Constitutional Law - Eleventh Amendment - Sovereign Immunity - Federalism

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Recommended Citation
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CONSTITUTIONAL LAW - ELEVENTH AMENDMENT - SOVEREIGN IMMUNITY - FEDERALISM - The United States Supreme Court held that congressional powers pursuant to Article I of the United States Constitution cannot be relied upon to evade constitutional limitations placed upon federal jurisdiction by the Eleventh Amendment as the Amendment restricts judicial power under Article III.


In September of 1991, the Seminole Tribe of Indians (the "Tribe") sued the state of Florida ("Florida") and its governor alleging that Florida had refused to negotiate conditions that would allow the Tribe to conduct certain gaming or gambling activities on the Seminole reservation as required by the Indian Gaming Regulatory Act ("IGRA"). In particular, the Tribe claimed that Florida violated the good faith negotiation requirement found in section 2710(d)(3) of the IGRA. Florida moved to

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1. Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1121 (1996). The Tribe wished to negotiate the inclusion of certain casino-type gambling activities and slot machines into a tribal-state compact. Respondent's Brief at 4, Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994) (No. 94-12). Congress passed the Indian Gaming Regulatory Act ("IGRA") pursuant to the Indian Commerce Clause, U.S. Const., art. I, § 8, cl. 3, for the stated purpose of "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1) (1988). The regulations embodied in the IGRA divide gaming into three classes and provide a different regulatory scheme for each class. See id. § 2703(6-8). Class I gaming encompasses social games played solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations. Id. § 2703(6). Class II gaming includes bingo, games similar to bingo, nonbanking card games not illegal under the laws of the state and card games operated in particular states prior to the passage of the IGRA. Id. § 2703(7). Class III games are the primary focus of most litigation, as "[i]t is the most heavily regulated of the three classes." Seminole, 116 S. Ct. at 1120. Class III gaming, which includes slots, banking games, parimutuel racing (e.g., horse racing) and lotteries, can be conducted by a tribe only when the regulatory scheme set forth in the IGRA is satisfied. Id. The IGRA provides that Class III gaming is lawful only when it is conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the state. 25 U.S.C. § 2710(d)(1) (1988).

2. Seminole, 116 S. Ct. at 1120. This section of the IGRA provides:

Any Indian tribe having jurisdiction over Indian lands upon which a Class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the state shall negotiate with the Indian tribe in good faith to enter into such a compact.
dismiss the complaint on the basis that the action violated the state's sovereign immunity from suit in federal court. On June 18, 1992, the United States District Court for the Southern District of Florida denied the motion and Florida commenced an interlocutory appeal of the decision. Immediate appellate review was granted based on the collateral order doctrine.

The United States Court of Appeals for the Eleventh Circuit reversed the decision of the district court and held that the Eleventh Amendment barred the Tribe's suit against Florida. Although the circuit court agreed with the district court's conclusion that Congress intended to abrogate states' sovereign immunity under the IGRA, and that it passed the IGRA pursuant to congressional power under the Indian Commerce Clause, the circuit court disagreed with the district court's finding that the Indian Commerce Clause granted Congress the power to abrogate states' sovereign immunity from suit. The circuit court then determined that as a result of Florida's sovereign immunity, it had no jurisdiction over the Tribe's pending suit. Importantly, the court also held that the doctrine of *Ex parte Young*, which would have permitted suit against the governor of Florida, was not available to the Tribe for use in forcing good faith negoti-


3. *Seminole*, 116 S. Ct. at 1121. Florida based its dismissal request on the Eleventh Amendment, which provides, in relevant part: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. See Respondent's Brief at 4, Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994) (No.94-12).


7. The Indian Commerce Clause is found in the United States Constitution, Article I, Section 8, clause 3, and provides: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3. Abrogation is defined as: "[t]he destruction or annulling of a former law, by act of the legislative power." BLACK'S LAW DICTIONARY 8 (6th ed. 1990). Abrogation in this context means a revocation of the immunity granted to states by the Eleventh Amendment, thereby making the states amendable to suit without their consent.


9. Id. at 1029.

10. 209 U.S. 123 (1908). The *Ex parte Young* doctrine allows a suit to go forward notwithstanding the Eleventh Amendment's jurisdictional bar where the suit seeks prospective injunctive relief in order to end a continuing violation of federal law. See id.
In conclusion, the Eleventh Circuit remanded the case to the district court with direction to dismiss the Tribe's suit for want of subject matter jurisdiction.

The United States Supreme Court granted certiorari in the case to address two questions. First, the Court considered whether the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against states for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause. Second, the Court examined whether the doctrine of Ex Parte Young permits suits against state governors for prospective injunctive relief to enforce the good faith bargaining requirement of the IGRA.

The Court began its analysis by stating that while the Eleventh Amendment appears to restrict only the federal courts' Article III diversity jurisdiction, the Amendment has been broadly interpreted to encompass not only its literal meaning but also the propositions that it reinforces. The Court then restated these propositions to be, as initially set forth in Hans v. Louisiana, that: (1) each state is a sovereign entity in the federal system; and (2) it is inherent in the nature of a sovereign not to be amenable to suit brought against it by an individual without its consent.

The Seminole Court then noted that for over one hundred years following Hans, the notion that federal jurisdiction over suits against unconsenting states "was not contemplated by

11. Seminole, 11 F.3d at 1028-29.
12. Id. at 1029. Subject matter jurisdiction "refers to a court's power to hear and determine cases of the general class or category to which proceedings in question belong." BLACK'S LAW DICTIONARY 1425 (6th ed. 1990).
13. Seminole, 116 S. Ct. at 1122. Certiorari is a writ used by the Supreme Court as a discretionary device in choosing the cases it wishes to hear. BLACK'S LAW DICTIONARY 228 (6th ed. 1990).
14. Id.
15. Id. While the interlocutory appeal was pending before the Eleventh Circuit, the district court granted Florida's earlier filed summary judgment motion and found that Florida had fulfilled its obligation under the IGRA to negotiate in good faith. Id. A summary judgment may be granted when there is no disputed issue as to the material facts of the case, or if only a question of law is involved. BLACK'S LAW DICTIONARY 1435 (6th ed. 1990). The Eleventh Circuit stayed its review of the summary judgment decision pending the disposition of the present case. Seminole, 116 S. Ct. at 1122.
17. 134 U.S. 1 (1890).
18. Seminole, 116 S. Ct. at 1122. In Hans, the Court quoted THE FEDERALIST NO. 81, written by Alexander Hamilton, and posited that the passage stands for the proposition that Article III was not intended to confer the power to sue sovereign states on individuals when written. Hans, 134 U.S. at 13.
the Constitution when establishing the judicial power of the United States" was reaffirmed.  

The Seminole Tribe did not dispute the fact that Florida had not consented to the suit. Rather, the Tribe argued that its suit was not barred by state sovereign immunity because Congress had abrogated the immunity through the IGRA. The Tribe also argued that its suit should be allowed to proceed against the governor of Florida under the doctrine of Ex parte Young.

The Court used a two-step process to determine whether Congress had abrogated Florida's sovereign immunity under the IGRA. First, pursuant to Green v. Mansour, the Court ascertained whether Congress had clearly expressed an intent to abrogate states' sovereign immunity within the IGRA. Second, if Congress did express such an intent, the Court determined whether such abrogation was a constitutionally valid exercise of congressional power.

Under the first step of the analysis, the Court agreed with the Eleventh Circuit's finding that Congress indeed intended to abrogate states' sovereign immunity under the IGRA by providing an "unmistakably clear" statement of this intent within the Act. Furthermore, the Court found that the remedial provisions of the IGRA left no doubt that states were to be the parties against whom remedies under the Act were to be sought. After then reviewing the numerous references to the word "state" in the text of the IGRA, the Court concluded that Congress intended to abrogate states' sovereign immunity from suit.

The Court next considered whether the action taken by Congress constituted a valid exercise of its constitutional power. The Tribe had argued that since the IGRA only sanctioned pro-

20. Id.
22. Seminole, 116 S. Ct. at 1123.
23. Id.
24. 474 U.S. 64, 68 (1985) (holding that absent continuing violation of federal law, Eleventh Amendment limitation on Article III jurisdiction prevents federal courts from ordering "notice relief" or declaratory judgments based on prior conduct of state officials).
26. Id. at 1123.
29. Seminole, 116 S. Ct. at 1123.
30. Id. at 1124.
The Court should find the abrogation of immunity to be a valid exercise of congressional power. The Court responded to this argument by noting that determining whether the Eleventh Amendment bars a suit by determining whether a party to the suit could receive a monetary judgment would be a curious approach. Consequently, the Court concluded that the type of relief sought is irrelevant to whether Congress has the power to abrogate states' immunity.

The Tribe then argued that since the federal government granted to the states via the IGRA a power that the states did not formerly have, the abrogation power was validly exercised. The Court also rejected this argument, finding that Congress may not unilaterally set aside Eleventh Amendment immunity with a grant of some other legislatively created authority. The Court subsequently focused its inquiry on whether Congress had passed the IGRA on the basis of a constitutional provision granting Congress the power of abrogation.

The Court had previously found congressional power to abrogate constitutionally valid in only two instances. In Fitzpatrick v. Bitzer, the Court held that the Fourteenth Amendment extended federal power to intrude upon the province of the Eleventh Amendment. In particular, the Court found that Section 5 of the Fourteenth Amendment allowed Congress to abrogate the states' immunity from suit otherwise guaranteed by the Elev-

31. Id.
32. Id. The Court quoted Corey v. White, 457 U.S. 85, 90 (1982), which provided that "it would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no monetary judgment is sought." Id.
33. Id. (citing Hess v. Port Authority Trans-Hudson Corporation, 115 S. Ct. 394, 404 (1994)(holding that "the Eleventh Amendment does not exist solely in order to prevent[ing] federal court judgments that must be paid out of a state's treasury").
34. Seminole, 116 S. Ct. at 1124. The Tribe was referring to the transfer of authority over gaming on Indian lands to the states as granted under the IGRA. Id.
35. Id. The Court agreed that "[i]t is true enough that the [IGRA] extends to the states a power withheld from them by the Constitution." Id. at 1124 (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (holding state could not enforce its civil regulatory gaming laws on Indian lands)). The Court concluded, however, that the supplemental grant of authority was irrelevant to a determination of whether Congress possesses the power to abrogate state sovereign immunity. Id. at 1125.
36. Id. at 1125. The Court simply asked whether "the Act in question was passed pursuant to a constitutional provision granting Congress the power to abrogate." Id.
37. Id.
39. Fitzpatrick, 427 U.S. at 455. The Court found that the Fourteenth Amendment expanded federal power at the expense of state autonomy and shifted the balance of state and federal power set by the Constitution. Id. at 456.
enth Amendment. In *Pennsylvania v. Union Gas Co.*, the Court upheld congressional abrogation of a state's Eleventh Amendment immunity under the Interstate Commerce Clause. The Court based the *Union Gas* decision upon the rationale that congressional regulatory power over interstate commerce would be incomplete without the authority to hold states liable for damages.

In *Seminole*, the Tribe argued that while Congress passed the IGRA pursuant to the Indian Commerce Clause rather than the Fourteenth Amendment or the Interstate Commerce Clause, this distinction was inconsequential as the power to abrogate under the Indian Commerce Clause was no less than the power conferred under the Interstate Commerce Clause. To support this assertion, the Tribe contended that the *Union Gas* plurality found the power to abrogate to be located in the plenary character of the grant of authority to Congress to regulate interstate commerce, which still leaves the states with some power to regulate themselves. Since congressional power to regulate under the Indian Commerce Clause is even more complete, as regulation of Indian affairs remains exclusively in the hands of the federal government, the Tribe reasoned that Congress' power to abrogate under the IGRA was more likely to be present.

In response, Florida argued that since Congress' authority over Indian Tribes is complete, the power to abrogate is not necessary to affirm the rightful exercise of congressional authority in that area. Florida attempted to distinguish the Interstate Commerce Clause from the Indian Commerce Clause by assert-

40. *Id.* at 456. The *Fitzpatrick* Court described this circumstance as “carving out” of state authority a power that was then passed to the federal government. *Id.*


42. *Union Gas*, 491 U.S. at 19-20. The Interstate Commerce Clause, located in the United States Constitution, Article I, Section 8, clause 3, provides: “Congress shall have Power ... To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl.3.

43. *Union Gas*, 491 U.S. at 19-20. Justice White added the fifth vote for the plurality but wrote separately to express his disagreement with much of the plurality's rationale. *Id.* at 57.


46. Petitioner's Brief at 20, *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994) (No. 94-12). The Tribe also argued that the power of abrogation under the Indian Commerce Clause is necessary for the protection of tribes from state action denying federally guaranteed rights. *Id.* The Tribe noted: “Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealings with the Federal Government ... there arises the duty of protection, and with it the power.” *Id.*

47. *Seminole*, 116 S. Ct. at 1126.
ing that the Interstate Commerce Clause does not involve a complete transfer of authority to the federal government, and, therefore, the abrogation power is necessary to accomplish the goals of Congress via the Interstate Commerce Clause. Florida then argued that the Indian Commerce Clause, in contrast, completely transfers authority to the federal government and renders the power of abrogation unnecessary. 48

The Court acknowledged both parties reliance upon the holding in Union Gas and commenced its opinion with an analysis of that case. 49 The Court considered whether the Indian Commerce Clause, like the Interstate Commerce Clause in Union Gas, constitutes a grant of authority to the federal government at the expense of the states. 50 Under the Union Gas rationale, the Court observed that if a state's partial relinquishment of control over a particular area includes a surrender of immunity from suit, then a state's total abdication of authority over a different area must also include a surrender of immunity from suit. 51 The Court then accepted the Tribe's position that Union Gas allows no distinction to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause. 52

The Court next stated, however, that it was not bound by the principle of stare decisis in the matter before it, and further stated that it was not constrained to follow precedent when decisions were impractical or illogically reasoned. 54 Subsequently, the Court overruled Union Gas. 55

The Court stated that at the time Union Gas was decided, it was well established that the Eleventh Amendment represented the constitutional principle that state sovereign immunity lim-

49. Seminole, 116 S. Ct. at 1126.
50. Id. The Court stated, "if anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the federal government than does the Interstate Commerce Clause." Id.
51. Id. The Court acknowledged Justice Scalia's dissenting conclusion in Union Gas: "[i]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the Article I powers." Id. See Union Gas, 491 U.S. at 42 (Scalia, J., dissenting).
52. Seminole, 116 S. Ct. at 1127.
53. Stare decisis is a prudential restraint imposed by the courts requiring courts to adhere to precedent and not to unsettle things that are established. See Black's Law Dictionary 1406 (6th ed. 1990).
54. Seminole, 116 S. Ct. at 1127. The Court found that avoiding strict adherence to precedent is especially necessary in constitutional cases since in such cases correction through legislative action is practically impossible. Id. Interestingly, the creation of the Eleventh Amendment stemmed from 'legislative correction' of the Supreme Court's holding in Chisholm v. Georgia, 2 Dall. 419 (1793). See Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934).
55. Seminole, 116 S. Ct. at 1128.
ited the federal courts’ jurisdiction under Article III. The Court then noted that *Union Gas* had been the only decision that expanded federal court jurisdiction beyond the bounds of Article III, contrary to the century old doctrine established in *Hans v. Louisiana*.

The Court concluded that when deciding whether Congress had the power to abrogate states’ sovereign immunity under the Indian Commerce Clause, it is required to proceed with fidelity to the *Hans* doctrine. The *Seminole* majority noted that the *Hans* decision was not grounded solely on English common law as had been characterized by the dissenting opinion in *Seminole*, but rather on the more fundamental “jurisprudence of all civilized nations.” The *Seminole* majority also found that the principle of state sovereign immunity is differentiated from other common law principles, as only sovereign immunity initiates the passage of a specific constitutional amendment. Finally, the *Seminole* majority held that Article I powers cannot be relied upon to evade the constitutional limitations placed upon federal jurisdiction by the Eleventh Amendment, as the Eleventh Amendment restricts the judicial power under Article III.

The Court then turned to the second inquiry in the case and noted that the doctrine of *Ex parte Young* allows a suit barred by the Eleventh Amendment to proceed in order to prevent a continuing violation of federal law by a state official. Looking at the facts of *Seminole*, the Court noted that the alleged continuing

56. *Id.* In *Chisholm v. Georgia*, 2 Dall. 419 (1793), the Court determined that the Constitution does not prohibit suits against states; and this determination led to the passage of the Eleventh Amendment. *Id.* at 1129. While the Eleventh Amendment does not specifically restrict federal question jurisdiction under Article III, it was held to do so in *Hans v. Louisiana*, 134 U.S. 1 (1890). The dissent in *Union Gas* argued that under the plurality’s conclusion in *Union Gas*, Congress could, under Article I, expand the scope of the federal courts’ jurisdiction under Article III pursuant to Article I powers. *Union Gas*, 491 U.S. at 40 (Scalia, J., dissenting). Such a conclusion, argued the *Union Gas* dissent, contradicts the Court’s long-standing principle that Article III sets forth the exclusive catalog of permissible federal court jurisdiction. *Id.* at 40.


58. *Seminole*, 116 S. Ct. at 1128. The *Hans* doctrine expanded the scope of Eleventh Amendment, establishing the constitutional principle that state sovereign immunity limits the federal courts’ jurisdiction under Article III. *Id.* at 1127.

59. *Id.* at 1129. The Court quoted *Hans*, where Chief Justice Taney stated: “It is an established principle of jurisprudence in all civilized nations that a sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . .” *Id.* (quoting *Hans*, 134 U.S. at 17).

60. *Id.* at 1130. The Court was responding to the dissent’s proposition that the common law principle of sovereign immunity is open to change by the legislature, thereby refuting the constitutional basis of sovereign immunity. *Id.*

61. *Id.* at 1131.

62. *Id.* at 1132. See supra note 10 for an explanation of an *Ex parte Young* injunction.
violation of federal law was the Florida governor's refusal to negotiate Indian gaming rights. The Court then responded to this allegation by asserting that it would not augment a remedial scheme designed by Congress such as that outlined in the IGRA with one of judicial creation, particularly when Congress provided that the scheme would be the sole remedy available for the enforcement of a particular federal right. The Court further expressed a desire to proceed with caution before discarding a particularized remedial scheme designed by Congress for violations of a statutorily created right.

The Court found the IGRA's good faith provisions to indeed be the remedial scheme available to a Tribe when a state fails to fulfill its obligations under the IGRA. The Court then concluded that an *Ex parte Young* injunction against a state official would unduly expand the remedies available to a tribe in the event of such a violation. The Court also found that allowing an action to proceed under *Ex parte Young* would expose state officials to the full remedial powers of a federal court, thus rendering section 2710(d)(7) of the IGRA superfluous.

Additionally, the Court reasoned that if it allowed an *Ex parte Young* injunction to issue in this circumstance, tribes would no longer seek redress through the less effective and more complex IGRA mechanism. The Court thus declined to rewrite the remedial scheme of the IGRA. Further, the Court refused to speculate as to what Congress may have intended had Congress

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64. *Id.* The Court noted that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations which may occur in the course of its administration, we have not created additional remedies." *Id.*
65. *Id.*
66. *Id.* The majority stated: "Congress intended . . . not only to define, but also significantly to limit, the duty imposed by § 2710(d)(3)." *Id.* Section 2710(d)(3)(A) provides:

Any Indian tribe having jurisdiction over the Indian lands upon which a Class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian Tribe in good faith to enter into such a compact.

68. *Id.* at 1133.
69. *Id.* The Court also considered the extent of the remedies available to tribes under an *Ex parte Young* action, concluding that this remedy would expose the state official to the full remedial powers of the federal courts, including contempt sanctions. *Id.*
known that it lacked the authority to make states amendable to suit under the IGRA.\textsuperscript{70}

The Court concluded that the Eleventh Amendment prohibits Congress from granting jurisdiction to federal courts for the purpose of enforcing federal statutory rights against the states.\textsuperscript{71} The Court further held that the \textit{Ex parte Young} exception to Eleventh Amendment immunity cannot be used to enforce section 2710(d)(3) of the IGRA.\textsuperscript{72} In effect, therefore, the Court affirmed the Eleventh Circuit's dismissal of the Tribe's suit.\textsuperscript{73}

The Eleventh Amendment was the first amendment added to the Constitution for the purpose of overturning a Supreme Court decision.\textsuperscript{74} In \textit{Chisholm v. Georgia},\textsuperscript{75} a South Carolina citizen sued the state of Georgia in a common law assumpsit action to collect a debt.\textsuperscript{76} The \textit{Chisholm} court concluded that Article III of the United States Constitution extended the judicial power of the federal government to encompass suits against a state by citizens of another state.\textsuperscript{77}

In a 4-1 decision, the court in \textit{Chisholm} found that state immunity existing prior to ratification of the Constitution was abrogated for purposes of federal jurisdiction involving state-citizen diversity.\textsuperscript{78} The court further determined that it made no difference whether the state was the plaintiff or defendant to the suit and thus rejected the view that Article III jurisdiction lies only in state-instituted actions.\textsuperscript{79} Georgia was therefore held subject to the judicial power of the federal court.\textsuperscript{80}

\textsuperscript{70.} \textit{Id.} The Court concluded that if the statutory scheme needed to be corrected, the effort should be made by Congress and not the federal courts. \textit{Id.}

\textsuperscript{71.} \textit{Id.}

\textsuperscript{72.} \textit{Seminole}, 116 S. Ct. at 1133. The Court stated that Congress imposed more limited liability upon a state under IGRA's remedial scheme indicating that Congress had no desire to expand the liability that would result under the \textit{Ex parte Young} doctrine. \textit{Id.}

\textsuperscript{73.} \textit{Id.}


\textsuperscript{75.} 2 Dall. 419 (1793).

\textsuperscript{76.} \textit{Chisholm}, 2 Dall. at 421. Chisholm sought payment for goods purchased by the state of Georgia during the revolutionary war. \textit{Id.} Assumpsit is a common law form of action that lies for the recovery of damages for the non-performance of a parol or simple contract or a contract that is neither of record or under seal. \textit{Black's Law Dictionary} 122 (6th ed. 1990).

\textsuperscript{77.} \textit{Chisholm}, 2 Dall. at 426. Article III, Section 2 of the United States Constitution provides in pertinent part: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority." U.S. \textit{Const.} art III, § 2.

\textsuperscript{78.} \textit{Chisholm}, 2 Dall. at 426.

\textsuperscript{79.} \textit{Id.} at 420-21.

\textsuperscript{80.} \textit{Id.} at 479. In response to the \textit{Chisholm} holding, "proposed amendments were offered, and within a year, Congress had passed the Eleventh Amendment." Jackson, supra note 74 at 8. Justice Souter, in his dissenting opinion in \textit{Seminole}, attacked the
Recent Decisions

In *Hans v. Louisiana*, the United States Supreme Court confronted the issue of whether the Eleventh Amendment barred a suit against a state by one of the state's own citizens. A citizen of Louisiana brought a suit against the state of Louisiana for recovery of interest due on a bond issue that Louisiana attempted to repudiate. Louisiana argued that the federal court lacked jurisdiction over the case. Hans argued in response that the Eleventh Amendment was no barrier to federal jurisdiction since he was a citizen of the state he was suing.

The Court agreed that a literal reading of the Eleventh Amendment only prohibits suits against a state brought by citizens of another state or by foreign subjects. The Court did not, however, accept the proposition that upon passage of the Eleventh Amendment, there was an implicit validation of a citizen's right to sue his/her home state; rather, the Court found that such a reading "strained the Constitution and the law to a construction never dreamed of.”

The *Hans* Court concluded that the Eleventh Amendment bars federal question jurisdiction raised by individuals who are citizens of the state they are suing. The Court read the Eleventh Amendment as to not only reverse the decision of the *Chisholm* court, but also interpreted the Eleventh Amendment to require courts to construe Article III jurisdiction so as not to create remedies that would have been unavailable prior to the passage of the Constitution. The *Hans* court conceded that while the literal

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*Seminole* majority's reliance on the statement that *Chisholm* “created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted.” *Seminole*, 116 S. Ct. at 1130 (Souter, J., dissenting) (quoting *Principality of Monaco*, 292 U.S. at 313). Justice Souter pointed to the fact that it was two years after *Chisholm* before the Eleventh Amendment was ratified. *Id.* at 1148.

81. 134 U.S. 1 (1890).
83. *Id.* at 3. The issue raised a federal question since Hans argued that the state had impaired the obligation of contracts, forbidden by Article I, Section 10 of the United States Constitution. *Id.*
84. *Id.* Louisiana's position was that absent consent, “the Constitution and laws do not give this Honorable Court jurisdiction of a suit against the state” and its jurisdiction was respectfully declined. *Hans*, 134 U.S. at 3.
85. *Id.* at 10. Hans argued that the Eleventh Amendment restricts jurisdiction in cases involving diversity alone, not those involving a federal question. *Id.*
86. *Id.*
87. *Hans*, 134 U.S. at 15. The Court reasoned that if Hans' argument was accepted, an anomalous result would occur because a state could be sued by its own citizens in federal question cases but not by the citizens of another state on the same cause of action. *Id.* at 10.
88. *Id.* at 21.
89. *Id.* at 11. The *Hans* Court stated, "it was not the intention to create new and unheard of remedies, by subjecting sovereign states to actions at the suit of individuals." *Id.* at 12.
language of the Eleventh Amendment does not prohibit suits by citizens against their home state, the Amendment does prohibit the Constitution from being construed as importing any power to authorize maintenance of such suits.\textsuperscript{90}

For more than a century following \textit{Hans}, the Court grounded decisions involving Article III jurisdiction on the understanding that state sovereign immunity is a fundamental part of the Eleventh Amendment.\textsuperscript{91} As a result of the broad construction given to the principle of state sovereign immunity under the Eleventh Amendment following \textit{Hans}, the doctrine of \textit{Ex parte Young} developed.\textsuperscript{92} Under this doctrine, the Court regarded an action against a state officer to be distinguishable from a suit against the state in certain instances, and therefore did not find the Eleventh Amendment to be an obstacle to such a suit.\textsuperscript{93}

In \textit{Ex parte Young},\textsuperscript{94} the Court decided a case that was prompted by an effort to prevent Minnesota from instituting rate regulation of railway companies.\textsuperscript{95} A group of stockholders sued the Attorney General of Minnesota in federal court, claiming that continued enforcement of a Minnesota state law setting railroad rates violated their constitutional rights to equal protection and due process.\textsuperscript{96} In response to the claim, the court directed the Minnesota Attorney General to cease enforcement of Minnesota's railroad rate regulations.\textsuperscript{97} The Attorney General then petitioned the Supreme Court for release from the injunction\textsuperscript{98} and argued that the suit was, in effect, a suit against the state of Minnesota.\textsuperscript{99} The Supreme Court rejected the Attorney General's arguments, and held that state officials who attempt to enforce unconstitutional laws may be enjoined from doing so by federal courts.\textsuperscript{100}

\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Seminole}, 116 S. Ct. at 1129.
\textsuperscript{92} \textit{Seminole}, 11 F.3d at 1028. The Supreme Court developed this exception to sovereign immunity by finding that the Eleventh Amendment does not always provide immunity to government officials. \textit{Id.}
\textsuperscript{93} \textit{Id.} This "fiction" permits an individual to obtain injunctive relief against the state officer who commits a violation of federal law. \textit{Id.}
\textsuperscript{94} 209 U.S. 123 (1908).
\textsuperscript{95} \textit{Ex parte Young}, 209 U.S. at 129.
\textsuperscript{96} \textit{Id.} at 131. The Minnesota legislature passed an act reducing railroad passenger rates from three cents to two cents per mile and established rates for the transportation of certain commodities. \textit{Id.} at 127.
\textsuperscript{97} \textit{Id.} at 132.
\textsuperscript{98} \textit{Id.} at 132-33. The Attorney General claimed that (1) the circuit court had no jurisdiction over him in his official capacity, and (2) the suit by the stockholders violated the Eleventh Amendment as neither he nor the state had consented to the suit. \textit{Id.}
\textsuperscript{99} \textit{Id.} at 132.
\textsuperscript{100} \textit{Ex parte Young}, 209 U.S. at 156.
In addition to the protection afforded individual parties by the *Ex parte Young* doctrine, several other avenues remained available for overcoming the Eleventh Amendment’s jurisdictional bar following *Hans*.\(^{101}\) For example, a general understanding prevailed that Congress retains the power to create federal causes of action against a state for violations of federal law.\(^{102}\) Further, Congress maintains the ability to override immunity when it acts pursuant to congressional powers grounded in the Constitution, albeit only in restricted instances where Congress makes its intent to do so “unmistakably clear.”\(^{103}\)

The Supreme Court first set forth the “clear statement” rule in *Atascadero State Hospital v. Scanlon*.\(^{104}\) In *Atascadero*, the issue was whether California was subject to suit in federal court by individuals seeking redress for violations of the Rehabilitation Act of 1973.\(^{105}\) Recognizing the Eleventh Amendment’s position in the crucial balance between the federal government and the states, the *Atascadero* Court concluded that Congress can abrogate a state’s constitutionally secured immunity only when it makes its intention to do so unmistakably clear in the language of a statute.\(^{106}\) The *Atascadero* Court then held that the general language authorizing suit in the Rehabilitation Act is not specific enough to subject a state to suit against it brought by its own citizens. Subsequently, the Court dismissed the action brought by the California citizens against California.\(^{107}\)

In *Fitzpatrick v. Bitzer*,\(^{108}\) current and retired male employees of the state of Connecticut sued Connecticut alleging that the state’s retirement plan was discriminatory in violation of Title

\(^{101}\) *Seminole*, 11 F.3d at 1021. In addition to an *Ex parte Young* injunction, sovereign immunity could be relinquished by consent and abrogation. *Id.*

\(^{102}\) *Seminole*, 116 S. Ct. at 1133 (Stevens, J., dissenting). Justice Stevens noted that the “clear statement” cases would have been unintelligible if *Hans* had established that Congress lacked the constitutional power to make states amenable to suit in federal courts no matter how clear its intention to do so. *Id.* at 1139.

\(^{103}\) *Union Gas*, 491 U.S. at 6 (citing Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)).


\(^{105}\) *Atascadero*, 473 U.S. at 240. Douglas Scanlon sued Atascadero State Hospital, alleging that the hospital denied him employment because of his physical handicaps. *Id.* at 236. Mr. Scanlon charged that the hospital’s refusal to hire him violated the Rehabilitation Act of 1973. *Id.* Section 794 of the Act prohibits discrimination by any program or facility receiving federal funds. 29 U.S.C. § 794 (1973).

\(^{106}\) *Id.* at 242.

\(^{107}\) *Id.* at 246. In addition to the “clear statement” requirement, the Court also stated that Congress must be acting pursuant to a bona fide exercise of authority before a state’s Eleventh Amendment immunity may be overridden. See *Green v. Mansour*, 474 U.S. 64 (1988).

VII of the Civil Rights Act of 1964. The issue in Fitzpatrick was whether Acts of Congress passed pursuant to the Fourteenth Amendment abrogate Eleventh Amendment protection of state sovereign immunity.

The Fitzpatrick Court held that the Eleventh Amendment embodiment of state sovereign immunity is limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. The Court reasoned that Congress has the power to provide for private causes of action against a state to enforce provisions of the Fourteenth Amendment because congressional intrusions into the autonomy previously reserved to the states, pursuant to the Fourteenth Amendment, were sanctioned by the Framers and incorporated into the Constitution upon passage of the Civil War Amendments.

Pennsylvania v. Union Gas Company marked the only other decision in which the Supreme Court found constitutional authority for congressional abrogation of a state’s Eleventh Amendment immunity. In Union Gas, the Court concluded that Congress had the authority to assess monetary recoveries against states in federal courts when legislating under the Interstate Commerce Clause. In a plurality decision, the Court found that the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA") permitted


111. *Id.* Section 5 of the Fourteenth Amendment provides: “The Congress shall have the power to enforce by appropriate legislation, the provisions of this article.” U.S. CONST. amend XIV, § 5.

112. *Fitzpatrick*, 427 U.S. at 448. The *Fitzpatrick* Court quoted *Ex parte Virginia*, 100 U.S. 339 (1880), where the Court there stated: “Congress is empowered to enforce, and to enforce against state action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of state sovereignty.” *Fitzpatrick*, 427 U.S. at 454.


115. *Union Gas*, 491 U.S. at 3. The Court stated: “Even if we never before had discussed the specific connection between Congress’ authority under the Commerce Clause and states’ immunity from suit, careful regard for precedent still would mandate the conclusion that Congress has the power to abrogate immunity when exercising its plenary authority to regulate commerce.” *Id.* at 15.

116. *Id.* The Court in *Union Gas* reached a result without an express rationale agreed upon by a majority of the court. *Id.* Justices Marshall, Blackmun and Stevens joined Justice Brennan, with Justice White providing the fifth vote for the result. *Id.* at 5, 45. Chief Justice Rehnquist and Justices Scalia, O’Connor and Kennedy joined in dissent. *Id.* at 45.

monetary damages by private individuals against a state in federal court.\textsuperscript{118}

Union Gas operated a coal gasification plant that required environmental cleanup by the Environmental Protection Agency.\textsuperscript{119} In conjunction with the state, the federal government removed coal tar deposits left by Union Gas and reimbursed the state for cleanup costs.\textsuperscript{120} The federal government then sued Union Gas to recoup its costs.\textsuperscript{121} In response, Union Gas filed a third-party claim against the state alleging that the state was partly responsible for the hazardous waste site.\textsuperscript{122}

After deciding that CERCLA was clearly intended to render states liable for monetary damages, the Court considered whether Congress possessed the same abrogation power under the Interstate Commerce Clause as had been found to exist under Section 5 of the Fourteenth Amendment in \textit{Fitzpatrick}.\textsuperscript{123} The Court determined that the states had indeed surrendered a part of their sovereignty when they empowered Congress to regulate interstate commerce.\textsuperscript{124} Analogizing \textit{Fitzpatrick}, the Court then reasoned that the same rationale employed in the \textit{Fitzpatrick} decision was applicable to \textit{Union Gas}, highlighting the fact that both the Interstate Commerce Clause and the Fourteenth Amendment expanded federal authority while contracting state power.\textsuperscript{125}

The \textit{Union Gas} Court distinguished \textit{Hans v. Louisiana}\textsuperscript{126} on the ground that \textit{Hans} was brought to federal court under the Judiciary Act of 1875; and that Act did no more than give effect

\textsuperscript{118} \textit{Union Gas}, 491 U.S. at 5.

\textsuperscript{119} Id. The gasification plant produced coal tar deposits as a by-product. Id. After the plant was dismantled, Pennsylvania attempted to install flood-control measures along the creek where the plant had existed and struck coal tar deposits. Id. at 5. After the deposits seeped into the creek, the Environmental Protection Agency declared the site to be the Nation's first Emergency Superfund site. Id.

\textsuperscript{120} Id. at 6.

\textsuperscript{121} Id. The federal government claimed that the Union Gas Company was liable as a depositor of the coal tar deposits. Id.

\textsuperscript{122} Id. The Union Gas Company alleged that Pennsylvania was liable for the cleanup costs as an owner or operator of the hazardous-waste site, as well as because its flood control efforts negligently caused the release of the deposits. Id.

\textsuperscript{123} \textit{Union Gas}, 491 U.S. at 7,14.

\textsuperscript{124} Id. at 14. The Court reasoned that states held liable under CERCLA were not unconsenting; rather, they had given their consent all at once by ratifying a Constitution that contained the Commerce Clause. Id. at 19.

\textsuperscript{125} Id. at 16-17. The Court stated, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress, while, with the other, it takes power away from the states. It cannot be relevant that the Fourteenth Amendment accomplishes this exchange in two steps (§ § 1-4, plus § 5), while the Commerce Clause does it in one." Id.

\textsuperscript{126} 134 U.S. 1 (1890).
to the grant of federal question jurisdiction under Article III.\textsuperscript{127} The Court reasoned that since Article III did not automatically eliminate sovereign immunity as demonstrated by the required passage of the Eleventh Amendment, neither did Article III’s enabling statute, the Judiciary Act of 1875.\textsuperscript{128} The Court reasoned, therefore, that \textit{Hans} had not conclusively decided the question of whether other congressional legislation could override states’ immunity. Thus, the Court left open the question whether Congress may abrogate state’s immunity under powers granted to it by the Constitution.\textsuperscript{129}

As noted previously, the \textit{Seminole} majority stated that “[n]ever before the decision in \textit{Union Gas} had [the Court] suggested that the bounds of Article III jurisdiction could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment.”\textsuperscript{130} The \textit{Seminole} majority further concluded that \textit{Union Gas} was wrongly decided and overruled the case as a result.\textsuperscript{131}

As Justice Stevens noted in a \textit{Seminole} dissenting opinion, “[t]he importance of the majority’s decision to overrule the Court’s holding in \textit{Union Gas} cannot be overstated.”\textsuperscript{132} The \textit{Seminole} decision will certainly have a tremendous impact on the annual six billion dollar Indian gambling industry, as it effectively means that because of the states’ Eleventh Amendment immunity, Indian tribes cannot seek the assistance of federal courts when a state fails to negotiate a compact in good faith or at all. Notwithstanding this fact, however, the \textit{Seminole} decision may not be as harmful to tribes as it would initially appear.

The \textit{Seminole} Court upheld the Eleventh Circuit Court of Appeals’ dismissal of the Tribe’s suit against Florida solely based on the Eleventh Amendment’s prohibition of proceedings against unconsenting states.\textsuperscript{133} Elsewhere in the Eleventh Circuit’s \textit{Seminole} decision, however, the Court interpreted the remaining provisions of the IGRA as offering tribes a substitute remedy when faced with recalcitrant states.\textsuperscript{134} After excising the IGRA’s offen-
sive provision, the Eleventh Circuit Court of Appeals concluded that the surviving provisions of the IGRA allow immediate recourse to the Secretary of Interior in the event of refusal by a state to negotiate. Should this scheme survive further judicial review, tribes apparently would be free from an obligation to deal with states regarding Indian gaming rights and would be required to deal only with the Secretary of Interior, a potentially more attractive alternative from the tribe's perspective.

The issue of Indian gaming regulation is important given the proliferation of gaming facilities in recent years. Yet, as important as this issue is, the real significance of the Seminole opinion lies in the decision to disallow congressional abrogation of state sovereign immunity pursuant to Article I powers. The holding in Seminole is the third entry in a trilogy of cases continuing the debate over defining the relationship of federal-state power recently entered into by the Court in New York v. United States and later in United States v. Lopez. Like New York and Lopez, Seminole was a case about power; and more specifically, about striking a balance between the federal government's power to regulate and state autonomy.

Both New York and Lopez constrict congressional authority while expanding state rights, which is the same result reached in Seminole. Justice Stevens, in his dissenting opinion in Seminole, asserts that this constriction may have broad implications concerning private parties' rights to seek redress in federal forums. The majority responded to this statement by expres-

135. Seminole, 116 S. Ct. at 1129. Florida objected to this effort at compromise as well, and filed a cross-petition (No. 94-219) appealing such modification of the IGRA's remedial processes. Id. Further, the Supreme Court expressly declined to consider or offer any opinion on that portion of the lower court's decision concerning the alternative remedy of direct recourse to the Secretary of Interior. Id. at 1133.

136. Transcript, U.S.S.C.T. at p. 5. [1195 WL 606007]. This opinion was expressed by Bruce Rogow, attorney for the Seminole Tribe, in response to questioning by Justice Ginsburg during oral arguments. Id. It appears that if states fail to negotiate a compact for Indian gaming rights, the Tribe's proposed compact will be the only compact submitted to the Secretary of Interior. As put forth by Mr. Rogow, "[the states] will lose the opportunity to participate in the scope of gaming . . . ." Id. at 9.


138. 505 U.S. 144 (1992). In New York, the Court dealt with a state sovereignty issue and held that Congress violated states' Tenth Amendment rights when it attempted to commander the legislative processes of the states by directly compelling them to enact and enforce federal regulatory programs. Id. at 175.

139. 115 S. Ct. 1624 (1995). The Court in Lopez, dramatically shifting from previous jurisprudence, found that Congress had exceeded its authority under the Interstate Commerce Clause in striking down the Gun-Free School Zones Act of 1990. Id.

140. Seminole, 116 S. Ct. at 1134. Justice Stevens stated that the Seminole holding not only prevents Congress from implementing the remedial scheme presented in the IGRA, but may also “[p]reclude Congress from supplying a federal forum for a broad range of actions against states, from those sounding in copyright and patent law, to those
sing that Justice Stevens' dire predictions are both "exaggerated in substance and significance." The accuracy of the majority's response to Justice Stevens will soon be tested, however, as the reach of the Seminole holding has already begun to affect the focus of litigation. With the continued devolution of federal power, as evidenced by the Seminole holding, litigants are showing signs of willingness to press the Court for further expansion of state power in the federalism equation.

One example of how the Seminole decision is impacting federalism is exhibited by Blessing v. Freestone, a case in which Arizona is attempting to defend a suit against the state on the basis of Eleventh Amendment sovereign immunity. The court in Blessing is confronted with the issue of whether the Eleventh Amendment precludes private individuals from seeking redress for alleged infractions regarding provisions of Title IV-D of the Social Security Act. Congress enacted Title IV-D, known as the Child Support Enforcement Act, to complement the federal welfare program, Aid to Families With Dependant Children ("AFDC"). Arizona is defending the case in part on the basis of the Seminole holding. Arizona contends that the Eleventh Amendment's guarantee of sovereign immunity, significantly strengthened by the Seminole ruling, precludes an action instituted by private individuals.

Regardless of whether one agrees with Justice Stevens' assessment of Seminole's future impact, or with the majority's conclusion that the Seminole holding merely re-establishes the proper balance in the federalism equation, it is apparent that the Seminole decision has placed another arrow in the quiver of states' concerning bankruptcy, environmental law, and the regulation of our vast national economy."

141. Seminole, 116 S. Ct. at 1132. The majority enumerated ways in which parties could still defend against a state's violation of federal law, including: the federal government bringing suit against the offending state, an Ex parte Young action by an individual against a state officer and by judicial review of federal questions arising from state court decisions where a state has consented to such suit. Id. at 1130. The Court concluded that any corrective action on the Tribe's behalf, however, would have to be made by Congress and not the courts. Id. at 1133.

142. Several cases are pending concerning state-funded universities' rights to immunity from intellectual property claims. See e.g., College Savings Bank v. Florida Pre-paid Postsecondary Education Expense Board, 919 F.Supp. 756 (1996).


144. Id.


146. Petitioner's Brief at 10, Blessing v. Freestone (No. 95-1441) (stating "[this case, concerning whether Title IV-D can be enforced privately against state officials ... tests the delicate balance of power ... between the federal government and the states").

147. Id. at 24.
rights advocates. As Justice Stevens stated in his dissenting opinion, it may be that *Seminole* will be regarded as no more than advisory in character.\textsuperscript{148} The potential protection afforded states from suits by individuals, however, may prove too alluring to ignore.

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\textsuperscript{148} *Seminole*, 116 S. Ct. at 1145 (Stevens, J., dissenting).