1-1-2000

Getting to Waiver – A Legislative Solution to State Sovereign Immunity in Bankruptcy After Seminole Tribe

Laura B. Bartell
Wayne State University, l.bartell@wayne.edu

Recommended Citation
Available at: http://digitalcommons.wayne.edu/lawfrp/26

This Article is brought to you for free and open access by the Law School at DigitalCommons@WayneState. It has been accepted for inclusion in Law Faculty Research Publications by an authorized administrator of DigitalCommons@WayneState.
Getting to Waiver—A Legislative Solution to State Sovereign Immunity in Bankruptcy after Seminole Tribe

by
Laura B. Bartell*

Introduction

In the aftermath of the Supreme Court’s decision in Seminole Tribe of Florida v. Florida,1 the inability of Congress to abrogate state sovereign immunity pursuant to the Bankruptcy Code2 has been repeatedly recognized.3 Yet it is essential for the fair and efficient operation of federal bankruptcy jurisdiction that all creditors, including those cloaked in the mantle of sovereign immunity, become subject to that jurisdiction and participate fully in the administration of bankruptcy cases.4 While there may be other

---

* Associate Professor of Law at Wayne State University Law School. This Article grew out of my participation in the National Conference of Bankruptcy Judges in San Francisco, during October 1999, as the recipient of a fellowship granted by the American Bankruptcy Law Journal. My thanks to the Journal for making my participation possible and to two of my fellow recipients, Jeffrey Davis and William A. Gregory, for helping me explore the topic. I would also like to thank Dean Joan Mahoney for the research support she has granted me, and my colleagues Robert Sedler and William Burnham for their valuable insights.

2 The Bankruptcy Code (the “Code”) is codified at 11 U.S.C. §§ 101-1330 (1999). In this Article, all section references are to sections of the Code unless otherwise specified.
3 See infra Part I.
4 See infra Part II.
theories on the basis of which the supremacy of federal bankruptcy law and the determinations of federal bankruptcy courts made pursuant thereto may be enforced against unwilling state actors despite their sovereign immunity,\(^5\) the protection of sovereign immunity can be eliminated only on a consensual basis, that is, when the state chooses to waive it.

This Article examines the concept of waiver of sovereign immunity\(^6\) in the bankruptcy context. After reviewing the

\(^5\) See infra Part II.

\(^6\) Except where a court uses constitutional terminology, I use the term "sovereign immunity" to refer to the protection afforded governmental units against being subjected to a suit or proceeding in any court without their consent. The terminology has proven somewhat confusing. Courts have long referred to this protection as embodied within the Eleventh Amendment to the Constitution. In fact, the Eleventh Amendment is much narrower in literal scope, explicitly providing merely that, "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Amendment was passed by Congress in 1794, hard on the heels of the decision of the Supreme Court in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), in which a divided Court concluded that pursuant to the Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, the federal court had jurisdiction over a suit by the executor of the estate of a deceased South Carolina merchant seeking payment for war supplies purchased by the State of Georgia. In dissent, Justice Iredell not only concluded that the Judiciary Act provided no such jurisdiction, but if Congress attempted to authorize such a suit, it would not be warranted under the Constitution. See id. at 449-50 (Iredell, J., dissenting). The swift passage and ratification (accomplished by February 1795) of the Eleventh Amendment effectively reversed the Court's decision in Chisholm and barred suits against states by non-citizens thereof in federal court. See generally CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 46-74 (1972); Alan D. Cullison, Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers), 5 HOUS. L. REV. 1, 10-14 (1967).

The next major expansion of the scope of the Eleventh Amendment came in response to the Act of March 3, 1875, ch. 137, 18 Stat. 470, which vested federal courts with concurrent jurisdiction over all civil cases arising under the Constitution or laws of the United States, i.e., the first federal question jurisdiction statute. Pursuant to this jurisdictional grant, a citizen of Louisiana brought suit against his own state in federal court to recover money owed on state obligations. See Hans v. Louisiana, 134 U.S. 1 (1890). In Hans, the Supreme Court upheld the dismissal of the suit on Eleventh Amendment grounds, concluding that the Eleventh Amendment rectified an erroneous interpretation of the scope of Article III of the Constitution, and that the Constitution never contemplated that federal judicial power would extend to suits against a state instituted by its own citizens any more than it extended to cross-border diversity cases. See id. at 15.

controversial holding of the Supreme Court in Seminole Tribe and its implications for § 106(a) of the Code in Part I, Part II of this Article explores why bankruptcy policy mandates the voluntary participation of the states, and why other proposed solutions to sovereign immunity are useful, but inherently flawed.

Having concluded that the bankruptcy system can operate effectively only if states waive their sovereign immunity, Part III looks at the concept of voluntary waiver and discusses what actions constitute waiver, who can waive on behalf of a state, the potential claims covered by a voluntary waiver, and which arms of the state are bound thereby. Finally, Part IV concludes by suggesting legislative actions that might encourage voluntary waivers by the states and examines the constitutionality of these proposed legislative amendments.

I. SECTION 106(a) AND SEMINOLE TRIBE

Although the Bankruptcy Act of 18987 conferred jurisdiction on the bankruptcy courts over certain matters relating to claims of sovereign entities against a debtor in § 2a thereof,8 it contained no waiver of sovereign immunity on behalf of the federal government or abrogation of immunity held by the states. Therefore, under the

---

8 For example, § 2a(2A) of the Bankruptcy Act, vested the federal courts, acting as courts of bankruptcy, with jurisdiction to "[h]ear and determine ... any question arising as to the amount or legality of any unpaid tax, whether or not previously assessed, which has not prior to bankruptcy been contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction ... ." 11 U.S.C. § 11(a)(2A) (1966), repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. The courts also had jurisdiction to allow or disallow claims, see id. § 11(a)(2), and determine the dischargeability of debts and grant or deny discharge to debtors, see id. § 11(a)(12).
Act, courts concluded that a bankruptcy court could exercise its § 2a jurisdiction even with respect to a governmental entity that had not consented to the exercise of that jurisdiction, but could not subject an unwilling state to suit because the Act did not abrogate a state's sovereign immunity.

In order to remedy this statutory deficiency, and consistent with the recommendation of the Commission on the Bankruptcy Laws of the United States, Congress included a new provision in the Bankruptcy Reform Act of 1978, codified as § 106(c) of the Code, which purported to make all provisions of the Code dealing with "creditors" applicable to governmental units and to bind them by any court determination pursuant to such a provision, "notwithstanding any assertion of sovereign immunity." The provision was intended not only to codify the results of those cases

---

9 See, e.g., Bostwick v. United States (In re Bostwick), 521 F.2d 741, 744 (8th Cir. 1975); Gwilliam v. United States (In re Gwilliam), 519 F.2d 407, 410 (9th Cir. 1975); California State Bd. of Equalization v. Goggin, 191 F.2d 726, 728 (9th Cir. 1951); In re Epstein, 416 F. Supp. 947, 949 (E.D.N.Y. 1976); In re Durensky, 377 F. Supp. 768, 800 (N.D. Tex. 1974), appeal dismissed, 519 F.2d 1024 (5th Cir. 1975); In re Murphy, 381 F. Supp. 813, 816 (N.D. Ala. 1974) (dictum), aff'd sub. nom. Murphy v. United States IRS, 533 F.2d 941 (5th Cir. 1976); In re O'Ffill, 368 F. Supp. 345, 350-51 (D. Kan. 1973); In re Savage, 329 F. Supp. 968, 969 (C.D. Cal. 1971); see also Gardner v. New Jersey, 329 U.S. 565, 572 (1947) (exercise of jurisdiction over proof and allowance of tax claims under § 77 of Act was not suit against state). But cf. United States v. Mel's Lockers, Inc., 346 F.2d 168, 170 (10th Cir. 1965) (U.S. did not waive sovereign immunity with respect to injunctions against acts by Small Business Administration; bankruptcy injunction not binding on SBA).


14 See id. Section 106(c) of the Code, as enacted in 1978, provided as follows:

(c) Except as provided in subsection (a) [dealing with waiver of sovereign immunity by the filing of a proof of claim] and (b) [dealing with offset against claims of governmental units] of this section and notwithstanding any assertion of sovereign immunity—

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

(2) a determination by the court of an issue arising under such a provision binds governmental units.
previously allowing a bankruptcy court to make determinations within its jurisdictional grant that would be binding on governmental players, but also to permit the exercise of avoiding powers against a governmental unit.

The statute worked effectively for several years, providing a basis for rejecting assertions of sovereign immunity by nonconsenting states in bankruptcy proceedings. But in 1989, resolving a conflict between the circuits with respect to the impact of § 106(c), the Supreme Court held in *Hoffman v. Connecticut Department of Income Maintenance* that § 106(c) of the Code did not effectively abrogate a state's Eleventh Amendment immunity with respect to money judgments, if a state had not filed a proof of claim in the case. Relying on the Court's prior decision in *Atascadero State Hospital v. Scanlon*, the plurality opinion concluded that Congress had failed to make its intention to abrogate sovereign immunity "unmistakably clear in the language of the statute." The plurality viewed the language of § 106(c) as "more indicative of declaratory and injunctive relief than of monetary recovery," and concluded that, while a state that did not file a proof of claim would be bound by discharge of debts in bankruptcy, it would not be subject to

---

15 See supra note 9 and cases cited therein.

16 See 124 CONG. REC. H32,594 (Sept. 28, 1978) (statement of Rep. Edwards); id. at S33,993 (Oct. 5, 1978) (statement of Sen. DeConcini) ("[S]ection 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit.").


20 With respect to the Court's invocation of the Eleventh Amendment, see supra note 6.


23 *Id.* at 102.
monetary judgments. Therefore, the Court affirmed the dismissal of actions by the trustee in bankruptcy against the state under §542 (requiring turnover of property of the estate) and §547 (avoidance of preferences) as barred by the Eleventh Amendment.

Following Hoffman, lower courts were compelled to dismiss claims seeking monetary relief against states under the Bankruptcy Code. After the Supreme Court followed the analysis of the Hoffman plurality to find the language of §106(c) insufficiently clear to abrogate federal sovereign immunity, as well as that of the states, Congress acted to express its intention more clearly. In the Bankruptcy Reform Act of 1994, Congress amended §106 to

24 See id.

25 Concurring in part and dissenting in part, Justice Scalia reiterated his belief, first expressed in his dissenting opinion in Pennsylvania v. Union Gas Co., that Congress cannot abrogate sovereign immunity pursuant to the exercise of its Article I powers. See 491 U.S. 1, 35-42 (1989) (Scalia, J., dissenting), overruled by Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). Noting that Union Gas involved the Commerce Clause (an Article I power), Justice Scalia stated that, "there is no basis for treating [Congress's] powers under the Bankruptcy Clause any differently." Hoffman, 492 U.S. at 105. The dissenting Justices agreed that congressional power under the Bankruptcy Clause should be coextensive with its Commerce Clause powers with respect to abrogation, and thus would have concluded that Union Gas allowed abrogation of sovereign immunity pursuant to the Bankruptcy Clause. See id. at 111 (Marshall, J., dissenting). They also would have concluded that §106(c) was sufficiently clear to constitute such an abrogation. See id. at 106-09 (Marshall, J., dissenting).


27 See United States v. Nordic Village, 503 U.S. 30 (1992). Justice Scalia wrote the opinion, which stated that the case was not controlled by Hoffman because the deciding vote (his own concurrence) in Hoffman turned on the Eleventh Amendment immunity of the states and the federal government has no such constitutional protection. See id. at 33.


29 The new §106(a) provided:

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


(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,
"expressly provide[] for abrogation of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief." The amendment survived challenge and was held to abrogate state sovereign immunity until the Supreme Court issued its opinion in Seminole Tribe of Florida v. Florida. Although not a bankruptcy case, Seminole Tribe demolished the accepted constitutional foundations of § 106(a) of the Code, and likely doomed all efforts at congressional abrogation of state sovereign immunity in bankruptcy cases.

Pursuant to the Indian Gaming Regulatory Act (IGRA), enacted by Congress under the Indian Commerce Clause of the Constitution, Indian tribes are permitted to conduct certain gaming activities only in conformance with a compact entered into by the tribe and a state. The IGRA states that, upon receiving a request by a tribe, "the State shall negotiate with the Indian tribe in

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

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

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


good faith to enter into such a compact." The IGRA further confers on the United States district courts jurisdiction over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe" with respect to its request for a compact, "or to conduct such negotiations in good faith." The Seminole Tribe of Florida commenced such an action against the State of Florida, claiming that Florida had refused to negotiate with respect to a compact.

The State moved to dismiss the complaint. It argued that it had sovereign immunity from suit in federal court and that Congress had no power to abrogate that immunity—as the IGRA purported to do—when acting pursuant to the Indian Commerce Clause. The Court of Appeals for the Eleventh Circuit agreed, remanding the case to the district court with directions to dismiss the suit. The Seminole Tribe sought review by the Supreme Court. By a five to four decision, the Court affirmed.

Although Congress may abrogate the sovereign immunity of the States, the Court emphasized it may do so only if two conditions are satisfied. First, it must express its intent to do so "unequivocally." In the IGRA, the Court held, Congress's intent to abrogate was "unmistakably clear." Second, Congress must have acted "pursuant to a valid exercise of power," i.e., "a constitutional

---

56 Id. § 2710(d)(3)(A).
57 Id. § 2710(d)(7)(A)(i). Such a suit by an Indian tribe can be commenced "only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations." Id. § 2710(d)(7)(B)(i). The IGRA contains detailed provisions with respect to burden of proof and available remedies in any such suit, including provisions for mandatory mediation with respect to the compact. See id. § 2710(d)(7)(B)(ii)-(vii).
59 See id. at 656.
60 See id.
61 See id.
62 See Seminole Tribe of Fla. v. Florida, 11 F.3d 1016, 1029 (11th Cir. 1994). The court agreed with the State both that abrogation of the State's sovereign immunity pursuant to the Indian Commerce Clause was barred by the Eleventh Amendment to the Constitution and that the Seminole Tribe could not compel compact negotiations by suing the governor under Ex parte Young, 209 U.S. 123 (1908).
64 See id. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).
65 See id. at 56 (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).
66 Id. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).
provision granting Congress the power to abrogate." The Court had previously identified section 5 of the Fourteenth Amendment as such a provision, but the IGRA was not enacted under the Fourteenth Amendment. Yet, the Court had even more recently held in *Pennsylvania v. Union Gas Co.* that Congress had the power to abrogate state sovereign immunity pursuant to the Interstate Commerce Clause. The Court agreed with the petitioners that the plurality opinion in *Union Gas* allowed "no principled distinction in favor of the States to be drawn between the Indian Commerce Clause [pursuant to which Congress enacted the IGRA] and the Interstate Commerce Clause."

But instead of upholding the IGRA abrogation provisions, as would be required by *Union Gas*, the Court concluded that "both the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III." Therefore, the Court overruled *Union Gas*, and instead stated flatly that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Acknowledging, as Justice Stevens noted in dissent, that its decision would apply to Congressional attempts to abrogate state sovereign immunity

---

47 *Id.* at 59.

48 Section 1 of the Fourteenth Amendment (ratified July 9, 1868) provides in part that, *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S. CONST. amend. XIV, § 1. Section 5 of the Amendment states that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5.


50 491 U.S. 1 (1989). The *Union Gas* decision was by a plurality of the Court. The fifth vote was supply by Justice White, who stated in his concurrence that, with respect to the constitutional issue, "I agree with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of [the plurality's] reasoning." *Id.* at 57 (White, J., concurring). He provided no elucidation on the source of his disagreement. *See id.*

51 *See* U.S. CONST. art. I, § 8, cl. 3; *see supra* note 34.


53 *Id.* at 66.

54 *See id.*

55 *Id.* at 72-73.

56 *See id.* at 77 n.1 (Stevens, J., dissenting).
pursuant to bankruptcy, copyright, and antitrust laws, the Court suggested that "there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States," and therefore the impact of the decision was not likely to be significant.

The impact of Seminole Tribe on § 106(a) of the Code was immediately apparent. Virtually every court faced with the issue since Seminole Tribe has concluded that § 106(a) of the Code was enacted pursuant to the Bankruptcy Clause of the Constitution, an Article I power, and that, under Seminole Tribe, § 106(a) cannot abrogate a state's sovereign immunity.

---

57 The Court has since explicitly applied Seminole Tribe to the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), which purported to abrogate explicitly sovereign immunity with respect to patent infringement actions. See 35 U.S.C. §§ 271, 296(a) (2000). In Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, the Court noted that "Seminole Tribe makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause." 527 U.S. 627, 636 (1999).


59 The Court further suggested that the availability of injunctive relief under Ex parte Young; 209 U.S. 123 (1908), against a state officer's ongoing violation of federal law, would help ensure state compliance with federal law. See Seminole Tribe, 517 U.S. at 72-73. However, in Seminole Tribe, the Court declined to permit an Ex parte Young action against Governor Chiles, concluding that, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right [as it did in § 2710(d) of the IGRA], a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young." Id. at 74.

60 After Seminole Tribe, the Court vacated and remanded to the Seventh Circuit for reconsideration in light of Seminole Tribe a case in which that court had found the enactment of § 106(a) a valid exercise of congressional power under the Bankruptcy Clause of Article I. See In re Merchants Grain Inc., 59 F.3d 630, 634-36 (7th Cir. 1995), vacated sub nom. Ohio Agric. Depositors Fund v. Mahern, 517 U.S. 1130 (1996). This action certainly suggested that the Supreme Court thought Seminole Tribe had some bearing on the constitutionality of § 106(a).

61 See U.S. CONST. art. I, § 8, cl. 4. Congress has the power "[t]o establish ... uniform laws on the subject of bankruptcies throughout the United States..." Id.

A few recent bankruptcy court cases have tried to distinguish the Article I Bankruptcy Clause from the Article I Indian Commerce Clause at issue in *Seminole Tribe* by suggesting that ratification of the Constitution, which includes a grant of the power to enact uniform bankruptcy laws, itself constitutes a surrender of state sovereignty effective when Congress chooses to enact such laws.\(^6\) Although there is no doubt the states surrendered some of their sovereignty when they agreed to confer on Congress the power to enact uniform bankruptcy laws, it seems unlikely that the scope of that surrender extended beyond relinquishment of their sovereign power to enact bankruptcy laws themselves.

A few courts have sought to overcome the clear import of *Seminole Tribe* by finding that § 106 was enacted pursuant to section 5 of the Fourteenth Amendment, which was the sole constitutional source of power for congressional abrogation of state sovereign immunity after *Seminole Tribe*.\(^4\) However, this argument has been

---


rejected by the vast majority of courts that have analyzed it,\(^55\) and is even more problematic after the decisions of the Supreme Court in *Boerne v. Flores*,\(^66\) *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,\(^67\) and *Kimel v. Florida Board of Regents*.\(^68\) These cases imposed limits on congressional power under section 5 of the Fourteenth Amendment.

In *Boerne*, the Court struck down the Religious Freedom Restoration Act of 1993 (RFRA),\(^69\) ostensibly enacted by Congress pursuant to its powers under section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions" of the Amendment protecting all persons from state deprivation of "life, liberty, or property, without due process of law" or "equal protection of the laws."\(^70\) While acknowledging that the protections afforded by the First Amendment, including the Free Exercise Clause,\(^71\) are included in the guarantee of "liberty" in the Due Process Clause of the Fourteenth Amendment,\(^72\) the Court emphasized that congressional powers under section 5 were limited to remedial acts aimed at *enforcement* of the substantive rights guaranteed by the Amendment, not efforts to define (or redefine)\(^73\)

\(^52\) U.S. 507 (1997).
\(^52\) U.S. 627 (1999).
\(^54\) U.S. CONST. amend. XIV, § 1; *see supra* note 48.
\(^55\) U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...")
\(^56\) *See Boerne v. Flores*, 521 U.S. 507, 519 (1997).
\(^57\) The RFRA was adopted by Congress in an effort to overturn the Supreme Court decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Court rejected a claim brought by members of the Native American Church who were refused unemployment benefits when they lost their jobs because they used peyote (an illegal drug) for sacramental purposes and challenged the drug law under the Free Exercise Clause as made applicable to the states through the Fourteenth Amendment. The Court refused to apply a test that would have struck down a state law that substantially burdened a religious practice unless it served a "compelling government interest." *See id.* at 883-89. Instead it held that a neutral, generally applicable state law would be upheld despite its burden on religion unless other constitutional protections were at stake. *See id.* at 881-82. The stated purposes of the RFRA included "restor[ing] the compelling interest test... and to guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b) (1993). The RFRA would thus redefine what constituted a constitutional claim...
what those rights are. To the extent that the RFRA could be considered remedial rather than substantive, the Court emphasized that there must still be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." The solution proposed by Congress was "so out of proportion to a supposed remedial or preventive object" that it could not stand.

If the Boerne decision put teeth into the requirement of section 5 that congressional acts be designed "to enforce" rather than to define Fourteenth Amendment rights, Florida Prepaid and Kimel narrowly interpreted the requirement of section 5 that such enforcement be "by appropriate legislation." The legislation at issue in Florida Prepaid was the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), adopted by Congress in 1992 to provide expressly for abrogation of state sovereign immunity in patent infringement cases. Recognizing that, after Seminole Tribe, the Patent Remedy Act could not be sustained if it was enacted under one of the Article I powers of Congress, the patent holder argued that the Patent Remedy Act was properly enacted by Congress under section 5 to prevent deprivations of property interests (which patent fights undoubtedly were) by infringing states without "due process of law" in violation of the Fourteenth Amendment’s Due Process Clause. In response, the Court held that, in order to sustain a legislative act under section 5, Congress must "identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." In enacting the Patent Remedy Act, Congress had failed to do either.

The Court first found that Congress had not identified any pattern of patent infringement by the states. Indeed, few instances

---

Footnotes:

74 See Boerne, 521 U.S. at 519.
75 See id. at 520.
76 See id. at 532.
77 See supra note 48.
81 Id. at 639.
of patent infringement suits against states were prosecuted in the 110 years prior to enactment of the Patent Remedy Act.\textsuperscript{82} Even if there were instances of patent infringement by states, they would not rise to the level of a violation of the Due Process Clause unless the states provided no remedy or an inadequate remedy (that is, lack of "due process") to address the infringement. The Court noted that Congress had not considered the availability of state remedies for patent infringement.\textsuperscript{83} Nor can a deprivation of property by a state constitute a violation of the Due Process Clause if it is not intentional or reckless.\textsuperscript{84} The legislative record demonstrated that most state infringement was negligent at worst.\textsuperscript{85} Finally, the Court emphasized that even if a problem of constitutional dimension were made out, Congress must tailor its response proportionately.\textsuperscript{86} Here, Congress did not limit the scope of the Patent Remedy Act to those states engaging in non-negligent infringement, or those who provided inadequate state remedies, or those who had a history of frequent infringement.\textsuperscript{87} Instead, Congress merely sought to treat states on the same basis as other patent infringers.\textsuperscript{88} The goal of a uniform remedy for patent infringement, the Court held, is a proper one, but is not the focus of the Fourteenth Amendment. Therefore, it can be effectuated by Congress only pursuant to its Article I powers, which are limited by state sovereign immunity.\textsuperscript{89}

The Court reached the same conclusion with respect to the Age Discrimination in Employment Act of 1967 (ADEA)\textsuperscript{90} in \textit{Kimel}.\textsuperscript{91} Although concluding that Congress had made clear its intent to abrogate the immunity from suit of discriminating state employers,\textsuperscript{92}
the majority found Congress had failed to meet the "congruence
and proportionality" test established by Boerne and applied in Florida Prepaid.\textsuperscript{93} Looking at the ADEA, the Court noted that the Act
purported to make unlawful conduct constituting discrimination
based on age that would not be unconstitutional under the
Fourteenth Amendment.\textsuperscript{94} While the Court emphasized that
Congress is given significant leeway in addressing difficult problems,
after examining the evidence of discrimination presented to
legislators, the Court found that application of the ADEA to the
states was "an unwarranted response to a perhaps inconsequential
problem" in that "Congress never identified any pattern of age
discrimination by the States, much less any discrimination
whatsoever that rose to the level of constitutional violation."\textsuperscript{95} When
coupled with the "indiscriminate scope of the Act’s substantive
provisions,"\textsuperscript{96} the lack of evidence establishing a problem of
constitutional dimension doomed the ADEA abrogation provision.

To ground § 106(a) of the Code in congressional power under
section 5 of the Fourteenth Amendment after Boerne, Florida Prepaid
and Kimel, one would first have to find a substantive provision of the
Amendment the state violation of which § 106(a) is aimed at
redressing. Those courts that have upheld § 106(a) on this basis
have identified the Privileges or Immunities Clause\textsuperscript{97} as such a
provision.\textsuperscript{98} However, the problem with this analysis is that it is

\textsuperscript{93} See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S.
627, 639 (1999).

\textsuperscript{94} The majority noted that age had consistently been held not to be a suspect
classification entitled to the benefit of heightened scrutiny under Fourteenth Amendment
jurisprudence. Therefore, discrimination on account of age would be sustained against
constitutional attack so long as the age classification is "rationally related to a legitimate state
interest." See Kimel, 528 U.S. at 83. The ADEA’s substantive provisions, the Court concluded,
"remain at a level akin to our heightened scrutiny cases under the Equal Protection Clause."
Id. at 88.

\textsuperscript{95} Id. at 89.

\textsuperscript{96} Id. at 91.

\textsuperscript{97} U.S. CONST. amend. XIV, § 1. “No State shall make or enforce any law which shall
abridge the privileges or immunities of citizens of the United States . . . .” See id.

\textsuperscript{98} The Code creates a "complex of privileges and immunities," including the:

privilege of efficient liquidation or other use and ratable distribution of a debtor's
completely untenable as a matter of constitutional doctrine. The Court made it very clear in Boerne that it is not the province of Congress to define the substance of the rights protected by the Fourteenth Amendment, but merely to enforce them. If Congress could create "privileges or immunities" of citizenship merely by legislating pursuant to its Article I powers, the substance of the Constitution would be defined by the legislative branch of government, rather than the judicial. The judicial branch has, in fact, spoken on the privileges and immunities protected by the Privileges or Immunities Clause of the Fourteenth Amendment, and has found them to be extremely limited.99 Not only has the Court

assets, or . . . immunity from inefficient liquidation of use and inequitable distribution of a debtor's assets which may obtain under State laws; the privilege of discharge, or . . . 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.


99 In the Slaughter-House Cases, 83 U.S. 36 (1872), a divided Court interpreted the Privileges or Immunities Clause as protecting only those privileges and immunities "which owe their existence to the Federal government, its National character, its Constitution, or its laws." Id. at 79. The Court provided as examples,

the right of the citizen of this great country, . . . to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions" as well as "the right of free access to its seaports, . . . to the subtreasuries, land offices, and courts of justice in the several States.

Id. The Court also cited the right "to demand the care and protection of the Federal government . . . when on the high seas or within the jurisdiction of a foreign government," and "the right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus" and "the right to use the navigable waters of the United States." Id. Finally, the Court mentioned the right to "become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State" and "the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth." Id. at 79-80. The decision in the Slaughter-House Cases effectively eliminated the Clause as a useful constitutional check on state power. See generally, e.g.,
never suggested that the rights created by the Code are privileges or immunities of citizenship, it has expressly concluded that no debtor has a constitutional right to a discharge of his debts in bankruptcy or, indeed, even access to the bankruptcy process if he cannot prepay filing fees. To suggest that operation of the bankruptcy system with involuntary state participation is a privilege or immunity of federal citizenship is fanciful, and most courts have rejected the notion.

Of course, there are other substantive protections provided by the Fourteenth Amendment, in particular the Due Process Clause and Equal Protection Clause. But arguments that §106(a) was enacted, or could have been enacted, pursuant to section 5 to remedy violations of these substantive clauses, have uniformly


The Court recently invoked the Privileges or Immunities Clause in striking down a California statute that limited welfare benefits payable to new state residents to the amount payable by the state from which the resident moved until the resident had lived in California for twelve months. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Court found the Clause protected the right of a citizen of the United States to choose to become a citizen of a state, and thereafter be afforded the same rights under state law as other citizens of that state. The Court viewed this protection as part of the constitutional right to travel from one state to another. See id. at 501-04.

See United States v. Kras, 409 U.S. 434, 446 (1973). The Court saw bankruptcy as "in the area of economics and social welfare" and the discharge as "a legislatively created benefit, not a constitutional one, and ... a benefit withheld, save for three short periods, during the first 110 years of the Nation's life." Id. at 446-47.

In fact, the provisions of the Code benefit all debtors, not merely those who are citizens of the United States. A "debtor" under the Code "means person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(13) (1999). A "person" "includes individual, partnership, and corporation ... ." 11 U.S.C. § 101(41) Nothing precludes a non-citizen from seeking protection under the Code. The rights or privileges afforded by the Code therefore cannot be "rights or privileges of citizens of the United States" referred to in the Privileges or Immunities Clause.


See supra note 48.
failed;\textsuperscript{104} and it is difficult to see where the failure to include states in the bankruptcy process, who do not choose such inclusion, amounts to constitutionally prohibited discrimination\textsuperscript{105} or deprivation of property without due process of law.\textsuperscript{106}

Even if one could identify a substantive right protected by the Fourteenth Amendment, which would be furthered by abrogating state sovereign immunity in bankruptcy, the hurdles erected by Florida Prepaid and Kimel to upholding § 106(a) under section 5 of the Fourteenth Amendment would be difficult to overcome. First, one must locate a pattern of Code provision violations by the states. Neither at the time of the original enactment of § 106, nor when it was amended to waive sovereign immunity more clearly,\textsuperscript{107} did Congress analyze whether states were frequently violating the Code,\textsuperscript{108} and a fortiori did not consider whether an alternative

\textsuperscript{104} See, e.g., United States v. Nebraska Dep’t of Revenue (In re Doiel), 228 B.R. 439, 445-48 (D.S.D. 1998); see also cases cited supra note 65.

\textsuperscript{105} Given that the Equal Protection Clause of the Fourteenth Amendment was intended to ensure nondiscriminatory treatment by government, see, e.g., Katzenbach v. Morgan, 384 U.S. 641, 652 (1966), one might ask what constitutes the class against which the state discriminates by retaining sovereign immunity in bankruptcy cases. Debtors? Debtors without assets available to distribute to creditors (because if there are assets available the state will file a proof of claim and thereby consent to jurisdiction)? Debtors without assets available to distribute to creditors in excess of any preferential payments or fraudulent transfers the state has received? Or perhaps not debtors at all, but other non-governmental creditors of debtors without assets available to distribute to creditors in excess of any preferential payments or fraudulent transfers the state has received? There is simply no readily definable class, suspect or other, that can be seen as the object of invidious discrimination by state action. Cf. Wilson-Jones v. Caviness, 99 F.3d 203, 210 (6th Cir. 1996) ("We think it best to ‘regard as an enactment to enforce’ the Equal Protection Clause, in the absence of explicit comment by Congress, only efforts to remedy discrimination against a class of persons that Fourteenth Amendment jurisprudence has already identified as deserving special protection.").

\textsuperscript{106} The argument has been made that a state’s refusal to consent to the jurisdiction of the bankruptcy court deprives the bankruptcy estate of property in the form of its claim against the state, and therefore the Due Process Clause is implicated. See Kenneth N. Klee et al., State Defiance of Bankruptcy Law, 52 Vand. L. Rev. 1527, 1583 n.284 (1999). But § 106(a) purported to make states subject to suit only for certain causes of action created by the Code itself, not state law claims that might devolve to the bankruptcy estate by virtue of § 541. In the absence of § 106(a), there is no cause of action against a nonconsenting state to constitute property of the estate. Therefore, the inability of the trustee to pursue these causes of action against the nonconsenting state does not deprive the estate of property because the estate would have had the property in the first instance only if § 106(a) withstood constitutional attack.

\textsuperscript{107} See supra notes 28-30 and accompanying text.

\textsuperscript{108} In connection with the Bankruptcy Reform Act of 1994, see supra note 28, Kenneth N. Klee, then chairman of the Legislation Committee for the National Bankruptcy Conference, submitted to Congress a National Bankruptcy Conference Position Paper including a
remedy might be provided to those injured by any such violation in state court. Even if Congress were now to undertake such an investigation, only a legislative response that is "tailor[ed] . . . to remedying or preventing such conduct"¹⁰⁹ can be upheld under section 5 of the Fourteenth Amendment. Section 106(a) makes no distinction between states that transgress and those which do not, states which provide alternative remedies and those which do not, or states which intentionally violate the Code and those whose violations are inadvertent. It is intended, as was the Patent Remedy Act at issue in Florida Prepaid, simply to provide for uniform treatment as between states and others with respect to the federal rights afforded by the legislation, bankruptcy in one case and patent infringement in the other. That goal of uniformity, the Supreme Court held in Florida Prepaid, is an Article I goal, and legislation promoting it cannot be upheld under the Fourteenth Amendment.¹¹⁰ The abrogation of state sovereign immunity contained in § 106(a) of the Code, intended to place governmental creditors on a uniform footing with nongovernmental creditors, cannot be sustained pursuant to section 5 of the Fourteenth Amendment.

II. WHY DOES SOVEREIGN IMMUNITY MATTER IN BANKRUPTCY?

Why should we be concerned that § 106(a) is unconstitutional as applied to the states? After all, the states are certainly bound by federal law, including the substantive provisions of the Code, by virtue of the Supremacy Clause of the Constitution.¹¹¹ Even if a state

¹¹⁰ See id. at 645-648.
¹¹¹ U.S. CONST. art. VI, cl. 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land;
is a creditor, the bankruptcy case filed by or against the debtor is not a suit "against" the state and is therefore not barred by sovereign immunity.\(^{112}\) And the states are also bound by the consequences of any such case, including the discharge of their debts, whether they file a proof of claim or not.\(^{113}\) Why is submission of states to the bankruptcy jurisdiction of the federal courts necessary? The short answer is that federal bankruptcy policy is undermined to the extent that a federal court cannot directly enforce the provisions of the Code against a nonconsenting state creditor of a debtor.

Underlying the Code are two fundamental objectives. First, Congress wished to provide an opportunity for honest debtors\(^{114}\) to obtain a fresh start in life after paying what they can to their creditors.\(^{115}\) Second, the Code was intended to provide a collective

---

\(^{112}\) See, e.g., Virginia v. Collins (In re Collins), 173 F.3d 924, 929-30 (4th Cir. 1999); Texas v. Walker, 142 F.3d, 813, 822 (9th Cir. 1998); Antonelli Creditors' Liquidating Trust, 123 F.3d at 786-87.


\(^{114}\) The debtors with whom Congress was concerned were individual debtors; others are not entitled to a discharge. See 11 U.S.C. § 727(a)(1) (1999).

mechanism for satisfaction of creditors pursuant to which similarly situated creditors would be treated equally, without preference of one over the other.\textsuperscript{116} This collective system has the additional benefit of maximizing value for all creditors over that obtainable by the piecemeal dismemberment of the debtor when individual creditors pursue their own interests in separate proceedings.\textsuperscript{117}

How does the nonparticipation by unwilling states affect these goals? To reflect on this question, one must first consider what aspects of the Code may be at issue between the state and the other interested parties in the bankruptcy case.

When the debtor files for protection under the Code, "all legal or equitable interests of the debtor in property as of the commencement of the case" become part of the bankruptcy "estate."\textsuperscript{118} If any such property is in the hands of a third party, such third party must deliver it to the trustee under the Code's turnover provisions.\textsuperscript{119} In addition, all entities are subject to the automatic stay,\textsuperscript{2} which protects the debtor, his property, and property of the estate from various acts. At this stage of the case, a nonconsenting

\textsuperscript{115} As Congress described it in 1994, the Code is intended "to enforce a distribution of the debtor's assets in an orderly manner in which the claims of all creditors are considered fairly, in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor." H.R. REP. NO. 103-835, at 33 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3341. See, e.g., New York State Elec. & Gas Corp. v. McMahon (In re McMahon), 129 F.3d 93, 97 (2d Cir. 1997); Newbery Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392, 1399 (9th Cir. 1996); Liona Corp. v. PCH Assoc. (In re PCH Assoc.), 949 F.2d 585, 598 (2d Cir. 1991); Epstein v. Official Comm. of Unsecured Creditors (In re Piper Aircraft Corp.), 168 B.R. 434, 440 (S.D. Fla. 1994), aff'd, 58 F.3d 1573 (11th Cir. 1995); Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.), 127 B.R. 453, 454 (E.D. Cal. 1991), aff'd, 955 F.2d 777 (9th Cir. 1992). See generally Ralph Brubaker, Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations, 1997 U. ILL. L. REV. 959, 980-81; Frederick Tung, Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy, 49 CASE W. RES. L. REV. 435, 482 & n.184 (1999); Pamela Kohlman Webster, The Malpractice of Health Care Bankruptcy Reform, 32 LOY. L.A. L. REV. 1045, 1054 (1999). Of course, there are exceptions to this general policy of equal treatment. Certain debts are excepted from discharge as a matter of public policy, see 11 U.S.C. §523 (1999), and others are given priority in the distribution of the assets of the estate, see id. § 507(a). As discussed infra Part IV, the Code already gives governmental units special treatment over other creditors.


\textsuperscript{117} See id. §§ 542, 543.


\textsuperscript{119} See id. §362.
state may be in possession of property of the estate, or may (inadvertently or intentionally) take actions that are precluded by the automatic stay.

Next, the trustee seeks to augment the estate by pursuing claims held by the estate against others. Among those claims will be causes of action created by the Code itself, such as claims for preferences, fraudulent conveyances, preferential set-offs, and avoidable postpetition transfers. Given that the state, in its role as taxing authority, is likely to be a creditor of every debtor, and one with significant leverage to obtain payment of amounts due, the recipient of those preferences, fraudulent conveyances, preferential set-offs, and postpetition transfers may well be a state.

The trustee may also seek to avoid creditor liens, either because they are unperfected or because they impair the debtor's exemptions, or may seek to determine who has title to certain property. The state may hold such a lien (for example, a tax lien that has not been filed) or have a claim to such property.

Because certain tax debts and debts for educational loans made, insured, or guaranteed by governmental units are not dischargeable if the provisions of § 523(a) of the Code exclude them from discharge, either before or after discharge is granted, the debtor may wish to seek a determination of whether such claims are dischargeable. Those claims may be held by the state.

Upon discharge, the debtor has the benefit of a permanent injunction against actions to collect any discharged debt. In addition, governmental units are prohibited from certain discriminatory treatment of debtors or former debtors with respect to licenses, permits, charters, franchises or other similar grants,

---

111 See id. § 547.
112 See id. § 548.
113 See id. § 553.
114 See id. § 549.
115 See id. § 544(a).
116 See id. § 522(f)(1).
117 See id. § 523(a)(1)(c) (excluding from discharge, among other tax debts, those "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax").
118 Section 523(a)(8) makes such debts for educational loans non-dischargeable, unless excepting the debt from discharge "will impose an undue hardship on the debtor and the debtor's dependents." Id. § 523(a)(8).
119 See id. § 523(b).
120 See id. § 524(a)(2).
employment, and student loan programs. The state may be the party to whom such discharged debt was owing, and may take actions (again, inadvertently or intentionally) to collect such discharged debt. The state may also be the governmental unit that engages in discriminatory treatment prohibited by the Code.

Now suppose the trustee or the debtor wishes to pursue the remedies provided for these wrongs under the Code, that is, request the bankruptcy court to do any of the following: to compel the state to turn over property of the estate; to enjoin the state's violations of the automatic stay and obtain damages for any past violation; to force the state to disgorge any preference or fraudulent conveyance or preferential set-off it received prior to the filing of the petition and return any post-petition transfers it received; to avoid the state's lien or determine whether the state has title to property; to determine the dischargeability of tax debts or student loans owed to a state agency; to enjoin violations of the permanent injunction or seek a declaration that the state's conduct violates the injunction, and secure damages for such violations; to order the state to grant a license, permit, charter, franchise, or other similar grant; or to order the state to offer employment or a student loan to the debtor. In the absence of sovereign immunity, all those remedies are within the power of a bankruptcy court and may be ordered against a creditor. The problem for the post-Seminole Tribe trustee or debtor is that a cause of action seeking each type of relief listed above must be brought as an adversary proceeding, commenced by filing a complaint and serving a summons and complaint upon the defendant. Each of those types of adversary proceeding against a nonconsenting state has been found barred by sovereign immunity in the aftermath of Seminole Tribe.

---

151 See id. §§ 525(a), 523(c).

152 Federal Rule of Bankruptcy Procedure 7001 defines an adversary proceeding (in relevant part) as a proceeding: "(1) to recover money or property... (2) to determine the validity, priority, or extent of a lien or other interest in property... (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief... (9) to obtain a declaratory judgment relating to any of the foregoing...." FED. R. BANKR. P. 7001.

153 See id. 7003-04.


Dischargeability of other debts owed the State: Kish v. Verniero (In re Kish), 212 B.R. 808, 817 (D.N.J. 1997) (surcharges for motor vehicle offenses).

Violations of permanent injunction: In re Lapin, 226 B.R. 637, 645 (B.A.P. 9th Cir. 1998);
Nor can the complainant circumvent the state's sovereign immunity by bringing its request for relief to the bankruptcy court through the mechanism of initiating a contested matter rather than filing an adversary proceeding. As is the case for adversary proceedings, contested matters seek to resolve "an actual dispute" between two or more parties. If a contested matter is prosecuted against a state, especially if such matter seeks recovery of money, the dispute is no less a suit against the state for sovereign immunity purposes than would be an adversary proceeding in which the complaint named the state as defendant.


"Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter." Fed. R. Bankr. P. 9014 (advisory committee's note). Contested matters are commenced by motion rather than complaint, but the motion is served in the same way as a summons and complaint pursuant to Federal Rule of Bankruptcy Procedure 7004. See Fed. R. Bankr. P. 9014. "[T]he party against whom relief is sought" must be afforded "reasonable notice and opportunity for hearing." Id.


See, e.g., NVR Homes, Inc. v. Clerks of Circuit Courts (In re NVR, LP), 189 F.3d 442, 454 (4th Cir. 1999) (dismissing motion under § 1146(c) seeking declaration that certain transfers of real property during bankruptcy case were exempt from state transfer and recordation tax, payment of which had already been made); In re A.H. Robins Co., 251 B.R. 312, 321-22 (Bankr. E.D. Va. 2000) (dismissing motion for determination that reorganized debtor was entitled to claim debtor's net operating losses on its state income tax returns); In re Lush Lawns, Inc., 203 B.R. 418, 421 (Bankr. N.D. Ohio 1996) (denying motion to have state appear and show cause why it should not be held in contempt for willful violation of automatic stay). Cf. In re Hechinger Inv. Co. of Del., Inc., 254 B.R. 306, 313 (Bankr. D. Del. 2000) (holding that motion under § 1146(c) seeking declaration that sales of real property were exempt from state tax was not a "suit" if taxes had not previously been collected); In re Mozingo, 222 B.R. 475, 478 (Bankr. E.D. Pa. 1998), vacated on other grounds, 234 B.R. 867 (E.D. Pa. 1999) (finding state agency waived sovereign immunity by filing proof of claim and that court had jurisdiction to hear motion to avoid agency's lien); In re Merry-Go-Round Enters., Inc., 227 B.R. 775, 780 (Bankr. D. Md. 1998) (finding objection to proof of claim filed by county was not suit against county, but if it was, county waived sovereign immunity by filing proof of claim); In re Layton, 220 B.R. 508, 514 (Bankr. N.D.N.Y. 1998) (holding county
Therefore, we are left with a system under which bankruptcy cases can, and indeed must, be brought in the federal district courts, and such courts may exercise their jurisdiction to confirm a plan and discharge debts (including state debts); however many of the tools provided to debtors and trustees to enforce provisions of the Code against recalcitrant creditors are jurisdictionally unavailable when that creditor is a nonconsenting state.

The policies underlying the Code are necessarily impacted by this jurisdictional impotence. For example, take the case of an individual debtor who seeks the protection of a bankruptcy filing because of crushing educational debts held by a state educational agency. Although educational debts are generally not subject to discharge under § 523(a)(8), the debtor may show that excepting the debts from discharge would "impose an undue hardship on the debtor and the debtor’s dependents" within the meaning of that section of the Code. The "fresh start" policy underlying the Code requires discharge of the educational debts of such a debtor. But because the debtor cannot commence an adversary proceeding against the state requesting determination of the dischargeability of the educational debts, the benefits of the bankruptcy case are lost to this debtor, undermining the congressional goal of discharge. The "fresh start" policy is also impaired when bankruptcy courts cannot waived sovereign immunity with respect to motion seeking order finding county in contempt for violation of automatic stay and awarding damages). But see In re Collins, 173 F.3d 924, 929 (4th Cir. 1999) (deciding motion to reopen case to enable the court to determine whether debt to state was discharged not barred by sovereign immunity); Harden v. Gilbert (In re Int’l Heritage, Inc.), 239 B.R. 306, 310 (Bankr. E.D.N.C. 1999) (holding motion to determine whether automatic stay barred administrative proceedings by state commissioner of securities not barred); In re Psychiatric Hosp. of Fla., Inc., 217 B.R. 645, 649-50 (Bankr. M.D. Fla. 1997), aff’d, 216 B.R. 660, 661 (M.D. Fla. 1998) (holding motion to determine tax liability under § 505 not suit against state).

See 28 U.S.C. § 1334(a) (1999) (giving the district courts “original and exclusive jurisdiction of all cases under title 11”). By standing rule, each district has referred all bankruptcy cases, as well as “all proceedings arising under title 11 or arising in or related to a case under title 11,” to the bankruptcy judges for the district. See 28 U.S.C. § 157(a).


See id. §§ 727, 1141(d), 1228, 1328. A discharge under § 727 is available only to an individual debtor. See id. § 727(a)(1).

See supra note 113.

compel compliance with the permanent injunction or enforce the anti-discrimination provisions of the Code.

The presence of nonconsenting state creditors also harms the equality principle, the objective that similarly-situated creditors should be treated in the same way in bankruptcy. Here, we can imagine a debtor who, pressured by the state authorities, made a significant payment of overdue taxes a month before filing for bankruptcy protection, satisfying all obligations owing to the state. No non-exempt assets remain in the bankruptcy estate. To effectuate the equality principle, Congress included § 547 in the Code, enabling the trustee to recover any preferential transfers made on the eve of bankruptcy and to force the recipient of any such transfer to share pro rata in the estate assets with others having equal priority claims. Yet, because the trustee cannot bring an adversary proceeding against the state (and the state in these circumstances certainly has no reason to submit to the jurisdiction of the court), the state can keep its preferential payment, thereby boosting itself ahead of other creditors who are legally entitled to the same amount under the Code or, indeed, whose priority in a bankruptcy distribution would be higher.

The consequences of this inability to recover payments could be even more troubling than the inequity of treating individual creditors differently in a particular case. As cogently described by Justice Marshall in his dissent in Hoffman v. Connecticut Department of Income Maintenance.

[A]ny State owed money by a debtor with financial problems will have a strong incentive to collect whatever it can, as fast as it can, even if doing so pushes the debtor into bankruptcy. Ordinary creditors will soon realize that States can receive more than their fair share; the very existence of this governmental power will cause these other creditors, in turn, to increase pressure on the debtor. The turnover provision is designed to prevent third parties from keeping property of the debtor or from refusing to make payments owed to the debtor, thereby aiding the reorganization of the debtor's affairs or the orderly and equitable distribution of the estate. Exempting States from this provision, as well as from the preference provision, undermines these important policy goals of the Code.145

In effect, state sovereign immunity turns the states into "preferred creditor[s] in every bankruptcy," who cannot be compelled by the bankruptcy court to honor the automatic stay, turn over estate property, give up preferential transfers or set-offs or fraudulent conveyances, or relinquish avoidable liens. Although it is perfectly appropriate to respect state sovereignty by denying Congress the power to abrogate state immunity, nothing could be more inimical to the principle of equality in bankruptcy than the exercise of that immunity to immunize states from liability other similarly situated creditors accept. And the incentives that preferred position creates to engage in coercive conduct toward troubled debtors—not only for the state, but for all other creditors who must compete with the state for the debtor's assets on an unequal footing—tend to force debtors into bankruptcy rather than keeping them out, contrary to congressional intent.

Perhaps this doomsday scenario overstates the harm caused by nonparticipating state creditors in bankruptcy. There are some "solutions" to ameliorate the impact of the preferred position conferred by state sovereign immunity. The Supreme Court in Seminole Tribe identified three "methods of ensuring the States' compliance with federal law": (1) the federal government can bring suit in federal court against a state; (2) an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law; and (3) review by the Court of any question of federal law arising from a state court decision where a state has consented to suit. Although these procedures in the bankruptcy context either are or could be available, none is completely satisfactory.

---

144 See In re McVey Trucking, Inc., 812 F.2d 311, 328 (7th Cir. 1987); see also Steven M. Richman, More Equal Than Others: State Sovereign Immunity Under the Bankruptcy Code, 21 RUTGERS L.J. 603, 604 (1990) (asserting that states enjoy the "position of a supercreditor, one that apparently has many of the rights but few of the liabilities facing most commercial creditors in a bankruptcy proceeding").

145 517 U.S. at 71 n.14.

146 See id.

147 A fourth "solution" occasionally raised should also be mentioned. Some courts have suggested that because the bankruptcy court exercises in rem jurisdiction over a res consisting of the bankruptcy estate, see 28 U.S.C. § 1334(e) (1999), any action that properly falls within that in rem jurisdiction is not properly characterized as an action "against a state" but is rather the exercise of jurisdiction with respect to the property itself. This approach has been successfully urged with respect to a confirmation order to which the state did not object. See Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1997) ("the
The first solution—the amenability of states to suit in federal court by the federal government—stems from the recognition that, in ratifying the Constitution, states consented to jurisdiction of federal courts over suits brought against them by other states and by the federal government itself. As explained by the Court in Alden

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). Cf. Horwitz v. Zywicki (In re Zywicki), 210 B.R. 924, 925 (Bankr. W.D.N.Y. 1997) (finding that court could make preliminary determination of whether property in possession of third party but in which state claimed an interest was property of the estate and subject to turnover over sovereign immunity objection of state because of fundamental policy of Code with respect to “control of the property of the estate”).

Yet, each of these cases concerned actions that were not, in fact, “against” the state, and can be explained on that basis. More problematic is the invocation of in rem jurisdiction to justify the exercise of jurisdiction over a nonconsenting state in an adversary proceeding or contested matter against the state. See, e.g., Bliemeister v. Industrial Comm’n of Ariz. (In re Bliemeister), 251 B.R. 383, 393 (Bankr. D. Az. 2000) (allowing motion to determine dischargeability of state claim); O’Brien v. Vermont Agency of Natural Res. (In re O’Brien), 216 B.R. 731, 737 (Bankr. D. Vt. 1998), appeal dismissed, 184 F.3d 140 (2d Cir. 1999) (allowing preference action seeking to avoid prejudgment attachment on debtor’s land). The problem with this solution in that context is that it flies in the face of Supreme Court jurisprudence. The Court has emphasized in a bankruptcy case that “we have never applied an in rem exception to the sovereign-immunity bar against monetary recovery and have suggested no such exception exists.” United States v. Nordic Village, 503 U.S. 30, 38 (1992) (finding IRS had not waived sovereign immunity with respect to adversary proceeding to recover unauthorized postpetition transfer); see also Missouri v. Fiske, 290 U.S. 18, 28 (1933) (“The 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.”). More recently the Court did, in fact, recognize an in rem exception to sovereign immunity in the admiralty context, but only where the objecting state was not in possession of the property at issue. See California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) (holding that court had jurisdiction to determine title to abandoned shipwreck over sovereign immunity objection when state was one of the claimants). However, the Court provided no encouragement for any extension of its holding beyond the admiralty context or, indeed, within the Court’s admiralty jurisdiction if the state had actual possession of the res. As a result, most courts have rejected any suggestion that a bankruptcy court’s in rem jurisdiction gives it the power to abrogate state sovereign immunity. See, e.g., In re Doiel, 228 B.R. 459, 441 n.1 (D.S.D. 1998); In re Lapin, 226 B.R. 637, 645 (B.A.P. 9th Cir. 1998); Mitchell v. California Franchise Tax Bd. (In re Mitchell), 222 B.R. 877, 885 (B.A.P. 9th Cir. 1998), aff’d, 209 F.3d 1111 (9th Cir. 2000); French v. Georgia Dept’t of Revenue (In re ABEP Acquisition Corp.), 215 B.R. 513, 616-17 (B.A.P. 6th Cir. 1997); In re Havens, 229 B.R. 613, 626-27 (Bankr. D.N.J. 1998). See generally Mark Browning, A Magic Bullet for Beat Seminole?, 17 AM. BANKR. INST. J. 10 (Feb. 1998); Klee et al., supra note 106, at 1575; Richard Lieb, Bankruptcy After Seminole Tribe: New Currents of Legal Thought, 8 NORTON BANKR. L. ADVISER 1 (1998); Richard Lieb, Eleventh Amendment Immunity of a State in Bankruptcy Cases: A New Jurisprudential Approach, 7 AM. BANKR. INST. L. REV. 269, 306-10 (1999) [hereinafter Lieb, Eleventh Amendment Immunity]; Adam L. Rosen, Is the In Rem Exception to Sovereign Immunity Expanding?, 16 BANKR. STRATEGIST, No. 4, at 8 (1999).

148 U.S. CONST. art. III, § 2, cl.1 explicitly includes within the judicial power of the United States all “controversies to which the United States shall be a party” and “controversies
v. Maine,149 "[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."150

However, the absence of sovereign immunity in a suit by the federal government provides a "solution" that is more theoretical than practical in bankruptcy. The Code is a mechanism for resolving competing claims to the bankrupt estate; it is a commercial statute, not a penal one. Unlike criminal cases in which the government acts as prosecutor,151 the federal government now has three basic roles in the bankruptcy process. First, it provides the judicial forum for resolution of the dispute.152 Second, it represents its own interests as creditor.153 Third, through the U.S. Trustee system, it "supervise[s] the administration of cases and [private] trustees. . ."154 Causes of action giving rise to defenses of state sovereign immunity are currently pursued not by the bankruptcy between two or more States." Therefore, the states have no sovereign immunity as against the federal government. See West Virginia v. United States, 479 U.S. 305, 311 (1987); United States v. Mississippi, 380 U.S. 128, 140 (1965); Principality of Monaco v. Mississippi, 292 U.S. 313, 328-29 (1934); United States v. Minnesota, 270 U.S. 181, 195 (1926); Oklahoma v. Texas, 258 U.S. 574, 581 (1922); United States v. Texas, 143 U.S. 621, 643-46 (1892).

150 Id. at 756.
151 Of course, actions relating to the bankruptcy case may become the basis of a criminal proceeding prosecuted by the federal government. See, e.g., 18 U.S.C. § 151 (2000).
153 In most cases, the government's involvement is limited to representing the Internal Revenue Service with respect to tax claims. See Craig A. Gargotta, The United States Attorney's Role in Bankruptcy: Representing the Internal Revenue Service in Bankruptcy, 12 AM BANKR. INST. J. 30, 30 (1993); William S. Parkinson, The Contempt Power of the Bankruptcy Court Fact or Fiction: The Debate Continues, 65 AM. BANKR. L.J. 591, 609 (1991). However, other agencies may also assert claims. See Gargotta, at 30.

This representation [of a federal entity as creditor] usually includes such federal agencies as the Department of Veterans Affairs, Small Business Administration, Farmer's Home Administration or Department of Housing and Urban Development. . . Other areas of representation might include the Federal Highway Administration, Department of Interior, or United States Custom Service, where the United States seeks enforcement and collection on an assessment for a fine or penalty in violation of a federal statute.

Id. See also I NAT'L BANKR. REVIEW COMM'N REP. 900 (1997) ("States . . . appear[1] in many bankruptcy cases in a myriad of roles—as priority tax creditor, secured creditor, unsecured creditor, police and regulatory authority, environmental creditor, landlord, guarantor, bondholder, leaseholder, and equity interest holder.").
court or by the U.S. Trustee, but are pursued by the debtor or the trustee in bankruptcy.\(^5\)

Although Congress could amend the Judicial Code to make the U.S. Trustee the acting bankruptcy trustee in every bankruptcy case with respect to any cause of action against a state that would be barred by sovereign immunity were it brought by a private party,\(^6\) it is unlikely to do so. Additional duties for the U.S. Trustees require additional resources. If the beneficiary of any such action were the estate rather than the U.S. Treasury, the proposal would seem to promote private interests over state autonomy, all at federal government expense, a politically unpalatable justification for passage.\(^7\) And even if Congress empowered private parties to


\(^7\) Apart from the political realities, the proposal may not work to avoid a sovereign immunity defense. First, if the U.S. Trustee assumes the role of bankruptcy trustee, one could argue that the U.S. Trustee has relinquished his governmental role and has instead become a private actor in the bankruptcy case. Cf. California State Bd. of Equilization v. Sierra Summit, Inc., 490 U.S. 844, 849 (1989) ("The bankruptcy trustee is the representative of the estate of the debtor, not an arm of the government.") (citation omitted); Schulman v. California State Water Res. Control Bd. (In re Lazar), 200 B.R. 358, 376 (Bankr. C.D. Cal. 1996) (finding bankruptcy trustee is not exempt from Eleventh Amendment defense to federal jurisdiction). In such capacity, the U.S. Trustee may not enjoy freedom from the sovereign immunity of the states.

Second, even if the U.S. Trustee is deemed to remain a representative of the federal government when acting in this non-governmental role, the government’s interest in these causes of action against the state may be too insignificant to support an exemption from the sovereign immunity defense. In New Hampshire v. Louisana, the Court refused to permit New Hampshire, as assignee of a claim by a private New Hampshire citizen, to bring suit in federal court against the State of Louisiana in the face of an Eleventh Amendment objection. See 108 U.S. 76 (1883). The Court characterized New Hampshire as a “nominal actor” for the true party in interest, its private assignor. See id. at 89. Because the U.S. government has no financial or other interest in a private party’s bankruptcy estate but would instead be asserting claims on behalf of private creditors (which may or may not include the U.S. government), its position under this proposal may be subject to the same constitutional deficiencies. See generally Scott P. Glauberman, Citizen Suits Against States: The Exclusive Jurisdiction Dilemma, 45 JOURNAL, COPYRIGHT SOC. OF U.S.A. 63, 104-06 (1997); Klee et al., supra note 106, at 1585 n.295; Joseph F. Riga, State Immunity in Bankruptcy After Seminole Tribe v. Florida, 28 SETON HALL
pursue any such action on behalf of the federal government (thereby limiting the direct cost to the U.S. government), such a legislative scheme is of questionable constitutionality.

The second proposed solution, suing a state officer to ensure compliance with federal law, was formulated by the Supreme Court's opinion in *Ex parte Young*. *Ex parte Young* was heard on a petition for habeas corpus seeking release of the Attorney General of Minnesota from custody. He was being held for contempt of court for enforcing a state law regulating rates charged by railroads in Minnesota in violation of a preliminary injunction granted by a federal court. Stockholders of the railway companies challenged the state law, claiming it deprived them of their property without due process of law and denied them equal protection of the laws in violation of the U.S. Constitution. The attorney general sought dismissal of the suit, declined to obey the preliminary injunction, and sought release from custody. He claimed that the federal court

---


This proposal, developed by analogy to the *qui tam* action (which is brought by an individual on behalf of both the individual and the government, who both share in the recovery), was proposed in an article that predated *Seminole Tribe*. See Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 551-70 (1995).

The Court has consistently viewed with skepticism any "broad delegation to private persons [of the right] to sue nonconsenting States," seeing such delegation as lacking "the exercise of political responsibility for each suit prosecuted against a State." *Alden v. Maine*, 527 U.S. 706, 756 (1999); see also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785-86 (1991) (suggesting in dictum that congressional delegation to a private party of the ability of the United States to sue a state is a "strange notion," and emphasizing that "[t]he consent... to suit by the United States— at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select"). *See generally Glauberman*, supra note 157, at 102-03 (characterizing the structure as "little more than an end run around the Eleventh Amendment"); Ted Janger, *Strategies for Preserving the Bankruptcy Trustee's Avoidance Power Against States After Seminole Tribe*, 23 OHIO N.U. L. REV. 1431, 1439 (1997) (criticizing this structure, suggesting that, "to satisfy Seminole Tribe, control over avoidance litigation would have to remain with the U.S. Trustee or some other executive official"); Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 125-26 n.162 (1996) ("Whether the Seminole Tribe majority would permit so transparent an evisceration of its holdings [as Congressionally-authorized qui tam actions on behalf of the U.S. by private parties] is unclear"); but see Siegel, supra note 158, at 558-63 (arguing that allowing delegation of control over government litigation is consistent with historical practice and congressional authority under separation of powers doctrine).

*209 U.S. 123 (1908).*
had no jurisdiction over him by virtue of Minnesota’s sovereign immunity and his position as a state official.

The Court first concluded that the lower federal court, which issued the contempt order, had jurisdiction over the case because federal questions were at issue. After holding that the Minnesota statutes at issue were in fact unconstitutional on their face, the Court turned to the Eleventh Amendment defense. The Court found that when a state official seeks to enforce an unconstitutional statute,

[i]t is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

In other words, a state official is never acting in his or her official capacity (and therefore is not sheltered by sovereign immunity) when the official engages in conduct which violates federal law or the U.S. Constitution.

*Ex parte Young* has remained the main enforcement mechanism for the supremacy of federal law over contrary state enactments. The Supreme Court mentioned it favorably in *Seminole Tribe*, and the Court’s more recent sovereign immunity decision, *Alden v. Maine*, emphasized that, notwithstanding state sovereign

---

161 See id. at 145.
162 See id. at 148.
163 Id. at 159-60.


165 See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.14 (1996) (“[A]n individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law, see, e.g., *Ex parte Young*...” (citation omitted)); id. at 72 n.16 (“[A]n individual may obtain injunctive relief under *Ex parte Young* in order to remedy a state officer's ongoing violation of federal law.”).

immunity, "certain suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land."\textsuperscript{167}

In the wake of opinions striking down congressional abrogation of state sovereign immunity in § 106(a),\textsuperscript{168} the \textit{Ex parte Young} doctrine has become an important means of ensuring compliance by state officials with certain Code provisions.\textsuperscript{169} However, it has severe limitations.\textsuperscript{170}

\textsuperscript{167} Id. at 747; see also id. at 756-57.

\textsuperscript{168} See supra note 62 and cases cited therein.


\textsuperscript{170} \textit{Seminole Tribe} itself restricted \textit{Ex parte Young} actions intended to remedy state violations of federal law to those federal laws in which Congress has not "prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right." 517 U.S. at 74. See generally Meltzer, supra note 156, at 36-41. Unlike the IGRA at issue in \textit{Seminole Tribe}, see supra note 33, which the Court concluded contained such a detailed scheme, see supra note 59, the Code specifies no remedies particular to state actors for the violation of its provisions. See, e.g., \textit{In re Ellett}, 229 B.R. at 206; \textit{In re Technologies Int'l Holdings, Inc.}, 234 B.R. at 713; \textit{In re Guiding Light}, 213 B.R. at 492. See generally S. Elizabeth Gibson, \textit{Sovereign Immunity in Bankruptcy: The Next Chapter}, 70 AM. BANKR. L.J. 195, 214-15 & n.137 (1996) [hereinafter Gibson, \textit{Sovereign Immunity}] (arguing that the statutory scheme in \textit{Seminole Tribe} is distinguishable from the bankruptcy provision in which Congress authorized relief against the states); Janger, supra note 159, at 1434 ("The Bankruptcy Code differs from the Indian Gaming Act [in terms of Congressional intent to permit remedies against states"); Klee et al., supra note 106, at 1570 ("Although the Bankruptcy Code is certainly an intricate weaving of various policies and considerations, there is nothing in the Code that indicates Congress intended to limit or prevent certain remedies against a state or state officials.").

More recently, in \textit{Idaho v. Coeur d'Alene Tribe}, while emphasizing that "[w]e do not, then, question the continuing validity of the \textit{Ex parte Young} doctrine," 521 U.S. 261, 269 (1997), Justice Kennedy, writing for the Court, recognized an additional limitation on the availability of \textit{Ex parte Young} relief. See id. at 281. Acknowledging that "[a]n allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the \textit{Young} fiction," the Court declined to permit such a suit when it would be "the functional equivalent of a quiet title action [with respect to submerged lands and lake bed and various tributaries] which implicates special sovereignty interest." Id. Given the "unique
First, the object of a suit based on *Ex parte Young* must be a state official, not the state itself, regardless of the nature of the relief sought. This creates a pleading trap for the unwary, and bankruptcy courts may dismiss actions against the state rather than permit amendment to add a state official who is susceptible to suit under *Ex parte Young*.

Second, in order to sustain such an action, the complainant must demonstrate an "ongoing violation of federal law." This limitation has two components. First, there must be some violation of federal law by the state official. Take our hypothetical debtor status in the law" afforded the sovereignty interests of states over submerged lands, the "special sovereignty interests" limitation on *Ex parte Young* relief is unlikely to limit its availability in bankruptcy cases. *Id.* at 283. *See e.g., In re Rainwater,* 223 B.R. at 149; *In re Elliott,* 229 B.R. at 208-09; *In re Technologies Int'l Holdings, Inc.***, 234 B.R. at 713. *Cf. In re DeAngelis,* 239 B.R. at 431-32 (erroneously stating that the "special sovereignty interest" limitation was not part of the opinion of the Court in *Coeur d'Alene* and declining to apply it). *See generally IN NAT'L BANKR. REVIEW COMM'N REP. 904 (1997) (stating that *Coeur d'Alene* may apply "only where the state would lose regulatory control as a result of the *Ex parte Young* action. These circumstances would rarely, if ever, be present in bankruptcy").

Justice Kennedy also observed that there are "in general, two instances where Young has been applied." *Coeur d'Alene Tribe,* 521 U.S. at 270. He noted that "where there is no state forum available to vindicate federal interests, ... the Young rule has special significance." *Id.* at 270-71. He also suggested that *Ex parte Young" may serve an important interest ... when the case calls for the interpretation of federal law." *Id.* at 274. Despite the fact that this portion of Justice Kennedy's opinion was joined only by Justice Rehnquist, and thus represented a minority view, *see id.* at 291-97 (O'Connor, J., concurring), it has been applied by several judges in deciding whether an *Ex parte Young* action should lie. *See, e.g., Burtch v. LaVecchia (In re PHP NJ MSO, Inc.), Nos. 98-2609, 98-2610, 1999 WL 360197, at *7 (D. Del. May 7, 1999); In re Rainwater,* 223 B.R. at 147-49; *In re Havens,* 229 B.R. at 628-29; *In re Neary,* 220 B.R. at 869-70.


*See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 72 n.16 (1996); *see also Coeur d'Alene Tribe,* 521 U.S. at 281 ("an on-going violation of federal law where the requested relief is prospective"); *Green v. Mansour,* 474 U.S. 64, 68 (1985) (finding that an *Ex parte Young* suit may be brought to enjoin "a continuing violation of federal law").

*Ex parte Young* is not available to compel state officials to comply with state law. *See
who filed for bankruptcy protection because of educational loans made by a state educational agency. We already determined that the debtor could not bring an adversary proceeding against the state agency under § 523(a)(8) to show undue hardship warranting discharge of the loans if the agency does not consent to federal jurisdiction. The debtor receives a discharge, which does not include the student loans, the state educational agency commences an action seeking to collect those loans. The debtor wishes to file an *Ex parte Young* action with the bankruptcy court against the individual who heads the state agency, seeking to enjoin his collection efforts because the loans are dischargeable on the grounds of undue hardship; but because the loans were not discharged, the actions of the state agency, in seeking to collect them, do not violate any provision of the Code. *Ex parte Young* cannot be used by the debtor to obtain an initial determination upon which the illegality of the state's conduct depends. Second, the violation of federal law by the state official must be ongoing, not merely some past action that was unlawful.  

---


76 See supra note 134; text following supra note 141.


177 See, e.g., *Burtch v. Lavecchia* (In re PHP NJ MSO, Inc.), Nos. 98-2609, 98-2610, 1999 WL 360199, at *8 (D. Del. May 7, 1999); *Franchise Tax Bd. v. Lapin* (In re Lapin), 226 B.R. 637, 646 (B.A.P. 9th Cir. 1998); *French v. Georgia Dep't of Revenue* (In re ABEPP Acquisition Corp.), 215 B.R. 513, 519 (B.A.P. 9th Cir. 1997); *Peterson v. Florida* (In re Peterson), 254 B.R. 740, 746 (Bankr. N.D. Ill. 2000); *Guiding Light Corp. v. Jindal* (In re Guiding Light Corp.), 217 B.R. 493, 498-99 (Bankr. E.D. Conn. 1997); *In re Louis*; *Harris*, 213 B.R. 796, 798 (Bankr. D. Conn. 1997); *Tri-City Turf Club, Inc. v. Kentucky Racing Comm'n* (In re Tri-City Turf Club, Inc.), 203 B.R. 617, 620 (Bankr. E.D. Ky. 1996). Distinguishing between ongoing and past acts is often a game of semantics. For example, if the state official declines to grant a permit to a former bankrupt in violation of § 525, one could characterize the violation as a single completed act or label the continued refusal to grant the permit as an ongoing violation of the legal requirement not to discriminate against former bankrupts. If the latter characterization is used, although an adversary proceeding could not be brought directly against the state for violation of § 525, see supra note 194, an *Ex parte Young* action could be
Therefore, *Ex parte Young* does not provide any basis for remediying an act that, however flagrant and intentional a violation of the Code, is completed prior to the time suit was brought. This creates a strange incentive for states to engage in unlawful conduct quickly, before a debtor can bring an *Ex parte Young* action seeking to enjoin such conduct.\(^\text{178}\)

Finally, the only relief that can be granted under *Ex parte Young* is injunctive or declaratory relief; an award of damages is not available.\(^\text{179}\) This means that if the state's violation of the Code resulted in the receipt of funds from the debtor, *Ex parte Young* cannot be used to obtain restitution.\(^\text{180}\)

The final method for ensuring the supremacy of federal law is to permit suits to enforce federal law to be brought in state court, subjecting them to federal court review in the usual course. But this

---

178 Some commentators have suggested that this incentive may be removed by amending the Code to add a statutory injunction against violations of Code provisions. See Klee et al., supra note 106, at 1588-89. However, as damages for past violations of federal law remain unavailable from a state which has not consented to federal jurisdiction, such a legislative provision is unlikely to have any effect on pre-filing behavior.


Prospective relief of an equitable nature may, in fact, have meaningful financial consequences on the state, as, for example, if the state official is ordered to hire a former bankrupt whose application for employment was rejected in violation of §525. But the monetary costs of compliance with an injunction are not barred by *Exparte Young*. See, e.g., Edelman, 415 U.S. at 667-68 ("The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues .... But the fiscal consequences .... were the necessary result of compliance with decrees which by their terms were prospective in nature .... Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*."). In addition, if the state violates the automatic stay or the permanent discharge injunction in bad faith, the Eleventh Amendment is no bar to assessment of monetary penalties under *Hutto v. Finney*. See 437 U.S. 678, 691 (1978) ("The ... power to impose a fine [for civil contempt] is properly treated as ancillary to the federal court's power to impose injunctive relief."). However, when the very nature of the relief sought is compensatory damages, *Ex parte Young* is not available.

solution also has serious deficiencies, particularly when one is dealing with bankruptcy jurisdiction.

The Judicial Code contemplates that, although the bankruptcy case itself lies within the exclusive jurisdiction of the federal district courts,\(^{181}\) state courts have concurrent jurisdiction over all civil proceedings arising under title 11 or arising in or related to cases under title 11.\(^{182}\) Nevertheless, few matters that fall within the jurisdiction of the federal district court with respect to bankruptcy\(^{183}\) have been brought in state court, unless they are based upon a State law claim or State law cause of action and are subject to mandatory abstention.\(^{184}\) Legal, practical, and policy concerns demonstrate the undesirability of a state forum for resolving bankruptcy claims against the states, even when they fall within the concurrent jurisdiction of the state courts.

As an initial matter, it is not clear that the state courts will be available to plaintiffs seeking redress for state violations of federal


Getting to Waiver

law. Just as the Supreme Court held in *Seminole Tribe* that Congress cannot abrogate state sovereign immunity in federal courts pursuant to its Article I powers,\(^\text{183}\) the Court concluded in *Alden v. Maine*\(^\text{186}\) that Congress could not subject nonconsenting states to suit in their own courts by Article I legislation.\(^\text{187}\) Therefore, unless a state has consented to be sued in its own court with respect to the federal claim at issue (that is, has waived sovereign immunity with respect to such suits), this alternative venue is also closed.\(^\text{188}\) But even assuming the states open their courts to such claims, other considerations render this forum less than adequate.

One concern is timing. Litigants have generally believed that a federal bankruptcy court can resolve a bankruptcy matter more quickly than can a state court.\(^\text{189}\) Because time is critical in achieving a successful outcome of a bankruptcy case, such a delay may make reorganization infeasible, or may deny a debtor an expeditious fresh start, especially if the claim against the nonconsenting state is a critical component of the case.

Costs will also necessarily increase if bankruptcy proceedings are bifurcated between multiple jurisdictions.\(^\text{190}\) Quite apart from the additional filing fees (which may be prohibitive for some debtors),\(^\text{191}\) there may be a need for travel expenses, additional attorneys’ fees for multiple counsel, and incremental costs for representation over a longer period of time. All of these costs are borne by the estate, and ultimately by the creditors who share in its residue. One of the goals of bankruptcy is the minimization of

---

\(^{183}\) See *supra* notes 32-59 and accompanying text.

\(^{184}\) 527 U.S. 706 (1999).

\(^{185}\) See *id.* at 754.

\(^{186}\) This prospect particularly troubled the dissenting Justices, who saw the Court abandoning “a principle nearly as inveterate, and much closer to the hearts of the Framers [than sovereign immunity]: that where there is a right, there must be a remedy.” *Id.* at 811 (Souter, J., dissenting).


\(^{189}\) See, e.g., *Snyder v. Board of Regents (In re Snyder)*, 228 B.R. 712, 719 (Bankr. D. Neb. 1998) (finding that state courts do not waive filing fee for debtors); *Horwitz v. Zywiczynski (In re Zywiczynski)*, 210 B.R. 924, 925 (Bankr. W.D.N.Y. 1997) (noting that trustee had “no resources with which to pursue this matter in another forum, not even to pay a filing fee in another court”).
collection costs by the collectivization of creditor action in a single forum.\textsuperscript{192} The enforced pursuit of state claims in state courts undermines this goal.

Bankruptcy courts also have expertise in resolving bankruptcy claims that state court judges, however bright and energetic, necessarily lack. Congress perceived the need for a specialized corps of bankruptcy experts when it enacted the Code in 1978,\textsuperscript{193} and placing the resolution of bankruptcy claims against the states in the hands of state court judges casts aside the accumulated learning of the federal courts in dealing with similar matters involving non-state litigants.\textsuperscript{194}

Related to the state court lack of experience with bankruptcy matters is the likely consequence of state court decisions, both in the individual case and for the bankruptcy system as a whole. The state court, having before it only a small piece of a much larger case, may render a decision that does not fit nicely into the larger picture; that is, uniformity of decision-making within a single case is lost. This means that the state court may reach a decision with respect to a state’s rights in or obligations to the bankruptcy estate that is inconsistent with decisions of the bankruptcy court respecting other

\textsuperscript{192} See supra note 117.


\textsuperscript{194} See, e.g., \textit{In re Snyder}, 228 B.R. at 718-19 (stating that relegating the debtor to state court bars debtor “from the forum most uniquely qualified to resolve” issue under the Code and that state courts “do not have the institutional memory or frequent contact” with bankruptcy litigation). Federal courts have, as a consequence, sometimes resisted recognizing the concurrent jurisdiction of state courts over bankruptcy matters. See, e.g., \textit{Halas v. Platek}, 239 B.R. 784, 792 (N.D. Ill. 1999) (state court does not have jurisdiction over § 362(h) sanctions “despite § 1334(b)’s language”). See generally Bufford, \textit{supra} note 190, at 6.
creditors. Bifurcation of decision-making power risks undermining the fundamental bankruptcy policy of equal treatment of similarly-situated creditors.\textsuperscript{193}

When this lack of uniformity expands from a single case to multiple cases nationwide, the probability of conflicting interpretations of the Code between jurisdictions and within single jurisdictions becomes much higher. The drafters of the Constitution perceived this risk of non-uniform bankruptcy treatment between the states as sufficiently harmful to include within the Article I powers of Congress the power to establish "uniform" bankruptcy laws "throughout the United States."\textsuperscript{196} But even a single supposedly uniform bankruptcy law becomes far less uniform when it is administered in a disparate fashion nationwide, with the only possibility for federal oversight being the normal appellate process from state courts to the Supreme Court.\textsuperscript{197} The

\textsuperscript{193} See, e.g., In re Snyder, 228 B.R. at 719 ("Removing isolated issues of discharge to state court from the context of a larger bankruptcy proceeding in bankruptcy court removes the ability of a bankruptcy court to review a debtor's entire financial picture and to ensure an equitable result for both the debtor and all creditors."); see also NAT'L BANKR. REV. COMM'N REP. 899 (1997) ("By providing a single forum governed by a single set of procedural rules, the bankruptcy process ensures uniform procedural treatment for every type of claimant. . . . Separate treatment in multiple courts may also result in unequal treatment of similarly-situated creditors.").


\textsuperscript{195} See U.S. CONST. art. I, § 8, cl. 4. James Madison justified congressional power in this area by stating:

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

THE FEDERALIST No. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961); see also MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 915 (9th Cir. 1996) ("[T]he unique, historical and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone.").

\textsuperscript{197} The Eleventh Amendment does not bar Supreme Court review of cases arising in state courts. See South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 166 (1999); McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31 (1990). One commentator has proposed expanding appellate review of state court judgments by giving appellate jurisdiction to intermediate federal appellate courts, thereby allowing them to exercise primary
Supreme Court's docket is limited, and the Court seldom grants review merely because a lower court reaches an erroneous decision. Reliance on Supreme Court review as a "solution" to the problem of states refusing to enforce the federal rights afforded by the Code is unwarranted.

This discussion leads to the ineludible conclusion that none of the suggested methods for enforcing the Code against nonconsenting states provides a complete solution to the problem of state sovereign immunity in bankruptcy. The only true solution grows out of the inherent nature of sovereign immunity: "sovereign immunity bars suits only in the absence of consent." The problem of states opting out of the federal bankruptcy process, therefore, can be solved by turning nonconsenting states into consenting states through waiver of sovereign immunity.

III. THE CONCEPT OF VOLUNTARY WAIVER

Although sovereign immunity limits the jurisdiction of a federal court (and thus can, as a procedural matter, be raised at any stage in the judicial proceedings by the litigants or by the court sua sponte), unlike other jurisdictional limitations, it can be waived by the state entitled to its protection. Conceptually, waiver seems


198 Supreme Court Rule 10, entitled "Considerations Governing Review on Certiorari," states in part that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. CT. R. 10.


201 See, e.g., Edelman v. Jordan, 415 U.S. 651, 677-78 (1974); California Franchise Tax Bd. v. Jackson (In re Jackson), 184 F.3d 1046, 1048 (9th Cir. 1999); Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 875 n.2 (9th Cir. 1987).

straightforward, but in practice even this simple notion becomes far more complex. The difficulties tend to group around four basic questions, as discussed in turn.

A. What Actions Constitute Waiver of Sovereign Immunity?

Three types of actions by sovereign entities have traditionally been thought to create some possibility of constituting a waiver of sovereign immunity. The first can be characterized as "litigative" in nature, involving the state's actions with respect to a pending court action. The second is contractual, the relinquishment of sovereign immunity as a part of a binding agreement between the state and another party. The third is legislative, where the state, either pursuant to its constitution or duly enacted legislation, waives sovereign immunity.

1. Waiver through Acts in Litigation

A bankruptcy case is commenced by the filing of a petition with the bankruptcy court, either by the debtor or by the statutorily-prescribed number of qualifying creditors. Were a state to join in
initiating a bankruptcy case, it would undoubtedly be deemed to have waived sovereign immunity with respect to its claim in that case.\footnote{Such an event has been characterized as "uncommon (even unheard of)." Riga, \textit{supra} note 157, at 56 n.143. However, a state is certainly an "entity" eligible to join in an involuntary petition, \textit{see id.}, and initiation of a bankruptcy case should waive sovereign immunity to the same extent any other voluntary appearance in federal court would. Cf. DeKalb County Div. of Family & Children Servs. v. Platter (\textit{In re Platter}), 140 F.3d 676, 679 (7th Cir. 1998); Confederated Tribes of Colville Reservation Tribal Credit v. White (\textit{In re White}), 139 F.3d 1268, 1271 (9th Cir. 1998); New Jersey v. Chen (\textit{In re Chen}), 227 B.R. 614, 623 (D.N.J. 1998) (waiver by filing adversary proceeding in bankruptcy case).}

In the more common voluntary bankruptcy case, the state creditor is most likely to take affirmative action in the litigation only if it files a proof of claim pursuant to § 501(a), seeking participation in the distribution of the estate assets.\footnote{Filed claims are deemed allowed unless a party in interest objects. \textit{See 11 U.S.C. § 502(a).} If objection is made, the court, after notice and a hearing, determines the amount of the claim (if any) to be allowed within the parameters of § 502(b)-(l). Only allowed claims share in distributions of property under chapter 7. \textit{See 11 U.S.C. § 726(a).} Only holders of allowed claims are entitled to vote on a chapter 11 plan, \textit{see id.} § 1126(a), and only such holders are entitled to distributions under plans proposed under chapter 11, 12 or 13, \textit{see id.} §§ 1129(a)(7)(A)(ii), 1225(a)(4), 1325(a)(4). Only a holder of an allowed unsecured claim may invoke the disposable income test of § 1325(b). \textit{See id.} § 1325(b).} The Supreme Court concluded in \textit{Gardner v. New Jersey}\footnote{\textit{Id.} at 574. \textit{See also Gunter v. Atlantic Coast Line R.R. Co.}, 200 U.S. 273, 284 (1906); Clark v. Barnard, 108 U.S. 436, 447-48 (1883). The scope of that waiver with respect to claims by the debtor against the filing state is discussed \textit{infra} Part III.C.} 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."\footnote{\textit{See Langenkamp v. Culp}, 498 U.S. 42, 44 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59-59 & n.14 (1989); Katchen v. Landy, 382 U.S. 323, 335 (1966).} Allowance or disallowance of claims rests within the equitable power of the bankruptcy court, and by filing a proof of claim the state submits to that federal court jurisdiction.\footnote{11 U.S.C. § 106(b) (1999).}

The Code itself contemplates such a type of waiver. In § 106(b) Congress provided that "[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."\footnote{Although courts differ over whether the "deemed" waiver...}
of § 106(b) survives constitutional challenge after Seminole Tribe,212 and arguments could be made that the act of filing a proof of claim is not the express and unequivocal waiver of sovereign immunity the Supreme Court requires,213 the Court itself has reaffirmed its adherence to the principles of Gardner even after Seminole Tribe.214

Courts have consistently continued to find a waiver of state sovereign immunity when the state files a proof of claim in the bankruptcy case.215 Indeed, courts are continuing to explore

212 Compare Schlossberg v. Comptroller of Treasury (In re Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1147 (4th Cir. 1997) (§ 106(b) is unconstitutional abrogation of state sovereign immunity), and Grabscheid v. Michigan Employment Sec. Comm’n (In re C.J. Rogers, Inc.), 212 B.R. 265, 271 (E.D. Mich. 1997) (same), and Rose v. United States Dep’t of Educ. (In re Rose), 215 B.R. 755, 758 (Bankr. W.D. Mo. 1997), aff’d and remanded, 187 F.3d 926 (8th Cir. 1999) (same), and In re NVR L.P., 206 B.R. 831, 839 (Bankr. E.D. Va. 1997), aff’d, 222 B.R. 514 (E.D. Va. 1998), rev’d, 189 F.3d 442 (4th Cir. 1999) (same), with Wyoming Dep’t of Transp. v. Straight (In re Straight), 143 F.3d 1387, 1392 (10th Cir. 1998) (concluding that § 106(b) merely codifies the Gardner doctrine), and Quesada v. Puerto Rico Dep’t of Health (In re Arecibo Cmty. Health Care, Inc.), 233 B.R. 625, 630 (D.P.R. 1999) (same), and Nana’s Petroleum, Inc. v. Clark (In re Nana’s Petroleum, Inc.), 234 B.R. 838, 847 (Bankr. S.D. Fla. 1999) (same). Cf. AER-Aerotron, Inc. v. Texas Dep’t of Transp., 104 F.3d 677, 681 (4th Cir. 1997) (declining to address issue because state did not file proof of claim); Pitts v. Ohio Dep’t of Taxation (In re Pitts), 241 B.R. 862, 862 (Bankr. N.D. Ohio 1999) (“the constitutionality of § 106(b) [is] now suspect”). See generally Patricia L. Barsalou, Defining the Limits of Federal Court Jurisdiction Over States in Bankruptcy Court, 28 ST. MARY’S LJ. 575, 615-17 (1997) (suggesting that § 106(b) “should be unconstitutional”); Mark Browning, Sovereign Immunity, supra note 170, at 211-22 (filling a proof of claim “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” and thus has nothing to do with the concept of waiver).

214 In his dissenting opinion in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999), Justice Breyer cited Gardner as authority for the proposition that a waiver of sovereign immunity did not have to be “express” and “unequivocal” and suggested that it supported the holding of the Court in Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964). See 527 U.S. at 696-97 (Breyer, J., dissenting). The majority overruled Parden, but found nothing troubling in Gardner, which “stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts.” Id. at 670 n.3.

215 See, e.g., Rose v. United States Dep’t of Educ. (In re Rose), 187 F.3d 926, 929 (8th Cir. 1999); California Franchise Tax Bd. v. Jackson (In re Jackson), 184 F.3d 1046, 1050 (9th Cir. 1999); Georgia Dep’t of Revenue v. Burke (In re Burke), 146 F.3d 1313, 1319 (11th Cir. 1998); In re Fennelly, 212 B.R. 61, 64 (D.N.J. 1997); In re Merry-Go-Round Enters., Inc., 227 B.R. 775,
whether other affirmative acts by the state in the bankruptcy case may also constitute a waiver of sovereign immunity. Although merely raising the state’s sovereign immunity defense by a motion to dismiss is insufficient to waive its protection,216 waiver has been found, for example, when the state files its own adversary proceeding seeking to declare its debt nondischargeable.217 What other actions are sufficient to waive sovereign immunity is unclear. Some courts tolerate a great deal of participation of the bankruptcy case short of filing a proof of claim,218 while others find an active role sufficient to constitute a waiver.219 These cases suggest that a

---


217 See, e.g., DeKalb County Div. of Family & Children Servs. v. Platter (In re Platter), 140 F.3d 676, 679 (7th Cir. 1998); Confederated Tribes of Colville Reservation Tribal Credit v. White (In re White), 139 F.3d 1268, 1271 (9th Cir. 1998); New Jersey v. Chen (In re Chen), 227 B.R. 614, 623 (D.N.J. 1998). Cf. Koehler v. Iowa College Student Aid Comm'n (In re Koehler), 204 B.R. 210, 220-21 (Bankr. D. Minn. 1997) (filing counterclaim for debt in adversary proceeding filed by debtor seeking to declare state's debt dischargeable 'waived sovereign immunity').

218 See, e.g., May v. Missouri Dep't of Revenue (In re May), 251 B.R. 714, 720 (B.A.P. 8th Cir. 2000) (state did not waive sovereign immunity by filing answer to complaint to determine dischargeability of taxes); Burch v. LaVecchia (In re PHP NJ MOSO, Inc.), Nos. 98-2609, 98-2610, 1999 WL 360199 at *4 (D. Del. May 7, 1999) (state commissioner filed motion to transfer venue, motion requesting abstention by bankruptcy court, motion for relief from automatic stay, objection to motion seeking extension of time to assume or reject executory contracts, entered into stipulation with debtor with respect to time to assume or reject executory contracts, and entered into stipulation with debtor providing for partial payment to state; no waiver found); In re O'Brien, 216 B.R. at 734-35 (state did not waive sovereign immunity by participating in confirmation proceedings).

219 See, e.g., In re White, 139 F.3d at 1271 (finding waiver because creditor “acknowledged that it had a claim, objected to confirmation of [debtor’s] plan of reorganization ... and it sought relief from the bankruptcy court in the form of an order denying confirmation. It twice voted against plans of reorganization”); Sullivan v. Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1153-54 (9th Cir. 1992) (government waived by offsetting prepetition overpayments by debtor against post-petition payments due debtor); Bliemeister v. Industrial Comm’n of Arizona (In re Bliemeister), 251 B.R. 388, 393 (Bankr. D. Az. 2000) (state affirmatively sought summary
state that becomes too comfortable appearing in a federal bankruptcy court may be found to have consented to being there.

While the doctrine that finds a waiver of sovereign immunity based on conduct in bankruptcy litigation is a valuable tool in encouraging state participation in the bankruptcy process, it has its limitations. First, the state will not choose to file a proof of claim or otherwise appear in the bankruptcy case unless it will derive some financial benefit thereby. As the majority of bankruptcy filings are "no asset" cases, waiver of sovereign immunity will not be obtained in those cases. Even if the estate is able to make some distribution to creditors, a state will generally not choose to file a proof of claim unless the distribution it would receive as a result exceeds any amount it might be required to disgorge were it subject to suit in the bankruptcy case. Finally, even if the state does file a proof of claim or actively litigate with respect to its claim, thereby waiving sovereign immunity with respect to that claim, not only does such waiver not necessarily apply to all claims against the state in that bankruptcy case,²²⁰ but it will have no effect on any other bankruptcy case. Waiver by litigation can be accomplished only on a case-by-case basis, which is inherently unpredictable and expensive, and provides states an unfair advantage that is not a necessary corollary of sovereign immunity.

2. Waiver by Contract

Like any other entity capable of binding itself to legal obligations by contract, a state may enter into a contractual arrangement that includes an agreement with respect to submission of the parties to the jurisdiction of a federal court or waiver of sovereign immunity. Such contractual clauses are quite common in

---

²²⁰ See infra Part III.C.
contracts to which foreign sovereign entities are parties.\textsuperscript{221} The purpose behind such provisions is to ensure that the non-sovereign contractual party will be able to enforce the contractual provisions against the sovereign in a forum that is not subject to the control of the sovereign itself (that is, a court other than a court of the sovereign jurisdiction) and which has expertise in the subject matter of the contract and will apply substantive and procedural rules with which the non-sovereign contracting party is more comfortable.\textsuperscript{222}

If a claim by a debtor against a state arises pursuant to a contract between the two in which the state waived its sovereign immunity, resolution of such claim in the bankruptcy court should be possible, even over the objection of the state.\textsuperscript{223} However, contractual waiver does not solve the problem of state sovereign immunity in bankruptcy for several reasons. First, most potential claims against a state, such as those for preferential payment of taxes or violation of the automatic stay or discharge injunction do not arise under a contract but under substantive provisions of the Code.

In those few cases where the claim is based on a contract, only the rare party contracting with the state has the negotiating leverage to obtain a contractual waiver of sovereign immunity. Parties with such leverage tend to be those who have sufficient financial resources that they are not dependent on the state contract. Such parties are generally less likely than others to find themselves in


\textsuperscript{223} See, e.g., Innes v. Kansas State Univ. (\textit{In re Innes}), 184 F.3d 1275, 1282 (10th Cir. 1999); \textit{In re Magnolia Venture Capital Corp.}, 218 B.R. 843, 849-50 (S.D. Miss. 1997).
bankruptcy, so most contracts between a debtor and the state will not have such a provision.

Even assuming the debtor, although now in bankruptcy, had the ability to bargain for such a clause at the time the contract was made, if the provision is less than explicit with respect to the waiver, the state may still contest its efficacy. Waivers of sovereign immunity must be "unequivocally expressed" to be effective. In addition, even if the provision is interpreted to waive sovereign immunity sufficiently expressly, states have argued, sometimes successfully, that the signatory of the contract, while having authority to bind the state to its substantive provisions, had no authority to waive the state's sovereign immunity.

2000] Getting to Waiver

For example, in In re Magnolia Venture Capital Corp., the contract provided that "courts within the State of Mississippi shall have jurisdiction over any and all disputes between the parties to this Pledge . . . . Venue in any such dispute, whether in federal or state court, shall be laid in Hinds County, Mississippi." 218 B.R. at 849-50. The state argued that the provision waived state immunity from suit only in state courts. The court interpreted the sentence dealing with venue to clarify the prior submission to jurisdiction clause to embrace federal courts in Hinds County, Mississippi. Similarly, in In re Innes, Kansas State University (KSU) had entered into a contract with the U.S. Department of Education to participate in the federal Perkins Loan Program. See 184 F.3d at 1283. Among the provisions of that contract was a clause under which KSU agreed to abide by specified federal regulations, which imposed on KSU the obligation, among others, to file a proof of claim in all bankruptcy cases of student borrowers that are not no-asset cases, and to oppose a request for discharge in appropriate cases. KSU argued that its agreement to abide by federal regulations was not a waiver of sovereign immunity. See id. The court disagreed, finding the agreement explicitly subjected KSU to federal bankruptcy court jurisdiction. See id.


See generally Patrick H. Tyler, In re Innes: The Supreme Court's Next Eleventh Amendment Case?, 18 AM. BANKR. INST. J. 16, 17 (1999) (criticizing the Innes court for its conclusion that KSU's authority to enter into contracts gave KSU the power to waive sovereign immunity). The justification generally given for finding that the power to enter into a contract on behalf of the state carries with it the implicit power to waive state sovereign immunity with respect to that contract is the requirement that contracts have a mutuality of obligation and remedy, and it would be unfair to allow a state to benefit from a contract which cannot be enforced against it by virtue of the state's sovereign immunity. See, e.g., In re Magnolia Venture Capital Corp., 218 B.R. 843, 850 (S.D. Miss. 1997); Na-Ja Constr. Corp. v. Roberts, 259 F. Supp. 895, 896-97 (D. Del. 1966).

See n. 226. For example, in In re Innes, Kansas State University (KSU) had entered into a contract with the U.S. Department of Education to participate in the federal Perkins Loan Program. See 184 F.3d at 1283. Among the provisions of that contract was a clause under which KSU agreed to abide by specified federal regulations, which imposed on KSU the obligation, among others, to file a proof of claim in all bankruptcy cases of student borrowers that are not no-asset cases, and to oppose a request for discharge in appropriate cases. KSU argued that its agreement to abide by federal regulations was not a waiver of sovereign immunity. See id. The court disagreed, finding the agreement explicitly subjected KSU to federal bankruptcy court jurisdiction. See id.

See id.


See generally Patrick H. Tyler, In re Innes: The Supreme Court's Next Eleventh Amendment Case?, 18 AM. BANKR. INST. J. 16, 17 (1999) (criticizing the Innes court for its conclusion that KSU's authority to enter into contracts gave KSU the power to waive sovereign immunity). The justification generally given for finding that the power to enter into a contract on behalf of the state carries with it the implicit power to waive state sovereign immunity with respect to that contract is the requirement that contracts have a mutuality of obligation and remedy, and it would be unfair to allow a state to benefit from a contract which cannot be enforced against it by virtue of the state's sovereign immunity. See, e.g., In re Magnolia Venture Capital Corp., 218 B.R. 843, 850 (S.D. Miss. 1997); Na-Ja Constr. Corp. v. Roberts, 259 F. Supp. 895, 896-97 (D. Del. 1966).
In sum, while contractual waivers of sovereign immunity are useful, they are of limited usefulness in most bankruptcy cases and with respect to a small universe of potential claims against states. If waiver by state sovereign entities is the solution to the nonconsenting state actor in bankruptcy, it must be accomplished by non-contractual means.

3. **Waiver by Legislative or Constitutional Provision**

The most direct method of waiving state sovereign immunity is the inclusion of such a waiver in a state constitution or the enactment of state legislation providing for consent to suit. That such constitutional or legislative provisions are effective to waive the protection afforded by the Eleventh Amendment and extra-constitutional notions of sovereign immunity is clear. Assuming that there is no issue as to the validity of the constitutional or statutory provision, the only issues relating to such waivers turn on interpretation.

The Supreme Court has emphasized that "a State will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." The state enactment must provide "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." The test, the Court says, "is a stringent one."

Such clarity of expression is unlikely to be found unless the state utilizes words that link the provision to such a waiver. Thus, unless the statutory or constitutional language includes a reference to "sovereign immunity" or "consent to suit" or "submission to

---


If the legislative provision was improperly enacted or violated either the United States or state constitution in some other respect, it would not be valid without regard to any waiver of sovereign immunity contained therein.


Atascadero State Hosp., 473 U.S. at 238 n.1; see also Pennhurst State Sch. & Hosp., 465 U.S. at 99 ("the State's consent [must] be unequivocally expressed").

Atascadero State Hosp., 473 U.S. at 241.
jurisdiction," a waiver of sovereign immunity is unlikely to be inferred.\(^{233}\) In case of inherent ambiguities in the language employed by the state, any clear expression by the state in the same provision that no waiver of sovereign immunity is intended is likely to be decisive.\(^{234}\) Waiver is an intentional relinquishment of a constitutionally-recognized right, and if intent is lacking waiver cannot be found.

Even if the provision at issue does clearly concern a waiver of sovereign immunity, the protection afforded a state by the doctrine "encompasses not merely whether it may be sued, but where it may be sued."\(^{235}\) Thus, a provision clearly subjecting states to suit in state court will not be deemed to waive sovereign immunity from suit in federal court.\(^{236}\) States will not be deemed to have submitted to the jurisdiction of federal courts unless the language employed in the waiver expressly so states.\(^{237}\)

\(^{233}\) See, e.g., Santee Sioux Tribe v. Nebraska, 121 F.3d 427, 431 (8th Cir. 1997) (statute directed Governor to negotiate tribal-state compacts); Barfield v. Blackwood, 7 F.3d 1140, 1146 (4th Cir. 1993) (statute provided for state to pay judgments against state employees); Angela R. v. Clinton, 999 F.2d 320, 325 (8th Cir. 1993) (statute acknowledged pendency of federal case); Burk v. Beeene, 948 F.2d 489, 493 (8th Cir. 1991) (statute provided for indemnification for damages assessed against state employees or officials by state or federal court); Kroll v. Board of Trustees, 934 F.2d 904, 909-910 (7th Cir. 1991) (special merger legislation made Board of Trustees liable for liabilities of merged entities, one of which had case pending against it in federal court); Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 794 F.2d 730, 734 (11th Cir. 1984) (statute contained direction that Council register as not-for-profit corporation); Williams v. Bennett, 689 F.2d 1370, 1377-78 (11th Cir. 1982) (statute provided for state to pay judgments awarded against certain state officers for acts in their official capacity); Kane v. Iowa Dep't of Human Servs., 955 F. Supp. 1117, 1129-30 (N.D. Iowa 1997) (Iowa Civil Rights Act defined employer as including state and provided for action against employer to be commenced in district court); McGuire v. Switzer, 734 F. Supp. 99, 106 (S.D.N.Y. 1990) (education law provided for state to accept provisions of federal law with respect to apportionment of grants among states).

\(^{234}\) See, e.g., Barfield, 7 F.3d at 1146 n.3; Williams, 689 F.2d at 1378; Richins v. Industrial Constr., Inc., 502 F.2d 1051, 1055 (10th Cir. 1974); Elliott v. Hinds, 573 F. Supp. 571, 575 (N.D. Ind. 1983).

\(^{235}\) Pennhurst State Sch. & Hosp., 465 U.S. at 99; see also Atascadero State Hosp., 473 U.S. at 241.


\(^{237}\) See Atascadero State Hosp., 473 U.S. at 241.
Finally, even if the state has enacted a valid, clearly expressed waiver of sovereign immunity with respect to certain claims in federal court, the claim at issue must fall within the scope of that waiver. The state has no obligation to waive its immunity with respect to all claims, or even all related claims. It can define the extent of its waiver as broadly or narrowly as it sees fit. If the claim sought to be asserted does not fall within the legislative language, it cannot be brought against the state in federal court even though other claims could be asserted in that jurisdiction.

B. Who Can Waive Sovereign Immunity on Behalf of the State?

When waiver is accomplished by legislative or constitutional provision, its efficacy is clear; as long as it has been duly adopted pursuant to state law, and expressly sets forth the state's intent to subject itself to suit in federal court, it is effective without regard to the identity of those participating in the process.

However, when state officials take actions in pending litigation that result in waiver of sovereign immunity, or sign contracts that subject the state to federal jurisdiction, the question arises whether the officials taking such action were authorized to waive sovereign immunity on behalf of the state, or whether their acts should be deemed ultra vires and ineffective to accomplish that result.

In the leading case examining this question, *Ford Motor Co. v. Department of Treasury of Indiana*, a foreign manufacturing company sought a refund of taxes paid to the state treasury and sued the department and various state officials. The state prevailed below, and the taxpayer sought certiorari, claiming that the court of appeals had erroneously decided an important question of Indiana law. Rather than addressing that issue, the Supreme Court found that the action could not be maintained in federal court.

First, the Court found that the suit against the treasury department and the state officials constituted "an action against the

---


239 See, e.g., Gamble v. Florida Dep't of Health & Rehabilitative Servs., 779 F.2d 1509, 1514-15 (11th Cir. 1986) (waiver as to traditional tort claims does not constitute waiver as to § 1983 action). Cf. Montana v. Peretti, 661 F.2d 756, 758 (9th Cir. 1981) (district court's conclusion that breach of contract constituted an injury to property and fell within terms of statutory waiver was "dubious").

323 U.S. 459 (1945).
State of Indiana" for purposes of the Eleventh Amendment.\textsuperscript{241} The Court then moved to the question of whether the State of Indiana had consented to be sued in federal court. Finding no statutory provision clearly waiving the state's immunity from prosecution in federal courts, the Court examined whether the Attorney General of the State of Indiana, by appearing in the case below to defend on the merits and failing to object to jurisdiction until the case was before the Supreme Court, had waived the state's sovereign immunity. The State conceded that, if the Attorney General had the power to waive the State's sovereign immunity, his actions had accomplished that result.\textsuperscript{242} However, the State successfully argued that Indiana law denied the Attorney General the power to effect such a waiver. The Indiana Constitution contained a provision authorizing the state legislature to consent to suit only by general law, which the Court interpreted to preclude discretionary waivers in individual cases; the Court found nothing in the powers specifically granted the Attorney General that would confer on him the power to consent to suit against the state where the legislature had not acted.\textsuperscript{243}

It is important to note that \textit{Ford Motor Co.} does not hold that a state attorney general can \textit{never} waive a state's sovereign immunity unless expressly authorized to do so by state statute. Rather, the inability of the Indiana Attorney General to waive the state's immunity sprang from the state Constitution, which vested in the state legislature the exclusive power to waive state sovereign immunity by enacting a law of general applicability. A fair reading of \textit{Ford Motor Co.} would suggest that, while state law may deny state officials the power to waive sovereign immunity by their actions,\textsuperscript{244}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 463-64.
\item See id. at 467.
\item See id. at 468-69.
\end{enumerate}
\end{footnotesize}

Even if the state constitution or statutory authority precludes waiver by non-legislative means, when the state official seeks affirmative relief in federal court and is statutorily authorized to do so, consent to jurisdiction may be deemed given. \textit{See Ford Motor Co. v.}
no affirmative grant of power is necessary in the absence of a preexisting prohibition. Rather, if state law authorizes a state official to take certain litigative actions (such as commencing an action in federal court or filing a proof of claim) or to bind the state to contracts, and state law does not expressly limit the ability of that state official to waive sovereign immunity, then when the state official engages in that authorized conduct, the loss of sovereign immunity follows.\(^2\)

Nevertheless, *Ford Motor Co.* has been read far more broadly. Even when a state actor has taken action—in litigation or by contract—that demonstrates a clear intent to permit adjudication by a federal court, decisions have permitted the state to disclaim those actions as ineffective to waive sovereign immunity because no express grant of power to waive immunity was conferred on that state actor by state law.\(^2\) When coupled with the holding of *Ford Motor Co.* that the defense of sovereign immunity can be raised at

\[^2\] *See, e.g.*, Innes v. Kansas (*In re Innes*), 184 F.3d 1275, 1284 (10th Cir. 1999); Georgia Dep’t of Revenue v. Burke (*In re Burke*), 146 F.3d 1315, 1319 (11th Cir. 1998); Confederated Tribes of Colville Reservation Tribal Credit v. White (*In re White*), 139 F.3d 1268, 1271 (9th Cir. 1998); Hankins v. Finnel, 964 F.2d 853, 858-59 (8th Cir. 1992); Beasley v. Alabama State Univ., 3 F. Supp. 2d 1304, 1324-25 (M.D. Ala. 1998); *In re Barrett Refining Corp.*, 221 B.R. at 811.

\[^2\] *See, e.g.*, Magnolia Venture Capital Corp. v. Prudential Secs., Inc., 151 F.3d 430, 445 (5th Cir. 1998) (Mississippi Department of Economic and Community Development entered into contract providing for waiver of immunity); Schlossberg v. Comptroller of Treasury (*In re Creative Goldsmiths of Washington, D.C.*, Inc.), 119 F.3d 1140, 1149 (4th Cir. 1997) (state attorney general defended case on the merits, raising sovereign immunity defense only on appeal); Santee Sioux Tribe v. Nebraska, 121 F.3d 427, 431-32 (8th Cir. 1997) (state attorney general answered federal complaint and filed counterclaim); Estate of Porter v. Illinois Dep’t of Mental Health, 36 F.3d 684, 690-91 (7th Cir. 1994) (attorney general removed state court action to federal court); Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986) (state defendants removed action to federal court); Terrell v. United States, 783 F.2d 1562, 1566 (11th Cir. 1986) (Florida Department of Transportation filed pretrial stipulation that district court had jurisdiction); Gwinn Area Cnty. Schs. v. Michigan, 741 F.2d 840, 847 (6th Cir. 1984) (state defendants removed action to federal court); Freimantis v. Sea-Land Serv., Inc., 654 F.2d 1155, 1160 (5th Cir. 1981) (attorney for Department of Transportation and Development entered into consent judgment with plaintiff); *Linkenhoker*, 529 F.2d at 53 (assistant attorney general expressly represented to the court that state waived its Eleventh Amendment immunity); *Rees* v. Nagata, No. CV 87-0024, 1987 WL 109921 at *12-14 (D. Hawaii Aug. 4, 1987) (defendant made general appearance, responded to discovery and participated at trial). *Cf.* *Pitts v. Ohio Dep’t of Taxation* (*In re Pitts*), 241 B.R. 862, 878 (Bankr. N.D. Ohio 1999) (noting that the court could find no Ohio law conferring upon special counsel to the state attorney general authority to waive Ohio’s sovereign immunity by answering complaint).
any stage of the proceedings, these cases encourage states to play games with federal jurisdiction, taking advantage of favorable decisions in federal court while raising the court’s lack of jurisdiction if the decisions initially go against them.

But whether Ford Motor Co. is read broadly or more narrowly, the task of a federal court in determining whether actions by particular state officials have waived the state’s sovereign immunity is not an easy one. If the state has constitutional or statutory provisions bearing on the authority of the official to waive, the federal court must interpret the state law, an undertaking that federalism suggests should be avoided whenever possible. Even if there is no applicable state law constraining the power of the state actor to waive the state’s immunity, the federal court must make a factual assessment in each case, determining whether the state actor did “enough” to consent to federal jurisdiction on behalf of the state. These difficulties make the desirability of encouraging clear legislative or constitutional waivers of sovereign immunity even more patent.

C. As to What Claims Is a Waiver of Sovereign Immunity Effective?

Again, when a state waives its sovereign immunity by constitutional provision or legislative act, the claims as to which it is waiving that immunity will be specified in the waiver provision itself. Similarly, when a waiver is contemplated by contractual provision, the words chosen by the negotiating parties will determine what

---

247 See Ford Motor Co. v. Department of Treasury of Ind., 323 U.S. 459, 467 (1945) (defense was raised for first time in Supreme Court).

248 The bankruptcy judge deciding In re Midland Mechanical Contractors, Inc., 200 B.R. at 453, commented on this gamesmanship, suggesting that it:

... substantially contradicts the Court’s own notion of fair play and equity. Through this course of events the estate has incurred substantial litigation expenses and much time has been devoted to the resolution of this controversy. Now, only after receiving a judgment adverse to its interests, the Board has chosen to reassert its Eleventh Amendment immunity to avoid that judgment’s consequences.

Id. at 459 n.6; see also Katrina A. Kelly, In the Aftermath of Seminole: Waiver of Sovereign Immunity Under Section 106(b) of the Bankruptcy Code, 15 BANKR. DEV. J. 151, 179 (1998).

Although the lack of a legislative grant of authority to waive sovereign immunity may encourage states that do not fare as well as they would hope in a bankruptcy proceeding to argue that their sovereign immunity was not waived, even by the filing of a claim, bankruptcy courts may not look favorably on states trying to have their cake and eat it too.

Id.
claims are covered. But when waiver is accomplished by a voluntary act undertaken by a duly empowered state official in pending litigation, the scope of that waiver is unclear. With respect to what potential claims against the state is the waiver effective?

Here, courts are confronted with two related issues. First, what is the applicable standard to be applied in analyzing whether a consent to federal jurisdiction with respect to one claim also waives immunity with respect to another? Second, once the applicable standard is identified, do the claims at issue in any particular case satisfy that standard?

In the bankruptcy context, waiver of sovereign immunity by litigative action is most likely to occur by the filing of a proof of claim by the state or one of its agencies. The leading Supreme Court case on waiver by submission of a proof of claim, Gardner v. New Jersey, did not need to address the scope of the state's waiver of sovereign immunity in any detail, because the claims by the estate against the state were all in the nature of objections to the state's claim for unpaid taxes. The Court noted that by filing a proof of claim "[t]he State is seeking something from the debtor. No judgment is sought against the State. . . . 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." At a minimum, therefore, the filing of a proof of claim, or the assertion of any other claim in bankruptcy court, waives sovereign immunity with respect to defensive counterclaims to the claim asserted by the state. So long as the estate seeks no recovery from the state, but merely seeks to relieve itself of liability to the state, the waiver resulting from the assertion of the claim by the state covers any defensive claim filed against it.

But does the waiver go further, to permit recovery from the state in excess of any claim asserted by it? The scope of a waiver by filing a proof of claim is addressed in the Code, which makes such a filing a "deemed" waiver "with respect to a claim against such governmental unit that is property of the estate and that arose out

---

290 Id. at 574.
281 See, e.g., Parker N. Am. Corp. v. Resolution Trust Corp. (In re Parker N. Am. Corp.), 24 F.3d 1145, 1155 (9th Cir. 1994) (preference action against RTC is properly characterized as an "affirmative defense" rather than counterclaim and lies within jurisdiction of bankruptcy court where claim filed against debtor by RTC exceeds amount of preference).
of the same transaction or occurrence out of which the claim of such governmental unit arose." 252 The language employed in § 106(b) is similar to that used with respect to compulsory counterclaims in the Federal Rules of Civil Procedure,253 and courts have interpreted it to call for the same type of analysis applied under the civil rules.254 This test would, unlike § 106(c) which provides for an “offset” against claims of governmental units claims by the estate against them,255 permit recovery by the estate against

---

252 11 U.S.C. § 106(b) (1999). Until the amendments to § 106 adopted as part of the Bankruptcy Reform Act of 1994, see supra note 29 and accompanying text, the same provision was designated as § 106(a).

253 Federal Rule of Civil Procedure 13(a) provides, “A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim....” FED. R. CIV. P. 13(a). The Supreme Court has characterized the language now set forth in § 106(b) as dealing with “compulsory counterclaims to governmental claims.” United States v. Nordic Village, 503 U.S. 30, 34 (1992); see also Wyoming Dep’t of Transp. v. Straight (In re Straight), 143 F.3d 1387, 1391 (10th Cir. 1998); Schlossberg v. Comptroller of Treasury (In re Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1149 (4th Cir. 1997); Quality Tooling, Inc. v. United States, 47 F.3d 1569, 1576 (C.A. Fed. Cir. 1995); Price v. United States (In re Price), 42 F.3d 1068, 1072 (7th Cir. 1994); Graham v. United States (In re Graham), 981 F.2d 1135, 1141 (10th Cir. 1992); Sullivan v. Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1150 (9th Cir. 1992); Brown v. United States (In re Rebel Coal Co.), 944 F.2d 320, 321 (6th Cir. 1991).

254 The legislative history of § 106 as originally enacted as part of the Bankruptcy Reform Act of 1978 supports this characterization:

Section 106 provides for a limited waiver of sovereign immunity in bankruptcy cases.... [T]he filing of a proof of claim against the estate by a governmental unit is a waiver by that governmental unit of sovereign immunity with respect to compulsory counterclaims, as defined in the Federal Rules of Civil Procedure... The governmental unit cannot receive a distribution from the estate without subjecting itself to any liability it has to the estate within the confines of a compulsory counterclaim rule.


256 See 11 U.S.C. § 106(c) (1999). Section 106(c) provides, “Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.” See id. This provision, without the introductory clause, was designated as § 106(b) prior to the amendments to § 106 adopted as part of the Bankruptcy Reform Act of 1994. See supra note 29 and accompanying text.
the governmental unit in excess of the amount of the claim by the governmental unit against the estate.256

In applying the statutory language, courts have looked to whether there is a "logical relationship" between the claim by the governmental unit against the debtor and the claim by the estate against the governmental unit.257 The test is a reasonably generous one. Counterclaims are most likely to fail the test if they relate to different time periods258 different types of claims,259 or different governmental entities.260


258 See, e.g., In re Graham, 981 F.2d at 1141; Dav's, 136 B.R. at 422; In re ABEPP Acquisition Corp., 215 B.R. at 518; Field v. Montgomery County (In re Anton Motors, Inc.), 177 B.R. 58, 66 (Bankr. D. Md. 1995).

259 See, e.g., In re Creative Goldsmiths of Washington, D.C., Inc., 119 F.3d at 1149 (claim for sales and withholding taxes did not arise from same transaction or occurrence as claim for preferential payment of corporate income tax); Ashbrook v. Block, 917 F.2d 918, 924 (6th Cir. 1990) (debtors' tort claim against government for failure to render credit and management counseling and denial of operating and emergency loans was not related to claim for amounts due on outstanding loans); WJM, Inc. v. Massachusetts Dep't of Pub. Welfare, 840 F.2d 996, 1003-04 (1st Cir. 1988) (debtors' claims for medicaid reimbursements did not arise out of same transaction or occurrence as state's claim for unpaid taxes); In re ABEPP Acquisition Corp., 215 B.R. at 518 (sales tax penalty did not arise out of same transaction or occurrence as 3% tax on sale of property); cf. In re Rebel Coal Co., Inc., 944 F.2d at 322 (preference action to recover funds garnished to satisfy judgment for penalties under Mine Safety and Health Act was not sufficiently related to claim for other unpaid civil penalties under Act); Seay v. Tennessee Student Assistance Corp. (In re Seay), 244 B.R. 112, 118 (Bankr. E.D. Tenn. 2000) (adversary proceeding for determination of discharge of student loan was distinct from claims allowance process, and state did not waive immunity by filing proof of claim for student loans).

260 See infra Part III.D. Cf. Jones v. Yorke (In re Friendship Med. Ctr., Ltd.), 710 F.2d 1297, 1301 (7th Cir. 1983) (claims by state agency against debtor were not related to claims by other creditors against state agency); William Ross, Inc. v. Biehn Constr., Inc. (In re William Ross, Inc.), 199 B.R. 551, 554 (Bankr. W.D. Pa. 1996) (claim against state Department of General Services not sufficiently related to claims filed by Departments of Revenue and Labor & Industry).
After *Seminole Tribe*, courts differ over whether § 106(b) survives constitutional challenge. Those that conclude it does obviously continue to apply the compulsory counterclaim (“same transaction or occurrence”) test with respect to a state’s waiver of sovereign immunity by filing a proof of claim. But surprisingly, the majority of those courts that have concluded that § 106(b) fails constitutional muster (or who are no longer willing to rely on its validity) also continue to apply the compulsory counterclaim test, finding it consistent with the *Gardner* analysis. Other post-*Seminole Tribe* decisions decline to go beyond the holding of *Gardner* and limit the scope of the waiver to defensive counterclaims, those that bear directly on the adjudication of the state’s filed claim.

---

261 See *supra* note 212 and accompanying text.


263 See, e.g., *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d at 1147; *Brewer v. New York State Dep’t of Corr. Serv. (In re Value-Added Communications, Inc.*), 224 B.R. 354, 357-58 & 357 n.1 (N.D. Tex. 1998); *Schulman v. California State Water Res. Control Bd. (In re Lazar*), 200 B.R. 958, 978 (Bankr. C.D. Cal. 1996). Cf *Georgia Dep’t of Revenue v. Burke (In re Burke*), 146 F.3d 1313, 1317 n.8, 1318 n.10, 1319 (11th Cir. 1998) (assuming § 106(b) is invalid, but holding that claim for costs and fees incurred in enforcing automatic stay were matters “respecting the adjudication of the claim” under *Gardner* and also arose out of the “same transaction or occurrence” as state’s claim). See generally *Teresa K. Goebel, Comment, Obtaining Jurisdiction Over States in Bankruptcy Proceedings After Seminole Tribe*, 65 U. CHI. L. REV. 911, 925 (1998) (advocating adoption of the same transaction or occurrence test and its liberal application even if § 106(b) is unconstitutional “because it better serves important policy goals of the bankruptcy system while still respecting the federalism concerns underlying the Eleventh Amendment”); Klee et al., *supra* note 106, at 1566-67 (calling the same transaction or occurrence test “a rough majority rule” and suggesting the same results will occur whether or not § 106(b) is constitutional).

264 See, e.g., *Grabscheid v. Michigan Employment Sec. Comm’n (In re CJ. Rogers, Inc.*), 212 B.R. 265, 274 (E.D. Mich. 1997). Cf *Koehler v. Iowa College Student Aid Comm’n (In re Koehler*), 204 B.R. 210, 219 (Bankr. D. Minn. 1997) (suggesting in dictum that, to the extent § 106(b) goes beyond recoupment cases, it may be subject to constitutional challenge). This narrower reading of *Gardner* seems justified. Pre-Code (but post-*Gardner*) cases also took the position that “affirmative recovery against the sovereign is not a corollary of the sovereign’s right to sue or present a claim for bankruptcy adjudication,” and that the waiver created by filing a claim—in the absence of a valid statutory waiver—does not extend to a counterclaim for affirmative relief against the government. See *Danning v. United States*, 259 F.2d 305, 309-10 (9th Cir. 1958). See also *Federal Sav. & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1017 (7th Cir. 1969) (by filing suit government waived immunity only with respect to matters “in recoupment” to the extent of defeating government’s claim); *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967) (when sovereign sues it waives immunity as to claims of defendant for recoupment, but not as to claims exceeding in amount that sought by sovereign as plaintiff); *United States v. Kennedy (In re Greenstreet, Inc.*), 209 F.2d 660, 663, 664 (7th
Thus, the scope of the waiver resulting from litigative conduct by a state after *Seminole Tribe* remains problematic. It is unclear whether § 106(b) remains valid, and even if it does, application of its compulsory counterclaim test is not always easy. If it is not valid, uncertainty prevails as to the appropriate test for determining whether a state asserting a claim against the estate has waived immunity with respect to a claim against it and how to apply any such test. This uncertainty benefits no one, not the debtor, not the bankruptcy estate and its non-sovereign creditors, and certainly not the governmental unit, which must decide whether to seek recovery from the estate. Waivers of sovereign immunity should be clear, certain, and create predictable results to promote the goals of both sovereign creditors and other bankruptcy parties. A valid constitutional or legislative waiver would accomplish this objective.

D. *As to What Entities Within the State is a Waiver of Sovereign Immunity Effective?*

Sovereign immunity may be asserted on behalf of a state not only by the governor or attorney general but by any state agency that is in essence an arm of the state as a matter of federal law.²⁶⁵ This

---

²⁶⁵ *See, e.g.*, Pendergrass v. Greater New Orleans Expressway Comm'n, 144 F.3d 342, 344 (5th Cir. 1998) (court must consider (1) whether state law characterizes agency as arm of state; (2) source of funds; (3) degree of autonomy; (4) whether entity is concerned with primarily local as opposed to statewide problems; (5) authority to sue and be sued; (6) right to hold and use property); Duke v. Grady Mun. Sch., 127 F.3d 972, 974 n.3 (10th Cir. 1997) (four factors to be considered are (1) characterization under state law; (2) guidance and control exercised by state; (3) degree of state funding; and (4) local entity's ability to raise funds on its own behalf); Mancuso v. New York State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996) (identifying six factors: (1) how entity is referred to in documents creating it; (2) how members of governing body are appointed; (3) how entity is funded; (4) whether function is traditionally one of local or state government; (5) whether state has veto power over entity's actions; and (6) whether state is bound by entity's obligations); Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir. 1989) (in determining whether a state agency may assert sovereign immunity, court must consider (1) whether payment of the judgment
multiplicity of state entities entitled to claim immunity may create additional problems. While a state constitutional provision or legislative enactment waiving sovereign immunity on behalf of the state is binding on every instrumentality of the state that would otherwise be entitled to assert its immunity, the impact of other actions waiving sovereign immunity on state actors other than those undertaking those actions is less clear.

When a sovereign entity asserts a right of set-off under § 553, most courts have followed non-bankruptcy law in concluding that the sovereign is a single entity and the debt owed by a debtor to one agency or department may be set off against the obligations of another agency or department to the same debtor. They have reached this conclusion against a backdrop of the language of § 553, which recognizes the right of offset of a "creditor." "Creditor" is defined to be an "entity that has a [prepetition] claim against the debtor," and "entity" is defined to include "governmental unit." "Governmental unit," the same term used in the operative provisions of § 106, means, among other itemized governmental

would come from state treasury; (2) status of agency under state law; and (3) degree of autonomy the agency enjoys).

See 11 U.S.C. § 553 (1999). Section 553 does not create a right of set-off applicable in bankruptcy cases. It merely makes applicable in bankruptcy (with some exceptions) the right of set-off as it exists outside of bankruptcy. Section 553(a) states in part that "this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor ... against a claim of such creditor against the debtor." See id.


11 U.S.C. § 101(10)(A) (creditor defined as "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor").

Id. § 101(15) (entity includes "person, estate, trust, governmental unit, and United States trustee").
entities, "State... [or] department, agency or instrumentality of... a State..." 271 In essence, these decisions are predicated on interpreting the term "governmental unit" which is one of the building blocks for the definition of "creditor" in § 553 as meaning a sovereign and all its constituent agencies and departments as a single unit entitled to offset debts owing by one constituent element against those owed to another, rather than considering each a separate "governmental entity" (and thus a separate "creditor") entitled to set off only its own debts against those owing by the debtor. Section 106(c), which authorizes set-off against claims of "governmental units" notwithstanding assertions of sovereign immunity, has been interpreted the same way. 272

Although some decisions have interpreted the term "governmental unit" in precisely this same way for purposes of the waiver provision of § 106(b), 273 others have not. 274 But whether or not they interpret "governmental unit" to point to a single sovereign

---

[Notes and references]

271 The definition of "governmental unit" in § 101(27) reads in full:

'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).


entity, most courts have emphasized the requirement of § 106(b) that waiver extends only to claims "that arose out of the same transaction or occurrence" as the claim as to which the governmental unit waived immunity, and conclude that a claim by an agency or department of the government other than that which filed a proof of claim can not be considered to arise out of the same transaction or occurrence as the claim as to which waiver occurred by filing. 

Of course, to the extent that "same transaction or occurrence" is interpreted more broadly, courts could reach a different conclusion.

If § 106(b) has not survived Seminole Tribe, the applicable standards under Gardner limit waiver only to those claims "respecting the adjudication of the [filed] claim." Because, pursuant to § 502(d), the court must disallow a claim of any "entity" (which includes a "governmental unit") which refuses to turn over estate property or which has received an avoidable transfer or preferential set-off, if "governmental unit" is interpreted on the single entity theory applicable to rights of set-off under § 553, a claim filed by one governmental agency or department could easily be interpreted to waive immunity with respect to claims against a separate agency or department pursuant to the turnover or

---


276 See supra note 212 and accompanying text.


278 Id. at 574.

279 Section 502(d) states in part "the court shall disallow any claim of any entity from which property is recoverable under sections 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title ...." 11 U.S.C. § 502(d) (1999).
avoidance powers that would justify disallowance of the filed claim under § 502(d).

The difficulties of determining the scope of the waiver of sovereign immunity occasioned by the filing of a proof of claim, not only as to other claims of the same agency or department, but also as to claims of other agencies or departments, provides additional support for the proposition that application of the waiver doctrine as it now exists is unpredictable and therefore inefficient, and results in inconsistent decisions between courts, which is also inherently unfair both to debtors and creditors. A better system is needed.

IV. GETTING TO WAIVER

After the Supreme Court's decision in Seminole Tribe, we are left with a bankruptcy system in which the purported abrogation of sovereign immunity in § 106(a) is unconstitutional if that section was enacted pursuant to the Bankruptcy Clause of the Constitution, and it is unlikely § 106(a) was, or could be, enacted pursuant to Congress's powers under section 5 of the Fourteenth Amendment, which the Supreme Court has concluded is the only constitutional basis for abrogation of state sovereign immunity. Yet, we have a federal bankruptcy system that is premised upon the participation of all interested parties, including those sovereign creditors entitled to immunity from compulsory suit in federal court. The myriad potential involvements of state entities in bankruptcy cases and the damage that can be done the policies underlying our bankruptcy system if states can choose not to participate mandates a solution to state sovereign immunity in bankruptcy that both respects the rights of the sovereign states and furthers the goals of the uniform federal system. But the solutions that have been proposed—empowering the federal government (or a representative thereof) to pursue bankruptcy causes of action against the states, seeking injunctive relief against state officials

282 See supra notes 32-63 and accompanying text.
283 See supra notes 64-110 and accompanying text.
284 See supra notes 114-44 and accompanying text.
285 See supra notes 148-59 and accompanying text.
under *Ex parte Young*,\textsuperscript{256} or seeking redress in state courts\textsuperscript{257}—while providing constitutional deference to state sovereignty, inadequately respond to the federal objectives.

The problem of sovereign immunity can be overcome only when it disappears, when the nonconsenting state entities who opt out of the bankruptcy process become consenting, participating players by waiving the immunity to which they would otherwise be entitled. But waiver itself, although it remains a viable means of vitiating sovereign immunity even after *Seminole Tribe*, has its own ambiguities and limitations. Short of a duly-enacted or adopted legislative or constitutional provision waiving immunity, it is unclear what actions constitute a waiver,\textsuperscript{258} who may take such actions on behalf of the state,\textsuperscript{259} what potential claims against the state are covered by any such waiver,\textsuperscript{260} and whether such waiver extends to state departments or agencies other than that which took the action resulting in waiver.\textsuperscript{261}

Even when those issues can be resolved in an individual case, we are left with a system in which states are encouraged, by economic self-interest, to engage in selective submission to bankruptcy court jurisdiction, waiving immunity when the cost of doing so is less than the benefits to be derived from participation, and opting out when the benefits of participation accrue not to the state but to the estate and the other creditors. The state may pick and choose, case by case, claim by claim, department by department, when it wants to be a player and when it does not. No other creditor has the right to exclude itself voluntarily from the bankruptcy system. Given the policy of equal treatment of similarly-situated creditors underlying the Code,\textsuperscript{262} no creditor should have that right unless such special treatment is constitutionally compelled. Although state sovereign immunity requires that states be given the choice whether to submit to federal jurisdiction, it does not require that states be given total flexibility in making that

\textsuperscript{256} See supra notes 160-80 and accompanying text.
\textsuperscript{257} See supra notes 181-99 and accompanying text.
\textsuperscript{258} See supra notes 203-39 and accompanying text.
\textsuperscript{259} See supra notes 240-48 and accompanying text.
\textsuperscript{260} See supra notes 249-64 and accompanying text.
\textsuperscript{261} See supra notes 265-80 and accompanying text.
\textsuperscript{262} See supra note 116 and accompanying text.
choice. Section 106(b) and *Gardner v. New Jersey*\(^{293}\) provide the states more freedom of choice than their sovereign status requires. A new approach to waiver is necessary that both respects state sovereign immunity and promotes the federal bankruptcy goal of equal treatment.

States can be put on an equal footing with other bankruptcy creditors only if they voluntarily waive their sovereign immunity with respect to all cases, all agencies and departments, and all claims. This can be accomplished by uniform legislation enacted in the state legislatures of all fifty states, pursuant to which each state would consensually waive sovereign immunity to the extent provided in the abrogation provisions of § 106(a).\(^{294}\)

But how can we achieve this goal? Is there any way of getting to waiver by every state? To answer this question, we must explore the limits imposed by the Constitution on Congress in seeking state legislative action, and the mechanisms Congress may use to obtain its objectives consistent with those limits.

---


294 A waiver that mirrors the provisions of 11 U.S.C. § 106(a) would put the states on an equal footing with the federal government, as to which § 106(a) remains effective even after *Seminole Tribe*. Such legislation could read:

(a) The State of [ ], for itself and for all of its agencies, departments, subdivisions or other entities entitled to assert sovereign immunity (herein collectively referred to as the “State”), hereby waives its sovereign immunity to the extent set forth herein with respect to the following:


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

(3) The federal court may issue against the State 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 United States Code title 11 or the Federal Rules of Bankruptcy Procedure against the State shall be consistent with the provisions and limitations of section 2412(d) (2) (A) of United States Code title 28.

(4) The enforcement of any such order, process or judgment against the State shall be consistent with appropriate nonbankruptcy law applicable to the State.

(5) Nothing herein shall create any substantive claim for relief or cause of action not otherwise existing under United States Code title 11, the Federal Rules of Bankruptcy Procedure or nonbankruptcy law.
A. Tenth Amendment

Just as Congress cannot constitutionally abrogate a state's sovereign immunity pursuant to its Article I powers, it cannot commandeer the state's legislative process by mandating the enactment of specific legislation without violating the Tenth Amendment. The Supreme Court explored the constitutional limits of congressional power over state legislatures in *New York v. United States.*

In an effort to ensure adequate disposal sites for low level radioactive waste, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985, which, among other provisions, required states that did not provide for disposal of all low-level radioactive waste generated within their boundaries by January 1, 1996 in accordance with the instructions of Congress to take title to and possession of such waste at the request of the generator or owner thereof, and to be liable for all damages incurred by the waste generator or owner as a result of the state's failure to do so. This provision gave the states two choices: either adopt legislation implementing the disposal mechanics for low-level radioactive waste proposed by Congress, or take title to the waste and assume responsibility for its disposal. The State of New York, while acknowledging that Congress itself had the Constitutional power to regulate with respect to the disposal of low-level radioactive waste, asserted that Congress did not have the power to force the states to regulate with respect to such disposal. New York

---


258 The Act provided the states some alternatives for disposing of the waste. They could contract with regional compacts that had established sites, 42 U.S.C. § 2021e(e)(1)(F) (1999), or they could construct a disposal site themselves or as part of a compact, *id.* § 2021e(e)(1)(A) & (B).

259 *Id.* at § 2021e(d)(2)(C).
sought a declaratory judgment that the Act was, among other things, inconsistent with the Tenth Amendment to the Constitution. 300

The Court struck down the “take title” provisions. Noting that Congress has the Constitutional authority “to regulate individuals, not States,” and therefore “lacks the power directly to compel the States to require or prohibit” even acts Congress could require or prohibit directly, 301 the Court noted that the “take title” provisions gave the states a choice between regulating with respect to disposal of the waste—which Congress could not order the states to do—and acquiring the waste from its producers—which Congress could not order the states to do. 302 Because Congress lacked the power to order states to implement either one of the two choices it gave them, it lacked the power to require them to choose to do one or the other. 303 Therefore, the “take title” provisions were unconstitutional.

However, the Court emphasized that Congress could, within its constitutional role, “encourage” a state to regulate, and “hold out incentives to the States as a method of influencing a State’s policy choices.” 304 Two acceptable methods of encouragement identified by the Court were the attachment of conditions to the receipt of federal funds and offering the states the choice of regulating or facing federal preemption, 305 but the Court acknowledged there may be other permissible methods, “short of outright coercion.” 306

B. Conditional Spending Power

Use of the spending power 307 to encourage state action, which Congress is powerless to compel directly, has long been recognized as consistent with the Tenth Amendment. In the leading case of

300 Amendment X states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.
302 See id. at 175-76.
303 See id. at 176.
304 Id. at 166.
305 See id. at 167.
306 Id. at 166.
307 Article I gives Congress the power, “To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . .” U.S. CONST. art. I, § 8, cl. 1.
"South Dakota v. Dole," the Supreme Court upheld a federal statute conditioning the receipt of a portion of the federal highway funds which a state would otherwise be offered on the state prohibiting the purchase or possession of alcoholic beverages by persons under the age of twenty-one. Quoting the spending power clause of the Constitution, the Court stated that "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds," even when the objectives sought to be achieved by these conditions are beyond the powers of Congress to legislate directly. Despite some academic criticism of this interpretation as inconsistent with the Court's other federalism decisions, the Court has adhered to it even while cutting back on federal power under the Commerce Clause and the Fourteenth Amendment.

The Court in Dole recognized that congressional power to condition receipt of federal funds on adherence to congressional directives is not without limits. First, the federal spending itself must, consistent with the language of the Constitution creating the spending power, be aimed at the "general welfare," although Congress is entitled to substantial deference in this determination. Second, Congress must make its conditions unambiguous, so that the state may exercise its choice "knowingly, cognizant of the

---

309 Id. at 206-07. In so holding, the Court was following a long line of cases, including: Steward Mach. Co. v. Davis, 301 U.S. 548 (1937), Helvering v. Davis, 301 U.S. 619 (1937), and United States v. Butler, 297 U.S. 1 (1936), where the Court embraced the Hamiltonian view that the spending clause is a self-contained grant of Congressional power, limited only by its terms, rather than the view of James Madison that the spending power could be used only to effectuate other enumerated powers of Congress. See generally David E. Engdahl, The Spending Power, 44 DUKE L.J. 1 (1994) (discussing Hamilton's view of the spending power and suggesting that the Court in Butler, Steward, and Helvering misunderstood it).
311 See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 665, 686 (1999) ("Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and . . . acceptance of the funds entails an agreement to the actions.").
312 Dole, 483 U.S. at 207 (citing Helvering, 301 U.S. at 640-41 and Butler, 297 U.S. at 65).
313 See id.
consequences” of accepting the funds. Third, the Court noted that its cases had suggested that conditions on receipt of federal funds might be invalid if they are unrelated “to the federal interest in particular national projects or programs.” Fourth, the state action Congress requires by the conditions can not be barred by another constitutional provision. Finally, the Court further suggested that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”

Although the threat of federal preemption is meaningless in the context of bankruptcy, where the enactment of the Code has already preempted state regulation, use of conditional spending as a means of obtaining state waiver of sovereign immunity in bankruptcy is worth examination. In order to pass muster, Congress would first have to attach the condition to a funding bill authorized by the spending power clause of the Constitution in that it must be aimed at promoting the “general welfare.” Given the reluctance of courts to second guess the political process in this respect, one can assume that any spending bill Congress enacted would satisfy this requirement.

Second, Congress would have to draft the condition clearly and unambiguously, stating that acceptance of the federal funds under

---

314 Id. (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). See also Counsel v. Dow, 849 F.2d 731, 736 (2d Cir. 1988) (Pennhurst “simply requires a clear indication of congressional intent to impose such conditions”).

315 Id. at 207-08 (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958)).

316 Id. at 208 (citing Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985); Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam); King v. Smith, 392 U.S. 309, 333 n.34 (1968)).

317 Id. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

the program would require a waiver by the state and all its subdivisions and agencies of its sovereign immunity in all bankruptcy cases to the extent specified in § 106 of the Code. Having once redrafted § 106 to satisfy the Supreme Court's objection that the original language did not make its intention to abrogate sovereign immunity "unmistakably clear," Congress could undoubtedly draft a provision conditioning receipt of federal funds on a similar waiver with sufficient clarity.

The fourth limitation on congressional power to condition receipt of federal funds on state compliance with federal objectives, the requirement that there be no constitutional provision barring the action requested by Congress in its condition, should also be easy to satisfy. Although the Constitution recognizes state sovereign immunity in the Eleventh Amendment, no constitutional provision precludes a state from waiving its immunity should it choose to do so. Indeed, the Supreme Court has clearly indicated that a state's waiver of sovereign immunity would be a permissible quid pro quo for receipt of federal funds, and lower courts have so held.

The fifth limitation on conditional spending provisions—that a state cannot be put to a choice that is so economically coercive as to

---


520 The unconstitutional conditions doctrine has never been clearly defined. See generally Meltzer, supra note 156, at 51; Rosenthal, supra note 310, at 1120-23; Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413 (1989); Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U.L. REV. 593 (1990); William Van Alstyne, "Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 HARV. J. L. & PUB. POL'Y 303 (1993). But the Court in Dole explained the limitation as intended to ensure that conditions on federal funding "not be used to induce the States to engage in activities that would themselves be unconstitutional." South Dakota v. Dole, 483 U.S. 203, 210 (1987).

521 See, e.g., Alden v. Maine, 527 U.S. 706, 755 (1999) ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the State's voluntary consent to private suits") (citing Dole); Atascadero State Hosp., 473 U.S. at 246-47 ("[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court.... The Act likewise falls far short in manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.").

522 See, e.g., Litman v. George Mason Univ., 186 F.3d 544, 555 (4th Cir. 1999); Clark v. California Dep't of Corr., 123 F.3d 1267, 1271 (9th Cir. 1997); Beasley v. Alabama State Univ., 3 F. Supp.2d 1304, 1311-16 (M.D. Ala. 1998).
become compulsion—has its critics. However, since the Supreme Court struck down the provisions of the Agricultural Adjustment Act of 1933 that conditioned farmers' receipt of federal financial assistance on their reduction in crop production in 1937, no court has yet found a condition on receipt of federal funds invalid as overly coercive. Congress could certainly tailor its spending bill to limit the sanction for failure to waive sovereign immunity to a level that would be unlikely to cross the line, wherever it may lie.

The major stumbling block to use of the spending power to solve the sovereign immunity problem in bankruptcy comes with the third limitation on use of conditional funding, the requirement that the condition be related "to the federal interest in particular

---

323 Some have argued that the amount Congress determines to withhold in the event a state "chooses" not to comply with the condition will always be sufficient to eliminate any real choice and thus is inherently coercive. See, e.g., W. Paul Koenig, Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with "Megan's Law", 88 J. CRIM. L. & CRIMINOLOGY 721, 749-54 (1998); McCoy & Friedman, supra note 310, at 118-20. Others suggest that a state, which has the power to tax its citizens, can never be economically coerced by the denial of federal funds, however great the amount, even if the choice of replacing the foregone federal support with state taxes is politically unpalatable. See, e.g., Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989). The state can always adopt the "simple expedient of not yielding to...federal coercion." Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143-44 (1947). Others have noted that the line between encouragement and coercion is inherently subjective and thus arbitrary. See, e.g., Baker, supra note 310, at 1973; Angel D. Mitchell, Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions, 48 U. KAN. L. REV. 161, 191 (1999).

324 United States v. Butler, 297 U.S. 1, 70-71 (1936). Although the Court framed its conclusion in terms of coercion, in fact it held that Congress had attempted by use of the spending power to regulate a subject beyond its powers—consistent with the Madisonian view of the spending clause which it purported to reject. The Court changed course in substance (while continuing to embrace the Hamiltonian idea of the spending clause) the following year in Steward and Helvering.

325 See, e.g., Lau v. Nichols, 414 U.S. 565, 569 (1974); United States Civil Serv. Comm'n, 330 U.S. at 149-44; California v. United States, 104 F.3d 1086, 1092 (9th Cir 1997); Virginia v. Brownner, 80 F.3d 669, 881-82 (4th Cir. 1996); Skinner, 884 F.2d at 448; Schweiker, 655 F.2d at 413-12; Kansas v. United States, 24 F. Supp. 2d at 1199; United Seniors Ass'n, 2 F. Supp. 2d at 42; Jones v. Wake County Hosp. Sys., Inc., 786 F. Supp. 538, 546 (E.D.N.C. 1991). But see Bradley ex rel. Bradley v. Arkansas Dep't of Educ., 189 F.3d 745, 757, rehearing en banc granted, 197 F.3d 958 (8th Cir. 1999) (finding § 504 of Rehabilitation Act of 1993, which prohibits any program or activity receiving federal funding from treating an individual differently "solely by reason of" a disability, amounts to "impermissible coercion" because it forces state to renounce even funding wholly unrelated to the Act if it does not want to comply). Some commentators suggest that the coercion test should be applied more stringently, recognizing that in reality states cannot afford to turn down significant federal funds. See, e.g., James V. Corbelli, Tower of Power: South Dakota v. Dole and the Strength of the Spending Power, 49 U. PITT. L. REV. 1097, 1121-25 (1988); Rosenthal, supra note 310, at 1135.
Getting to Waiver

national projects or programs.\textsuperscript{525} To what national projects or programs is the Supreme Court referring? On the one hand, it could be referring to any national projects or program with respect to which Congress wishes the states to take action pursuant to the condition to funding. On the other hand, it could be referring to the national project or program for which the funds to which the condition is attached are to be used.

If the former interpretation were correct, a waiver of sovereign immunity by the states in bankruptcy proceedings could be justified as related to the federal interest in the federal bankruptcy system itself. Although that interpretation is attractive insofar as it furthers the goal of obtaining state waiver in a constitutional manner, it is inherently inconsistent with the Court’s characterization of it as a “limitation” on Congressional power because it imposes no limitation on Congress at all.\textsuperscript{27} If Congress attaches a condition to a spending bill, it is always trying to obtain state action that would further some federal objective. The Supreme Court could not have meant that a condition is unconstitutional only when it is not rationally related to a valid Congressional legislative power, or it would be beyond the power of Congress to enact in the first place.

But if some relationship between the condition imposed on the states and the federal program being funded by the funds to which the condition is attached is required, it is difficult to identify any federal funding program that has a relationship—even a tenuous one—to a waiver of sovereign immunity in bankruptcy.\textsuperscript{228} Without such a relationship, the condition may fail constitutional scrutiny.

The Court, although urged in \textit{Dole} to hold “that a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached,”\textsuperscript{229} found it unnecessary to do so, in part because “the condition imposed by Congress is...


\textsuperscript{27} Indeed, David E. Engdahl, \textit{supra} note 309, at 56, suggests that this “germaneness” requirement, while appealing to those seeking to cure “fiscal bullying” by Congress, “amount[s] to no more than cheap whiskey and snake oil” and is inherently inconsistent with the Hamiltonian interpretation of the spending clause. \textit{See id.} at 56.

\textsuperscript{228} See \textit{Glauberman}, \textit{supra} note 157, at 108 n.274 ("it is difficult to imagine a federal expenditure germane to the bankruptcy laws"); \textit{Meltzer, supra} note 156, at 55 ("some of the recent statutory provisions purporing to abrogate sovereign immunity—for example, in bankruptcy proceedings—are not now, and could not easily be, associated with federal spending programs").

\textsuperscript{229} South Dakota v. Dole, 483 U.S. 203, 208-9 n.3 (1987).
directly related to one of the main purposes for which highway funds are expended—safe interstate travel.\textsuperscript{330} However, requiring a relationship between the condition imposed on receipt of federal funds and the very program being funded is far more consistent with the Supreme Court cases from which the language of the third limitation set forth in \textit{Dole} was taken,\textsuperscript{331} and the Supreme Court suggested in \textit{New York v. United States} that this was its interpretation.\textsuperscript{332}

\textsuperscript{330} \textit{Id.} at 208. Justice O'Connor, writing in dissent, disagreed. She interpreted the requirement imposed by the majority as requiring that "the conditions imposed ... must be reasonably related to the purpose of the expenditure," and characterized the minimum drinking age condition as "not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose." \textit{Id.} at 213-14 (O'Connor, J., dissenting). She would have limited permissible conditions on federal funding to those which specify "in some way how the [federal] money should be spent." \textit{Id.} at 216 (quoting Brief for the National Conference of State Legislatures et al. as Amici Curiae).

\textsuperscript{331} The language first appeared in \textit{Massachusetts v. United States}, 435 U.S. 444, 461 (1978), in which the Court found appropriate a condition that states owning civil aircraft flying the navigable airspace of the United States pay an annual registration tax. The Court explained, "We have repeatedly held that the Federal Government may impose appropriate conditions on the use of federal property or privileges and may require that state instrumentalities comply with conditions that are reasonably related to the federal interest in particular national projects or programs.... A requirement that States, like all other users, pay a portion of the costs of the benefits they enjoy from federal programs is surely permissible since it is closely related to the federal interest in recovering costs from those who benefit...." \textit{Id.}. The condition imposed by the Federal government creating payment of user registration taxes was clearly related to the federal benefit provided to the state—use of the national air system.

The Court cited to \textit{Ivanhoe Irrigation District v. McCracken}, 357 U.S. 275, 295 (1958), in which the Court stated that,

... beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges.... [T]he Federal Government may establish and impose reasonably conditions [in that case, restrictions on the quantity of land under single ownership to which project water could be supplied] relevant to federal interest in the project [in that case, an irrigation project to be funded by the federal government] and to the over-all objectives thereof.

\textit{Id.} (emphasis added). Again, the linkage between the condition and the federally financed project was clear.

Also cited in \textit{Massachusetts} was \textit{Oklahoma v. United States Civil Service Commission}, 330 U.S. 127, 142-43 (1947), in which the Court upheld portions of the Hatch Act that allowed a federal agency to withhold from a state program it funded an amount equal to two years' compensation for any officer or employee of that state program who took an active role in political campaigns. \textit{See Massachusetts}, 435 U.S. at 461. Once more there was a specific relationship between the condition—no political activities by state officers or employees whose activities are funded by the federal government—and the federal program of funding those activities.

\textsuperscript{332} \textit{See New York v. United States}, 505 U.S. 144, 167 (1992) ("Such conditions must...
Therefore, even if receipt of federal funds for most programs can appropriately be conditioned on the recipient state waiving sovereign immunity with respect to suits against the state involving the program so funded, the conditional spending power of Congress is a far more problematic solution in bankruptcy where the federal interest in the bankruptcy system promoted by the condition would necessarily be entirely divorced from (and thus unrelated to) the program to which the conditional funding is attached.


See generally Kiprots, supra note 318, at 825, 831-32 (suggesting that Congress's power to condition states' receipt of federal money on waiver of Eleventh Amendment immunity establishes that the doctrine of implied waiver remains viable after Seminole Tribe).

Kenneth N. Klee, James O. Johnston & Eric Winston disagree with this proposition. See Klee et al., supra note 106, at 1527-28 n.317. They maintain that (1) there need not be "direct" relationship, but only a "reasonable" one, and (2) that the relationship need not be between the condition and the federal interest served by the particular project or program being funded, but merely between the condition and the federal interest served by the condition, even if unrelated to the funding. See id. I do not disagree with their first point. Indeed, although the Dole majority characterized the condition at issue there as "directly related" to the federal goal of providing highway funds, in stating the limitation the majority merely said that a condition may be invalid if it is "unrelated" to the federal interest in a particular project or program. Even in dissent, Justice O'Connor said that she agreed with the majority that a condition must be "reasonably related" to the purpose of the expenditure, but found no reasonably relationship in that case. See South Dakota v. Dole, 483 U.S. 203, 213 (1987) (O'Connor, J., dissenting). The "reasonably related" language was also contained in the cases to which both majority and dissent cited as the basis for the limitation. See supra note 391. Therefore, despite the use of the words "directly related" by the Dole majority, I do not believe either the majority or the dissent intended to require a closer connection than a "reasonable" one. Cf. Terry W. Dorris, Comment, Constitutional Law—South Dakota v. Dole: Federal Conditional Spending is Subjected to a Multi-Pronged Analysis, 18 MEM. ST. U.L. REV. 741, 758 (1988) (advocating use of a standard that would require the conditions be "substantially" related to a "legitimate" federal project or activity).

But their second point is more problematic. As I previously stated, if the only requirement imposed by the Court in Dole is that the condition on funding is reasonably related to some conceivable federal interest, the only conditions that would be struck down would be those that are irrational exercises of Congressional power. That is no limitation at all, and cannot be what was intended by the Court in Dole.
C. Conditional Regulation

When Congress has the power under Article I of the Constitution to regulate private activity, the Court has also consistently concluded that Congress may constitutionally give states a choice between regulating in that area in accordance with federal guidelines or facing federal preemption (thereby effectively conditioning state regulation on the adoption of federal standards). Thus, in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, the Court upheld provisions of the Surface Mining Control and Reclamation Act of 1977 that permitted states to assume permanent regulatory authority over surface coal mining operations on private lands within their borders (rather than having the federal government regulate with respect to those lands directly), only if they submitted a proposed permanent program to the Secretary of the Interior which implemented federal environmental protection standards established by the Act and the regulations promulgated pursuant thereto. The Court emphasized that,

... the States are not compelled to enforce the... [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

Similarly, in *Federal Energy Regulatory Commission v. Mississippi*, the Court rejected a challenge to provisions of the Public Utility Regulatory Policies Act of 1978 that (among other things) required State utility regulatory commissions to "consider" the adoption of certain federally specified rate standards. The Court noted that,

---

337 See *Hodel*, 452 U.S. at 288.
if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals. . . . Congress could have preempted the field . . . ; [the statute] should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards. 540

Conditional federal regulation is certainly not a solution to the problem of the nonconsenting state in bankruptcy. Even the drafters of the Constitution recognized the benefits to be derived from a uniform federal system of bankruptcy, 541 and although Congress could give state courts jurisdiction over bankruptcy cases conditioned upon waiver of sovereign immunity by the state for all bankruptcy cases within its jurisdiction, few would argue that the benefits to be derived from state waiver of sovereign immunity outweigh the detriment that would be caused by eliminating the exclusive federal jurisdiction over bankruptcy cases. 542

However, the conditional federal regulation cases help illuminate the path towards other solutions to the extent that they focus—as do the conditional spending cases in part—on the choice Congress provides to the states. A state may either choose to regulate in accordance with federal directives, or choose to leave the field to federal regulation and enforcement. As long as a state is not compelled to implement federal policy, the legitimate sovereign interests of the state have been respected. The existence of choice is all that the Tenth Amendment requires. 543

D. Bankruptcy Incentives and Disincentives

Respect for state sovereign immunity renders Congress unable to order states to waive their sovereign immunity in bankruptcy. The absence of any federally-funded state program with a nexus to the federal interest in bankruptcy may also doom any congressional

541 See U.S. Const. art. I, § 8, cl. 4; see also supra note 196.
543 As stated in Federal Energy Regulatory Commission v. Mississippi, "having the power to make decisions and to set policy is what gives the State its sovereign nature." 456 U.S. at 761. See New York v. United States, 505 U.S. 144, 168 (1992) ("by any . . . permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply").
effort to condition a state’s receipt of federal funds on such a waiver. And although the conditional regulation opinions are useful in their focus on the existence of choice as the touchstone of state sovereignty, Congress has not conditioned state regulation of bankruptcy on waiver of sovereign immunity but has preempted the field, and the importance of a uniform federal bankruptcy system far outweighs the benefits to be derived from waiver of state sovereign immunity.

However, as the Supreme Court acknowledged in New York v. United States, conditional funding and conditional regulation are not the exclusive methods for encouraging state action consistent with federal goals. The Code itself provides a legislative mechanism for rewarding states that choose to subject themselves to federal bankruptcy jurisdiction, and withholding benefits from those who choose to remain outside the system. This mixture of incentives and disincentives—carrots and sticks—provides a solution to the problem of the non-participating state that is within the power of Congress, can be implemented quickly and without incremental cost, should quickly achieve consensual waivers that are applicable to all bankruptcy cases and all bankruptcy causes of action, and thereby should put the states once again on an equal footing with all similarly-situated creditors.

The Code currently not only welcomes states into the bankruptcy courts when they choose to submit to federal jurisdiction, and provides for them to share in the distributions made to creditors from property of the estate, but it also provides all “governmental units” preferred treatment in many respects. For example, the trustee is required to “withhold from payments of claims for wages, salaries, commissions, dividends, interest or other payments” amounts required to be withheld under applicable state or local tax law and remit the withheld amounts to the appropriate governmental unit. Certain actions of governmental units with respect to taxes are excluded from the automatic stay, as is the

---

505 U.S. at 144.

"Governmental unit" is defined by the Code as, “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 . . .” 11 U.S.C. § 101(27) (1999).

See id. § 346(f).

Section 362(b)(9) allows the governmental unit to audit, issue a notice of tax
commencement or continuation of actions or proceedings by governmental units to enforce their police and regulatory power.\textsuperscript{348} Governmental units are given 180 days after the date of the order for relief to file a proof of claim (or, if the governmental unit seeks an extension before the 180-day period expires, such additional time as the court provides for cause shown),\textsuperscript{349} where other creditors in chapter 7, chapter 12, and chapter 13 cases must file a proof of claim not later than ninety days after the first date set for the meeting of creditors called under § 341(a),\textsuperscript{350} and the court has no discretion to extend the time for filing.\textsuperscript{351} The bankruptcy court is precluded from determining the right of the bankruptcy estate to a tax refund until the trustee has given the governmental unit an opportunity to respond to a request for such refund.\textsuperscript{352} Certain taxes incurred by the estate and other amounts related thereto are defined as "administrative expenses" under the Code,\textsuperscript{353} and many

\textsuperscript{348} See id. § 362(b)(9).
\textsuperscript{349} See id. § 362(b)(4).
\textsuperscript{350} See id. § 502(b)(9); FED. R. BANKR. P. 3002(c)(1).
\textsuperscript{351} Bankruptcy Procedure Rule 9006(b)(1) generally permits the bankruptcy court to enlarge a period specified by the bankruptcy rules or by court order "for cause" if the request is made before the original period expires, or upon a showing of "excusable neglect" if the request is made after expiration of the specified period. See FED. R. BANKR. P. 9006(b)(1). However, Rule 9006(b)(3) allows the court to enlarge the time for filing proofs of claim in cases under chapter 7, chapter 12 and chapter 13 "only to the extent and under the conditions stated in" Rule 3002(c). FED. R. BANKR. P. 9006(b)(1); see also FED. R. BANKR. P. 3002(c). Unless a creditor falls within one of the exceptions set forth in Rule 3002(c), therefore, the court cannot extend the date for timely filing of a proof of claim under that Rule. See, e.g., Pioneer Inv. Servs. Co. v. Burnswick Assocs. Ltd. P'ship, 507 U.S. 380, 389 n.4 (1993) (dictum); In re Greenig, 152 F.3d 631, 634 (7th Cir. 1998); Jones v. Arross, 9 F.3d 79, 81 (10th Cir. 1993); Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.), 920 F.2d 1428, 1432-33 (9th Cir. 1990).

\textsuperscript{352} See 11 U.S.C. § 505(a)(2)(B). Section 505(a)(2)(B) provides the governmental unit 120 days after the trustee’s request to determine whether the refund is due; if the governmental unit fails to act in that time, the court may make an independent determination. See id. Section 505(b) also gives a governmental unit an opportunity to examine tax returns and determine the estate’s unpaid tax liabilities before the bankruptcy court may do so independently. Similar deference is given to governmental units with respect to expedited determinations of interests in and disposition of grain in a case concerning a debtor owning or operating a grain storage facility; the governmental unit with regulatory jurisdiction over the facility must be given notice of a request for an expedited determination, must be given the right to appear and be heard on the any issue relating to the gain, and the trustee must consult with the governmental unit before taking any action relating to disposition of the grain. See id. § 557(e).

\textsuperscript{353} See id. §§ 503(b)(1)(B) & (C).
unsecured claims of governmental units for taxes (income, property, withholding, employment, excise, customs duties and penalties) are given priority treatment in distribution of the property of the estate.\textsuperscript{554}

Certain tax debts and customs duties, including those entitled to priority distributions, are generally excepted from discharge,\textsuperscript{555} as are fines, penalties, or forfeitures payable to a governmental unit,\textsuperscript{556} student loans (which are often held by governmental units),\textsuperscript{557} and debts owed to states or municipalities that are in the nature of support.\textsuperscript{558} A governmental unit may bar confirmation of a chapter 11 plan if it shows that "the principal purpose of the plan is the avoidance of taxes."\textsuperscript{559}

Of course, certain provisions of the Code single out governmental units in less advantageous ways. For example, governmental units may not discriminate against debtors with respect to licenses, permits, charters, franchises, or other similar grants,\textsuperscript{560} nor with respect to student loans.\textsuperscript{561} And the issuance, transfer, or exchange of a security or the delivery of an instrument of transfer under a confirmed chapter 11 plan is not subject to local stamp or similar tax.\textsuperscript{562} But the benefits afforded governmental units under the Code far outweigh the special burdens imposed on them.

Some of the provisions favoring the governmental units are intended to protect the public from harm, such as the exclusion from the scope of the automatic stay of actions or proceedings by governmental units to enforce their police and regulatory powers.\textsuperscript{563} But others protect the government merely in its role as a creditor (and an inefficient one at that). The only constitutional constraint on the power of Congress to enact bankruptcy laws is that they be "uniform . . . throughout the United States."\textsuperscript{564} The Code need not

\textsuperscript{554} See id. §§ 507(a)(8), 507(c).
\textsuperscript{555} See id. § 523(a)(1).
\textsuperscript{556} See id. § 523(a)(7).
\textsuperscript{557} See id. § 523(a)(8).
\textsuperscript{558} See id. § 523(a)(18).
\textsuperscript{559} Id. § 1129(d).
\textsuperscript{560} See id. § 525(a).
\textsuperscript{561} See id. § 525(c).
\textsuperscript{562} See id. § 1146(c).
\textsuperscript{563} See id. § 362(b)(4).
\textsuperscript{564} Article I gives Congress the power "[t]o establish . . . uniform laws on the subject of bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. The "uniformity"
provide preferred treatment to government entities, either state or federal, if Congress chooses not to do so, and need not treat all states the same way. Indeed, Congress need not provide any of the benefits of the bankruptcy system to states that elect not to submit to federal jurisdiction in all bankruptcy cases, and should decline to do so.

If Congress wishes to encourage states to waive their sovereign immunity and voluntarily submit to the jurisdiction of the federal courts in bankruptcy cases, it can pull up the welcome mat for those that do not, effectively closing the door on selective submission to federal bankruptcy jurisdiction. To use a sports metaphor, a state should not be able to play only in those bankruptcy games it thinks it will win; it should commit to take the field against all challengers or choose to retire from competition all together. Respect for state sovereignty requires that states be given a choice to submit to federal bankruptcy jurisdiction or decline to do so. That choice is a legitimate sovereign concern. But deference for state sovereignty does not require that states be given the flexibility to pick and choose the particular federal bankruptcy cases in which they wish to participate. Differentiation between federal cases based on economic factors is an illegitimate objective of state sovereignty and Congress need not facilitate its achievement. Congress can appropriately balance the legitimate goals of state sovereignty with the federal objectives of the bankruptcy system by giving states the choice of submitting to federal bankruptcy jurisdiction once and for all, or opting out. Those who choose to opt out should be precluded from filing a proof of claim or otherwise appearing in any bankruptcy case, and their claims should be denied the benefit of any exclusions from discharge.

What are the potential consequences of this proposal? The most obvious is that those states that choose not to waive their immunity would be unable to receive any distributions on account of their claims in any bankruptcy case, while suffering the detriment of having those claims discharged so that they could not recover on the claims outside of bankruptcy. Congress would thereby be

to which the Constitution refers has been interpreted to be geographic rather than substantive, i.e., the fact that the federal bankruptcy laws incorporate state legal concepts that differ one from the other does not make them unconstitutional. See Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 190 (1902).
conditioning recovery on the state's claim upon an effective waiver of sovereign immunity. Can Congress do so?

Attaching conditions to the receipt of private funds in bankruptcy to which states would otherwise be entitled seems entirely consistent with the Tenth Amendment constraints imposed on congressional authority under *New York v. United States* and *South Dakota v. Dole*. *South Dakota v. Dole*, of course, explored the limitations on conditioning the receipt of federal funds on desirable state action, such as waiver of sovereign immunity. As previously discussed, the Court, in *Dole*, suggested five limitations on conditional spending power—that the federal spending promote the general welfare, that the condition be unambiguous, that the condition be related to the "federal interest in particular national projects or programs," that there be no independent constitutional bar on the state action sought by the condition, and that the financial inducement offered by Congress not be unduly "coercive." Although linking a waiver of state sovereign immunity in bankruptcy cases to receipt of federal funds would likely meet any challenge on four of the five limitations, I suggested that if the "related to" prong means (as I believe it does) that there must be some reasonable relationship between the condition imposed on the states and the very program for which the funds to which the condition is attached are being provided, there is no federal funding to states that relates in any way to bankruptcy, and the condition of waiver would be struck down.

But if the same limitations were deemed applicable to conditional receipt of funds not from the federal government itself, but through the auspices of its bankruptcy courts, the requirement that states waive their sovereign immunity in all bankruptcy cases as a condition to receiving funds in any such case would likely withstand challenge. As it did for the conditional spending power analysis, the Court would likely find congressional intent to promote the general welfare supports modification of the Code to effectuate such a condition. Similarly, Congress could surely express its

505 U.S. 144 (1992). The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.


See supra Part IV.B.
intentions clearly and unambiguously in its amendment. As previously discussed, conditioning receipt of federal funds on a waiver of sovereign immunity has not been found to require unconstitutional action by a state. And the amounts at issue in bankruptcy cases, even when considered in the aggregate, are, if anything, far less likely to prove coercive to state action than the smallest grants coming from Washington. The final limitation—the "related to" requirement—which proves so problematic in the conditional spending context, would be easily satisfied under this approach. Both the condition imposed and the distributions to which it would be attached are intimately related to the operation of the bankruptcy system. If conditional bankruptcy distributions under the jurisdiction of federal bankruptcy courts can be analyzed as conditional federal spending for constitutional purposes, the condition should be upheld.

Even if the recovery of funds from a bankruptcy estate cannot be analogized to the grant of federal funds, under New York v. United States, use of the conditional spending power is not the exclusive method of encouraging state action; Congress is entitled to "hold out incentives to the States as a method of influencing a state's policy choices." Congress already provides the incentive of recovery from a bankruptcy estate to those creditors—sovereign or otherwise—who file a proof of claim and thereby submit to federal jurisdiction by disallowing any claim as to which a timely proof of claim is not filed. This condition to a bankruptcy recovery has been upheld against constitutional challenge, despite the operation of the bankruptcy discharge which precludes non-bankruptcy methods of recovery.

---

569 See 11 U.S.C. § 502(b)(9) (1999). Only holders of "allowed" claims are entitled to distributions in a chapter 7 liquidation. See id. § 726.
In modifying the Code to allow participation in bankruptcy only by those states that effectively waive sovereign immunity not merely by filing a proof of claim in a single case but by legislative or constitutional enactment with respect to all cases, Congress would do no more than provide an incentive that differs only marginally from that it already adopts by conditioning payments in respect of state claims to the filing of a proof of claim, which filing also constitutes a waiver of state sovereign immunity. This incentive would encourage states to relinquish their constitutional immunity once and for all with respect to federal bankruptcy jurisdiction, but would not mandate it. States could continue to opt out of the federal bankruptcy system, at the cost of foregoing any recovery from a bankruptcy estate or from the bankrupt who receives a discharge. Each state could do its own cost/benefit analysis. Is the benefit the state will potentially derive from participation in federal bankruptcy cases greater than the cost of the possible liability the state will suffer if it is susceptible to suit in federal bankruptcy court? If so, the state will choose to waive its immunity. If not, the state will elect to remain immune.

Just because this choice is unpalatable does not render it unconstitutional. Individual creditors are put to an equally

---

351 See supra Part III.A.1.
372 Use of the term "opt out" is not intended to suggest that affirmative action by the state would be required to preserve its immunity. The default position, in the face of state inaction, would be opting out. This may, of course, be less a function of political choice than absence of political will. One commentator has suggested that, where transaction costs do not interfere with bargaining, "if Congress wants to eliminate [state sovereign] immunity more than the state wants to keep it," by application of the Coase Theorem it will be eliminated through Congressional incentive to reach an economically efficient result. See Daniel A. Farber, The Coase Theorem and the Eleventh Amendment, 13 CONST. COMMENT. 141, 142 (1996). However, Seminole Tribe imposed transaction costs by eliminating congressional abrogation of state sovereign immunity through low-cost Article I federal legislation. Instead, sovereign immunity must be waived by legislative act on a state-by-state basis. "[I]t is possible that some states will in the end by harmed by Seminole because political inertia will prevent them from entering into waiver bargains that actually would be in their interests." Id.

373 The argument that a state does not "voluntarily" waive its sovereign immunity by filing a proof of claim if failure to do so would deny it a share of the bankruptcy estate has been consistently rejected. See, e.g., Texas v. Walker, 142 F.3d 813, 822 (5th Cir. 1998) (argument that Eleventh Amendment should prevent a state from being put to the "Hobson's choice" of either subjecting itself to federal court jurisdiction or taking nothing "is ultimately unpersuasive"); WJM, Inc. v. Massachusetts Dep't of Pub. Welfare, 840 F.2d 996, 1004 (1st Cir. 1988) (rejecting the suggestion "that a waiver of a constitutional right lacks validity simply because it is the outcome of a "no-win" situation"); Schulman v. California State Water Res. Control Bd. (In re Lazar), 200 B.R. 358, 380 (Bankr. C.D. Cal. 1996) (in response to argument that "[f]orcing the state to choose between waiving its constitutional rights ... or waiving its
unpleasant (but constitutional) choice when they are forced to submit to the equitable jurisdiction of the bankruptcy court and thereby give up their right to a jury trial with respect to any defense to their claim against the debtor if they wish to file a proof of claim in order to receive a distribution in bankruptcy. As the Court suggested in the conditional regulation cases, the key factor under the Tenth Amendment is the existence of choice rather than compulsion. The approach I am suggesting gives the state that choice.

Similar congressional incentives, but more cautious in approach, have previously been suggested by commentators. Joseph Riga proposed that Congress could "reorder[] or condition[] the states' bankruptcy claim priorities," as by "condition[ing] state tax claim priority on a state's voluntary waiver of its immunity." However, Riga went on to question whether such an approach might amount to improper "conditioning [of] participation in federal programs on a waiver of state immunity," within the meaning of the now-overruled decision in *Parden v. Terminal Railway of Alabama State Docks Department* But the Supreme Court has now made clear that the objectionable feature of *Parden* was the fact that Congress statutorily inferred a waiver of sovereign immunity on the part of states choosing to participate in interstate railroad commerce and that the waiver was therefore "implied" or "constructive" rather than "unequivocal." If participation in the federal bankruptcy courts did not automatically abrogate sovereign immunity as a matter of congressional directive, but was conditioned on a pre-existing voluntary and unequivocal decision by the appropriate state legislators to waive their sovereign immunity, the rejection of *Parden* should not threaten its validity.

substantive claims is not a voluntary choice," stating that "[t]he facts that a particular creditor finds these choices unattractive does not convert the choice into an involuntary decision").


575 See supra Part IV.C.

576 Riga, *supra* note 157, at 64; see also McKenzie, *supra* note 190, at 236-40 (suggesting that conditioning state tax claim priority on state waiver of sovereign immunity can be supported by conditional spending cases).

577 See Riga, *supra* note 157, at 65; *Parden v. Terminal Ry. Of Ala. State Docks Dept.*, 377 U.S. 184, 192 (1964); see also I NAT'L BANKR. REV. COMM'N REP. 908-09 (1997) ("Whether a waiver of this type would withstand Supreme Court scrutiny remains in some doubt . . . .").

578 See supra note 203 and accompanying text discussing *Parden*.

579 Cf. Glauberman, *supra* note 157, at 87 n.145 (suggesting that Congress has the power
Commentators Kenneth Klee, James O. Johnson, and Eric Winston also discussed what they labeled "conditional claims allowance," by which Congress would amend the Code to provide for allowance of a state's claim only if "the state has waived sovereign immunity and Eleventh Amendment immunity regarding the claim and compulsory counterclaims." If they are proposing that a state's claim be allowed so long as the state has effectively waived sovereign immunity with respect to that particular claim and all compulsory counterclaims (an approach that would reach the same result as § 106(b) were that provision found to be an unconstitutional abrogation of immunity), their proposal does not go far enough. States should not be able to take advantage of bankruptcy when they will benefit by it, and eschew its burdens in other cases. The door to the federal bankruptcy court should not be a revolving one, but should be unlocked for all cases and all claims by the single key of voluntary waiver of state sovereign immunity. In addition, Congress must not only close the courthouse door to the nonconsenting state, but must eliminate the preferred treatment afforded state claims—even those not asserted in court—under the statutory provisions of the Code. The exclusions from discharge may be far more valuable to state creditors than the possibility of sharing in the distributions from bankruptcy estates that are frequently unable to make any payments to unsecured creditors. If their recovery were barred both inside and outside of the bankruptcy court, they may be more willing to submit to federal jurisdiction.

---

Klee et al., *supra* note 106, at 1589-90.

In the brief part of their article devoted to this subject, Klee, Johnston & Winston propose an amendment to § 502(b) to disallow a state's claim unless the state has waived its immunity regarding "the claim and compulsory counterclaims." *Id.* at 1590 (emphasis supplied). This seems to suggest a waiver applicable only to the claim sought to be filed. Elsewhere, however, they suggest that such a waiver could be effectuated "perhaps through an act of [the state's] legislature." *Id.* Such a mechanism may in fact be consistent with a case-by-case waiver, if, for example, the legislation adopted affirmatively stated that the filing of a proof of claim in a bankruptcy case would waive state sovereign immunity with respect to that claim and all compulsory counterclaims. On the other hand, Klee, Johnston, and Winston may be proposing a single waiver applicable to all cases and all claims, consistent with the proposal I make above. But unless that proposal is coupled with the elimination of preferential treatment afforded states under the Code, particularly with respect to exceptions to discharge, the inducement may not be sufficient to achieve the desired goal of waiver.
CONCLUSION

The Supreme Court’s decisions in *Seminole Tribe, Boerne, Florida Prepaid,* and *Kimel* have undoubtedly made congressional abrogation of state sovereign immunity under § 106(a) of the Code unconstitutional. Yet, submission of state creditors to the jurisdiction of federal bankruptcy courts is essential if the Code is to achieve its twin goals of ensuring the uniform treatment of similarly-situated creditors, and providing honest individual debtors the chance to begin life anew, free from the burden of prepetition debt.

Some proposed solutions to the problem of the nonconsenting sovereign state—such as empowering the federal government to assert bankruptcy claims, relying on the *Ex parte Young* doctrine, and allowing bankruptcy claims to be brought in state court subject to federal appellate review—are either too expensive, uncertain in application, politically impracticable, constitutionally questionable, or a combination of the above. The only true solution to state sovereign immunity in bankruptcy is voluntary waiver of that immunity by the states themselves.

But the doctrine of voluntary waiver has also had conceptual difficulties when applied to bankruptcy cases. Unless a state takes constitutional or legislative steps to waive its immunity expressly, it is unclear whether the actions taken by a state, such as filing a proof of claim or appearing in bankruptcy court, constitute an effective waiver. Moreover, even if the actions would be effective if taken by an authorized state official, courts are confused about what sort of authorization is necessary to empower a representative of the state to waive sovereign immunity. Even assuming the waiver is effective, the scope of the waiver remains problematic, both with respect to the claims against the state covered by the waiver and the entities within the state bound by it.

Given these difficulties, voluntary waiver becomes the true solution only when it is validly enacted by the state’s lawmakers and applies uniformly to every bankruptcy claim in every bankruptcy case. Contrary to popular thought, there is a means of getting to waiver, even after *Seminole Tribe.* Although Congress cannot commandeering state legislative processes consistent with the Tenth Amendment, it has the power to “encourage” legislative action consistent with congressional policy objectives. Attaching conditions to the receipt of federal funding and conditional regulation have been the most frequent methods of providing this
encouragement, but they are not the exclusive permissible methods of inducing voluntary state action. The Code itself provides Congress a mechanism for “incentivizing” states to waive their sovereign immunity.

The Code provides many advantages to sovereign creditors who consent to federal jurisdiction, the principal one of which is the ability to share in distributions made from the bankruptcy estate. But the Code currently provides advantages to sovereign creditors even if they do not choose to submit to federal jurisdiction, including generous exemptions from discharge for many of their claims. If Congress wishes to bring nonconsenting states back into the fold of the bankruptcy system, it must limit the benefits of that system to those who validly and effectively waive their sovereign immunity for all bankruptcy cases and all bankruptcy claims, and deny the advantages of recovery against bankrupt debtors (either in or out of bankruptcy), as well as the other preferential treatment currently afforded to all governmental units, to those who choose to opt out. Modifying the Code to limit access to federal bankruptcy court to those states who elect to submit to federal bankruptcy jurisdiction for all bankruptcy cases provides the states the one thing required by respect for their sovereign position in a federal system—a choice. The Tenth Amendment permits no less, but demands no more. A legislative solution to state sovereign immunity, both at the federal level through amendment of the Code and at the state level, through appropriate uniform enactments waiving that immunity, is easy to effectuate, inexpensive to administer, likely to achieve the desired goals, and lacks apparent constitutional infirmities. Congress can get to waiver. And Congress should.