Government.[62] In this respect, the federal courts may not act without congressional guidance in subjecting states to suit, and Congress, which can act to the extent of its granted powers, is constrained by judicially created doctrines requiring it to be explicit when it legislates against state immunity.[63]

Suits Against States

Despite the apparent limitations of the Eleventh Amendment, individuals may, under certain circumstances, bring constitutional and statutory cases against states. In some of these cases, the state's sovereign immunity has either been waived by the state or abrogated by Congress. In other cases, the Eleventh Amendment does not apply because the procedural posture is such that the Court does not view them as being against a state. As discussed below, this latter doctrine is most often seen in suits to enjoin state officials. However, it has also been invoked in bankruptcy and admiralty cases, where the *res*, or property in dispute, is in fact the legal target of a dispute.[64]

The application of this last exception to the bankruptcy area has become less relevant, because even when a bankruptcy case is not focused on a particular *res*, the Court has held that a state's sovereign immunity is not infringed by being subject to an order of a bankruptcy court. "The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."[65] Thus, where a federal law authorized a bankruptcy trustee to recover "preferential transfers" made to state

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[62] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Quern v. Jordan, 440 U.S. 332, 337 (1979).

[63] *See* Hutto v. Finney, 437 U.S. 678 (1978), in which the various opinions differ among themselves as to the degree of explicitness required. *See also* Quern v. Jordan, 440 U.S. 332, 343–45 (1979). As noted in the previous section, later cases stiffened the rule of construction. The parallelism of congressional power to regulate and to legislate away immunity is not exact. Thus, in Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279 (1973), the Court strictly construed congressional provision of suits as not reaching states, while in Maryland v. Wirtz, 392 U.S. 183 (1968), it had sustained the constitutionality of the substantive law.

[64] *See* Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446–48 (2004) (exercise of bankruptcy court's *in rem* jurisdiction over a debtor's estate to discharge a debt owed to a state does not infringe the state's sovereignty); California v. Deep Sea Research, Inc., 523 U.S. 491, 507–08 (1998) (despite state claims over shipwrecked vessel, the Eleventh Amendment does not bar federal court *in rem* admiralty jurisdiction where the *res* is not in the possession of the sovereign).

[65] Central Virginia Community College v. Katz, 546 U.S. 356, 362–63 (2006).