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PIERCING SOVEREIGN IMMUNITY IN BANKRUPTCY: MYTH OR REALITY?

I. INTRODUCTION

There are two United States Supreme Court cases, *Seminole Tribe of Florida v. Florida*¹ and *Alden v. Maine*,² which create an impenetrable state sovereign immunity rule under the Eleventh Amendment. These two cases, when combined, support the unconscionable proposition that a citizen of a state cannot sue the state in federal or state court for a violation of a federally created right under Article I of the United States Constitution.

The result of such a rule recently presented itself in a case entitled *In re Chandler*,³ which was brought before the Bankruptcy Court for the Northern District of Oklahoma. In *Chandler*, an Oklahoma citizen sought to bring an adversary proceeding against the Oklahoma Tax Commission ("OTC") to determine the dischargeability of his tax debt owed to the state.⁴ In response to the suit, the OTC filed a motion to dismiss and based its authority on sovereign immunity and *Seminole Tribe*.⁵

The court denied the motion to dismiss the adversary proceeding and the OTC appealed to the Bankruptcy Appellate Panel ("BAP") for the Tenth Circuit.⁶ Consequently, the BAP court overruled and held that state sovereign immunity barred the debtor from bringing such a suit against the state of Oklahoma.⁷

Such a holding leaves the debtor with absolutely no remedy at law for his dispute with the OTC, and it deprives him of his fundamental due process rights guaranteed to him under the Fifth Amendment of the United States Constitution.⁸ Although this seems untenable, it is absolutely correct under the Rehnquist Court and their interpretation of

1. 517 U.S. 44 (1996).

2. 527 U.S. 706 (1999).

3. No. 99-01929-M (Bankr. N.D. Okla. Mar. 8, 2000).

4. *Id.* at 2.

5. *Id.* at 3.

6. *In re Chandler*, 251 B.R. 872 (B.A.P. 10th Cir. 2000).

7. *Id.* at 874-78.

8. See U.S. Const. amend. V (providing that "no person shall be . . . deprived of life, liberty, or property, without due process of law").

the Eleventh Amendment and state sovereign immunity.

It is clear that the Rehnquist Court is dedicated to protecting the states' rights from being usurped from Congress.⁹ However, in their zeal to reclaim a more federalistic government, the Rehnquist Court has lost sight of the practical consequences of their decisions in *Seminole Tribe* and *Alden*. As Justice Holmes has stated, "[g]reat cases like hard cases make bad law. For great cases are called great, not by some reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feeling and distorts of judgment."¹⁰

Justice Stevens warned of such one-sidedness in *Seminole Tribe*. In his dissent he stated that the majority's holding "prevents Congress from providing a federal forum for a broad range of actions against [the] States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."¹¹ Thus, it seems as though the BAP Court's holding in *Chandler* is a realization of such fears, and it is a perfect example of the problems the Rehnquist Court has created by expounding an impenetrable state sovereign immunity rule under the auspices of the Eleventh Amendment and Federalism.¹²

This Comment is intended to show how state sovereign immunity has developed under the Eleventh Amendment, where it stands today, and the practical effects of the modern rule on cases involving bankruptcy. Section II traces the development of the United States Supreme Court's Eleventh Amendment jurisprudence from the amendment's ratification to the Rehnquist Court's decisions in *Seminole Tribe* and *Alden*. Section III describes the application of the modern understanding of the Eleventh Amendment within the context of bankruptcy. Section III also details possible ways to circumvent the Eleventh Amendment and enable debtors to bring suits against states. Section IV concludes that the Rehnquist Court's modern understanding of the Eleventh Amendment is fatally flawed and that the holding in *Jacoby v. Arkansas Department of Education*¹³ is a compromise that Congress, states, and citizens can live with in a comfortable manner.

9. See e.g. *Printz v. U.S.*, 521 U.S. 898 (1997) (holding that a provision under the Brady Handgun Violence Protection Act was invalid because it forced states to administer a federal regulatory scheme that violated the notion of "dual sovereignty"); *U.S. v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun Free School Act enacted under the Commerce Clause was invalid because it violated the states' Tenth Amendment rights); *N.Y. v. U.S.*, 505 U.S. 144 (1992) (holding that a provision of the Low-level Radiation Waste Policy Act was invalid because it commandeered the state to choose between administration of a federal scheme or liability for any waste found in the state, which violated the Tenth Amendment and "dual sovereignty").

10. *N. Securities Co. v. U.S.*, 193 U.S. 197, 364 (1904).

11. *Seminole Tribe*, 517 U.S. at 77.

12. See *infra* Section II.D.

13. 962 S.W.2d 773 (1998).

As it stands, debtors like Chandler are without a legal remedy over a dispute with a state and this is completely at odds with the "rule of law" ideal, which is the foundation of the United States government.¹⁴ Chief Justice Marshall was correct when he declared, "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."¹⁵ Thus, when the United States Supreme Court creates constitutional law protecting states' rights to the detriment of its people, that law is "bad law," and it must give way to protect the integrity of the United States and the legal foundation upon which it is built. Such a notion is far from novel and can also be found in the writings of the Framers of the United States Constitution: "as far as the sovereignty of the states cannot be reconciled to the happiness of the people, the voice of every good citizen must be, . . . let the former be sacrificed to the latter."¹⁶

It is only a matter of time before the United States Supreme Court will hear the issues discussed in this Comment.¹⁷ Therefore, it is hoped that the Rehnquist Court will free itself from their agenda of re-establishing federalism¹⁸ and act as "good citizens" by allowing debtors like Chandler to pursue valid suits against the states.

II. THE ELEVENTH AMENDMENT

A. *Origins of the Eleventh Amendment*

In February of 1793, the United States Supreme Court decided *Chisholm v. Georgia*.¹⁹ Chisholm, a citizen from South Carolina, brought an assumpsit action against the state of Georgia.²⁰ The issue before the Court was whether or not sovereign immunity protected Georgia from such an action.²¹ Relying on Article III, section 2 of the United States

14. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

15. *Id.*

16. *The Federalist* No. 45, 309 (James Madison) (J.E. Cooke ed., Wesleyan U. Press 1961).

17. The Rehnquist Court has had several opportunities to decide the constitutionality of the issues presented in this Comment, but for one reason or another have decided against such action. See e.g. *In re Collins*, 173 F.3d 924 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 785 (2000); *In re NVR, L.P.*, 189 F.3d 442 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000); *In re Straight*, 143 F.3d 1387 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 446 (1998); *In re Creative Goldsmiths of D.C., Inc.* 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998).

18. Friedrich Nietzsche warned of individuals who believed too much in their cause when he stated, "[w]hoever fights monsters should see to it that in the process he does not become a monster. And when you look long into an abyss, the abyss also looks into you." Friedrich Nietzsche, *Beyond Good & Evil* 89 (Walter Kaufmann trans., Vintage Books 1989).

19. 2 U.S. 419 (1793).

20. *Id.* at 430.

21. *Id.*

Constitution and the Judiciary Act of 1789, the majority determined that Georgia's sovereign immunity had been abrogated and Chisholm's action was valid.²²

Justice Iredell dissented from the Court's decision, stating that the majority had essentially placed the "cart before the horse" because Article III, section 2 of the United States Constitution and the Judiciary Act of 1789 did not by themselves abrogate states' sovereign immunity granted to them under common law.²³ Rather, the provisions only provided for a jurisdictional scheme when Congress created legislative acts that allow suits against the states by certain enumerated parties.²⁴ Since Congress had not abrogated state sovereign immunity for actions such as the one Chisholm was pursuing, Justice Iredell believed that the action had no foundation on which to stand, and that the common law understanding of state sovereign immunity was still in force.²⁵

Nevertheless, the *Chisholm* decision sent panic throughout many of the states.²⁶ The United States House of Representatives proposed a constitutional amendment to reverse the Court's holding only one day after the decision was handed down.²⁷ On February 7, 1795, two years after it was proposed, the states ratified the Eleventh Amendment,²⁸ which states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.²⁹

The passing of the Eleventh Amendment created scholarly debate as to what purpose the amendment was to serve.³⁰ Many scholars agree that it was specifically ratified to overrule *Chisholm*, but disagree as to what

22. *Id.* at 475-78. As it will be shown, the Rehnquist Court relies heavily on history to determine the original intent of the Framers of the United States Constitution without much regard for the text of the Constitution itself. See *infra* Section II.D. It is interesting, however, that all of the Justices sitting to hear and decide *Chisholm* were active in the actual framing of the Constitution. See Peter Irons, *The People's History of the Supreme Court* 90-95 (Penguin 2000). For example, Justice James Wilson helped draft Article III and should have been quite knowledgeable of its meaning. *Id.* Thus, it seems curious that the Rehnquist Court so eagerly discounts the holding in *Chisholm* as a misunderstanding of the original intent and structure of the Constitution. See Alden, 527 U.S. at 721.

23. *Chisholm*, 2 U.S. at 430-34.

24. *Id.*

25. *Id.* at 435.

26. H. Stephen Harris, Jr. & Michael P. Kenny, *Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash with Antitrust, Copyright, and Other Causes of Action which the Federal Courts Have Exclusive Jurisdiction*, 37 *Emory L.J.* 645, 653 (1988).

27. *Id.*

28. *Id.* at 654.

29. U.S. Const. amend. XI.

30. Carlos Manuel Vasquez, *What is Eleventh Amendment Immunity?*, 106 *Yale L.J.* 1683, 1694 (1997).

view of the case the amendment spoke to.³¹ Did the Eleventh Amendment reverse the majority's view that Article III, section 2 of the United States Constitution and the Judiciary Act of 1789 abrogated state sovereign immunity (as understood by Justice Iredell's dissent); or did the Eleventh Amendment accept abrogation of state sovereign immunity and merely deny original federal jurisdiction for suits against states by citizens of other states and citizens of foreign states?³²

B. Early Understanding of the Eleventh Amendment

In 1890, the United States Supreme Court began to answer this question on its own. In *Hans v. Louisiana*,³³ a Louisiana citizen brought suit against Louisiana to recover funds owed to him under state issued bonds.³⁴ The Court had to determine whether or not the Eleventh Amendment barred such a claim.³⁵ The Court concluded that under a plain reading of the amendment the answer would be no; however, the Court believed that such a result would be anomalous because

cases arising under the constitution or laws of the United States, a state may be sued in the federal courts by its own citizens, though is cannot be sued for a like cause of action by the citizens of other states, or a foreign state; and may thus be sued in federal courts, although not allowing itself to be sued in its own courts.³⁶

Thus the Eleventh Amendment,

expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court [in *Chisholm*]. It did not in terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits.³⁷

Therefore, the Court believed that the Eleventh Amendment meant something more than it actually said, and that in reality it "constitutionalized" the common law notion of state sovereign immunity as a defense to suits brought by private individuals against states in federal court.³⁸ Under *Hans*, the Court expanded the Eleventh

31. *Id.* at 1696.

32. *Id.*

33. 134 U.S. 1 (1890).

34. *Id.*

35. *Id.* at 10.

36. *Id.*

37. *Id.* at 11.

38. The Court has relied on the reasoning of *Hans* for over a century. See e.g. *N.C. v. Temple*, 134 U.S. 22, 30 (1890); *Fitts v. McGhee*, 172 U.S. 516, 524 (1899); *Bell v. Miss.*, 177 U.S. 693 (1900); *Smith v. Reeves*, 178 U.S. 436, 446 (1900); *Palmer v. Ohio*, 248 U.S. 32, 34, 39 (1918); *Duhne v. N.J.*, 251 U.S. 311, 313 (1920); *Mo. v. Fisk*, 290 U.S. 18, 26 (1933); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944); *Ford Motor Co. v. Dept. of Treas. of Ind.*, 323 U.S. 459, 464 (1945); *Ga. R.R. & Banking Co. v. Redwine*, 342 U.S.

Amendment to protect states against suits brought by Indian Tribes,³⁹ foreign nations,⁴⁰ and admiralty plaintiffs⁴¹ although the plain language of the Eleventh Amendment does not address any of these particulars.

C. *The Turn Away from the Reasoning of Hans*

Justice Brennan was one of the first members of the United States Supreme Court to show dissatisfaction with *Hans* and the vast protection it afforded the states against suits created by federal law.⁴² He articulated his interpretation of the Eleventh Amendment in *Parden v. Terminal Railway of Alabama State Dockers Department*,⁴³ *Employees v. Department of Public Health and Welfare of Missouri*,⁴⁴ and *Atascadero State Hospital v. Scanlon*.⁴⁵ Justice Brennan's understanding would eventually command a majority in *Pennsylvania v. Union Gas Company*.⁴⁶

In *Parden*, the Court was presented for the first time with a suit brought by citizens of a state claiming the state violated a federally created right under Article I of the United States Constitution.⁴⁷ Justice Brennan, writing for the majority, held that Alabama was liable for damages because Congress had abrogated the state's sovereign immunity under the Federal Employees' Liability Act ("FELA"), which was enacted under the Commerce Clause of Article I.⁴⁸ The majority reasoned that acceptance of FELA necessarily waived a state's sovereign immunity because regulation of interstate commerce is plenary.⁴⁹ However, *Parden* stopped short of overruling *Hans* and its progeny. The Court stated:

[O]ur conclusion that this suit may be maintained is in accord with the common sense of this Nation's federalism. A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that

299, 304 (1952); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Cory v. White*, 457 U.S. 85, 102 (1982); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97-100 (1984); *Dellmuth v. Muth*, 491 U.S. 223, 227-229 (1989); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

39. *E.g. Blatchford v. Native Village of Noatak*, 505 U.S. 775, 779-82 (1991).

40. *E.g. Monaco v. Miss.*, 292 U.S. 313, 330 (1934).

41. *E.g. Ex parte N.Y.*, 256 U.S. 490, 497 (1921).

42. Vasquez, *supra* n. 30, at 1698.

43. 377 U.S. 184 (1964).

44. 411 U.S. 279 (1973).

45. 473 U.S. 234 (1985).

46. 491 U.S. 1 (1989).

47. *Parden*, 377 U.S. at 187.

48. *Id.* at 190-91.

49. *Id.*

regulation as fully as if it were a private person or corporation.⁵⁰

Justice Brennan reiterated this position in his dissent of *Employees*.⁵¹ However, he added that the Eleventh Amendment should be read literally.⁵² To support this proposition, Justice Brennan cited *Cohens v. Virginia*,⁵³ which held that the Eleventh Amendment only withdrew original federal jurisdiction for state law claims and not federal questions.⁵⁴

In his dissent of *Atascadero*, Justice Brennan fully developed his views regarding Eleventh Amendment jurisprudence, which he perceived as “put[ting] the federal judiciary in the unseemly position of exempting states from compliance with laws that bind every other legal actor in our nation.”⁵⁵ Justice Brennan explained that the Eleventh Amendment was an attempt to remedy a problem with the jurisdictional requirements of Article III, section 2 of the United States Constitution, which if left unchanged would have permitted diversity jurisdiction in federal courts over a state by non-citizens and foreigners.⁵⁶ This, he believed, created a federal bar against the defense of sovereign immunity in cases that only involve state law.⁵⁷

Since Article III, section 2 of the United States Constitution only had its diversity jurisdiction stripped away by the Eleventh Amendment, its federal question jurisdiction remained intact, which

is as broad as . . . the lawmaking authority of Congress. If Congress acting within its Article I or other powers creates a legal right and remedy, and if neither the right nor the remedy violates any provision of the Constitution outside Article III, then Congress may entrust adjudication of claims based on the newly created right to the federal courts—even if the defendant is a State.⁵⁸

From this brief exposition, it is clear that Justice Brennan was of the opinion that state sovereign immunity was not “constitutionalized” by the Eleventh Amendment. Rather, he believed that the Eleventh Amendment only protected states from diversity suits in federal courts by private parties.⁵⁹

Four years after *Atascadero*, a majority of justices embraced Justice Brennan’s reasoning. In *Union Gas*, the state of Pennsylvania was sued as a third party defendant to recoup a portion of the cost of an

50. *Id.* at 196.

51. *Employees*, 411 U.S. at 299.

52. *Id.* at 309-11.

53. 19 U.S. 264 (1821) (Marshall, C.J.).

54. *Id.* at 348-49.

55. *Atascadero*, 473 U.S. at 248.

56. *Id.* at 289-91.

57. *Id.*

58. *Id.* at 290.

59. *See id.*

environmental disaster.⁶⁰ Pennsylvania argued that sovereign immunity was a valid defense due to ambiguous language in the controlling act.⁶¹ The majority found this position unavailing.⁶² They held that when the states ratified the United States Constitution, the states had given their consent in every instance that Congress chooses to abrogate the states' sovereign immunity under the Constitution.⁶³ Thus, after ninety-nine years of interpreting the Eleventh Amendment as a "constitutionalization" of absolute state sovereign immunity that began with *Hans*, Justice Brennan had shifted to a pragmatic approach.

After this occurrence in Eleventh Amendment jurisprudence, many scholars scrambled to understand the United States Supreme Court's position and what the Eleventh Amendment meant after *Union Gas*.⁶⁴ Professor Vazquez, in his article on the subject, asks whether or not "immunity conferred on the states by the Eleventh Amendment [is] immunity from liability under federal law; or is it merely immunity from the jurisdiction of the federal courts."⁶⁵

D. *The Rehnquist Court's Interpretation of the Eleventh Amendment*

The Rehnquist Court would begin to answer Professor Vazquez's question in *Seminole Tribe*. As a preface to the decision, the Court stated:

Although the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms. That presupposition, first observed over a century ago in *Hans v. Louisiana*, has two parts: first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.⁶⁶

In this case, the plaintiffs brought a suit against Florida for violating a provision of the Indian Gaming Regulatory Act ("IGRA"), which required a state to negotiate in "good faith" with Indians for the acquisition of gaming rights.⁶⁷ The Rehnquist Court determined that Congress did not have the authority to abrogate states' sovereign immunity under the United States Constitution even though the language of IGRA clearly stated an intent to do so under the authority of the Indian Commerce

60. *Union Gas*, 491 U.S. at 6.

61. *Id.* at 11-14.

62. *Id.*

63. *Id.* at 19-21.

64. See e.g. Vazquez, *supra* n. 30, at 1699.

65. *Id.* at 1700.

66. *Seminole Tribe*, 517 U.S. at 54-55 (citations and quotations omitted).

67. *Id.* at 47-53.

Constitution.⁷⁷ The Court concluded its opinion by stating:

We do not deem the fact that *Seminole Tribe* . . . has struck down state liability for FLSA claims in federal courts as determinative of state liability in its own courts. The FLSA remains valid law. . . . This law remains the law throughout the land, and state sovereign immunity cannot impede it.⁷⁸

From this language it is clear that the Arkansas Supreme Court understood *Seminole Tribe* as meaning state immunity from original federal court jurisdiction and not immunity from rights and liabilities created under federal law. Thus, states are still liable for violations of federal law, but the state courts have original jurisdiction over such claims, which they must hear under the Supremacy Clause of the United States Constitution.⁷⁹

In *Alden*, the plaintiff filed a suit in state court against the state of Maine for an alleged violation of the FLSA.⁸⁰ The Maine Supreme Court held that the Eleventh Amendment stood for absolute sovereign state immunity from suits initiated in state courts by private citizens.⁸¹ The Court based their claim on *Seminole Tribe* and its understanding of *Hans*.⁸² Accordingly, the Court stated:

The Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather, it reflects but one aspect of the states' inherent, more sweeping immunity from suits brought by private parties. A power so basic and profound would be an odd power indeed if it protected the states from suit in federal courts but provided no comparable protection in their own courts. If Congress does not have the power to abrogate state sovereign immunity with respect to federal causes of action brought in federal courts, as the *Seminole Tribe* case clearly held, then that limitation on congressional power may not be circumvented

77. *Id.* at 775-76. The Supremacy Clause states:

This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI. The Arkansas Supreme Court cited *Howlett v. Rose*, 496 U.S. 356 (1990) to support its holding. *Jacoby*, 962 S.W.2d at 775. *Howlett* states:

Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and the laws passed pursuant to it are as much laws in the states as laws passed by the state legislature.

Howlett, 496 U.S. at 367. The decision went on to say that by not allowing these types of suits in state courts, the states essentially could “nullify for their own people the legislative decisions that Congress has made on behalf of all the people.” *Id.* at 383.

78. *Jacoby*, 962 S.W.2d at 777.

79. *Accord Vazquez*, *supra* n. 30, at 1702.

80. *Alden*, 715 A.2d at 173.

81. *Id.* at 174.

82. *Id.* at 174-76.

Clause.⁶⁸ Through their holding, the Court expressly overruled *Union Gas* and the rationale behind it.⁶⁹ The Court decreed:

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power of Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for lack of jurisdiction.⁷⁰

However, an inconsistency emerges within the Court's understanding of the Eleventh Amendment. In the beginning, the Court declared that "the nature of sovereignty [is] not amenable to the suit of an individual,"⁷¹ and then held that petitioner's suit "must be dismissed for lack of [federal court] jurisdiction."⁷² Does this mean that states are still liable to private individuals for a violation of a federal right in their own courts? *Seminole Tribe* seems to have left the answer unclear. Two different state supreme courts took up this question in *Jacoby v. Arkansas Department of Education*⁷³ and *Alden v. State*.⁷⁴ After evaluating the issue, the courts ultimately came to different conclusions.

In *Jacoby*, the plaintiff sued the state of Arkansas for a violation of the Fair Labor Standards Act ("FLSA") in state court as an attempt to avoid the rule established in *Seminole Tribe*.⁷⁵ The Arkansas Supreme Court noted that the Eleventh Amendment by its express terms only applied to the judicial power of the United States, and held that the law as expressed in FLSA bound Arkansas to suits in its own courts.⁷⁶ The Court qualified their holding by opining that when Congress creates rights under a valid federal act, which clearly expresses an intention to abrogate state sovereign immunity, the states lose the defense of sovereign immunity due to the Supremacy Clause of the United States

68. *Id.* at 54-72. The rule created by *Seminole Tribe* has two prongs. First, Congress must unequivocally express its intent to abrogate states' sovereign immunity; and second, abrogation must be made pursuant to Section 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 55, 59.

69. *Seminole Tribe*, 517 U.S. at 72.

70. *Id.*

71. *Id.* at 44.

72. *Id.* at 73.

73. 962 S.W.2d 773 (1998).

74. 715 A.2d 172 (1998).

75. *Jacoby*, 962 S.W.2d at 774-75.

76. *Id.*

simply by moving to a state court.⁸³

The plaintiff, having lost, appealed the Maine Supreme Court's decision to the United States Supreme Court. In 1999, the Rehnquist Court granted certiorari and set the stage for them to qualify their *Seminole Tribe* holding and to either expand or contract the protection afforded to the states under the Eleventh Amendment.⁸⁴

The Court affirmed the decision of the Maine Supreme Court.⁸⁵ In doing so, the Court reached its decision by relying on historical events, secondary accounts, and omnipresent notions of common law that were fashionable during the time leading up to and immediately after the ratification of the United States Constitution.⁸⁶ As Professor Young explained, the Court "drop[ed] the textual fig leaf entirely, [and] acknowledg[ed] that any principle of immunity applicable in state court can have no basis in the Eleventh Amendment."⁸⁷ The Court stated that state sovereign immunity, as understood by the structure and substance of the United States Constitution, protects the states from liability under federal law made under the authority of Article I in suits brought in state court.⁸⁸

The Court also refuted the *Jacoby* case's belief that the Supremacy Clause was a barrier to such immunity.⁸⁹ The Court reasoned that the Supremacy Clause only applies to federal acts that accord with constitutional design.⁹⁰ Since abrogation of states' sovereign immunity necessarily infringes upon the Constitution, any federal law that does so is unenforceable.⁹¹ From the Rehnquist Court's logic, states' sovereign immunity, as guaranteed in the structure and form of the United States Constitution, supercedes the written portion of Article VI declaring

83. *Id.* at 175.

84. *Alden*, 527 U.S. at 712 (1999).

85. *Id.*

86. *Id.* at 715, 741. In law school one is taught to follow a general hierarchy of legal authorities to determine the outcome of a particular legal issue. That hierarchy in order from the highest to lowest priority is the United States Constitution, United States statutes, state constitutions, state statutes, and then the common law of the states if none of the aforementioned authorities is controlling. History, it appears, is conspicuously absent from the list. One wonders whether or not the Justices of the United States Supreme Court feel at all constrained to follow this hierarchy that all other legal actors in the United States are bound to follow? If an attorney argued a case relying exclusively on history, he or she would undoubtedly be castigated by the opposing attorney as well as the presiding judge. But when the Supreme Court does so—as in *Alden*—one must look for ways to make this type of "structural" argument based on history valid. See generally Young, *infra* n. 87. However, the Court should be held to the same standards as everyone else.

87. Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 Wm. & Mary L. Rev. 1601, 1601 (2000).

88. See *Alden*, 527 U.S. at 728-29.

89. *Id.* at 732-33, 753.

90. *Id.*

91. *Id.*

federal law as “the Supreme law of the Land.”⁹² Thus, after the Court’s decision in *Alden*, the Eleventh Amendment—or the spirit of the amendment anyway—requires absolute state sovereign immunity from liability under federal law.

III. BANKRUPTCY

A. *The Eleventh Amendment in Bankruptcy Proceedings*

The defense of state sovereign immunity generally raises three issues that a bankruptcy court must address.⁹³ The first is whether a litigated claim in bankruptcy constitutes a “suit.”⁹⁴ The second is whether a state has somehow waived its right to assert sovereign immunity.⁹⁵ And third, whether 11 U.S.C. § 106 constitutionally abrogates state sovereign immunity when no waiver is found.⁹⁶

However, before addressing these issues, a brief overview of bankruptcy will be helpful. Bankruptcy is in the exclusive jurisdiction of the United States government.⁹⁷ There were no longstanding laws on the subject until 1898, when the “Torrey Bill” was passed and implemented throughout the land.⁹⁸ This bill, which is the foundation of the modern Bankruptcy Code, has been amended many times.⁹⁹

The guiding principle behind the modern Bankruptcy Code is the notion of the debtor’s right to a “fresh start.”¹⁰⁰ This fresh start is intended to “free[] the debtor’s future income from the chains of previous debts,”¹⁰¹ and “give[] . . . the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort.”¹⁰² A person wishing to receive such a grant must file a petition in the bankruptcy court.¹⁰³ Immediately upon filing with the court, all of the assets that the debtor owns become part of the “bankruptcy estate,”¹⁰⁴ and any actions by creditors to recover debt is prevented by

92. *See id.*

93. *See e.g. In re Barrett Refining Corp.*, 221 B.R. 795 (Bankr. W.D. Okla. 1998).

94. *Id.* at 801-08.

95. *Id.* at 808-14.

96. *Id.* at 801-08.

97. *See* U.S. Const. art. I, § 8, cl. 4 (stating, “Congress shall have the power . . . to . . . establish . . . uniform laws on the subject of Bankruptcies throughout the United States”).

98. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 24 (1995).

99. *Id.* at 26-43.

100. *See generally* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393 (1985).

101. *Id.* at 1393.

102. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

103. *See* 11 U.S.C.A. § 541 (West 2001).

104. 11 U.S.C.A. § 541(a) (West 2001).

the “automatic stay.”¹⁰⁵

Individuals generally file a petition for either a Chapter 7 or Chapter 13 bankruptcy. In a Chapter 7 proceeding, a trustee is appointed to liquidate the assets of the bankruptcy estate and to use the proceeds to pay back debts according to a creditor hierarchy.¹⁰⁶ In contrast, the trustee in a Chapter 13 proceeding reorganizes the debtor’s assets and debts so that monthly payments may be made over a period of time.¹⁰⁷

In either proceeding, all interested parties must receive notice that a bankruptcy has commenced and that their rights will be affected without specific actions being taken.¹⁰⁸ To preserve their rights, creditors may either file a “proof of claim” with the bankruptcy court¹⁰⁹ or file an “adversary proceeding” to settle their dispute with the debtor.¹¹⁰ However, an adversary proceeding is different from filing a proof of claim. Adversary proceedings are usually brought to determine the dischargeability of a debt.¹¹¹ Many times, the debts are of the type that are nondischargeable but for narrow exceptions.¹¹² An adversary proceeding is a separate action that relates to the bankruptcy, which is essentially a two party dispute between a debtor and a creditor.¹¹³ The parties institute such a proceeding to determine the rights and duties of each other, and in some instances seek monetary awards and damages.¹¹⁴

B. *What Constitutes a “Suit” in Bankruptcy*

In *Cohens v. Virginia*,¹¹⁵ Chief Justice Marshall gave the classic definition of a “suit.” He explained that a suit is a two party dispute, where one party has been damaged or injured in some way, who is seeking a remedy at law or equity, and that participation by either party

105. 11 U.S.C.A. § 362 (West 2001).

106. 11 U.S.C.A. § 701 *et seq.* (West 2001).

107. 11 U.S.C.A. § 1301 *et seq.* (West 2001).

108. Fed. R. Bankr. P. 2002 (2001).

109. Fed. R. Bankr. P. 3001 (2001); 11 U.S.C.A. § 501 (West 2001).

110. Fed. R. Bankr. P. 7003 (2001); *see* 28 U.S.C.A. § 1334(b) (West 2001).

111. *See e.g. Chandler*, No. 99-01929-M.

112. *See* 11 U.S.C.A. § 523 (West 2001). This section of the Bankruptcy Code provides a list of debts that are nondischargeable and the exceptions that allow for a discharge. Debtors and states clash most often regarding student loans and unpaid taxes. *See e.g. In re Innes*, 184 F.3d 1275 (10th Cir. 1999) (denying state sovereign immunity on the theory that state universities waived the defense by participating in federal loan programs); *In re Rose*, 187 F.3d 926 (8th Cir. 1999) (holding that the state waived its sovereign immunity by participating in federal student loan programs); *In re Mitchell*, 209 F.3d 1111 (9th Cir. 2000) (holding that sovereign immunity barred a discharge of unpaid taxes); *In re Jackson*, 184 F.3d 1046 (9th Cir. 1999) (holding that sovereign immunity was waived when the state filed a proof of claim for unpaid taxes against the bankruptcy estate).

113. *See* 28 U.S.C.A. § 1334(b) (West 2001); Fed. R. Bankr. P. 7003 (2001).

114. *See id.*

115. 19 U.S. 264 (1821).

is compulsory rather than permissive.¹¹⁶

It seems clear that adversary proceedings, as described above, are included in Chief Justice Marshall's definition in *Cohens*;¹¹⁷ however, the United States Supreme Court has expressly ruled that proofs of claims are not suits under such a definition.¹¹⁸ The Court stated:

It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and the distribution is, shortly speaking, an adjudication of interests claimed in a res.¹¹⁹

Thus a "bankruptcy case," containing multiple proofs of claims, is not a suit because it is not a two party dispute, a creditor is not injured per se, there is only the adjudication in a res or thing, and attendance on the part of the creditor is permissive rather than compulsory.¹²⁰

The case of *In re Collins*¹²¹ is a good example of a bankruptcy case not constituting a suit. In *Collins*, the state failed to file a proof of claim and the debtor was discharged of all debts.¹²² After six years, the state tried to collect its debt and the debtor re-opened his bankruptcy case to determine whether or not he still owed the money.¹²³ The Fourth Circuit determined that sovereign immunity did not apply because re-opening the case did not constitute a suit, and that the determination of such a debt related back to the debtor's main case, in which the state, as a creditor, was not required to appear.¹²⁴ The Fourth Circuit then held that the debt owed to the state was extinguished because it did not meet any of the exceptions to discharge.¹²⁵

As the Court noted, there are some debts (such as tax arrearages) that survive through the debtor's discharge.¹²⁶ This is the situation that the debtor in *Chandler* has regarding the debt owed to the OTC.¹²⁷ By claiming sovereign immunity in the adversary proceeding, the debt

116. *Id.* at 407-12.

117. *See id.*

118. *See Gardner v. N.J.*, 329 U.S. 465 (1947).

119. *Id.* at 473. The Court relied in part on an earlier case, *N.Y. v. Irving Trust Co.*, 288 U.S. 329 (1933), which stated "[i]f a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power . . ." *Id.* at 333.

120. *See id.*

121. 173 F.3d 924 (4th Cir. 1999).

122. *Id.* at 927.

123. *Id.* at 926-27.

124. *See id.* at 929-931.

125. *Id.* at 931.

126. 11 U.S.C.A. § 523(a)(1) (West 2001).

127. *Chandler*, No. 99-01929-M.

passes through the bankruptcy case without the court determining its validity and leaves the debtor to account for the debt.¹²⁸

In short, a debtor is safe from the defense of sovereign immunity so long as the state files a proof of claim or if the debts are of the type that is usually discharged. Unfortunately for debtors, most debts incurred against a state require an adversary proceeding.¹²⁹

C. *What Constitutes a Waiver in Bankruptcy*

If a debtor files an adversary proceeding to determine the dischargeability of a debt owed to a state, he or she still stands the chance that a state may waive the defense of sovereign immunity. There are three ways for a state to do so.¹³⁰ The first is waiver by a state constitution or statute.¹³¹ The second way is when a state constructively consents to suits by its citizens.¹³² And the third way is by the state's voluntary participation in any aspect of the bankruptcy case.¹³³

In order for a state to waive its defense of sovereign immunity by statute or its constitution, the waiver must be free from any ambiguity and must expressly allow the waiver to extend into the jurisdiction of the federal courts.¹³⁴ Constructive consent to suits against a state by private individuals involves state participation in optional federal programs that condition participation upon the state's waiver of its sovereign immunity.¹³⁵ As with the states, the language of the federal statute that creates such a condition "must be expressed in unmistakably clear language."¹³⁶

The third way states waive the defense of sovereign immunity is by making a voluntary appearance in a suit.¹³⁷ Thus, states that voluntarily file proofs of claims in a bankruptcy case waive any defense to sovereign immunity.¹³⁸ Many post-*Seminole Tribe* cases have also applied waiver when states voluntarily participate in adversary proceedings.¹³⁹ In

128. *See id.* As the Court noted, the OTC is free under Oklahoma law to collect its debt by levying the debtor's property and selling it without resort to the judicial process. *Id.* at 9.

129. *See supra* n. 112.

130. *Barrett*, 221 B.R. at 812.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *Employees v. Mo. Pub. Health & Welfare Dept.*, 411 U.S. 279, 283-285 (1973); *Welch v. Tex. Dept. of Hwy. & Pub. Trans.*, 483 U.S. 468, 478 (1987).

135. *See Innes*, 184 F.3d 1275; *Rose*, 187 F.3d 926.

136. *Welch*, 483 U.S. at 478.

137. *E.g. Gardner*, 329 U.S. at 573.

138. *Id.*

139. *In re Martinez*, 196 B.R. 225, 229-30 (Bankr. D.P.R. 1996); *In re Charter Oaks Associates*, 203 B.R. 17, 21-22 (Bankr. D. Conn. 1996); *In re York-Hanover Devel., Inc.*, 201 B.R. 137, 142 (Bankr. E.D.N.C. 1996); *In re Sacred Heart Hosp.*, 199 B.R. 129, 134 (Bankr. E.D. Pa. 1996); *In re Koehler*, 204 B.R. 210, 217-20 (Bankr. D. Minn. 1997); *In re Burke*, 203 B.R. 493, 497-98 (Bankr. S.D. Ga. 1996); *In re Straight*, 209 B.R. 546, 555-58 (Bankr.

Chandler, the OTC did not waive its sovereign immunity under any of the previously enumerated ways.¹⁴⁰ All that is left for the debtor is a determination of whether or not the state's sovereign immunity is constitutionally abrogated by 11 U.S.C. § 106.¹⁴¹

D. *The Constitutionality of 11 U.S.C. § 106 in Bankruptcy*

Seminole Tribe establishes a two-prong test for determining whether Congress has constitutionally abrogated states' sovereign immunity. The first prong is whether the statute clearly expresses its intent to abrogate states' sovereign immunity; and the second prong requires that the statute be made pursuant to a valid exercise of Congressional power.¹⁴²

There is no doubt the language of 11 U.S.C. § 106 is clear and free from any ambiguity regarding Congress' intent to abrogate states' sovereign immunity in bankruptcy proceedings against states.¹⁴³ However, there is much debate in the courts as to whether or not the second prong of *Seminole Tribe* is satisfied.¹⁴⁴

According to *Seminole Tribe*, the only valid constitutional authority allowing Congress to abrogate states' sovereign immunity is Section 5 of

D. Wyo. 1997).

140. See *Chandler*, No. 99-01929-M.

141. See *id.*

142. *Id.*

143. See 11 U.S.C. § 106 (West 2001). Section 106 reads in pertinent part:

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

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 546, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

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

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

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

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

Id.

144. See *infra* nn. 146-49.

the Fourteenth Amendment.¹⁴⁵ Some courts have taken the position that § 106 was made pursuant to such authority,¹⁴⁶ but the vast majority of courts have concluded that § 106 was not.¹⁴⁷ Other courts have concluded that § 106 was made pursuant to Article I, section 8, clause 4, which is expressly forbidden by *Seminole Tribe*.¹⁴⁸

Regardless of the overwhelming majority contradicting the courts that believe § 106 was made pursuant to Section 5 of the Fourteenth Amendment, the argument for such a position is still very persuasive. In the case of *In re Southern Star Foods, Inc.*,¹⁴⁹ decided prior to *Seminole Tribe*, the court stated:

To attempt to separate the power of national enactment under Article I from the power of national enforcement under the Fourteenth Amendment is to mince the Constitution—to take what should be considered as a working whole, and dismember it into a scatter of lifeless parts. . . . It is apparent to this Court that 11 U.S.C. § 106(a), even though enacted pursuant to Article I, is also a valid exercise of Congressional enforcement power, including the power to abrogate State sovereign immunity, through the Fourteenth Amendment.¹⁵⁰

As will be show below, the Rehnquist Court has created case law that, while not directly dealing with bankruptcy, severely limits and infringes upon many of the aforementioned ways to pierce states' sovereign immunity—including the notion that § 106 was made pursuant to Section 5 of the Fourteenth Amendment.

E. Restrictions on Piercing States' Sovereign Immunity in Bankruptcy

In College Savings Bank v. Florida Prepaid Postsecondary Education

145. *Seminole Tribe*, 517 U.S. at 59. The Fourteenth Amendment reads in pertinent part: Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV.

146. *In re Southern Star Foods, Inc.*, 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995); *In re Straight*, 209 B.R. 540, 555 (Bankr. D. Wyo. 1997); *In re Headrick*, 203 B.R. 805, 809 (Bankr. S.D. Ga. 1996); *In re Willis*, 230 B.R. 619, 623 (Bankr. E.D. Okla. 1999); *In re Lees*, 252 B.R. 441, 449 (Bankr. W.D. Tenn. 2000).

147. *In re Creative Goldsmiths of D.C., Inc.*, 119 F.3d 1140, 1146 (4th Cir. 1997); *In re Fernandez*, 123 F.3d 241, 245-46 (5th Cir. 1997); *In re Morrell*, 218 B.R. 87, 91 (Bankr. C.D. Cal. 1997); *In re Mueller*, 211 B.R. 737, 742 (Bankr. D. Mont. 1997); *In re Elias*, 218 B.R. 80, 86 (B.A.P. 9th Cir. 1998); *In re Neary*, 220 B.R. 864, 867 (Bankr. E.D. Pa. 1998); *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 244 (3rd Cir. 1998).

148. *In re Martínez*, 196 B.R. 225, 230 (Bankr. D.P.R. 1996); *In re York-Hanover Dev. Inc.*, 201 B.R. 137, 142 (Bankr. E.D.N.C. 1996); *In re Midland Mech. Contractors*, 200 B.R. 453, 457-58 (Bankr. N.D. Ga. 1996); *In Re NVR, L.P.*, 206 B.R. 831, 838 (Bankr. E.D. Va. 1997).

149. 190 B.R. 419 (Bankr. E.D. Okla. 1995).

150. *Id.* at 426 (quotations omitted).

Expense Board,¹⁵¹ the Rehnquist Court determined that constructive waiver could not be used to abrogate states' sovereign immunity.¹⁵² If applied in the bankruptcy context, cases that have held constructive waiver valid when a state voluntarily participates in federal programs that provide citizens with such things as student loans or money for small businesses must be overruled.¹⁵³

The Rehnquist Court has also limited the scope of the Fourteenth Amendment as a tool for abrogating states' sovereign immunity. In *City of Boerne v. Flores*,¹⁵⁴ the Court restricted the Congress' use of Section 5 of the Fourteenth Amendment. The Court held that the provision was "remedial" in nature and that it gives the "power to enforce, not the power to determine what constitutes a constitutional violation."¹⁵⁵ In a subsequent case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,¹⁵⁶ the Court reaffirmed and clarified its hazy holding in *Boerne*. In order for legislation to be valid under Section 5 of the Fourteenth Amendment—including legislation that abrogates states' sovereign immunity—Congress "must identify conduct transgressing the Fourteenth Amendment's substantive provisions" as well as "tailor its legislative scheme to remedying or preventing such conduct."¹⁵⁷

One commentator analyzing the application of the *Boerne* test to the abrogation of states' sovereign immunity has outlined the two-step process needed for a constitutional stamp of approval for abrogation of states' sovereign immunity under Section 5 of the Fourteenth Amendment.¹⁵⁸ First, Congress has to "find a pattern of constitutional violations [of federal rights] by the States," attribute the pattern of violations to a judicially accepted arm of the state, and incorporate the

151. 527 U.S. 666 (1999).

152. *Id.* at 680-81. The Court opined:

The whole point of requiring a "clear declaration" by the state of its waiver is to be certain that the state in fact consents to a suit. But there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity.

Id. at 680-81. They relied in part on the prior case, *Edelman v. Jordan*, 415 U.S. 651, 655 (1974), which stated, "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *College Savings Bank*, 527 U.S. at 681.

153. See e.g. *Rose*, 187 F.3d 926 (holding that the state waived its sovereign immunity by participating in federal student loan programs); *In re Straight*, 143 F.3d 1387 (10th Cir. 1998) (holding that the state waived its defense of sovereign immunity by participating in a federal program to aid disadvantaged businesses).

154. 521 U.S. 507 (1997).

155. *Id.* at 519.

156. 527 U.S. 627 (1999).

157. *Id.* at 639.

158. William Thro, *The Educational Lawyer's Guide to the Sovereign Immunity Revolution*, 146 West L. Rev. 951, 961 (2000).

findings of constitutional violations into "the legislative history of the statute that purports to abrogate sovereign immunity."¹⁵⁹ Second, the federal courts have to determine whether abrogation of states' sovereign immunity is necessary to remedy the constitutional violation of federal rights, that abrogation is only limited to remedy the documented violations of specific federal statutes, and preventing blanket abrogation over states that have no record of the constitutional violations.¹⁶⁰

In the case of *In re Creative Goldsmiths of Washington, D.C., Inc.*,¹⁶¹ the Fourth Circuit used the *Boerne* test to invalidate the notion that § 106 was made pursuant to Section 5 of the Fourteenth Amendment.¹⁶² *Creative Goldsmiths* and the *Boerne* test will be a huge hurdle for debtors to overcome. The Supreme Court has previously ruled that a discharge in bankruptcy is only a privilege and not a constitutionally protected right.¹⁶³ Thus, a state, when denying consent to suits brought by the debtor, is doing nothing that can be enforced by Congress under Section 5 of the Fourteenth Amendment.¹⁶⁴

After the Rehnquist Court's rulings in *College Savings Bank*, *Boerne*, and *Florida Prepaid* it seems as though debtors will have to rely upon the states to either expressly waive their defense of sovereign immunity under the Eleventh Amendment or voluntarily take part in the bankruptcy proceeding or adversary proceeding in order to have a chance to litigate their claims against the states.¹⁶⁵ However, there is a Supreme Court doctrine that could possibly be used to circumvent the debtor's game of chance with the state.

F. *Ex Parte Young*

Some scholars believe that with the current state of sovereign immunity, and its devastating impact on bankruptcy, the doctrine of *Ex parte Young* will be increasingly used as a way around the ironclad protection now afforded to states under the *Seminole Tribe's* interpretation of the Eleventh Amendment.¹⁶⁶ The doctrine, as it was

159. *Id.* at 962-63.

160. *Id.* at 961.

161. 119 F.3d 1140 (4th Cir. 1997).

162. *Id.* at 1146-47.

163. *U.S. v. Kras*, 409 U.S. 434, 446-47 (1973). Although the Supreme Court has not explicitly overruled *Kras*, it could be argued that prior cases undermine the Court's logic in the case. See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (holding that a state statute created a property right to be protected by the Due Process Clause of the Fourteenth Amendment and that "[t]he constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege and not a right'"); *Bd. of Regents v. Roth*, 408 U.S. 564, 571 (1972) ("Th[is] Court has finally and fully rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights.").

164. See *Boerne*, 521 U.S. at 519.

165. See *infra* Section III.C.

166. See Patricia C. Barsalou & Scott A. Stengel, *Ex Parte Young: Relativity in Practice*, 72

originally fashioned by the United States Supreme Court, created an exception to the Eleventh Amendment that allowed a private citizen to sue a state official for injunctive relief from violating federally created rights.¹⁶⁷ However, the doctrine has been severely curtailed over the years.

In *Edelman v. Jordan*,¹⁶⁸ the Court ruled that relief granted under the *Young* doctrine was prospective only and that reparations for wrongly withheld benefits would essentially be a retrospective claim against the state.¹⁶⁹ This situation, the Court reasoned violated the Eleventh Amendment.¹⁷⁰

In *Seminole Tribe*, the Court held that when Congress creates a remedial scheme to combat particular violations of federal law by state officers, the *Young* doctrine becomes inoperative.¹⁷¹ Thus, the Court will follow the remedies set forth in the plan rather than allowing a suit against state officials.¹⁷²

In *Pennhurst State School & Hospital v. Halderman*,¹⁷³ the Court determined that *Young* only applied to state officials for a violation of federal law.¹⁷⁴ The Court opined, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."¹⁷⁵

The case of *In re Schmitt*¹⁷⁶ contemplates the application of the *Young* doctrine within the bankruptcy setting. The court dismissed the adversary proceeding based on state sovereign immunity and the binding precedent of *Seminole Tribe*, but noted that bringing an adversary proceeding against a state officer would require a different outcome.¹⁷⁷

Am. Bankr. L.J. 455; M. Browning, *Supreme Court Cases Have Major Bankruptcy Implications*, Consumer Bankr. News (July 29, 1999).

167. See *Ex parte Young*, 209 U.S. 123 (1908).

168. 415 U.S. 651 (1974).

169. *Id.* at 664-65.

170. *Id.*

171. *Seminole Tribe*, 517 U.S. at 74. The Court explained:

Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex Parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*.

Id. (citations omitted).

172. See *id.*

173. 465 U.S. 89 (1984).

174. *Id.* at 106.

175. *Id.*

176. 220 B.R. 68 (Bankr. W.D. Mo. 1998).

177. *Id.* at 71.

The court opined that if the debtor were to do so, the *Young* doctrine and its progeny would allow the debtor to get around the Eleventh Amendment because “[t]he granting of a bankruptcy discharge enjoins a creditor from enforcing the debt . . . [and] is a form of prospective relief;¹⁷⁸ “the [Bankruptcy] Code does not establish a detailed remedial scheme for obtaining the discharge of a student loan held by the state;”¹⁷⁹ and a discharge is a federal right.¹⁸⁰

However, the Rehnquist Court potentially eviscerates the *Young* doctrine’s scope of application in their decision, *Idaho v. Coeur d’Alene Tribe of Idaho*,¹⁸¹ which prevented Indians from using *Young* to sue various state officials to determine the title to submerged lands on the reservation.¹⁸² The Court, conceding that the elements of the *Young* doctrine were met,¹⁸³ denied its application because of special sovereignty interests of the state.¹⁸⁴

Although special sovereignty interests were not fully enumerated in *Coeur d’Alene*, the Court’s use of a balancing test to determine them will undoubtedly figure prominently when the *Young* doctrine is asserted in other contexts.¹⁸⁵ One thing is certain, the *Young* doctrine will no longer be applied to reach the states simply because a private citizen seeks relief afforded under the doctrine.¹⁸⁶ After *Coeur d’Alene*, debtors have no guarantee that the *Young* doctrine will enable the bankruptcy court to adjudicate his or her debt dispute with a state.¹⁸⁷

IV. CONCLUSION

The Rehnquist Court glossed over their devastating holding in *Alden* by stating that there are real “limits . . . implicit in the constitutional principle of sovereign immunity.”¹⁸⁸ The Court listed states’ consent to

178. *Id.* at 73.

179. *Id.*

180. *Id.*

181. 521 U.S. 261 (1997).

182. *Id.* at 264-67.

183. *Id.* at 280.

184. *Id.* at 288.

185. *Id.* at 278, 280.

186. *Coeur d’Alene*, 521 U.S. at 270. The Court stated:

To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle . . . that the Eleventh Amendment immunity represents a real limitation on a federal court’s federal-question jurisdiction.

Id.

187. See e.g. *In re LTV Steel Co., Inc.*, 264 B.R. 455, 469 (2001) (holding that the *Young* doctrine allowed a debtor to bring suit regarding tax debt because collecting taxes, while a sovereign interest of the state, did not cross *Coeur d’Alene*’s Eleventh Amendment threshold).

188. *Alden*, 527 U.S. at 755.

being sued, suits by the federal government to enforce compliance with federal law, enforcement under Section 5 of the Fourteenth Amendment, and the *Young* doctrine.¹⁸⁹ Unfortunately for debtors like Chandler, these limits are meaningless.¹⁹⁰

There is no doubt that the United States Constitution secures the sovereignty of both the states and the federal government. However, the Rehnquist Court's insisted upon symmetry and absolutism concerning sovereign immunity of the states must give way to a more pragmatic view. If it is respect that that the Rehnquist Court seeks to ordain upon the states, the more reasonable model is that described in *Jacoby v. Arkansas Department of Education*,¹⁹¹ which forbids federal diversity jurisdiction enumerated in the Eleventh Amendment, but requires the state courts to uphold the "Supreme Law of the Land" when it has been violated.

Having said that, the historical and structural holding of *Alden* is wrong or misplaced at best. The judge's function when interpreting and applying the Constitution is "to read English intelligently"¹⁹² and other considerations should only come into play "when the meaning of the words used is open to reasonable doubt."¹⁹³ The Eleventh Amendment is free from ambiguity on its face, and the Rehnquist Court should not indulge in speculation concerning its meaning or whether or not it is the embodiment of great wisdom.¹⁹⁴

Furthermore, *Seminole Tribe* must have its exceptions. The jurisdiction of the bankruptcy court, including its adjudication of adversary proceedings, is sufficiently different from that of Article III Courts to allow such an exception without rendering federalism moot. As it stands, however, debtors like *Chandler* are without a remedy at law

189. *Id.* at 755-56.

190. *See supra* Section III.E-F.

191. 962 S.W.2d 773 (1998).

192. *N. Securities*, 193 U.S. at 401 (Holmes, J. dissenting).

193. *Id.*

194. As Justice Jackson remarked, "[w]e are not final because we are infallible, but we are infallible because we are final." *Brown v. Allen*, 344 U.S. 445, 540 (1953). Thus, *Alden* and (to a lesser degree) *Seminole Tribe* are right only because the Court says they are right.

for a valid claim against a state in either federal or state court, and something must give way to make this anomaly disappear.¹⁹⁵ If not, then “the rule of law” ideal is nothing more than an empty promise.

Chad J. Kutmas

195. There are, however, some bankruptcy courts that have eschewed the Court's precedents and denied the states their protection of the Eleventh Amendment on less traditional grounds. The first of these cases is *In re Ranstrom*, 215 B.R. 454, 455 (Bankr. N.D. Cal. 1997) (holding that *Seminole Tribe* did not apply in the context of a bankruptcy proceeding and that “[o]nly hoary case law extends the Eleventh Amendment to” cases between a state and its citizens). The others include *In re Bleimeister*, 251 B.R. 383, 387-88 (Bankr. D. Ariz. 2000), *aff'd on other grounds*, No. 00-1557-PHX (D. Ariz. 2001) (turning the structural analysis of *Alden* on itself to declare that the states, by ratifying the United States Constitution, lost their sovereign immunity in bankruptcy proceedings under Article 1, section 8, clause 4); *In re Nelson*, 254 B.R. 436, 443 (Bankr. W.D. Wisc. 2000); *In re Hood*, 262 B.R. 412, 414 (B.A.P. 6th Cir. 2001).

