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State Sovereign Immunity and the False Claims Act: Respecting the Limitations Created by the Eleventh Amendment upon the Federal Courts

Cover Page Footnote

In Deo Speramus

STATE SOVEREIGN IMMUNITY AND THE FALSE CLAIMS ACT: RESPECTING THE LIMITATIONS CREATED BY THE ELEVENTH AMENDMENT UPON THE FEDERAL COURTS

James Y. Ho*

INTRODUCTION

Congress enacted the False Claims Act (“FCA” or “Act”) in 1863 as a whistleblower statute.¹ The Act provides that a person having knowledge of fraud perpetrated upon the federal government² may bring suit against the defrauder on behalf of himself and on behalf of the United States.³ By doing so, the whistleblower is deemed to be a *qui tam* relator.⁴ The plaintiff-whistleblower receives a portion of any amount ultimately recovered by the federal government, regardless of whether the relator prosecutes the suit or the United States takes over prosecution.⁵ To date, about two billion dollars have been recovered under the Act and approximately sixteen percent of that two billion dollars has been handed over to the whistleblower.⁶

Procedurally, a person with knowledge of a fraud being perpetrated upon the government files a lawsuit in federal court.⁷ The complaint

* *In Deo Speramus.*

1. See Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (amended and codified at 31 U.S.C. §§ 3729-3733 (1994)).

2. See 31 U.S.C. § 3729(a)(1)-(7) (listing ways in which a person may be held liable to the United States).

3. See *id.* § 3730(b).

4. *Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro seipso*, which translates into “he who as much for the king as for himself.” See Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81, 83 (1972) [hereinafter *History and Development*] (citing 3 W. Blackstone, *Commentaries on the Laws of England* 160 (1st ed. 1768)). Because the FCA allows plaintiffs to sue on behalf of the United States as well as for themselves, see 31 U.S.C. § 3730(b), these actions are often known as *qui tam* actions. Plaintiffs in a *qui tam* action are known as relators. See *United States ex rel. Foulds v. Texas Tech Univ.*, 980 F. Supp. 864, 866 n.2 (N.D. Tex. 1997).

5. See 31 U.S.C. § 3730(d).

6. See Fried, Frank, Harris, Shriver & Jacobson, *Fried Frank Qui Tam Page—FCA Statistics* (last modified Jan. 13, 1999) <<http://www.fhsj.com/quitam/fcastats.htm>>.

7. Although the FCA does not explicitly limit jurisdiction solely to federal courts, 28 U.S.C. § 1355 confers original jurisdiction “exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress.” 28 U.S.C. § 1355 (1994). Because the FCA makes any person who defrauds the govern-

is filed *in camera* and is kept under seal for at least sixty days.⁸ During those sixty days, the Department of Justice ("DOJ") has the opportunity to investigate the claim.⁹ Within the sixty-day period, the DOJ may elect to intervene and take over the lawsuit.¹⁰ If it does not intervene, then the whistleblower may proceed with the lawsuit.¹¹ The amount of the reward that *qui tam* plaintiffs may receive is based on a sliding scale, depending on how much work the relator puts into the litigation and how early, if ever, the government intervenes.¹²

When the party accused of defrauding the government is a state, the state may attempt to dismiss the lawsuit by asserting its sovereign immunity.¹³ The Eleventh Amendment generally limits the jurisdiction

ment liable "for a civil penalty," § 1355 seems to apply. *See* 31 U.S.C. § 3729(a). *But see* *United States v. Halper*, 490 U.S. 435, 446 (1989) (finding that the FCA is a remedial, not a punitive, statute). Additional support for exclusive jurisdiction of the federal courts appears in the procedural requirements of the FCA, which are all federal. *See, e.g.*, 31 U.S.C. § 3732(a) ("A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States."). One court disagreed with this analysis and held that states have concurrent jurisdiction with the federal courts. *See United States ex rel. Hartigan v. Palumbo Bros.*, 797 F. Supp. 624, 632-33 (N.D. Ill. 1992) (reasoning that because the civil penalties under the FCA resemble liquidated damages more than the fines, forfeitures, and penalties covered by § 1355, § 1355's general grant of jurisdiction does not apply); *see also United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 860 F. Supp. 370, 374-75 (S.D. Tex. 1994) (adopting the *Hartigan* court's conclusion for the purpose of determining whether the case should be dismissed on *res judicata* grounds); *United States ex rel. Hindo v. University of Health Sciences/The Chicago Med. Sch.*, No. 91 C 1432, 1993 WL 512609, at *2 (N.D. Ill. Dec. 8, 1993) (same). *But see* John T. Boese, *Civil False Claims and Qui Tam Actions 5-65 to 5-66* (Supp. 1999) (criticizing the decision in *Hartigan* as misinterpreting the FCA and its legislative history).

8. *See* 31 U.S.C. § 3730(b)(2).

9. *See id.*; *see also* S. Rep. No. 99-345, at 24 (1986), *reprinted in* 1986 U.S.C.A.N. 5266, 5289 (explaining that the sixty-day time period is "intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action").

10. *See* 31 U.S.C. § 3730(b)(2). Pursuant to § 3730(b)(3), the DOJ often obtains long extensions of time during which the complaint remains under seal. *See* Boese, *supra* note 7, at 4-101.

11. *See* 31 U.S.C. § 3730(c)(3).

12. *See id.* § 3730(d).

13. *See United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 199 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 867 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2387 (1999); *United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1457 (4th Cir.), *cert. denied*, 522 U.S. 916 (1997); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 962 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (1995); *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48 (4th Cir. 1992); *United States ex rel. Long v. SCS Bus. & Tech. Inst.*, 999 F. Supp. 78, 83 (D.D.C. 1998), *rev'd on other grounds*, Nos. 98-5133, 98-5149 & 98-5150, 1999 WL 178713 (D.C. Cir. Apr. 2, 1999); *United States ex rel. Foulds v. Texas Tech Univ.*, 980 F. Supp. 864, 870 (N.D. Tex. 1997), *rev'd*, 171 F.3d 279 (5th Cir. 1999); *United States v. Rockwell Int'l Corp.* 730 F. Supp. 1031, 1035 (D.

of federal courts over suits when the state is a defendant.¹⁴ The most significant exception to states' broad immunity occurs when an individual sues a state to vindicate a right¹⁵ recognized by federal common or statutory law.¹⁶ According to the Supreme Court, this exception exists because the Fourteenth Amendment, which the states ratified after the Eleventh Amendment, necessarily circumscribes some of the states' sovereign powers.¹⁷

*Seminole Tribe v. Florida*¹⁸ represents the Supreme Court's current position on the issue of the Eleventh Amendment and sovereign immunity. The Court in *Seminole Tribe* held that although sovereign immunity cannot be abrogated by an act of Congress pursuant to its Article I powers,¹⁹ Congress has the power to do so under its Fourteenth Amendment powers.²⁰ The Court parried the dissent's concerns that the majority's holding would make it impossible to ensure state compliance with federal law. It noted that its decision did not affect the United States's authority to sue states,²¹ or the right of indi-

Colo. 1990).

14. See generally *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-70 (1997) (describing the extent of federal courts' jurisdiction over suits against states). If the plaintiff of the suit is either the United States or another state, however, sovereign immunity is waived implicitly because the surrender is "inherent in the constitutional compact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991).

15. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress could, under the Fourteenth Amendment, abrogate state sovereign immunity). In such cases, the state is still not the party subject to suit; technically, the state official who violated the plaintiff's rights is sued. See *Ex Parte Young*, 209 U.S. 123, 156-60 (1908). Even in these cases, the plaintiff may sue only for injunctive relief, which must also be prospective in nature. See *Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

16. In these cases, Congress must have created the law through a valid exercise of its powers pursuant to the Fourteenth Amendment. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (holding that Congress may abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment when it speaks with the requisite clarity).

17. See *Seminole Tribe v. Florida*, 517 U.S. 44, 65-66 (1996) (holding that Congress had the authority to abrogate state sovereign immunity because "the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment").

18. 517 U.S. 44 (1996).

19. See *id.* at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."); see also *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999) (recognizing and reaffirming *Seminole Tribe's* holding).

20. See *id.* at 59 (observing that "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that [Section] 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment").

21. See *id.* at 71 n.14 (citing *United States v. Texas*, 143 U.S. 621, 644-45 (1892)). More recently, the Court, after ruling that a state's sovereign immunity shielded it from suit brought by state probation officers for violation of the federal Fair Labor Standards Act's ("FLSA") overtime provisions, observed that federal prosecution of the same state violation would have been both permissible and appropriate. See *Alden*, 119 S. Ct. at 2269 (dictum).

viduals to bring suits against state officers to ensure their compliance with federal law,²² or the right of the Court to review a question of federal law arising from a state court decision where a state has consented to suit.²³ On a more abstract level, the *Seminole Tribe* court emphasized the link between sovereign immunity and federalism concerns by intimating that national concerns and state concerns should be rigidly partitioned, and that the federal government should not infringe upon states' sovereignty.²⁴ The Court's jurisprudence on the Eleventh Amendment closely parallels its jurisprudence on federalism and its belief in the devolution of the federal government.²⁵

Because states can be sued in federal court only when the plaintiff is the United States or another state, to answer the question of whether a state can be sued under the FCA, courts must first determine the identity of the plaintiff in such actions.²⁶ Because most courts find that it is the United States who is "the real party in interest,"²⁷ they conclude that states cannot invoke their sovereign immunity to dismiss these claims, even when the plaintiff prosecuting the action remains the individual whistleblower.²⁸ In response to this practice, this Note argues that "real party in interest" is little more than a term of art that refers to procedural practice.²⁹ In designating the United States as the real party in interest, most courts ignore the fact that *qui tam* relators are also real parties in interest in FCA suits.³⁰ Thus, identifying the "real party in interest" does not further the inquiry into whether a state may invoke its sovereign immunity.³¹ State sovereign immunity is a constitutional limitation on the federal courts regardless of whether the United States is a real party in interest.³² A better approach would be to allow FCA suits brought against a state to proceed where the United States has intervened, and to dismiss those suits in

22. See 517 U.S. at 711 n.14 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

23. See *id.* (citing *Cohens v. Virginia*, 6 U.S. (6 Wheat.) 264 (1821)).

24. See *infra* notes 208-12 and accompanying text.

25. See *infra* note 212 and accompanying text. See also Linda Greenhouse, *High Court Faces Moment of Truth in Federalism Cases*, N.Y. Times, Mar. 28, 1999, at 34.

26. See *infra* notes 241-43 and accompanying text.

27. In *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (5th Cir. 1999), the Fifth Circuit drew a distinction between "the real party in interest" and "a real party in interest." *Id.* at 289 n.16 (emphasis added). The difference between using the definite, rather than the indefinite, article is relevant to solving the principal question that this Note poses—when can a state defending an FCA suit assert its sovereign immunity?

28. See *infra* note 246 and accompanying text.

29. See *infra* Part IV.A.

30. See *infra* notes 263-70 and accompanying text.

31. See *infra* notes 268-70 and accompanying text.

32. There exists some dispute as to whether this constitutional limitation acts as a jurisdictional bar or the limitation is more akin to an affirmative defense that the state can assert at any stage of the litigation. See generally *United States ex rel. Long v. SCS Bus. & Tech. Inst.*, Nos. 98-5133, 98-5148 & 98-5150, 1999 WL 252644, at *1 to *2 (D.C. Cir. Apr. 30, 1999), (discussing the different interpretations of how to classify the sovereign immunity defense).

which it has not.³³ Doing so also acknowledges and reinforces the principles of federalism underlying the Court's recent Eleventh Amendment jurisprudence.³⁴

Part I of this Note provides a brief history of *qui tam* actions and of the FCA. This part also considers the procedures governing the prosecution of FCA actions. Part II discusses the Eleventh Amendment, beginning with an analysis of Article III of the Constitution and its interpretation in *Chisholm v. Georgia*, and of the Eleventh Amendment, which was ratified in response to the *Chisholm* decision. This part then explains the Court's decision in *Hans v. Louisiana* and its importance in the Supreme Court's Eleventh Amendment jurisprudence. The Court's current position with respect to the Eleventh Amendment, as stated in *Seminole Tribe v. Florida*, is then presented. Part III describes the "real party in interest" doctrine and explains its role in courts' analysis of whether states may invoke their sovereign immunity to escape lawsuits based on the FCA. Part IV explains why a real party in interest analysis is incorrect in this context, and argues that courts should instead focus on the party possessing primary responsibility to prosecute an FCA action in determining whether a state can invoke immunity.

I. HISTORICAL BACKGROUND

This part discusses the legal evolution of *qui tam* actions from their inception in England to their importation to the New World and subsequent incorporation into the FCA. It then describes in detail the circumstances surrounding the FCA's passage and the amendments that followed. This part concludes with a brief discussion of procedure under the FCA.

A. *The Origin of Qui Tam Statutes*

1. *Qui Tam* Statutes in England

The *qui tam* action first developed in England in the thirteenth century as a means for private parties to gain access to the king's court, because that court considered disputes involving the king only.³⁵ Lawyers considered the king's court to be superior to local courts, which usually had jurisdiction over disputes between private parties, because of the local courts' poor reputation for competency and fairness.³⁶ There existed two types of common law *qui tam* proceedings: the first type was brought by individuals suing for a redress of their

33. See *infra* notes 300-06 and accompanying text.

34. See *infra* notes 308-14 and accompanying text.

35. See *History and Development*, *supra* note 4, at 83-84.

36. See *id.* at 85.

grievances, and the second type was brought by individuals, known as common informers, who sued for part of a statutory penalty and were considered bounty hunters.³⁷ Eventually, the king's court expanded its jurisdiction to include disputes between private parties, and the common law *qui tam* action fell into disuse.³⁸ In addition, the overzealous pursuit of bounty by *qui tam* relators resulted in a distrust of common law informers.³⁹

As the common law *qui tam* action declined in importance, statutory *qui tam* actions became more prevalent.⁴⁰ The attractiveness of *qui tam* statutes in fourteenth century England resulted, in large part, from the absence of an organized and established police force.⁴¹ Thus, in lieu of formal governmental authority that enforced the law, parliament established a series of *qui tam* statutes to enforce the penal law.⁴² The relator could bring suit in either a civil or a criminal proceeding;⁴³ the choice of proceeding determined the manner in which the court conducted the suit.⁴⁴ The *qui tam* relator's authority even allowed him to bring indictments against defendants, although parliament eventually limited the relators' criminal prosecutions to informations.⁴⁵

Despite the utility of *qui tam* actions, Parliament also took steps to rein in the power of *qui tam* relators in order to curb abuse of relators' power. To prevent the collusive use of *qui tam* suits allowing a wrongdoer to escape the effect of a penalty,⁴⁶ Parliament eliminated the preclusive effect of collusive suits in instances where the relator misbehaved.⁴⁷ Parliament later passed a statute that fined *qui tam* relators who brought suit for purposes of harassment, and allowed prevailing defendants to recover attorneys' fees and court costs.⁴⁸

37. *See id.* at 84-85.

38. *See id.* at 85.

39. *See id.*

40. *See id.* at 85-86.

41. *See id.* at 86. Although statutory *qui tam* provisions existed as early as the fourteenth century, they did not become prevalent until the sixteenth century. *See id.*

42. *See id.*

43. *See id.* at 88.

44. *See id.*

45. *See id.* at 87-88. *Qui tam* relators were permitted to bring informations on behalf of the British government until 1950. *See* Robert W. Fischer, Jr., Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 U.C.L.A. L. Rev. 778, 779 & n.8 (1973).

46. In such cases, the relator, a friend of the wrongdoer, would agree to prosecute a *qui tam* action and either settle the case for a minimal fine or allow the wrongdoer to prevail at a feigned trial. *See History and Development, supra* note 4, at 89. For similar purposes, during the Tudor period, relators in *qui tam* actions were prevented from discontinuing actions without permission from the court. *See United States v. Griswold*, 24 F. 361, 364 (D. Or. 1885).

47. *See History and Development, supra* note 4, at 89 & n.48.

48. *See id.* at 90.

2. *Qui Tam* Statutes in the United States

Most of the British North American colonies adopted the bulk of existing English statutory law through legislative fiat.⁴⁹ Although statutory *qui tam* laws were thus adopted wholesale, it is unclear to what extent the colonies adopted English common law.⁵⁰ There appears to be no evidence, however, that a common law *qui tam* suit was ever filed in colonial North America.⁵¹

The historical record demonstrates that the colonists were aware of the utility of *qui tam* suits.⁵² For example, at least ten of the first fourteen statutes enacted by the United States Congress relied upon *qui tam* provisions for enforcement.⁵³ Colonies, and later states, enacted *qui tam* provisions to help enforce the law.⁵⁴ Most courts at this time recognized that *qui tam* provisions represented the joinder of public and private interests.⁵⁵ As in England, *qui tam* provisions were popular because an effective police force was non-existent.⁵⁶

American legislatures, like Parliament, passed numerous laws to curb the power of *qui tam* relators who initiated lawsuits intended to harass, or to collude with, the defendant. In some instances of abuse, relators were required to pay the prevailing defendant's costs; other times courts levied penalties.⁵⁷ The enactment of short statutes of limitations for *qui tam* actions and stricter venue statutes also helped control abuses by relators.⁵⁸ In addition, some states made criminal prosecution the exclusive jurisdiction of the state, vesting in the government the decision whether to prosecute. Other jurisdictions simply revoked the relator's share of the penalty in civil and criminal actions, thus removing any incentive to prosecute an action *qui tam*.⁵⁹

Over the course of the nineteenth century, the popularity of *qui tam* provisions waned on both federal and state levels.⁶⁰ This was due in part to the development of other means to enforce laws. For instance,

49. *See id.* at 91.

50. *See id.* at 93; *see also* *Seminole Tribe v. Florida*, 517 U.S. 44, 132-37 (1996) (Souter, J., dissenting) (describing the adoption of common law doctrines in the United States).

51. Boese, *supra* note 7, at 1-8.

52. *See* *Marvin v. Trout*, 199 U.S. 212, 225 (1905) ("Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in . . . this country ever since the foundation of our Government.").

53. *See* *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 342 & n.3 (1989).

54. *See History and Development, supra* note 4, at 94-95.

55. *See id.* at 95.

56. *See* Fischer, *supra* note 45, 778-79.

57. *See History and Development, supra* note 4, at 97.

58. *See id.* at 97.

59. *See id.* at 97-98.

60. *See id.* at 99-100.

Congress created the DOJ in 1870, which enabled the Attorney General to enforce the laws more effectively.⁶¹ The creation of governmental bodies to enforce the law not only eliminated the need for *qui tam* actions in general, but also provided a more neutral enforcer of the law. Although the use of *qui tam* actions waned and almost became forgotten, Congress incorporated the underlying doctrines and principals behind such actions into the FCA, as will be discussed in part II.

B. *The False Claims Act*

1. History of the False Claims Act

Congress enacted the FCA in response to rampant fraud that was perpetrated upon the United States military by government contractors during the Civil War.⁶² *Qui tam* actions were at that time a familiar part of American law.⁶³ Prior to the creation of the DOJ, the Attorney General's office and its staff lacked the resources to enforce laws that required extensive investigation.⁶⁴ Therefore, one of Congress's motivations in creating a *qui tam* action under the FCA was to stymie fraud against the government more effectively, or as one of the statute's supporters stated, the Act encourages "a rogue to catch a rogue."⁶⁵ Additionally, many public officials were thought to be intimately involved in the corrupt practices of Civil War defense contractors, and Congress feared that public law enforcement officers might therefore hesitate to prosecute offenses diligently.⁶⁶

The FCA,⁶⁷ also known as the "Informer's Act" or "Lincoln Law,"⁶⁸ authorized the recovery of double the amount of damages sustained by the United States in addition to a \$2000 fine for each false claim by a contractor.⁶⁹ The *qui tam* provision allotted half of any amount re-

61. See Boese, *supra* note 7, at 1-6.

62. See United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1496-97 (11th Cir. 1991). Since then, there were two major revisions of the statute; one occurred in 1943, and the other in 1986. See generally James B. Helmer, Jr., et al., *False Claims Act: Whistleblower Litigation 27-34* (1994) (describing the original statute, its subsequent statutory history, and the 1943 and 1986 amendments). For a more detailed description of the 1943 and 1986 amendments, see *infra* notes 85-87, 90-100 and accompanying text.

63. See *supra* notes 52-61 and accompanying text.

64. See Boese, *supra* note 7, at 1-6; see also Helmer, et al., *supra* note 62, at 27 ("Few tools existed to combat fraud and profiteering in 1863.")

65. Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Howard).

66. See Note, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 Nw. U. L. Rev. 446, 453 n.32 (1972).

67. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

68. See United States *ex rel.* Graber v. City of New York, 8 F. Supp. 2d 343, 352 (S.D.N.Y. 1998).

69. See Act of Mar. 2, 1863, § 3, 12 Stat. at 698.

covered to the relator.⁷⁰ It also assessed criminal and civil penalties against the violator.⁷¹ Although the legislative history of the Act focused specifically on military contractor fraud, the Act was applicable to fraud committed by government contractors generally.⁷² Unlike the modern-day FCA, the 1863 Act required the relator to bear the cost of pursuing his suit,⁷³ and permitted the government to assume complete control "over the suit entirely at any time, at its sole discretion."⁷⁴

There were few civil False Claims Act decisions prior to 1930.⁷⁵ This was due in part to the end of the Civil War, which created the opportunities for defrauding the government that the Informer's Act was meant to remedy.⁷⁶ The most significant FCA decision after the Civil War and prior to the Great Depression was *United States v. Griswold*.⁷⁷ In *Griswold*, the court held that although the Government could release a *qui tam* defendant from damages owed under the Act, it could not release the defendant from damages owed to the informer.⁷⁸

Unlike the modern version of the FCA, the Informer's Act lacked a provision limiting relators to recovery on actions brought alleging fraud that was previously unknown to the government.⁷⁹ Without such a limiting provision, a number of "parasitic" suits were brought using information in the criminal indictment to initiate civil *qui tam* suits.⁸⁰ With the expansion of the federal government and the increased use of government contractors subsequent to the enactment of New Deal legislation, this failing became more apparent.⁸¹ The Supreme Court, in *United States ex rel. Marcus v. Hess*,⁸² considered whether the Informer's Act allowed such "parasitic" actions and concluded that it did not prevent them.⁸³

In response to the Court's decision in *Marcus*, Congress amended

70. See *id.* at § 6, 12 Stat. at 698.

71. See *id.* at § 3, 12 Stat. at 698. Congress eventually divided the Act into two separate provisions, one involving the criminal prosecution of tendering false statements, codified in 18 U.S.C. § 1001 (1994), and the other involving civil prosecution of the submission of false claims, codified in 31 U.S.C. § 3729-3733 (1994). See Helmer, et al., *supra* note 62, § 3-4, at 27-28.

72. See Act of Mar. 2, 1863, §§ 1, 3 & 6, 12 Stat. at 697, 698.

73. See *id.* § 6, 12 Stat. at 698.

74. Boese, *supra* note 7, at 1-11.

75. See *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1354 (D. Mass 1988).

76. See Boese, *supra* note 7, at 1-12.

77. 24 F. 361 (D. Or. 1885).

78. See *id.* at 367.

79. Compare Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 with 31 U.S.C. §§ 3729-3730 (1994).

80. See *LaValley*, 707 F. Supp. at 1354.

81. See Boese, *supra* note 7, at 1-12.

82. 317 U.S. 537 (1943).

83. See *id.* at 546.

the Informer's Act to provide that the government's prior knowledge of the allegations in a *qui tam* complaint acted as an absolute bar against FCA suits based on the same facts, even if the relator was the original source of the information.⁸⁴ Instead, to make out a valid complaint the relator had to contribute new information previously unknown to the government.⁸⁵ This constituted the first major amendment to the 1863 FCA statute.

The statute, as amended in 1943, also allowed the DOJ to intervene and take over the prosecution of a FCA case.⁸⁶ To decrease the incentive to cheat the government, Congress reduced the bounty available to relators to a maximum of 25% in cases where the government did not intervene and a maximum of 10% where the government did intervene.⁸⁷ Although the 1943 amendments made the prospect of suing *qui tam* less attractive, there existed a strong correlation between the frequency of FCA actions and times of war.⁸⁸ Additionally, with the increase in the number of government assistance programs after World War II, the government began to use the FCA against persons and corporations other than government contractors.⁸⁹

In 1986, faced with an increasing federal budget deficit and reports from the media of \$100 screwdrivers and \$600 toilet seats,⁹⁰ Congress amended the FCA once more to facilitate the prosecution of FCA actions.⁹¹ Congress revised the penalty provisions of the FCA by increasing the civil penalty from \$2000 to up to \$10,000, and by increasing the damages due to the government from two times the amount of the fraud perpetrated to three times the amount of money defrauded.⁹² As an incentive to increase the number of FCA suits initiated, the relator's share of the recovery also increased to a minimum of 15% if the government intervenes and 25% if the government declines to intervene.⁹³

The 1986 amendments also gave the government more control over *qui tam* lawsuits than it previously had under the 1863 statute as

84. See Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, 609.

85. See 57 Stat. at 609.

86. See 57 Stat. at 608.

87. See 57 Stat. at 609.

88. See *Boese*, *supra* note 7, at 1-14. This correlation makes sense since the government's contracting activities increase dramatically during times of war.

89. See *id.* at 1-14.

90. See 132 Cong. Rec. S6077 (1986) (remarks of Sen. McClure); see also Helmer et al., *supra* note 62, § 3-6, at 33-34 (citing 131 Cong. Rec. 17818 (1985)) (remarks of Rep. Weiss) (describing contractor abuses such as billing the government \$400 for hammers and \$7000 for coffeepots).

91. See S. Rep. No. 99-345, at 2-3 (1986), reprinted in 1986 U.S.C.A.A.N. 5266, 5267.

92. Compare 31 U.S.C. § 3729 (1982) with 31 U.S.C. § 3729(a) (1994); see also S. Rep. No. 99-345, at 17 (1986), reprinted in 1986 U.S.C.A.A.N. 5266, 5282.

93. See S. Rep. No. 99-345, at 27 (1986), reprinted in 1986 U.S.C.A.A.N. 5266, 5292.

amended in 1943. For instance, under the 1986 amendments, the government can decline to intervene in the suit initially and then petition the court to intervene at a later date upon a showing of "good cause."⁹⁴ Furthermore, the government is able to keep a closer watch over the *qui tam* relator, even when it elects not to intervene, by requiring that the relator forward copies of all pleadings and deposition transcripts.⁹⁵

The 1986 amendments also provided greater protection of the relator's interest in the action, and permitted greater participation by the relator in the FCA action.⁹⁶ Although the government has the power to settle a case notwithstanding the relator's objections, the relator has an opportunity, in a hearing before the court, to enjoin the government from settling.⁹⁷ In addition, even though both the government and the defendant can petition the court to restrict the relator's role in the false claims prosecution, such a petition will be successful only if the petitioner can prove that the relator's actions are duplicative, harassing, or vexatious.⁹⁸ Finally, the 1986 amendments appended a clause concerning the wrongful termination of employees who file a complaint as a *qui tam* plaintiff.⁹⁹ Such a *qui tam* relator's relief includes "reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees."¹⁰⁰

2. Procedure Under the False Claims Act

After the *qui tam* relator files a sealed complaint in federal court, the government has sixty days to investigate the complaint and to re-

94. 31 U.S.C. § 3730(c)(3) (1994); see S. Rep. No. 99-345, at 26-27 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5266, 5291-92. "Good cause" is a very easy standard to satisfy; courts have often permitted the government to intervene after the initial investigative period if the government can demonstrate that newly discovered evidence has forced it to re-evaluate the wisdom of declining intervention earlier and that its intervention would not prejudice the defendant. See Boese, *supra* note 7, at 4-107.

95. See 31 U.S.C. § 3730(c)(3).

96. See S. Rep. No. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5266, 5290.

97. See 31 U.S.C. § 3730(c)(2)(B).

98. See *id.* § 3730(c)(2)(C) & (D).

99. See *id.* § 3730(h). This section of the statute has its own Eleventh Amendment problems. In cases where a relator alleges that she has been wrongfully terminated by a state agency because of her role as a *qui tam* relator, courts have routinely dismissed the claim on the ground of sovereign immunity. See, e.g., *United States ex rel. Wilkins v. Ohio*, No. 97-3216, 1998 WL 279375, at *3 (6th Cir. May 20, 1998) (*per curiam*) (affirming district court's holding that the Eleventh Amendment bars compensatory relief sought by the plaintiff under § 3730(h)), *aff'g* 885 F. Supp. 1055 (S.D. Ohio 1995); *United States ex rel. Moore v. University of Mich.*, 860 F. Supp. 400, 404-05 (E.D. Mich. 1994) (holding that the statute did not abrogate state sovereign immunity).

100. 31 U.S.C. § 3730(h).

view the supporting evidence and materials.¹⁰¹ Within this period of time, the government may elect to “intervene and proceed with the action.”¹⁰² If the government does intervene, it has “the primary responsibility for prosecuting the action, and shall not be bound by an act of the [relator].”¹⁰³ Alternatively, if the government elects not to intervene, “the person who initiated the action shall have the right to conduct the action.”¹⁰⁴

If the government elects not to intervene, it has no role in the conduct of the litigation other than its right to request service of copies of all deposition transcripts and pleadings filed in the action.¹⁰⁵ The government may also petition the court to stay discovery upon demonstration that the relator “would interfere with the Government’s investigation or prosecution of a criminal or civil matter arising out of the same facts.”¹⁰⁶ This right to stay discovery exists regardless of whether the government elects to intervene,¹⁰⁷ and is in accord with the FCA’s purpose of remedying fraud against the government.¹⁰⁸ Nevertheless, the government may still intervene at a later time if it can demonstrate “good cause.”¹⁰⁹

If the government elects to intervene in the action, it has “primary responsibility for prosecuting the action, and [is not] bound by an act of the person bringing the action.”¹¹⁰ The relator, however, may continue to participate in the litigation subject to certain enumerated conditions.¹¹¹ Upon petition by the government, the court may restrict the participation of the relator if it can be shown that the relator’s unrestricted participation would “interfere with or unduly delay the

101. *See id.* § 3730(b)(2).

102. *Id.* With the court’s permission, the government may postpone its decision on whether to intervene to allow additional time for investigation. *See id.* § 3730(b)(3).

103. *Id.* § 3730(c)(1).

104. *Id.* § 3730(c)(3).

105. *See id.* Some courts have interpreted this limitation to exclude participation by the United States in settlement negotiations. *See infra* note 306 and accompanying text; *see generally* Gretchen L. Forney, Note, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator under the False Claims Act*, 82 Minn. L. Rev. 1357, 1360 (1998) (discussing the current circuit split on whether the United States has absolute power to block *qui tam* settlements).

106. 31 U.S.C. § 3730(c)(4). Although the statute allows the government this right, there have been no reported cases to date interpreting or applying this section. *See* Boese, *supra* note 7, at 4-112.1.

107. *See* 31 U.S.C. § 3730(c)(4).

108. *See* S. Rep. No. 99-345, at 1-3 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5266, 5266-68.

109. 31 U.S.C. § 3730(c)(3); *see* Boese, *supra* note 7, at 4-107 to 4-108 and notes therein.

110. 31 U.S.C. § 3730(c)(1); *see also id.* § 3730(c)(2) (setting forth various conditions for the relator’s conditioned participation). The default rule is that the relator is permitted to continue her involvement in the case unless it either unduly interferes with the government’s prosecution of the case or unduly harasses the defendant. *See id.* § 3730(c)(2)(C) & (D).

111. *See id.* § 3730(c)(2).

Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment."¹¹² The defendant may move the court for similar relief, which will be granted if it can be demonstrated that the relator's actions are "for purposes of harassment or would cause the defendant undue burden or unnecessary expense."¹¹³ These limitations on the relator's actions reflect the historic hostility toward relators who were often perceived as acting solely in their own interest or with malice toward the defendant.¹¹⁴

Although the government has the option to intervene either after the filing of the complaint or later upon a demonstration of "good cause," and although an FCA action is brought in part for the benefit of the United States,¹¹⁵ the relator does not surrender all of his interest in the action once the government intervenes. If the government, after intervening, elects to dismiss the case despite the relator's objection, the government must inform the relator of the motion to dismiss, and the court must provide the relator with a hearing on that motion.¹¹⁶ If the government desires to settle the case despite the relator's objection, the court must first hold a hearing to review the settlement for its fairness, adequacy, and reasonableness under all the circumstances.¹¹⁷

When the government proceeds with an action brought initially by the relator, the relator is entitled to receive at least 15%, but no more than 25%, of any amount recovered.¹¹⁸ It is within the court's discretion to determine where in this range the award should be granted, although it may consider any contributions to the litigation made by the relator.¹¹⁹ Prevailing relators also receive reasonable attorneys' fees from the defendant.¹²⁰ If the government does not proceed with an action brought by the relator, and if the relator is ultimately successful in recovering money from the defendant, the relator, at the discretion of the court, is entitled to receive between 25% to 30% of the recovery plus reasonable attorneys' fees.¹²¹

When a relator brings an FCA action against a state, the procedure is no different than when the defendant is a corporation or an individual. States, however, often assert a defense of sovereign immunity in order to dismiss the suit. Part II will discuss the constitutional roots of state sovereign immunity under the Eleventh Amendment, and will outline relevant Supreme Court cases that have developed the con-

112. *Id.* § 3730(c)(2)(C).

113. *Id.* § 3730(c)(2)(D).

114. *See supra* notes 46-48, 57-59 and accompanying text.

115. *See* 31 U.S.C. § 3730(b)(1).

116. *See id.* § 3730(c)(2)(A).

117. *See id.* § 3730(c)(2)(B).

118. *See id.* § 3730(d)(1).

119. *See id.*

120. *See id.*

121. *See id.* § 3730(d)(2).

cept of sovereign immunity in FCA actions.

II. THE ELEVENTH AMENDMENT

The Constitution, as subsequently amended by the Eleventh Amendment, serves as the starting point for any analysis of sovereign immunity. This part analyzes the original constitutional language creating the federal judiciary and defining its jurisdiction, together with the Supreme Court's interpretation of it. It then analyzes the Supreme Court's subsequent interpretation of the Eleventh Amendment and how that interpretation forecloses virtually all suits brought by individuals against states.

Article III, Section 2, of the United States Constitution defines the limits of the federal courts' jurisdiction.¹²² Among other jurisdictional delineations, it states that "[t]he judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State."¹²³ The available historical evidence does not reveal definitively what the drafters of the Constitution meant by this grant of authority. At various state constitutional conventions, certain ratifiers of the Constitution expressed their concern about the scope of the federal courts' jurisdiction over states. A literal reading of the Constitutional language suggests that the federal courts were given original jurisdiction in all cases in which a state and the citizen of another state are adversaries. By a vote of four to one, this was also the Supreme Court's interpretation of the clause in *Chisholm v. Georgia*.¹²⁴

A. *Chisholm v. Georgia*

The background of *Chisholm v. Georgia* involved Robert Farquhar, a South Carolina citizen who supplied materials to Georgia during the Revolutionary War.¹²⁵ Alexander Chisholm, a South Carolina citizen and the executor of Farquhar's estate, brought an action of *assumpsit* against Georgia to recover money owed to the estate.¹²⁶ Under the Judiciary Act of 1789, the Supreme Court had original jurisdiction over suits against a state by citizens of other states.¹²⁷ Edmund Randolph, who was also serving at that time as Attorney General, represented Chisholm before the Court.¹²⁸ Randolph argued that the controversy was one that could be litigated in federal court because

122. See U.S. Const. art. III, § 2, cl. 1 (amended 1798); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 760-61, 819 (1824).

123. U.S. Const. art. III, § 2, cl. 1 (amended 1798).

124. 2 U.S. (2 Dall.) 419, 449, 452, 466-67, 479 (1793).

125. See John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 12 (1987).

126. See *id.*

127. See Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80 (codified as amended in scattered sections of 28 U.S.C.).

128. See *Chisholm*, 2 U.S. (2 Dall.) at 419.

the Constitution specifically granted the Court original jurisdiction over controversies between a state and a citizen of another state.¹²⁹ Although both the governor and attorney general of Georgia received notice of the lawsuit before the Supreme Court, neither appeared before the Court because Georgia refused to acknowledge that the Court had power over it unless it consented to be sued.¹³⁰

In a four-to-one decision, the Court ruled in favor of *Chisholm* and concluded that the text of the Constitution authorized suits against a state by citizens of another state.¹³¹ The Court justified this holding through a literal interpretation of Article III, Section 2 of the Constitution. Dissenting alone, Justice Iredell reviewed the Judiciary Act of 1789¹³² and concluded that it neither specifically nor implicitly authorized suits in *assumpsit* against the states.¹³³ Because the legislative grant of authority to the courts did not resolve the issue, Justice Iredell looked next to English common law¹³⁴ and concluded that such suits were not permitted against the government under common law unless the government consented to suit.¹³⁵ Consequently, and notwithstanding the language of Article III, which he deemed inconclusive, Justice Iredell believed the Court should not have the authority to hear a suit brought by a citizen against a state.¹³⁶

The states were outraged by the Court's decision.¹³⁷ For example, the lower house of the Georgia legislature adopted a resolution de-

129. See *id.* at 420.

130. See Orth, *supra* note 125, at 13.

131. See *Chisholm*, 2 U.S. (2 Dall.) at 449, 452, 466-67, 479.

132. See Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.) (granting federal courts jurisdiction to hear various types of cases).

133. See *Chisholm*, 2 U.S. (2 Dall.) at 433-34, 436-47 (Iredell, J., dissenting) ("[T]he whole business of organizing the Courts, and directing the methods of their proceeding where necessary [is] in the discretion of Congress."). In reaching this conclusion, Iredell considered Section 14 of the Judiciary Act, which, in turn, "referred [the Court] to principles and usages of law already well known." *Id.* at 434. Section 14 of the Judiciary Act stated that federal courts had the "power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Section 14, 1 Stat. at 81-82 (footnote omitted).

134. See *Chisholm*, 2 U.S. (2 Dall.) at 437 (Iredell, J., dissenting) ("[C]onsequently we have no other rule to govern us but the principles of the . . . common law."). For Justice Iredell's analysis of sovereign immunity in English common law, see *id.* at 437-45.

135. See *id.* at 445-46.

136. See *id.* at 449.

137. See *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (stating that the *Chisholm* decision created "a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed."); Erwin Chemerinsky, *Federal Jurisdiction* § 7.2, at 373-74 (2d ed. 1994); Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 55 (1972). *But see* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 578-88 (1994) (arguing that the states' reaction to *Chisholm* was more complex).

claring that anyone attempting to enforce the Supreme Court's decision is "hereby declared to be guilty of felony, and shall suffer death, without the benefit of the clergy, by being hanged."¹³⁸ Within three weeks of the entry of judgment, both houses of Congress proposed resolutions to amend the Constitution that would overturn the Court's decision in *Chisholm*.¹³⁹ Of the fifteen states then in the Union, twelve ratified the Eleventh Amendment within one year of the *Chisholm* decision.¹⁴⁰

The text of the Eleventh Amendment states: "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."¹⁴¹ A literal reading of the text of the amendment appears to eliminate only the federal courts' diversity jurisdiction over cases in which citizen-state diversity exists.¹⁴² Furthermore, a literal reading would suggest that federal courts retained jurisdiction over cases, "in law and equity, arising under this Constitution, [or] the Laws of the United States."¹⁴³ The scope of the Eleventh Amendment, however, was not construed so narrowly; in 1890, the Court in *Hans v. Louisiana*¹⁴⁴ expanded the scope of sovereign immunity to shield states from suits by its own citizens that were based upon the court's federal question jurisdiction.¹⁴⁵

138. Jacobs, *supra* note 137, at 56-57 (quoting The Augusta Chronicle, Nov. 23, 1793) (reporting the actions of the Georgia legislature of November 19).

139. See Chemerinsky, *supra* note 137, § 7.2, at 374.

140. See Jacobs, *supra* note 137, at 66-67. Some historians have attributed the states' underlying motivation in preserving their sovereign immunity to fear of a vast wave of similar suits brought by their creditors for debts incurred during the Revolution. See Orth, *supra* note 125, at 7-8. *But see* Jacobs, *supra* note 137, at 70 ("[T]here is practically no evidence that Congress proposed and the legislatures ratified the Eleventh Amendment to permit the states to escape payment of existing obligations."). These scholars note that there was concern among the states that British creditors and American Tories whose property was seized during the war would sue the states to recover their assets. See Orth, *supra* note 125, at 7.

141. U.S. Const. amend. XI.

142. Compare U.S. Const. amend. XI (stating that judicial power of the federal government does not extend to "any suit . . . commenced or prosecuted against one of the United States by Citizens . . . of [another] State"), with U.S. Const. art. III, § 2, cl. 1 (amended 1798) (stating that the federal judiciary has the authority to hear controversies between "a State and Citizens of another State").

143. U.S. Const. art. III, § 2, cl. 1 (amended 1798). Although Congress did not create federal question jurisdiction for the courts until 1875, see Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (amended as codified in scattered sections of 28 U.S.C.), earlier courts recognized the possibility of federal jurisdiction pursuant to the "arising under" clause of Article III. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 760-61 (1824).

144. 134 U.S. 1 (1890).

145. See *id.* at 20 ("[T]he obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court. . . .").

B. Hans v. Louisiana

In *Hans v. Louisiana*, the plaintiff, a citizen of Louisiana, held bonds issued in 1874 by authority of the Louisiana state legislature.¹⁴⁶ The bonds had a forty-year maturity date, and bearers were entitled to receive interest payments semi-annually.¹⁴⁷ In 1879, Louisiana adopted a new constitution and repudiated all of its prior contract obligations, including the payment of bond coupons.¹⁴⁸ Subsequently, Hans sued Louisiana in federal court to recover the principal and interest owed.¹⁴⁹

In response, Louisiana invoked its sovereign immunity, arguing that Hans's suit lacked state consent.¹⁵⁰ The circuit court sustained Louisiana's assertion of its sovereign immunity and dismissed the suit.¹⁵¹ Hans appealed the circuit court's decision, arguing that the Eleventh Amendment should be interpreted literally to allow a state to invoke its sovereign immunity only against the citizens and subjects of other states, not its own citizens.¹⁵² In addition, Hans argued that he should thus be allowed to proceed with his suit because his cause of action arose out of Louisiana's violation of his constitutional right to contract freely.¹⁵³ Accordingly, Hans argued, this cause of action fell within the court's federal question jurisdiction.¹⁵⁴

Justice Bradley, writing for the Court, rejected Hans's contention that the Court could exercise federal question jurisdiction over a non-consenting state.¹⁵⁵ Instead, the court observed that if the Eleventh Amendment were read literally, then an "anomalous result" would be achieved in federal question cases: "a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state."¹⁵⁶ Permitting such suits would allow states to be sued in federal court even if they refused to surrender sovereign immunity in their own courts.¹⁵⁷

Instead of adopting the literalist approach, the Court adopted the legal analysis in Justice Iredell's *Chisholm* dissent.¹⁵⁸ It reasoned that because Congress and the states ratified the Eleventh Amendment in order to nullify the Court's decision in *Chisholm*, effectively adopting

146. *See id.* at 1-2.

147. *See id.*

148. *See id.* at 2-3.

149. *See id.* at 1-2.

150. *See id.* at 3.

151. *See id.* at 4.

152. *See id.* at 9.

153. *See id.* at 10.

154. *See id.* at 9-10.

155. *See id.* at 18.

156. *Id.* at 10.

157. *See id.*

158. For an analysis of Justice Iredell's dissent see *supra* text accompanying notes 132-33.

Justice Iredell's dissenting opinion, the Court should continue to follow Iredell's reasoning in this case.¹⁵⁹ It is illogical, the Court argued, to believe that Congress and the states ratified the Eleventh Amendment with the intention to allow citizens of a state to sue their own state in federal courts, while "indignantly repell[ing]" similar suits by citizens of other states, or of foreign states.¹⁶⁰ The Court was not only able to point to Justice Iredell's dissent in *Chisholm*, but also to other opinions by the Court in support of the proposition that the ratifiers never contemplated abrogation of sovereign immunity.¹⁶¹ Furthermore, "cognizance of suits and actions unknown to the law," Justice Bradley wrote, "was not contemplated by the Constitution when establishing the judicial power of the United States."¹⁶² The Court, however, acknowledged certain exceptions, such as the resolution of boundary disputes between states, which were necessarily created as a result of the Union's formation.¹⁶³ Additionally, the Court marshaled historical evidence from the writings and speeches of Alexander Hamilton, James Madison, and John Marshall in support of the proposition that states retained their sovereign immunity after the ratification of the Constitution, despite the apparent nullification of sovereign immunity in Article III.¹⁶⁴ Using the historical record, it attempted to demonstrate that Hans's legal arguments "strain[ed] the Constitution and the law to a construction never imagined or dreamed of."¹⁶⁵

For example, the Court noted that in Federalist Number 81, Alexander Hamilton stated that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the state's] consent."¹⁶⁶ In the same essay, Hamilton wrote that "[t]he contracts between a nation and individuals are only binding on the

159. See *Hans*, 134 U.S. at 12 ("[O]n this question of the suability of the States . . . the highest authority of this country was in accord rather with the minority than with the majority of the court [in *Chisholm*]; and this fact lends additional interest to the able opinion of Mr. Justice Iredell . . .").

160. *Id.* at 15.

161. See *id.* at 16 ("The suability of a State, without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.").

162. *Id.* at 15.

163. See *id.*

164. See *id.* at 12-15. For alternative views regarding the effect of the ratification of the Constitution and the Eleventh Amendment on state sovereign immunity, see generally, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1473-92 (1987); 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, 1054-63 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1934-38 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 39-73 (1988).

165. *Hans*, 134 U.S. at 15.

166. *Id.* at 13 (emphasis omitted) (quoting The Federalist No. 81 (Alexander Hamilton)).

conscience of the sovereign, and have no pretension to a compulsive force."¹⁶⁷ During the Virginia state constitutional convention, James Madison addressed the fears of the anti-Federalists concerning Virginia's legal liabilities by stating that "[i]t is not in the power of individuals to call any State into court."¹⁶⁸ Madison also interpreted Article III, Section 2, Clause 1 as only providing "a citizen a right to be heard in the federal courts; and if a State should condescend to be a party, [the federal courts] may take cognizance of it."¹⁶⁹

The Court also analyzed the Judiciary Act of March 3, 1875, which granted federal courts jurisdiction over federal question issues.¹⁷⁰ It observed that the language of the statute suggested that Congress "did not intend to invest its courts with any new and strange jurisdictions."¹⁷¹ Furthermore, the Court reasoned, because state courts did not have power to entertain suits by individuals against a state without its consent, it would be incongruous that the federal circuit court, which had only concurrent jurisdiction with the state courts, could acquire the power to entertain such suits.¹⁷²

Although not expressly stated, the Court's holding in *Hans* constitutionalized the principle of sovereign immunity, as has been recognized in subsequent cases.¹⁷³ *Hans* remains the touchstone that all subsequent Eleventh Amendment jurisprudence must consider and interpret.¹⁷⁴ Although *Hans* faced relentless attacks by legal academia through the 1980s,¹⁷⁵ the Supreme Court in *Seminole Tribe v. Florida* recognized the vitality of the underlying doctrine stated in *Hans*: the judicial power of the federal courts does not extend to suits brought by individuals directly against a state, regardless of the individual's citizenship, unless the state first consents to the action.¹⁷⁶

167. *Id.* (quoting The Federalist No. 81 (Alexander Hamilton)).

168. *Id.* at 14.

169. *Id.*

170. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

171. See *Hans*, 134 U.S. at 18.

172. See *id.* at 18.

173. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996) (stating that decisions "since *Hans* had been equally clear that the Eleventh Amendment reflects 'the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III'" (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984))); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) ("Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control.").

174. See, e.g., Daniel J. Meltzer, *The Seminole Tribe Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1, 7-13 (1996) (discussing various theories regarding the significance and meaning of *Hans* in connection with interpreting the Eleventh Amendment).

175. See, e.g., Fletcher, *supra* note 164, at 1038-45; Gibbons, *supra* note 164, at 1893-94.

176. See *Seminole Tribe*, 517 U.S. at 72.

C. Seminole Tribe v. Florida

*Seminole Tribe v. Florida*¹⁷⁷ explicitly overruled *Pennsylvania v. Union Gas Co.*¹⁷⁸ with respect to the question of whether the Eleventh Amendment prevents congressional authorization of suits by private parties against non-consenting states in areas of law where the Constitution vests Congress with complete law-making authority.¹⁷⁹ The Court considered for the first time whether Congress had the power to abrogate a state's sovereign immunity outside the context of the Fourteenth Amendment.¹⁸⁰ The *Union Gas* court concluded that Congress did have the authority to abrogate state sovereign immunity so long as it acted pursuant to the powers granted to it either under Article I of the Constitution or under Section 5 of the Fourteenth Amendment.¹⁸¹

In *Union Gas*, the Court considered whether Congress, in enacting the Comprehensive Environmental Response Compensation and Liability Act¹⁸² ("CERCLA") as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA")¹⁸³, clearly expressed an intent to hold states liable for any damage resulting from the conduct described in the statute.¹⁸⁴ After concluding that it did,¹⁸⁵ the Court considered whether Congress could create a cause of action for monetary damages against the states when legislating pursuant to the Commerce Clause.¹⁸⁶ The Court concluded that Congress could do so, but Justice Brennan could only muster a plurality of Justices to agree with his reasoning.¹⁸⁷ In reaching its conclusion, the Brennan plurality reasoned that the Commerce Clause, like the Fourteenth Amendment, "expand[ed] federal power and contract[ed] state power."¹⁸⁸ Furthermore, the plurality reasoned that the power granted to Congress by the Commerce Clause would be incomplete unless Congress also retained the authority to abrogate Eleventh

177. 517 U.S. 44 (1996).

178. 491 U.S. 1 (1989).

179. See *Seminole Tribe*, 517 U.S. at 72.

180. See Meltzer, *supra* note 174, at 28.

181. See *Union Gas*, 491 U.S. at 16, 23. Article I of the Constitution enumerates the powers of Congress, such as the power to pass laws protecting patent and trademarks, laws protecting interstate commerce, and laws regulating Native Americans. See U.S. Const. art. I, § 8. Section 5 of the Fourteenth Amendment grants Congress the power "to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." U.S. Const. amend. XIV, § 5.

182. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1994 & Supp. II 1996)).

183. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

184. See *Union Gas*, 491 U.S. at 5.

185. See *id.* at 13.

186. See *id.* at 5.

187. The plurality consisted of Justices Stevens, Marshall, and Blackmun.

188. See *Union Gas*, 491 U.S. at 17; cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress had the authority to nullify state sovereign immunity when it acted pursuant to the Fourteenth Amendment).

Amendment immunity.¹⁸⁹ Justice White provided the fifth vote in a separate opinion, in which he reached the same conclusion as the plurality, although disagreeing with the plurality's reasoning.¹⁹⁰

In dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, argued that Congress did not have the Constitutional authority to abrogate the Eleventh Amendment.¹⁹¹ State sovereign immunity, according to the dissent, was "a fundamental principle of federalism, evidenced by the Eleventh Amendment."¹⁹² To uphold abrogation of sovereign immunity through the Commerce Clause, or another Article I power, however, would violate the rationale of *Hans* and eviscerate the principle of immunity which it conferred.¹⁹³

The Court's holding in *Seminole Tribe v. Florida*¹⁹⁴ represents the triumph of the *Union Gas* dissenters. In *Seminole Tribe*, the Court considered whether Congress, under authority of the Indian Commerce Act,¹⁹⁵ had the power to allow a Native American tribe to bring suit in federal court against a state to compel performance under the Indian Gaming Regulatory Act.¹⁹⁶ The Court, in an opinion written by Chief Justice Rehnquist, held that Congress exceeded its authority in attempting to abrogate the states' sovereign immunity through use

189. See *Union Gas*, 491 U.S. at 15-17.

190. See *id.* at 45 (White, J., concurring in part and dissenting in part).

191. See *id.* at 38 (Scalia, J., dissenting).

192. *Id.* at 37 (Scalia, J., dissenting). In a concurring opinion with the plurality, Justice Stevens observes that the Eleventh Amendment, as construed by the Court, really contains two distinct applications that others often confuse. See *id.* at 23-24 (Stevens, J., concurring). The first application, a literal interpretation of the plain language of the Eleventh Amendment, bars only the prosecution of citizen-state and alien-state suits. See *id.* The second application, developed by the Court in *Hans v. Louisiana* is "based on a prudential interest in federal-state comity and a concern for 'Our Federalism.'" *Id.* at 25 (Stevens, J., concurring). Thus, Stevens argues that the central question in any Eleventh Amendment case should be whether the judiciary has the "power to entertain the suit." *Id.* If it does not, no act of Congress, regardless of its intention, can give the judiciary this power. See *id.* Yet when the Court has dealt with the Eleventh Amendment in the past, it considered state sovereign immunity on grounds other than judicial power. See *id.* at 25-26. Justice Stevens argues that the only way to make sense of the Court's refusal to assert its power on these occasions is to treat the issue of immunity as a question of what the proper role of the federal courts in the "amalgam of federal-state relations." *Id.* at 25. Thus, rather than trammel needlessly upon the delicate balance between federal and state power, Justice Stevens explains that the Court requires that Congress evince a clear intent to abrogate state sovereign immunity. See *id.*

193. See *id.* at 40 (Scalia, J., dissenting) (arguing that if the Commerce Clause could be used to circumvent the restriction of jurisdiction posited in Article III, as amended by the Eleventh Amendment, then Article III "would be transformed from a comprehensive description of the permissible scope of federal judicial authority to a mere default disposition").

194. 517 U.S. 44 (1996).

195. See U.S. Const. art. I, § 8, cl. 3.

196. See Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 11, 102 Stat. 2472 (1988) (amended and codified at 25 U.S.C. § 2710 (1994)); *Seminole Tribe*, 517 U.S. at 47.

of its Article I powers.¹⁹⁷ This holding “reconfirm[ed] that the background principle of state sovereign immunity embodied in the Eleventh Amendment,” serves as a limitation on the judicial power under Article III that cannot be circumvented by Congress’s Article I powers.¹⁹⁸

In concluding that Congress had unconstitutionally abrogated the states’ sovereign immunity, the Court first considered whether Congress had “unequivocally expresse[d] its intent to abrogate the immunity,”¹⁹⁹ and then whether Congress had acted “pursuant to a valid exercise of power.”²⁰⁰ After reviewing the statute, the Court stated that Congress intended through the Act to abrogate the States’ sovereign immunity from suit.²⁰¹ Observing that the authority to abrogate the Eleventh Amendment had previously been recognized in only two provisions of the Constitution²⁰²—Section 5 of the Fourteenth Amendment and the Interstate Commerce Clause—the Court considered whether the Indian Commerce Clause was sufficiently similar to the Interstate Commerce Clause to justify application of *Union Gas*’s holding. Although the Court could find “no principled distinction” between the Indian Commerce Clause and the Interstate Commerce Clause,²⁰³ it nevertheless overruled *Union Gas*.²⁰⁴

The majority reversed *Union Gas* by arguing that the weight of *stare decisis* from *Hans v. Louisiana*²⁰⁵ and *Pennhurst State School and Hospital v. Halderman*²⁰⁶ compelled it to reaffirm the Court’s established federalism jurisprudence.²⁰⁷ The Court reasoned that state sovereign immunity had been an “essential part of the Eleventh Amendment” for over a century,²⁰⁸ and that “the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts’ jurisdiction under Article III.”²⁰⁹ Citing to precedent, the Court established that the Eleventh Amendment “does not exist solely in order to ‘preven[t] federal-court judgments that must be

197. See *Seminole Tribe*, 517 U.S. at 72-73.

198. *Id.* at 72. For a more detailed discussion of the “background principle,” see *infra* notes 308-14 and accompanying text.

199. *Seminole Tribe*, 517 U.S. at 55 (alteration in original) (quoting *Green*, 474 U.S. at 68).

200. *Id.* (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

201. *Id.* at 57.

202. See *id.* at 59-60.

203. *Id.* at 63.

204. See *id.* at 66.

205. 134 U.S. 1, 10 (1889) (holding that sovereign immunity, affirmed by the Eleventh Amendment, shielded states from suits by even its own citizens).

206. 465 U.S. 89, 98 (1984) (stating that the Eleventh Amendment reflects “the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III”).

207. See *Seminole Tribe*, 517 U.S. at 63, 66.

208. *Id.* at 67.

209. *Id.* at 64.

paid out of a State's treasury,"²¹⁰ but also served "to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'"²¹¹ The Court's desire to avoid affront to the states conforms to its established Eleventh Amendment jurisprudence.²¹²

The Court also observed that the confusion that *Union Gas* had promoted in the lower courts, along with the fact that the *Union Gas* rationale was based on only a plurality of the Court, had rendered the decision vulnerable to reversal.²¹³ Citing the dissent in *Union Gas*, the Court stated that the expansion of the scope of the federal courts' jurisdiction through Congress's use of its Article I powers "contradict[ed] [the Court's] unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal-court jurisdiction."²¹⁴

Finally, the Court rejected the *Union Gas* plurality's reliance on Section 5 of the Fourteenth Amendment as an analogous provision to justify congressional abrogation of state sovereign immunity.²¹⁵ The majority distinguished Section 5 of the Fourteenth Amendment from the Interstate Commerce Clause chronologically because the Fourteenth Amendment was "adopted well after the adoption of the Eleventh Amendment and . . . operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."²¹⁶ Although this chronological argument is criticized by the plurality in *Union Gas*,²¹⁷ it does conform to the Court's dicta concerning the relation between the deference due to states and the states' sovereign immunity.²¹⁸

By raising a defense of sovereign immunity, a state asserts its right

210. *Id.* at 58 (alteration in original) (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994)).

211. *Id.* at 58 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)); *see also Hess*, 513 U.S. at 39 (stating that the twin goals of the Eleventh Amendment were to shield states from forced payment of war debts from the American Revolution and to sustain the "integrity retained by each State in our federal system").

212. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("'[C]onstitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'. . . . By guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance." (citations omitted); *cf. United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding the Gun-Free School Zones Act to be an unconstitutional infringement on the states' sovereign right to regulate police power).

213. *See Seminole Tribe*, 517 U.S. at 63.

214. *Id.* at 65 (alteration in original) (citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 39 (1989) (Scalia, J., dissenting)).

215. *See id.* at 65-66.

216. *Id.*

217. *See Union Gas*, 491 U.S. at 17-18.

218. *See infra* notes 308-14 and accompanying text.

to be free of the heavy hand of federal control. Courts hearing FCA claims brought against states recognize this, but have concluded that because the United States is “the real party in interest” in these cases, state sovereign immunity cannot be raised as a defense. Part III describes and explains the courts’ “real party in interest” analysis in FCA litigation.

III. “REAL PARTY IN INTEREST” ANALYSIS

This part examines the development and evolution of the real party in interest doctrine. It then explains courts’ application of the doctrine to FCA claims against states, which has resulted in the denial of sovereign-immunity defenses. In formulating their reasoning behind allowing suits against the states under the FCA to proceed, courts begin by positing that the United States is the real party in interest.²¹⁹ To support a finding that state sovereign immunity is no barrier to prosecution when a state or state agency is the defendant in an FCA action, courts borrow from the conclusions drawn in cases challenging the *qui tam* relator’s standing to sue.²²⁰ In concluding that standing does exist, these courts assume that the United States is a “real party in interest.”²²¹ This, however, does not preclude the *qui tam* relator from also being a “real party in interest.” By concluding that the United States is the only real party in interest, these courts miss the more basic procedural purpose of Federal Rule of Civil Procedure 17(a).

A. *Development of the Real Party in Interest Requirement*

Rule 17(a) of the Federal Rules of Civil Procedure requires that “[e]very action shall be prosecuted in the name of the real party in interest.”²²² Consequently, courts have held that the person who, according to the governing substantive law, is entitled to enforce the right must bring the action.²²³ The “real party in interest” doctrine embodied in Rule 17(a) protects individuals from harassment and multiple suits by persons who would not be bound by the principles of

219. The first reported decision to address whether the Eleventh Amendment’s provision of sovereign immunity to the states shields these states from FCA actions was *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992). *But see* *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 289 (5th Cir. 1999) (diverging from this approach by instead inquiring into who commenced or prosecuted the suit against the defendant).

220. *See Milam*, 961 F.2d at 49.

221. *See id.*

222. Fed. R. Civ. P. 17(a).

223. *See* 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1543, at 334 & n.1 (1990); *see also id.* § 1541, at 321 & n.7 (stating that under Rule 17(a), “the action should be brought in the name of the party who possesses the substantive right being asserted under the applicable law, whether that be state or federal” and providing case law in support of that proposition).

claim preclusion.²²⁴ In *Rackley v. Board of Trustees of Orangeburg Regional Hospital*,²²⁵ the court stated: "The purpose of [Rule 17(a)] is to enable the defendant to present his defenses against the proper persons, to avoid subsequent suits, and to proceed to finality of judgment."²²⁶ In addition, the requirement that plaintiffs bring an action in the name of the real party in interest allows the defense to fully avail itself of all discoverable evidence.²²⁷

The real party in interest doctrine developed as a way to circumvent common law rules governing parties permitted to prosecute an action. At common law, the assignee of a chose in action could not qualify as the real party in interest because the assignee did not have legal title to the action.²²⁸ Thus, the assignee was forced to persuade the assignor to bring the suit.²²⁹ In courts of equity, this rule was more relaxed, although a person having an equitable or beneficial interest who sued in equity would often name the owner of the legal title to bind him to the decree.²³⁰ The real party in interest doctrine developed as a means of eliminating the restrictive rule of the common law courts.²³¹ At the time of the adoption of the Field Code, from which Rule 17(a) is derived,²³² the purpose of the real party in interest rule

224. See *Gogolin & Stelter v. Karn's Auto Imports, Inc.*, 886 F.2d 100, 102 (5th Cir. 1989); see also *Wright et al.*, *supra* note 223, § 1541, at 322 & n.9. With the development of the doctrine of defensive non-mutual collateral estoppel, it is easier to protect individuals from multiple suits, but this protection is not complete. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-28 (1979).

225. 35 F.R.D. 516 (E.D.S.C. 1964).

226. *Id.* at 517; see *Honey v. George Hyman Constr. Co.*, 63 F.R.D. 443, 447 (D.D.C. 1974); see also *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973) (stating that the purpose of Rule 17(a) "is to enable a defendant to present defenses he has against the real party in interest, to protect the defendant against a subsequent action by the party actually entitled to relief, and to ensure that the judgment will have proper res judicata effect").

227. See *Celanese Corp. of Am. v. John Clark Indus.*, 214 F.2d 551, 556 (5th Cir. 1954).

228. See *Wright et al.*, *supra* note 223, § 1541, at 320, § 1545, at 346.

229. See Michael C. Ferguson, *The Real Party in Interest Rule Revitalized: Recognizing Defendant's Interest in the Determination of Proper Parties Plaintiff*, 55 Cal. L. Rev. 1452, 1453-54 (1967) ("Even though law courts recognized the concept of a real party in interest, they insisted, for example, that all suits on a chose in action be commenced in the name of the legal owner of the chose." (footnote omitted)).

230. See *Wright et al.*, *supra* note 223, § 1541, at 320.

231. See *id.* § 1545, at 346; see also John E. Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 Minn. L. Rev. 675, 675-76 (1967) (suggesting that the real purpose behind the adoption of the real party in interest rule was to facilitate the evasion of the common law rule, which prohibited a party from testifying; by assigning her interest, the assignee became the "real party plaintiff," enabling the assignor to testify as a nonparty). *But see* Ferguson, *supra* note 229, at 1452 (stating that "[t]he real party in interest rule was originally designed to help courts determine proper parties plaintiff in civil suits").

232. See *Wright et al.*, *supra* note 223, § 1541, at 321 ("The original text of Rule 17(a) was taken almost verbatim from Equity Rule 37, which in turn was derived from New York's Field Code of 1848 and similar state code provisions." (footnote omitted)).

was “to help courts determine proper parties plaintiff in civil suits.”²³³

A party now may become a real party in interest through an assignment of interest.²³⁴ In such a case, the assignee is generally treated as the real party in interest under Rule 17(a) and the assignor may no longer sue.²³⁵ If there is a partial assignment in which both assignor and assignee each retain an interest in the claim, both parties are real parties in interest.²³⁶

The question of whether a party is a “real party in interest” is rarely raised when considering whether a challenger to an act that violates both public and private rights is the proper plaintiff to assert a claim.²³⁷ Instead, courts apply the doctrine of standing to answer this question.²³⁸ Standing is similar to the real party in interest rule in that both terms describe a plaintiff who possesses a sufficient interest in the action to have a case heard on its merits. However, once a court recognizes that a party has standing to raise a constitutional point, that ruling also disposes of whether the party is a real party in interest.²³⁹ Although distinctions between standing and real party in interest analyses exist, some of which the courts occasionally confuse,²⁴⁰ these differences are immaterial when analyzing the FCA.

B. *Real Party in Interest Analysis and the False Claims Act*

When courts consider whether a state may invoke its sovereign immunity to dismiss a suit against it under the FCA, the preliminary issue to be resolved is determining whether the *qui tam* relator or the government brings the suit.²⁴¹ If the suit is found to be a private action brought by the relator, then most courts agree that a state may invoke its sovereign immunity to dismiss the action.²⁴² Alternatively, if the suit is found to be a public action brought by the United States, a state will be unable to invoke its sovereign immunity.²⁴³ In answering this

233. Ferguson, *supra* note 229, at 1452.

234. See Wright et al., *supra* note 223, § 1545, at 346.

235. See *id.* at 351.

236. See *id.* at 351, 353.

237. See *id.* § 1542, at 329.

238. See *id.*

239. See Apter v. Richardson, 510 F.2d 351, 353 (7th Cir. 1975).

240. See Wright et al., *supra* note 223, § 1542, at 330.

241. See United States *ex rel.* Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195, 202 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999); cf. Valerie R. Park, *The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?*, 43 Stan. L. Rev. 1061, 1062-63 (1991) (arguing that the courts' apparent inconsistency in deciding whether the United States is a real party in interest in FCA litigation is appropriate and should continue).

242. See Stevens, 162 F.3d at 202; see also United States *ex rel.* Foulds v. Texas Tech Univ., 171 F.3d 279, 294 (5th Cir. 1999) (dismissing an FCA action after determining that it was being prosecuted by an individual and not by the federal government).

243. See Stevens, 162 F.3d at 202. It is settled law that states may not assert their sovereign immunity to dismiss suits initiated by the United States. See *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996) (“The Federal Government can bring suit in

preliminary question, courts have considered whose interests are to be vindicated, the control that each party has over the prosecution of the action,²⁴⁴ and to whom the benefits of the litigation will accrue.²⁴⁵

Courts that have addressed this question uniformly conclude that the United States is a real party in interest, even when the government does not intervene in the relator's action.²⁴⁶ Because all of the acts that render a person liable under § 3729(a) of the FCA focus on the use of deception to secure payment from the government,²⁴⁷ courts identify the government as the injured party who should pursue a remedy.²⁴⁸ These courts buttress their conclusions as to the United States's interest by observing that the government always exerts "substantial control" over the progress of litigation and can enjoin discovery by the relator if such discovery interferes with the government's ongoing investigation.²⁴⁹ Courts have also found the requirement that

federal court against a State."); *United States v. Mississippi*, 380 U.S. 128, 140 (1965) (stating that "nothing in [the Eleventh Amendment] or in any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States").

244. See, e.g., *Stevens*, 162 F.3d at 202 (listing the various factors that courts consider in determining the proper plaintiff).

245. See, e.g., *id.* (acknowledging that although the relator does benefit financially, the United States receives "the lion's share").

246. See *id.* at 202-03; *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 872-73 (8th Cir. 1998); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2387 (1999); *United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1458-59 (4th Cir.), *cert. denied*, 522 U.S. 916 (1997); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 963 (9th Cir. 1994); *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48-49 (4th Cir. 1992); *United States ex rel. Long v. SCS Bus. & Tech. Inst.*, 999 F. Supp. 78, 83-84 (D.D.C. 1998), *reversed by* Nos. 98-5133, 98-5149 & 98-5150, 1999 WL 178713, at *17 (D.C. Cir. Apr. 2, 1999); *United States v. Rockwell Int'l Corp.* 730 F. Supp. 1031, 1035 (D. Colo. 1990). *But see Foulds*, 171 F.3d at 289, 295, *overruling* 980 F. Supp. 864 (N.D. Tex. 1997) (distinguishing between the circuit's precedent in designating the United States as "a real party in interest" rather than "the real party in interest" (emphasis added)).

247. See 31 U.S.C. § 3729(a) (1994).

248. See *Stevens*, 162 F.3d at 202 ("It is the government that has been injured by the presentation of [fraudulent] claims."); *Rodgers*, 154 F.3d at 868 (stating that the *qui tam* provisions "do not alter the underlying character of the action as one for the aggrieved party as defined by the statute"); *Milam*, 961 F.2d at 48 ("[T]he False Claims Act is concerned solely with false claims submitted to the government."). *But see United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 835 (N.D. Ill. 1993) (stating that a relator suffers injury from the embarrassment of working for a company that has perpetrated a fraud on the government and that the relator is also injured by the emotional stress caused by the choice of keeping silent or reporting the fraud, thus risking retaliation); *United States ex rel. Burch v. Piqua Eng'g, Inc.*, 803 F. Supp. 115, 119 (S.D. Ohio 1992) (stating that the relator suffers an injury by risking the loss of her job and by decreasing the possibility of future employment in the same industry subsequent to the initiation of an FCA action). In support of the theory that the government, as the injured party, is the real party in interest, the *Stevens* court made the additional observation that it is the government's injury that provides the damages which the defendant must pay. See *Stevens*, 162 F.3d at 202.

249. See *Stevens*, 162 F.3d at 202-03; *Milam*, 961 F.2d at 48-49 (describing the extent

a relator commence the action to the name of the United States²⁵⁰ relevant in identifying the real party in interest.²⁵¹ In conjunction with Rule 17(a), which requires that “[every] action shall be prosecuted in the name of the real party in interest,”²⁵² courts reason that the United States must be the real party in interest.²⁵³ In addition, because the United States receives the bulk of any recovery from an FCA action, courts find that the United States is the real beneficiary of the litigation.²⁵⁴ When courts weigh all of these factors, they conclude that the government is the real party in interest, and accordingly rule that the defendant-state cannot assert its sovereign immunity against the United States in an FCA suit.²⁵⁵

Simply determining who is the real party in interest, however, does not satisfactorily resolve whether a state may appropriately assert a defense of sovereign immunity in the face of an FCA action. Part IV explains why using a real party in interest analysis is unsatisfactory, and explains why this Note’s proposed solution more closely conforms with the Supreme Court’s established federalism jurisprudence.

IV. WHY THE REAL PARTY IN INTEREST IS A STRAW MAN

Based on the theory that the United States is the real party in interest in FCA actions, courts have refused to let states invoke their sovereign immunity from suit.²⁵⁶ By emphasizing that the United States is “the real party in interest,” and that the *qui tam* relator acts merely as a “private attorney general,”²⁵⁷ these courts inaccurately downplay the substantial interest that *qui tam* relators have in the lawsuit.

A. *The Real Party in Interest Doctrine Is Procedural Not Substantive*

Under Federal Rule of Civil Procedure Rule 17(a), the party whose substantive right is to be vindicated through litigation must be named in the action.²⁵⁸ The policy rationale behind prosecuting all actions in the name of the real party in interest is to protect parties from harassment and multiple suits by persons who would not otherwise be

of the government’s control over the litigation).

250. See 31 U.S.C. § 3730(b)(1).

251. See *Stevens*, 162 F.3d at 202 (“[I]t is in the government’s name that the action must be brought.”); *Fine*, 39 F.3d at 962-63; *Milam*, 961 F.2d at 48; *Rockwell*, 730 F. Supp. at 1035 (“[A]s *qui tam* plaintiffs, they have commenced suit in the name of the government and the United States is the real party in interest.”).

252. Fed. R. Civ. P. 17(a).

253. See *Milam*, 961 F.2d at 48.

254. See *Stevens*, 162 F.3d at 202 (“[I]t is the government that must receive the lion’s share—at least 70%—of any recovery.”).

255. See *supra* note 246.

256. See *supra* note 246.

257. *Milam*, 961 F.2d at 49.

258. See *supra* notes 222-23 and accompanying text.

bound by claim preclusion,²⁵⁹ and to allow the defense to use the tools of discovery effectively.²⁶⁰ The statutory language of the FCA addresses these policy objectives and satisfies the general procedural rule concerning real parties in interest as set forth in Rule 17(a)—the United States is the party whose substantive rights are to be vindicated, whom the defendant has injured, and who will be bound by collateral estoppel.

The real party in interest rule helps define the jurisdictional limitations of federal courts. In determining whether diversity jurisdiction exists, courts will look beyond the formal or nominal parties named and consider the citizenship of the real party in interest.²⁶¹ Additionally, the second sentence of Rule 17(a) explicitly recognizes executors, administrators, guardians, and other fiduciaries as real parties in interest.²⁶² Accordingly, courts are correct in designating the United States as a real party in interest in FCA litigation.

The courts' identification of the real party in interest is, however, incomplete. These courts fail to recognize that the *qui tam* relator, regardless of whether the United States has intervened, is also a real party in interest. Because the relator is properly viewed as having standing,²⁶³ the relator should also qualify as a real party in interest.²⁶⁴

259. See *supra* notes 224-26.

260. See *Celanese Corp. of Am. v. John Clark Indus.*, 214 F.2d 551, 556 (5th Cir. 1954).

261. See *Wright et al.*, *supra* note 223, § 1556, at 419-21.

262. See Fed. R. Civ. P. 17(a); see also *id.* advisory committee's note to 1966 Amendment (noting that the purpose of the second sentence is to resolve any doubts as to the real party in interest status of the named fiduciaries); *Wright et al.*, *supra* note 223, § 1548, at 370. *But see* 28 U.S.C. § 1332(c)(2) (1994) (providing that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent"); *Wright et al.*, *supra* note 223, § 1556, at 424 (explaining how this alters the "ordinary rule of looking to the citizenship of the real party in interest").

263. See, e.g., *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) (holding that *qui tam* relator has standing to sue defendant); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993) (same). *But see* *United States ex rel. Riley v. Saint Luke's Episcopal Hosp.*, 982 F. Supp. 1261, 1267-68 (S.D. Tex. 1997) (holding that a relator has no standing to sue unless he can demonstrate injury in fact that is personal to him); *Boese*, *supra* note 7, at 4-192 to 4-193 (criticizing the court's decision in *Kelly*). The *Kelly* court reasoned that the FCA "effectively assigns the government's claims to *qui tam* plaintiffs." *Kelly*, 9 F.3d at 748. Although the word "assignment" does not appear in the text of the FCA, the *Kelly* court stated that Congress "intended to assign the government's fraud claims to individual *qui tam* plaintiffs in cases where [it] chooses not to pursue such claims." *Id.*; cf. *AmeriFirst Bank v. Bomar*, 757 F. Supp. 1365, 1372 (S.D. Fla. 1991) (holding that claims under Rule 10b-5 of the Security Exchange Act of 1934 are assignable); *FDIC v. Main Hurdman*, 655 F. Supp. 259, 266-68 (E.D. Cal. 1987) (holding that bank's action for fraud and malpractice is assignable to the FDIC); *In re National Mortgage Equity Corp. Mortgage Pool*, 636 F. Supp. 1138, 1156 (C.D. Cal. 1986) (holding that a treble damages claim under RICO is assignable). Furthermore, although such an assignment would be contingent on future events, the *Kelly* court found this type of assignment to be consistent with prior case law. See *Kelly*, 9 F.3d at

Although some courts have dismissed the relator's interest as solely pecuniary, likening it to an attorney's contingency fee,²⁶⁵ the FCA statute clearly recognizes the relator's interest in FCA litigation.²⁶⁶

If Congress did not intend the *qui tam* relator to be a real party in interest, the statutory protections provided to relators would be superfluous.²⁶⁷ In addition, if a relator was not a real party in interest, there would be no way for *qui tam* suits to ever be prosecuted. The alternative to considering the relator as a real party in interest is to consider the relator as a deputy of the United States.²⁶⁸ Decisions upholding the FCA's constitutionality in the face of Appointments Clause challenges, however, foreclose this approach.²⁶⁹ The fact that the United States is a real party in interest does not preclude the *qui tam* relator from also being a real party in interest.²⁷⁰ Thus, finding that the United States is the sole real party in interest in *qui tam* litigation, as defined by Rule 17(a), is not only inaccurate, but it also treats the question of the unconstitutional abrogation of a state's sovereign im-

748. For a discussion of other reasons that relators have standing unrelated to their pecuniary interest in the action, see *supra* note 248.

264. See *supra* note 239 and accompanying text. Hence, the relator, like the United States, would be a real party in interest. As a result, the United States could not be considered the real party in interest. See *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 289 n.16 (5th Cir. 1999).

265. See *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 202 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999).

266. See *supra* notes 96-100 and accompanying text (discussing the ways in which the FCA protects the relator's interest in the litigation even after the Government intervenes). The problem, as the Fifth Circuit recently identified, is determining the specific "contours of the relationship between the *qui tam* plaintiff and the United States." See *Foulds*, 171 F.3d at 289.

267. See *supra* notes 96-100 and accompanying text.

268. It is well-settled, however, that *qui tam* relators are not officers of the United States. See *infra* notes 316-17 and accompanying text.

269. See *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 758-59 (9th Cir. 1993) (holding that the authority exercised by *qui tam* relators is not significant enough to be equated with powers exercisable only by officers of the United States). *But see United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 869 (8th Cir. 1998) (Panner, J., dissenting) (describing *qui tam* relators as "self-appointed 'ad hoc deputies'" (quoting *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992)), *cert. dismissed*, 119 S. Ct. 2387 (1999); Boese, *supra* note 7, at 4-185 (criticizing the *Kelly* court's analysis of challenges to the constitutionality of the FCA under the Appointments Clause). In addition, the Court in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991), rejected the notion that states could be sued by any plaintiff in the name of the United States. Instead, the Court stated that such suits had to be "under the control of responsible federal officers." *Id.* Thus, because *Kelly* held that *qui tam* relators are not officers of the United States, *qui tam* relators cannot abrogate the state sovereign immunity in a suit in the name of the United States.

270. See *United States ex rel. Long v. SCS Bus. & Tech. Inst.*, Nos. 98-5133, 98-5149 & 98-5150, 1999 WL 178713, at *11 (D.C. Cir. Apr. 2, 1999); *Foulds*, 171 F.3d at 289 n.16, 291; *cf. United States ex rel. Felton v. Allflex, USA, Inc.*, 989 F. Supp. 259, 263 (Ct. Int'l Trade 1997) (holding that although the United States is the real party in interest, the relator also has a substantial interest in the litigation that courts recognize and will protect).

munity in an unnecessarily oblique manner.

B. *Rejecting a Real Party in Interest Analysis in FCA Cases Against States*

If the government intervenes in an FCA suit before the complaint is unsealed, it has “the primary responsibility for prosecuting the action, and shall not be bound by an act of the [relator].”²⁷¹ Although the relator remains a party in the action and a full participant, the government may petition the court to limit the relator’s role by demonstrating that the relator would “interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment.”²⁷² More significantly, the government has the authority to dismiss and to settle a case notwithstanding the objection of the relator.²⁷³ Thus, the government, in cases in which it has intervened, maintains significant control over the conduct of the litigation.

When the government chooses not to intervene, it has virtually no control over the conduct of the relator in the FCA action,²⁷⁴ although the government may, with permission of the court, temporarily enjoin discovery by the relator.²⁷⁵ The purpose of the injunction is to prevent the relator’s possible interference with the government’s own investigations, and does not authorize the government to meddle in the progress of the litigation.²⁷⁶ Thus, should the relator prevail, the government is effectively a non-party,²⁷⁷ although it eventually receives most of any recovery the relator obtains.

The “chimerical presence” of the United States in such instances was the primary reason that the Fifth Circuit recently concluded that the Eleventh Amendment bars suits in federal court against sovereign states in FCA cases in which the United States has not intervened.²⁷⁸ According to the court in *United States ex rel. Foulds v. Texas Tech University*, the *qui tam* plaintiff’s control over virtually all strategic and tactical litigation decisions, absent the government’s intervention, is dispositive as to the question of who is prosecuting the suit.²⁷⁹ Also

271. 31 U.S.C. § 3730(c)(1) (1994).

272. *Id.* § 3730(c)(2)(C).

273. *See id.* § 3730(c)(2)(A) & (B). If the government were to attempt to dismiss or settle a case over the relator’s objection, the relator would be permitted to demand a hearing before the court approves the government’s motion. *See id.*

274. *See supra* notes 104-108 and accompanying text.

275. *See* 31 U.S.C. § 3730(c)(4).

276. *See id.*

277. *See Searcy v. Philips Elecs. N. Am. Corp.* 117 F.3d 154, 156 (5th Cir. 1997).

278. *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 291-94 (5th Cir. 1999) (“[W]hen the government chooses to remain passive, as it [has here], we [see] no reason to treat it as a party with standing to challenge the district court’s action as of right.”).

279. *See id.* at 293.

significant to the *Foulds* court's analysis is the relator's sole responsibility for financing the litigation.²⁸⁰ Accordingly, the court held that in circumstances in which the United States declines to intervene, Eleventh Amendment jurisprudence bars suits against states.

As of the end of fiscal year 1998, the United States has recovered approximately \$2.085 billion from FCA actions.²⁸¹ Of this \$2.085 billion, \$2.027 billion was recovered through prosecutions conducted by the government.²⁸² In cases that the DOJ declined to pursue, relators recovered only approximately \$58 million of the \$2.085 billion.²⁸³ As of the end of fiscal year 1998, the DOJ had pursued 337 cases,²⁸⁴ and settled or obtained judgments in more than 229 of them.²⁸⁵ In comparison, by July 1998, federal courts dismissed, or relators gave up on, 831 out of 1,117 cases in which the government chose not to intervene.²⁸⁶ These statistics demonstrate that the government plays an active role in FCA litigation and suggest that it has a good grasp of the merits of each case. Because of the DOJ's apparent skill at selecting and prosecuting FCA actions, it would be reasonable for it to pursue a litigation against a state, state agency, or instrumentality of a state, if it appeared that the potential recovery exceeded potential costs.²⁸⁷

Congress created a dichotomy of responsibility in the FCA: when the government intervenes, it has primary responsibility for the prosecution of the suit, and when it does not, the relator is responsible. Courts should follow this elegant division of labor in determining who is suing the state in an FCA action, and eschew the use of a real party in interest analysis, which yields a more muddled answer. This dichotomy would adhere more closely to the principles that have animated the Supreme Court's Eleventh Amendment jurisprudence.

C. *The Eleventh Amendment, Federalism, and the False Claims Act*

Despite a tremendous amount of criticism of the Court's convoluted Eleventh Amendment jurisprudence,²⁸⁸ the Court in *Seminole Tribe v.*

280. *See id.*

281. *See* Fried, Frank, Harris, Shriver & Jacobson, *Fried Frank Qui Tam Page—FCA Statistics* (last modified Jan. 13, 1999) <<http://www.ffhsj.com/quitam/fcastats.htm>>.

282. *See id.*

283. *See id.*

284. *See id.*

285. *See* Boese, *supra* note 7, at app. H-1.

286. *See id.*

287. In light of evidence that the United States has been able to easily intervene in FCA actions, it is difficult to justify allowing a relator to prosecute an action on behalf of the federal action. *Cf.* *Alden v. Maine*, 119 S. Ct. 2240, 2269 (1999) (observing that the FLSA's provisions allowing either the "United States or the individual to prosecute violations implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the state").

288. *See supra* note 164 and accompanying text.

*Florida*²⁸⁹ settled the question of whether Congress can abrogate a state's sovereign immunity using its Article I powers: it cannot, because doing so would expand the scope of the federal courts' jurisdiction beyond the bounds described by Article III.²⁹⁰ This decision is consistent with the Court's position regarding the vitality of the principles of federalism and the wide deference that it has given to states over the past decade.²⁹¹

The Court, in *Seminole Tribe*, noted that Congress may only abrogate the sovereign immunity of states through the authority granted to it in Section 5 of the Fourteenth Amendment.²⁹² In addition to this limitation, Congress must unequivocally declare its intention to abrogate state sovereign immunity.²⁹³ This requirement of an unequivocal statement reflects the Court's desire to ensure that Congress will not subject states to liability idly or accidentally. It also reflects the Court's respect for state dignity.²⁹⁴

Congress enacted the FCA, like the Indian Gambling Regulatory Act, under the authority granted to it under Article I. Therefore, it would appear that a suit by a citizen against a state under the FCA would be unconstitutional. Because the FCA is a *qui tam* action, however, there arises a question of whether such an action should be viewed "as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred."²⁹⁵

Courts have taken a surprisingly cursory approach to the question of the *qui tam* relator's and the government's rights.²⁹⁶ There is no doubt that Congress enacted and amended the FCA with the intention of deterring and remedying fraud,²⁹⁷ and it is reasonable to expect that Congress intended the FCA to facilitate this goal as efficiently as possible. As explained previously, although the United States is a "real party in interest," the *qui tam* relator is as well.²⁹⁸ The rights that Congress afforded the *qui tam* relator even after the United States in-

289. 517 U.S. 44 (1996).

290. *See id.* at 72-73.

291. *See supra* note 212, *infra* notes 313-14 and accompanying text.

292. *See Seminole Tribe*, 517 U.S. at 59-60. The Court, however, acknowledged that states could not assert their sovereign immunity in lawsuits initiated by the federal government. *See id.* at 71 n.14.

293. *See id.* at 55.

294. *See, e.g.,* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985) (noting that the "fundamental nature of the interests implicated by the Eleventh Amendment" dictates the conclusion that Congress has the authority to abrogate a state's sovereign immunity only when it makes its intention unmistakably clear in the statute's language).

295. *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 202 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999).

296. *See supra* notes 263-65 & 268-70.

297. *See supra* note 108 and accompanying text.

298. *See supra* notes 263-65 & 270.

tervenes suggests that the *qui tam* relator has a continuing role in the litigation and a substantial pecuniary interest therein.²⁹⁹ Because the relator is properly considered a real party in interest, courts' reliance upon the incorrect determination that the government is "the real party in interest" to decide whether a state may assert its sovereign immunity is inapposite.

A more useful approach to resolving whether a state may assert its sovereign immunity in FCA actions would be to determine who is conducting the actual litigation.³⁰⁰ There are only two choices: either the government intervenes and consequently assumes "the primary responsibility for prosecuting the action,"³⁰¹ or the relator proceeds with her statutory right "to conduct the action."³⁰² By assuming primary responsibility for the litigation, the government takes effective control of the litigation.³⁰³ It has the power to settle or to dismiss the case, but if the relator objects, the government must receive approval from the court.³⁰⁴ The government may also restrict the relator's participation in the litigation by demonstrating that the relator's actions would "interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment."³⁰⁵ If the government elects not to intervene, it can do little to control the relator's litigation tactics or strategy, although it must approve any voluntary dismissal of the action.³⁰⁶ If the government intervenes and litigates the FCA action, a state should not be able to assert its sovereign immunity as a shield to suit. If, however, the relator litigates the FCA action alone, a state should be able to assert its sovereign immunity as a shield, despite the fact that the relator litigates on behalf of, and for the benefit of, the United States.³⁰⁷

299. See *supra* notes 111-17 and accompanying text. In a time of limited judicial resources, the fact that Congress mandated courts to conduct hearings before allowing the government to dismiss or settle a case over the relator's objections suggests that the relator's interest in the litigation is substantial. See 31 U.S.C. § 3730(c)(2)(A) & (B) (1994).

300. This solution conforms closely to the Fifth Circuit's analysis of who commences and prosecutes an FCA action for the purposes of determining whether federal courts can exercise jurisdiction without running afoul of the Eleventh Amendment. See *supra* notes 279-80.

301. 31 U.S.C. § 3730(c)(1).

302. *Id.* § 3730(c)(3).

303. See *id.* § 3730(c)(1).

304. See *id.* § 3730(c)(2)(A) & (B).

305. *Id.* § 3730(c)(2)(C).

306. See *id.* § 3730(b)(1). There is some dispute over whether the DOJ must approve all settlements. The Fifth Circuit maintains that the government has an absolute right to review settlements, see *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1992), while the Ninth Circuit holds that the government may only review settlements if they are made within the 60-day investigation period, see *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 722 (9th Cir. 1994).

307. Cf. *Alden v. Maine*, 119 S. Ct. 2240, 2269 (1999) (stating that although an individual could not sue a state under the FLSA to collect overtime pay in neither state nor federal court, the United States could prosecute the action on the individual's be-

Distinguishing between the two parties who may undertake prosecution of an FCA action conforms with the principles underlying Eleventh Amendment jurisprudence. The Court in *Seminole Tribe* observed that “[t]he Eleventh Amendment does not exist solely in order to ‘preven[t] federal-court judgments that must be paid out of a State’s treasury.’”³⁰⁸ Prior to *Seminole Tribe*, the Court had explained that the Amendment’s purpose was “to prevent the indignity of subjecting a [s]tate to the coercive process of judicial tribunals at the instance of private parties.”³⁰⁹ By doing so, the Court’s jealous guardianship of state sovereign immunity accords “the States the respect owed them as members of the federation.”³¹⁰ Thus, a relator should not be allowed to bring an FCA action against a state, because doing so unnecessarily infringes upon states’ sovereignty. If the alleged fraud perpetrated by a state were monetarily significant or easily provable, the DOJ could readily intervene and supplant the relator as the primary plaintiff. In fact, from the statistics on *qui tam* recoveries published by the DOJ, it appears that the DOJ does intervene when the stakes of the litigation are sufficiently high or when the chances of prevailing are sufficiently good.³¹¹

Unlike suits by individual relators, suits by the government against a state do not disparage the dignity and respect owed the states.³¹² The judicial resolution of a dispute between the United States and a state, “‘each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,’ . . . but both subject to the supreme law of the land, does no

half).

308. *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994)).

309. *In re Ayers*, 123 U.S. 443, 505 (1887).

310. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. at 505). More recently, in a trio of decisions issued consecutively, the Court has strongly voiced its continued belief in the states’ individual sovereignty within the framework of a national government and the limited areas in which Congress can legislate. See *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999) (holding that Congress lacks the power under Article I of the Constitution to subject nonconsenting states to private suits for damages in state courts); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2210-11 (1999) (holding that the Patent Remedies Act, which subjected states to suit for patent violations, was an unconstitutional exercise of Congress’s power under the Fourteenth Amendment because of a failure to narrowly tailor the legislation to redress unconstitutional deprivations of property (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997))); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2233 (1999) (holding that state sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act, which subjected states to suit brought under § 43(a) of the Trademark Act of 1946 for false and misleading advertising nor voluntarily waived by the state’s activities in interstate commerce).

311. See *supra* notes 282-87 and accompanying text.

312. See *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 213 (2d Cir. 1998) (Weinstein, J., dissenting), *cert. granted*, 119 S. Ct. 2391 (1999).

violence to the inherent nature of sovereignty."³¹³ The Supreme Court has consistently recognized that the states' consent to suit by the United States is "inherent in the [Constitutional] convention."³¹⁴

The United States's power to sue a constituent state, however, cannot be delegated.³¹⁵ The Court in *Blatchford v. Native Village of Noatak* noted that "[t]he consent, 'inherent in the convention,' to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select."³¹⁶ Consequently, in cases in which the United States declines to intervene, a relator should not be able to assert the federal government's privilege to sue states.³¹⁷ Although the FCA states that the litigation is undertaken "for the person and for the United States Government,"³¹⁸ and although the United States is bound by the actions of the relator unless it intervenes, the relator and the United States are not one and the same.

CONCLUSION

When courts consider whether states can invoke sovereign immunity from suit by individuals in federal court, courts should focus on who is prosecuting the action. With this focus, the principle question of this Note is easily answered: States should not be able to invoke their sovereign immunity when the federal government is the principal party responsible for prosecution of the action, and states *should* be able to invoke their sovereign immunity when an individual is the principal party responsible for prosecution of the action. The immunity of states from suit by *qui tam* relators does not give states free license to cheat and swindle the federal government. Under the provisions of the FCA, the United States, acting through the office of the Attorney General, may pursue a remedy against the states. Doing so would maintain the delicate federal-state balance that makes the United States *sui generis* among nations.

313. *United States v. Texas*, 143 U.S. 621, 646 (1892) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400, 410 (1819)).

314. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991); see *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) ("While . . . jurisdiction [over suits by the United States against a state] is not conferred by the Constitution in express words, it is inherent in the constitutional plan." (citation omitted)); *Texas*, 143 U.S. at 646 (stating that consent to suit by the United States "was given by Texas when admitted into the Union upon an equal footing in all respects with the other States").

315. See *Blatchford*, 501 U.S. at 785.

316. *Id.*

317. This also adheres to the law that various circuits have developed in response to challenges to the FCA's constitutionality with respect to the Appointments Clause. See *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 758-59 (9th Cir. 1993). But see Boese, *supra* note 7, at 4-185 (criticizing the Kelly court's analysis of challenges to the constitutionality of the FCA under the Appointments Clause).

318. 31 U.S.C. § 3730(b)(1) (1994).