[116]

In this regard, it is irrefutable that the States granted to the Union the uniform and exclusive power to enact bankruptcy legislation.[117] As Alexander Hamilton observed, state governments would not retain sovereignty over rights *exclusively* delegated to the federal government.[118] He explained: "This exclusive delegation,

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113. Seminole Tribe v. Florida, 517 U.S. at 100 (Souter, J., dissenting) (citing Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (Stevens, J., concurring)); *see also* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) (describing Eleventh Amendment jurisprudence as "little more than a hodgepodge of confusing and intellectually indefensible judge-made law").

114. Seminole Tribe v. Florida, 517 U.S. at 72-73 (footnote omitted).

115. *See* U.S. CONST. art. I, § 8, cl. 4.

116. Blatchford v. Native Village, 501 U.S. 775, 779 (1991); *see also* THE FEDERALIST NO. 81, at 248 (Alexander Hamilton) (Roy P. Fairfield ed., 1966) ("Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . .").

117. *See* U.S. CONST. art. I, § 8, cl. 4.

118. *See* THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 116.

or rather this *alienation*, of State sovereignty, would only exist in three cases,"[119] the third of which is "where [the Constitution] granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."[120]

In the context of bankruptcy, authority in the States to enact bankruptcy laws "would be absolutely and totally *contradictory* and *repugnant*"[121] to the federal bankruptcy power.[122] In fact, the Supreme Court has acknowledged:

> The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. . . . It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of [a state insolvency law], that *intolerable inconsistencies and confusion would result* if that insolvency law be given effect while the national Act is in force.[123]

Therefore, it is self-evident that under the plan of the Constitution, the power to enact bankruptcy laws was granted exclusively to Congress.

Furthermore, it is pivotal to note that the only example articulated by Hamilton of an exclusive grant of authority to the federal government where a "similar authority in the States would be . . . *contradictory* and *repugnant*"[124] is Congress's power to establish uniform laws on naturalization,[125] which is expressed in Article I, Section 8, Clause 4 of the Constitution.[126] This Clause reads: "The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."[127] Inasmuch as this provision delegates to Congress the power to enact uniform laws over only two subjects—naturalization and bankruptcy—it is highly unlikely that the Framers of the Constitution intended to treat Congress's power over bankruptcy legislation differently than its legislative power over naturalization. Consequently, consistent with Hamilton's explanation, if the States alienated their sovereignty with respect to uniform laws on naturalization due to the exclusive grant of that power to Congress, then the same surrender of sovereignty must apply to uniform laws on bankruptcy. Because the Supreme Court's extension of the Eleventh Amendment bar to suits against states depends upon the sovereignty with which the States entered the Union,

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119. *Id.* at 80 (emphasis added).
120. *Id.*
121. *Id.*
122. *See* U.S. CONST. art. I, § 8, cl. 4.
123. International Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929) (emphasis added).
124. THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 116, at 80.
125. *See id.*
126. *See* U.S. CONST. art. I, § 8, cl. 4.
127. *Id.*

it does not apply where the States surrendered sovereignty in the "plan of the convention."[128] Therefore, Congress's exclusive power to enact uniform laws on naturalization and bankruptcy is free from the prohibitions of the Eleventh Amendment. This analysis exposes the Supreme Court's defective reasoning in *Seminole Tribe*, which should be overruled.[129]

XI. SECTION 106(a) IS CONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

However, even under *Seminole Tribe*, the States' Eleventh Amendment sovereign immunity can be abrogated pursuant to Congress's power under Section 5 of the Fourteenth Amendment.[130] Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article,"[131] which include privileges and immunities of United States citizenship, equal protection of the laws, and due process of law.[132]

With respect to the privileges and immunities protected by the Fourteenth Amendment, the Supreme Court has limited them strictly to those "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[133] More specifically, there appear to be only eight recognized privileges and immunities protected by the Fourteenth Amendment:[134] (1) taking and holding real property;[135] (2) informing authorities of violations of law;[136] (3) being protected when in federal custody;[137] (4) carrying on interstate commerce;[138] (5) occupying public

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128. *See* Blatchford v. Native Village, 501 U.S. 775, 779 (1991) (internal quotation omitted).

129. Subsequent to *Seminole Tribe*, the First Circuit held that Congress's abrogation of state Eleventh Amendment sovereign immunity under its Article I war powers was valid. *See* Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609, 616 & n.9 (1st Cir. 1996).

130. *See* Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996).

131. U.S. CONST. amend. XIV, § 5.

132. *Id.* amend. XIV, § 1 (providing in relevant part: "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.").

133. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873); *see also* Lutz v. City of York, 899 F.2d 255, 264 (3d Cir. 1990) (noting that the Privileges and Immunities Clause "has remained essentially moribund since *Slaughter-House*" and rejecting plaintiffs' assertion of a general fundamental right to interstate travel).

134. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-4, at 555-56 (2d ed. 1988); *see also* Twining v. New Jersey, 211 U.S. 78, 97 (1908) (listing some privileges of national citizenship).

135. *See* Oyama v. California, 332 U.S. 633, 640 (1948).

136. *See In re* Quarles, 158 U.S. 532, 536 (1895).

137. *See* Logan v. United States, 144 U.S. 263, 294 (1892).

138. *See* Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

lands in order to perfect title to a homestead;[139] (6) voting for federal electors and members of Congress;[140] (7) assembling and petitioning the government for redress of grievances;[141] and (8) traveling interstate in order to conduct business with the federal government.[142] In the context of bankruptcy, the Supreme Court has held that a discharge in bankruptcy is not accorded the status of a constitutional right.[143] Nonetheless, several lower courts have upheld section 106(a) of the Code[144] under the Privileges and Immunities Clause.[145] On the other hand, this theory has been rejected by two federal courts of appeals' decisions,[146] which represent the correct interpretation of the law.

Similarly, the Equal Protection Clause[147] is not a basis for upholding the constitutionality of section 106(a) of the Code.[148] Historically, where Section 5 of the Fourteenth Amendment[149] has been used to enforce the Equal Protection Clause,[150] the purpose was to prevent discrimination such as that based on race, gender, or other suspect classifications,[151] and, therefore, the Equal Protection Clause is not helpful in resolving this constitutional dilemma.[152]

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139. *See* United States v. Waddell, 112 U.S. 76, 80 (1884).

140. *See Ex parte* Yarbrough, 110 U.S. 651, 664 (1884).

141. *See* United States v. Cruikshank, 92 U.S. 542, 552 (1875).

142. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867).

143. *See* United States v. Kras, 409 U.S. 434, 446 (1973). In *Kras*, the Supreme Court rejected the petitioner's assertion that he had a right to file a voluntary bankruptcy petition *in forma pauperis*. *See id.* at 450. The Court reasoned that bankruptcy "is hardly akin to free speech or marriage or to those other rights . . . that the Court has come to regard as fundamental." *Id.* at 446. Therefore, the Court declared, "There is no constitutional right to obtain a discharge of one's debts in bankruptcy." *Id. But see In re* Southern Star Foods, Inc., 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995) (reasoning that Congress used its Article I bankruptcy power to create "the complex of privileges and immunities, rights and liabilities, found in the Bankruptcy Code").

144. 11 U.S.C. § 106(a) (1994).

145. U.S. CONST. amend. XIV, § 1; *see In re* Straight, 209 B.R. 540, 555 (D. Wyo. 1997), *aff'd on other grounds*, 143 F.3d 1387, 1392 (10th Cir.) (affirming on basis of waiver), *cert. denied sub nom.* 119 S. Ct. 446 (1998); *In re* Burke, 203 B.R. 493, 497 (Bankr. S.D. Ga.), *denying motion to amend* 200 B.R. 282 (Bankr. S.D. Ga. 1996), *aff'd*, No. CV197-43 (S.D. Ga. July 23, 1997), *aff'd on other grounds by* 146 F.3d 1313, 1319-20 (11th Cir. 1998) (affirming on basis of waiver); *In re* Headrick, 200 B.R. 963, 967 (Bankr. S.D. Ga.), *motion to amend denied by* 203 B.R. 805 (Bankr. S.D. Ga. 1996), *aff'd* No. CV197-43 (S.D. Ga. July 23, 1997), *aff'd on other grounds sub nom. In re* Burke, 146 F.3d 1313, 1319-20 (11th Cir.) (affirming on basis of waiver), *petition for cert. filed*, 67 U.S.L.W. 3394 (U.S. Dec. 1, 1998) (No. 98-90).

146. *In re* Sacred Heart Hosp., 133 F.3d 237, 244-45 (3d Cir. 1998); *In re* Estate of Fernandez, 123 F.3d 241, 245 (5th Cir.), *amended by* 130 F.3d 1138 (5th Cir. 1997).

147. U.S. CONST. amend. XIV, § 1.

148. 11 U.S.C. § 106(a).

149. U.S. CONST. amend. XIV, § 5.

150. *Id.* amend. XIV, § 1.

151. *See* Wilson-Jones v. Caviness, 99 F.3d 203, 210 (6th Cir. 1996), *modified on other grounds*, 107 F.3d 358 (6th Cir. 1997).

152. *See In re* NVR L.P., 206 B.R. 831, 842 (Bankr. E.D. Va. 1997), *aff'd in part and rev'd*

Unlike privileges and immunities and equal protection, the Due Process Clause of the Fourteenth Amendment[153] provides a proper constitutional basis for the enforcement of section 106(a) of the Code. The Due Process Clause reads: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."[154] It is essential to understand that this argument supporting the constitutionality of section 106(a) rests upon the prohibition against a state depriving a person of *property* (as opposed to life or liberty) without *substantive* due process of law (as opposed to procedural due process).[155] As applied in bankruptcy, the Clause would read: "[N]or shall any State deprive any person of . . . property [in a bankruptcy case], without due process of law."[156] The most logical interpretation of "without due process of law" is: without the protections provided by the substantive provisions of the Bankruptcy Code against state deprivation of property of the bankruptcy estate. It is precisely this protection of estate property that section 106(a) of the Code is intended to enforce remedially by requiring the States to participate in bankruptcy cases in the bankruptcy court.

By analogy, in a post-*Seminole Tribe* case involving property rights created under Congress's Article I patent and commerce powers,[157] it was held that Congress validly abrogated state Eleventh Amendment sovereign immunity under the Fourteenth Amendment.[158] The district court in that case reasoned, "if rights protected by the Patent Act are correctly considered 'property,' legislation making

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in part sub nom. Clerk v. NVR Homes, Inc., 222 B.R. 514, 518 (E.D. Va. 1998) (holding that contested matter regarding exemption of real property from recordation taxes under reorganization plan is not a "suit" under the Eleventh Amendment).

153. U.S. CONST. amend. XIV, § 1.

154. *Id.*

155. The Due Process Clause clearly contains a substantive element. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996) (holding a "grossly excessive" punitive damages award unconstitutional as a deprivation of property without substantive due process). Although substantive due process is often associated with disfavored and disavowed cases such as *Lochner v. New York*, 198 U.S. 45, 64 (1905) (finding a liberty of contract protected by due process), the concept remains alive and well as part of the Constitution. "The text of the Due Process Clause . . . imposes nothing less than an obligation to give substantive content to the words . . . 'due process of law.'" Washington v. Glucksberg, 117 S. Ct. 2258, 2281 (1997) (Souter, J., concurring).

156. U.S. CONST. amend. XIV, § 1. Certainly if the Due Process Clause applies to protect property in a broader sense, then it follows that it applies to protect property in a more narrow sense. Also, in this context, "person" could include the bankruptcy estate, a bankruptcy trustee, a debtor in possession, any equity security holders, or the creditors in the case.

157. *See id.* art. I, § 8, cls. 3, 8.

158. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 948 F. Supp. 400, 422 (D.N.J. 1996), *aff'd on other grounds*, 131 F.3d 353 (3d Cir. 1997), *cert. granted*, 67 U.S.L.W. 3084 (U.S. Jan. 8, 1999) (No. 98-149) & 67 U.S.L.W. 3433 (U.S. Jan. 8, 1999) (No. 98-531).

the states liable in federal court for violating that statute would 'plainly' be 'appropriate' for enforcing the Fourteenth Amendment."[159]

In bankruptcy, protection of property rights is paramount, and that protection is provided by the provisions of the Code. For example, in *United States v. Whiting Pools, Inc.*,[160] the United States Supreme Court held that the IRS was required to comply with the Code's turnover provision[161] where it had seized, but not yet sold, tangible personal property of the debtor prior to a Chapter 11 bankruptcy filing.[162] In that case, had the creditor been a state (rather than the IRS), and not been subject to the bankruptcy court's order to turn over the property to the bankruptcy estate, the debtor in possession would have been deprived of property by the state without substantive due process—without the protections provided by the turnover provision of the Code.[163] Similarly, had that state received a preferential or fraudulent transfer prior to bankruptcy and not been required to respond to an action by a trustee or debtor in possession in the bankruptcy court to avoid and recover such transfer, the bankruptcy estate and all of the unsecured creditors in the case would have been deprived of property by the state without substantive due process—specifically, without the protections afforded by sections 547,[164] 548,[165] and 550[166] of the Code.

In recognizing Congress's power to enforce the protective provisions of the Code through the Fourteenth Amendment to prevent a state's deprivation of property without due process, it is important to note that such legislation—here, the abrogation of state Eleventh Amendment sovereign immunity[167]—must be remedial in nature and not create any new substantive rights.[168] It is obvious that section 106(a) creates no additional substantive rights for debtors or creditors, but merely requires states to adhere to the uniform laws on bankruptcy, as must all other creditors in a bankruptcy case.[169] The legislative history of section 106(a) states: "Nothing in this section is intended to create substantive claims for relief or causes of action not otherwise existing under title 11, the Bankruptcy Rules, or nonbankruptcy law."[170]

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159. *Id.* (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).
160. United States v. Whiting Pools, Inc., 462 U.S. 198 (1983).
161. 11 U.S.C. § 542(a) (1994).
162. United States v. Whiting Pools, Inc., 462 U.S. at 211-12.
163. 11 U.S.C. § 542(a). Note that an attempt to effect a turnover in state court would be burdened by unnecessary delay and expense. *See supra* notes 76-105 and accompanying text.
164. 11 U.S.C. § 547.
165. *Id.* § 548.
166. *Id.* § 550.
167. *Id.* § 106(a).
168. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2166 (1997).
169. Section 106(a) abrogates state Eleventh Amendment sovereign immunity with regard to 60 sections of the Code, not every provision. *See* 11 U.S.C. § 106(a).
170. 140 CONG. REC. H10, 766 (daily ed. Oct. 4, 1994); *see also* 11 U.S.C. § 106(a)(5).

The United States Supreme Court has established a three-prong test to determine the constitutionality of such remedial legislation under Section 5 of the Fourteenth Amendment.[171] The three factors are: (1) whether the legislation may be regarded as an enactment to enforce the Fourteenth Amendment; (2) whether it is "plainly adapted to that end"; and (3) whether "it is not prohibited by, but is consistent with the letter and spirit of the constitution."[172] The first factor has been construed to require a sufficient connection between the enactment and the objectives of the Fourteenth Amendment.[173] In the context of bankruptcy, the only practicable means of preventing a state from depriving the bankruptcy estate of property without the due process safeguards of the Code is Congress's abrogation of state Eleventh Amendment sovereign immunity with respect to certain Code provisions, as accomplished by the enactment of section 106(a).[174] Therefore, this required nexus is evident.

As to the second criterion, section 106(a) is plainly adapted to the due process objective by Congress's mandate that states not obtain or retain property of the bankruptcy estate without complying with certain specified Code provisions. Third, section 106(a) is completely consistent with the letter and spirit of the Constitution, which provides for Congress's creation of a uniform national bankruptcy system applicable to all creditors in the bankruptcy case.[175]

Consequently, while section 106(a) is not a valid enactment under either the Privileges and Immunities Clause[176] or the Equal Protection Clause,[177] it is constitutional as a remedial provision designed to protect property rights in bankruptcy cases from deprivation by states without due process of law.

In ascertaining the constitutionality of section 106(a), it is not necessary to find that Congress expressly referred to the Fourteenth Amendment as its source of power because the Supreme Court has ruled that a federal statute is constitutional if it is valid under any provision of the Constitution, whether or not that provision was cited in the legislative history.[178] For example, the Tenth Circuit held, in a post-*Seminole Tribe* case, that the 1974 amendments to the Age Discrimination in Employment Act abrogating state Eleventh Amendment sovereign immunity were valid under the

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171. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

172. *Id.* (internal quotations omitted).

173. *See* Wilson-Jones v. Caviness, 99 F.3d 203, 210 (6th Cir. 1996), *modified on other grounds*, 107 F.3d 358 (6th Cir. 1997).

174. 11 U.S.C. § 106(a). *But cf. In re* Lapin, 226 B.R. 637, 646 (B.A.P. 9th Cir. 1998) (noting that states can be sued in their own courts).

175. *See* U.S. CONST. art. I, § 8, cl. 4.

176. *Id.* amend. XIV, § 1.

177. *Id.*

178. *See* EEOC v. Wyoming, 460 U.S. 226, 243-44 n.18 (1983) (citing Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948)).

Fourteenth Amendment,[179] even though prior to *Seminole Tribe* the Supreme Court had found these same amendments were enacted pursuant to Congress's Article I commerce power.[180] Similarly, another court stated (in the context of patent law) that "[i]f federal legislation can be upheld as an exercise of federal power under any provision of the Constitution, the courts are bound to uphold it."[181] Therefore, although it is clear that Congress enacted section 106(a) of the Code under its Article I, Section 8 bankruptcy power[182] without any reference to the Fourteenth Amendment in its legislative history,[183] section 106(a) passes constitutional muster on account of its validity under Section 5 of the Fourteenth Amendment in remedially enforcing the protections of the Due Process Clause against state deprivations of property in bankruptcy cases.

XII. CONCLUSION

Thus, the posture of the issue is as follows: In 1998, a record number of 1,442,549 bankruptcy cases were filed;[184] a 1996 survey revealed that states were creditors in almost 363,000 bankruptcy cases and held claims totaling $3.6 billion;[185] under the most commonly accepted interpretation of *Seminole Tribe*,[186] states would be permitted to deplete bankruptcy estates without playing by the rules of the Code in federal court; the holding in *Seminole Tribe*, which was badly reasoned, is literally unworkable in the context of bankruptcy, and is "totally *contradictory* and *repugnant*"[187] to the intent of the Framers of the Constitution; and this issue of national concern has divided the federal courts.[188]

There is no question concerning the gravity of the problem and the urgency for a resolution of this constitutional dilemma. On one hand, Congress could repeal section 106(a) of the Code and expressly re-enact it under the Fourteenth

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179. *See* Hurd v. Pittsburg State Univ., 109 F.3d 1540, 1545 (10th Cir. 1997).

180. *See* EEOC v. Wyoming, 460 U.S. at 243.

181. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 948 F. Supp. 400, 422 n.23 (D.N.J. 1996), *aff'd on other grounds*, 131 F.3d 353 (3d Cir. 1997), *cert. granted*, 67 U.S.L.W. 3084 (U.S. Jan. 8, 1999) (No. 98-149) & 67 U.S.L.W. 3433 (U.S. Jan. 8, 1999) (No. 98-531).

182. U.S. CONST. art. I, § 8, cl. 4.

183. *See In re* NVR L.P., 206 B.R. 831, 840-41 (Bankr. E.D. Va. 1997), *aff'd in part and rev'd in part sub nom.* Clerk v. NVR Homes, Inc., 222 B.R. 514, 518 (E.D. Va. 1998) (holding that contested matter regarding exemption of real property from recordation taxes under reorganization plan is not a "suit" under the Eleventh Amendment).

184. *See* STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, SPECIAL TABLES, TABLE F-2 FOR THE TWELVE-MONTH PERIOD ENDED DEC. 31, 1998 (tables on file with the Statistics Division).

185. *See supra* note 9.

186. *See supra* note 38.

187. THE FEDERALIST No. 32 (Alexander Hamilton), *supra* note 116, at 80.

188. *See supra* notes 38, 51.

Amendment.[189] Another option would be to amend the Eleventh Amendment, thereby permitting federal jurisdiction over states based on federal questions,[190] but that solution is not politically realistic because the states would be unlikely to acquiesce in sharing billions of dollars with other creditors. Therefore, the time is ripe for the United States Supreme Court to reconsider its earlier decisions with a better-reasoned constitutional approach, and in consideration of the impracticalities and exigencies affecting millions of Americans who are participants as debtors and creditors in bankruptcy cases. More specifically, the Supreme Court should:

(1) follow the plain language of the Eleventh Amendment and overrule *Hans v. Louisiana*;[191] or

(2) pay deference to the intent of the Framers of the Constitution who granted Congress the exclusive authority to enact uniform laws on bankruptcy[192] and thus overrule its five-four decision in *Seminole Tribe*; or

(3) uphold section 106(a) as a valid exercise of Congress's remedial power under the Fourteenth Amendment to enforce the provisions of the Code, thereby preventing state deprivations of property of the bankruptcy estate without due process of law.[193]

The thorough and divergent *Seminole Tribe* opinions[194] foreshadowed the intricate constitutional problem certain to arise in the context of bankruptcy.[195] It has become clear that in order to preserve the uniform and equitable nature of the bankruptcy process and strike the proper constitutional balance of federal and state powers, abrogation of state Eleventh Amendment sovereign immunity in bankruptcy cases must be sanctioned by United States Supreme Court review and reinterpretation, or by appropriate legislation or constitutional reform.

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189. *Cf.* Wilson-Jones v. Caviness, 99 F.3d 203, 210 (6th Cir. 1996) ("The simplest way to meet [the first *Katzenbach* factor] is for Congress to declare explicitly that the legislation is passed to enforce Fourteenth Amendment rights."), *modified on other grounds*, 107 F.3d 358 (6th Cir. 1997).

190. *See* U.S. CONST. art. V.

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

192. *See* U.S. CONST. art. I, § 8, cl. 4.

193. *See id.* amend. XIV, §§ 1, 5.

194. *See* Seminole Tribe v. Florida, 517 U.S. at 47-76 (opinion of the Court, per Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.), 76-100 (Stevens, J., dissenting), 100-85 (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.).

195. *See id.* at 72 n.16, 77 n.1.