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Bankruptcy as Constitutional Property: Using Statutory Entitlement Theory To Abrogate State Sovereign Immunity

ABSTRACT. In the decade following *Seminole Tribe*'s ruling that Article I is not a grant of authority to abrogate state sovereign immunity, scholars and courts overwhelmingly agreed that the Eleventh Amendment barred Congress from subjecting states to suit in bankruptcy proceedings. The Court has since backpedaled, holding in *Katz* that the states ceded their sovereign immunity when they ratified the Bankruptcy Clause. *Katz*, however, leaves much unsettled – including whether the ratifying states intended to cede their immunity defenses to suits seeking monetary damages. There is also reason to doubt *Katz*'s durability: beyond the serious flaws in its reasoning, Eleventh Amendment precedents perish and reanimate with the changing composition of the Court, and mere days after *Katz* was handed down, Justice O'Connor, who provided the fifth vote for the majority, was replaced by Justice Alito. The prospect that *Katz* may be overruled or cabined has caused anxiety for scholars and practioners who convincingly argue that the bankruptcy system cannot effectively function unless the states, like private creditors, are subject to the binding jurisdiction of bankruptcy tribunals.

In an effort to insure against *Katz*'s rollback, this Note offers a new theory for how Congress could invoke its enforcement powers under Section 5 of the Fourteenth Amendment to authorize suits against the state for bankruptcy violations. Borrowing from the case law on statutory entitlements and procedural due process, the Note argues that like welfare, public education, and government employment, bankruptcy protections are property interests cognizable under the Due Process Clause. Because these property interests are conferred by the federal government and binding on the states, a state that tramples on an individual's bankruptcy rights in violation of federal law effects an unconstitutional deprivation of property without due process.

AUTHOR. Yale Law School, J.D. expected 2010; Harvard University, A.B. 2006. Special thanks to Anand Balakrishnan, Eric Brunstad, Nicholas Parrillo, Judith Resnik, and Elizabeth Tulis for their insightful comments.

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INTRODUCTION

Over the last decade, the scope of Congress's authority to abrogate state sovereign immunity in bankruptcy proceedings has ebbed and flowed as factions within the Court have battled over the proper meaning of the Eleventh Amendment. Following the Court's watershed ruling in *Seminole Tribe v. Florida*[1] that Congress could not subject states to suit under the Indian Commerce Clause,[2] and the majority and dissent's dicta that the ruling applied to all Article I grants,[3] courts and commentators overwhelmingly concluded that states enjoyed immunity from private proceedings brought under the Bankruptcy Code.[4] A cry of alarm issued from bankruptcy scholars and some judges, who convincingly argued that exempting states—among the largest and most frequent creditors in bankruptcy—from the binding jurisdiction of bankruptcy courts would inflict significant damage on the regime's ability to function effectively.[5]

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1. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).
2. The majority dismissed the dissent's claim that the decision would deprive individuals of any remedy for state violations of federal law, but it did not confute its characterization of the case as applying to the totality of Article I. *Id.* at 72 n.16.
3. Congress's bankruptcy powers are housed in U.S. CONST. art. I, § 8, cl. 4.
4. *See, e.g.*, Nelson v. La Crosse County Dist. Att'y, 301 F.3d 820, 838 (7th Cir. 2002); Mitchell v. Franchise Tax Bd. (*In re* Mitchell), 209 F.3d 1111, 1120-21 (9th Cir. 2000); NVR Homes, Inc. v. Clerks of the Circuit Courts (*In re* NVR), 189 F.3d 442, 454 (4th Cir. 1999); Sacred Heart Hosp. of Norristown v. Pennsylvania (*In re* Sacred Heart Hosp. of Norristown), 133 F.3d 237, 241-45 (3d Cir. 1998); Schlossberg v. Maryland (*In re* Creative Goldsmiths of Wash., D.C., Inc.), 119 F.3d 1140, 1147-49 (4th Cir. 1997); *see also* S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195, 201-03 (1996) (arguing that after *Seminole Tribe*, states could not be sued in bankruptcy court without their consent). *But see* Texas v. Walker, 142 F.3d 813, 820-23 (5th Cir. 1998) (holding that bankruptcy court had jurisdiction to determine discharge of state debt).
5. *See, e.g.*, Laura B. Bartell, *Getting to Waiver—A Legislative Solution to State Sovereign Immunity in Bankruptcy After* Seminole Tribe, 17 BANKR. DEV. J. 17, 17 (2000); Ralph Brubaker, *From Fictionalism to Functionalism in State Sovereign Immunity: The Bankruptcy Discharge as Statutory* Ex parte Young *Relief After* Hood, 13 AM. BANKR. INST. L. REV. 59, 68-69 (2005) [hereinafter Brubaker, *From Fictionalism*]; Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief*, 76 AM. BANKR. L.J. 461 (2002); Leonard H. Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the* Seminole Tribe *Doctrine*, 74 AM. BANKR. L.J. 1 (2000); The Honorable Randolph J. Haines, *Getting to Abrogation*, 75 AM. BANKR. L.J. 447, 468-70 (2001) (documenting state infringements on bankruptcy rights post-*Seminole Tribe*); Katrina A. Kelly, *In the Aftermath of* Seminole: *Waiver of Soveriegn [sic] Immunity Under Section 106(b) of the Bankruptcy Code*, 15 BANKR. DEV. J. 151, 182-83 (1999); Ned W. Waxman & David C. Christian II, *Federal Powers after* Seminole Tribe: *Constitutionally Bankrupt*, 47 DRAKE L. REV.

Eight years later, the Court began to backtrack. In *Tennessee Student Assistance Corp. v. Hood*, it declared that discharge actions, because they are in rem and not suits against the state, did not violate the Eleventh Amendment.[6] Two years later, in *Central Virginia Community College v. Katz*, the Court declared that in personam actions to reclaim preferential transfers—concededly suits against the state—were permissible because they were "ancillary" to and necessary to facilitate the in rem functioning of bankruptcy courts.[7] The five-person *Katz* majority carved out a bankruptcy-wide exception to *Seminole Tribe* by finding that when the states ratified the Bankruptcy Clause, they intended to cede their claims to sovereign immunity in suits brought to enforce bankruptcy laws. As written, the decision did not purport to alter *Seminole Tribe*'s holding that Congress cannot subject states to suit under Article I without their consent.[8] Instead of attacking that principle directly, it grafted consent onto the Bankruptcy Clause itself.

However, it is unlikely that the last word has been spoken on the matter. While the *Katz* majority disclaimed *Seminole Tribe*'s dicta that Congress cannot abrogate state immunity under the Bankruptcy Clause,[9] there are several reasons to suspect that the Court will revisit the issue and revise its recent judgments. First, decisions delineating the Eleventh Amendment have unusually unpredictable lifespans, perishing[10] (and sometimes reanimating) with the changing composition of the Court. Neither of the Court's factions has been shy about casting stare decisis aside when reviewing decisions pertaining to the scope of state sovereign immunity.[11] The fierceness and

467, 483-84 (1998). *But see* O'Brien v. Vermont (*In re* O'Brien), 216 B.R. 731, 736 (Bankr. D. Vt. 1998) (dismissing such criticism as cries of alarm by "Chicken Littles").

6. 541 U.S. 440, 443, 453 (2004).

7. 546 U.S. 356, 373 (2006).

8. 517 U.S. 44, 47 (1996).

9. 546 U.S. at 363.

10. *See* Pennsylvania v. Union Gas Co., 497 U.S. 1 (1989) (plurality opinion), *overruled by Seminole Tribe*, 517 U.S. at 63-73; Parden v. Terminal Ry. Co. of Ala. Docks Dep't, 377 U.S. 184 (1964), *overruled by* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

11. The liberal wing has explicitly and consistently signaled its desire to overrule *Seminole Tribe*. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 97-98 (2000) (Stevens, J., dissenting) ("Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. . . . [T]he reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference and respect owed to decisions of this Court."); *Coll. Sav. Bank*, 527 U.S. at 699 (Breyer, J., dissenting) (declaring that he is "not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*"). The conservative wing has been equally willing to uproot precedent articulating a generous view of Congress's power

persistence of the factions' disagreement has occasioned scholarly resort to military analogies: one scholar speaks of "tit-for-tat retaliation,"[12] another of "doctrinal guerilla warfare."[13] Importantly, the composition of the Court has undergone a significant change since *Katz*: one week after Justice O'Connor furnished the fifth vote in that decision, Justice Alito was sworn in as her

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to override state immunity. *See, e.g.*, *Coll. Sav. Bank*, 527 U.S. at 680 (overruling *Parden*, 377 U.S. 184 (1964)); *Seminole Tribe*, 517 U.S. at 63-73 (overruling *Union Gas Co.*, 491 U.S. 1 (1989) (plurality opinion)); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 127 (1984) (Stevens, J., dissenting) ("[T]he Court repudiates at least 28 cases, spanning well over a century of this Court's jurisprudence. . . ."); *id.* at 132-37 (describing these cases). For an analysis of the internal dispute in the Court over sovereign immunity and the Court's willingness to disregard precedent, see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 52 & n.205 (1988); and Neil S. Siegel, *State Sovereign Immunity and Stare Decisis: Solving the Prisoners' Dilemma Within the Court*, 89 CAL. L. REV. 1165 (2001).

12. Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2520 (2006).

13. Martin H. Redish & Daniel M. Greenfield, *Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of* Central Virginia Community College v. Katz, 15 AM. BANKR. INST. L. REV. 13, 19 (2007). Academic treatment of the Court's Eleventh Amendment jurisprudence has been overwhelmingly negative. Among the common criticisms of this body of law is that it is confusing, unprincipled, subversive to the supremacy of federal law, and contrary to the notion that for every right against the government there should be a corresponding remedy. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (arguing that expansive readings of state sovereign immunity undermine the constitutional guarantee to redress for government wrongs); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) (arguing that the Eleventh Amendment was intended to eliminate diversity jurisdiction, not jurisdiction based on federal claims); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) (arguing that the Court has strayed from the Framers' understanding of state sovereign immunity and that the "eleventh amendment [sic] today represents little more than a hodgepodge of confusing and intellectually indefensible judge-made law"); Jackson, *supra* note 11, at 72-104 (arguing that state sovereign immunity is a common law principle that Congress may overrule); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1670 (2004) (criticizing the Court for giving an expansive meaning to the "precise rule-like terms" of the Eleventh Amendment); Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana: *An Essay on Law, Race, History and "Federal Courts,"* 81 N.C. L. REV. 1927 (2003) (arguing that Court's decision in *Hans v. Lousiana* extending the Eleventh Amendment to suits brought by citizens against their own state was part of a post-Reconstruction settlement to reestablish "white rule" in the South).

replacement. This has led at least two scholars to question *Katz*'s durability[14] and another to predict its demise.[15]

Second, the problematic reasoning on display in *Hood* and *Katz* leaves these decisions vulnerable to pruning or repeal.[16] Unable to attack *Seminole Tribe*'s holding head-on, the *Katz* majority argued that bankruptcy was unique among Article I grants of authority. But in disaggregating the bankruptcy power from the rest of Article I, the majority relied on a questionable characterization of bankruptcy proceedings as in rem and, therefore, inoffensive to state immunity. It padded a gossamer thin historical record with speculation to assert that the states "understood" they were ceding their immunity in all suits "on the subject of Bankruptcies"—in rem and in personam alike—when they ratified the Bankruptcy Clause.[17] Thus, even scholars and practitioners who applauded the ultimate conclusion found fault with how the Court arrived at its decision.[18]

Third, the Supreme Court will likely have to revisit *Katz* to clarify its scope. The majority did not define the limits of its "ancillary order" theory.[19] The majority provided that "insofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction . . . implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity";[20] but it also warned that its decision was "not meant to suggest that every law labeled a

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14. Vicki C. Jackson & Judith Resnik, *Sovereignties—Federal, State, and Tribal: The Story of* Seminole Tribe v. Florida, *in* FEDERAL COURTS STORIES, 329, 356 (Vicki C. Jackson & Judith Resnik eds., 2010).

15. *See* Rochelle Bobroff, *The Early Roberts Court Attacks Congress's Power to Protect Civil Rights*, 30 N.C. CENT. L. REV. 231, 260 (2008).

16. For a trenchant criticism of *Hood*, see The Honorable Randolph J. Haines, *The Uniformity Power: Why Bankruptcy is Different*, 77 AM. BANKR. L.J. 129 (2003) [hereinafter, Haines, *Uniformity*].

17. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 372, 370 (2006).

18. *See* Ralph Brubaker, *Explaining* Katz*'s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 97 (2007) [hereinafter Brubaker, *Explaining* Katz]; Brubaker, *From Fictionalism*, *supra* note 5, at 74-80; Thomas E. Plank, *State Sovereignty in Bankruptcy After* Katz, 15 AM. BANKR. INST. L. REV. 59, 60 (2007); Redish & Greenfield, *supra* note 13, at 48. As one scholar aptly put it, "In *Katz*, the Court created a bad exception to a bad rule. It used speculative history to counter speculative history, unprincipled reasoning to counter unprincipled reasoning, silence to counter silence." Scott Fruehwald, *The Supreme Court's Confusing State Sovereign Immunity Jurisprudence*, 56 DRAKE L. REV. 253, 298 (2008).

19. Richard Lieb, *State Sovereign Immunity: Bankruptcy is Special*, 14 AM. BANKR. INST. L. REV. 201, 232 (2006) (arguing that the "ancillary" includes all proceedings "related to" bankruptcy).

20. *Katz*, 546 U.S. at 373.

'bankruptcy' law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity."[21] That formulation cum caveat prompts a new set of questions. What are the dimensions of an ancillary order? To which bankruptcy laws does the ancillary order theory apply? Insofar as the majority purported to ground its conclusion in the Framers' comprehension of contemporary bankruptcy law, how should the courts adapt that intent to modern innovations in the Bankruptcy Code? As the courts take up these nagging questions, opportunities will abound to roll back *Katz*.

Perhaps the most unsettled issue is whether states intended to submit themselves to suit for retroactive money damages. In *Edelman v. Jordan*,[22] the Court etched a distinction into Eleventh Amendment doctrine between *Ex parte Young* suits for prospective relief, which it permitted, and actions for retrospective monetary relief, which it did not. Conservatives on the Court have defended this remedial distinction on the grounds that it strikes an appropriate balance between the need to maintain the primacy of federal law and the preservation of state immunity.[23] In *Green v. Mansour*, a five-Justice majority went a step further and declared that remedies designed only to serve "compensatory or deterrence interests" were impermissible under the Eleventh Amendment.[24] Much rides on whether the Court applies that remedial distinction in the bankruptcy context. As explained below, bankruptcy violations may inflict severe economic harm on already financially distressed parties, but in most cases the violation is complete before the party can commence an action for relief. In an effort to ensure adequate compensation and deter misconduct, the Code provides for compensatory damages, punitive damages, and attorneys' fees for willful bankruptcy violations.[25] But this

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21. *Id.* at 378 n.15.

22. 415 U.S. 651, 663 (1974).

23. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105-06 (1984). For an interesting discussion of the prospective-retrospective remedial distinction, see Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998).

24. 474 U.S. 64, 68 (1985).

25. *See* 11 U.S.C. § 362(k)(1) (2006) ("[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."). One lower court has found that *Katz* does permit such suits. *See* Fla. Dep't of Revenue v. Omine (*In re* Omine), 485 F.3d 1305 (11th Cir. 2007). But there is a strong argument that it is prohibited under *Edelman*, in which the Supreme Court held that "[a] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." 415 U.S. at 663.

provision's constitutionality as applied to states is an open question even after *Katz*.

Finally, the recent economic crisis may hasten reconsideration. The number of bankruptcy filings has skyrocketed in the past two years,[26] any one of which might occasion the act of state noncompliance that furnishes the test case to roll back *Katz*. Perhaps more importantly from a realist vantage point, the economic turbulence responsible for the surge in bankruptcy filings has also occasioned state budgetary crises across the country.[27] Against this backdrop, the argument that the Eleventh Amendment is a necessary bar to private suits that "threaten the financial integrity of the States"[28] may resonate more with swing Justices who are asked to endorse a rule that would subject financially stressed states to further liability.

To shore up *Katz*'s holding—and ensure its extension to retroactive damages actions—this Note advances a new theory as to how Congress can abrogate state sovereign immunity in bankruptcy proceedings. This Note proposes that Congress re-enact § 106(a)[29]—the Bankruptcy Code's immunity-stripping provision—under Section 5 of the Fourteenth Amendment. While the factions within the Court continue to contest whether Article I can ever be a valid source of authority to subject states to suit, both sides agree—and *Seminole Tribe* explicitly affirmed—that Congress may abrogate state immunity under Section 5 of the Fourteenth Amendment to enforce the substantive guarantees of Sections 1 through 4.[30] Thus, in the aftermath of *Seminole Tribe*, Congress began to rejustify immunity stripping provisions originally enacted under Article I as valid exercises of its Section 5 powers. While the Court has thwarted many of these efforts in a constellation of decisions that has reworked several key areas of constitutional doctrine, [31] this Note argues that abrogating state immunity in bankruptcy under Section 5 remains a viable option.

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26. Bankruptcy filings have increased steadily since 2006, and increased by thirty-four percent in fiscal year 2009. News Release, Bankruptcy Filings Up 34 Percent over Last Fiscal Year (Nov. 25, 2009), http://www.uscourts.gov/Press_Releases/2009/BankruptcyFilingsSep2009.cfm [hereinafter News Release, Bankruptcy Filings Up].

27. *Jobless Rate Went Higher in 26 States Last Month*, N.Y. TIMES, Aug. 22, 2009, at B6.

28. Alden v. Maine, 527 U.S. 706, 750 (1999).

29. 11 U.S.C. § 106(a).

30. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) (affirming the Court's holding in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress can extinguish state sovereignty under the Fourteenth Amendment).

31. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (invalidating a provision of the American Disabilities Act authorizing suit against states for disability discrimination); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (invalidating a provision of the Age Discrimination in Employment Act authorizing suit against states for age

Many scholars and judges have been quick to dismiss this option, casting the Court's decision in *United States v. Kras* that individuals lack substantive due process rights in bankruptcy as the gravaman of any attempt to frame state defiance of federal bankruptcy law as a violation of the Fourteenth Amendment. I contend, however, that by resorting to a different doctrine – the doctrine of "statutory entitlements" and *procedural* due process – it is in fact possible to bring federally conferred bankruptcy rights within the ambit of the Fourteenth Amendment. The key substantive guarantee for the purposes of this analysis is the Due Process Clause, which provides that the state may not "deprive any person of . . . property, without due process of law."[32] *City of Boerne v. Flores*[33] held that Congress's powers under the Fourteenth Amendment are remedial, not definitional – that is, Congress can remedy ongoing violations of constitutional rights but it cannot declare the substance of those rights. There is, however, an important asterisk to that proposition. Determining *how much* process must accompany state deprivations of property interests is the prerogative of the Court. But determining whether a constitutionally cognizable property interest exists in the first place is primarily (albeit no longer exclusively) the function of the legislature.[34] Until recently, the Court would recognize a protected property interest in any monetizable benefit grounded in positive law, so long as that law constrained officialdom's discretion in dispensing and terminating the benefit.[35] The Court dubbed these "statutory entitlements," a category encompassing, among other things, welfare, government employment, unadjudicated causes of action, public education, and licenses.[36]

This Note adds bankruptcy protections to that list. Such protections display all the attributes of statutory entitlements: they have readily ascertainable monetary values, and they are grounded in the Federal

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discrimination); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (invalidating a law authorizing suit against states for false advertising); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (invalidating a law authorizing suit against a state for patent infringements).

32. U.S. CONST. amend. XIV, § 1.

33. 521 U.S. 507, 519 (1997).

34. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'" (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part))).

35. *See infra* Section IV.

36. *See infra* notes 201-206.

Bankruptcy Code. Most importantly, insofar as the Code binds the states by virtue of the Supremacy Clause,[37] federal bankruptcy regulations act as an absolute constraint on state discretion to deprive individuals of federally conferred bankruptcy rights. It is at this juncture that Congress's legislative powers under Article I and its abrogation powers under Section 5 converge. Even the *Katz* dissenters implicitly concede that, though *Seminole Tribe* may have eliminated Article I as a source of authority to subject states to private suit in bankruptcy, *Seminole Tribe* did nothing to alter Congress's unquestioned authority under Article I to impose *substantive obligations* on the states in the field of bankruptcy.[38] The Court's most fervid defenders of state sovereign immunity would readily acknowledge that a state that defies the mandates of the Bankruptcy Code acts in violation of federal law,[39] and, in fact, the *Seminole Tribe* majority proffered a list of legal tools that both private citizens and the federal government might use to enforce federal law in the face of state noncompliance.[40]

In short, the import of the Eleventh Amendment is that it purges a particular enforcement technique—private suits against unconsenting states—from that list; it does not alter the unlawfulness of the state's noncompliance. *Seminole Tribe* implicitly erects a distinction between state action that is unlawful (state defiance of federal commands) and state action that is unconstitutional (state deprivation of property without due process). *Seminole Tribe* extinguishes Congress's authority to authorize private suits against the state to counter the former, but upholds that authority to counter the latter.

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37. U.S. CONST. art. VI, cl. 2.

38. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 384 (2006) (Thomas, J., dissenting) (arguing that the states' authority to legislate in the field is a facet of sovereignty independent of their capacity to avoid being hauled into court by private parties).

39. Indeed, decisions extending *Seminole Tribe* have consistently flagged the distinction between Congress's unquestioned ability to impose obligations on the states via Article I and its authority to enforce those obligations by authorizing private suit. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring) ("It must be noted, moreover, that what is in question is not whether the Congress, acting pursuant to a power granted to it by the Constitution, can compel the States to act. What is involved is only the question whether the States can be subjected to liability in suits brought not by the Federal Government . . . but by private persons seeking to collect moneys from the state treasury without the consent of the State."); Alden v. Maine, 527 U.S. 706, 732-33 (1999) (holding that Congress's authority to pass laws binding on the states does not give rise to an incidental authority to subject states to private suit); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

40. *Seminole Tribe*, 517 U.S. at 72 n.16.

And here is the key point: the Supremacy Clause, by eliminating states' discretion to defy federal bankruptcy law, satisfies the final condition of a statutory entitlement. It effectively elevates bankruptcy rights to the status of protected property. Therefore, when a state trenches on those rights without due process, it not only acts unlawfully—it acts unconstitutionally. Having established the predicate constitutional violation, Congress should be able to invoke its remedial powers under Section 5 to subject states to suit.[41]

Two companion cases, *College Savings Bank* and *Florida Prepaid*, have concededly muddied the doctrinal waters. In *College Savings Bank*, the Court invalidated a law subjecting states to suit for false and misleading advertising on the grounds that the interests the law protected did not qualify as property. Writing for five members of the Court, Justice Scalia held that an essential attribute of protected property is the "right to exclude."[42] The majority did not explain how this squares with the previous definition of property as a statutory entitlement and the Court's recognition of nonexclusionary rights like unadjudicated causes of action[43] and education.[44] In *Florida Prepaid*, the same majority held that Congress could not subject states to suit for infringements on federally conferred property rights if the states offered their own remedy.[45] These cases may prefigure greater judicial involvement in defining the dimensions of protected property as well as a high degree of suspicion toward congressional attempts to sidestep *Seminole Tribe* by grounding Article I enactments in the Fourteenth Amendment. They suggest that Congress may not simply impose a duty on the states, denominate it property, and enforce the right by subjecting states to suit. But, as I will show, these cases do not undermine the serviceability of entitlement theory as a basis for abrogating state immunity in bankruptcy proceedings.

The statutory entitlement/due process approach presents numerous advantages. It does not rely on a quixotic search for a fundamental right to bankruptcy protections in the Constitution itself. It recognizes that most bankruptcy rights are bequeathed by Congress and may be retracted without constitutional objection.[46] It provides a substitute rationale for upholding

41. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

42. 527 U.S. at 672.

43. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

44. Goss v. Lopez, 419 U.S. 565 (1975).

45. 527 U.S. at 643.

46. *Cf.* Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part) (explaining that the legislature may elect not to confer a property interests in the first place).

abrogation should a later Court reject the reasoning in *Katz*. It also guarantees that individuals will be able to wrest money damages from states for flouting bankruptcy regulations, for it is well settled that Congress may open the states' purses to private suits for infringements of Fourteenth Amendment rights.[47]

This Note proceeds as follows: Part I explains why permitting states to assert sovereign immunity to evade the jurisdiction of bankruptcy courts undermines the proper functioning of the bankruptcy regime. Part II summarizes the recent Court rulings in *Hood* and *Katz* that have narrowed state sovereign immunity defenses in bankruptcy proceedings. Part III offers a critique of *Hood* and *Katz* and explains why the bankruptcy-wide exception to *Seminole Tribe* is vulnerable to rollback by the present Court. Part IV explains how bankruptcy protections qualify as property cognizable under the Due Process Clause and how states use their immunity as a shield to unconstitutionally deprive individuals of those property rights. It will then explain how Congress may use Section 5 to enforce those rights against state infringements. Finally, Part V will explain the broader implications of entitlement theory, as well as its limitations, as a vehicle to bypass the Court's holding in *Seminole Tribe*.

I. THE DESTRUCTIVE CONSEQUENCES OF SOVEREIGN IMMUNITY DEFENSES IN BANKRUPTCY PROCEEDINGS

In *Seminole Tribe*, a five member majority ruled that Congress could not authorize suits against states in federal court to enforce legislative enactments passed under the Commerce Clause of Article I.[48] In *Alden v. Maine*, the same majority extended that principle to immunize states from private suits arising under federal claims in state courts.[49] While neither decision pertained to bankruptcy, the majority and dissent in *Seminole Tribe* pronounced that the ruling applied to the full run of Article I grants, bankruptcy included.[50]

Indeed, the conclusion that no Article I power was spared *Seminole Tribe*'s judgment seemed to follow inexorably from the broad suppositions about state sovereign immunity on which the majority relied. The majority's approach disaggregated state sovereignty into two independent facets—immunity from

47. *Fitzpatrick*, 427 U.S. 445.

48. In so doing, the majority overruled its decision seven years prior in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that the Commerce Clause was a valid source of authority to abrogate state immunity. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66 (1996).

49. 527 U.S. 706 (1999).

50. *See supra* note 2 and accompanying text.

private suit and freedom from federal regulation—and implied that the validity of the congressional regulation had no bearing on whether Congress could enforce it by subjecting states to suit.[51] Further, the majority's approach refused to credit arguments about the pragmatics of enforcement; even a showing that abrogating immunity was critical to enforcing a particular regulatory regime would not conjure Article I authority to do so. Rather, the only source of authority to displace state sovereignty after *Seminole Tribe* was the Fourteenth Amendment, and because few believed bankruptcy implicated its provisions, it appeared that states retained immunity in suits brought in state and federal courts to enforce compliance with validly enacted federal bankruptcy laws.

Many scholars criticized this result, expressing anxiety that preserving state immunity defenses in bankruptcy would undermine the regime's integrity.[52] States are not mere spectators in the bankruptcy process—in a majority of cases they are implicated as creditors filing tax claims, environmental creditors, equity interest holders, bond and leaseholders, parties to discharge disputes, or as defendants from whom trustees and debtors seek recovery. As this Part elaborates, permitting states to assert their sovereign immunity in bankruptcy proceedings threatens to undermine the three core principles underpinning the bankruptcy regime: ensuring equitable distribution among creditors,[53] rehabilitating viable businesses,[54] and affording the "honest but unfortunate debtor" a fresh start.[55]

A. Equality of Distribution Among Creditors

The primary purpose of the bankruptcy regime is to provide a collective system that maximizes return for the body of creditors by distributing the debtor's assets pro rata according to a set system of priorities.[56] The problem that the bankruptcy cures is thus: when a debtor becomes insolvent, there are a multitude of creditors clamoring to collect from a pile of assets that is, by definition, too small to accommodate all claims. Knowing this, creditors have

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51. 517 U.S. at 72.

52. *See, e.g.*, Bartell, *supra* note 5; Haines, *supra* note 5; Kenneth N. Klee, James O. Johnston & Eric Winston, *State Defiance of Bankruptcy Law*, 52 VAND. L. REV. 1527, 1579-84 (1999).

53. *See* Young v. Higbee Co., 324 U.S. 204, 210 (1945).

54. JEFF FERRIELL & EDWARD J. JANGER, UNDERSTANDING BANKRUPTCY § 1.01, at 5-6 (2d ed. 2007).

55. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" (quoting Grogan v. Garner, 498 U.S. 279, 286, 287 (1991))).

56. *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 7-19 (1986).

every incentive to collect as much as possible as fast as possible, without any regard for the fact that maximizing their recovery comes at the expense of other creditors. For example, imagine a debtor owed $10,000 to each of ten unsecured creditors for a total of $100,000 in debts, but she only has $10,000 total in assets. Without some externally imposed system of debt collection, the first creditor to file suit and get a judgment collects all $10,000—the remaining nine creditors are left empty handed. But if all parties could agree to file their claims simultaneously, each would get a guaranteed return of $1,000. This hypothetical agreement is often called the "creditors' bargain."[57] The bankruptcy regime solves the collective action problem by imposing the creditors' bargain: the moment a party files for bankruptcy, an automatic stay issues that prevents all collection efforts.[58] To counteract creditors' incentives to beat the bankruptcy filing and collect at the first signs of insolvency, the Code provides that all pre-petition payments within ninety days of filing will be returned to the estate.[59] The assets are then collected into a single estate so they may be distributed on an equitable basis.[60]

This system cannot function if one creditor, especially one as large and frequent as the state, can opt out by asserting immunity. If states were unbound by the Code, a state could initiate collection proceedings and deplete the debtor's estate before the other creditors had time to file their proofs of claim, and the courts would be unable to afford either debtor or creditor relief. The Seventh Circuit explained the dire consequences resulting from the creditors' race to collect claims:

> If the federal courts were not able to order a state to turn over assets to a bankruptcy estate, then any state owed money by a debtor having financial problems would have a strong incentive to collect whatever funds it believed to be due as rapidly as possible—even if this pushed the debtor into insolvency—rather than risking the possibility of recovering only a portion of their debt in any subsequent bankruptcy proceedings. In effect, we would be holding that the Constitution makes a state a preferred creditor in every bankruptcy. The very existence of this power would doubtless encourage other creditors to

57. FERRIELL & EDWARD, *supra* note 54, § 1.02, at 10.

58. 11 U.S.C. § 362 (2006).

59. *Id.* § 547.

60. *Id.* § 541(a)(1); 28 U.S.C. § 1334(e) ("The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction . . . of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate . . . .").

> accelerate their collections. The end result would be an increase in bankruptcies and a distortion of the system of preferences that Congress has carefully crafted.[61]

In short, allowing the state to assert its immunity would turn it into a super-creditor, unraveling the equitable guarantees of the bankruptcy regime.

B. Rehabilitating Viable Businesses

A second purpose of the bankruptcy system is to give distressed but viable businesses an opportunity to regain solvency. The central purpose of Chapter 11 bankruptcy is to preserve going-concern value, save jobs, and promote the efficient use of capital.[62] If the going-concern value is greater than the liquidation value of its assets, Chapter 11 reorganization will enable debtors to pay a higher percentage of their prepetition debts than Chapter 7 liquidation.[63] However, a permissive bankruptcy regime that allowed selected creditors to nibble away at the estate could cripple potentially profitable businesses and force debtors into inefficient and unnecessary liquidations. Thus, the bankruptcy system offers two safeguards. First, the Code provides that if a creditor seizes property prior to the debtor's bankruptcy filing, the creditor must return the property to the estate.[64] The reason is simple: property seizures, even if they do not immediately force the business to shutter, may hamper the business's ability to generate income, worsen its financial standing, and eventually force liquidation. To take a stylized example, a successfully reorganizing publishing company could be well on its way out of insolvency, but if a state creditor lost patience and exercised its lien on the printing press, business would come to a halt, and the other creditors would watch their investments vanish. If a state were to seize a debtor's assets prior to the bankruptcy filing and assert its immunity, neither the debtor nor the creditors would have recourse in federal court. Even if the state waived its common law

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61. McVey Trucking, Inc. v. Sec'y of State (*In re* McVey Trucking, Inc.), 812 F.2d 311, 328 (7th Cir. 1987).

62. United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983) ("By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.'" (internal citations omitted)).

63. Of course, this simplistic formulation is more often true in theory than in reality. The vast majority of firms never manage to successfully reorganize. WILLIAM D. WARREN & DANIEL J. BUSSEL, BANKRUPTCY 593 (6th ed. 2002).

64. 11 U.S.C. § 542(a).

immunity in its own courts and the private parties sought a remedy in state court, the delays and expense of pursuing parallel suits in two courts could severely hamper the viability of reorganization.[65]

Second, the Code provides for a temporary injunction against debt-collection efforts at the moment of filing, called the automatic stay. The automatic stay has been referred to as "an essential foundation block of the bankruptcy rebuilding process" for good reason.[66] The moment the debtor files a bankruptcy petition, all civil actions involving the debtor, her property, and the property of the estate are brought to a halt. This provides debtors with a "breathing spell" from creditor pressure and harassment to collect their claims.[67] For an individual, this might stop an imminent mortgage foreclosure sale or prevent a wage garnishment.[68] The automatic stay is especially critical for Chapter 11 reorganization cases, in which the creditors' interest in prompt collection of the maximum amount of the debt collides with the debtor's need to maintain control over the estate in order to prepare and follow a reorganization plan.

One case in particular illustrates how state violations of the automatic stay may endanger the viability of a profitable business. In *In re Tri-City Turf Club,* a horse racing club in Kentucky filed a voluntary petition for reorganization under Chapter 11.[69] The State Racing Commission responded by revoking Tri-City's license to host live horse racing, in violation of the automatic stay.[70] The debtor initiated adversary proceedings against the Commission and won an injunction against the state from revoking its license.[71] But shortly thereafter, the Supreme Court rendered its decision in *Seminole Tribe* and the bankruptcy court dismissed the adversary proceeding, holding that "*Seminole Tribe* clearly undermines the jurisdictional basis of this action against the

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65. *See* Paul's Lobster Co. v. Massachusetts (*In re* Paul's Lobster Co.), 206 B.R. 275, 276-77 (Bankr. D. Mass. 1997); Meehan v. Pennsylvania (*In re* Barsky), 6 B.R. 624, 627 (Bankr. E.D. Pa. 1980) (observing that state retention of the debtor's property seized prepetition would lead Chapter 11 cases to forced liquidation); *see also* Gerson, *supra* note 5, at 8 ("[I]f the creditor making the seizure is a state claiming sovereign immunity, the debtor . . . may be forced to utilize lengthy state court remedies, making a reorganization much less likely.").

66. Patterson v. B.F. Goodrich Employees Fed. Credit Union (*In re* Patterson), 125 B.R. 40, 47 (Bankr. N.D. Ala. 1990).

67. Tringali v. Hathaway Mach. Co., 796 F.2d 553, 562 (1st Cir. 1986).

68. FERRIELL & JANGER, *supra* note 54, § 8.01, at 257.

69. *In re* Tri-City Turf Club, Inc., 203 B.R. 617 (Bankr. E.D. Ky. 1996).

70. *Id.* at 618.

71. *Id.*

defendant, Kentucky Racing Commission, and the members of the Commission. This court simply lacks jurisdiction to entertain this adversary proceeding."[72]

C. *The "Fresh Start" Principle*

A third core principle of American bankruptcy law is that the honest but unfortunate debtor should be given a financial "fresh start," liberated from the crippling debt that drove the debtor into insolvency.[73] The primary mechanism by which bankruptcy law affords a fresh start is the discharge. The debtor files a petition for bankruptcy, which triggers the automatic stay and halts collection efforts. Following the petition, the debtor submits a plan for the handling of certain outstanding debts, and upon completion, the automatic stay matures into the discharge—that is, the debtor is permanently relieved of personal liability for repayment of pre-petition debts and the individual (or corporate entity) becomes entitled to retain post-petition earnings.[74] If, however, creditors—either state or private—could insist on collecting discharged debts, individuals and corporations could be strangled by debt in perpetuity.

Exempting states from the court's jurisdiction interferes with the debtor's ability to secure the relief promised by the Bankruptcy Code in several ways. The most egregious cases are those in which the state disregards a court order shielding debtors from collection efforts. Thus, in *In re Martinez*, a court approved a Chapter 13 reorganization plan that listed tax debts to Puerto Rico's Department of Treasury.[75] The Department of Treasury never filed a proof of claim, and the debtors spent the next three years handling their finances in accordance with the reorganization plan, until the Department of Treasury suddenly filed a tax lien on the debtors' property for $100,000.[76] The debtors

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72. *Id.* at 620.

73. Wetmore v. Markoe, 196 U.S. 68, 77 (1904) ("Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes."). For a discussion of the rationale behind the "fresh start" principle, see Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

74. The Bankruptcy Code contains different sets of discharge rules depending on the nature of the bankruptcy and identity of the debtor. *See generally* FERRIELL & JANGER, *supra* note 54, § 13, at 465-530.

75. 196 B.R. 225, 226 (D.P.R. 1996). Puerto Rico is treated as a state for the purposes of the Eleventh Amendment. *Id.* at 228.

76. *Id.* at 226.

moved the court to hold the Department of Treasury in contempt for the Department's willful disregard of the automatic stay and attempted to collect monetary damages.[77] The court conceded that "it is clear that Treasury violated the debtors' automatic stay when Treasury filed a tax lien over debtors' property after the Chapter 13 petition had been filed," and even extolled the virtues of the automatic stay.[78] However, the court ultimately found that it did not have jurisdiction over the debtors' claim because the Treasury had not waived its sovereign immunity.[79]

In other instances, assertions of sovereign immunity complicate the court's ability to issue a discharge at all. Many tax claims are nondischargeable,[80] but in order for a claim to survive the discharge, the court must first determine whether it is allowable. To get that determination, debtors may have to initiate an adversary proceeding against the state. For example, claims for property back taxes are only allowable up to the value of the property.[81] In other words, if someone has real property worth $100,000 and has been assessed with real estate taxes for $150,000, only $100,000 of the claim is allowed. But, if the state can assert its sovereign immunity and evade the substantive obligations that the Bankruptcy Code imposes, it may be impossible for the debtor to secure a ruling exempting her from the additional $50,000 payment.[82] In short, permitting state sovereign immunity defenses may directly undermine a debtor's ability to vindicate the financial guarantees that federal bankruptcy provides.

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77. *Id.* at 228.

78. *Id.*

79. *Id.* at 228-30.

80. A wide variety of tax claims are entitled to priority under 11 U.S.C. § 507(a)(8) (2006), and 11 U.S.C. § 523(a)(1) renders each of those tax claims nondischargeable.

81. 11 U.S.C. § 502(b)(3).

82. *See, e.g.*, Mitchell v. Franchise Tax Bd. (*In re* Mitchell), 209 F.3d 1111, 1115 (9th Cir. 2000) (dismissing complaint to determine the amount and dischargeability of taxes owed to the state on Eleventh Amendment grounds).

II. RE-EVALUATING *SEMINOLE TRIBE*: THE BANKRUPTCY EXCEPTION UNDER *HOOD* AND *KATZ*

A. Hood *and the In Rem Exception*

Almost ten years after *Seminole Tribe* and after repeatedly declining opportunities to consider the question directly,[83] the Court finally granted certiorari to consider whether § 106(a) of the Bankruptcy Code validly abrogated sovereign immunity in bankruptcy proceedings. The case, *Tennessee Student Assistance Corp. v. Hood*, involved a debtor, Pamela Hood, who had over $4,000 in outstanding student loans.[84] After filing for Chapter 7 bankruptcy, Ms. Hood sought to take advantage of a provision of the Code that allows individuals who can show an "undue hardship" in paying off student loans to get the loans discharged.[85] But when she filed a complaint against the state agency that administered the student assistance program, the state moved to dismiss on the grounds that Congress's authorization of a suit against the state to secure a discharge of student loans infringed on its Eleventh Amendment immunity.[86] The bankruptcy court and the Sixth Circuit denied the motion, holding that § 106(a) validly abrogated the state government's sovereign immunity[87] and the Court granted certiorari to consider that question.[88]

Instead of reaching that question, though, the Court resolved the case on narrower grounds: writing for a 7-2 majority, Justice Rehnquist concluded that the discharge proceeding was an exercise of in rem jurisdiction and was therefore "not a suit against the State for the purposes of the Eleventh Amendment."[89] Bankruptcy jurisdiction, the majority reasoned, "derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates."[90] In bankruptcy, the debtor turns over all of his or her assets to the bankruptcy court's exclusive jurisdiction for ratable

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83. *See* Magnolia Venture Capital Corp. v. Prudential Sec., Inc., 151 F.3d 439 (5th Cir. 1998), *cert. denied*, 525 U.S. 1178 (1999); Wyo. Dep't of Transp. v. Straight (*In re* Straight), 143 F.3d 1387 (10th Cir. 1998), *cert. denied*, 525 U.S. 982 (1998); Texas v. Walker, 142 F.3d 813 (5th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).

84. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 444 (2004).

85. Generally, student loans are not subject to discharge absent a showing of "undue hardship." 11 U.S.C. § 523(a)(8).

86. *Hood*, 541 U.S. at 445.

87. *Id.*

88. *Id.* at 443.

89. *Id.*; *see id.* at 442, 447-49.

90. *Id.* at 447-48 (quoting *In re* Collins, 173 F.3d 924, 929 (4th Cir. 1999)).

distribution.[91] The court's role is to issue a judgment that determines the universe of claims against the estate and that judgment is binding "against the world"—including parties over whom the court would not have in personam jurisdiction.[92]

The in rem exception was not entirely without precedent. Seven years prior, the Court unanimously held in *California v. Deep Sea Research, Inc.* that Eleventh Amendment immunity was not a bar to purely in rem admiralty proceedings when the state was not in possession of the res.[93] In that case, researchers who had located a historic shipwreck within California's territorial waters sought a determination of their ownership claim.[94] The state countered that it had title to the wreck and asserted that its Eleventh Amendment immunity barred any federal court from considering the researchers' claim.[95] The Court rebuffed that contention, finding instead that because the proceeding adjudicated claims to the wreck and the state had neither a colorable claim nor possession of the res, the proceeding did not implicate state immunity.[96] The *Hood* majority thus situated the immunity exception in discharge proceedings in the narrow niche that *Deep Sea Research* chiseled out of *Seminole Tribe*'s holding.[97]

As the Court framed it, *Hood* was not a radical departure from the string of recent cases broadly construing state immunity. While the decision blackened the previously dim lines of an in rem exception to Eleventh Amendment immunity, it did not create a bankruptcy-wide exception to the *Seminole Tribe* rule. Indeed, the majority reaffirmed its judgment in *Seminole Tribe* that exercising in personam jurisdiction would be "an indignity to the sovereignty of a State" and run afoul of the Eleventh Amendment.[98] The decision permitted suits to issue discharge and automatic stay orders that implicated

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91. *See id.* at 447.

92. *See id.* at 447-48.

93. 523 U.S. 491, 494-95 (1998).

94. *Id.* at 494.

95. *Id.*

96. *Id.* at 504-08.

97. *See* Hood, 541 U.S. at 446-47.

98. *Hood*, 541 U.S. at 453. The majority recognized that the discharge proceeding at issue had the trappings of personal jurisdiction, such as issuance of process, *id.* at 452-53, and the dissent noted that the proceeding was similar in almost every meaningful respect to an adversarial proceeding in civil litigation, *id.* at 457-58 (Thomas, J., dissenting). Nonetheless, the majority reasoned that because the court *could* have discharged the debt without the compulsory process, the mere addition of a summons would not alter the character of the court's power as essentially in rem. *Id.* at 454-55.

state interests, but it did nothing to open up the door to suits for retroactive or monetary relief.[99] Relying on *Hood* alone, therefore, it is difficult to see how a trustee could have sued to recover voidable transfers or how a debtor could have sought punitive or compensatory damages from the state for violating a discharge or automatic stay.

B. Katz *and the Bankruptcy-Wide Exception*

The Court reached these issues two years later in *Central Virginia Community College v. Katz.*[100] *Katz* arose out of a bankruptcy involving a chain of bookstores that had made payments to a collection of state colleges shortly before filing its bankruptcy petition. The appointed trustee, Bernard Katz, moved to void these payments as "preferential transfers"—defined as a payment made by an insolvent debtor to a creditor within ninety days prior to filing for bankruptcy.[101] Recognizing that debtors on the brink of bankruptcy would be tempted to apportion their assets to preferred creditors (for example, friends and family) while leaving disfavored creditors (for example, credit card companies) with nothing, the Code provides that those payments will be disgorged and returned to the estate for equitable distribution among all creditors. The college, however, filed a motion to dismiss, arguing that since it was an arm of the state, the preference action—and § 106(a), which furnished jurisdiction—were impermissible violations of its sovereign immunity. This case posed a deeper challenge than *Hood*: the *Hood* majority characterized the discharge as an in rem proceeding because it did not involve recovery of money from the state defendant. But in *Katz* a judgment against Virginia's community colleges would necessarily entail the entry of a money judgment. The Court granted certiorari once again to determine whether Congress validly abrogated state sovereign immunity with § 106(a).[102]

In a 5-4 decision, the Court rejected the state's claim of sovereign immunity, but not because § 106(a) extinguished it. Rather, the majority opinion, penned by Justice Stevens, held that the states surrendered their sovereign immunity two hundred years prior when they ratified the

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99. In fact, the Court seemed to prejudge the issue that would appear before it two years later in *Katz*. *See Hood*, 541 U.S. at 454 ("The case before us is thus unlike an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference.").

100. 546 U.S. 356 (2006).

101. 11 U.S.C. § 547(b) (2006).

102. *Katz*, 546 U.S. at 361.

Bankruptcy Clause in Article I.[103] The majority reached this conclusion by examining the legal backdrop against which that Clause was adopted. Under the Articles of Confederation, the sovereign states had enacted a mélange of conflicting rules: "[U]ncoordinated actions of multiple sovereigns, each laying claim to the debtor's body and effects according to different rules" resulted in the imprisonment of debtors by states unwilling to accept their sister states' discharge.[104] Responding to this injustice, the Framers added the Bankruptcy Clause to provide "a uniform federal response" to the patchwork of existing state bankruptcy laws and the resulting lack of enforceability of state discharge provisions in other states.[105] The majority concluded that not only did the ratifying states cede authority to Congress to enact bankruptcy regulations, they "agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'"[106]

As evidence for its claim that the states intended to surrender their immunity, the majority pointed to statutes that Congress enacted in the years immediately following ratification that authorized federal courts to issue writs of habeas corpus requiring states to release debtors from their prisons. According to Justice Stevens, the proverbial dog did not bark: despite heightened sensitivities regarding issues of state immunity and the "intrusion upon state sovereignty" that the writs represented,[107] there was "no record of any objection . . . based on an infringement of sovereign immunity," either before or after the enactment of the Eleventh Amendment.[108] From this silence, the majority inferred consent not just to the authorization of the writs, but to laws designed to ensure uniformity in bankruptcy practice.[109]

That left the question: in which bankruptcy proceedings did the states intend to surrender their sovereign immunity? According to the majority, the Framers would have understood "laws on the subject of Bankruptcies" to

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103. *Id.* at 362.

104. *Id.* at 366.

105. *Id.* at 369. The Bankruptcy Clause is the only Article I power apart from the Naturalization Clause that has a uniformity requirement. *See* U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress to make "uniform Laws . . . on the subject of Bankruptcies").

106. 546 U.S. at 377.

107. *Id.* at 375. It was during this same period, Justice Stevens notes, that the Court handed down *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which so "shocked" the country as to impel the adoption of the Eleventh Amendment. 546 U.S. at 375 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934)).

108. 546 U.S. at 375.

109. *Id.* at 377.

encompass "more than simple adjudications of rights in the res."[110] True, the bankruptcy court's authority is principally an exercise in in rem jurisdiction, which *Hood* deemed nonviolative of the Eleventh Amendment because in rem actions "do[] not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction."[111] But the bankruptcy courts also historically possessed authority to issue "ancillary" orders "necessary to effectuate the in rem jurisdiction of the bankruptcy courts"[112]—among them, the authority to jail noncompliant third parties and recover preferential transfers.[113] According to the majority, the Framers understood that "the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the administration and distribution of the res," and must have intended to surrender sovereign immunity defenses in those concededly in personam proceedings as well.[114]

Putting to rest the question that had befuddled bankruptcy courts for a decade, the majority found that "[c]areful study and reflection have convinced us" that the *Seminole* dicta applying its holding to bankruptcy was mistaken.[115] In short, where *Hood* carved out a discharge-sized nook into sovereign immunity jurisprudence, *Katz* appeared to carve out a gaping bankruptcy-sized hole.

C. *The Court's Troubled Bankruptcy Jurisprudence: A Critical Look at* Hood *and* Katz

The reasoning in *Hood* and *Katz* leaves much to be desired, a troubling point because the post-*Katz* composition of the Court raises serious questions about the solidity of the judgment that the Bankruptcy Clause is outside the scope of *Seminole Tribe*'s holding.[116] Failing to muster enough votes to overturn *Seminole Tribe*, *Hood* and *Katz* sought to distinguish bankruptcy from the remainder of Article I powers. The Court identified three factors supporting its

110. *Id.* at 370-71.

111. *Id.* at 362.

112. *Id.* at 378.

113. *Id.* at 370.

114. *Id.*

115. *Id.* at 363.

116. Indeed, even scholars sympathetic to the outcome have criticized both *Hood* and *Katz* as prejudged outcomes in vain search of principled justification. *See* Brubaker, *Explaining* Katz, *supra* note 18, at 97; Brubaker, *From Fictionalism*, *supra* note 5, at 74-80; Plank, *supra* note 18, at 60; Redish & Greenfield, *supra* note 13, at 48.

contention that bankruptcy is special. First, the word "uniform" in the Bankruptcy Clause requires a bankruptcy regime that does not vary from state to state[117]—an impossibility if states can escape its provisions by claiming immunity. Second, it is evident from practices contemporary to the Convention that the ratifying states would have understood that they were ceding sovereignty in bankruptcy proceedings. And third, bankruptcy is unique because its powers are premised on in rem jurisdiction. All three of these arguments are highly disputable, which only enhances *Katz*'s vulnerability. Moreover, even if the Court ultimately accepts the validity of *Katz*, none of these arguments resolves the question of whether states enjoy immunity from actions for retroactive relief.

1. *Uniformity*

According to the *Katz* majority, the Framers' "primary goal" in mandating uniform bankruptcy laws "was to prevent competing sovereigns' interference with the debtor's discharge" and, specifically, to prevent one state from imprisoning debtors whose debts had been discharged by another state's courts. The majority thus concludes—based largely on the states' acquiescence to laws enabling federal courts to liberate debtors from state prisons—that the Framers intended to forgo sovereign immunity defenses in *all* core bankruptcy proceedings to ensure uniformity.[118] There are at least two objections to the majority's reasoning. First, one must have a particularly robust conception of uniformity to make the move from states accepting the binding force of other states' discharge orders to states ceding immunity in any and all bankruptcy proceedings in which the assertion of immunity would tend to inject interstate variance in debtor and creditor rights. History and precedent, however, ratify a much more constrained vision of uniformity, one that sanctions a great deal of deviation from state to state. Second, if the ill was interstate nonuniformity, it does not follow that the only cure is wholesale displacement of state immunity. Rather, uniformity could be achieved by a dual rule holding that states are bound by each others' discharge orders under the Full Faith and Credit Clause, but no state can be subject to compulsory process in bankruptcy courts absent consent.

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117. A state may add its own bankruptcy protections as long as they do not conflict with the federal Bankruptcy Code. For a related discussion, see *infra* note 212 and accompanying text.

118. *Katz*, 546 U.S. at 377. The majority was careful to note, however, that simply labeling something a bankruptcy law would not be sufficient to displace state sovereign immunity. *Id.* at 378 n.15.

There are two competing interpretations of the word "uniform" in the Bankruptcy Clause. The first reads the word as imposing a requirement that the Bankruptcy Code be geographically uniform[119]—that is, it prohibits Congress from enacting regionally specific bankruptcy laws.[120] Under this view, the word "uniform" acts as a substantive constraint on Congress's authority to promulgate bankruptcy regulations, not as a grant of power to use otherwise impermissible means to stamp out interstate bankruptcy variance. The second interpretation—the one adopted by the *Katz* majority—reads the word to impose a more stringent requirement that the *application* of the bankruptcy laws be uniform throughout the United States.[121] In other words, bankruptcy law must have the same impact on all similarly situated parties, regardless of which states they are in. The Court has labeled this second interpretation "personal" uniformity (as opposed to "geographical" uniformity).[122] This second view leads to a more substantial conclusion than the first: in ratifying the Bankruptcy Clause, the states did not merely cede to Congress a bounded power to enact geographically consistent laws. Rather, the states surrendered their authority to act in a manner that would upset the laws' uniform application.

But this proves too much. If "uniform" means that bankruptcy law must treat all similarly situated creditors and debtors equally, and if this requirement is so rigid as to divest states of their immunity in proceedings where asserting it might lead to disparate treatment, it should follow that states are prohibited from affirmatively enacting legislation that disrupts this uniformity. In other words, if the states surrendered their sovereign immunity to further some overriding constitutional command of personal uniformity, one might expect them to have surrendered in the same breath the authority to inject interstate variance into the bankruptcy regime's treatment of individuals by passing their own variable bankruptcy laws.[123]

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119. *See, e.g.*, Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring) ("The Constitutional requirement of uniformity is a requirement of geographic uniformity.").

120. *See* Bartell, *supra* note 5, at 57-58.

121. *Katz*, 546 U.S. at 377 n.13 ("Congress has the power to enact bankruptcy laws the purpose and effect of which are to ensure uniformity in treatment of state and private creditors.").

122. Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902).

123. *See Katz*, 546 U.S. at 383 (Thomas, J., dissenting) (observing that the majority's decision is based on the "conten[tion] that the Framers found it intolerable that bankruptcy laws could vary from State to State, and demanded the enactment of a single, uniform national body of bankruptcy law").

However, well over a hundred years of practice and doctrine affirm the authority of the states to enact divergent bankruptcy laws—laws that profoundly affect creditor and debtor rights depending on their state of residence.[124] Homestead exemptions are but one example: a debtor lucky enough to have primary residence in Florida gets to exempt her house no matter its value, whereas one with residence in Nevada is liable for the value of her house above $550,000.[125] The Court had previously rejected both the idea that the Constitution requires uniform application of bankruptcy laws and the idea that it preempts state actions that rupture uniformity in the bankruptcy regime in *Hanover National Bank v. Moyses*.[126] That case considered the constitutionality of a provision of the Bankruptcy Code that left intact each state's unique exemption scheme. Holding that the Bankruptcy Clause required "geographic, not personal, uniformity," the Court stated that "the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed."[127] In other words, Congress is free to refrain from legislating segments of bankruptcy law, and wherever

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124. Thus, Judge Haines argues that interpreting "uniform" as a grant of power to ensure uniform application as opposed to a constraint on enacting regionally specific bankruptcy laws "changes over a century of bankruptcy jurisprudence, and has implications far beyond the context of suits against States." The Honorable Randolph J. Haines, *Federalism Principles in Bankruptcy After* Katz, 15 AM. BANKR. INST. L. REV. 135, 136 (2007). For discussions of the substantial variance in state bankruptcy laws, see Daniel A. Austin, *For Debtor or Worse: Discharge of Marital Debt Obligations Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 51 WAYNE L. REV. 1369 (2005) (explaining the differing treatment of discharge in domestic support obligations); Daniel A. Austin, *The Bankruptcy Clause and the Eleventh Amendment: An Uncertain Boundary Between Federalism and State Sovereignty*, 42 U.S.F. L. REV. 383, 396 (2007) (explaining that many states have refused to adopt the tort of "deepening solvency" which imposes liability on corporate officers for artificially extending the life of moribund companies); and Paul R. Glassman, *Choice of State Law in Bankruptcy Cases: Part I*, AM. BANKR. INST. J., Sept. 2005, at 32 (providing an overview of differing state bankruptcy legislation). The Court's uniformity argument, brought to its logical conclusion, would seem to require the invalidation of all these divergent state laws.

125. FLA. CONST. art. X, § 4; NEV. STAT. ANN. § 21.090 (West 1997).

126. 186 U.S. 181 (1902); *see also* Stellwagen v. Clum, 245 U.S. 605, 613 (1918) ("Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States."). For a critique of the *Moyses* doctrine, see Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22 (1983) (arguing that the doctrine misreads the Framers' intent).

127. *Moyses*, 186 U.S. at 190.

Congress is silent the states are at liberty to speak.[128] The fact that the states speak in discordant tones is of no constitutional significance.[129]

Perhaps, then, the majority is embracing a more modest conception of uniformity: variegated state laws are permissible, but the enforcement of *federal* bankruptcy law must be unvarying across state lines. That, however, does not require abrogating immunity in all bankruptcy proceedings. Uniformity could just as easily be preserved by a nationwide rule that state agencies can *never* be ordered to grant specific discharges or turn over preferences to a private trustee—and that version of uniformity has the advantage of being consistent with the prevailing interpretation of the Eleventh Amendment. Granted, that alternative seems entirely unsatisfactory because it would disable creditors and debtors from vindicating some of their bankruptcy rights against the state. But, as the *Katz* dissent points out, so long as *Seminole Tribe* and *Florida Prepaid* are good law, the deleterious practical effects of immunity defenses are not a cognizable argument for concluding that Congress may strip states of immunity.[130]

2. *Plan of the Convention*

The *Katz* majority's argument that the states understood that they were ceding their sovereign immunity in bankruptcy proceedings—even ones that would award money judgments from state coffers—enjoys even less support. Given the dearth of evidence and near total absence of debate over the

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128. The *Katz* majority never mentions *Moyses* except in a string citation to support the proposition that bankruptcy jurisdiction is principally in rem. *Katz*, 546 U.S. at 370.

129. Some have claimed that *Katz* is consistent with the erosion of the *Moyses* doctrine in subsequent cases—*Regional Rail Reorganization Act Cases* (*3R Act Cases*), 419 U.S. 102 (1974); and *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982). Susan Hauser, *Necessary Fictions: Bankruptcy Jurisdiction After* Hood *and* Katz, 82 TUL. L. REV. 1181, 1229 n.331 (2008). This is incorrect: the *3R Act Cases* upheld a bankruptcy statute governing railroad reorganization in a single locale on the grounds that "the uniformity clause was not intended 'to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions.'" 419 U.S. at 159 (citing *In re* Penn Cent. Transp. Co., 384 F. Supp. 895, 915 (1974)). In so doing, the Court may have diluted the geographical uniformity requirement, but it never endorsed the more stringent personal uniformity standard.

130. 546 U.S. at 384-85 (Thomas, J., dissenting); *cf.* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645 (1999) (conceding that uniformity in patent law is critical, but arguing that this need is "a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law").

Bankruptcy Clause, the historical evidence for this proposition is slim and almost entirely speculative.[131]

Unable to cite any contemporary statements confirming the supposed intent to surrender immunity, the majority instead infers such a design by cobbling together three historical observations: first, the Framers were primarily concerned with state nonobservance of sister-state discharge orders; second, state submission to federal habeas jurisdiction over debtors incarcerated in state prisons evinces a settled understanding that the Eleventh Amendment did not bar such proceedings; and third, that while bankruptcy jurisdiction was primarily in rem, bankruptcy courts have historically possessed in personam powers to effectuate in rem adjudications. From there, the majority makes the inferential leap that the "coverage [of the states' cession of immunity] encompasses *the entire 'subject* of Bankruptcies.'"[132]

The problems with this reasoning are manifold. First, as the dissent points out, the lack of outcry over the writs proves little given that "the habeas writ was well established by the time of the framing, and consistent with then-prevailing notions of sovereignty."[133] Second, even if the states had understood the Bankruptcy Clause as extinguishing sovereign immunity in habeas proceedings, that means nothing for the myriad of other proceedings where the state is a party with financial interests at stake.[134] Issuing a writ of habeas for a debtor held in state prison at the behest of a private creditor is qualitatively different from suing a state for relief from debt or recovery of assets—unlike the former, the latter entails a direct draw on the state's coffers.[135] To this, the majority offers an unsatisfactory response: the Framers granted the entire power of bankruptcy law to Congress and the Framers understood that body of law to include the bankruptcy court's traditional power to retrieve preferential transfers.[136] But the majority adduced no evidence that the bankruptcy courts

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131. *Katz*, 546 U.S. at 379 (Thomas, J., dissenting). The Bankruptcy Clause was a last minute addition to Article I and was subject to minimal debate. *See* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 4-5 (William S. Hein & Co. 1994) (1935). The only recorded discussion of the bankruptcy power was a brief exchange between two drafters airing concerns about the imposition of the death sentence for debtors. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 489 (Max Farrand ed., 1966).

132. 546 U.S. at 370 (emphasis added).

133. *Id.* at 388-90 (Thomas, J., dissenting).

134. *See id.* at 387.

135. *See id.* (noting that "it was a particularly grave offense to a State's sovereignty to be hauled into court by a private citizen and forced to make payments on debts").

136. *Id.* at 370 (majority opinion) ("The power granted to Congress by that Clause is a unitary concept rather than an amalgam of discrete segments.").

had ever wielded—or the Framers thought they were capable of wielding—that retrieval power against the states.

The dissent points out a third flaw in the majority's interpretation of history: it does not follow from evidence that the Framers sought a uniform body of bankruptcy law that the Framers sought to waive the state's immunity to suit in bankruptcy proceedings.[137] If, as the majority's discussion suggests, the Framers' primary concern was the enforceability of discharge orders in all states, the solution would be to bind states through the Full Faith and Credit Clause, not to subject states to private suit.[138] Even if the Framers harbored a broader desire to preempt all inconsistent bankruptcy state laws, that does not necessarily mean that they intended to render the states susceptible to private suit. Numerous decisions left untouched by *Katz* have held that the state's authority to legislate and its ability to avoid suit without consent are two independent facets of sovereignty.[139] Thus, the Framers may have eliminated the states' sovereign capacity to enact regulations contrary to federal bankruptcy law while simultaneously preserving the states' immunity shield from private suits brought to enforce that body of federal law. This bifurcated view of sovereignty has inspired intense academic criticism.[140] But it remains the prevailing one.

3. *The In Rem Exception*

Katz and *Hood* build on the fact that the bankruptcy court's authority is principally in rem—that is, that the proceeding is directed at property as opposed to persons. However, while the in rem/in personam distinction has descriptive utility,[141] it is of little relevance in determining whether bankruptcy proceedings are consistent with the precepts of state sovereign immunity. The

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137. *Id.* at 379-82 (Thomas, J., dissenting); *see* Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 643 (2008).

138. 546 U.S. at 390-91 (Thomas, J., dissenting). Indeed, as the dissent observes, the bankruptcy issue arose in the Constitutional Convention during discussions of the scope of the Full Faith and Credit Clause.

139. *Id.* at 384 (Thomas, J., dissenting); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

140. *See supra* note 13.

141. It also has limited utility in context of establishing a court's personal jurisdiction over a defendant. *See* Burnham v. Superior Court, 495 U.S. 604, 620-21 (1990) (suggesting that the in rem/in personam distinction is relevant to ascertaining whether the court can assert personal jurisdiction over an individual consistent with the requirements of due process).

two premier values that sovereign immunity furthers are staving off suits that threaten "the financial integrity of the States"[142] and guarding against the "indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."[143] Even the purest in rem action, the general discharge, has significant effects on state coffers. From a financial standpoint, there is no difference between an order discharging a $10,000 debt to the state and a judgment against the state awarding $10,000 in monetary damages. The discharge may issue without the state having to expend the resources of dispatching a lawyer to court; but the same could be said for default judgments when monetary damages are at issue. A state that wishes to defend its financial interests in bankruptcy has no choice but to participate in the proceeding. The Supreme Court recognized the artificiality of the in rem/in personam distinction in *Shaffer v. Heitner* by agreeing with "[t]he overwhelming majority of commentators [who] have also rejected [the] premise that a proceeding 'against' property is not a proceeding against the owners of that property."[144] "All proceedings, like all rights," it concluded, "are really against persons."[145]

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142. Alden v. Maine, 527 U.S. 706, 750 (1999).

143. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1992) (quoting *In re* Ayers, 123 U.S. 443, 505 (1887)); *see* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 747 (2002) (extending state sovereign immunity beyond the confines of judicial proceedings on the grounds that the Eleventh Amendment protects states from having to defend themselves even in a federal administrative proceeding); *Seminole Tribe*, 517 U.S. at 58 (quoting *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 146); *id.* at 96 (Stevens, J., dissenting). Dignity has been a prominent theme in state sovereign immunity cases. *See, e.g.*, *Fed. Mar. Comm'n*, 535 U.S. at 760 (holding that sovereign immunity protected states from adjudication at a federal agency responding to a private party's complaint of a violation of a federal statute regulating shipping); *see also Alden*, 527 U.S. at 715 (commenting that "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity"); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997) (stating that "the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy" by private suits in federal courts, regardless of the basis of federal courts' jurisdiction); *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 146 (permitting states to appeal the denial of sovereign immunity defenses to ensure "that the States' dignitary interests can be fully vindicated"). For a critique of the Court's characterization of immunity as a product of state dignity, see Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

144. 433 U.S. 186, 205 (1977); *see also id.* at 212 ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification."). This accords with the *Restatement (Second) of Judgments*: "The distinction between 'in rem' and 'quasi in rem' jurisdiction, on the one hand, and 'in personam' jurisdiction, on the other hand, is in many respects elusive. Especially is this so when it is recognized that all exercises of jurisdiction have the purpose and effect of determining interests of persons." RESTATEMENT (SECOND)

As to the second interest, the only way to maintain that bankruptcy orders do not implicate the states' dignity interest in avoiding compulsory process is to decouple the initial in rem adjudication from its enforcement. An automatic stay is a universal injunction prohibiting creditors from recovering their property under threat of judicial retaliation. A general discharge is a court order that terminates creditors' property rights and renders recovery of those erstwhile debts unlawful. Even if one thinks the initial orders are not sufficiently coercive to implicate Eleventh Amendment immunity, any effort to enforce them—that is, the injunction enjoining collection—surely is. Any state agency that disregards the automatic stay or discharge will be hauled into court and ordered to desist.[146]

But even if one accepted that in rem proceedings did not infringe on state sovereign immunity, the outcomes in *Hood* and *Katz* hardly follow, for neither

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OF JUDGMENTS § 6 cmt. a. (1982); *see also* Kenneth J. Vandevelde, *Ideology, Due Process and Civil Procedure*, 67 ST. JOHN'S L. REV. 265, 294 (arguing that "one of the effects of mid-twentieth century jurisprudence was the collapse of the distinction between personal and property rights" and that "[w]ithout a distinction between personal and property rights, the distinction between in personam and in rem jurisdiction seemed to lose its justification").

145. *Shaffer*, 433 U.S. at 207 n.22 (quoting Tyler v. Court of Registration, 175 Mass. 71, 76 (1900), *appeal dismissed*, 179 U.S. 405 (1900)). Ralph Brubaker also makes a strong case that the Framers viewed bankruptcy discharge proceedings as an exercise of in personam, not in rem jurisdiction. *See* Brubaker, *From Fictionalism*, *supra* note 5, at 64. The Court's judgment in *Deep Sea Research* adds only a wrinkle: that case hinged on the fact that the state had failed to assert any colorable claim to the property and it was not in possession of the res. California v. Deep Sea Research, Inc., 523 U.S. 491, 498-501, 504 (1998). It was thus inapposite to discharge proceedings where the state always has a colorable claim to the property—usually derived from its tax code—and preferential recovery proceedings where the state does possess the res. Even after *Deep Sea Research*, the scope of the in rem exception was largely unsettled. Several pre-*Deep Sea Research* cases had suggested that the Eleventh Amendment barred all suits in federal court to adjudicate state interests in property. *See, e.g.*, *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 289 (O'Connor, J., concurring) ("A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest."); Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 682 (1982) (plurality opinion) ("The court did not have power . . . to adjudicate the State's interest in the property without the State's consent."); *id.* at 711 (White, J., concurring in part and dissenting in part) ("It is . . . beyond reasonable dispute that the Eleventh Amendment bars a federal court from deciding the rights and obligations of a State in a contract unless the State consents."). Justice O'Connor, who delivered the *Deep Sea Research* opinion for the unanimous Court, did not purport to overturn those decisions (though several concurring justices seemed to welcome such a move, *see* 523 U.S. at 509 (Stevens, J., concurring); *id.* at 510 (Kennedy, J., concurring)). Rather, she framed the decision as addressing the limited issue of in rem admiralty proceedings where the state lacked a colorable claim to the res. *Id.* at 506 (majority opinion).

146. *See* Brubaker, *From Fictionalism*, *supra* note 5, at 98-99, 125 (criticizing the characterization of discharge as in rem as a "fiction").

of those proceedings was actually in rem. The debtor in *Hood* filed an adversary complaint against the state to secure a student loan discharge.[147] As Professor Hauser notes, the Court committed an oversight by equating this with the general discharge for the purposes of its in rem analysis. The latter is "an undifferentiated, take it or leave it" order that is good against the world and requires minimal process and notice.[148] The former is governed by a different section of the Code,[149] requires an adversary proceeding against an individual creditor, and requires all the due process protections of a civil suit.[150] Moreover, this type of action has no effect on the bankruptcy estate; rather, "if the debtor/plaintiff prevails in this type of action, only the creditor's rights outside of bankruptcy are affected."[151] In response to these objections,[152] the *Hood* majority offered that "[n]o matter how difficult Congress has decided to make the discharge of student loan debt, the bankruptcy court's jurisdiction is premised on the res, not on the persona."[153] But where a privately initiated suit forces a state to defend its claim in court or default, it would seem that the court has overstepped that "premise."[154]

The Court's reasoning becomes even more problematic in *Katz*. The *Katz* majority recognized that preference actions entail the exercise of in personam jurisdiction but insisted that this exercise was redeemed because it is ancillary to and in furtherance of the court's legitimate in rem jurisdiction.[155] As a logical matter, it is hard to see how the advancement of proceedings *in*offensive to state sovereignty inoculates against constitutional challenge a suit that clearly *does* offend state sovereignty. The majority's position in *Hood* was that an exercise of in rem jurisdiction is legitimate because it is not in personam.[156] When one combines that proposition with *Katz*, the output is a dizzyingly

147. *See* 11 U.S.C. § 523(a)(8) (2006).

148. Hauser, *supra* note 129, at 1205.

149. 11 U.S.C. § 523. Even the amount of process varies. *See* FED R. BANKR. P. 7001.

150. *See* FED. R. BANKR. P. 7002.

151. Hauser, *supra* note 129, at 1223.

152. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 456 (2004) (Thomas, J., dissenting) ("[T]he adversary proceeding here clearly constitutes a suit against the State for sovereign immunity purposes."); *id.* at 457-59 (itemizing elements of compulsory process in the discharge action).

153. *Id.* at 450.

154. Hauser, *supra* note 129, at 1223.

155. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 347, 373 (2006).

156. *Hood*, 541 U.S. at 447-49 (explaining that discharge is an in rem action); *id.* at 452-53 ("Nor is there any dispute that, if the Bankruptcy Court had to exercise personal jurisdiction over [the state agency], such an adjudication would implicate the Eleventh Amendment.").

circular paralogism: in personam jurisdiction is legitimate because it is necessary to effectuate in rem jurisdiction, which is legitimate because it is not in personam.[157]

These infirmities in the majority's reasoning are reflected in the dissent's parting jab: "It would be one thing if the majority simply wanted to overrule *Seminole Tribe* altogether. That would be wrong, but at least the terms of our disagreement would be transparent. The majority's action today, by contrast, is difficult to comprehend."[158]

III. AN ALTERNATIVE GROUND FOR ABROGATING STATE SOVEREIGN IMMUNITY: PROCEDURAL DUE PROCESS

Given the shortcomings in the majorities' reasoning in *Hood* and *Katz* and the relatively short life expectancy of rulings defining the scope of the Eleventh Amendment,[159] scholars and practitioners may once again find themselves in search of an alternative constitutional underpinning on which to anchor Congress's authority to override state immunity in bankruptcy proceedings. The Fourteenth Amendment provides just such a foothold. The five members of the *Seminole Tribe* majority who declared that Congress could not invoke Article I to displace state sovereign immunity have repeatedly affirmed that Section 5 of the Fourteenth Amendment is a valid source of abrogation authority.[160] Thus, if bankruptcy rights could be lodged in one of the

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157. As Professor Hauser notes, the Court's choice of words—"ancillary to *in rem*"—"bears a superficial resemblance to ancillary jurisdiction, and it is possible that the Court's word choice in *Katz* was influenced by this similarity." Hauser, *supra* note 129, at 1217. That doctrine—also known as pendent or supplemental jurisdiction—was developed to permit federal courts to hear claims outside their subject matter jurisdiction where such jurisdiction was necessary "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994). For a good discussion of the doctrine, see Robert G. Bone, *Revisiting the Policy Case for Supplemental Jurisdiction*, 74 IND. L.J. 139 (1998). However, these jurisdiction-extending devices cannot justify the conclusion in *Katz* that bankruptcy courts may intrude on sovereign immunity to enforce in rem judgments. Sovereign immunity is, by its nature, a limitation on federal court subject matter jurisdiction and the Court has held that "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984).

158. *Katz*, 546 U.S. at 393 (Thomas, J., dissenting).

159. *See supra* Introduction and notes 10, 11.

160. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80 (2000); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59-60 (1996).

substantive provisions of the Fourteenth Amendment, Congress might be able to re-enact § 106(a) without resort to the problematic—and potentially vulnerable—theories propounded in *Hood* and *Katz*.

The first hurdle is finding a substantive provision that could house bankruptcy rights. Thus far, courts have resoundingly rejected efforts to characterize state bankruptcy violations as violations of substantive due process or the Privileges and Immunities Clause.[161] The reason this approach has failed is because a substantive due process challenge usually requires a showing either that the government action is arbitrary and substantively unjustifiable,[162] or that it assaults a fundamental interest.[163] The argument that state defiance of federal bankruptcy law is arbitrary and substantively unjustifiable would not seem a difficult one: the Supremacy Clause binds the states to the Bankruptcy Code, and there is no legal justification for flouting mandatory federal regulations. Indeed, the United States could, if Congress so authorized, successfully prosecute a suit against a state that violated any portion of federal bankruptcy law.[164] However, the fact that state noncompliance in bankruptcy is definitionally without legal justification does not mean that these violations implicate substantive due process. "Arbitrary" in the substantive due process context is a term of art: as Justice Souter wrote in *County of Sacramento v. Lewis*, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense. . . . [F]or half a century now we have spoken of the

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161. *See* Sacred Heart Hosp. v. Pa. Dep't of Pub. Welfare (*In re* Sacred Heart Hosp.), 133 F.3d 237, 243-45 (3d Cir. 1998); Schlossberg v. Maryland (*In re* Creative Goldsmiths of D.C., Inc.), 119 F.3d 1140, 1146-47 (4th Cir. 1997); Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co. (*In re* Estate of Fernandez), 123 F.3d 241, 245 (5th Cir. 1997); Quesada v. P.R. Dep't of Health (*In re* Arecibo Cmty. Health Care, Inc.), 233 B.R. 625, 629 (D.P.R. 1999); United States v. Neb. Dep't of Revenue (*In re* Doiel), 228 B.R. 439, 443-49 (D.S.D. 1998). *But see* Wyo. Dep't of Transp. v. Straight (*In re* Straight), 209 B.R. 540, 551-55 (D. Wyo. 1997) (concluding that Congress may abrogate state sovereign immunity in bankruptcy proceedings under the Fourteenth Amendment).

162. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986) ("[T]he Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" (quoting Hurtado v. California, 110 U.S. 516, 527 (1884))); *see also* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("[T]he Due Process Clause . . . bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990))); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("The question . . . is whether . . . [the defendant] acted arbitrarily. . . .").

163. *Ewing*, 474 U.S. at 229-30 (rights implicated by substantive due process must bear a "resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution").

164. *See* Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 56-57.

cognizable level of executive abuse of power as that which shocks the conscience."[165] The Court has imposed this threshold requirement that the challenged conduct shock the conscience out of a concern that if every arbitrary official act gave rise to a substantive due process challenge, the Due Process Clause would be reduced to a mere "font of tort law." [166] Conduct that shocks the conscience includes actions along the lines of forcibly pumping a criminal's stomach for evidence of drug use.[167] It is difficult to imagine the Court placing the state's violation of a discharge order or refusal to turn over preferential transfers in the same category.

The argument that bankruptcy implicates fundamental rights is even more beset since the Court declared over thirty years ago in *United States v. Kras* that there is no constitutionally protected right to a discharge—the oldest and most fundamental guarantee afforded in bankruptcy.[168] That decision is fatal to any theory that bankruptcy rights are somehow embedded in the constitutional fabric itself.[169] In his scholarship, Judge Haines has suggested that one way to overcome *Kras* is to recharacterize bankruptcy protections as privileges and immunities.[170] This argument as well has enjoyed little traction inside the academic community[171] and has been almost universally rejected by courts.[172]

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165. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). *But see* Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 (1957) (finding a substantive due process violation when state officials denied bar admission to an applicant with "no basis for their finding that he fail[ed] to meet" applicable standards).

166. *Lewis*, 523 U.S. at 847 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)); *see also id.* at 847 n.8 ("[E]xecutive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.")

167. Rochin v. California, 342 U.S. 165 (1952).

168. 409 U.S. 434, 445 (1973). Furthermore, the Court has never subjected policies impacting property rights to strict scrutiny and has only twice in modern times struck down a state policy for violating substantive property rights. E. Enters. v. Apfel, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring); BMW of N. Am. v. Gore, 517 U.S. 559, 574-75 (1996).

169. On the contrary, the first permanent federal bankruptcy act was in 1898. Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 174 n.7 (1987).

170. Haines, *supra* note 5.

171. *See* Patricia L. Barsalou & Scott A. Stengel, *Ex parte Young: Relativity in Practice*, 72 AM. BANKR. L.J. 455, 465-67 (1998) (arguing that bankruptcy does not further any recognized Fourteenth Amendment aims); Bartell, *supra* note 5, at 31-35; Klee, Johnston & Winston, *supra* note 52, at 1579-84 (1999) (arguing that bankruptcy is not connected to any traditional Fourteenth Amendment aim, though allowing for the possibility that Congress could reenact § 106(a) under the Due Process Clause); Chad J. Kutmas, Comment, *Piercing*

The biggest obstacle to the adoption of that theory is not lack of historical support or cogency, but rather judicial inertia: the Privileges and Immunities Clause, notwithstanding one recent invocation,[173] is largely dead letter, having been – in Justice Thomas's words – "sapped . . . of any meaning" over a century ago in the *Slaughter House Cases*.[174]

If Congress were able to augment the body of rights encompassed by the Fourteenth Amendment, the *Kras* Court's conclusion that the Constitution does not guarantee a right to bankruptcy might not be so problematic. But under *City of Boerne v. Flores*, Congress has no such authority.[175] *City of Boerne*, announced a mere year after *Seminole Tribe* by the same majority, involved a challenge to the Religious Freedom Restoration Act (RFRA). Congress had enacted the RFRA, pursuant to its Section 5 powers, to overturn the judgment in *Employment Division v. Smith* that individuals could not launch a Free Exercise Clause claim against "non-discriminatory laws of general applicability" that had incidental discriminatory effects on religious groups.[176] Under the RFRA, the courts would be obliged to subject all such laws to the strictest scrutiny. The Court struck down the law on the grounds that it was an illegitimate attempt to declare the substance of constitutional rights, not enforce them, remarking: "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[177]

Sovereign Immunity in Bankruptcy: Myth or Reality?, 37 TULSA L. REV. 457, 475 (2001) (arguing that the Supreme Court's holding that discharge is not a constitutional right forecloses re-enactment under Section 5).

172. *See* Sacred Heart Hosp. v. Pa. Dep't of Pub. Welfare (*In re* Sacred Heart Hosp.), 133 F.3d 237, 243-45 (3d Cir. 1998); Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co. (*In re* Estate of Fernandez), 123 F.3d 241, 245 (5th Cir. 1997); Schlossberg v. Maryland (*In re* Creative Goldsmiths of D.C., Inc.), 119 F.3d 1140, 1146-47 (4th Cir. 1997); Quesada v. P.R. Dep't of Health (*In re* Arecibo Cmty. Health Care, Inc.), 233 B.R. 625, 629 (D.P.R. 1999); United States v. Neb. Dep't of Revenue (*In re* Doiel), 228 B.R. 439, 443-49 (D.S.D. 1998).

173. Saenz v. Roe, 526 U.S. 489, 489-90 (1999). Some scholars spoke prematurely of a revival after *Saenz*. *See* Haines, *supra* note 5, at 67-68.

174. *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting).

175. 521 U.S. 507 (1997).

176. 494 U.S. 872 (1990).

177. *City of Boerne*, 521 U.S. at 519. The Court reaffirmed this decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000), which invalidated a provision of the Age Discrimination in Employment Act (ADEA) that subjected states to suit against state employers for age discrimination; and again in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 365 (2001), invalidating a provision of the American Disabilities Act (ADA) that allowed suits against states by private individuals for rational discrimination against disabled people.

If the Court has disclaimed any inherent constitutional right to bankruptcy protections and disempowered Congress from defining what rights the Constitution protects, how can state violations of bankruptcy law ever violate the Fourteenth Amendment? The answer lies in the Court's property and procedural due process jurisprudence. The Fourteenth Amendment provides that no state may "deprive any person of . . . property, without due process of law."[178] Unlike other rights such as life, liberty, free speech, and trial by jury that emanate from the Constitution itself, "property" emanates from positive law.[179] As such, the legislature has substantial leeway in dictating its content. Importantly, the kinds of property that are cognizable under the Due Process Clause are not limited to real and personal property. Since its landmark decision in *Goldberg v. Kelly*, the Court has extended due process protections to a new body of property known as statutory entitlements.[180] The statutory entitlement forms of property have encompassed a wide array of benefits—welfare, government employment, licenses, public education—but they share three common attributes: each has an easily accessible monetary value, each is grounded in positive law, and each carries restraints on officials' discretion to terminate or deny the benefit.[181] These constrains give individuals who meet the statutory criteria a legitimate expectation in law to receive the entitlement.[182]

This Part argues that the Bankruptcy Code comprises an assemblage of statutory entitlements that constitute property cognizable under the Due Process Clause, and that a state that trespasses on these rights acts without affording adequate process violates the Fourteenth Amendment. As such, Congress may invoke its powers under Section 5 to secure the property interests the Bankruptcy Code generates against state infringements.

The claim that bankruptcy protections are cognizable property interests is in many ways unremarkable. Like many of the benefits that the Court has classified as protected property, bankruptcy protections are creatures of federal

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Both decisions concluded that the offending provisions would render unlawful large swaths of conduct permissible under the Fourteenth Amendment.

178. U.S. CONST. amend. XIV, § 1.

179. In the prison context, for example, the Court has largely abandoned the positive law approach to finding liberty interests and imposed a substantive requirement that the interest be of a certain import. *See* Sandin v. Conner, 515 U.S. 472 (1995).

180. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

181. *See infra* Part IV.

182. Perry v. Sindermann, 408 U.S. 593, 599-603 (1972).

law.[183] The provisions in this legal regime—the right to an automatic stay, the discharge, and the right to void preferential transfers (to name a few)—are designed to protect parties in bankruptcy proceedings against the property decimating consequences of insolvency. Because these protections operate by rearranging and suspending financial liabilities, it is impossible to deny that they have "some ascertainable monetary value."[184] Furthermore, bankruptcy law gives rise to many expectations: whenever individuals engage in an economic transaction they do so against the backdrop of these protections and they have a legally grounded basis for the expectation that should they become a party in a bankruptcy action, their property rights will be secured according to the dictates of the Code.

There are also several unusual aspects about casting bankruptcy rights as protected property interests and using their constitutional status as a hook to invoke Section 5. First, there is a federalist dimension in bankruptcy that is lacking in most statutory entitlement cases. Usually, the legal feature that turns a government-conferred privilege into a protected property interest is *self-imposed* constraints on agency discretion—usually in the form of statutory criteria that inscribe circumstances in which the government entity must accord the benefit. Think, for example, of a state law that says any claimant with a yearly income less than $20,000 is entitled to welfare payments. The constitutionally protected entitlement springs from the state legislature's withdrawal of the state welfare agency's discretion to deny payment to claimants making less than the specified amount. But what the state legislature giveth it can taketh away: since the Due Process Clause is largely agnostic as to the substantive content of the welfare regime, the state may, without constitutional objection,[185] raise the recipient cut-off to $40,000 or even terminate the entire welfare regime.[186] But in bankruptcy, what limits—or,

183. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642 (1999) (assuming that patents are a constitutionally protected property that binds the states); *see also* Mathews v. Eldridge, 424 U.S. 319 (1976) (acknowledging a property interest in benefits provided under Social Security Act); Arnett v. Kennedy, 416 U.S. 134 (1974) (acknowledging a property interest in continued employment with a federal agency, an interest created by federal statute); Goldberg v. Kelly, 397 U.S. 254 (1970) (finding a property interest in continued receipt of financial aid under the Aid to Families with Dependent Children program).

184. Town of Castle Rock v. Gonzales, 545 U.S. 748, 766 (2005).

185. *See* Thomas C. Grey, *Procedural Fairness and Substantive Rights*, *in* DUE PROCESS: NOMOS XVIII 182, 190 (J. Roland Pennock & John W. Chapman eds., 1977).

186. The only qualification comes from the largely moribund doctrine on irrebuttable presumptions, which suggests that the statutory criteria for a benefit scheme must have some rational justification. *See, e.g.*, U.S. Dep't of Agric. v. Murry, 413 U.S. 508 (1973)

rather, eliminates—state discretion are not self-imposed statutory criteria. It is the federal Bankruptcy Code, which is imposed from above and made binding on the states by the Supremacy Clause. Thus, it is simply outside the competency of the state to terminate benefits guaranteed by the Bankruptcy Code. Federally conferred bankruptcy protections are not the state's to grant and they are not the state's to deny.

A second and related oddity is how state bankruptcy violations could sound in procedural due process. Usually the inquiry in a procedural due process claim is, how much procedure must a state provide when it deprives an individual of some species of property? But implicit in that question is the assumption the state could *ever* lawfully conduct such a deprivation. If the preceding analysis is correct, the state may never lawfully infringe on federally secured bankruptcy rights—asking "how much process" is due in this context is akin to a court asking what sort of hearing a state must provide before its law enforcement officer can beat up an innocent bystander. Nonetheless, for doctrinally convoluted reasons explained below, the Court would likely be amenable to a procedural due process framing of state infringements in bankruptcy. This Note does not attempt to answer the "how much process is due" question from scratch: Congress has already answered that question by specifying the procedures governing the adjudication of claims in bankruptcy.[187] Rather, I argue a more basic point: for a state to adhere to these congressionally mandated procedures, the state must first show up—it cannot assert its sovereign immunity any moreso than the state welfare agency could have in *Goldberg v. Kelly*.

(striking down a provision denying eligibility for food stamps to the entire household where a member of that household above eighteen years of age was claimed as a dependent for tax purposes).

187. *See* FED. R. BANKR. P. (2009). I do not mean to suggest that these procedures are constitutionally mandatory *because* Congress enacted them. In *Loudermill*, the Court established that determining the substance of the property right was the prerogative of the legislature, while determining what procedures that must accompany the deprivation is the prerogative of the court. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Instead, I maintain that if the Court were to apply the *Mathews v. Eldridge* balancing test to ascertain the quantum of due process in bankruptcy proceedings, it would arrive at something akin to the procedures outlined in the Code. And even if its test required less, Congress should be able to provide for enhanced procedural protections via Section 5. *See* Bd. of Trs. of the Univ. of Ala. v. Garnett, 531 U.S. 356, 365 (2001) ("Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in § 1 by enacting 'appropriate legislation.' Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." (internal citations omitted)).

This Part proceeds as follows: first, I disaggregate the Due Process Clause into its three constituent elements – the "property," the "deprivation," and the deficient provision of "due process of law" – and explicate the operation of each element in the bankruptcy context. I will also engage recent doctrinal developments in the statutory entitlement doctrine, including cases like *Town of Castle Rock*[188] and *College Savings Bank*[189] which have constricted the body of statutory entitlements that qualify as protected property, and explain why these cases do not undermine my claim that bankruptcy rights are cognizable interests under the Due Process Clause. The final section will explain how, consistent with the Court's decisions in *City of Boerne* and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[190] that crimped Congress's Section 5 powers, Congress may nonetheless invoke that authority to displace state immunity in bankruptcy proceedings.

A. ". . . property . . ."

Before an individual can invoke the protections of the Due Process Clause, she must first satisfy the threshold condition of showing a property interest. The case for treating rights in bankruptcy as protected property interests draws on a series of cases from the 1970s that instigated a profound revolution in the anatomy of constitutional property. Prior to the Court's landmark decision in *Goldberg v. Kelly*, the only property interests that the Constitution secured against government interference "were those that would enjoy protection at common law against invasion by private parties."[191] Property in the colloquial sense – actual ownership of real estate, chattels, or money[192] – qualified for constitutional protection; state-granted privileges such as government employment[193] and licenses did not.[194] This so-called rights/privileges distinction gradually came under attack, most notably by Yale Professor Charles Reich who argued that the dichotomy was an anachronism in an age in

188. Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).

189. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

190. 527 U.S. 627 (1999).

191. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1717 (1975).

192. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 971-72 (2000).

193. Bailey v. Richardson, 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951).

194. *See* Barsky v. Bd. of Regents, 347 U.S. 442, 451-56 (1954).

which individuals relied on government benefits like jobs, education, and social security for their livelihoods.[195]

In *Goldberg* and *Roth*, the Court endorsed Reich's position and rejected the "wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."[196] In its stead, the Court adopted a new definition of constitutional property that embraced traditional property rights as well as government benefits: the statutory entitlement. This newly conceived property was defined by two elements.[197] First, it had to be grounded in positive law. "Property interests," the Court declared, "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[198] Second, the benefit had to have a nondiscretionary component—that is, if the claimant satisfied the specified criteria, the government agency had to confer the benefit.[199] A mere "abstract need or desire" for a benefit does not suffice; rather, the claimant must have "a legitimate claim of entitlement to it" founded on positive law.[200] Deploying this definition, the Court has found that individuals have constitutionally cognizable property interests in welfare,[201] governmental employment,[202] driver's licenses,[203] utilities,[204] education,[205] and even

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195. Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

196. Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972).

197. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

198. *Roth*, 408 U.S. at 577.

199. Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion."); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (public support payments to be continued unless recipient not qualified). This has often been characterized as a "for cause" requirement. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11 (1978) (holding that receipt of services from public utility was not terminable "except for good and sufficient cause" (quoting Farmer v. Nashville, 156 S.W. 189, 190 (Tenn. 1913))); Bishop v. Wood, 426 U.S. 341, 345 n.8 (1976) (finding determinative that public employment was terminable at will, rather than for cause); Goss v. Lopez, 419 U.S. 565, 573-574 (1975) (public education must be continued absent "misconduct"); *Roth*, 408 U.S. at 578 (distinguishing a situation in which nonrenewal of state college professor's employment was authorized only for "sufficient cause").

200. *Roth*, 408 U.S. at 577.

201. *Goldberg*, 397 U.S. 254.

202. Perry v. Sindermann, 408 U.S. 593 (1972); *Roth*, 408 U.S. 564.

203. Bell v. Burson, 402 U.S. 535 (1971).

204. *Memphis Light*, 436 U.S. at 10.

unadjudicated causes of action.[206] Critically, it has done so without ever insinuating that *any* of those interests are protected by substantive due process.[207]

As I explain below, the Court has reworked the doctrine such that not all statutory entitlements qualify as property interests. Being grounded in state law and constraining discretion is no longer sufficient: to achieve status as cognizable property, the benefit must also have a readily ascertainable monetary value and it must impart unto its recipient some right to exclude. But before moving to those additional attributes, it is important to first establish bankruptcy protections' bone fides as statutory entitlements.

Bankruptcy protections indisputably meet the first condition—that the benefit be grounded in positive law. The debtor's right to the automatic stay and discharge and the creditors' rights to equitable recovery emanate from the federal Bankruptcy Code. While the *Roth* Court offered state law as an illustration of a place from which property rights originate, nothing in the Court's procedural due process jurisprudence suggests that an entitlement sourced in federal law merits any less safeguarding.[208] On the contrary, the Court recognized in *Florida Prepaid* that patents, which owe their existence to federal law, are property for the purposes of the Due Process Clause.[209]

The more interesting issue is how bankruptcy protections meet the second condition—the requirement that the law minting the benefit also constrains agency discretion in a manner that gives individuals a legally grounded

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205. Goss v. Lopez, 419 U.S. 565 (1975).

206. Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) (collecting cases).

207. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 229-30 (1985) (Powell, J., concurring) (suggesting that continued enrollment in medical school does not qualify as substantive due process right); Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 198 (1979) (per curiam) (finding that the school board's refusal to renew teacher's contract does not rise to level of substantive due process violation because the teacher's interest in employment was not similar enough to interests in "basic matters of procreation, marriage, and family life").

208. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (involving a property interest in continued the receipt of disability benefits under Social Security Act); Arnett v. Kennedy, 416 U.S. 134 (1974) (involving a property interest in the continued employment with federal agency, an interest created by federal statute); Goldberg v. Kelly, 397 U.S. 254 (1970) (involving a property interest in the continued receipt of financial aid under Aid to Families with Dependent Children program); Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 435 n.194 (1977); *see also* Haitian Refugee Ctr., Inc. v. Nelson, 872 F.2d 1555, 1562 (11th Cir. 1989) ("Congress may, through the enactment of legislation, create a substantive entitlement to a particular governmental benefit."); Devine v. Cleland, 616 F.2d 1080, 1086 (9th Cir. 1980) (recognizing a property interest in federal veterans benefits).

209. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642 (1999).

expectation to receive it. Usually, the sovereign entity that provides the benefit and the sovereign entity that carries out the deprivation are one and the same. Thus, when the court inquires into the existence of a protected property interest, the question it asks is: did the *state* regulations establishing a benefit limit the *state's* discretion to terminate the benefit?[210] But here, the source of the entitlement and the entity effecting the deprivation are different and—crucially—unequal sovereigns. So the question becomes: do *federal* regulations establishing bankruptcy benefits limit the *state's* authority to deny those benefits? The answer, by virtue of the Supremacy Clause, is unequivocally yes. As explained above, the debate within the Court is not whether Article I is a fount of authority to impose binding obligations on the states; it is whether Article I permits Congress to use a particular technique of enforcement—authorizing private suits against the state.[211] The resolution of the latter dispute has no bearing on the well-established principle that Congress may, under Article I, regulate state conduct in the realm of bankruptcy and that the Supremacy Clause strips states of their discretion to defy those regulations.[212]

The combined effect of the Bankruptcy Code and the Supremacy Clause is to accord debtors and creditors legitimate expectations that should they become embroiled in bankruptcy proceedings, they will enjoy all the protections the federal bankruptcy regime provides.[213] Just as the indigent who satisfies the eligibility criteria of the welfare statute has a claim of entitlement to a welfare check, the debtor who satisfies the dischargeability criteria in the bankruptcy statute has a claim of entitlement to relief from outstanding debt. The debtor has a legitimate expectation, grounded in federal law, that all debt collection efforts will halt upon her filing of a bankruptcy petition; she further

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210. *See* Judith Resnik, *The Story of* Goldberg*: Why This Case Is Our Shorthand*, *in* CIVIL PROCEDURE STORIES 473, 502 (Kevin M. Clermont ed., 2d ed. 2008).

211. *See supra* notes 38-40.

212. Perez v. Campbell, 402 U.S. 637, 649 (1971) (invalidating under the Supremacy Clause a state statute enforced by a state agency that provided for the recovery of tort claims in violation of the Bankruptcy Act's discharge provisions, and remarking that "'acts of the State Legislatures . . . [which] *interfere with*, or are contrary to the laws of Congress, made in pursuance of the constitution,' are invalid under the Supremacy Clause." (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)) (alteration and emphasis in original)); Van Huffel v. Harkelrode, 284 U.S. 225, 228 (1931) (holding that realization on state tax lien "must yield" to the requirements of bankruptcy law).

213. A possible counter is that individuals cannot really claim to have a legitimate expectation to bankruptcy entitlements where a constitutional amendment bars them from bringing suit against the state to enforce those entitlements. This argument misses the point. The legitimate expectation stems from something antecedent to the enforcement question—namely, the assumption that states will act in a lawful manner consistent with their obligations under binding federal bankruptcy law.

has a legally secured interest that, at the end of her bankruptcy, late-moving creditors will not attempt to reclaim discharged debts. The creditors' statutory entitlements in bankruptcy are no less concrete. Each creditor has a legitimate expectation, grounded in federal law, that it will receive its fair share of the estate according to its placement in the Code's statutory hierarchy; each creditor has a related legally grounded expectation that the state will not diminish the pool of distributable assets by retaining pre-petition transfers or collecting in violation of the automatic stay.

Not only do bankruptcy protections meet the criteria for statutory entitlements protected by the Due Process Clause, they are in many ways analogous to the welfare payments that occasioned the articulation of the "new property." The Court itself has recognized that bankruptcy is a form of social welfare.[214] As explained above, one of the animating purposes behind the bankruptcy system is to give the honest, but unfortunate debtor an opportunity to throw off crippling debts and start anew.[215] A vast majority of individuals who declare Chapter 13 bankruptcy do so because economic dislocation cost them their jobs or because unforeseen medical expenses drove them into poverty.[216] For many, bankruptcy is the last resort when the standard social welfare systems prove insufficient, and the consequence for an individual's livelihood of a state violating discharge and demanding payment is severe. Even for the corporate debtor,[217] the welfare analogy has traction. Corporations often file bankruptcy petitions to prevent creditors from terminating leases, levying bank accounts, or repossessing equipment and inventory, and bringing business to a halt. In other words, bankruptcy protections may be the only things that stand between successful reorganization and forced liquidation.

Of course, the parties in bankruptcy are differently situated from the claimants in welfare termination cases. In the latter cases, the recipients are challenging the termination of an ongoing benefit. In bankruptcy, the parties are petitioning for relief; in that sense, they more closely resemble indigents whose initial welfare applications have been rejected than recipients whose ongoing payments have been suspended. While the Supreme Court has reserved decision on the question of whether *applicants* for benefits possess a

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214. United States v. Kras, 409 U.S. 434, 446 (1973).

215. *See supra* Section I.C.

216. *See generally* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 67 (2000) (discussing the economic stresses that force individuals into bankruptcy).

217. Private corporations are persons for the purposes of the Fourteenth Amendment's Due Process Clause. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 446 (1993).

property interest protected by the Due Process Clause,[218] every circuit to consider the issue has answered the question in the affirmative.[219]

To be sure, the doctrine on statutory entitlements has evolved substantially since *Goldberg* and *Roth*. Until recently, the Court's approach toward protected property could be described as laissez faire. It left the task of defining the substantive content of the property right entirely to the legislature—so long as the entitlement met the two aforementioned conditions, the Court would accept the entitlement's stature as constitutionally protected property and extend to it the protections of the Due Process Clause.[220] Rather than conduct an independent assessment of the entitlement's import to its recipient before deeming it a protected interest,[221] the Court plumbed the underlying statute in search of discretion-constraining language.[222] This often involved a "relatively mechanistic inquiry"[223]: if the statute contained the mandatory "shall," or its equivalent, the Court would credit the benefit as constitutionally protected. If the statute contained only the permissive "may," the state's retention of

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218. *See* Lyng v. Payne, 476 U.S. 926, 942 (1986) (citing Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 320 n.8 (1985)).

219. Kapps v. Wing, 404 F.3d 105, 115 (2d Cir. 2005); Hamby v. Neel, 368 F.3d 549, 557-59 (6th Cir. 2004); Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998); Flatford v. Chater, 93 F.3d 1296, 1304-05 (6th Cir. 1996); Mallette v. Arlington County Employees' Supplemental Ret. Sys. II, 91 F.3d 630, 637-640 (4th Cir. 1996); Ward v. Downtown Dev. Auth., 786 F.2d 1526, 1531 (11th Cir. 1986); Daniels v. Woodbury County, 742 F.2d 1128, 1132-33 (8th Cir. 1984); Kelly v. Railroad Ret. Bd., 625 F.2d 486, 489-90 (3d Cir. 1980); Griffeth v. Detrich, 603 F.2d 118, 121-22 (9th Cir. 1979).

220. *See* Grey, *supra* note 185.

221. Until recently, the Court's value judgments were mostly limited to assessments of the import of the property interest for the purpose of assigning how much process was due before depriving an individual of it. *See* Resnik, *supra* note 210, at 498.

222. A common misconception is that the property interest must be indispensable to one's livelihood. *See, e.g.*, Davida H. Isaacs, *Shifting Constitutional Sands: Can and Should Patentholders Rely on the Due Process Clause To Thwart Government Action?*, 35 FLA. ST. U. L. REV. 627, 654 (2008) (arguing that only the weightiest interests qualify as property interests). The Court, however, has repeatedly rejected that notion. *See* Goss v. Lopez, 419 U.S. 565, 576 (1975) ("The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause."); Fuentes v. Shevin, 407 U.S. 67, 88-90 (1972) (rejecting the argument that only "absolute necessities of life" like welfare qualify as property protected by the Due Process Clause). Courts consider the gravity of the interest not when determining the *existence* of a property interest but when determining how much process is required when a state terminates the interest. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

223. Resnik, *supra* note 210, at 502.

discretion would likely disqualify the benefit from any claim to status as constitutional property.[224]

In two recent cases, however, the Court has abandoned this deferential approach and asserted its authority to limit what types of discretion-limiting statutory entitlements may qualify as property cognizable under the Due Process Clause. The first case, *Town of Castle Rock v. Gonzales*, involved a claim brought by a woman alleging that the town police violated her due process rights when their failure to enforce a restraining order against her estranged husband led to the kidnapping and murder of her children.[225] The woman asserted a property interest in the enforcement of the restraining order, which provided that, unless impractical, the "peace officer shall arrest" an individual in violation of the restraining order.[226] A seven-Justice majority rejected the plaintiff's claim to a property interest in the enforcement of the restraining order on three grounds. First, the majority concluded that obligatory language ("shall") notwithstanding, the coexistence of the "well established tradition of police discretion" and mandatory enforcement statutes suggested that Colorado law did not really make enforcement of the restraining order mandatory.[227] Second, the majority found that even if arrest were mandatory under Colorado law, "that would not necessarily mean that state law gave *respondent* an entitlement to *enforcement* of the mandate," given that the beneficiary of the restraint order scheme was not just the plaintiff, but society at large.[228] Third, the majority found that even if the plaintiff had an entitlement to enforcement of the restraining order, that entitlement was not a "property" interest because it did not have "some ascertainable monetary value."[229] The majority asserted that this final requirement was implicit in its "*Roth*-type property-as-entitlement" cases, a claim with at least some plausibility.[230]

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224. *Id.*

225. 545 U.S. 748, 751 (2005).

226. *Id.* at 759.

227. *Id.* at 760-64.

228. *Id.* at 764-65 (emphasis in original).

229. *Id.* at 766 (quoting Merrill, *supra* note 192, at 964).

230. It is certainly true that welfare, licenses, and salaried jobs have a readily ascertainable monetary value. But the Court has recognized other benefits that cast doubt on the viability of this requirement as a basis for excluding mandatory enforcement of restraining orders from the rubric of "property." As the *Town of Castle Rock* dissent pointed out, it is unclear how the interest in enforcing a restraining order is any less monetizable than the interest in public education, which the Court recognized as a property interest in *Goss v. Lopez*. Just as

In the second case, *College Savings Bank*, the Court showed an even greater willingness to dictate which types of statutory entitlements could attain the status of constitutionally protected property. The Court had previously stated that the "hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"[231] But in *College Savings Bank*, the majority introduced a new and substantially more restrictive "hallmark." The case involved an amendment to the Lanham Act[232] that stripped states of their immunity in suits for false and misleading advertising. The parties defending the statute insisted that the abrogation was a legitimate exercise of Congress's Section 5 enforcement powers, in this case enforcing "two species of 'property' rights: (1) a right to be free from a business competitor's false advertising about its own product, and (2) a more generalized right to be secure in one's business interests."[233] The majority determined that neither qualified as a property interest protected by the Due Process Clause. "The hallmark of a protected property interest," it insisted, "is the right to exclude others" and no one could claim "exclusive dominion" over either.[234] The majority never attempted to reconcile the two hallmarks, a puzzling oversight given the Court's prior holdings that unadjudicated causes of action – which are no more exclusionary than the interests the Lanhman Act protected – were protected property interests.[235]

Town of Castle Rock and *College Savings Bank* prefigure a greater willingness on the part of the Court to conduct its own evaluation, outside the four corners of the originating statute, of whether an entitlement is constitutionally cognizable property. It is entirely possible that the Court will narrow further the scope of protected property interests, but these two cases do not alter the conclusion that bankruptcy entitlements are protected property interests. Bankruptcy protections easily satisfy *Town of Castle Rock*'s requirement that the entitlement have some readily ascertainable value: the entire bankruptcy

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the alternative to public education is costly private schools, the alternative to police protection is costly private security. *Id.* at 791 n.19.

231. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

232. Trademark Remedy Clarification Act (TRCA), Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified at 15 U.S.C. § 1122(b) (2006)), *amending* Trademark Act of 1946 (Lanham Act), 60 Stat. 441 (codified as amended at 15 U.S.C. §§ 1051-1141 (2006)).

233. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (1999).

234. *Id.* at 673.

235. *Logan*, 455 U.S. 422; *see also* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988) ("Appellant's interest is an unsecured claim, a cause of action against the estate for an unpaid bill. Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment.").

regime is geared toward protecting and redistributing real and personal property as well as debts with clear monetary values.

Similarly, bankruptcy protections fulfill *College Saving Bank*'s condition that the interests secured by the statute "bear [a] relationship to [a] right to exclude."[236] Virtually every dispute in bankruptcy revolves around who has exclusive rights to pieces of property.[237] When the court issues an automatic stay—a temporary injunction preventing creditor expropriation—the court is giving the debtor an exclusive (albeit provisional) right over all property to which the stay applies. When the automatic stay morphs into a discharge, the debtor's exclusive interest vis-à-vis pre-petition creditors becomes permanent. Similarly, an order voiding a preferential transfer increases the size of the pool of assets from which the creditors will make their recovery, thereby increasing the amount of property to which creditors, at the end of the day, will have exclusive rights.

B. *"Nor shall any State deprive . . ."*

As explained above, state violations of the federal bankruptcy law are far from rare.[238] The most clear-cut illustration of how a state violation amounts to a deprivation of protected property is state defiance of discharge orders. The discharge establishes a property right free and clear of all claims. If a court granted title over a disputed sliver of land to an adverse possessor, and the true owner tried to reclaim the property the day after, no one would quibble with the characterization of the latter's action as lawless. No less so with state flouting of court-ordered discharges. A state that garnishes a debtor's wages or executes a tax lien in violation of a discharge is not only acting contrary to federal law, it is depriving an individual of a constitutionally secured right.[239]

Similarly, state violations of the automatic stay infringe on protected property interests. One might argue that because the automatic stay, unlike the discharge, does not conclusively resolve competing claims, a state is not effecting a deprivation when it collects on its claims—especially since the state's place at the top of the hierarchy scheme ensures that it will collect most of its claims before the bankruptcy's conclusion. The problems with this argument

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236. 527 U.S. at 673.

237. This is the case even where creditors are fighting to secure liens in property. *See, e.g.*, Merrill, *supra* note 192, at 972 ("Mortgages and liens entail the right to exclude others from impairing a security interest in resources.").

238. *See supra* Part I.

239. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969).

are threefold. First, even if the automatic stay does not conclusively determine property rights, it is a universally binding injunction that accords the debtor exclusive domain over her property in the interim. Second, much of the property that the automatic stay secures temporarily, the discharge will secure permanently.[240] Third, it does not matter that state creditors might have claims against the property, or that the final bankruptcy plan may require the property's surrender to the state. As the Court made clear in *Fuentes v. Shevin*, "[t]he Fourteenth Amendment's protection of 'property,' . . . has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest,' including statutory entitlements."[241]

Of course, the beneficiary of bankruptcy protections—and, in particular, the automatic stay—is not just the debtor. Creditors have a tremendous stake in universal compliance with the automatic stay. Under state law, collection efforts are first-come-first-served: the creditor that makes it to court first gets first claim to the assets, even if that leaves the remaining creditors with nothing. In the colorful words of Professors Ferriell and Janger: "Unrestrained, individual creditors pay little heed to the desirability of preserving financial value for creditors who have lagged behind in their efforts to collect. After all, the first vulture to arrive on the scene of a fresh carcass cares little for whether later arrivals eat their fill."[242] In the bankruptcy system, each creditor surrenders the right to rush the assets, but in return for patiently waiting in line, all creditors receive a guarantee of orderly and equitable distribution of the estate. When a state jumps the queue and reclaims its assets, it is not merely depriving the creditor of some abstract property interest in orderly and equitable distribution. It is directly and unlawfully diminishing the size of the

240. Partly due to these uncertainties over whether the debtor will end up retaining a particular piece of a property at the end of her bankruptcy, it is doubtful that the Due Process Clause would admit of distinctions between property temporarily secured by an automatic stay and property permanently secured by a discharge. What matters is that the claimant had a property interest *at the moment* of deprivation.

241. 407 U.S. 67, 86 (1972) (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)) (internal citations omitted). The issue in *Fuentes* was two state replevin statutes, which provided that upon commencement of an action of replevin and the creditor's posting of a bond, the sheriff could seize from the debtor the property securing the debt. The creditors who seized the property asserted that the debtors' right to continued possession was in dispute and that a hearing would reach the same result. The Court dismissed this point as "immaterial," remarking that "[t]o one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Id.* at 87 (quoting Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915)).

242. FERRIELL & JANGER, *supra* note 54, at 6.

estate against which the creditors file their claims and depleting the reservoir from which the creditors will draw their returns.

The state's failure to return assets obtained through preferential transfer constitutes a deprivation for the same reason. If a state keeps assets properly belonging to the estate, every other creditor loses some of her rightful return. There is ample precedent supporting the conclusion that this is a deprivation of constitutional caliber. The Supreme Court's decision in *Reich v. Collins* is a near perfect analogy: in that case, the Court found that a state's refusal to provide a procedure to recover a wrongfully taxed federal entitlement (retirement benefits) in violation of a superseding federal law (the tax code) constituted a deprivation in violation of the Due Process Clause.[243]

One might object that, in practice, preferential transfers will rarely constitute cognizable deprivations, because the state is often unaware of the impending bankruptcy. In such cases, the would-be debtor has violated the provision against preferential transfers and the transaction is voidable—but the state has not acted unlawfully by receiving a voidable transfer without its knowledge. This state's ignorance poses two problems. First, under *O'Bannon*—a case finding that lawful revocation of a nursing home's license did not deprive that home's patients of a property interest—a lawful exercise of power that indirectly or incidentally has an adverse impact on an individual's property rights does not qualify as a constitutional violation.[244] Second, under *Daniels v. Williams*, a deprivation resulting from negligence cannot furnish a due process claim.[245]

O'Bannon and *Daniels* may demonstrate that a state that receives a preferential transfer without foreknowledge of the impending bankruptcy is acting negligently, but not unconstitutionally. The state's ignorance might render the initial violation of § 547[246]—in other words, the acquisition itself—an act of negligence. But once the bankruptcy court voids a transfer and declares that the property rightfully belongs to the estate, the state is not depriving creditors of their property interests out of mere negligence. Nor could one characterize the economic harm it inflicts as "consequential injuries resulting from the exercise of lawful power."[247] Rather, the deprivation is a result of the state knowingly persisting in the retention of another's property in

243. 513 U.S. 106, 108-10 (1994).

244. O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 788-89 (1980).

245. 474 U.S. 327, 328 (1986).

246. 11 U.S.C § 547 (2006).

247. *O'Bannon*, 447 U.S. at 789 (quoting Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871)).

violation of federal law. This sort of deprivation is readily cognizable under the Due Process Clause.

C. "... *without due process of law*"

At first glance, it is not entirely clear what function the phrase "without due process of law" has in the context of state violations of federal bankruptcy rights. In *Zinermon*, the Court noted that the Due Process Clause encompasses three types of claims: claims brought under the provisions of the Bill of Rights incorporated through the Fourteenth Amendment; substantive due process claims that challenge "arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them'"; and procedural due process claims.[248] With the first two types of claims, "the constitutional violation ... is complete when the wrongful action is taken."[249] Procedural due process claims, however, are distinct: in these cases, "the deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law."[250] This formulation suggests that if bankruptcy violations sound in procedural due process, the inquiry is twofold. First, what procedures must accompany state deprivations in bankruptcy? And second, are the states affording those procedures? But there are also reasons to suppose that state bankruptcy violations sound in substantive due process. Insofar as bankruptcy entitlements owe their existence to federal law—which binds the states through the Supremacy Clause—a state that trenches on these entitlements acts unlawfully by definition. Affording more procedure will not change that basic fact.

This Subsection explains why, contrary to intuition, state violations would in fact sound in procedural due process. It then explains why the procedural protections that must accompany these deprivations are the protections provided by the Bankruptcy Code itself.

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248. Zinermon v. Burch, 494 U.S. 113, 125 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

249. *Id.* (citing *Daniels*, 474 U.S. at 338 (Stevens, J., concurring)).

250. *Id.* (citing Parratt v. Taylor, 451 U.S. 527, 537 (1981); Carey v. Piphus, 435 U.S. 247, 259 (1978)).

1. *Procedural Versus Substantive Due Process*

State violations of federal bankruptcy law do not fit neatly under either the substantive or procedural due process rubric. On the one hand, the Court has always treated deprivations of statutory entitlements as matters sounding in procedural due process. On the other, there is a compelling argument that state bankruptcy violations should sound in substantive due process. Procedural due process claims do not question the underlying competency of government to effect a deprivation, but rather, contest the adequacy of the procedures accompanying that deprivation.[251] In the standard statutory entitlement case, the primary function of procedure is to ensure the accuracy of the government's legal conclusion that the claimant no longer meets the statutory criteria for the benefit.[252] The remedy, in turn, is not halting all deprivations, but enhancing procedural protections to lessen the error rate—for example, by providing pre- as opposed to post-termination hearings, court-appointed counsel, or more robust confrontation rights.

But there is a critical difference between the standard case involving a deprivation of a statutory entitlement and cases involving state noncompliance in bankruptcy: the Supremacy Clause. Usually, state law generates the benefit and specifies the conditions under which state agencies may terminate enjoyment of the benefit. Some deprivations will be valid, some will be in error. But where federal law generates the benefit and specifies that only a federal bankruptcy court—not a state agency—may adjust the individual's enjoyment of that benefit, the state is never acting within its competency by conducting a deprivation. The error rate is one hundred percent. A state may never lawfully collect its debts in defiance of a discharge, or violate the automatic stay, or retain preferential transfers belonging to the estate. In that

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251. *Carey*, 435 U.S. at 259 ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."); Fuentes v. Shevin, 407 U.S. 67, 81 (1972) ("[Procedural due process] raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property.").

252. Mathews v. Eldridge, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process . . . ."); *id.* at 335 (announcing that in determining the quantum of procedure due, a court must consider, inter alia, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"). Several scholars, however, have argued that due process aims to preserve individual dignity as well. JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 145-51 (1985); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 3 (1974).

sense, the deprivation looks like a substantive due process violation: a court hearing a claimant's challenge would order the state to halt its conduct, not order the state to accord more process.[253]

The force of this argument notwithstanding, present doctrine suggests that the Court would, in fact, treat state bankruptcy violations as matters sounding in procedural due process. The best evidence for this claim is the Court's opinion in *Florida Prepaid.* That decision recognized that federally conferred patent rights were protected property interests, and that a state that knowingly infringed on those rights acted unlawfully. However, the majority concluded that the state's unlawful conduct did not ripen into a constitutional violation unless the state failed to provide a post-deprivation remedy.[254] What is striking about this opinion is that it takes an act of substantively arbitrary state conduct for which there is no legal justification (patent infringements) and converts it into a claim about whether the state is providing proper procedure (the post-deprivation remedy). Of course, providing a tort remedy may insulate the state from a due process challenge, but it will not render the patent violation lawful. Put differently, the tort remedy does not "authorize" the deprivation in the way that notice and a pre-termination hearing "authorize" the state to terminate someone's welfare payments. Moreover, unlike the procedural safeguards in the welfare context, the post-deprivation tort remedy for patent violations is not designed to assist a state agency in the accurate application of state law; rather, its purpose is to provide compensatory relief for conduct that would have been unlawful no matter how much predeprivation procedure accompanied it.

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253. Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring) ("[S]ubstantive due process . . . bars certain arbitrary government actions regardless of the fairness of the procedures used to implement them." (internal quotation marks omitted)). Substantive due process may be used to challenge both unlawful official conduct and rules and legislation. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) ("While due process protection in the substantive sense limits what the government may do in both its legislative . . . and its executive capacities . . . criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."). For a discussion on the theoretical and doctrinal differences between the two, see Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 315-27 (1993). *See also* Robert Chesney, *Old Wine or New?: The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 1003-17 (2000) (arguing that there are no plausible constitutional or prudential reasons for treating legislative and executive challenges differently).

254. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643 (1999). The Court proceeded to strike down the congressional statute abrogating state immunity, finding that the existence of state remedies countered Congress's assertion that there was a widespread practice of unconstitutional deprivations. *Id.* at 643-48.

2. *How Much Process is Due Process?*

Assuming the Court would treat state deprivations of federally secured bankruptcy protections as it did state infringements on patent rights, the question becomes, how much process must the state provide to evade a constitutional challenge when it deprives someone of a bankruptcy entitlement? Is a post-deprivation tort remedy sufficient or must the state provide something more?[255]

Rather than assist the inquiry, *Florida Prepaid* only creates more confusion. In holding that the availability of state tort schemes nullified a due process challenge, the Court relied on a line of prison cases that have also been criticized as conflating substantive and procedural due process.[256] In *Parratt v. Taylor*[257] and *Hudson v. Palmer*,[258] the Court held that where a deprivation of liberty or property was random and unauthorized, the only required process is a post-deprivation remedy—for example, a state tort remedy. In *Parratt*, the prisoner's claim was for negligent loss of property;[259] in *Hudson*, the prisoner's claim was intentional destruction of property.[260] In both instances, the deprivation was concededly tortious and no batch of procedural safeguards would make it otherwise. But in *Zinermon v. Burch*,[261] the Court clarified that post-deprivation remedies satisfied the states' obligations under the Due Process Clause in *Parratt* and *Hudson* only because the nature of the unlawful conduct made a pretermination hearing impossible: since the deprivation was random and unauthorized, the state could not be expected to foresee it and

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255. At the moment, little rides on the answer to this question because states do not appear to offer *any* remedies for bankruptcy violations—pre or post-deprivation. Of course, it is difficult to prove a negative, but if such remedies existed one would expect that the states would have referenced them in the amicus brief filed by forty-nine states on behalf of the state university in *Katz*. Brief of Ohio and 48 Other States as Amici Curiae in Support of Petitioners, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) (No. 04-885). If, however, states do begin to provide such remedies, the "how much process is due" inquiry will become critically important.

256. *Florida Prepaid*, 527 U.S. at 643. Several scholars have criticized these cases as conflating substantive and procedural due process. *See, e.g.*, Fallon, *supra* note 253; Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984).

257. 451 U.S. 527 (1981).

258. 468 U.S. 517 (1984).

259. 451 U.S. at 529.

260. 468 U.S. at 520.

261. 494 U.S. 113 (1990).

offer predeprivation process.[262] Where, on the other hand, the state is able to predict the deprivation and afford predeprivation process, it must do so to escape constitutional liability.[263] Therefore, one would have expected the *Florida Prepaid* majority to have inquired into the practical feasibility of predicting state patent violations and affording predeprivation proceedings. But the majority did no such thing, which only adds uncertainty to the question of how much process a state must provide to prevent an unlawful deprivation from giving rise to a constitutional challenge.

Since *Florida Prepaid* has muddled the inquiry quantifying the appropriate amount of process, perhaps the best way to find guidance is by returning to the case whose test *Parratt*, *Hudson*, and *Zinermon* purported to apply—*Mathews v. Eldridge*.[264] The test articulated in that case considers the weight of the private interest at stake and the probability that additional procedure will reduce erroneous deprivations, and balances those deprivations against the burdens that the added procedure imposes on the state.[265] When applied to bankruptcy protections, the test suggests that the minimum level of procedure that the state must accord when acting against bankruptcy rights is the procedure embodied in the Bankruptcy Code itself. In other words, if the state wishes to collect a claim subject to a discharge or automatic stay, it must first plead its case in front of the bankruptcy court. If the state wishes to retain a preferential transfer, it must justify its authority to do so in an adjudicatory proceeding. In each case, complying with this mandatory process requires that the state submit to the binding jurisdiction of the bankruptcy court with its sovereign immunity shield lowered.

Starting with the first of the three *Mathews* factors, the private interest at stake in bankruptcy is profound. As explained in Part I, bankruptcy protections are often the only thing that stands between a debtor and perpetual penury, a corporation and forced liquidation, or a creditor and tremendous financial loss.

As to the second factor, forcing states to comply with the Bankruptcy Code *pari passu* with private creditors is essential to preserving debtor and creditor rights in bankruptcy. The *Florida Prepaid* majority's endorsement of post-deprivation remedies is unworkable in bankruptcy for several reasons. First, the economic damage resulting from state noncompliance in bankruptcy is often dispersed, compounding, and irreversible. If, for example, a state refuses to return a preferential transfer to the estate, potentially hundreds of

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262. *Id.* at 128-30.

263. *Id.* at 136-38.

264. 424 U.S. 319, 335 (1976).

265. *Id.*

creditors will see a diminution in their rightful return. Violations of the automatic stay have the potential to inflict losses that are geometrically—possibly exponentially—greater than the value of the debt that the state sought to reclaim. Thus, to revisit the stylized publishing house example, if a state exercised a tax lien on the printing press, the entire enterprise could fail. A state remedy would have to accommodate not only the claims of the business owners, but claims of employees whose jobs were terminated and creditors whose investments evaporated. As a general rule, where a claimant is unlikely to suffer severe irreparable injury from an improper deprivation, states can satisfy their obligations under the Due Process Clause with a post hoc remedy.[266] But forced liquidation is not a bell that can be unrung.

State remedies fall short for a structural reason as well. For the bankruptcy regime to work effectively, states must be treated like every other creditor. That in turn requires that they be susceptible to suit and subject to the mandatory jurisdiction of the bankruptcy court like every other creditor. Exempting the states from the bankruptcy process, while promising that states will nonetheless be held accountable for their infractions at a later date and in a later proceeding, violates this core precept of mandatory equality of treatment. It would also represent the fragmentation of the bankruptcy system. To the greatest extent possible, a trip to a bankruptcy court should be one-stop-shopping for the resolution of claims on a debtor's assets.[267] Building a remedial scheme to enforce bankruptcy law that operates *outside* bankruptcy court would create tremendous inefficiency and waste. Parties in federal bankruptcy court would have to launch parallel suits in state courts to vindicate state tort remedies; since both courts would be issuing orders effecting creditors' interest in the estate, creditors would have to participate in all proceedings to secure their claims.[268] Adjudicating the related claims in multiple fora would risk conflicting judgments and would require another round of money-squandering and time-wasting litigation in venues with different procedural and evidentiary rules. Meanwhile, the final disposition of the bankruptcy would likely be put on hold as the parallel litigation unfolded, introducing further delay into a process where time truly is money.[269]

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266. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978).

267. 1 NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 898-900 (1997) [hereinafter BANKRUPTCY: THE NEXT TWENTY YEARS] (discussing the need for a single forum to maximize fairness and efficiency).

268. For a general discussion on the costs of bifurcating claims between federal and state courts, see Jackson, *supra* note 11, at 57-58 & nn.231-32.

269. *See* Kenneth N. Klee, *One Size Fits Some: Single Asset Real Estate Bankruptcy Cases*, 87 CORNELL L. REV. 1285, 1299 n.68 (2002) (explaining that prompt restructuring is often

It is simple to make the case that state remedies are a poor substitute for the procedures embodied in the Bankruptcy Code. But *Florida Prepaid* raises questions as to how readily accessible or fully compensatory a remedy must be before it is judged adequate. In *Parratt*, the Court declared that "an adequate state remedy to redress property damage inflicted by state officers"[270] must "fully compensate[]"[271] the plaintiff and satisfy her right "to be made whole."[272] But in *Florida Prepaid*, the majority suggested that an adequate remedy was something less. In that case, the majority reiterated that a deprivation violates due process "only where the state provides no remedy, or only inadequate remedies, to injured [parties]."[273] The congressional record was peppered with testimony about the uncertain access to relief, the rampant forum-shopping,[274] and the costs of pursuing claims in fifty states with disparate patent remedies.[275] The majority, however, was unswayed: the fact that state remedies "were less convenient than federal remedies, and might undermine the uniformity of patent law," it ruled, was insufficient to establish inadequacy, and therefore insufficient to justify invoking Section 5 to abrogate state immunity.[276] In response to the uniformity argument, the majority insisted: "the need for uniformity in the construction of patent law is undoubtedly important, but that is a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law."[277]

While this suggests that state remedies need not match the efficacy, ease, or certainty of their federal counterpart, the costs of fighting a two-front litigation battle cannot be dismissed as mere inconvenience, nor can they be dismissed as "factor[s] which belong[] to the Article I patent-power calculus"[278] rather than the due process inquiry. The whole purpose of the bankruptcy system is to

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critical to staving off liquidity crises and preventing Chapter 11 bankruptcies from resulting in liquidation).

270. Parratt v. Taylor, 451 U.S. 527, 542 (1981) (quoting Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975)).

271. *Id.* at 544.

272. *Id.* at 542 (quoting *Bonner*, 517 F.2d at 1319).

273. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643 (1999).

274. *Id.* at 651 n.3 (Stevens, J., dissenting).

275. *Id.* at 656 n.7 (quoting *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. (1990) (statement of Robert Merges)).

276. *Id.* at 644, 644-48.

277. *Id.* at 645.

278. *Id.*

temper the property-decimating effects of insolvency. The private interest that bankruptcy processes protect is almost entirely pecuniary. Thus, it would be nonsensical for the Court to suggest that the unnecessary expense associated with state remedies was somehow irrelevant to the due process question. The *Mathews v. Eldridge* test requires the Court to consider what kind of procedure is necessary to vindicate the claimant's protected interests – in bankruptcy, there is no adequate substitute for the procedure mandated by the Code.

That leaves the final *Mathews* factor: the burdens imposed on the state by being forced to submit to federal bankruptcy procedure. Complying with federal bankruptcy law is certainly costly; facing the prospect of suit for noncompliance is costlier yet. But there are at least two reasons to doubt that this would ever tip the balance. First, like the states, the United States is frequently a creditor in bankruptcy; yet, Congress waived the federal government's sovereign immunity in bankruptcy proceedings,[279] which undermines the claim that subjecting governments to binding bankruptcy process is unduly onerous. Second, in order to meet the dictates of the Due Process Clause, the state remedy would have to provide recompense for losses inflicted by state noncompliance. But, as explained above, minor violations in bankruptcy may wreak exponentially greater damage on debtor prospects, especially if the debtor is a corporation facing forced liquidation. If the state were required to fully compensate individuals for the losses inflicted by state violations, in many cases the state would bring less financial imposition on itself by simply complying with the bankruptcy process from the beginning.

D. Abrogating State Sovereign Immunity in Bankruptcy Under Section 5

Shortly after the *Seminole Tribe* majority affirmed Congress's authority to subject states to suit to enforce rights embodied in the Fourteenth Amendment, the same majority of Justices began whittling away at that enforcement power. Under *City of Boerne* and *Florida Prepaid*, before Congress invokes its Section 5 powers to abrogate state sovereign immunity, it must bound a new set of hurdles, which include (1) making a showing that there is a pervasive practice of state constitutional infringements; (2) that the proposed remedy is "congruent and proportional" to the targeted violations; and (3) that less intrusive state remedial schemes do not obviate the need for a federal remedy. This Section will explain that notwithstanding the Court's inconsistent treatment of these conditions, Congress could fulfill each requirement when abrogating state immunity in bankruptcy proceedings.

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279. 11 U.S.C. § 106(a) (2006).

The first hurdle is the requirement that Congress make a legislative finding showing a "widespread and persisting deprivation of constitutional rights."[280] The requisite level of thoroughness and detail in that finding has varied significantly. For example, in *Garrett*, which concerned a provision of the ADA subjecting states to suit for disability discrimination, the record of state misconduct was voluminous and comprehensive, but deemed inadequate by a majority who dismissed the record as a scattering of unsubstantiated anecdotes.[281] This prompted Justice Breyer to remark in his dissent that the Court now "review[s] the congressional record as if it were an administrative agency record."[282] In *Nevada Department of Human Resources v. Hibbs*, by contrast, two members of the *Seminole Tribe* majority found the evidence of widespread deprivations sufficient despite a substantially sparser legislative finding.[283] *Hibbs* upheld the Family Medical Leave Act of 1993 (FMLA), which authorized the recovery of money damages for state failure to comply with the Act's provision entitling eligible employees to weeks of unpaid leave for family-care purposes.[284] The Court explained the differing results in *Hibbs* and *Garrett* by noting that FMLA violations tended to involve gender discrimination, which triggered a higher level of scrutiny than disability discrimination; state violations of FMLA were more likely to offend Fourteenth Amendment rights, and therefore, it was easier to show a pattern of constitutional violations.[285] But, as the *Hibbs* dissent points out, the evidence of widespread violations of family-care leave provisions was as sparse or sparser than the evidence Congress adduced in *Garrett*.[286] To add further confusion, in *United States v. Georgia*, Justice Scalia wrote for a unanimous Court upholding Title II of the

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280. City of Boerne v. Flores, 521 U.S. 507, 526 (1997).

281. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368-73 (2001); *see id.* at 368 ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."); *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.").

282. *Garrett*, 531 U.S. at 376 (Breyer, J., dissenting).

283. 538 U.S. 721, 745-47 (2003) (Kennedy, J., dissenting) (criticizing the majority for abandoning *Garrett*'s stricter standard and relying on generic evidence of widespread gender discrimination); *see also* Tennessee v. Lane, 541 U.S. 509, 528 (2004) ("Just last Term in *Hibbs*, we approved the family-care leave provision of the FMLA as valid § 5 legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct.").

284. *Hibbs*, 538 U.S. at 725-26.

285. *Id.* at 735-36.

286. *Id.* at 745-47 (Kennedy, J., dissenting).

ADA's abrogation of state immunity in a suit brought by a prisoner alleging disability discrimination in violation of his Eighth Amendment rights—without mentioning any legislative finding at all.[287]

One way to make sense of these seemingly inconsistent cases is that the Court has taken the "widespread pattern of constitutional deprivation" standard, parsed its requirements (first, that the injuries be constitutionally cognizable and second, that they be pervasive), and evaluated the two on a sliding scale: the more apparent the constitutional injury, the less stringent the requirement that Congress prove its pervasiveness. If the Court is in fact hewing to that methodology, and if my analysis is correct and state defiance of federal bankruptcy law effects a constitutionally cognizable deprivation, Congress should face little trouble in making an adequate legislative finding. Obviously, by eliminating the state's sovereign immunity defense, *Hood* and *Katz* will have reduced the instances in which the state has defied federal bankruptcy law. But during the years between *Seminole Tribe* and *Hood* and *Katz*, when states *were* able to assert sovereign immunity defenses, there was a wealth of evidence documenting state noncompliance.[288] Thus, it should be easy to prove that in the absence of abrogation—either by constitutional design or statutory effect—there would be pervasive state deprivations of protected property without due process.

The second hurdle that *City of Boerne* and its progeny erected is the requirement that there be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[289] The congruence and proportionality requirement is much like the narrow tailoring rule in equal protection cases, only here, the states are cast as the suspect class and the fundamental right at stake is the states' freedom from undue federal influence in their affairs. Even the conservatives on the Court recognize that the Fourteenth Amendment operates in a zone in which the Tenth and

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287. United States v. Georgia, 546 U.S. 151 (2006).

288. *See, e.g.*, Haines, *supra* note 5, at 468-71 (using legal database searches to document widespread state practice of violating federal bankruptcy law). Of course, the cases Haines cites do not treat these violations as deprivations of due process, but they do establish the factual predicate that violations were frequent. Furthermore, the fact that the documentation is in the form of judicial proceedings may be significant given Justice Kennedy's apparent view that litigated disputes are prime evidence of a pattern of state misconduct. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 382 (2001) (Breyer, J., dissenting) (claiming that Justice Kennedy's judgment that the congressional record was inadequate "rests heavily upon his failure to find 'extensive litigation and discussion of constitutional violations' in '*the courts* of the United States'" (quoting *id.* at 376 (Kennedy, J., concurring)) (emphasis in original)).

289. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

Eleventh Amendments are inoperative, but for those lcery of federal power, the corollary of this recognition is that the courts must stand vigilant against congressional attempts to expand that zone. The *City of Boerne* Court struck down the RFRA because Congress tried to do just that: by requiring courts to apply strict scrutiny to policies resulting in nonpurposeful discrimination against religious groups, and thereby expounding a presumptive right under the Free Exercise Clause to challenge neutral laws of general applicability, Congress was expanding the zone of constitutional rights rather than enforcing existing ones.[290] The Court found that the law failed the congruence and proportionality requirement because its "[s]weeping coverage ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter" or of their constitutionality.[291] The provisions of the ADA challenged in *Garrett* fell for similar reasons.[292]

Florida Prepaid, however, poses a different challenge. In that case, the majority concluded the Patent Remedy Act's elimination of state sovereign immunity defenses was disproportionate to the alleged constitutional harm for two reasons: first, because Congress had failed to demonstrate a high frequency of violations;[293] and second, because the law might subject states to suit for negligent deprivations, which do not satisfy the deliberateness requirement for a procedural due process violation.[294] But as Justice Stevens pointed out in dissent, this is conflating the two *City of Boerne* requirements. The pervasiveness of constitutional violations is a wholly separate question from the congruence and proportionality inquiry. The former speaks to the frequency of misconduct; the latter speaks to the margin of constitutionally permissible state conduct for which an individual can bring suit. An abrogation provision may be perfectly fit to a certain species of constitutional violation—if such violations are rare, the provision will rarely be utilized.[295] Furthermore, Justice Stevens noted, because few patent infringements are the result of pure

290. *Id.* at 532-35.

291. *Id.* at 532.

292. *Garrett*, 531 U.S. at 372-73; *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (criticizing "the indiscriminate scope of the [ADEA's] substantive requirements").

293. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640-41 (1999).

294. *Id.* at 646-47.

295. *Id.* at 662-63 (Stevens, J., dissenting).

negligence, a vast majority of applications of the Act would be directed at deliberate deprivations that do implicate due process.[296]

Thus *Florida Prepaid* turns the convergence and proportionality requirement into a two-fold inquiry: First, is the frequency of state bankruptcy violations high enough to justify eliminating immunity defenses? Second, would a law that abrogated state sovereign immunity in bankruptcy court subject states to suit for actions that were *not* constitutionally suspect? The first question—how widespread is widespread enough?—is difficult to answer with any certainty because the Court has never defined the requisite level of state misbehavior necessary to trigger Congress's Section 5 authority. However, as explained above, there is plenty of evidence of state defiance in bankruptcy. The second question is easier to evaluate. The probable answer is no: eliminating immunity defenses would not increase states' liability for constitutionally sound acts. This is because the assertion of immunity itself is inextricably linked to the deprivation. Every time a state asserts its immunity to escape the jurisdiction of a bankruptcy court, it disables that court from effectively adjudicating the debtors' and creditors' property rights. If the bankruptcy system by its very nature only functions properly when the court has binding jurisdiction over all parties, assertions of sovereign immunity result in a deprivation of property interests almost by definition. And if that is true, abrogating sovereign immunity in bankruptcy proceedings is definitionally congruent and proportional. The abrogation does not augment anyone's constitutional rights; nor does it do anything to impose obligations on states, displace state laws, or prohibit official actions that were not already prohibited by the binding force of the Bankruptcy Code itself. [297] Abrogation merely enforces the property interests spelled out in the Code.

That leaves one potential final hurdle: showing that there are no means, short of abrogating state immunity in bankruptcy proceedings, to enforce the

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296. *Id.* at 654 n.5. The *Florida Prepaid* majority's reasoning is all the more baffling given that the same five members have repeatedly affirmed that Congress's enactments under Section 5 may sweep up some state action that does not independently violate the Fourteenth Amendment. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 539 (2004) (Rehnquist, C.J., dissenting) (quoting *Garnett*, 531 U.S. at 365) ("Congress' power to enact 'appropriate' enforcement legislation is not limited to 'mere legislative repetition' of this Court's Fourteenth Amendment jurisprudence."). It is hard to reconcile this recognition that Section 5 permits prophylactic measures with the majority's decision to invalidate the Patent Remedy Act because in permitting suits against states for unconstitutional deprivations, it may authorize suits against a vanishingly small number of deprivations that do *not* violate independently due process.

297. *See supra* note 212 and accompanying text (explaining how federal bankruptcy law displaces inconsistent state laws via the Supremacy Clause).

property interests grounded in the Bankruptcy Code. The Court has never explicitly required such a showing, but it would seem to follow from a combination of *Florida Prepaid*'s conclusion that there is no due process violation where individuals can vindicate their rights through other remedial schemes and the majority's assertion in *Seminole Tribe* that there were plenty of means to vindicate federal rights short of authorizing private suits against the state.[298]

I have already explained why state remedies cannot suffice.[299] But the *Seminole Tribe* majority offered three other enforcement mechanisms. First, the federal government could bring suit against the state.[300] Second, the Supreme Court could grant certiorari to review questions of federal law arising out of state court decisions (assuming, of course, that the state had consented to suit in its own courts).[301] Third, individuals could sue for injunctive relief under *Ex parte Young*.[302]

None of these avenues offer adequate redress. As Professor Bartell has observed, the first alternative—having the federal government initiate the lawsuit—is "more theoretical than practical in bankruptcy" because most debtors are private individuals, not arms of the federal government.[303] Furthermore, Congress would have to commit untold sums of money and resources to the Department of Justice to enable the Executive to bring suit against every state body that violated a bankruptcy order.

The second alternative—Supreme Court review of federal claims in state courts—is similarly beset. When the Court held in *Alden* that states retain sovereign immunity against federal causes of actions in their own courts, the Court directly imperiled even this avenue for enforcement of bankruptcy provisions. This alternative only functions if states waive their common law immunity from suit in state court.[304] It makes little sense to suppose that a state that pled a sovereign immunity defense against suit in federal courts

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298. *Florida Prepaid*, 527 U.S. at 643; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 n.16 (1996).

299. *See supra* Subsection III.C.2.

300. *Seminole Tribe*, 517 U.S. at 71 n.14.

301. *Id.*

302. For an excellent indictment of the majority's claim that, even where Congress may not displace state sovereign immunity, the availability of other enforcement mechanisms is sufficient to ensure the primacy of federal law, see Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1015-27 (2000).

303. Bartell, *supra* note 5, at 46.

304. *See* Richard Lieb, *Eleventh Amendment Immunity of a State in Bankruptcy Cases: A New Jurisprudential Approach*, 7 AM. BANKR. INST. L. REV. 269, 334 (1999).

would choose to forgo an equally potent defense just because the suit was brought in state court. But the larger obstacle to securing state compliance by exercising appellate jurisdiction over state cases stems from the sheer volume of bankruptcy cases—approximately 1.1 million in 2008, a majority of which involve property interests of or claims against a state.[305] Apart from the fact that the Supreme Court could only grant certiorari to a piddling fraction of those cases, this pathway would entail massive costs to the parties—including both the cost of legal representation for another round of appeals and the cost attending the delay in settling the bankruptcy proceedings while the parties awaited the Court's final judgment.

The viability of the final alternative—seeking an *Ex parte Young* injunction—has been the subject of much debate, but it too suffers from a critical restriction.[306] An *Ex parte Young* suit must prove an "ongoing violation of federal law," and the only equitable relief it authorizes is prospective.[307] This means that no matter how much financial damage a state's misconduct inflicts, so long as the state brings its conduct into compliance with federal bankruptcy law on the eve of the action's filing, the court will lack any authority to offer relief. Where only Article I rooted rights are at stake, the Court has defended this partial relief on the grounds that it strikes an appropriate balance between the supremacy of federal law and the values embodied by the Eleventh Amendment.[308] But where interests protected by the Fourteenth Amendment Due Process Clause are at stake—as they are in bankruptcy—the Eleventh Amendment ceases to operate as a constraint on the remedial relief that Congress may authorize.[309]

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305. *See* News Release, Bankruptcy Filings Up, *supra* note 26.

306. For a criticism of the *Ex parte Young* alternative, see Karen Codry, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Part Young *Relief: A Response*, 77 AM. BANKR. L.J. 23 (2003).

307. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 73 n.16 (1996); *see also* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 145 (1993) ("[T]he [*Ex parte Young*] exception is narrow: It applies only to prospective relief [and] does not permit judgments against state officers declaring that they violated federal law in the past . . . ."); Green v. Mansour, 474 U.S. 64, 68 (1985) (holding that the Eleventh Amendment bars courts from offering retrospective monetary relief for *Ex parte Young* actions).

308. *Green*, 474 U.S. at 68.

309. Edelman v. Jordan, 415 U.S. 651, 663 (1974) (holding that Congress may authorize monetary damages against states for violations of constitutional rights).

IV. USING ENTITLEMENT THEORY TO BYPASS *SEMINOLE TRIBE*

The theory that I advance in this Note—that federally sourced statutory entitlements are protected property interests that Congress may safeguard via Section 5—has applications far beyond bankruptcy. The theory has the potential to resuscitate many of the congressional regimes frustrated by *Seminole Tribe*'s holding that Article I is not a grant of authority to abrogate state immunity. But the theory's utility in this regard is also its greatest liability. Without limits, its potential to upend *Seminole Tribe* makes it unlikely that any one of the five pro-*Seminole Tribe* members of the Court would adopt it. This Part of the Note will explain how a federalist entitlement theory could threaten *Seminole Tribe*'s legacy; it will also show how recent doctrinal developments have diminished the theory's serviceability for other Article I powers. In short, the Court could adopt my theory of bankruptcy rights as protected property interests while doing minimal damage to the *Seminole Tribe* regime.

In the immediate aftermath of *Seminole Tribe*, there was a compelling argument that, given the prevailing law on statutory entitlements and Congress's broad Section 5 powers, *Seminole Tribe* planted the seeds of its own demise. *Seminole Tribe* held that Article I is not a source of authority to displace state immunity, but the opinion also affirmed *Fitzpatrick*'s holding that the Fourteenth Amendment is such a source.[310] *Seminole Tribe* was widely billed as a major truncation of Congress's power over the states. By leaving *Fitzpatrick* intact, though, *Seminole* only constrains Congress's abrogation authority if the body of rights emanating from the Fourteenth Amendment is smaller than the body of rights Congress could engender through its Article I powers. But under a pre-*Town of Castle Rock* and pre-*College Savings* view of statutory entitlements, the bodies of rights were virtually identical. Prior to those cases, the existence of a constitutionally protected property interest hinged solely on whether the entitlement was grounded in positive law and whether the statute imposed mandatory limits on the ability of officials to act against the entitlement holder.[311] But the only limit on Congress's authority to generate these entitlements and impose the attending obligations on the states is the outermost bound of Article I itself. And so the analysis comes full circle: any

310. *Seminole Tribe*, 517 U.S. at 59.

311. *See supra* Section III.A.

private right that Congress could make binding on the states pursuant to its Article I powers, it could enforce against the state under its Section 5 powers.[312]

If this were the present lay of the legal landscape, *Seminole Tribe* could be reduced to an empty shell. If property were defined solely by its source in statute, and if the legislature had "'unfettered discretion' in defining 'property' for purposes of the Due Process Clause,"[313] Congress could overturn almost all of the Court's post-*Seminole Tribe* decisions striking down statutory abrogations by reclassifying the federally conferred rights as protected property. It could re-enact the provision invalidated in *Garrett* subjecting states to suit for violations of ADA Title I on the theory that Title I is a validly enacted restriction on state antidisability discrimination,[314] and that this restriction provides disabled individuals a legitimate, legally anchored expectation that the state will not subject them to such disparate treatment. Congress could do the same with the ADEA provision invalidated by *Kimel* on the theory that individuals have a federally secured interest in having their employment unaffected by considerations of age. Even IGRA—the subject of dispute in *Seminole Tribe*—could find a new lease on life on the theory that its abrogation provision was a legitimate invocation of Congress's Section 5 powers to prevent states from arbitrarily denying Indian tribes their federally afforded right to engage in certain gaming activities. All Congress would have to do is reenact IGRA and pronounce it a bulwark designed to secure a constitutionally protected property interest. If this were the law, *Seminole Tribe* could be reduced to merely the latest reiteration of the clear statement rule governing abrogations pursuant to the Fourteenth Amendment.[315]

The legal landscape, however, has changed significantly in the last fifteen years. While no one on the Court explicitly commented on the combined potential of *Roth*-type entitlement cases and *Fitzpatrick* to thwart *Seminole Tribe*'s federalist makeover, subsequent decisions suggest that the

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312. The only exception would be where the states provide an adequate remedial scheme such that the deprivations never rise to the level of Due Process violations to begin with. *See supra* Section III.C.

313. Bishop v. Wood, 426 U.S. 341, 353 n.4 (1976) (Brennan, J., dissenting).

314. *Cf.* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring) ("It must be noted, moreover, that what is in question is not whether the Congress, acting pursuant to a power granted to it by the Constitution, can compel the States to act. What is involved is only the question whether the States can be subjected to liability in suits brought not by the Federal Government . . . but by private persons seeking to collect moneys from the state treasury without the consent of the State.").

315. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985) (affirming that Congress may abrogate state sovereign immunity to enforce the provisions of the Fourteenth Amendment, but only by "unequivocally express[ing] this intention").

conservatives on the Court were cognizant of the risk. *College Savings* is a prime example of how the pro-*Seminole Tribe* contingent has circumscribed the definition of property to prevent such sidestepping. Scholars have puzzled over why the majority introduced the "right to exclude" as the new hallmark of constitutional property, especially without so much as referencing the contrary precedent holding that nonexclusive entitlements like public education and unadjudicated causes of action qualified for constitutional protection.[316] A likely explanation is that the majority realized that the purely positivist conception of property could become a sort of Trojan horse, through which Congress could insinuate traditional Article I grounded rights into the due process acropolis. By changing the definition of protected property from any monetizable statutory entitlement to only those interests displaying some right to exclude, the Court drastically limited the number of statutory entitlements that Congress could constitutionalize as protected property. Like the right to operate a business free from false advertising,[317] neither the right to work clear of age or disability-based discrimination nor the tribes' rights to good-faith negotiations with states for gaming permits "bear[s] [a] relationship to any right to exclude."[318] Thus, adopting my theory of federal statutory entitlements need not necessarily lead to a reinstatement of the pre-*Seminole Tribe* status quo.

The *College Savings* majority's failure to reconcile the new hallmark of property with the old generates instability in this body of law and uncertainty over how courts will handle nonexclusionary entitlements. Future majorities may ultimately embrace the *College Savings* standard by withdrawing constitutional recognition from entitlements like public education and unadjudicated causes of action; or they may abandon the "right to exclude" hallmark altogether and return to the prior definition of protected property as statutory entitlement. The former would remake much of the Court's statutory entitlement jurisprudence and diminish the body of so-called new property; the latter would remake much of the Court's Fourteenth and Eleventh Amendment jurisprudence by bringing Congress's abrogation powers under the Fourteenth Amendment into alignment with its substantive lawmaking powers under Article I.

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316. *See, e.g.*, Merrill, *supra* note 192, at 911-14 (finding it "embarrassing" that the Court failed to reconcile the two approaches to protected property).

317. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 673 (1999) (holding that the "hallmark of a protected property interest is the right to exclude others").

318. *Id.*

It is unlikely that the Court will do either. So long as the 5-4 balance favors proponents of *Seminole Tribe*, the Court probably will embrace a dual standard: all federal statutory entitlements are protected property as far as federal agencies are concerned and all state statutory entitlements are protected property as far as state agencies are concerned. But where federal law generates legal entitlements that bind the states, that entitlement is only a protected property interest as far as the states are concerned if the entitlement conveys some right to exclude. Put differently, a state is bound by the Due Process Clause when it administers its own entitlement schemes and the United States is bound by the Due Process Clause when it administers its own entitlement schemes. But the state is not bound by the Due Process Clause when it interferes with a federally accorded entitlement unless that entitlement fulfills the *College Savings* hallmark. The conservative justices might defend the dual standard on the grounds that it strikes a balance between ensuring that governments fairly and consistently implement their own entitlement schemes and preserving the Eleventh Amendment from congressional encroachment. This may seem unprincipled—why, after all, should the states have more latitude in violating supreme federal law than state law?—but these types of compromises are hardly foreign to Eleventh Amendment jurisprudence.[319]

However future majorities reconcile the dueling hallmarks of property, two limitations will bound Congress's ability to use the statutory entitlement theory to abrogate state immunity. First, as a threshold matter, Congress will have to identify a fount of authority to mint the property interests.[320] Wherever Congress seeks to create a statutory entitlement that binds the states in some way, it will have to demonstrate that it is acting within the scope of its enumerated authority and in keeping with current principles of federalism.[321]

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319. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105-06 (1984) (holding that permitting prospective relief while prohibiting retroactive relief maintains a balance between the Supremacy Clause and the constitutional precept of state immunity); Jackson, *supra* note 11, at 90-91 (criticizing the prospective-retroactive distinction as unprincipled); *see also* Meltzer, *supra* note 302, at 1012 ("What is striking about [*Alden*, *Florida Prepaid*, and *College Savings Bank*] is [the Court's] effort to enforce a vision of constitutional federalism not by restricting the reach of congressional authority to regulate the states, but rather by limiting the remedial means by which Congress may enforce regulation of the states that is otherwise within its substantive legislative power. In ways that the Court fails to acknowledge, its effort fails to promote any coherent conception of states' rights or state autonomy while harming legitimate national objectives.")

320. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

321. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (striking down the Violence Against Women Act's civil remedy in part because it was not closely enough linked to economic activity to come within federal commerce power).

Second, even if Congress satisfied the Court that it was acting pursuant to its Article I authority and that the entitlement qualified as property, it would still have to hew to the conditions laid out in *City of Boerne* and *Florida Prepaid* before it enacted enforcement legislation. These decisions require Congress to identify a pattern of unconstitutional deprivations, to show that the abrogation is a congruent and proportional means to correct these deprivations, and to demonstrate that no alternative remedy short of wholesale abrogation exists to secure a property interest.[322] Many efforts to abrogate state immunity using the procedural due process theory have and would run aground on these shoals. In sum, bankruptcy may be one of only a handful of Article I powers for which Congress could leverage entitlement theory to displace state sovereign immunity.

CONCLUSION

In the four years since Justice Alito assumed Justice O'Connor's seat, the Court has not found occasion to revisit its post-*Seminole Tribe* bankruptcy jurisprudence. That fact should not lure practitioners or scholars into a false sense of security over *Katz*'s durability. As the last two decades of chaotic uprooting of precedent attest, few areas of law are as unstable and personality-driven as the Court's Eleventh Amendment jurisprudence. The deficiencies in the *Katz* majority's reasoning further enhance the likelihood that a future Court will overrule *Katz*. The majority's failure to clarify the scope of its ancillary order theory or hint at whether the states' cession of immunity extended to retroactive monetary damages provide ample opportunity for conservatives on the Court to limit *Katz* to its facts—that is, a suit against the state for an ongoing violation of a facet of bankruptcy law that was well established at the time of the Constitutional Convention. An effective bankruptcy regime requires more.

Scholars and practitioners, however, need not rely on future majorities affirming or extending *Katz*'s judgment that Congress's bankruptcy powers are an exception to *Seminole Tribe*'s disavowal of Article I as a source to abrogate state immunity. Bankruptcy protections are federally conferred property interests of the same constitutional caliber as the welfare rights in *Goldberg v. Kelly* or the state-provided utilities in *Memphis Light*. When a state tramples on those statutory entitlements it does not merely contravene supreme federal law, it contravenes debtors' and creditors' constitutional right to be secure from deprivation of property without due process of law. Even under *Seminole Tribe*

322. *See supra* Section III.D.

and progeny, it is well within Congress's authority to strip states of their sovereign immunity to ensure that those constitutional deprivations do not go unremedied.