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## Uniform Laws or State Immunity? The Constitutionality of Section 106(a) After Seminole, 39 J. Marshall L. Rev. 969 (2006)

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# UNIFORM LAWS OR STATE IMMUNITY? THE CONSTITUTIONALITY OF SECTION 106(A) AFTER *SEMINOLE*

JOHN F. HILTZ\*

## I. A FRESH START

Julie Smith is in financial trouble. She has recently lost her job and is a single parent with two children to support. Although she has been looking for work, her savings are quickly depleting. Soon, Julie is forced to take a position paying \$30,000 a year less than she was making at her previous job. The income from this new job is not sufficient, and Julie becomes overwhelmed by her debt. Julie decides, in the end, that her only way out is to declare bankruptcy. Julie is not alone.<sup>1</sup> More and more Americans are declaring bankruptcy every year.<sup>2</sup> All of them are trying to get a fresh start. This is one of the main purposes behind bankruptcy.<sup>3</sup> Similarly, Julie's creditors also want to be treated fairly when her assets are divided amongst them. This, after all, is the second major purpose behind bankruptcy.<sup>4</sup>

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\* J.D., May 2006, The John Marshall Law School. The author wishes to say "Muchos Gracias" to Paul Orser and Teresa Sanhueza whose support so long ago will never be forgotten. The author also thanks the previous and current editorial boards, especially Jennifer Hagberg and Manish Mehta, for their comprehensive editing of this comment. The author is very grateful to Professor Paul Lewis for inspiring an interest in this topic as well as providing continual advice and guidance throughout the past three years. Finally, the author wishes to dedicate this comment to his family, especially his wife, Virginia, for her constant love and support.

1. Press Release, Administrative Office of the U.S. Courts, Number of Bankruptcy Cases Filed in Federal Courts Down Less Than One Percent (Aug. 27, 2004), available at [http://www.uscourts.gov/Press\\_Releases/june04bk.pdf](http://www.uscourts.gov/Press_Releases/june04bk.pdf) (last visited Jan. 28, 2005). The total number of non-business bankruptcies filed in federal court in the twelve-month period ending June 30, 2004 was 1,599,986. *Id.*

2. *Id.* From 1999 to 2004 the number of non-business bankruptcy filings in federal court has risen from 1,352,030 to 1,599,986 per year. *Id.*

3. *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 514 (1938). "The development of bankruptcy legislation has been towards relieving the honest debtor from oppressive indebtedness and permitting him to start afresh." *Id.*

4. *See Reading Co. v. Brown*, 391 U.S. 471, 477 (1968) (holding that an important objective of bankruptcy is fairness to all creditors having claims against the debtor).

These two ideas, a fresh start for the debtor and fairness towards the creditors, were so important to the founding fathers that they entrusted Congress with a specific grant of power “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>5</sup> However, if Julie has student loans, and those loans are guaranteed by a state agency, she and her creditors may discover that the two main purposes of bankruptcy law might not be so easily achieved.<sup>6</sup>

One of the largest hurdles to Julie’s fresh start and fair treatment for her creditors lies in the uncertainty surrounding the constitutionality of section 106(a) of the Bankruptcy Code.<sup>7</sup> Section 106(a) is Congress’s attempt to abrogate State sovereign immunity.<sup>8</sup> If section 106(a) is constitutional, then the creditor state or state agency is not immune from suit,<sup>9</sup> and will be treated like a normal creditor.<sup>10</sup> If section 106(a) is unconstitutional, then the state agency guaranteeing her student loan may be able to avoid discharge. This is so even if a bankruptcy court discharges

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5. U.S. CONST. art. I, § 8, cl. 4.

6. As we will see later, if section 106(a) is invalid, states may be able to avoid the bankruptcy proceeding and Julie’s loans will not be discharged. This would frustrate her ability to get a fresh start and may well prevent her creditors from receiving payment they may have otherwise been entitled.

7. 11 U.S.C. § 106(a) (2000). The act states in part: “Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . . .” *Id.* The constitutionality of this section is uncertain and there is currently a split among courts as to whether Congress was acting within its power to enact this section of code. See *Dep’t of Transp. & Dev. v. PNL Asset Mgmt. Co.* (*In re Fernandez*), 123 F.3d 241, 246 (5th Cir. 1997) (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996)) (holding that section 106(a) is unconstitutional because Congress lacks authority under the bankruptcy clause as well as section 5 of the Fourteenth Amendment of the Constitution). See also *Sacred Heart Hosp. v. Pa. Dep’t of Pub. Welfare* (*In re Sacred Heart Hosp.*), 133 F.3d 237, 245 (3rd Cir. 1998) (concluding that because Congress lacks the authority to abrogate state sovereign immunity pursuant to any Article I powers and because Congress did not enact section 106(a) pursuant to the Fourteenth Amendment, it must be unconstitutional). *But see Wilson v. South Car. State Educ. Assistant Auth.* (*In re Wilson*), 258 B.R. 303, 307-08 (Bankr. S.D. Ga. 2001) (holding that section 106(a) was a valid abrogation of state sovereign immunity because Congress was acting under the power of the Fourteenth Amendment). For a discussion concerning the internal split among bankruptcy courts in Tennessee see generally Shauna Fuller Veach, *Dissension Among the Ranks – The Courts Are at Odds Over 11 U.S.C. § 106 and Its Purported Abrogation of Sovereign Immunity in the Bankruptcy Code*, 32 U. MEM. L. REV. 475, 510-14 (2002) (discussing the internal conflicts among the various bankruptcy districts within Tennessee as to whether section 106 is a valid abrogation of sovereign immunity).

8. 11 U.S.C. § 106(a).

9. U.S. CONST. amend. XI. Otherwise state sovereign immunity under the Eleventh Amendment would allow the state to avoid the proceedings. *Id.*

10. 11 U.S.C. § 106(a).

the loans on the theory that Congress cannot prevent the State, or an agency acting on its behalf, from exercising its Eleventh Amendment protection to avoid the bankruptcy proceeding.<sup>11</sup>

Part II of this Comment will briefly address Congressional power under the Bankruptcy Clause and its limitations. It will also examine the Eleventh and Fourteenth Amendments of the Constitution and the effect they have on Congressional power and State immunity.

Part III will examine how both the Supreme Court and the lower courts decided cases involving the constitutionality of section 106(a). It will also explore the arguments for and against the validity of section 106(a).

Part IV will propose that the Supreme Court declare that section 106(a) is constitutional, thereby preventing States from avoiding bankruptcy proceedings, putting the current uncertainty to rest, thereby restoring the two major purposes of bankruptcy.

## II. A HISTORICAL OVERVIEW

### A. *Bankruptcy and the Constitution*

Article 1, section 8 of the Constitution grants Congress the power “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>12</sup> But, it has not been established just how far this power extends. Could Congress abrogate States’ sovereign immunity afforded them under the Eleventh Amendment and force States to either join in the bankruptcy proceeding or forfeit their rights as creditors?<sup>13</sup> Prior to 1996, the answer seemed obvious: Congress did have the power to abrogate States’ Eleventh Amendment immunity, so long as it was acting pursuant to a valid power.<sup>14</sup> In 1996, however, the

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11. U.S. CONST. amend. XI. This is explained in much greater detail in Part III.

12. U.S. CONST. art. I, § 8, cl. 4.

13. U.S. CONST. amend. XI. It is not technically correct to say that the Eleventh Amendment is the source of state sovereign immunity. Karen Cordry, *Sovereign Immunity – Time to Come in from the Cold!*, AM. BANKR. INST. J., Sept. 13, 1994, at 5-6. The Amendment merely symbolizes the sovereign immunity that was there all along. *Id.* It should not be understood as setting boundaries for the immunity, rather it reaffirms the common law immunity that existed before the constitution, as well as today. *Id.*

14. See *Texas v. Walker*, 142 F.3d 813, 820 (5th Cir. 1998) (stating that prior to *Seminole* an individual could have debt owed to a state discharged); *Sacred Heart*, 133 F.3d at 242 (acknowledging two sources of authority, prior to *Seminole*, that allowed Congress to abrogate state sovereign immunity: the Fourteenth Amendment and the Interstate Commerce Clause). See also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (holding that Article I powers (specifically the Commerce Clause) grants Congress the authority to

Supreme Court's decision in a non-bankruptcy case cast serious doubt on Congress' ability to abrogate States' immunity from suit, including bankruptcy proceedings.<sup>15</sup> The effect *Seminole Tribe v. Florida* had on the bankruptcy world was initially pointed out by Justice Stevens in the dissent.<sup>16</sup>

For abrogation via section 106(a) to be valid, Congress must act pursuant to a valid exercise of its constitutional power.<sup>17</sup> In *Seminole*, the Court found that abrogating States' immunity pursuant to the Commerce Clause<sup>18</sup> was not a valid exercise of Congressional power.<sup>19</sup> Although the Court did not specifically rule on the constitutionality of abrogation via the Bankruptcy Clause, lower courts broadly interpreted the *Seminole* ruling to cover all Article I, section 8 powers.<sup>20</sup> Although there is some case law to the contrary,<sup>21</sup> it would appear that *Seminole* presents a serious obstacle to Congress' attempt to justify enactment of section 106(a) with power granted by the Bankruptcy Clause.

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abrogate state sovereign immunity). This case was explicitly overturned by *Seminole*. 517 U.S. at 66.

15. *Seminole*, 517 U.S. 44.

16. *See id.* at 77 (stating that the majority's opinion would prevent Congress from providing a federal forum for actions against states concerning bankruptcies) (Stevens, J., dissenting).

17. *Id.* at 55. The Court fashions a two step test to determine if Congress has validly abrogated State's Eleventh Amendment immunity. *Id.* The first step of the test is whether Congress has clearly stated its intent to abrogate. *Id.* In the case of section 106(a) the answer is obviously yes. *Pitts v. OH. Dep't of Tax. (In Re Pitts)*, 241 B.R. 862, 876 (Bankr. N.D. OH. 1999). The second step requires a determination if Congress has acted pursuant to a valid source of power. *Seminole*, 517 U.S. at 55. *See* Richard Lieb, *Development: Eleventh Amendment Immunity of A State in Bankruptcy Cases: A New Jurisdictional Approach*, 7 AM. BANKR. INST. L. REV. 269, 287 (1999) (discussing requirements for abrogation in general). It is clear that Congress assumed that it had the power pursuant to Article I, Section 8, Clause 4 (the Bankruptcy Clause) to abrogate state sovereign immunity and that by clearly expressing its intent to do so via section 106(a). *Id.*

18. U.S. CONST. art. I, § 8, cl. 3.

19. *Seminole*, 517 U.S. at 77 (Stevens, J., dissenting) (holding that because the purpose of the Eleventh Amendment is to curtail the power under Article III, Article I cannot be used as a way around these limitations).

20. *See In re NVR L.P.*, 206 B.R. 831, 838 (Bankr. E.D. Va. 1997) (pointing out that the majority of courts have found section 106(a) unconstitutional since *Seminole*).

21. *See Wilson*, 258 B.R. at 306 (concluding that section 106(a) is constitutional). *See Hood v. Tenn. Student Assistance Corp. (In re Hood)*, 319 F.3d 755, 767 (6th Cir. 2003) [hereinafter *Hood I*] (becoming the first federal circuit court to hold that section 106(a) is constitutional). *See, e.g., Bliemeister v. Indus. Comm'n of Ariz. (In re Bliemeister)*, 251 B.R. 383, 391-92 (Bankr. D. Ariz. 2000) (holding that the states waived their sovereign immunity when they ratified the Constitution).

### B. *The Fourteenth Amendment: Another Way?*

Article I is not the only tool available to Congress in its attempt to abrogate State sovereign immunity.<sup>22</sup> The Fourteenth Amendment grants protections to the citizens of the United States and empowers Congress to enforce those protections.<sup>23</sup> There is little question on whether Congress can abrogate a State's Eleventh Amendment immunity by exercising its Fourteenth Amendment powers.<sup>24</sup> The only question, then, is whether Congress is acting pursuant to the Fourteenth Amendment when it enacts a piece of legislation.<sup>25</sup>

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22. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (noting that congress also has power under section 5 of the Fourteenth Amendment). In *Ex parte Young*, the Supreme Court articulated what is known as the "*Ex parte Young* Doctrine," which allows an individual to bring suit against a state official, acting in his official capacity, as a way to avoid offending the Eleventh Amendment. 209 U.S. 123 (1908). The doctrine creates a legal fiction that the official was not acting under direction of the sovereign and, therefore, does not have immunity. *Id.* at 167. While not abrogation of immunity as such, it provides a way for a citizen to get injunctive relief against a state. *Id.* S. Elizabeth Gibson, *How to Deal With a State in Bankruptcy in a Post-Seminole World?*, in WAIVER OF ELEVENTH AMENDMENT IMMUNITY: THE DEBATE CONTINUES 12, 23 (1999) (explaining that the *Ex parte Young* fiction is necessary to protect federal rights against states).

23. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment prevents states from enacting or enforcing "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." *Id.* "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." *Id.* at § 5.

24. See *Dodson v. Tenn. Student Assistance Corp.*, 259 B.R. 635, 638 (Bankr. E.D. Tenn. 2001) (stating that Congress may authorize a state to be sued by exercising its Fourteenth Amendment power). In examining the relationship between the Eleventh Amendment and the Fourteenth Amendment, the Court noted that section 5 expressly grants Congress the power to enforce the provisions of the Fourteenth Amendment, which already inherently limit state authority, "by appropriate legislation." *Fitzpatrick*, 427 U.S. at 456. The Court further explained that by acting pursuant to Section 5 of the Fourteenth amendment, Congress is exercising plenary authority via a section of an Amendment that already limits state power. *Id.* In deciding which legislation is appropriate, Congress may provide for suits against states that might otherwise be barred by the Eleventh Amendment. *Id.*

25. See *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343, 1348 (Fed. Cir. 1998) (explaining the test used to determine if a particular piece of legislation was passed pursuant to the powers granted by the Fourteenth Amendment). When deciding if a piece of legislation was enacted pursuant to an appropriate use of Congress's Fourteenth Amendment power, the Supreme Court will allow Congress to use any rational means to enforce the provisions of that Amendment. *Id.* The Supreme Court consistently looks to Chief Justice Marshall's explanation of the powers of Congress: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and

In considering whether section 106(a) was enacted pursuant to the Fourteenth Amendment, one must first determine if bankruptcy is one of the rights protected in section 1 of the Fourteenth Amendment.<sup>26</sup>

Section 1 provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>27</sup>

Congress is not required to specifically state that they are acting pursuant to the Fourteenth Amendment.<sup>28</sup> Although there are no "magic words" that signify that Congress is acting under the power of the Fourteenth Amendment,<sup>29</sup> the legislation must correspond to some recognizable Fourteenth Amendment protection.<sup>30</sup>

### C. States' Answer: The Eleventh Amendment

The Eleventh Amendment prevents citizens from bringing suit against a State.<sup>31</sup> Although the language says that a State

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spirit of the constitution, are constitutional." *Id.* (citing *McCulloch v. Maryland*, 17 U.S. 314 (1819)). See *City of Boerne v. Flores*, 521 U.S. 507, 517-18 (1997) (With regard to Congress' enforcement power under the Fourteenth Amendment: "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain . . . if not prohibited, is brought within the domain of congressional power." (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46, (1880))).

26. The question has not been answered decisively. See *Pitts*, 241 B.R. at 876 (rejecting the argument that section 106(a) was enacted through the Fourteenth Amendment). But see *Wilson*, 258 B.R. at 306 (finding that in enacting § 106(a), Congress had acted pursuant to their Fourteenth Amendment powers).

27. U.S. CONST. amend. XIV, § 1.

28. *EEOC v. Wyoming*, 460 U.S. 226, 244, n.18 (1983). In *EEOC v. Wyoming*, the Court stated "[t]hat does not mean, however, that Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection,' . . . for '[the] . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Id.* (citing *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

29. See *EEOC v. Wyoming*, 460 U.S. at 244 (explaining that no specific words are required in order to utilize Fourteenth Amendment powers).

30. *Id.* The Supreme Court will review legislation passed by Congress that is being presented as constitutional because it was enacted pursuant to Section 5 of the Fourteenth Amendment in order to determine if there is a legitimate purpose that supports the use of that power. *Id.*

31. U.S. CONST. amend. XI. The amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

cannot be sued by a citizen of another State, courts have construed that language to also prevent suits against States by their own citizens.<sup>32</sup> Because a State is protected by the Eleventh Amendment, without a valid abrogation of this protection or another way to compel the State to submit to the court's jurisdiction,<sup>33</sup> a bankruptcy proceeding would be unable to discharge debt owed to a creditor State.<sup>34</sup> Although almost assuredly not the intent of the Eleventh Amendment,<sup>35</sup> the result of such immunity frustrates of the very intent of the Bankruptcy Clause.<sup>36</sup>

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32. *Tenn. Student Assistance Corp. v. Hood*, 451 U.S. 440, 444-45 (2004) [hereinafter *Hood II*]. "For over a century, however, we have recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment." *Id.* For example, in *Hans v. Louisiana* the Court stated that the purpose and breadth of the Eleventh Amendment was as follows:

It is not necessary that we should enter upon an examination of the reason or expediency of . . . [state sovereign immunity] which exempts a sovereign State from prosecution in a court of justice at the suit of *individuals*. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

134 U.S. 1, 21 (1890) (emphasis added).

33. The recent Supreme Court case *Hood II* provides another way to compel the state to submit to the bankruptcy court's jurisdiction. 451 U.S. 440. This issue will be discussed in much greater detail in Parts III and IV.

34. Unless, of course, the State consented to suit thereby waiving its Eleventh Amendment protection. Otherwise the state will escape the jurisdiction of the bankruptcy court. U.S. CONST. amend. XI.

35. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934). The Court held that the catalyst for the Eleventh Amendment, "in *Chisholm v. Georgia*, over the vigorous dissent of Mr. Justice Iredell, that a State was liable to suit by a citizen of another State or of a foreign country. But this decision created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted . . ."). *Id.* See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1921-23 (1983) (discussing the relevant political backdrop of *Chisholm* and the goal of maintaining the peace treaty between the United States and Great Britain).

36. By avoiding suit, the state can disrupt Congress' ability to "establish . . . uniform laws on the subject of bankruptcies." U.S. CONST. art. I, § 8, cl. 2. Such avoidance will also frustrate the ability of the debtor to get a fresh start, one of the major goals of bankruptcy. *Wright*, 304 U.S. at 514.



### 1. *Shock and Surprise: Chisholm Causes the Adoption of the Eleventh Amendment*

To fully understand the role that the Eleventh Amendment can play in bankruptcy proceedings, it is necessary to examine the events leading up to the enactment of the Amendment, as well as the reasoning behind its adoption.<sup>37</sup> The concept of sovereign immunity was introduced to this country under the British common-law.<sup>38</sup> Simply put, it means that the King can do no wrong; and thus cannot be sued.<sup>39</sup> The concept was discussed and debated at the Constitutional Convention in Virginia.<sup>40</sup> In the end, the concept of sovereign immunity did not make its way into the Constitution, in part at least, because the Constitution called for a federal government with broad powers that would override any sovereignty that States might have held.<sup>41</sup>

In 1793, the Supreme Court handed down a decision that compelled Congress to quickly reassess this omission.<sup>42</sup> In *Chisholm v. Georgia*, the Supreme Court allowed a citizen of South Carolina to sue the state of Georgia for unpaid Revolutionary War debts.<sup>43</sup> The Court reasoned that Article III vested the federal courts with jurisdiction in cases between citizens and states,<sup>44</sup> and moreover, that forcing a State to submit to the jurisdiction of the

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37. See generally Gibbons, *supra* note 35 (giving an overview of the historical context in which the Eleventh Amendment was enacted). It is worth noting that the *Ex parte Young* doctrine only allows injunctive relief against the state. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (explaining that the significance of *Edleman v. Jordan*, 415 U.S. 651, 663 (1974), is that the Supreme Court did not allow the *Ex parte Young* doctrine to apply to retroactive relief). Other forms of relief, such as monetary damages, are not available to the plaintiff. *Id.* As such, *Ex parte Young* is far from a complete substitution for Congressional abrogation.

38. Christina M. Royer, *Paradise Lost? State Employees' Rights in the Wake of "New Federalism"*, 34 AKRON L. REV. 637, 640 (2001).

39. *Id.* A close look at the eighteenth century concept of sovereign immunity will illuminate some large differences between Eleventh Amendment sovereign immunity and the sovereign immunity that was enjoyed by the king. Gibbons, *supra* note 35, at 1895. The king's immunity extended no further than himself; the immunity was personal, it did not extend to the government as a whole. *Id.* at 1895-96. This common law notion later evolved with the petition of "right," a writ by which suit could be brought against the monarch. *Id.* at 1896. This effectively eliminated the traditional notion of sovereign immunity. *Id.* "Thus the true meaning of the English expression 'the king can do no wrong' was that the king would do no wrong, for if he did, the petition of right would set wrongs right." *Id.*

40. Royer, *supra* note 38, at 640-41.

41. *Id.* at 641.

42. *Chisholm*, 2 U.S. at 419.

43. *Id.* at 480.

44. U.S. CONST. art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases . . . between a State and Citizens of another State . . ." *Id.*

federal court was not a “degradation of sovereignty” of the State.<sup>45</sup> Likely concerned with the possibility of being haled into federal court and forced to pay revolutionary war debt themselves, the States responded.<sup>46</sup> The reaction to the *Chisholm* decision was “swift and hostile,”<sup>47</sup> and within two years, the Eleventh Amendment was enacted.<sup>48</sup>

## 2. *The Eleventh Amendment Grows Stronger*

Although on its face the Eleventh Amendment only bars suits against States by citizens of another state, such a plain language interpretation was rejected by the Court as illogical.<sup>49</sup> The Court in *Hans v. Louisiana* construed the Eleventh Amendment to apply to suits against a State even by its own citizens.<sup>50</sup> This interpretation greatly increased the scope of State sovereign immunity, and States were now immune from suit brought by any private individual.<sup>51</sup> Since *Hans*, there has been little change in the scope of the Eleventh Amendment. Even today, with one

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45. *Chisholm*, 2 U.S. at 419.

46. *Welch v. Tex. Dep't. of Highways*, 483 U.S. 468, 484 (1987). See *Gibbons*, *supra* note 35, at 1894 (noting that the argument is that it was not the “shock and surprise” generated by the *Chisholm* decision that caused the ratification of the Eleventh Amendment). Nor was the Eleventh Amendment an attempt order to restore the original concept that states were immune from all suits and that Article III had never authorized such suits in the first place. *Id.* Instead, the Eleventh Amendment was merely a “narrow and technical redefinition” of the section of Article III that grants jurisdiction in suits between states and citizens of other states. *Id.*

47. *Welch*, 483 U.S. at 484.

48. *Id.*

49. See *Hans*, 134 U.S. at 15 (concluding that the mere suggestion that the states would have ratified the Eleventh Amendment if it had contained a provision allowing them to be sued by their own citizens was “almost an absurdity on its face”).

50. *Id.*

51. See *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress lacks the power to subject states to private suits in state courts). With this ruling, states are immune from suits by private citizens in both federal and state courts. *Id.* In explaining the apparent broadening of the scope of the Eleventh Amendment, the *Alden* court explains that such rulings only affirm a well-settled view held by the “leading advocates of the Constitution’s ratification.” *Id.* at 728. The idea is that state sovereign immunity does not spring from the Eleventh Amendment but is instead inherent in the very structure of the Constitution itself. *Id.* All the Eleventh Amendment did was to restate that immunity. *Id.* As such, it is logical that the full scope of such sovereign immunity is not dictated solely by the Eleventh Amendment, but incorporates instead the fundamental principle required by the very nature of the Constitution. *Id.* at 729.

exception,<sup>52</sup> unless State sovereign immunity is validly abrogated,<sup>53</sup> States are immune from suits brought by individuals.<sup>54</sup>

### 3. *The Eleventh Amendment vs. Bankruptcy*

When the state, or state agency, is a creditor in a bankruptcy proceeding, the possibility exists for the State to assert its Eleventh Amendment immunity. This situation is most common when dealing with the issue of student loans. Although it is true that student loans are generally not dischargeable through bankruptcy proceedings, they can be discharged if found to present an undue hardship to the debtor.<sup>55</sup> States waive their sovereign immunity by participating in any part of the proceeding, including the undue hardship hearing.<sup>56</sup> The question of sovereign immunity thus arises when the State does not participate, but instead watches from the sidelines to see the result. Then, if the loans are discharged, the State can raise the Eleventh Amendment argument.<sup>57</sup>

52. *Ex parte Young*, 209 U.S. at 123. See *supra* note 22 (explaining the *Ex parte Young* doctrine).

53. See generally U.S. CONST. amend XIV, § 1 (indicating that the abrogation need not be explicitly stated in a statute). Under the Fourteenth Amendment, for example, States are subject to suits from private individuals if the State deprives the individual of their "life, liberty, or property" without first providing the individual with a hearing and the full protection of due process. *Id.* Similarly, the State cannot deny any individual equal protection. *Id.*

54. See *supra* note 51 (explaining that the full scope of state sovereign immunity prevents suits against states by all individuals, regardless of their home state).

55. 11 U.S.C. § 523 (a)(8) (2004). The statute explains that a general discharge will not include debt:

unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or an obligation to repay funds received as an educational benefit, scholarship or stipend . . . .

*Id.*

56. *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). In *Gardner*, the Court explained 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." *Id.*

57. *Hood II*, 541 U.S. at 449. "Thus, the major difference between the discharge of a student loan debt and the discharge of most other debts is that governmental creditors, including States, that choose not to submit themselves to the court's jurisdiction might still receive some benefit: The debtor's personal liability on the loan may survive the discharge." *Id.* at 450. This explains that the presumption is that the debt will not be discharged. *Id.* at 449. The debtor may be granted an "undue hardship" determination, which would then cause the court to discharge the debt. *Id.* At this point the state,

#### D. *The Collision between Section 106(a) and Sovereign Immunity*

What should the bankruptcy court do in Julie's situation? On one hand, the doctrine of State sovereign immunity is well established and appears to protect the State from unwillingly participating in the proceeding. On the other hand, the main tenets of bankruptcy would seem to require that Julie be given an opportunity for a fresh start and that her creditors be treated fairly. However, these two theories are clearly at odds with each other. The courts have struggled with this issue and the Supreme Court has not only refused to decisively answer the question, but ironically, has itself added to the quandary. These questions will be discussed in greater detail in Part III.

### III. A DEEPER LOOK

#### A. *The Ramifications of Seminole in Lower Courts*

Although *Seminole* did not deal directly with bankruptcy law, the dissent was prophetic in its concern that other Article I powers, such as bankruptcy, would be greatly affected by this ruling.<sup>58</sup> In the first bankruptcy cases to reach the U.S. courts of appeals after the *Seminole* ruling, the courts were essentially united in their handling of section 106(a).<sup>59</sup> According to the courts, although section 106(a) expressly states Congress' intent to abrogate state sovereign immunity, it was unconstitutional because it was enacted pursuant to an Article I power and not section 5 of the Fourteenth Amendment.<sup>60</sup> The courts found several different arguments in favor of abrogation of state sovereign immunity unpersuasive; most of which were handled identically by each individual circuit.<sup>61</sup>

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or state agency, must either act (thus waiving its Eleventh Amendment immunity) or simply live with the Court's decision. *Id.* Thus, the state is stuck between the proverbial rock and a hard place: either submit to the court's jurisdiction, or live with its decision. *Id.* This is the crux of the argument that the Eleventh Amendment is being offended. *Id.*

58. *Seminole*, 517 U.S. at 77 (Stevens, J., dissenting). The majority did not seem to agree. *Id.* at 73. The majority claims that bankruptcy statutes do not attempt to abrogate state sovereign immunity. *Id.* It would seem, based upon the straightforward wording of section 106(a), that the majority was simply mistaken.

59. See generally *Sacred Heart*, 133 F.3d 237; *Fernandez*, 123 F.3d 241; *Schlossberg v. Maryland (In re Creative Goldsmiths)*, 119 F.3d 1140 (4th Cir. 1997); *Nelson v. Wisconsin (In re Nelson)*, 301 F.3d 820 (7th Cir. 2002); *Mitchell v. California (In re Mitchell)*, 209 F.3d 1111 (9th Cir. 2000). Each of these cases held that section 106(a) was unconstitutional.

60. See, e.g., *In re Creative Goldsmiths*, 119 F.3d at 1144-45 (determining that although Congress had clearly intended to abrogate state sovereign immunity, it did not do so pursuant to a valid exercise of power).

61. See discussion *infra* Part III.A.3 (regarding some of these arguments in

### 1. *Seminole does not apply*

One argument to the validity of section 106(a) is that the *Seminole* ruling only addressed the Indian and Interstate Commerce Clauses and not the other Article I powers.<sup>62</sup> The courts quickly dismissed this argument, relying on *Seminole* and concluding that no Article I power can be used to get around the restriction that the Eleventh Amendment places on Article III.<sup>63</sup>

Similarly, the courts were not convinced by arguments that “the Bankruptcy Clause is distinguishable from other Article I” powers by nature of its uniformity requirement.<sup>64</sup> The court, in *Sacred Heart Hospital v. Pennsylvania Department of Public Welfare*, pointed out that both the Bankruptcy Clause and the Commerce Clause grant Congress “plenary power over national economic activity.”<sup>65</sup> Additionally, according to the court, the uniformity requirement is merely geographical and requires only that the Eleventh Amendment apply to all States.<sup>66</sup> Other circuit courts agree with these arguments.<sup>67</sup> The court in *Department of Transportation & Development v. PNL Asset Management Co. (In re Fernandez)* added that the Framers intended the Bankruptcy Clause and the Commerce Clause to be treated equivalently.<sup>68</sup>

### 2. *The Fourteenth Amendment Validates Section 106(a)*

The courts next considered whether there was any weight to the argument that Congress acted pursuant to the Fourteenth Amendment in passing section 106(a) and thus abrogating State sovereign immunity.<sup>69</sup> All the circuits faced with this issue agreed:

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lower bankruptcy courts).

62. *Fernandez*, 123 F.3d at 243-44.

63. *Id.*

64. *Sacred Heart*, 133 F.3d at 243.

65. *Id.*

66. *Id.*

67. *See, e.g., In re Creative Goldsmiths*, 119 F.3d at 1145-46 (finding unpersuasive the argument that the uniformity requirement requires the Bankruptcy Clause to be treated differently than other Article I powers); *Fernandez*, 123 F.3d at 244 (holding that the uniformity requirement is merely a geographical requirement); *Mitchell*, 209 F.3d at 1119 (stating that there is no uniformity exception to *Seminole*).

68. 123 F.3d at 244. The court relies on THE FEDERALIST NO. 42 (James Madison) which stated that uniform bankruptcy laws and the regulation of commerce were “intimately connected.” *Id.* *See also* *Vanston Bondholders v. Green*, 329 U.S. 156, 172 (1946) (holding that the requirement of uniformity is merely geographic and can be completely satisfied by similar treatment across the country without regard to which state the proceedings take place).

69. *Fernandez*, 123 F.3d at 245. It is well settled that the Fourteenth Amendment is a valid source of power, which would allow Congress to abrogate State sovereign immunity; the question is only whether it was properly invoked in section 106(a). *Id.*

the Fourteenth Amendment did not apply to section 106(a).<sup>70</sup>

The court in *Fernandez* found no evidence that section 106(a) was passed pursuant to anything except the Article I power.<sup>71</sup> Additionally, the court was reluctant to recognize the power of Congress to pass substantive legislation pursuant to section 5 of the Fourteenth Amendment, because that “would render Eleventh Amendment state sovereign immunity meaningless and eviscerate the fundamental construct of federalism in our constitutional form of government.”<sup>72</sup>

The court in *Mitchell v. California (In re Mitchell)* agreed, pointing out that for legislation enacted pursuant to the Fourteenth Amendment to be valid, it must be remedial in nature.<sup>73</sup> The courts that dealt with this argument concluded that section 106(a) was not passed pursuant to the Fourteenth Amendment, and even if it had been, it was not remedial in nature, and therefore, was unconstitutional.<sup>74</sup>

### 3. *The Constitution Validates Section 106(a)*

At least two courts have dealt with more creative arguments regarding the constitutionality of section 106(a).<sup>75</sup> In *Mitchell*, the court rejected an argument that section 106(a) was unnecessary because the Supremacy Clause overrides state law in the same way that the Fourteenth Amendment intrudes “upon the province of the Eleventh Amendment . . . .”<sup>76</sup> The court agreed that the Supremacy Clause requires federal law to trump state law, but pointed out that it does not in and of itself abrogate state sovereign immunity.<sup>77</sup>

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70. *Id.*

71. *Id.*

72. *Id.*

73. See *Mitchell*, 209 F.3d at 1119 (explaining that Congress is limited to passing legislation that is “appropriate;” the legislation must protect a right recognized under the Fourteenth Amendment and the nature of the legislation must be remedial).

74. *In re Creative Goldsmiths*, 119 F.3d at 1146-47. To allow the Fourteenth Amendment to apply in this situation would broaden the scope of the Amendment so much as allow it to be used to “justify every federal enforcement scheme as a requirement of due process.” *Id.* See also *Mitchell*, 209 F.3d at 1119-20 (explaining that abrogation of state sovereign immunity pursuant to the Fourteenth Amendment must be “congruent and proportional” to the right being protected and the way in which it is being protected). The court in *Mitchell* would require Congressional findings that a state had engaged in a “pattern of constitutional violations of federal bankruptcy law” before legislation abrogating state sovereign immunity could be validly enacted. *Id.* at 1120. Even then the legislation would need to be proportional to the “remedial aims.” *Id.*

75. *Mitchell*, 209 F.3d 1111; *Nelson*, 301 F.3d 820.

76. 209 F.3d at 1120-21.

77. *Id.* See also *Alden*, 527 U.S. at 731-32 (holding that the constitution

In *Nelson v. Wisconsin (In re Nelson)*, an argument that had been successful in a few lower courts, including the lower court in the *Nelson* case, was rejected.<sup>78</sup> The argument stressed that section 106(a) is unnecessary because the states already relinquished their immunity when they ratified the Constitution. By ratifying the Bankruptcy Clause, which, according to the argument, subjected the States to the federal bankruptcy laws as well as abrogated their sovereign immunity in relation to those laws, the States understood and agreed to give up their immunity.<sup>79</sup> If true, the Eleventh Amendment does not apply since it has been construed as merely restoring the sovereign immunity that existed before *Chisholm*, and did not create any new immunity.<sup>80</sup>

None of these arguments were successful in convincing the Courts of Appeals to rule that section 106(a) was valid. Only one circuit bucked the trend and determined that section 106(a) was valid.<sup>81</sup>

#### B. The 6th Circuit Hood Reasoning – You Can Have Your Cake and Eat it Too

Instead of falling in line with the other circuits, the court in *Hood* took a fresh look at the historical backdrop of the Bankruptcy Clause and the Eleventh Amendment and determined that even by applying *Seminole*, the Bankruptcy Clause did grant Congress the authority to abrogate state sovereign immunity because of its uniformity requirement.<sup>82</sup>

The court embraced precedent, following the direction of the Supreme Court in *Alden v. Maine*, by looking at the structure of the Constitution.<sup>83</sup> The analysis quickly dispatched any Fourteenth or Eleventh Amendment considerations as irrelevant.<sup>84</sup>

grants Congress the power to create the supreme law of the land but that does not preclude a state from having immunity from certain claims arising under that supreme law simply because the federal law is greater than the state law).

78. 301 F.3d at 832. *Nelson* noted that several courts have held that sovereign immunity was waived without section 106(a) even being necessary. *Id.* at 832 n.13.

79. *Id.*

80. *Id.* See *Alden*, 527 U.S. at 727-28 (stating that the Eleventh Amendment merely corrected the mistake made by the Supreme Court in *Chisholm*).

81. *Hood I*, 319 F.3d at 768.

82. *Id.* at 768. Although other courts had determined that the uniformity requirement was nothing more than a geographical requirement, the Sixth Circuit did not dismiss the uniformity requirement so quickly.

83. *Id.* at 762.

84. *Id.* at 762 n.1. The court reasoned that the Eleventh Amendment is inconsequential to the analysis because it only restored the concept of sovereign immunity enjoyed by the states prior to *Chisholm*. *Id.* at 762. The

Instead, the court focused on the actual language of the Constitution, namely the word “uniform” in the Bankruptcy Clause.<sup>85</sup> Unlike the other circuits that determined that “uniform” was related merely to geography, this court pointed out that there is significance in the wording, stating that: “[t]he peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States.”<sup>86</sup> The notion that the uniformity requirement is merely geographical arose from a concurring opinion and was not controlling, since the issue according to the concurring opinion was inconsistent with the majority opinion.<sup>87</sup>

The court then turned to the Federalist Papers for the Framers’ intent in drafting the Bankruptcy Clause.<sup>88</sup> Relying heavily on The Federalist Nos. 81, 32, the court determined that it was the intent of the Framers, when drafting the Bankruptcy Clause, to have states surrender both their legislative powers and their sovereign immunity in relation to bankruptcy.<sup>89</sup> In the Federalist No. 81, Alexander Hamilton stated that:

it is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent* . . . [and] the exemption is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention it will remain with the States. . . .<sup>90</sup>

Hamilton then referenced the article on taxation, The Federalist No. 32, which discussed how immunity can be alienated.<sup>91</sup> The Federalist No. 32 lists three circumstances where

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Fourteenth Amendment is likewise not an issue in the argument because section 106(a) and the Bankruptcy Code in general were not enacted to “remedy violations of the Fourteenth Amendment.” *Id.* at 762 n.1.

85. U.S. CONST. art. I, § 8, cl. 4. The clause grants Congress the power to establish “. . . uniform laws on the subject of Bankruptcies throughout the United States.” *Id.*

86. *Hood I*, 319 F.3d at 763 (quoting *Sturges v. Crowninshield*, 17 U.S. 122 (1819)). The court gave an insightful argument against the Fourth Circuit’s interpretation in *In re Creative Goldsmiths* that the Commerce and Bankruptcy Clauses are to be treated similarly. *Id.* The Sixth Circuit looked at the context in which Justice Marshall made that statement and concluded that Marshall only meant that the Bankruptcy Clause did not give Congress less power. *Id.* (citing *Hoffman v. Conn. Dep’t of Income Maint.*, 492 U.S. 96, 111 (1989) (Marshall, J., dissenting)). He never addressed whether the Bankruptcy Clause granted Congress more power. *Id.*

87. *Id.* at 763. The issue in question was taken from Justice Frankfurter’s concurring opinion. *Id.*

88. *Id.* at 764.

89. *Id.* at 765.

90. THE FEDERALIST NO. 81 (Alexander Hamilton).

91. THE FEDERALIST NO. 32 (Alexander Hamilton).



state sovereignty is alienated.<sup>92</sup> The court in *Hood* determined that the logic of the third circumstance, where the Constitution grants a power to the federal government, and a State's exercise of the same power would be inconsistent, applies to bankruptcy.<sup>93</sup>

Put concisely, the circuit court in *Hood* determined that state sovereign immunity, in relation to bankruptcy, was "altered by the plan of the Convention" and, thus, the Bankruptcy Clause does grant Congress the authority to abrogate state sovereign immunity.<sup>94</sup>

### C. *On One Hand: The Supreme Court's Reasoning Behind Hood*

The Supreme Court had an opportunity to address the split in the circuits when it granted *certiorari* in *Hood*.<sup>95</sup> Instead, the Court went in a completely different direction and reached its decision on an application of the bankruptcy court's *in rem* jurisdiction.<sup>96</sup> The Court based its reasoning on *California v. Deep Sea Research*,<sup>97</sup> in which it held that "the Eleventh Amendment does not bar federal jurisdiction over *in rem* admiralty actions when the state is not in possession of the property."<sup>98</sup> Because a bankruptcy case is also an *in rem* proceeding in which the State does not possess the property in question, the Court applied a similar line of reasoning.<sup>99</sup> The Court stated that "[a]lthough both bankruptcy and admiralty are specialized areas of the law, we see

92. *Id.* The three circumstances are: 1) when the Constitution expressly grants an exclusive power to the federal government; 2) where the Constitution grants power to the federal government and forbids the states from possessing the same power; and 3) where the Constitution grants a power to the federal government, and although it does not grant such a power exclusively to the federal government, nor forbid the states from sharing it, states exercising such power would be "absolutely and totally *contradictory and repugnant*" to the Constitution. *Id.*

93. *Hood I*, 319 F.3d at 766. Hamilton used the power of naturalization as his example of the third circumstance, and the court in *Hood* concluded that the same reasoning applies to bankruptcy. *Id.*

94. *Id.* at 767.

95. *Hood II*, 541 U.S. at 452-53. The Court based its decision on the fact that the bankruptcy court's exercise of its *in rem* jurisdiction would not offend the Eleventh Amendment. *Id.* Since the Court found that no *in personam* jurisdiction is necessary in discharging debt, the question of States' sovereign immunity was not reached. *Id.* at 452-53.

96. *Id.* at 443.

97. 523 U.S. 491 (1998).

98. *See Hood II*, 541 U.S. at 446 (concluding that "the Eleventh Amendment does not bar jurisdiction of a federal court over an *in rem* admiralty action where the res is not within the State's possession") (citing *Deep Sea*, 523 U.S. at 494-95).

99. *Hood II*, 541 U.S. at 447. The Supreme Court stated "[t]he discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding. Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate." *Id.*

no reason why the exercise of federal courts' *in rem* bankruptcy jurisdiction is more threatening to state sovereignty than the exercise of their *in rem* admiralty jurisdiction."<sup>100</sup> The ultimate conclusion of the majority was that a bankruptcy proceeding is not a suit against a state, which precludes the invocation of the Eleventh Amendment.<sup>101</sup>

#### D. On the Other Hand: The Dissent's Logic

The dissent by Justice Thomas, joined by Justice Scalia,<sup>102</sup> believed that due to the similarities between bankruptcy proceedings and civil litigation, the majority should have relied on *Federal Maritime Commission v. South Carolina State Ports Authority* to reach its decision.<sup>103</sup> In *Federal Maritime*, the Court ruled that a cruise ship company's complaint against the South Carolina State Ports Authority for violation of the Shipping Act was barred by the Eleventh Amendment.<sup>104</sup> The Court in *Federal Maritime* reasoned that the Framers would have found it just as offensive for a State to be subjected to suit in an Article I court as an Article III court.<sup>105</sup> The Court's reasoning heavily relied on the similarities between Federal Maritime Commission (FMC)

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100. *Id.* at 451.

101. *Id.* Justices Souter and Ginsburg concur except for any implicit approval of *Seminole*. *Id.* at 455.

102. See *id.* at 455-464 (Thomas, J., dissenting) (highlighting the majority's failure to address the issue for which *certiorari* was granted). The dissent characterized the *in rem* argument that the majority relied on as "irrelevant to this case" as well as "complex and uncertain." *Id.* at 456.

103. *Id.* at 457. The dissent felt that the similarities between civil litigation and Federal Maritime Commission (FMC) proceeding, which caused the Court to determine that State sovereign immunity prevented states from appearing before a FMC proceeding against their will, were in line with the similarities between federal civil litigation and bankruptcy proceedings. *Id.* Therefore, according to the logic employed in *Fed. Mar. Comm'n v. So. Car. State Ports Auth.*, 535 U.S. 743 (2002), the same result should be reached in *Hood*. *Id.* The similarities include the fact that the Federal Rules of Civil Procedure control a large part of both proceedings. *Id.* Additionally, the rules governing the discovery process are similar in both bankruptcy and civil litigation. *Id.*

104. *Federal Maritime*, 535 U.S. at 747. The Federal Maritime Commission is an administrative tribunal granted its authority by Article I, as are bankruptcy courts. *Id.* at 750; U.S. CONST. art I, § 8.

105. See *Hood II*, 541 U.S. at 457 (citing an explanation in *Federal Maritime*, 535 U.S. 743).

[I]f the Framers would have found it an 'impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts,' the Framers would have found it equally impermissible to compel States to do so simply because the adjudication takes place in an Article I rather than an Article III court.

*Id.*

proceedings and civil litigation to reach its decision.<sup>106</sup> Since bankruptcy proceedings are also very similar to civil litigation, the Eleventh Amendment would apply.<sup>107</sup>

The dissent also focused on the fact that a bankruptcy proceeding is adversarial in nature, and although it does not necessarily require the State to defend itself in the same manner as it would in a civil suit, "the effect is the same, whether done by adversary proceeding or by motion, and whether the proceeding is *in personam* or *in rem*. To preserve its rights, the State is compelled either to subject itself to the Bankruptcy court's jurisdiction or to forfeit its rights."<sup>108</sup> These similarities to civil litigation are precisely the indignities that the Eleventh Amendment was designed to prevent.<sup>109</sup>

### E. The Current Situation: Now What?

The current situation leaves us with three separate analyses of section 106(a): first, the Sixth Circuit that found section 106(a) constitutional; second, the Third, Fourth, Fifth, Seventh, and Ninth Circuits that found section 106(a) unconstitutional; and finally, the Supreme Court, which did not reach the question and relied instead on the court's *in rem* jurisdiction.<sup>110</sup>

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106. *Hood II*, 541 U.S. at 457 (citing *Federal Maritime* and explaining the similarities between FMC proceedings and civil litigation). The Court concluded that:

FMC's rules governing pleadings and discovery are very similar to the analogous Federal Rules of Civil Procedure. Moreover . . . "the role of the [administrative law judge], the impartial officer designated to hear a case, is similar to that of an Article III judge." (citations omitted) Based on these similarities, we held that, for purposes of state sovereign immunity, the adjudication before the FMC was indistinguishable from an adjudication in an Article III tribunal.

*Id.*

107. *Id.* at 457. See *supra* note 103 (explaining the similar logic).

108. *Hood II*, 451 U.S. at 459.

109. U.S. CONST. amend. XI. The similarities to civil litigation may be sufficient to qualify as a "suit in law or equity," therefore, to force a state to participate without its consent would be expressly prohibited by the Eleventh Amendment. *Id.*

110. See *Hood*, 319 F.3d at 767 (holding that section 106(a) is constitutional because states granted Congress the power to abrogate their sovereign immunity under the Bankruptcy Clause when they ratified the constitution); *Sacred Heart*, 133 F.3d at 245 (ruling that Congress may not abrogate state sovereign immunity pursuant to any Article I power and that section 106(a) was not enacted pursuant to the Fourteenth Amendment and is therefore unconstitutional); *In re Creative Goldsmiths*, 119 F.3d at 1147 (holding that Congress cannot use the Bankruptcy Clause to circumvent the Eleventh Amendment restriction on the federal court's jurisdiction over states, and section 106(a) was not enacted pursuant to Section 5 of the Fourteenth Amendment, and likewise does not protect a right guaranteed by the Fourteenth Amendment; therefore section 106(a) is unconstitutional);

#### IV. THE OUTLOOK FOR THE FUTURE

One important role of the Supreme Court is to grant *certiorari* in order to address splits in the circuit courts.<sup>111</sup> By not addressing the constitutionality of section 106(a), the Supreme Court, in this instance, has failed in this role. Instead of having an issue resolved, there may be even more confusion than before. There are at least three legally sound analyses of the constitutionality of section 106(a).<sup>112</sup> This section will examine the pros and cons of each argument. It also proposes that the Supreme Court adopt the best of these arguments, namely the reasoning of the Sixth Circuit, and accordingly hold that section 106(a) is constitutional.

##### A. *The Majority Is Not Always Right*

The conclusion reached by most circuits is that section 106(a) is unconstitutional, thus States can exercise their Eleventh Amendment immunity and avoid submitting themselves to the jurisdiction of the bankruptcy court.<sup>113</sup> In light of *Seminole*, this is the simplest argument to make.<sup>114</sup> However, it is also the most dangerous. By allowing States to avoid the jurisdiction of the bankruptcy court by exercising its Eleventh Amendment

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*Fernandez*, 123 F.3d at 246 (holding that section 106(a) is unconstitutional, because Congress cannot find the power to abrogate state sovereign immunity in either Section 5 of the Fourteenth Amendment or the Bankruptcy Clause); *Nelson*, 301 F.3d at 838 (holding that states did not waive their immunity by ratifying the constitution, and Congress lacks the authority pursuant to Article I necessary to abrogate that immunity); *Mitchell*, 209 F.3d at 1121 (relying on *Seminole* and holding that Congress cannot use Article I to abrogate state sovereign immunity, and even if Congress did act pursuant to the Fourteenth Amendment, they did not satisfy the “congruence” requirement of the Fourteenth Amendment); *Hood II*, 451 U.S. at 454-55 (declining to answer the question of the constitutionality of section 106(a) and instead granting the bankruptcy court jurisdiction based on *in rem* jurisdiction).

111. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 226 (8th ed. 2002) (stating that a “prime” purpose of granting *certiorari* is to bring uniformity among the different courts of appeals). See also SUP. CT. R. 10(A) (naming circuit splits as a reason for granting *certiorari*).

112. See *infra* Part III and corresponding endnotes (outlining the three distinct arguments regarding the constitutionality of section 106(a)).

113. See *Sacred Heart*, 133 F.3d at 245 (holding that section 106(a) is unconstitutional); *In re Creative Goldsmiths*, 119 F.3d at 1147 (holding that section 106(a) is unconstitutional); *Fernandez*, 123 F.3d at 246 (holding that section 106(a) is unconstitutional); *Nelson*, 301 F.3d at 838 (holding that section 106(a) is unconstitutional); *Mitchell*, 209 F.3d at 1121 (holding that section 106(a) is unconstitutional).

114. The circuit courts lumped all Article I powers together and quickly decided that *Seminole* applied equally to all of them. *Sacred Heart*, 133 F.3d at 245; *In re Creative Goldsmiths*, 119 F.3d at 1147; *Fernandez*, 123 F.3d at 246; *Nelson*, 301 F.3d at 838; *Mitchell*, 209 F.3d at 1121. This is obviously easier than trying to distinguish one Article I power from the rest.

immunity, the two main tenets of bankruptcy are undermined.<sup>115</sup> Adopting this line of reasoning would make states a kind of “*uber-creditor*,” able to avoid discharge, and essentially make any debts owed to them non-dischargeable.

Under this interpretation, Julie will not be able to discharge her student loans, even if a bankruptcy court finds that those loans burden her with an undue hardship.<sup>116</sup> Julie will not be provided with a fresh start, and her other creditors will not be treated fairly. This is because she will have to pay off her student loans in full, while her other creditors will likely receive nothing.<sup>117</sup>

This result is overly harsh, especially when one considers that it is merely the unanticipated confluence of *Seminole*, in which a State did not want to negotiate in good faith with Indian tribes,<sup>118</sup> and the fear of being forced to pay a Revolutionary War debt caused by *Chisholm*.<sup>119</sup> The Supreme Court was correct in not adopting this line of reasoning, but should have taken it one-step further by expressly overruling it. With careful wording, the Court could avoid opening the door to abrogation via other Article I powers.

### B. Is a Technicality the Answer?

Perhaps the Supreme Court realized that finding section 106(a) unconstitutional would undermine the main philosophy of bankruptcy when it decided *Hood*.<sup>120</sup> Apparently unwilling to disturb the general rule of *Seminole*, that Congress cannot abrogate state sovereign immunity pursuant to an Article I power,<sup>121</sup> but also wanting to avoid the unfortunate result of declaring section 106 (a) unconstitutional,<sup>122</sup> the Supreme Court

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115. The danger lies in the marginalization of the two main tenets of bankruptcy. By liberally applying *Seminole* to all Article I powers, the ability of debtors to get a fresh start and for creditors to receive fair treatment is potentially harmed.

116. Since the bankruptcy court does not have jurisdiction over the state or state agencies, it will not be able to discharge the student loans unless the state consents.

117. Julie will likely need all her assets to pay off the loans.

118. *Seminole*, 517 U.S. 44. The case did not concern bankruptcy, at least on the facts. *Id.* at 47. Rather, it dealt with Florida's duty to negotiate with the Seminole tribe in good faith. *Id.*

119. *Chisholm*, 2 U.S. 419. It was the “shock and surprise” generated by this decision that apparently caused Congress to quickly answer with the Eleventh Amendment. *Welch*, 483 U.S. at 484.

120. *Hood II*, 451 U.S. 440.

121. *See Seminole*, 517 U.S. at 72 (stating in broad terms that Article I powers may not be utilized to avoid the constitutional limitations the Eleventh Amendment places on federal jurisdiction pursuant to Article III).

122. *See supra* Part I (stating that the unfortunate result is the inability for the debtor to get a fresh start and the inability of other creditors to be treated fairly when a state or state agency is involved).

arrived at its own approach.<sup>123</sup> By deciding that the bankruptcy court's jurisdiction was based on *in rem* jurisdiction, the Court was attempting to avoid deciding the issue.<sup>124</sup>

### 1. *The Good*

The Supreme Court's approach has a few advantages. In the majority of cases, it will allow a debtor to discharge debts owed to a state or state agency.<sup>125</sup> Furthermore, it will allow the debtor to get a fresh start and the creditors to be treated fairly by requiring the state to abide by the bankruptcy court's judgment, whether it participates in the proceeding or not.<sup>126</sup> By affirming the ability of the bankruptcy court to provide a fresh start for the debtor and fair treatment for the creditors, this approach is significantly better than simply ruling section 106(a) unconstitutional.

This approach also maintains a State's sovereign immunity. By relying on *in rem* jurisdiction, the Eleventh Amendment is not implicated.<sup>127</sup> This allows the Court to protect the tenets of bankruptcy without threatening State sovereign immunity in other situations.<sup>128</sup> The Supreme Court has used a scalpel to cut a small hole for bankruptcy without inadvertently granting Congress the power to abrogate state sovereign immunity in other situations.<sup>129</sup>

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123. See *Hood II*, 451 U.S. at 452-55 (explaining that the bankruptcy court's *in rem* jurisdiction does not implicate the Eleventh Amendment and therefore, there is no need to rule on the constitutionality of section 106 (a)).

124. *Id.* at 443. The Court expressly says that it is not deciding the issue for which *certiorari* was granted but is instead ruling based on an alternative argument. *Id.*

125. The bankruptcy court still must make a finding that the loans present an undue hardship on the debtor. 11 U.S.C. § 523 (a)(8). Additionally, the majority hints at other situations that may arise that would cause the bankruptcy court to exceed its *in rem* jurisdiction. *Hood II*, 451 U.S. at 455. It does not enumerate these situations choosing, instead, to label them "hypothetical." *Id.*

126. Because *Hood II* will not allow the state to assert its Eleventh Amendment immunity, the state must either participate in the proceedings or waive its rights and abide by the decision of the bankruptcy court. 451 U.S. at 454.

127. See *id.* at 451 (finding no reason that the bankruptcy court's *in rem* jurisdiction would "infringe" upon state sovereign immunity under the Eleventh Amendment).

128. *Hood II* would have no impact on adversarial proceedings or other civil litigation not based on the court's *in rem* jurisdiction. *Id.* However, if the *in rem* jurisdiction is exceeded, then Eleventh Amendment sovereignty becomes a viable defense again. *Id.* at 455.

129. *Id.* Again, this is a fairly narrow ruling applying only to bankruptcy and arguably other proceedings, such as admiralty, that are premised on the *in rem* jurisdiction of the court. *Id.*

## 2. *The Bad*

What is wrong with the Supreme Court's approach on this issue?<sup>130</sup> The very nature of *in rem* jurisdiction is based on possession of the property.<sup>131</sup> This approach seems to work fine in most situations. However, what if one month before declaring bankruptcy, Julie paid \$1,000 to a state for back taxes? Normally, a bankruptcy court could order that money returned to the bankruptcy estate to be divided appropriately amongst the creditors.<sup>132</sup> If the bankruptcy court's jurisdiction is *in rem*, it may not be able to force the state to return the money because the bankruptcy estate does not have possession of the property, in this case the \$1,000.<sup>133</sup> In this and similar situations,<sup>134</sup> the well-intentioned approach of *Hood* breaks down.

## 3. *The Ugly*

In addition to the problems inherent in *in rem* jurisdiction described above, this approach is simply an attempt to fix the constitutionality problem of section 106(a) with a proverbial band-aid. Instead of validating the section of the Code, the Court has attempted to bypass section 106(a) and still reach the same result. Putting a "band-aid" on the Bankruptcy Code will not be as effective as resolving the real issue, especially when working with something as complex as the Bankruptcy Code.

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130. According to the dissent in *Hood II*, there are at least two problems. 451 U.S. at 455-458 (Thomas, J., dissenting). *In rem* jurisdiction is complex and uncertain and the adversarial nature of the bankruptcy proceeding clearly implicates the Eleventh Amendment. *Id.*

131. See *Hood II*, 451 U.S. at 446-47 (explaining the reach of the bankruptcy court's *in rem* jurisdiction). The Court states that the court has "exclusive jurisdiction over a debtor's property, wherever located, and over the estate." *Id.* at 447. They continue by explaining that the court is able to give a debtor a fresh start because jurisdiction "derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates." *Id.* at 447-48. Finally, the court's *in rem* jurisdiction allows it to determine the claims that anyone has to the particular property in question; the parties do not need to participate in the action. *Id.* at 448.

132. See 11 U.S.C. § 547(b) (2005) (allowing a debtor to avoid a transfer of property to a creditor under certain circumstances).

133. The bankruptcy court's jurisdiction over the property must be certain, otherwise state sovereignty may be infringed upon. *Hood II*, 451 U.S. at 448-49. Earlier, the Court stated that the bankruptcy court does have jurisdiction over the debtor's property no matter where it is located. *Id.* at 448. The ruling in *Hood II* makes it unclear whether the bankruptcy court has the authority to order the property returned to the estate.

134. The Court recognizes that there may be situations in which the bankruptcy court might exceed its *in rem* jurisdiction and implicate the Eleventh Amendment, but characterizes these situations as "hypothetical." *Id.* at 455. Presumably, such situations would arise when the property in question is not clearly the debtor's, or when such proceedings became too adversarial.

### C. *The Path Less Traveled*

Although clearly in the minority on the issue, the Sixth Circuit provides the most compelling and reasonable analysis of all: that the uniformity requirement of the Bankruptcy Code grants Congress the authority to abrogate Eleventh Amendment immunity.<sup>135</sup> Seemingly the simplest approach, which leaves the Bankruptcy Code as written, in actuality it requires an in-depth understanding of the very formation of the Constitution.<sup>136</sup> Regardless of its apparent simplicity, the argument utilized by the Sixth Circuit in *Hood* is the most satisfying.<sup>137</sup>

#### 1. *All the Strengths of in rem . . .*

Declaring section 106(a) as constitutional would deliver all of the benefits of the Supreme Court's "*in rem* jurisdiction" approach. It would protect the two main tenets of bankruptcy.<sup>138</sup> The plain language of section 106(a) eliminates any possible argument a state could make to avoid jurisdiction.<sup>139</sup> Bankruptcy would return to its "pre-*Seminole*" days.<sup>140</sup>

In addition to restoring the main purposes of bankruptcy, this approach would be a much neater and more holistic analysis than the *in rem* jurisdiction theory. Section 106(a) was intended to fit into the larger overall Bankruptcy Code. It is a piece of the overall puzzle, and as such fits much better into the code than any "band-aid" approach.

#### 2. *But none of the weaknesses*

Not only does this approach restore the fresh start and fair treatment of bankruptcy, it does so in all cases. Because jurisdiction is not premised on the property, even in situations where the State is in possession of the property, the State will still

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135. See *supra* Part III.B (explaining in detail the Sixth Circuit's analysis of the issue).

136. See *id.* (explaining the role that the formation of the Constitution had in the court's conclusion that section 106(a) was constitutional).

137. *Hood I*, 319 F.3d 755.

138. See *supra* Part I (stating that the two tenets are, of course, the fresh start for the debtor and the fair treatment of creditors).

139. The section is titled "Waiver of sovereign immunity" and expressly states that "sovereign immunity is abrogated . . ." 11 U.S.C. § 106(a). Predictably enough, the courts have not struggled with the intent of this section. See, e.g., *In re Creative Goldsmiths*, 119 F.3d. at 1144 (stating that there is no doubt that Congress intended to abrogate state sovereign immunity in section 106(a)).

140. See Gibson, *supra* notes 22, 23 (stating that it was *Seminole* that determined that Congress lacked authority under Article I to validly abrogate state sovereign immunity). Prior to *Seminole*, it was assumed that section 106(a) was valid. *Id.*



be unable to avoid the bankruptcy proceedings.<sup>141</sup> Under this approach, there will be less litigation in the future because the law is clear; states cannot avoid the bankruptcy court's jurisdiction, regardless of who is in possession of the property.<sup>142</sup>

Finally, the Supreme Court could eliminate any possible deterioration of the power of the Eleventh Amendment by expressly upholding *Seminole*, unambiguously basing this "bankruptcy exception" on the uniformity provision of the bankruptcy clause.<sup>143</sup> This, combined with the broad language of *Seminole*,<sup>144</sup> should prevent any future attempts by Congress to abrogate state sovereign immunity pursuant to an Article I power.

## V. CONCLUSION

Confusion on this issue is evident from the multitude of approaches and conclusions different courts have reached. Until the Supreme Court ultimately addresses this question and provides the lower courts with a definitive answer, the present confusion will persist. The most effective way to eliminate the confusion and protect the debtor's fresh start and creditors' fair treatment, the two tenants intended by Framers, is to hold section 106(a) constitutional.

## VI. CENTRAL VIRGINIA COMMUNITY COLLEGE V. KATZ

After this comment was written, and shortly before publication, the Supreme Court handed down a 5-4 decision in *Central Virginia Community College v. Katz*.<sup>145</sup> Relying heavily on the history of the Bankruptcy Clause, the Court determined that a bankruptcy trustee's proceeding to set aside preferential transfers to state agencies is not barred by state sovereign immunity.<sup>146</sup> Although at first glance, it appears that the question of state sovereign immunity and section 106 (a) of the bankruptcy code – raised by *Seminole Tribe* and avoided in *Hood* – has finally been

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141. State sovereign immunity is waived under section 106(a) and therefore the bankruptcy court's jurisdiction extends to the state as a creditor. 11 U.S.C. § 106(a).

142. The clear cut language of section 106(a) leaves significantly less room for debate than the vague "hypothetical" situations mentioned in *Hood II*. 451 U.S. at 455. The Court even states that if the bankruptcy court exceeds its *in rem* jurisdiction it can be challenged by a state. *Id.*

143. Because the only time that the word "uniform" appears in Article I is in relation to bankruptcy and naturalization, basing an exception to *Seminole* on uniformity will distinguish it from other Article I powers. U.S. CONST. art. I, § 8, cl. 4.

144. See *Seminole*, 517 U.S. at 72 (treating all Article I powers similarly and ruling that no Article I power may be used to abrogate state sovereign immunity).

145. 126 S. Ct. 990 (2006).

146. *Id.* at 904.

answered, the Court instead redefined the question. Rather than deciding whether Congress has the power to abrogate state sovereign immunity pursuant to the Article I Bankruptcy Clause, the Court declared that question to be irrelevant. According to the majority, “[t]he [relevant] question, rather, is whether Congress’ determination that States should be amenable to [preferential transfer] proceedings is within the scope of its power to enact ‘Laws on the subject of Bankruptcies.’ We think it beyond peradventure that it is.”<sup>147</sup>

The Court continues to rely heavily on the *in rem* nature of bankruptcy. The majority concludes that the States agreed to subordinate their sovereign immunity to “effectuate the *in rem* jurisdiction of the bankruptcy courts.”<sup>148</sup> This historical conclusion fails to take into account the fact that the Eleventh Amendment had yet to be passed, and, as the dissent points out, “the States are not subject to suit by private parties for monetary relief absent their consent or a valid congressional abrogation, and it is ‘settled doctrine’ that nothing in Article I of the Constitution establishes those preconditions.”<sup>149</sup>

Although this case goes along way towards resolving the issue left open by *Hood*, the original question remains as to whether section 106 (a) was a valid exercise of Congress’ power.

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147. *Id.* at 1005.

148. *Id.*

149. *Id.* at 1005-06 (Thomas, J. dissenting).

