Sovereign Impunity: The "Uniform Laws" Theory Tries (and Fails) to Take a Bankruptcy-sized Bited out of the Eleventh Amendment

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SOVEREIGN IMPUNITY: THE "UNIFORM LAWS" THEORY TRIES (AND FAILS) TO TAKE A BANKRUPTCY-SIZED BITE OUT OF THE ELEVENTH AMENDMENT

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Abstract: Sovereign immunity represents the principle that a state cannot be subjected to suit without its consent. In bankruptcy proceedings, it is sometimes necessary for a debtor to file an adversary proceeding against a creditor to determine the dischargeability of a debt. When the creditor is a state, the exercise of sovereign immunity by that state can pose an obstacle to the total discharge of debts contemplated by the bankruptcy system. Courts have found unconstitutional recent attempts by Congress to abrogate states' sovereignty in § 106(a) of the Bankruptcy Code. In response, some courts have adopted a "uniform laws" theory. This theory suggests that states waived their sovereign immunity in the bankruptcy realm when they ratified the Constitution. However, sovereign immunity is a vital part of the nation's constitutional structure, and the arguments advanced by the "uniform laws" theory in favor of an original waiver of sovereign immunity are not sufficiently compelling to justify abandoning such an important principle. The theory that bankruptcy proceedings should be exempt from sovereign immunity under the "uniform laws" clause of Article I runs contrary to essential principles of federalism and state sovereignty and should be abandoned.

Sovereign immunity stands for the principle that states cannot be subjected to suit without their consent. The Supreme Court has held that, although sovereign immunity is implicit in the structure of the Constitution, the principles on which that immunity is based were re-expressed and reaffirmed by the passage of the Eleventh Amendment.¹ Recent Supreme Court cases have clarified and strengthened the power of sovereign immunity, strictly limiting Congress’s power to abrogate the exercise of sovereign immunity by states, and curtailing courts’ ability to find that a state has waived its immunity in a given case.²

Federal bankruptcy law fulfills an important function in the economic and social life of the nation. By submitting their estate and their

creditors’ claims to a bankruptcy court, overwhelmed debtors can take care of their debts and obtain a fresh start. The bankruptcy court’s oversight of the process benefits debtors by protecting them from creditors’ pressure, and by ensuring that debts, once discharged, will not be revived again to haunt the debtor’s future life. The bankruptcy system also benefits creditors by ensuring that the debtor’s remaining resources are distributed fairly between all parties, and by moving the process along to a swift resolution that minimizes the expense and trouble of litigation.

Sovereign immunity presents a number of challenges to the bankruptcy process when asserted by a state against a debtor in an adversary proceeding. A debtor who is unable to have state debts discharged may lose part of the advantage of bankruptcy’s fresh start. Furthermore, full payment of all debts to the state may leave very little of the debtor’s estate available to other creditors. Finally, a state’s decision to opt out of the bankruptcy process may delay the expeditious resolution of the process, frustrating one of the primary advantages of the bankruptcy process.

However, recent Supreme Court decisions on state sovereign immunity have made it clear that state sovereign immunity is an integral part of the nation’s constitutional structure that cannot be lightly abrogated. The tensions between state and federal power are carefully balanced by the Constitution, and the right to invoke sovereign immunity in the face of suit deserves the same stringent protections as other constitutional rights. As a result, any legal theory purporting to find that states have waived their immunity must pass through the constitutional safeguards established by the Court.

4. See, e.g., Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915) (noting that the purpose of federal bankruptcy law is to “relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes”).
7. See Bartell, supra note 5, at 43–44.
8. See id. at 55.
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Some courts, looking for ways to circumvent sovereign immunity in order to further the important purposes of the bankruptcy system, have adopted a "uniform laws" theory that they believe exempts bankruptcy proceedings from the power of states' immunity. Courts adopting the "uniform laws" theory argue that the framers of the Constitution did not contemplate that states would retain their immunity in bankruptcy upon ratification. These courts point to Alexander Hamilton's *Federalist* Nos. 81 and 32 for the proposition that the Constitution limits state sovereignty in bankruptcy and conclude that these limitations on sovereignty also apply to states' sovereign immunity.

However, this theory is profoundly flawed. It ignores the precedential force of Supreme Court decisions concerning the Eleventh Amendment, and fails to recognize the large number of circuit courts that have considered and rejected such a theory. The theory itself is based on a fundamental confusion between "sovereignty" and "sovereign immunity," and incorrectly asserts that Hamilton's comments on the former necessarily apply to the latter. Finally, the theory places undue emphasis on the requirement of "uniform laws" in the Bankruptcy Clause of the Constitution. Uniformity can be achieved through geographical uniformity, which allows for the assertion of sovereign immunity and the protection of vital federalist principles.

Part I of this Comment examines the underpinnings of sovereign immunity through the history and judicial interpretation of the Eleventh Amendment. Part II lays out the policies and procedures of the bankruptcy system and discusses some of the special difficulties that sovereign immunity poses in the bankruptcy context. Part III looks at previous legislative and judicial attempts to address these difficulties and why those attempts have generally failed to solve the problem. Part IV describes the recently developed "uniform laws" theory, which attempts to remove the sovereign immunity issue from bankruptcy proceedings through a novel interpretation of the Constitution's Bankruptcy Clause.


14. *See infra* Section V.A.

15. *See infra* Section V.B.


17. *See infra* Section V.C.
Part V argues that the tenuous connections made by the "uniform laws" theory between the Constitution and the *Federalist Papers* ignore binding precedent, represent an error in legal reasoning, and fail to recognize that even the most pressing policy considerations must bow to the basic federalist structures that underlie our political structure. This Comment concludes that the bankruptcy system must accept and incorporate states’ sovereign immunity as a part of its underlying plan.

I. THE CURRENT DOCTRINE OF SOVEREIGN IMMUNITY IS THE PRODUCT OF THE ELEVENTH AMENDMENT AND ITS JUDICIAL EXPLICATION AND INTERPRETATION

Sovereign immunity is the principle that states are immune to suit by individuals. The Eleventh Amendment to the Constitution codifies that principle to a limited extent. Since its passage, however, the Supreme Court has interpreted the Eleventh Amendment to apply more broadly than its text suggests, creating what has been referred to as the “other” Eleventh Amendment. In the last six years, the Court has strictly limited Congress’s ability to abrogate states’ sovereign immunity. Furthermore, although states may voluntarily waive their immunity, the Court has required that the waiver be explicit and unmistakable.

A. *Congress Passed the Eleventh Amendment in Response to Chisholm v. Georgia*

The Eleventh Amendment reads as follows: “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

18. U.S. CONST. amend. XI.
State.” Congress crafted the Amendment as a direct response to the Supreme Court’s 1793 decision in *Chisholm v. Georgia*, which extended the Court’s judicial power to a dispute over Georgia’s Civil War debts. State legislatures were shocked by the Court’s decision, seeing it as a serious assault on states’ sovereign immunity rights. In response, Congress introduced the Eleventh Amendment in order to prevent any further erosion of the states’ independence.

In *Chisholm*, the Court held that states could be subjected to federal courts’ Article III jurisdiction when sued by citizens of other states. Robert Farquahar, a South Carolina native, had sold vital war materials to the State of Georgia during the Revolutionary War, but Georgia neglected to pay for the supplies. Farquahar’s executor, Alexander Chisholm, sued to recover the money owed to his estate. Chisholm filed his action against Georgia in the U.S. Supreme Court, invoking its original Article III jurisdiction over “all cases . . . in which a State shall be Party.” The Court acknowledged its jurisdiction, holding that the Constitution extends the judicial power of the United States to disputes over the debts of individual states, and that the Supreme Court therefore had jurisdiction over Chisholm’s assumpsit action. As a result, the Court ordered that the state of Georgia be issued a summons to either appear or risk a default judgment against it.

The decision in *Chisholm* sparked immediate controversy. Newspapers of the time loudly protested what they saw as an unexpected violation of state sovereignty that could produce widespread raids on state treasuries. State legislatures immediately swung into action: the Massachusetts Legislature deemed the decision “repugnant to the first
principles of a federal government” and urged the state’s federal representatives to modify the Constitution in order to prevent such suits.34 In Georgia, public feeling ran even higher, and the State House of Representatives passed a bill providing that anyone attempting to enforce the Supreme Court’s decision would be “guilty of felony and . . . suffer death, without benefit of clergy, by being hanged.”35

Congress moved quickly to address the assault on state sovereignty by proposing a constitutional amendment. On the day after the *Chisholm* decision became public, the House of Representatives introduced the proposed amendment, intended to overrule the Supreme Court’s holding and restore states’ immunity to suit.36 Within a mere two months, both the House and the Senate had approved a proposal and sent it to the states for ratification.37 Debate over the amendment had lasted only a single day in each house,38 and the language was approved almost unanimously: 23-2 in the Senate, and 81-9 in the House.39 The states ratified the final version in 1795, only five years after the *Chisholm* decision.40 The Eleventh Amendment was finally incorporated into the Constitution in 1798.41

**B. Judicial Interpretation Has Created the “Other” Eleventh Amendment, Which Extends Beyond the Plain Text of the Constitution**

Eleventh Amendment sovereign immunity is a complex doctrine, shaped not only by the plain text of the Constitution but also by a series of Supreme Court decisions which have created what is generally referred to as the “other” Eleventh Amendment. Based on its plain text alone, the Amendment would seem to limit states’ immunity only to suits by citizens of other states. However, the Supreme Court has emphasized that the underlying principle of sovereign immunity is far broader than the Eleventh Amendment language, on its face, would indicate. As a

34. Id. (citing 15 PAPERS OF ALEXANDER HAMILTON 314 (H. Syrett & J. Cooke eds., 1969)).
35. Id. at 720–21 (citing CURRIE, supra note 33, at 196).
36. Id. at 721 (citing CURRIE, supra note 33, at 196).
37. Id.
38. Id.
39. Id.
40. ORTH, supra note 28, at 20.
41. U.S. CONST. amend. XI.
result, states' immunity extends to cases filed by their own citizens as well.

The plain text of the Amendment limits states' immunity from suit only in cases where the plaintiff is an out-of-state citizen. It was specifically designed to overrule the *Chisholm* decision and would, on its face, seem to apply only to that particular set of facts. If this were the case, states would be immune from suits initiated by citizens of other states, but not from suits by their own citizens.

However, the Supreme Court has held that states' immunity is a fundamental aspect of the traditional sovereignty they enjoyed before the ratification of the U.S. Constitution. Because the immunity of the sovereign can traditionally only be waived by that sovereign's consent, any limitations on a state's sovereignty can only exist as a result of that state's consent to such limitations. In ratifying the Constitution, the states consented to certain suits, including those brought by other states or by the Federal Government, but states retained sovereign immunity in all other areas.

Therefore, the Supreme Court has also held that states retain sovereign immunity when sued by their own citizens. *Hans v. Louisiana* was the first case in which the Supreme Court held that sovereign immunity extends beyond the plain language of the Eleventh Amendment. In *Hans*, a resident of Louisiana brought a suit against his home state in federal court under federal question jurisdiction when the state breached its obligation to pay interest on a bond. Although the Eleventh Amendment only eliminates jurisdiction for suits against states by out-of-state citizens, the Court nevertheless unanimously held that the fundamental principle of sovereign immunity also prevented states from being sued by their own citizens without the state's consent. This expansive view of immunity—which has come to be called the “other”

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42. *Id.* ("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... ").
43. *Alden*, 527 U.S. at 723.
44. *Id.* at 713.
45. *Id.* at 755.
46. *Id.*
47. 134 U.S. 1 (1890).
48. *Id.* at 1.
49. *Id.* at 17.
Eleventh Amendment—continued to be followed in *Ex parte New York*, where the Court held that a non-consenting state was immune from suit in an admiralty action.

The Court has emphasized the importance and power of the "other" Eleventh Amendment in recent years. Over the last decade, Congress has frequently attempted to bring states into the sphere of its legislative power by enacting various statutory schemes that attempt to abrogate states' sovereign immunity. However, a series of recent Supreme Court decisions has sharply limited the circumstances under which abrogation might occur.

C. In Recent Years, the Supreme Court Has Limited Congress's Ability To Abrogate States' Sovereign Immunity

Under certain circumstances, Congress has the power to abrogate states' sovereign immunity through legislation, as long as it clearly and unmistakably expresses its intent and acts in a constitutional manner. Prior to 1996, Congress could abrogate state sovereign immunity in legislation passed pursuant to either Article I's Commerce Clause or the Fourteenth Amendment. In 1996, however, the Court held in *Seminole Tribe of Florida v. Florida* that Congress could not abrogate states' immunity under any of its Article I powers. Furthermore, in *City of Boerne v. Flores*, decided in 1997, the Court sharply limited Congress's ability to act under the Fourteenth Amendment. As a result, since 1997

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51. 256 U.S. 490 (1921).

52. *Id.* at 497.


58. *Id.* at 62–66.


60. *Id.* at 519.
the Court has found a number of Congress's attempts at abrogation unconstitutional under the standards of *Seminole* and *City of Boerne*.\(^{61}\)

Prior to 1996, Congress had two potential ways to abrogate state sovereign immunity. In *Pennsylvania v. Union Gas Co.*,\(^{62}\) the Court ruled in a plurality opinion that Congress could abrogate a state's immunity under its Article I power to regulate interstate commerce.\(^{63}\) The Court also ruled in *Fitzpatrick v. Bitzer*\(^{64}\) that Congress could abrogate state immunity if it was acting under the Fourteenth Amendment.\(^{65}\) The Fourteenth Amendment embodies "significant limitations on state authority,"\(^{66}\) and expressly grants Congress the authority to enforce its provisions by appropriate legislation.\(^{67}\) Consequently, the court held that Congress may, in exercising its Fourteenth Amendment powers, provide for suits against states that would be constitutionally impermissible in other contexts.\(^{68}\)

After *Union Gas* and *Fitzpatrick*, Congress wielded its authority to eliminate states' immunity in many areas. Congress enacted a number of statutes that contained similar provisions abrogating state sovereign immunity within their statutory schemes. The range of affected statutes was considerable, including intellectual property laws such as the Patent and Plant Variety Protection Remedy Clarification Act,\(^ {69}\) civil rights laws such as the Age Discrimination in Employment Act (ADEA)\(^ {70}\) and

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\(^{63}\) U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power "[t]o regulate Commerce... among the several States"); Pennsylvania v. Union Gas Co., 491 U.S. 1, 13–14 (1989).

\(^{64}\) 427 U.S. 445 (1976).

\(^{65}\) U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

\(^{66}\) Fitzpatrick, 427 U.S. at 456.

\(^{67}\) Id.

\(^{68}\) Id.


Americans with Disabilities Act (ADA),\textsuperscript{71} and bankruptcy laws such as § 106(a) of the Bankruptcy Code.\textsuperscript{72}

Only a few years after the \textit{Union Gas} decision, however, the Court did a sharp about-face, overruling \textit{Union Gas} and putting stringent limits on Congress’s ability to abrogate state immunity in \textit{Seminole Tribe of Florida v. Florida}\textsuperscript{73} and \textit{City of Boerne v. Flores}.\textsuperscript{74} In \textit{Seminole}, the Seminole tribe sued the state of Florida under the Indian Gaming Regulatory Act (IGRA),\textsuperscript{75} which had been passed by Congress pursuant to its Article I powers to regulate commerce with Indian tribes.\textsuperscript{76} Under IGRA, states were obligated to negotiate in good faith with the tribes in order to form a state-tribal compact governing gaming activities by the tribe within the state.\textsuperscript{77} Congress had also authorized tribes to bring suit against a state in federal court to compel it to negotiate in good faith.\textsuperscript{78} Alleging that the state and its governor had failed in their duty, the Seminole tribe filed suit under IGRA’s enforcement provisions.\textsuperscript{79}

The Supreme Court affirmed the lower court’s dismissal of the tribe’s suit in a 5-4 decision that limited Congress’s ability to include enforcement provisions against states when enacting Article I legislation.\textsuperscript{80} \textit{Seminole} explicitly overruled \textit{Union Gas}, holding that Congress may not use its Article I powers to overcome the Eleventh Amendment.\textsuperscript{81} The Court held that Article III, as shaped by the Eleventh Amendment, represents the exclusive catalog of permissible federal jurisdiction and that Congress could not expand the scope of that jurisdiction through Article I legislation.\textsuperscript{82} As a result, concluded the Court, Congress has no authority to abrogate states’ sovereign immunity under its Article I powers.\textsuperscript{83} Although the \textit{Seminole} decision reaffirmed

\textsuperscript{72} 11 U.S.C. § 106(a) (1994).
\textsuperscript{73} 517 U.S. 44 (1996).
\textsuperscript{74} 521 U.S. 507 (1997).
\textsuperscript{76} U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power “[t]o regulate Commerce . . . with the Indian Tribes”); \textit{Seminole Tribe}, 517 U.S. at 47.
\textsuperscript{77} \textit{Seminole Tribe}, 517 U.S. at 47.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 51–52.
\textsuperscript{80} Id. at 72–73.
\textsuperscript{81} Id. at 66.
\textsuperscript{82} Id. at 64–65 (citing U.S. CONST. art. III, § 2, cl. 1).
\textsuperscript{83} Id. at 73.
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Fitzpatrick's assertion that Congress could abrogate under the Fourteenth Amendment, the Court noted that IGRA had been passed solely based on Congress's Article I power to regulate relationships with the tribes, so Fitzpatrick would not apply.84

Only a year after eliminating Congress's ability to abrogate under Article I, the Court tightened the scope of Fourteenth Amendment abrogation authorized by Fitzpatrick in City of Boerne v. Flores.85 City of Boerne created a number of safeguards to protect states' rights from incursions by Congress. In order for any legislation under the Fourteenth Amendment to be constitutional, the Court ruled, certain conditions must be met.86 First, the abrogation must be a remedial response to a pattern of constitutional violations by the states,87 and the pattern should ideally be laid out clearly in the legislative record.88 Secondly, the remedial legislation must be shaped with "congruence" and "proportionality" in mind,89 responding to an actual or potential injury rather than creating new substantive rights.90 As a result, City of Boerne's holding limits Fitzpatrick's scope.91

Consequently, Seminole Tribe and City of Boerne have become the Scylla and Charybdis of Congressional abrogation. If the legislation is passed under Article I, Congress's abrogation of state sovereign immunity is absolutely unconstitutional; if it is passed under the Fourteenth Amendment, the abrogation of immunity is unconstitutional unless the stringent requirements of City of Boerne are met. Under the standards set by Seminole and City of Boerne, the Supreme Court has found a number of abrogation provisions in various statutes to be unconstitutional.92 As a result, Congress's ability to abrogate state sovereign immunity has been sharply curtailed since 1997.

84. Id. at 60.
86. Id. at 520.
87. Id. at 526.
88. Id. at 530.
89. Id.
90. Id. at 520.
91. Id. at 518-19.
D. States May Waive Their Sovereign Immunity but Must Do So Expressly

States’ sovereign immunity can be disposed of through a knowing, voluntary waiver on the part of the state. Sovereign immunity is a privilege personal to the sovereign and may be waived at the sovereign’s pleasure.\textsuperscript{93} In some cases, state legislatures may pass laws expressly committing the state to a waiver of immunity in certain kinds of suits; for example, by passing legislation subjecting themselves to some tort suits by their own citizens.\textsuperscript{94}

Even if a state has not passed legislation acknowledging its consent to suit, courts may find a state to have consented through its actions.\textsuperscript{95} For example, courts may find that a state has waived its immunity if the state has voluntarily invoked the jurisdiction of the court or if the state makes a clear declaration that it intends to submit itself to the court’s jurisdiction.\textsuperscript{96} However, courts must use stringent standards to determine whether a state has consented to suit.\textsuperscript{97}

The degree to which the state’s waiver must be clear and voluntary has been set out recently by the Supreme Court in \textit{College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board},\textsuperscript{98} which specifically examines the waiver doctrine in the context of Congress’s Article I powers. In an earlier decision, the Court had allowed a finding of “implied” or “constructive” waiver of immunity by a state if it voluntarily engaged in certain actions regulated by Congress, and under the regulatory scheme Congress had required actors to consent to suit in federal courts.\textsuperscript{99} However, the Court in \textit{College Savings Bank} explicitly overruled this holding, finding the constructive waiver doctrine to be an “ill conceived . . . anomaly” lacking any merit.\textsuperscript{100} Sovereign immunity, the Court reasoned, is as fundamental a constitutional right as the right to

\textsuperscript{94} See 57 AM. JUR. 2D Municipal, County, School, & State Tort Liability § 41 (2001).
\textsuperscript{95} Id.
\textsuperscript{97} 527 U.S. 666 (1999).
\textsuperscript{98} Parden v. Terminal Ry. of the Ala. State Docks Dep’t, 377 U.S. 184, 192 (1964).
\textsuperscript{99} Coll. Sav. Bank, 527 U.S. at 675–76.
\textsuperscript{100} Id.
trial by jury in criminal cases and must be protected with equal care. As a result, a state is deemed to have waived its immunity only when its waiver is stated "by the most express language or by such overwhelming implication...as will leave no room for any other reasonable construction." A showing of anything less is inadequate to justify infringing on a state's sovereign rights.

II. THE POLICIES AND PROCEDURES OF BANKRUPTCY AND THE IMPACT OF A STATE'S ASSERTION OF SOVEREIGN IMMUNITY

Sovereign immunity presents certain difficulties in the bankruptcy context. In a bankruptcy proceeding, most debts are discharged once the trustee distributes the assets of the debtor. However, certain debts that are owed to the state have a special status and cannot be discharged unless a debtor files an adversary proceeding against the state and obtains a court ruling. In such a scenario, a state may assert sovereign immunity, leaving the debtor still owing those debts even after having completed the bankruptcy process. Such results can frustrate some of the policies underlying the bankruptcy system.

A. Procedure in Bankruptcy Proceedings: Discharging Private Debts

The majority of bankruptcy cases that are aimed at discharging debts follow a particular pattern. Generally, the bankruptcy process begins when the debtor files a petition with the bankruptcy court. A bankruptcy trustee is appointed, who proceeds to collect the property of the bankruptcy estate from the debtor. Certain assets of individual debtors may be claimed as "exempt" and retained by the debtor. In a typical Chapter 7 consumer case, most of the debtor's assets will be exempt, and there will be nothing for the trustee to collect. Such cases are referred to as "no asset" cases. Once the property, if any, has been

101. Id. at 682.
102. Scanlon, 473 U.S. at 239-40 (internal quotation marks omitted).
104. Id. at 10.
105. Id.
106. Id.
107. Id.
collected, the trustee liquidates the estate's assets and distributes them on a pro rata basis to creditors.\textsuperscript{108} After the distribution, the debtor generally receives a discharge and exits from the process freed of the burden of debts.\textsuperscript{109} Although most debts will be readily discharged, § 523 of the Bankruptcy Code exempts certain special kinds of debts from the operation of any discharge.\textsuperscript{110}

B. The Special Status of Certain Public Debts Means That Many Debts Owed to a State Are Not Automatically Discharged

Sovereign immunity can be invoked by the processing of certain types of debts in bankruptcy, when those debts are owed to a state or state agency. Generally speaking, debts in a bankruptcy action are discharged once the bankruptcy trustee has distributed the assets of the debtor, if any exist.\textsuperscript{111} However, certain kinds of debts have a special status and are not routinely discharged, including student loans,\textsuperscript{112} child support and alimony,\textsuperscript{113} and certain taxes.\textsuperscript{114} Such debts may remain even after all other liabilities of the debtor have been dealt with.

Under some circumstances, a debtor may need to file an adversary proceeding against a state creditor. A debtor may wish to settle the issue of whether a particular tax debt to a state falls into a non-dischargeable category, and must file suit against the state in bankruptcy court in order to obtain a final ruling.\textsuperscript{115} If the debt in question is an educational loan, there is a presumption of non-dischargeability, and the debtor’s only chance to discharge such a loan is to file an adversary proceeding requesting the court to grant a hardship discharge.\textsuperscript{116}

Congress has determined that vital policy interests are best served by making certain debts more difficult to discharge. For example, Congress created the federal student loan program to help Americans advance their

\textsuperscript{108} Id. at 10–11.
\textsuperscript{109} Id. at 11.
\textsuperscript{110} Id.
\textsuperscript{112} Id. § 523(a)(8).
\textsuperscript{113} Id. § 523(a)(5).
\textsuperscript{114} Id. § 523(a)(1).
\textsuperscript{116} 11 U.S.C. § 523(a)(8).
education, ensuring that no American would have to forego higher education for financial reasons.\textsuperscript{117} By making student loans more difficult to discharge, Congress strengthens the fiscal soundness of the loan program and prevents debtors from taking advantage of the system.\textsuperscript{118} The bankruptcy process allows Congress to weigh the relative importance of different debts and adjust bankruptcy procedures accordingly, with an eye to supporting important national policies that arise outside of the bankruptcy context.

C. Because a Debtor Must Sue the State To Determine the Dischargeability of Certain Debts, These Suits Can Raise Difficult Sovereign Immunity Issues and Threaten Important Bankruptcy Policies

Filing an adversary proceeding against a state triggers sovereign immunity issues. Such proceedings are considered "suits" within the meaning of the Eleventh Amendment.\textsuperscript{119} As a result, states are able to assert sovereign immunity as a defense against the initiation of such discharge proceedings and thus "opt out" of the entire bankruptcy process if they so choose. If they do so, these types of debts owed to the public purse will remain intact even though the debtor's other debts have been entirely discharged.

Congress has been concerned that an assertion of sovereign immunity can frustrate some of the policies that underlie the bankruptcy system. A debtor who cannot discharge state debts will not enjoy the advantage of bankruptcy's fresh start.\textsuperscript{120} Full payment of all debts to the state may leave very little of the debtor's estate available to other creditors, preventing a fully equitable settlement of the estate.\textsuperscript{121} Finally, a state's decision to opt out of the bankruptcy process might delay the expeditious

\begin{thebibliography}{9}
\bibitem{118} \textit{See In re Pelkowski}, 990 F.2d 737, 743 (3d Cir. 1993) (describing the legislative history of the Bankruptcy Reform Act of 1978).
\bibitem{119} Adversary proceedings involve service of process, which hales the state into court; therefore, most courts have found them to be "suits." \textit{See, e.g., Mitchell v. Franchise Tax Bd. (In re Mitchell)}, 209 F.3d 1111, 1117 (9th Cir. 2000); Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 786-87 (4th Cir. 1997).
\bibitem{121} \textit{See BFP v. Resolution Trust Corp.}, 511 U.S. 531, 563 (1994).
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resolution of competing claims, frustrating one of the primary advantages of the bankruptcy process.\textsuperscript{122}

III. CONGRESS HAS ATTEMPTED TO ABROGATE SOVEREIGN IMMUNITY IN BANKRUPTCY LAW, BUT HAS FAILED TO DO SO CONSTITUTIONALLY

Concerned about the assertion of sovereign immunity in bankruptcy, Congress has passed various statutory provisions, most recently § 106(a), which attempt to abrogate states' immunity in bankruptcy proceedings.\textsuperscript{123} However, \textit{Seminole} prevents Congress from abrogating immunity under any of its Article I powers. Because § 106(a) is considered to have been passed pursuant to Congress's Article I bankruptcy power, rather than under the Fourteenth Amendment, most courts have held § 106(a) to be unconstitutional. States themselves could voluntarily waive their immunity, but they have little incentive to do so. As a result, sovereign immunity continues to pose difficulties in the bankruptcy process.

\textbf{A. Congress Has Attempted To Abrogate Sovereign Immunity in Bankruptcy, But Most Courts Have Found These Attempts To Be Unconstitutional}

Congress has attempted to limit states' sovereign immunity in bankruptcy by inserting various abrogation provisions into the bankruptcy code, most recently with § 106(a). However, after \textit{Seminole}, Congress may not abrogate under any of its Article I powers. Moreover, after \textit{City of Boerne}, abrogation under the Fourteenth Amendment is severely limited, and Congress has not met the requirements necessary to show that § 106(a) was constitutionally permissible under the Fourteenth Amendment. As a result, a majority of courts have held that § 106(a) is unconstitutional and invalid.

In 1994, Congress revised the Bankruptcy Code in order to abrogate state sovereign immunity in certain parts of the bankruptcy process.\textsuperscript{124} An earlier attempt to statutorily abrogate sovereign immunity had been ruled unconstitutional by the Supreme Court on the grounds that

\begin{footnotesize}
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\item \textsuperscript{122} See Bartell, \textit{supra} note 5, at 55–56.
\item \textsuperscript{123} See \textit{supra} note 53.
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\end{footnotesize}
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Congress had not shown a sufficiently explicit intent to eliminate sovereign immunity. The 1994 revision was certainly clear: "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit[]."

However, this provision is not a constitutional use of Congress’s Article I powers. After Seminole, Congress may not abrogate state immunity from suit under its Article I powers. Because Congress’s power to establish a national bankruptcy system comes from Article I, its propagation of bankruptcy laws falls under the limitations placed on all Article I powers by the Seminole decision. As a result, a number of circuit courts have looked at § 106(a) in light of these standards and found it wanting. Courts have ruled that, to the extent that § 106(a) has been propagated pursuant to the bankruptcy power, it is invalid.

Although Congress can successfully abrogate immunity under the Fourteenth Amendment if it meets certain conditions, most courts have found it improbable that § 106(a) was, or even could be, passed pursuant to Congress’s powers under that Amendment. The ability to discharge debts in bankruptcy is not a “right” protected by the Fourteenth Amendment. Even if the Court were to change direction entirely and begin to view discharge as a protected right, Congress’s legislation would still have to pass muster under the analysis established by City of Boerne. Therefore, Congress must be acting in a remedial capacity in response to a clear and well-documented pattern of constitutional violations by the states. However, there is no evidence that Congress

128. Id.
130. See, e.g., In re Mitchell, 209 F.3d at 1121.
132. See, e.g., In re Mitchell, 209 F.3d at 1119; In re Sacred Heart Hosp., 133 F.3d at 244–45; In re Fernandez, 123 F.3d at 245.
134. City of Boerne, 521 U.S. at 519.
135. Id.
identified such a pattern when it passed § 106(a), or that it advanced the provision as a proportional remedy to such violations. In fact, there is no indication that the 1994 Act was intended to address even an "unarticulated, general violation" of individuals' Fourteenth Amendment rights. Finally, Congress passed the first incarnation of the bankruptcy laws in 1800—68 years before the Fourteenth Amendment was ratified. As one court has observed, it seems "logically inescapable" that Congress, in passing the 1994 Act, exercised the same specifically enumerated Article I bankruptcy power that it relied on in passing the earliest versions of the Act.

Following this analysis, most courts that have considered the constitutionality of § 106(a) have determined that the section is invalid. At least one court has found it to be validly enacted under the privileges and immunities clause of the Fourteenth Amendment. However, most courts have ruled that § 106(a) cannot function as a limitation on state's assertions of sovereign immunity in bankruptcy proceedings.

B. Although States Can Waive Their Immunity to Adversary Proceedings, They Often Do Not

Because so many courts have found § 106(a) to be invalid, the only remaining way of overcoming state sovereign immunity is by showing that the state has waived its immunity expressly and voluntarily. States need not waive their immunity in bankruptcy proceedings, however. As a

137. In re Fernandez, 123 F.3d at 245.
138. Id.
139. In re Creative Goldsmiths, 119 F.3d at 1146.
140. Id.
141. See supra note 129 and accompanying text.
142. See In re Willis, 230 B.R. 619 (Bankr. E.D. Okla. 1999) (relying on the district court's analysis in Wyoming Department of Transportation v. Straight, 209 B.R. 540 (D. Wyo. 1997)). But see In re Straight, 248 B.R. 403, 415 (B.A.P. 10th Cir. 2000) (noting that since the lower court's decision, Seminole and other Supreme Court decisions had established that its constitutional analysis was incorrect and that § 106(a) is unconstitutional).
143. See supra note 129 and accompanying text.
result, waiver is seldom effective to resolve the difficulties presented by the existence of sovereign immunity.¹⁴⁴

The test for determining whether a state has waived its immunity from federal court jurisdiction is an extremely stringent one.¹⁴⁵ A state is deemed to have waived its immunity only when its waiver is stated "by the most express language or by such overwhelming implication . . . as will leave no room for any other reasonable construction."¹⁴⁶ Most jurisdictions have held that a state may waive its immunity by invoking the jurisdiction of a court in certain circumstances—by initially defending a discharge proceeding on the merits,¹⁴⁷ for example, or by filing a proof of claim against a debtor’s estate.¹⁴⁸

However, this kind of waiver will not occur in all bankruptcy proceedings. If the debtor’s estate has assets remaining, a state may decide to file a proof of claim in order to show its entitlement to a portion of the remaining assets.¹⁴⁹ In a case where the debtor has no significant assets, however, there is no reason for the state to file a proof of claim. Rather, the state may simply choose not to participate actively in the bankruptcy proceedings, instead responding to a debtor’s adversary proceeding by asserting sovereign immunity. Once that assertion is made, the court no longer has jurisdiction over the state, and the debt will remain undischarged.¹⁵⁰

Ideally, states would pass statutes that would routinely waive their immunity in bankruptcy proceedings in order to expedite the process. However, states have an obvious financial interest in avoiding the trouble and expense of adversary proceedings whenever possible and, consequently, are more likely to engage in the proceedings only when necessary to protect their interests.¹⁵¹ Although one commentator has suggested various ways to encourage states to participate,¹⁵² states have

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¹⁴⁴. For a useful discussion of waiver issues in sovereign immunity in bankruptcy, see generally Bartell, supra note 5.
¹⁴⁶. Id. at 239–40.
¹⁴⁸. Cal. Franchise Tax Bd. v. Jackson (In re Jackson), 184 F.3d 1046, 1050 (9th Cir. 1999).
¹⁴⁹. See Epstein et al., supra note 103, at 455.
¹⁵⁰. See Bartell, supra note 5, at 40.
¹⁵¹. Id. at 81.
¹⁵². See generally id. (noting that possible methods include use of the spending power, conditional regulation, and manipulating the bankruptcy code to provide incentives for states to participate).
very little incentive to do so. As a result, sovereign immunity will continue to pose difficulties in bankruptcy proceedings.

IV. THE "UNIFORM LAWS" THEORY SUGGESTS THAT STATES RELINQUISHED THEIR SOVEREIGN IMMUNITY IN BANKRUPTCY AS PART OF THE PLAN OF THE CONSTITUTION

A theory based on states' implied waiver of sovereign immunity has recently gained some degree of acceptance. Originally developed by attorney Leonard H. Gerson, this "uniform laws" theory has been adopted by a bankruptcy court in the Ninth Circuit and by the Bankruptcy Appellate Panel of the Sixth Circuit. Courts adopting the theory assert that the wording of the Constitution's Bankruptcy Clause suggests that states waived their sovereign immunity in bankruptcy as part of the constitutional plan, and therefore that there is no need for Congress to abrogate an immunity that, by the terms of the Constitution, no longer exists.

A. Development and Adoption of the "Uniform Laws" Theory

The "uniform laws" theory was originally proposed by bankruptcy attorney Leonard H. Gerson in a law review article. Two courts have adopted the theory as an attractive alternative to honoring a state's immunity in discharge proceedings, and those opinions have been appealed to the Sixth and Ninth Circuits. Gerson himself has represented the Business Bankruptcy Law Committee before a number of Circuit Courts of Appeal as an amicus curiae supporting the constitutionality of § 106(a). Gerson's theory has been used in a number of cases by parties attempting to counteract states' assertions of sovereign immunity and has been adopted by courts in both the Sixth and Ninth Circuits.


155. Id. at 1 n.*.

156. Gerson's theory was first taken up by an Arizona Bankruptcy Court in Bliemeister v. Industrial Commission of Arizona (In re Bliemeister), 251 B.R. 383 (Bankr. D. Ariz. 2000), and more recently adopted by the Sixth Circuit Bankruptcy Appellate Panel in Hood v. Tennessee Student Assistance Corp. (In re Hood), 262 B.R. 412 (B.A.P. 6th Cir. 2001). Both cases are currently on appeal: In re Bliemeister to the Bankruptcy Appellate Panel of the Ninth Circuit, and In re Hood...
B. Legal Argument Presented by the "Uniform Laws" Theory

The In re Bliemeister and In re Hood courts followed an analytic process similar to that suggested by Leonard Gerson in his law review article. First, the courts noted that the "sovereignty" of the states derives from the structure of the original Constitution. As a result, the question before the court was whether the original Constitution was intended to preserve states' "sovereignty" over the subject of bankruptcies. The courts looked to Federalist No. 81, which notes that states retain their immunity except as altered by the "plan of convention," and Federalist No. 32, for a discussion of how state sovereignty can be ceded under that plan. In Federalist No. 32, Hamilton presents the Naturalization Clause as an example of an area in the Constitution where states relinquish their sovereignty. Because the naturalization and bankruptcy powers are set forth in the same clause with similar language, the courts concluded that states also relinquished their sovereign powers in bankruptcy under the Constitution. Consequently, sovereign immunity, one of the traditional attributes of sovereignty, must also have been ceded by the states. Finally, because the "uniform laws" theory establishes that states waived their sovereign immunity when they ratified the Constitution, the theory permits courts to avoid the question of whether § 106(a) is constitutional.

The In re Hood and In re Bliemeister courts noted that states' sovereign immunity is a fundamental aspect of their sovereignty as it
existed before the passage of the Constitution and that they continue to exercise that sovereignty except insofar as it was altered by the plan of the Constitutional Convention.\textsuperscript{165} The fundamental question, then, is whether the plan of the Convention envisioned the preservation of states’ sovereign immunity in bankruptcy.\textsuperscript{166} To determine what the framers of the Constitution intended with respect to sovereign immunity, these courts followed the Supreme Court in looking to Alexander Hamilton’s \textit{Federalist Papers}.\textsuperscript{167}

The courts began their textual analysis with an examination of \textit{The Federalist} No. 81. In this essay, Alexander Hamilton responded to his readers’ fears that states’ sovereign immunity might be destroyed under the new Constitution:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual \textit{without its consent}. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, 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 convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here.\textsuperscript{168}

States’ sovereign immunity survives, then, unless it has been specifically surrendered in the “plan of convention”—that is, in the Constitution developed by the Constitutional Convention. The circumstances under which that surrender might occur are described in \textit{Federalist} No. 32, the “article of taxation.”\textsuperscript{169}

\textit{The Federalist} No. 32 examines the limitations on state sovereignty as they are expressed in the Constitution’s Naturalization Clause. In this “article of taxation,” Hamilton is primarily concerned with describing the distribution of taxing power between the federal and state

\begin{itemize}
  \item \textsuperscript{165} \textit{In re Hood}, 262 B.R. at 415; \textit{In re Bliemeister}, 251 B.R. at 388 (citing \textit{Alden v. Maine}, 527 U.S. 706, 734 (1999)).
  \item \textsuperscript{166} \textit{In re Hood}, 262 B.R. at 416.
  \item \textsuperscript{167} \textit{See} \textit{Alden v. Maine}, 527 U.S.706, 716 (1999) (determining that states’ sovereign immunity included immunity from suit in their own courts and citing Hamilton’s essays, describing him as one of the Constitution’s “leading advocates”).
  \item \textsuperscript{168} \textit{The Federalist} No. 81, at 529–30 (Alexander Hamilton) (Modern Library ed., 1937).
  \item \textsuperscript{169} \textit{The Federalist} No. 32, at 193 (Alexander Hamilton) (Modern Library ed., 1937).
\end{itemize}
governments. In the process, he discusses the circumstances under which state sovereignty might be limited by various constitutional provisions, specifically by the Naturalization Clause:

[T]he State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would ... exist ... [among other cases] where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant ... [for example,] in that clause which declares that Congress shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.

Hamilton obviously has a point: in legislating naturalization, any power-sharing between state and federal authority would produce nonsensical results. The federal system allows citizens of one state to easily move to another state; consequently, whichever state produced the most lenient rule for naturalization would be legislating a de facto naturalization standard for the entire country. Such a result would indeed be "contradictory and repugnant" to national authority.

According to the "uniform laws" theory, the limitations on states' sovereignty in naturalization also apply to bankruptcy. The courts note that the same clause quoted by Hamilton also establishes Congress's Article I bankruptcy authority, granting Congress the power "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." The implication, the courts suggest, is unmistakable: the "contradictory and repugnant" authority of the states that is foreclosed in naturalization is foreclosed in bankruptcy as well. Congress is allowed to establish "an

170. Id.
171. Id. at 194–95 (emphasis in original).
172. Id.
uniform Rule” for naturalization, and “uniform laws” for bankruptcy.\textsuperscript{175} Thus, the states must have agreed to surrender their sovereign powers in bankruptcy if Congress chose to act in that sphere.\textsuperscript{176} As one of the traditional sovereign powers, sovereign immunity is presumably surrendered as well.\textsuperscript{177}

By positing bankruptcy as a special exception, the courts adopting the “uniform laws” theory attempt to sidestep earlier, otherwise precedential decisions that allow sovereign immunity to be asserted in bankruptcy. Recent Supreme Court decisions like \textit{Seminole} have forbidden congressional abrogation of state sovereign immunity under its Article I powers, but the lower courts suggest that bankruptcy’s unique placement in the Constitution means that it, like naturalization, is an exception to this rule.\textsuperscript{178} Similarly, under the lower courts’ analysis, Congress did not need to adopt §106(a) because states’ sovereign immunity had been abrogated in the original Constitution.\textsuperscript{179} Consequently, other courts’ determinations of §106(a)’s unconstitutionality are simply not relevant and can be ignored.

V. THE “UNIFORM LAWS” THEORY IgNORES BINDING PRECEDENT, IS BASED UPon ERRONEOUS LEGAL REASONING, AND FAILS TO MAKE COMPELLING POLICY ARGUMENTS FOR ITS ADOPTION

The “uniform laws” theory is profoundly flawed on a number of levels. First, its adoption requires courts to improperly ignore a considerable body of binding Eleventh Amendment jurisprudence by the Supreme Court\textsuperscript{180} and to deviate from a number of persuasive opinions

\textsuperscript{175} See supra note 173.
\textsuperscript{176} \textit{In re Hood}, 262 B.R. at 418; \textit{In re Bliemeister}, 251 B.R. at 389–90.
\textsuperscript{178} See \textit{In re Hood}, 262 B.R. at 419.
\textsuperscript{179} Id. at 426; \textit{In re Bliemeister}, 251 B.R. at 391–92.
by lower courts. Second, the theory is founded on an erroneous understanding of the distinction between "sovereignty" and "sovereign immunity." Courts adopting the theory's analysis misinterpret the Federalist's discussion of "sovereignty," arguing as though it refers to sovereign immunity and misrepresent early attitudes about the importance of retaining states' immunity under the Constitution. Finally, the theory bases its arguments on a spurious policy justification of "uniformity," incorrectly asserting that the "uniform laws" requirement of the Constitution cannot be achieved if states' immunity remains in play.


In order to adopt the "uniform laws" theory, courts must find that bankruptcy is an exception to the Eleventh Amendment interpretations set forth by Seminole and its progeny. However, the Supreme Court's decisions allowing immunity in other Article I legislation apply just as strongly in the bankruptcy context. Furthermore, a number of circuits have explicitly examined and rejected the "uniform laws" theory. Consequently, the In re Hood and In re Bliemeister courts' disregard of these binding precedents is improper.

Courts adopting the "uniform laws" theory argue that the Supreme Court's Eleventh Amendment precedents do not apply in the area of bankruptcy law. The In re Hood and In re Bliemeister courts describe bankruptcy as a wide-open field in sovereign immunity jurisprudence, with the In re Bliemeister court going so far as to assert that "neither the Ninth Circuit nor the Supreme Court has yet determined in the post-Seminole era...whether the Eleventh Amendment preserved states'
sovereignty over the subject of bankruptcies."

Because the Supreme Court has not directly addressed the unique constitutional status of sovereign immunity in the bankruptcy context, these courts reason, previous rulings against Congressional abrogation of sovereign immunity under Article I do not apply in this sphere. As a result, any earlier generalizations about Article I powers must be considered dicta in the bankruptcy context.

However, the Supreme Court's rulings on the Eleventh Amendment must be considered as binding on courts adjudicating bankruptcy issues as in all other Article I legislation. Chief Justice Rehnquist noted in Seminole that the binding rulings of the Supreme Court include not only the bare holding of its opinions, but also all processes of reasoning necessary to reach those holdings. The holding in Seminole could conceivably have been reached without finding that all of Congress's Article I powers are ineffective in abrogating state immunity; in this particular case, the "uniform laws" courts may be correct in reading the Court's assertions as dicta. However, in later cases, the Court took a blanket prohibition on Article I abrogation as a given. In these cases, the Court's analysis found that the statutes in question were enacted under Article I; once that finding was reached, the Court ruled that, as a result, the abrogation in those statutes was ineffective. Consequently, the holdings of these later cases are completely illogical unless the Court has created a blanket Article I ban. Under Rehnquist's Seminole rule, this ban on Congress's ability to abrogate sovereign immunity in Article I is a necessary predicate to the final holding of these cases, and thus is as binding as the holdings themselves. There is a clear indication, then, that when the Supreme Court says "all Article I powers," they in fact mean all Article I powers, including the bankruptcy power.

Most lower courts have also found that bankruptcy is not an exception to the Seminole rule. Even if lower courts accept the In re Bliemeister and In re Hood contention that the Supreme Court has not explicitly addressed bankruptcy, various circuit courts have considered and

186. In re Bliemeister, 251 B.R. at 386.
190. Seminole, 517 U.S. at 67.
rejected the "uniform laws" theory, including the *In re Bliemeister* court's own Ninth Circuit. In *Mitchell v. Franchise Tax Board (In re Mitchell)*, the court was primarily concerned with determining the constitutionality of § 106(a), and found that it was not, in fact, constitutional. Although the court did not directly cite Gerson's article, it did specify that "there is no policy-based exception—such as national uniformity—to the Seminole Tribe rule," citing to *Seminole* and, significantly, to the Fourth Circuit's explicit rejection of the "uniform laws" theory in *In re Creative Goldsmiths*. As a result, the weight of precedential opinion alone would suggest that the "uniform laws" theory should be rejected.

The *In re Hood* and *In re Bliemeister* courts found that bankruptcy's inclusion in the "uniform laws" clause makes it a special case and that, therefore, precedential decisions by higher courts did not apply. This argument is unconvincing given that a number of those higher courts have considered and rejected the "uniform laws" theory. However, even if these courts were correct in discounting earlier precedent, the "uniform laws" analysis is still built on legally erroneous foundations.

**B. Courts Adopting the "Uniform Laws" Theory Err by Ignoring the Distinction Between "Sovereignty" and "Sovereign Immunity"**

The "uniform laws" theory is based on a profound confusion about the distinction between "sovereignty" and "sovereign immunity." Although "sovereign immunity" is traditionally one of the attributes of "sovereignty," the two concepts are quite distinct. In the *Federalist Papers*, Hamilton addresses a number of ways in which states' lawmaking powers will be limited, while simultaneously assuring his readers that states' sovereign immunity will be protected. However, courts adopting this theory take Hamilton's comments on state sovereignty and read them as applying equally to sovereign immunity. They also fail to note significant historical evidence showing that the framers of the Constitution placed considerable emphasis on the

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191. *See, e.g.*, Mitchell v. Franchise Tax Bd. (*In re Mitchell*), 209 F.3d 1111, 1119 (9th Cir. 2000); Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co. (*In re Fernandez*), 123 F.3d 241, 244 (5th Cir. 1997); Schlossberg v. Comptroller of Treasury (*In re Creative Goldsmiths*), 119 F.3d 1140, 1145–46 (4th Cir. 1997).

192. 209 F.3d 1111 (9th Cir. 2000).

193. *Id.* at 1119.

194. *Id.* (citing *In re Creative Goldsmiths*, 119 F.3d at 1145–46).
importance of sovereign immunity and their reassurances to their constituents that that immunity would not be limited by the constitutional plan.

States' "sovereignty" is a concept that both encompasses and is distinct from states' "sovereign immunity." Although immunity is one of the traditional attributes of the sovereign, the two concepts are not interchangeable. In *Alden v. Maine*, cited by both the *In re Hood* and *In re Bliemeister* courts as foundational to their "uniform law" analysis, the U.S. Supreme Court addressed the "authority and dignity" aspects of state sovereignty. According to the Court, "authority" represents the sovereign's power to make and enforce laws in its domains, and "dignity" refers to the sovereign's immunity from the indignity of being served with process and ordered to appear before a court. This distinction becomes clearer with an example from international law. A sovereign foreign nation (for example, Japan) retains a certain degree of sovereign immunity in the United States court system. Traditionally, it would not have been subject to suit without its consent. However, to say that Japan has sovereign immunity in the United States and to say that Japan has sovereignty in the United States are two very different things: Japan retains the "dignity" of sovereign immunity, but does not take on other attributes of sovereignty—most notably, the "authority" to make and enforce laws.

Courts adopting the "uniform laws" theory err by conflating these two concepts. First, these courts misread Hamilton's *Federalist* text, substituting "sovereign immunity" for "sovereignty" and vice versa, despite clear indications that Hamilton was drawing distinctions between the two. Secondly, these courts ignore evidence from constitutional history that indicates that the framers of the Constitution saw these two terms very differently, providing for the necessary concession of some state sovereignty while indicating that state sovereign immunity would continue to be protected.

196. Id. at 715.
197. Id.
199. See infra text accompanying notes 210-212.
200. See infra text accompanying notes 213-215.
The courts' analysis of Hamilton's *Federalist* essays profoundly misunderstands the import of the test. *Federalist* No. 32 refers specifically to the "authority" of the states, and how that "authority" can be relinquished within the plan of the Constitution. Hamilton's examples of how that authority might be transferred make it clearer that he is speaking about the distribution of lawmaking powers between the states and the federal government, i.e., sovereignty. The passage from *Federalist* No. 81, however, is referring solely to sovereign immunity—the "dignity" aspect described in *Alden*. Although No. 81 points the reader to No. 32 for a discussion of how immunity might be given up by the states, it most certainly does not assert that that immunity has been or will be given up under the plan of the convention—to the contrary, in No. 81 Hamilton reassures states that their prized immunity will not be impinged upon. In *Federalist* No. 32, Hamilton had laid out the plan of the Constitution, noting that states clearly gave up their sovereign authority over many areas: regulation of foreign trade, establishment of patents, and many others, including bankruptcy. But, as in the example of Japan, the authority to legislate is not coequal with the privilege of immunity from suit, and the states' inability to legislate in those specified areas does not in any way affect their ability to assert their sovereign immunity, even in areas where they have relinquished their sovereignty in other ways.

Courts adopting the uniform laws theory shade over this distinction when analyzing the *Federalist* text, and confuse the "authority" of sovereignty with the "dignity" of sovereign immunity. In *In re Hood*, the court went through its analysis and concluded that states do not retain their "sovereignty" in bankruptcy. Similarly, the *In re Bliemeister* court performed an extensive analysis of the history of pre-constitutional state lawmaking and concluded that states' "sovereignty" over

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202. Id.
203. *Id*.
206. See *id*.
207. U.S. CONST. art. I, § 8, cl. 3.
bankruptcy was surrendered under the Constitution.\footnote{211}{Bliemeister v. Indus. Comm'n of Ariz. (\textit{In re Bliemeister}), 251 B.R. 383, 391 (Bankr. D. Ariz. 2000).} However, the fact that states' "sovereignty"—their authority to legislate in a particular matter—has been pre-empted by the Constitution does not mean that their immunity has also been eliminated. If this were true, states would lose their immunity in any area where Congress was given exclusive power, and the Supreme Court's recent sovereign immunity decisions would be constitutionally unfounded.\footnote{212}{See supra note 92.} Such is not the case.

In order to sustain their amalgamation of sovereignty and sovereign immunity, the \textit{In re Hood} and \textit{In re Bliemeister} courts also ignored significant evidence showing that the framers of the Constitution valued states' sovereign immunity and were determined to protect it. Evidence exists showing that the framers of the Constitution had no intention of limiting states' sovereign immunity to suits by individuals, and even went to some trouble to reassure states that this kind of immunity would remain completely intact. The retention of sovereign immunity under the Constitution was an issue of vital interest to state legislators, and members of the Constitutional Convention addressed the constitutional ratification conventions of the various states in order to reassure them on the subject.\footnote{213}{Alden v. Maine, 527 U.S. 706, 716 (1999).} James Madison spoke to the Virginia ratifying convention, noting that:

\begin{quote}
[the Supreme Court's] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. . . . It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.\footnote{214}{\textit{Id.} at 717 (citing 3 \textsc{The Debates on the Federal Constitution} 553 (Jonathan Elliot ed., 2d ed. 1836–45) [hereinafter \textsc{Debates}]).}
\end{quote}

John Marshall, later to be appointed as Chief Justice of the Supreme Court, remarked that:

\begin{quote}
It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this
construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant . . . It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent it being plaintiff.215

Given this strong emphasis on the sanctity of state immunity set forth by Hamilton and others, then, it seems highly unlikely that this immunity would be abrogated by the Constitution, especially in the elliptical way posited by the “uniform laws” theory.

C. Courts Adopting the “Uniform Laws” Theory Fail To Present an Adequate Policy Argument for Uniformity Because a Bankruptcy Law That Provides for Uniform, Nationwide Immunity Is a “Uniform Law”

Courts supporting the “uniform laws” theory justify abrogating states’ immunity by pointing to the desirability and consistency of having one uniform bankruptcy law throughout the country. However, uniformity can be reached either by passing bankruptcy laws in which sovereign immunity is uniformly abrogated or by passing laws in which states’ immunity is uniformly upheld. The question of whether to allow immunity ultimately comes down to a conflict of policies: on the one hand, Congress’s desire for a strong, flexible system that brings states into its scope and, on the other hand, the fundamental importance of sovereign immunity to the nation’s federalist structure. The Supreme Court has repeatedly held that the importance of sovereign immunity trumps even the most powerful policy considerations, however, and therefore the stronger arguments are in favor of maintaining immunity.

There is no strong policy reason to abrogate states’ immunity in bankruptcy law, because uniformity can be achieved with or without immunity, as long as that immunity is uniformly available to all states. At the time of the Constitutional Convention, “uniform laws” in bankruptcy were considered necessary in order to provide for clarity and consistency nationwide.216 However, sovereign immunity would not interfere with this uniformity any more than it would interfere with the nation-wide uniformity of copyright law or any other Article I Congressional legislation. If states are uniformly immune from suit under

215. Id. at 718 (citing DEBATES, supra note 214, at 555–56).
the bankruptcy statute, then the kind of geographical uniformity contemplated by the Constitution is maintained, and debtors and creditors alike can make decisions accordingly. A "uniform law" with sovereign immunity included is no more chaotic or irregular than a "uniform law" without an immunity provision.

Ultimately, the question of uniformity comes down to a matter of conflicting policies, and the Supreme Court has repeatedly found that the constitutional importance of sovereign immunity outweighs other policy considerations. Certainly, Congress wants to craft a "complete and effective bankruptcy system." However, the principle of sovereign immunity is a fundamental principle of constitutional structure. The tension between state and federal interests lies at the heart of the Constitution, and the balance of power created by that document should not be tampered with. However, these same kinds of policies have come into conflict in each of the recent sovereign immunity cases decided by the Supreme Court. The usefulness and power of the nation's intellectual property system is certainly affected by states' power to appropriate ideas without fear of a lawsuit, but the Court has held that Congress cannot subject states to the Trademark Remedy Clarification Act without their consent.

VI. CONCLUSION

Sovereign immunity represents the essential constitutional principle that states cannot be subjected to suit without their consent. It existed as part of the original sovereignty of the states before the ratification of the Constitution and was incorporated in that document and reaffirmed by

217. United States v. Fox, 95 U.S. 670, 672 (1877).
218. See Alden, 527 U.S. at 715.
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the passage of the Eleventh Amendment. In recent years, the Supreme Court has further strengthened the power of states’ immunity by forbidding Congressional abrogation under Article I and strictly regulating abrogation under the Fourteenth Amendment.

However, sovereign immunity poses challenges to the underlying purposes of the bankruptcy system. When states raise immunity as a defense to adversary proceedings, it creates difficulties in the administration of debtors’ estates. Certain debts owed to a state may become non-dischargeable and, thus, creditors and debtors may not be able to get the speedy and fair resolution of conflicts that the bankruptcy process is designed to provide. Attempts to address the problem of sovereign immunity in bankruptcy have been largely unsuccessful on constitutional grounds. Congress has attempted to abrogate states’ sovereign immunity in bankruptcy through legislation, most recently through the passage of 11 U.S.C. § 106(a), but most courts have found these attempts to be an unconstitutional abrogation under Article I. Although states could voluntarily waive their immunity in bankruptcy, they generally do not, so the problem remains.

Recently, however, a novel “uniform laws” argument has been developed and adopted by some courts. According to this theory, the Constitution’s Bankruptcy Clause acts to waive states’ immunity in the bankruptcy realm. As a result, proponents argue, Congress does not need to abrogate states’ immunity in the Bankruptcy Code because their immunity in this area ceased to exist when the Constitution was ratified. However, the “uniform laws” theory is profoundly flawed. Courts adopting its arguments ignore binding Supreme Court precedent, improperly gloss over the distinction between “sovereignty” and “sovereign immunity,” and misrepresent the Constitutional framers’ views on the importance of states’ immunity. By failing to consider the uniform alternative of a federal law which universally allows for the assertion of states’ immunity, courts adopting the “uniform laws” theory fail to give sufficient weight to sovereign immunity’s profoundly important place in the Constitution’s balance of federal and state power. Given these problems, the use of the “uniform laws” theory by some courts to find a waiver of immunity in as vast an area of law as bankruptcy is surely misguided.

The problem of sovereign immunity cannot be solved through unconstitutional legislation. The “uniform laws” theory represents an attempt to overcome some of the difficult policy issues presented by the application of sovereign immunity in bankruptcy. These issues are undeniably serious, and should be examined. However, a theory as
profoundly flawed as this one is not the answer to the bankruptcy system's difficulties. As a result, barring further, constitutionally legitimate legislation by Congress, the bankruptcy system must learn to live with the reality of state sovereign immunity.