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Seminole Tribe of Florida v. Florida: Has the Seminole Tribe Gambled with Citizens' Rights to Sue Their State Under CERCLA

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SEMINOLE TRIBE OF FLORIDA v. FLORIDA: HAS THE SEMINOLE TRIBE GAMBLED WITH CITIZENS' RIGHTS TO SUE THEIR STATE UNDER CERCLA?

I. INTRODUCTION

Since the formation of this nation's government, the federal courts have recognized, to a certain extent, the doctrine of sovereign immunity.[1] This doctrine prohibits an individual from suing a state without its consent.[2] Governmental immunity from suit is premised upon the notion that a right cannot be enforced against the maker of law.[3] Recognition of the doctrine of sovereign immunity by the federal courts has created a jurisdictional barrier for plaintiffs seeking relief, and as a result, victims of state governmental misdeeds have often been denied the opportunity to seek relief in the federal courts.[4]

1. *See* Jane M. Ward, Note, *Sullivan v. United States: Are Federal Public Defenders in Need of a Defense?*, 40 VILL. L. REV. 233, 233 (1995). *See also* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 150-64 (1972) (discussing various rationales for judicial recognition of doctrine of sovereign immunity); JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES 136-52 (1987) (detailing evolution of doctrine of sovereign immunity through twentieth century); Edwin M. Borchard, *Governmental Responsibility in Tort, VI*, 36 YALE L.J. 1, 38 (1926) (explaining that courts in United States have regarded sovereign immunity "as a matter of simple logic"); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 480-81 (1953) ("Despite the absence of historical and philosophical justification, the doctrine of sovereign immunity is today a part of American legal dogma."). For a further discussion of the doctrine of sovereign immunity, see *infra* notes 22-42 and accompanying text.

2. *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1890 (1983); Reginald Parker, *The King Does No Wrong - Liability for Misadministration*, 5 VAND. L. REV. 167, 174 (1952).

3. *See* JACOBS, supra note 1, at 154-55 (citing Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)). In *Kawananakoa*, Justice Holmes offered the following as justification for the doctrine of sovereign immunity:

> Some doubts have been expressed as to the source of immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

Id.

4. *See id.* at 153 (noting that "the immunity doctrine . . . frustrates the performance of one of the most essential government functions, the dispensation of justice according to law"). *See also* PETER H. SCHUCK, SUING GOVERNMENT, CITIZEN

By enacting the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), Congress sought to avoid the potential inequities of sovereign immunity by authorizing suits against states in the federal courts.[5] Pursuant to its powers under the Commerce Clause of the Constitution, Congress enacted CERCLA in response to public health problems created by the disposition and release of hazardous wastes.[6] CERCLA created a $1.6 billion "Superfund" for use by the Environmental Protection Agency (EPA) to pay for the costs incurred in responding to these problems.[7] In the event that EPA has cleaned up haz-

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REMEDIES FOR OFFICIAL WRONGS 38 (1983) (noting that doctrine of sovereign immunity's "harsh results . . . could not have been congenial to judicial sensibilities accustomed to remedying established wrongs").

In his first annual message to Congress, President Abraham Lincoln expressed his displeasure with the concept of sovereign immunity. *See* JACOBS, *supra* note 1, at vii. The President argued, "[i]t is as much the duty of Government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals." *Id.*

In 1946, Congress recognized the inequities created by this doctrine and enacted the Federal Tort Claims Act (FTCA). *See* Irvin M. Gottlieb, *The Tort Claims Act Revisited*, 49 GEO. L.J. 539 (1961) (discussing provisions of FTCA in detail); Ward, *supra* note 1, at 233-34 (discussing Congress' reaction to courts' expansion of doctrine of sovereign immunity in early nineteenth century to government employees who committed torts during course of employment). Under the FTCA, Congress waived a portion of the federal government's immunity such that injured parties could hold the federal government liable for certain torts committed by federal employees within their scope of employment. *See id.* at 234 (citing 28 U.S.C. § 1346(b) (1988)).

5. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1994)) [hereinafter CERCLA]. For a discussion of the provisions of CERCLA that authorize suits against states, see *infra* notes 76-83 and accompanying text.

6. *See* H.R. REP. NO. 96-1016, pt. 1, at 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. At the time CERCLA was enacted, estimates indicated that industry disposed one hundred billion pounds of hazardous chemical waste annually. *See* 126 CONG. REC. 26,342 (daily ed. Sept. 19, 1980) (statement of then Rep. Gore). Of this amount, ninety percent of the waste was disposed improperly. *See id.* Congress' decision to enact CERCLA followed EPA's findings that in 1979, an estimated thirty to fifty thousand inactive and uncontrolled hazardous waste sites existed in the United States. *See* H.R. REP. NO. 96-1016, pt. 1, at 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. These findings demonstrated the need for congressional action since many of these sites posed a serious risk to public health. *See id.*

7. *See* Elizabeth Ann Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385 (1988). Congress established this fund by imposing a tax on the chemical industry. *See id.* Congress debated the creation of this fund and justified it as follows:

> Financing the Fund primarily from fees paid by the industry is the most equitable and rational method of broadly spreading the costs of past, present and future releases of hazardous substances among all those industrial sectors and consumers who benefit from such substances. The concept of a fund financed largely by appropriations was not adopted. A

ardous waste, CERCLA authorizes EPA to seek reimbursement for these response costs from potentially responsible parties.[8] Interestingly enough, CERCLA also empowers potentially responsible parties to file contribution suits against states in the federal courts.[9]

Authorizing potentially responsible parties to sue states in the federal courts, despite the doctrine of sovereign immunity, raised a question as to whether the federal courts' exercise of jurisdiction over such suits was Constitutional. In *Pennsylvania v. Union Gas Co.*,[10] the United States Supreme Court faced this issue for the first time in determining whether the federal courts had jurisdiction over a suit brought by a citizen against its state under CERCLA.[11] Pennsylvania argued that the federal courts lacked jurisdiction since the Commonwealth was immune from a suit brought by one of its own citizens.[12] The Court found, however, that Congress had abrogated Pennsylvania's immunity in CERCLA, and thus concluded that the federal courts had jurisdiction over the action.[13]

In March 1996, the United States Supreme Court confronted the almost identical issue in *Seminole Tribe of Florida v. Florida*.[14]

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largely appropriated fund establishes a precedent adverse to the public interest — it tells polluters that the longer it takes for problems to appear, the less responsible they are for paying the consequences of their actions, regardless of the severity of the impacts. Too often the general taxpayer is asked to pick up the bill for problems he did not create; when costs can be more appropriately allocated to specific economic sectors and consumers, such costs should not be added to the public debt.

S. REP. No. 96-848, at 72 (1980).

8. *See* CERCLA § 107, 42 U.S.C. § 9607. For a review of this provision of CERCLA, see *infra* note 79.

9. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). Specifically, this section provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action .... In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

Id.

10. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996).

11. For a complete discussion of the Court's holding in *Union Gas*, see *infra* notes 84-92 and accompanying text.

12. *See Union Gas*, 491 U.S. at 22. Specifically, the Commonwealth of Pennsylvania argued that the drafters of the Eleventh Amendment incorporated the principle of sovereign immunity into the Constitution, and thus, the Court was barred from exercising jurisdiction over the suit. *See id.* at 13-14.

13. *See id.* at 23 (reasoning that "Congress has the authority to render [states] liable when legislating pursuant to the Commerce Clause").

14. *See generally* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996). For a complete discussion of the Court's holding in *Seminole Tribe*, see *infra* notes 93-99 and accompanying text.

Here, the Court had to determine whether the federal courts had jurisdiction over a suit brought by a citizen against its state pursuant to the Indian Gaming Regulatory Act.[15] In making its decision, the Court overruled its earlier holding in *Union Gas*, finding that Congress lacked the authority to abrogate a state's immunity in any legislation enacted through the Commerce Clause.[16]

This Note examines the federal courts' authority to exercise jurisdiction over cases brought by citizens against their own state. Part II of this Note discusses the origin of the doctrine of sovereign immunity and the Court's various attempts to determine the validity of the doctrine subsequent to the ratification of the Eleventh Amendment.[17] Part III reviews the facts of *Seminole Tribe* and examines the Court's reasoning behind its decision.[18] Part IV contends that although the Court had various pieces of evidence to aid in its resolution of the case, the majority relied primarily on precedent that is clouded with uncertainty.[19] This section also discusses the insignificant distinction between Congress' power to abrogate a state's immunity and a state's ability to implicitly waive its immunity from suit.[20] Finally, Part V considers the impact of the Court's decision, and concludes that the Court's holding in *Seminole Tribe* has completely relinquished a citizen's ability to seek relief against his state in federal court under CERCLA.[21]

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15. *See id.* at 1119.

16. *See id.* at 1131 ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

17. For a discussion of the history of the doctrine of sovereign immunity, the enactment of the Eleventh Amendment and relevant case law, see *infra* notes 22-92 and accompanying text.

18. For a discussion of the facts of *Seminole Tribe* and an examination of the Supreme Court's reasoning, see *infra* notes 93-116 and accompanying text.

19. For a thorough critique of the Supreme Court's rationale in *Seminole Tribe*, see *infra* notes 117-140 and accompanying text.

20. For an analysis of the inconsequential distinction between congressional abrogation and a state's ability to waive its immunity, see *infra* notes 141-159 and accompanying text.

21. For a discussion of the impact of the Court's decision in *Seminole Tribe* on citizens' rights to sue their state under CERCLA, see *infra* notes 160-166 and accompanying text.

II. BACKGROUND

A. Common Law

"The belief that 'the King c[ould] do no wrong' originated under English law."[22] The early American colonists brought this concept to the New World.[23] Alexander Hamilton evidenced colonial recognition of the doctrine of sovereign immunity in Federalist No. 81 by explaining that all sovereigns maintained an inherent power to be immune from suit without their consent.[24] Although the framers of the Constitution debated the inclusion of a provision granting immunity to state governments, Article III of the Constitution seems to permit suits against states.[25] Article III specifically

22. Ward, *supra* note 1, at 238 (citing W. BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND, 241-42 (1765)). This doctrine evolved from the conviction that the King could not be compelled to answer in his own court. *See* Pugh, *supra* note 1, at 478. Gradually, this belief of personal immunity for the King transformed into the modern concept of sovereign immunity. *See id.*

Bodin, Hobbes and Machiavelli have been regarded as the framers of this modern notion of sovereign immunity. *See* Edwin M. Borchard, *Governmental Responsibility in Tort, V*, 36 YALE L.J. 757, 785 (1927) (noting all three envisioned King as law-giver, therefore, above law and not subject to suit by anyone).

23. *See* Pugh, *supra* note 1, at 480-81. Blackstone's *Commentaries* encouraged the teaching of English law in American Universities. *See also* ERNEST BARKER, ESSAYS ON GOVERNMENT 128 (1965). Blackstone's first volume was published in 1765, and in 1771, when tensions between America and England started to flare, all four volumes of Blackstone's *Commentaries* were reprinted in Philadelphia. *See id.* at 128. Prior to the drafting of the Declaration of Independence, the thirteen colonies had sold approximately 2,500 copies of Blackstone's work. *See id.* at 128 n.1.

24. THE FEDERALIST NO. 81 (Alexander Hamilton). Alexander Hamilton supported the notion of sovereign immunity by writing:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.

Id.

25. *See* U.S. CONST. art. III, § 2, cl. 1. For a partial reading of the relevant language of Article III, see *infra* note 26 and accompanying text. At least four of the state ratifying conventions that debated the question of governmental immunity from suit believed that the drafters intended to hold states accountable for violating federal law. *See* Gibbons, *supra* note 2, at 1902. In the state ratification convention for Virginia, James Madison noted that he also interpreted Article III of the Constitution to provide for suits against states, by writing:

> Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the

provides that, "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies . . . between a State and Citizens of another State . . . ."[26]

In *Chisholm v. Georgia*,[27] the Court faced the issue of whether the Constitution provided the federal courts with jurisdiction over a suit filed against a state when a citizen of South Carolina filed suit against the State of Georgia.[28] The Court, in a four to one decision, decided that the doctrine of sovereign immunity had not survived the ratification of the Constitution, and thereby held that the federal courts had jurisdiction.[29] The *Chisholm* decision had an imme-

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> power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts. It is a case which cannot often happen, and if it should be found improper, it will be altered. But it may be attended with good effects.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 533 (Elliot ed. 1859).

Many colonists favored the idea that a state could be held liable in a suit brought against it. For example, while attempting to muster support for its ratification, Edmond Randolph, a drafter of the Constitution, told the Virginia Convention, "I admire that part [of the Constitution] that forces Virginia to pay her debts." Gibbons, *supra* note 2, at 1906. On the other hand, some colonists were displeased with the drafter's failure to incorporate state sovereign immunity into the Constitution. For example, George Mason argued at the Virginia ratification convention that:

> Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender?

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 526-27 (Elliot ed. 1859).

Most scholars agree that Article III of the Constitution provided the federal courts with jurisdiction over suits against states. *See, e.g.*, Pugh, *supra* note 1, at 481; SCHUCK, supra note 4, at 44. However, some commentators contend that the language of Article III is not conclusive. *See, e.g.*, JACOBS, supra note 1, at 21 (arguing that "[t]he question of whether immunity was waived cannot . . . be settled by a literal reading of the broad language of Article III").

26. U.S. CONST. art. III, § 2, cl. 1.

27. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

28. *See id.* at 420. Chisholm was the executor of a South Carolina citizen's estate who brought a suit in assumpsit against the State of Georgia. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 373 (1994). He claimed that the State owed the estate money for materials supplied during the Revolutionary War. *See id.* Chisholm argued that Article III of the Constitution expressively provided the federal courts with jurisdiction over such suits. *See id.* The majority of the Supreme Court ruled in Chisholm's favor. *See id.*

29. *See generally* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419. All five Justices of the *Chisholm* Court wrote their own opinion. *See id.* Each of the four Justices who

diate impact on the states, and Congress reacted swiftly by proposing the first Constitutional amendment subsequent to its ratification.[30] The Eleventh Amendment specifically provides that, "[t]he 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 . . . ."[31]

B. The Scope of the Eleventh Amendment

Cohens v. Virginia[32] marked the first time that a state asserted the Eleventh Amendment as a defense in an action brought by one of its own citizens.[33] In *Cohens*, two criminal defendants sought appellate review in the United States Supreme Court after being tried

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comprised the majority concluded that Article III authorized suits against a state by citizens of another state. *See id.* at 450-51 (opinion of Blair, J.); *see id.* at 464-66 (opinion of Wilson, J.); *see id.* at 467-68 (opinion of Cushing, J.); *see id.* at 476-78 (opinion of Jay, C.J.).

In his dissenting opinion, however, Justice Irdell concluded that the language of Article III was insufficient to provide the federal courts with jurisdiction over an action brought by a citizen against a state. *See id.* at 429-50 (Irdell, J., dissenting). Specifically, he noted that section 14 of the Judiciary Act of 1789 provided that, "'[a]ll the before mentioned Courts of the United States, shall have power . . . which may be necessary for the exercise of their respective jurisdictions, *and agreeable to the principles and usages of law.*'" *Id.* at 433-34. Justice Irdell argued that this language required a recognition of the common law doctrine of sovereign immunity. *See id.* at 435-36.

30. *See* 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, 1058 (1983). By denying the states immunity, citizens would have been able to file suits against states to collect unpaid war debts. *See id.* at 1058 n.114. As a result, British creditors would also have been permitted to sue in order to reclaim property that had been seized during the Revolutionary War. *See* CHEMERINSKY, *supra* note 28, at 374.

To calm the early colonists' fear of financial ruin to state governments, the House of Representatives proposed a Constitutional Amendment one day after the *Chisholm* decision. *See* Fletcher, *supra*, at 1058. This original draft of the Eleventh Amendment provided:

> [N]o state shall be liable to be made a party defendant in any of the judicial courts . . . at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.

Id. at 1058-59 (citing PA. J. & WEEKLY ADVERTISER, Feb. 27, 1793, at 1, col. 2). By January, 1794, Congress had agreed on what would become the final language of the Eleventh Amendment, and the requisite number of states ratified it in February, 1795. *See id.* at 1059.

31. U.S. CONST. amend. XI.

32. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

33. *See id.* at 302-12. Prior to *Cohens*, the Court had actually entertained several actions brought by a citizen against his own state. *See e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (citizen successfully sued State of Maryland challenging State's attempt to tax bank chartered by federal government).

in a state court.[34] The Commonwealth of Virginia filed a motion to dismiss, claiming that the Eleventh Amendment barred the federal courts from exercising jurisdiction over a suit brought by a citizen against his state.[35] In an opinion written by Justice Marshall, however, the Court denied the motion, finding that the Eleventh Amendment was irrelevant because an appeal of a criminal conviction did not constitute a "suit" within the meaning of the Eleventh Amendment.[36] Nonetheless, Justice Marshall noted in dicta that even if the action had been considered a suit, the Eleventh Amendment would not preclude the federal courts from presiding over such an action.[37]

Less than a century later, the Court in *Hans v. Louisiana*[38] chose not to rely on Justice Marshall's dicta and dismissed a suit brought by a citizen against his own state.[39] In *Hans*, a Louisiana citizen sought to recover unpaid interest on bonds and filed a suit against his state alleging a violation of the Contracts Clause of the

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34. *See Cohens*, 19 U.S. (6 Wheat.) at 268-69. The Commonwealth of Virginia had enacted a statute that prohibited the sale of lottery tickets within the commonwealth. *See id.* at 268. Virginia accused the Cohen brothers of selling a lottery ticket for the "National Lottery" operated in Washington D.C. *See id.*

35. *See id.* at 303-12. The Commonwealth of Virginia argued that the Eleventh Amendment effectively reestablished the doctrine of sovereign immunity. *See id.* at 307.

36. *See id.* at 410. The Eleventh Amendment precludes the judicial power of the United States from extending to *suits* commenced by citizens of another state against a state. *See* U.S. CONST. amend. XI (emphasis added). Justice Marshall found that the appellant had technically not filed a suit, and thus, the Eleventh Amendment was not applicable. *See Cohens*, 19 U.S. (6 Wheat.) at 410. Justice Marshall specifically held that:

> Where, then, a State obtains a judgment against an individual, and the Court, rendering such judgment, overrules a defence [sic] set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State . . . .

Id.

In the end, the Court noted that the Judiciary Act of 1789 provided the Supreme Court with jurisdiction over actions in which the party had previously obtained a final judgment in a state court. *See id.* at 264. The Court found, therefore, that it had jurisdiction pursuant to the Judiciary Act. *See id.*

37. *See Cohens*, 19 U.S. (6 Wheat.) at 412. Justice Marshall noted that if this case were considered a suit, "[i]t is not then within the [Eleventh] [A]mendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States . . . ." *Id.*

38. Hans v. Louisiana, 134 U.S. 1 (1890).

39. *See id.* at 10-11. The Court noted that Justice Marshall's comments regarding the scope of the Eleventh Amendment "ought not to outweigh the important considerations . . . which lead to a different conclusion." *Id.* at 20.

Constitution.[40] *Hans* marked the first time since the enactment of the Eleventh Amendment that the Court considered whether a citizen could bring a civil suit against his own state in federal court.[41] Relying on "history and experience and the established order of things," Justice Bradley found that the federal courts lacked jurisdiction over the dispute.[42]

C. Citizens Seeking Relief from Their Own State

Although allowing a litigant to expand the federal courts' jurisdictional limitations contradicts the plain language of Article III of the Constitution,[43] the Court has permitted this in certain circum-

40. *See id.* at 1. The plaintiff alleged that the Court had jurisdiction since the dispute arose under the Contracts Clause of the Constitution. *See id.* at 3. Specifically, the Contracts Clause provides that, "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1. The plaintiff reasoned that the issuance of bonds by the State created a contract between the State and each bondholder. *See Hans*, 134 U.S. at 2.

41. *See id.* at 10. The Court noted that the language of the Eleventh Amendment and relevant case law made it clear that a citizen of one state could not sue another state in federal court. *See id.* The Court admitted, however, that since Congress had ratified the Eleventh Amendment, the issue of whether the federal courts had jurisdiction over a suit brought by a citizen against his own state had been undecided. *See id.*

42. *Id.* at 14. The Court noted that *Chisholm's* failure to recognize the doctrine of sovereign immunity "created such a shock of surprise throughout the country" that the Eleventh Amendment was almost unanimously adopted at the first meeting of Congress thereafter. *Id.* at 11.

In *Hans*, the Court cited both comments made by several framers of the Constitution and Justice Irdell's dissent in *Chisholm v. Georgia* as support for its holding. *See id.* at 11-14. Specifically, *Hans* relied on the writings of Alexander Hamilton and quoted the following:

> "To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

Id. at 13 (citing THE FEDERALIST NO. 81 (Alexander Hamilton)). For a discussion of Justice Irdell's reasoning, see *supra* note 29.

43. *See* Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 66 (1989). This proposition remains somewhat anomalous. *See id.* Article III of the Constitution lays out the specific cases and controversies over which the Court has jurisdiction. *See* U.S. CONST. art. III, § 2, cl. 1. The Eleventh Amendment effectively limits this power by carving out an exception such that the Court cannot preside over a case brought by a citizen of one state against another state. *See* U.S. CONST. amend. XI. The notion that the state can confer jurisdiction upon the Court by waiving its immunity, therefore, suggests that a state has the power to override the Constitution. *See* Massey, *supra* at 66.

Nevertheless, this concept was recognized prior to the ratification of the Constitution in Hamilton's Federalist No. 81, when he argued that, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its*

stances.[44] For example, in *Petty v. Tennessee-Missouri Bridge Commission*,[45] the Court held that the federal courts had jurisdiction over a suit brought against a state where the state had expressly agreed to be liable to suit.[46] The Court reasoned that since the state had explicitly waived its immunity, the federal courts could hear the

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consent." THE FEDERALIST NO. 81 (A. Hamilton). The Court actually recognized this notion in *Hans v. Louisiana*. 134 U.S. at 17. Quoting Justice Taney, the *Hans* Court wrote:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state."

Id. at 17 (citing Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857)).

44. *See* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 280 (1959) (finding that when State "approved a sue-and-be-sued clause . . . it waived any immunity from suit"); Clark v. Barnard, 108 U.S. 436, 447 (1883) (holding that Court was relieved of determining the issue of jurisdiction due to "the voluntary appearance of the State"); Curran v. Arkansas, 56 U.S. (15 How.) 304, 309 (1853) (noting that "by its own consent, the State has become liable . . . if the complainant has valid grounds entitling him to the relief prayed"). *See also* John R. Pagan, *Eleventh Amendment Analysis*, 39 ARK. L. REV. 447, 488-89 (1986) ("When a state consents to federal adjudication, it waives not the lack of subject-matter jurisdiction, which a litigant never can waive, but rather the privilege of enforcing a limitation on the exercise of jurisdiction otherwise possessed by the court.").

Additionally, the Court in *Ex parte Young* recognized a significant exception to the principle precluding the federal courts from exercising jurisdiction over suits against states. *See* Ex parte Young, 209 U.S. 123 (1908). Here, the Court found that the Eleventh Amendment did not preclude the federal courts from exercising jurisdiction over suits for injunctive relief against state officials who had performed unconstitutional acts. *See id.* at 159-60.

The Court in *Edelman v. Jordan*, however, limited the application of *Ex parte Young*. *See* Edelman v. Jordan, 415 U.S. 651, 668-69 (1974). In *Edelman*, although the plaintiffs sued a state official seeking injunctive relief, the injunction would have required the payment of funds that had been improperly withheld by the state official. *See id.* at 655-56. The Court in *Edelman* held that the Eleventh Amendment prohibited the federal courts from exercising jurisdiction over a suit where the plaintiffs sought injunctive relief that would compensate for retrospective damages. *See id.* at 666-69. The *Edelman* Court noted that the federal courts could exercise jurisdiction under the doctrine of *Ex parte Young* only where the injunction required expenditures by the State for future compliance. *See id.* at 667-68.

Despite the Court's efforts to create a clear rule in *Edelman*, *Milliken v. Bradley* evidenced that the distinction between prospective and retrospective relief was not quite clear. *See Milliken II*, 433 U.S. 267, 288-89 (1977). The dispute in *Milliken* arose after citizens sued the State Superintendent of Public Instruction, seeking desegregation of the public school system. *See Milliken I*, 418 U.S. 717, 722 (1974). As part of the Court's award of injunctive relief, the Court ordered the State to implement educational programs that would compensate school children for benefits that they had been denied. *See Milliken II*, 433 U.S. at 290. The Court reasoned such an award was prospective in the sense that it sought to dissipate the continuing effects of past misconduct. *See id.*

45. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

46. *See id.* at 280. In *Petty*, acting pursuant to the Contract Clause of the Constitution, the States of Missouri and Tennessee agreed to form an agency in order

case.[47] Since its holding in *Petty*, the Court has recognized two other permissible expansions of the federal courts' jurisdiction: (1) the Theory of Implicit Waiver; and (2) the Theory of Congressional Abrogation.[48]

1. *The Theory of Implicit Waiver*

The Court established the Theory of Implicit Waiver by expanding *Petty's* concept of express waiver in three decisions where citizens had filed suits against their states through legislation enacted pursuant to the Interstate Commerce Clause.[49] The Interstate Commerce Clause of the Constitution provides that, "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ."[50] In each of these three cases, the plaintiffs sought to obtain relief from their respective states, claiming that their suits could proceed because the actions were brought pursuant to statutes enacted through the Interstate Commerce Clause.[51]

In *Parden v. Terminal Railway*,[52] the Court permitted the federal courts to exercise jurisdiction over a suit brought by citizens against their state where the state had implicitly consented to such suit.[53] In *Parden*, the Court reasoned that since the Constitution empow-

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to operate a ferry across the Mississippi. *See id.* at 277. The contract provided that the agency had the power to "'sue and be sued in its own name.'" *Id.*

47. *See id.* at 276-82. In making its decision, the Court noted that, "[t]his is not enlarging the jurisdiction of the federal courts but only recognizing as one of its appropriate applications the business activities of [a state] agency active in commerce . . . ." *Id.* at 281.

48. For a discussion of these theories, see *infra* notes 49-75 and accompanying text.

49. *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987) (holding that only where Congress has provided "unmistakably clear" statement of its intent to hold state amenable to suit will Court find that state has waived its immunity); Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 285 (1973) (requiring congressional statement authorizing suit against state in order to find implicit waiver of immunity); Parden v. Terminal Ry., 377 U.S. 184, 192-93 (1964), *overruled in part by* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987) (holding that federal courts have jurisdiction over case brought by citizen against his state where state has implicitly waived its immunity).

50. U.S. CONST. ART. I, § 8, cl. 3.

51. For a discussion of each of these cases, see *infra* notes 52-63 and accompanying text.

52. Parden v. Terminal Ry., 377 U.S. 184 (1964), *overruled in part by* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987).

53. *See id.* at 192-93. The Federal Employers' Liability Act (FELA) permitted employees injured in the scope of their employment to recover from employers "'engaging in commerce between any of the several States . . . .'" *Id.* at 184. Petitioners contended that the State, as their employer, was subject to liability pursuant to the language in FELA. *See id.* at 184-85.

ered Congress to regulate interstate commerce, the State had implicitly subjected itself to suit in federal court by voluntarily operating an interstate railway.[54] The Court justified its decision by pointing out that the State had actually surrendered a portion of its immunity by ratifying the Constitution and thereby granting Congress the power to regulate interstate commerce.[55]

In encountering the virtually identical issue less than a decade later, the Court in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*[56] seemed hesitant to affirm *Parden*.[57] In *Employees*, citizens employed by a state health facility sought relief pursuant to the Fair Labor Standards Act (FLSA).[58] Under the *Parden* analysis, any state that had participated in a federally regulated activity would have been found to have implicitly consented to suit in federal court.[59] Realizing *Parden's*

54. *See id.* at 187-93. The Court raised two issues in resolving the case: (1) whether Congress intended to subject the State to suit in these circumstances; and (2) whether Congress had the power to subject the State to suit. *See id.* at 187. In resolving the first issue, the Court determined that FELA's language holding "[a]ny common carrier engaged in interstate commerce by railroad," liable, demonstrated Congress' intent to subject the states to liability. *Id.* at 188. For a discussion of the second issue raised by the Court, see *infra* note 55.

55. *See id.* at 191. In making its determination of whether Congress had the power to subject the State to suit, the Court reasoned that since the enactment of FELA was an exercise of its commerce power, Congress was justified in making a state amenable to suit in the federal courts. *See id.* In making this decision, the Court relied on the well established principles regarding Congress' plenary powers to regulate commerce:

> "[The power to regulate commerce] is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution .... If, as has always been understood, the sovereignty of congress, though limited to specified objects is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

Id. (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824)).

56. Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973).

57. *See id.* at 281-87. For a discussion of the Court's distinction between its reasoning in *Parden* and its decision in *Employees*, see *infra* note 60.

58. *See id.* at 281. The Court in *Employees* applied the same test that the Court had used previously in *Parden*. For a discussion of the analysis employed by the *Parden* Court, see *supra* note 54.

In *Employees*, the Court first examined the language of the Fair Labor Standards Act (FLSA) to determine whether Congress intended to hold states liable. *See id.* at 282-83. The Court ended its analysis here, however, since it found that Congress had not conveyed an intent to waive the State's immunity from suit. *See id.* at 285.

59. *See id.* at 285. The Court reasoned that its earlier decision in *Parden* implied that the federal courts could have jurisdiction over a suit involving almost any

broad implications, the Court in *Employees* held that the Theory of Implicit Waiver required not only participation by the state in an interstate activity, but also a statutory expression from Congress authorizing the suit against the state.[60]

The Court further modified the Theory of Implicit Waiver in *Welch v. Texas Department of Highways & Public Transportation*.[61] Here, the Court partially overruled *Parden* and refined the requirements set forth in *Employees* by permitting the federal courts to exercise jurisdiction over a suit brought by citizens against their state only where Congress has provided for a waiver of the state's immunity in unmistakably clear language.[62] According to *Welch*, the Theory of Implicit Waiver required that the state participate in an

building within a state's governmental hierarchy. *See id.* The Court noted that *Parden's* holding "implicate[d] elevator operators, janitors, charwomen, security guards, secretaries, and the like . . . ." *Id.*

60. *See id.* In *Employees*, the employees of the health facility contended that the Court's holding in *Parden* precluded the Court from recognizing the defense of sovereign immunity. *See id.* at 282. In *Parden*, the Court had determined that the language employed by Congress in FELA indicated that Congress had intended to waive the state's immunity. For a discussion of the Court's decision in *Parden*, see *supra* notes 52-55 and accompanying text.

The Court distinguished its decision in *Parden* from *Employees* by finding a distinction between the language of FELA and FLSA. *Employees*, 411 U.S. at 284-85. FLSA pertained expressly to "'[e]nterprise[s] engaged in commerce or in the production of goods for commerce.'" *Employees*, 411 U.S. at 283. The *Employees* Court noted that although the language set forth in FELA was specific enough to convey Congress' intent to waive a state's immunity, the language of FLSA was not. *See id.* at 284-85. Thus, the Court found that the federal courts did not have jurisdiction since Congress had not expressly revoked the state's sovereign immunity in FLSA. *See id.* at 285. The *Employees* Court justified its decision by reasoning that a responsible Congress would not have intended for states to waive their immunity without providing explicitly for such waiver in the language of the statute. *See id.* at 284-85.

The Court also distinguished the two cases by pointing out that the state entity in *Parden* operated a railway, whereas *Employees* involved a state health facility. *See id.* at 284. The Court in *Employees* noted that the railway operated for profit and competed in an industry normally run by private persons while the state facility in *Employees* was a not-for-profit and non-proprietary institution. *See id.* The Court reasoned that state institutions not conducted for profit "have such a relation to interstate commerce that national policy . . . indicates that their status should be raised . . . ." *Id.*

61. *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987). In *Welch*, an employee of the Texas Highways Department sued the State after she was injured in the scope of her employment. *See id.* at 468. The employee claimed that she was entitled to relief since the Jones Act provided an award of damages for such injuries. *See id.* After examining the language of the Jones Act, the Court found that the language of the statute did not utilize the requisite language to waive the state's immunity from suit. *See id.* at 475.

62. *See id.* at 478 (relying on Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). In making this decision, the Court held that "to the extent that *Parden v. Terminal Railway* . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." *See id.*

interstate activity and that Congress provide an "unequivocal expression" of its intent to hold states amenable to suit.[63]

2. *The Theory of Congressional Abrogation*

While the Court in *Parden*, *Employees* and *Welch* analyzed suits brought through legislation enacted under the Interstate Commerce Clause by applying the Theory of Implicit Waiver, in *Fitzpatrick v. Bitzer*[64] and *Quern v. Jordan*[65] the Court considered whether the federal courts could exercise jurisdiction over suits brought by citizens against their state pursuant to legislation enacted through the Fourteenth Amendment[66] by applying the Theory of Congressional Abrogation.[67] The Court in *Fitzpatrick* and *Quern* did not examine whether the state had waived its immunity, but rather considered whether Congress had the power to abrogate a state's immunity.[68]

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63. *See id.* Four members of the Court actually voted to overrule *Hans v. Louisiana*. *See id.* at 496-521 (Brennan, J., dissenting). Nevertheless, *Hans* remains good law, since Justice Scalia refused to subscribe to the dissenters' view. *See id.* at 495-96 (Scalia, J., concurring in part, dissenting in part). The dissent urged for the overruling of *Hans* by pointing out that there was no support for the argument that the Constitution prohibited suits by citizens against their own state. *See id.* at 509-16. In his concurring opinion, Justice Scalia noted that it was unnecessary to render judgment on the applicability of *Hans*. *See id.* at 496. For a discussion of the Court's holding in *Hans*, see *supra* notes 38-42 and accompanying text.

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

65. Quern v. Jordan, 440 U.S. 332 (1979).

66. The relevant sections of the Fourteenth Amendment provide:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

67. *Fitzpatrick*, 427 U.S. at 452-57; *Quern*, 440 U.S. at 343-45.

68. For a discussion of the Court's holdings in *Fitzpatrick* and *Quern*, see *infra* notes 69-75 and accompanying text. Although the statutes at issue in *Fitzpatrick* and *Quern* had been enacted through the Fourteenth Amendment, the Court in *Atascadero State Hospital v. Scanlon* considered whether Congress could abrogate a state's immunity in legislation enacted through the Interstate Commerce Clause. *See Atascadero*, 473 U.S. at 234 (1985). In *Atascadero*, a diabetic filed suit pursuant to the Rehabilitation Act of 1973, claiming that a state hospital had discriminated against him by denying him employment. *See id.* at 236. The state hospital contended that the Eleventh Amendment barred the federal courts from exercising jurisdiction over the suit. *See id.* Consistent with past cases, the Court began its analysis by reviewing the language of the statute. *See id.* at 244-45. The Court noted, however, that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of that statute." *See id.* at 242. Applying this test, the Court

In *Fitzpatrick*, the Court introduced the Theory of Congressional Abrogation, finding that the federal courts could exercise jurisdiction over a suit brought by a citizen against his state because Congress had abrogated the state's immunity.[69] In making its determination, the Court reasoned that the Fourteenth Amendment expressly granted Congress the authority to enforce the amendment through legislation, and therefore, necessarily imposed a significant limitation on state authority.[70] Based on this reasoning, the Court held that Congress could enact legislation empowering a citizen to sue his state in federal court to enforce the provisions of the Fourteenth Amendment.[71]

In *Quern*, the Court slightly altered the Theory of Congressional Abrogation by holding that a clear congressional expression was necessary to abrogate a state's immunity in suits brought under legislation enacted through the Fourteenth Amendment.[72] The *Quern* Court rejected a citizen's attempt to hold the State of Illinois

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found that the State was immune from suit since the statute failed to demonstrate that Congress intended to abrogate the state's immunity. *Id.* at 246.

69. *See Fitzpatrick*, 427 U.S. at 456. In *Fitzpatrick*, present and retired employees of the State of Connecticut sued the State under Title VII of the Civil Rights Act of 1964. *See id.* at 448. The employees claimed that the state's employee benefit plan discriminated against them on the basis of their sex. *See id.* The State claimed that the Eleventh Amendment rendered the State immune from suit. *See id.* at 450.

70. *See id.* at 456. The Court found that the Fourteenth Amendment limited the protections of the Eleventh Amendment. *See id.* The Court reasoned that when Congress acts pursuant to the Fourteenth Amendment, "it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Id.*

71. *See id.* Specifically, the Court noted that section five of the Fourteenth Amendment empowers Congress to enforce the Fourteenth Amendment "by appropriate legislation." *Id.* Based on this language, the Court held that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States . . . which are constitutionally impermissible in other contexts." *Id.*

In his concurring opinion, Justice Brennan agreed that the federal courts had jurisdiction because federal question jurisdiction existed. *See id.* at 457. He argued that the Eleventh Amendment was not at issue, since it precluded the federal courts from exercising jurisdiction only over suits where the federal courts' jurisdiction was based on diversity of citizenship. *See id.* He contended further that the only issue in this case was whether the State of Connecticut could assert the nonconstitutional doctrine of sovereign immunity as a defense. *See id.* Nonetheless, Justice Brennan concluded that this defense was not available since it had been abandoned by the ratification of the Constitution. *See id.* at 457-58.

72. *See Quern*, 440 U.S. at 342. Specifically, the Court found that the federal courts lacked jurisdiction because Congress had not clearly indicated that it intended "to overturn the constitutionally guaranteed immunity of the several States." *Id.*

liable in a suit brought under the Civil Rights Act of 1871.[73] The Court reasoned that Congress' failure to specifically express its intent to hold states liable in the language of the statute indicated congressional respect for state sovereign immunity.[74] Thus, after *Quern*, the Theory of Congressional Abrogation permitted the federal courts to exercise jurisdiction over suits brought by a citizen against his state through legislation enacted under the Fourteenth Amendment where Congress had abrogated the state's immunity in a clear statutory expression.[75]

D. CERCLA

In the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), Congress attempted to avoid the unjust results that accompany judicial recognition of the doctrine of sovereign immunity by specifically authorizfing suits against states in federal court.[76] CERCLA requires parties who have

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73. *See id.* at 342-45. In *Quern*, to determine whether the federal courts had jurisdiction over the suit, the Court relied principally on *Employees*. *See id.* at 343-45. For a discussion of the Court's holding in *Employees*, see *supra* notes 56-60 and accompanying text. The Court reasoned that since the *Employees* Court had required a clear congressional expression to abrogate a state's immunity under actions brought through the Commerce Clause, a similar expression was necessary in actions brought pursuant to the Fourteenth Amendment. *See id.* at 343-44.

74. *See id.* at 344-45. In examining the language of the statute, the Court noted:

> [The Civil Rights Act of 1871] does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.

Id. at 345.

75. *See id.* In support of its conclusion, the Court noted:

> Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with other evils that they thought would result from the Act. Instead, § 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1.

Id. at 343.

76. *See* Glass, *supra* note 7, at 389; Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1,2 (1982); Edward L. Stohbehn, Jr., *The Bases for Federal/State Relationships in Environmental Law*, 12 ENVTL. L. REP. 15074, 15083 (1982).

In 1978, President Carter declared a state of emergency in Love Canal, New York, after the city's water supply became contaminated. *See* Glass, *supra* at 387.

had control over hazardous materials to notify the Environmental Protection Agency (EPA) of the storage and release of such substances.[77] After receiving notice, EPA evaluates the potential health risks and formulates a response plan.[78]

CERCLA provides EPA with broad powers to hold any "person" or "owner or operator" liable for the costs associated with implementing the response plan.[79] When Congress enacted CERCLA, it

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Developers had constructed this neighborhood on an abandoned dump and hazardous waste had seeped into the water. *See id.*

Congress enacted CERCLA on December 11, 1980 as a direct result of this discovery. *See id.* at 389. CERCLA was passed during the "lameduck" days of the 96th Congress. *See id.* Accordingly, the statute does not lack deficiencies. *See id.* at 390 (citing United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984), *aff'd*, 810 F.2d 726 (8th Cir. 1986) (noting that CERCLA is "'a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions'")).

77. *See* CERCLA § 103, 42 U.S.C. § 9603(c). Specifically, this provision requires that:

> [A]ny person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances . . . are or have been stored, treated, or disposed of shall, . . . notify the Administrator of the Environmental Protection Agency of the existence of such facility . . . .

Id.

78. *See id.* § 104, 42 U.S.C. § 9604. Once EPA has reason to believe that a certain material released into the environment poses a risk to health, it "may undertake such investigations, monitoring, surveys, testing, and other information gathering as [it] may deem necessary or appropriate to identify the existence and extent of the release or threat . . . ." *Id.* § 104(b)(1), 42 U.S.C. § 9604(b)(1).

79. *See id.* § 107(a), 42 U.S.C. § 9607(a). This section provides that:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for –
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

expressly included states in its definitions of both "person" and "owner or operator."[80]

In 1986, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act (SARA).[81] One purpose of SARA was to assist states in fulfilling their obligations under CERCLA.[82] In doing so, SARA expressly limited state liability in instances where the state had obtained ownership of property involuntarily by virtue of its function as the sovereign.[83]

E. *Pennsylvania v. Union Gas Co.*

In 1989, the Court in *Pennsylvania v. Union Gas Co.* addressed whether the federal courts had jurisdiction over a suit brought by a

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(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out [consistent with] this title.

Id.

80. *Id.* §§ 101(20)(A),(21), 42 U.S.C. §§ 9601(20)(A),(21). CERCLA specifically provides that "[t]he term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.* § 101(21), 42 U.S.C. § 9601(21).

In defining the term owner or operator, CERCLA provides that:

The term 'owner or operator' means . . . (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.

Id. § 101(20)(A), 42 U.S.C. § 9601(20)(A).

81. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C. §§ 9601-75 (1994)) [hereinafter SARA].

82. *See* H.R. REP. No. 99-253(I), at 54 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2836 (noting that SARA aimed to provide "assistance to the states in fulfilling their role in the Superfund program").

83. *See* CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D). The amendments clarified the meaning of owners and operators by providing that:

The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity . . . .

Id.

citizen against its state under CERCLA.[84] In *Union Gas*, Pennsylvania argued that it was not liable because: (1) the language of CERCLA had not clearly abrogated its immunity from suit; and (2) CERCLA was unconstitutional because Congress did not have the power to enact legislation holding a state amenable to suit by one of its citizens in the federal courts.[85] Although five Justices wrote opinions concerning the issues raised in this controversial case, a bare majority rejected both of Pennsylvania's arguments.[86]

The plurality opinion, written by Justice Brennan, refuted the first of Pennsylvania's arguments, noting that CERCLA rendered "person[s]" and "owner[s] or operator[s]" liable for the costs associated with remedial action under CERCLA.[87] The Court further noted that the statutory definitions of "persons" and "owners or op-

84. Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989). The predecessors of the Union Gas Company operated a coal gasification plant in Stroudsburg, Pennsylvania, which had produced coal tar as a byproduct. *See id.* In 1980, the Commonwealth of Pennsylvania obtained an easement to this property. *See id.* During excavations on this property, the Commonwealth struck a large deposit of coal tar which subsequently seeped into a nearby creek. *See id.*

The United States paid $720,000 to clean up the area. *See id.* at 6. The United States filed a suit pursuant to CERCLA against Union Gas Company, seeking reimbursement for this expenditure. *See id.* Union Gas Company then filed a third-party complaint against Pennsylvania, asserting that the Commonwealth was liable for a portion of the clean up costs. *See id.*

The district court dismissed the third-party complaint, accepting Pennsylvania's contention that the Eleventh Amendment provided for its immunity from suit. *See id.* The Court of Appeals affirmed, finding that CERCLA did not provide a clear expression of Congress' intent to hold a state liable. *See id.* (citing United States v. Union Gas Co., 792 F.2d 372 (3d Cir. 1986)).

While Union Gas' petition for certiorari was pending, Congress amended CERCLA by enacting the SARA amendments. *See id.* As a result, the Supreme Court remanded the case for reconsideration in light of these amendments. *See id.* On remand, the Court of Appeals held that the statute, as amended, provided a clear expression of congressional intent to hold states liable. *See id.* (citing United States v. Union Gas Co., 832 F.2d 1343 (3d Cir. 1986)). The Third Circuit also held that Congress had the power to abrogate a state's immunity when enacting legislation under the Commerce Clause. *See id.* (citing United States v. Union Gas Co., 832 F.2d 1343 (3d Cir. 1986)).

85. *See id.* at 11-14. Pennsylvania contended that CERCLA only authorized a suit against a state if it was brought by the United States, rather than by a private entity. *See id.* at 11. In support of its second contention, Pennsylvania argued that the principle of sovereign immunity embodied in the Eleventh Amendment barred congressional abrogation of its immunity from suit. *See id.* at 13-14.

86. *See id.* at 5. The Court's conclusion that Congress had clearly expressed its intent to strip the states of their Eleventh Amendment immunity was supported by Justices Brennan, Marshall, Blackmun, Stevens and Scalia. *See id.* at 5, 29. Additionally, the Court's finding that Congress had the power to abrogate a state's immunity through the Commerce Clause was supported by Justices Brennan, Marshall, Blackmun, Stevens and White. *See id.* at 5, 45.

87. *Id.* at 7 (citing CERCLA § 107(a), 42 U.S.C. § 9607(a)). For a discussion of this provision, see *supra* note 79.

erators" explicitly included states.[88] Accordingly, based on the plain language of the statute, the Court found that the language of CERCLA abrogated the state's immunity in unmistakable clarity.[89]

The Court rendered its decision on Pennsylvania's second argument by relying primarily on *Fitzpatrick v. Bitzer*, in which the Court had applied the Theory of Congressional Abrogation where a plaintiff had filed suit pursuant to legislation enacted through the Fourteenth Amendment.[90] In doing so, the *Union Gas* Court found

88. *Id.* (citing CERCLA §§ 101(20)(A),(21), 42 U.S.C. §§ 9601(20)(A),(21)). For a further discussion of these provisions, see *supra* note 80.

The plurality noted two additional provisions of CERCLA that supported its argument. *See id.* at 9-10. First, the plurality noted that § 9607(d)(2) of CERCLA provided that, "[n]o State . . . shall be liable . . . for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person." *Id.* at 9 (citing CERCLA § 107(d)(2), 42 U.S.C. § 9607(d)(2)). He reasoned that this section presumed that Congress recognized the potential of state liability. *See id.* at 10.

Second, the plurality noted that Congress effectively waived the federal government's immunity in § 9620(a)(1) of CERCLA when it provided that, "[e]ach department . . . of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent . . . as any nongovernmental entity . . . ." *Id.* (citing CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1)). Since Congress mirrored this language in § 9601(20)(D) in describing the potential liability of states, the plurality concluded that Congress must have also intended to override a state's immunity from suit. *See id.*

89. *See id.* at 13. In his dissenting opinion, however, Justice White argued that the language of CERCLA did not abrogate a state's immunity in unmistakably clear language. *See id.* at 45. In his analysis, Justice White examined the statute as two separate pieces of legislation. *See id.* at 45-57. He first reviewed the language of CERCLA as enacted in 1980, and cited the district court's finding as support for his conclusion that the statute did not abrogate states' immunity in unmistakable clarity. *See id.* at 45-50. In the second part of his review, he separately analyzed SARA and held that these amendments also failed to rise to the level of unmistakable clarity. *See id.* at 55-56.

90. *See id.* at 15-17. The plurality summarized the "trail" that unmistakably led to its conclusion in *Union Gas*. *Id.* at 14. The plurality began with the Court's decision in *Parden*, noting that although the Court characterized that case as one involving a waiver of immunity, the Court's reasoning laid the foundation for the concept of abrogating a state's sovereign immunity. *See id.* The plurality discussed how the Court expanded this idea in *Employees* by requiring an expression from Congress to override a state's Eleventh Amendment immunity from suit. *See id.* at 14-15. He further explained that when the *Welch* Court modified its holding in *Employees* to require an unequivocal expression from Congress, the Court had actually assumed that Congress had the authority to abrogate a state's immunity through the Commerce Clause. *See id.* The plurality then pointed to *Fitzpatrick*, which held that Congress could abrogate a state's immunity in statutes enacted pursuant to the Fourteenth Amendment. *See id.* at 15. Combining the concepts developed in each of these cases, the plurality concluded that Congress had the power to abrogate a state's immunity in statutes enacted through the Commerce Clause. *See id.*

For a discussion of the Court's holdings in *Parden*, *Employees* and *Welch*, see *supra* notes 52-63 and accompanying text.

that Congress also had the power to abrogate a state's immunity through legislation enacted through the Commerce Clause.[91] The Court reasoned that, like the Fourteenth Amendment, the Commerce Clause necessarily limits the principle of state sovereign immunity embodied in the Eleventh Amendment.[92] Although the *Union Gas* Court concluded that the federal courts could exercise jurisdiction over a suit brought by a citizen against its state under a statute enacted through the Commerce Clause, the Court revisited this issue in *Seminole Tribe of Florida v. Florida.*

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91. *See id.* at 16. The plurality found that the Court's reasoning in *Fitzpatrick* concerning the Fourteenth Amendment was also applicable to the Commerce Clause. *See id.* at 16-17. He pointed out that both of these Constitutional provisions "with one hand gives power to Congress while, with the other, it takes power away from the States." *Id.* at 16. He compared these Constitutional provisions and pointed out that while the Fourteenth Amendment provides for this exchange of power in two steps (i.e. §§ 1-4 plus § 5), the Commerce Clause expands federal power and contracts state power in just one. *See id.* at 17. The plurality summed up this argument noting that the following is equally applicable to the Fourteenth Amendment as well as the Commerce Clause:

> Such enforcement [of the prohibitions of the Fourteenth Amendment] is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . . [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

Id. at 16 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 454-55 (1976)).

92. *See id.* at 16-17. In his dissenting opinion, Justice Scalia distinguished statutes enacted through the Fourteenth Amendment from laws passed pursuant to the Commerce Clause. *See id.* at 40-41. He argued that Congress was justified in abrogating a state's immunity in *Fitzpatrick* only because the Fourteenth Amendment was ratified after the Eleventh Amendment. *See id.* at 42. Thus, relying on chronology, he found that statutes enacted through the Commerce Clause could not deny a state its sovereign immunity. *See id.*

The plurality offered an argument to counter Justice Scalia's contention. *See id.* at 17-18. The plurality pointed out that Justice Scalia had adopted the belief that the principle of sovereign immunity embodied in the Eleventh Amendment had existed since the days before the Constitution was ratified. *See id.* The plurality decided that based on Justice Scalia's understanding, the Commerce Clause does not pre-date the concept of sovereign immunity. *See id.* Thus, the plurality concluded that since sovereign immunity had been recognized prior to the ratification of the Commerce Clause, Justice Scalia's argument based on chronology was flawed. *See id.*

III. *Seminole Tribe of Florida v. Florida*

A. Facts

In September 1991, the Seminole Tribe sued the State of Florida and its governor.[93] The Seminole Tribe alleged that the State had violated the Indian Gaming Regulatory Act of 1988 (IGRA), which Congress had enacted through the Indian Commerce Clause.[94] The Seminole Tribe sought an injunction requiring certain state officials to negotiate for the formation of a tribal-state compact that would allow the Seminole Tribe to conduct certain gaming activities in Florida.[95]

The State of Florida filed a motion to dismiss, claiming that the Eleventh Amendment rendered it immune from suit and thus precluded the Seminole Tribe from bringing suit in federal court.[96]

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93. *See Seminole Tribe*, 116 S. Ct. at 1121. The Seminole Tribe also sued the Governor of Florida under the doctrine of *Ex parte Young*. *See id.* at 1121-22. This doctrine enables plaintiffs to circumvent the Eleventh Amendment's jurisdictional bar by allowing plaintiffs to obtain injunctive relief from state officials. *Ex parte Young*, 209 U.S. 123, 159-60 (1908). This Note does not consider the issues raised by the Seminole Tribe's claim against the Governor. For a brief discussion of the doctrine of *Ex parte Young*, see *supra* note 44.

94. *See Seminole Tribe*, 116 S. Ct. at 1121. The Constitution explicitly provides that, "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3. Congress enacted the Indian Gaming Regulatory Act (IGRA) for the following reasons:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

IGRA § 3, 25 U.S.C. § 2702 (1994).

95. *See Seminole Tribe*, 116 S. Ct. at 1121. The Seminole Tribe claimed that the State had violated 25 U.S.C. § 2701(d)(3). *Id.* This section of IGRA provides that:

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

IGRA § 11(d)(3)(A), 25 U.S.C. § 2710(d)(3)(A).

96. *See Seminole Tribe*, 116 S. Ct. at 1121.

The district court denied the motion.[97] On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the district court's decision and remanded the case with instructions to dismiss for lack of subject matter jurisdiction.[98] In a five to four

97. *See id.* In the district court, the Seminole Tribe argued that dismissal was inappropriate since Congress had abrogated the State's Eleventh Amendment immunity. Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 657 (S.D. Fla. 1992). The district court agreed with this argument and denied Florida's motion to dismiss. *See id.* at 663.

The district court began its inquiry noting that congressional abrogation of the State's immunity required both a clear expression from Congress and congressional power to do so. *See id.* at 658. Applying this test, the district court first examined the language of the statute to determine whether Congress had provided for abrogation in unmistakably clear language. *See id.* After examining 25 U.S.C. § 2710(d)(7)(A)(i), the district court found that IGRA clearly provided for the abrogation of a states' immunity. *See id.* For a discussion of the language of 25 U.S.C. § 2710(d)(7)(A)(i), see *infra* note 102.

The district court then had to determine whether Congress had the power to abrogate a state's immunity in legislation enacted through the Indian Commerce Clause. *Seminole Tribe*, 801 F. Supp. at 658. The district court relied primarily on *Pennsylvania v. Union Gas Co.*, in which the Court held that Congress had the power to abrogate a state's immunity though legislation enacted through the Commerce Clause. *See id.* Noting that the power to regulate interstate commerce and Indian commerce is contained within the same clause in the Constitution, the district court determined that "Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater, than its powers under the Interstate Commerce Clause." *Id.* at 662. Based on these findings, the district court found that Congress had the power to abrogate a state's immunity through legislation enacted through the Indian Commerce Clause. *See id.* For a discussion of the Court's holding in *Pennsylvania v. Union Gas Co.*, see *supra* notes 84-92 and accompanying text.

98. *See Seminole Tribe*, 116 S. Ct. at 1121-22. The Eleventh Circuit agreed with the district court that Congress intended to abrogate the state's sovereign immunity in § 2710(d)(7) of IGRA. *See id.* at 1121. However, the Eleventh Circuit disagreed with the district court's conclusion that the Indian Commerce Clause granted Congress the power to abrogate a state's immunity. *See id.*

In making its determination, the Eleventh Circuit applied the same two part test used by the district court. Seminole Tribe of Florida v. Florida, 11 F.3d 1016, 1024 (11th Cir. 1994). In a brief analysis, the circuit court disposed of the first issue by analyzing the language of IGRA, finding that the statute manifested Congress's intent to abrogate a state's immunity. *See id.* In determining the second prong of the test, the Seminole Tribe argued that Congress had enacted IGRA through the Fourteenth Amendment or the Commerce Clause. *See id.* at 1025. The Eleventh Circuit rejected this argument and found that Congress enacted IGRA solely under the Indian Commerce Clause. *See id.* at 1026.

The Seminole Tribe then reiterated its argument used in the district court, namely, that since Congress could abrogate a state's immunity through legislation passed through the Interstate Commerce Clause, Congress could do the same through the Indian Commerce Clause. *See id.* The Eleventh Circuit, however distinguished the Interstate Commerce Clause from the Indian Commerce Clause. *See id.* at 1027. The circuit court noted that the Interstate Commerce Clause allows "Congress to place limits on the states in order to 'maintain[ ] free trade among the States.'" *Id.* The Eleventh Circuit further noted that the purpose of the Indian Commerce Clause is to provide Congress with powers to legislate in the field of Indian affairs. *See id.* Based on the different purposes of these Constitutional pro-

decision, the Court overruled *Pennsylvania v. Union Gas Co.*, and affirmed the Eleventh Circuit's decision, finding that the Eleventh Amendment precluded Congress from abrogating a state's sovereign immunity through legislation enacted through the Commerce Clause.[99]

B. The Court's Rationale

Writing the opinion for the majority, Justice Rehnquist set forth a two-prong test to determine whether the Eleventh Amendment permitted the federal courts to exercise jurisdiction over a suit brought by a citizen against its state through legislation enacted pursuant to the Indian Commerce Clause.[100] This test required the Court to determine: (1) whether the language of IGRA unequivocally expressed Congress' intent to abrogate the state's immunity; and (2) whether Congress had acted pursuant to a valid exercise of power by abrogating a state's immunity in IGRA.[101]

In examining the first prong of the test, the Court analyzed the language of the statute,[102] and concluded that Congress had clearly

visions, the circuit court found it unnecessary to extend the power to abrogate a state's immunity to legislation enacted through the Indian Commerce Clause. *See id.*

The Eleventh Circuit also justified its finding by distinguishing *Pennsylvania v. Union Gas Co.* and its supporting precedent from the case at hand. *See id.* at 1028. The circuit court noted that in all of the cases where the Court had found that the federal courts could exercise jurisdiction, the State had actively participated in an activity normally conducted by private companies. *See id.* (citing Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (discussing State's ownership of polluted land); Parden v. Terminal Ry., 377 U.S. 184 (1964) (examining State's operation of railway in interstate commerce)). The Eleventh Circuit distinguished the present case by explaining that Florida had acted "'wholly within [the States'] sphere of authority.'" *Id.* Interestingly enough, the circuit court also noted that the Supreme Court's change in composition since the *Union Gas* decision made "it likely that a majority of the present Court would disagree with *Union Gas* and find that Congress was not empowered to abrogate the states' immunity." *Id.* at 1027.

99. *See id.* at 1128. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas comprised the majority. *See id.* at 1119. The dissent included Justices Stevens, Souter, Ginsberg and Breyer. *See id.* For a discussion of the majority's rationale, see notes 100-116 and accompanying text.

100. *See id.* at 1123.

101. *See id.* The Supreme Court actually used this same analysis in *Pennsylvania v. Union Gas Co.*. For a discussion of the analysis used by the Court in *Union Gas*, see *supra* notes 84-92 and accompanying text.

102. *See Seminole Tribe*, 116 S. Ct. at 1123-24. The Court examined the following sections of IGRA:

> (7)(A)The United States district courts shall have jurisdiction over –
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

expressed its intent to abrogate a state's immunity in suits brought under IGRA.[103] With respect to the second prong of the test, the Court noted initially that it had held a state amenable to suit under the Theory of Congressional Abrogation only in two prior cases.[104] First, the Court in *Fitzpatrick v. Bitzer* had permitted a citizen to sue his state in federal court through legislation enacted pursuant to the Fourteenth Amendment.[105] More recently, in *Pennsylvania v. Union Gas Co.*, the Court had found that Congress could abrogate a state's immunity in legislation passed through the Interstate Commerce Clause.[106] Relying principally on the Court's holding in *Union Gas*, the Seminole Tribe argued that since Congress could abrogate a state's immunity through the Interstate Commerce Clause, it could do the same through the Indian Commerce Clause.[107] Although the Court agreed that *Union Gas* supported

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(ii) any cause of action initiated by a State or Indian tribe to enjoin a Class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

IGRA § 11, 25 U.S.C. § 2710(d).

103. *See Seminole Tribe*, 116 S. Ct. at 1124. The Court determined that 25 U.S.C. § 2710(d) provided an "'unmistakably clear'" statement of Congress' intent to abrogate the state's sovereign immunity. *Id.* The Court noted that this finding was consistent with lower court's determination as well as the decisions of the Eighth, Ninth, and Tenth Circuits. *See id.* at 1123 n.8 (citing Ponca Tribe of Oklahoma v. Oklahoma, 37 F.3d 1422 (10th Cir. 1994), *vacated*, 116 S. Ct. 1410 (1996); Spokane Tribe v. Washington, 28 F.3d 991 (9th Cir. 1994), *vacated*, 116 S. Ct. 1410 (1996); Cheyenne River Sioux Tribe v. South Dakota (8th Cir. 1993)).

104. *See id.* at 1125.

105. *See id.* at 1125. For a complete discussion of *Fitzpatrick v. Bitzer*, see *supra* notes 69-71 and accompanying text.

106. *See id.* at 1125. For a complete discussion of *Pennsylvania v. Union Gas Co.*, see *supra* notes 84-92 and accompanying text.

107. *See id.* at 1124-28. The Seminole Tribe made several arguments to support its contention that Congress could abrogate a state's immunity through legislation enacted under the Interstate Commerce Clause. *See id.* at 1124-25. First, the

the Seminole Tribe's argument, the majority voted to overrule *Union Gas*, finding that it "has proven to be a solitary departure from established law."[108]

The Court justified its decision to overrule *Union Gas* by relying on established principles of jurisprudence and its previous decision in *Hans v. Louisiana*.[109] The Court pointed out that the principle of sovereign immunity enjoyed wide recognition in both English common law and in the colonial era.[110] Noting that the original Constitution did not include a provision specifically granting the states immunity, the Court reasoned that the Eleventh Amendment rectified this deficiency.[111] The Court further pointed out that the *Hans* Court had the first opportunity to consider the implications of the

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Seminole Tribe argued that the federal courts had jurisdiction since it sought to obtain prospective injunctive relief rather than retroactive monetary relief. *See id.* at 1124. The Court disagreed, however, and found that such a distinction was irrelevant. *See id.* (relying on Cory v. White, 457 U.S. 85, 90 (1982)). The Seminole Tribe also argued that abrogation of the state's immunity was appropriate in this instance, since IGRA grants the state the authority to regulate Indian affairs, which is a power that the state would not normally have. *See id.* The Court again disregarded the contention, noting that such a consideration was irrelevant. *See id.* at 1125.

108. *Seminole Tribe*, 116 S. Ct. at 1128. In making its primary argument, the Seminole Tribe relied on the plurality's decision in *Union Gas*. *See id.* at 1125. The Seminole Tribe noted that the Indian Commerce Clause makes "Indian relations . . . the exclusive province of federal law." *Id.* (citing County of Oneida v. Onieda Indian Nation of N.Y., 470 U.S. 226 (1985)). Based on this contention, the Seminole Tribe argued that since "the Indian Commerce Clause vests the Federal Government with 'the duty of protect[ing]' the tribes from 'local ill feeling' and 'the people of the States,' [the power of abrogation is necessary] 'to protect the tribes from state action denying federally guaranteed rights.'" *Id.* at 1125-26. The Court agreed that the plurality's decision in *Union Gas* supported the Seminole Tribe's argument. *See id.* at 1126. In fact, the Court specifically noted that, "it was in those circumstances where Congress exercised complete authority that Justice Brennan thought that the power to abrogate most necessary." *Id.* (relying on Pennsylvania v. Union Gas Co., 491 U.S. 1, 20 (1989)). Nevertheless, the Court decided to overrule *Union Gas*, finding that the Court's holding in *Union Gas* had created much confusion and that the decision was a sharp deviation from "established federalism jurisprudence." *Id.* at 1127.

109. *See id.* at 1127.

110. *See id.* at 1130. The Court supported its finding by relying on Federalist No. 81, in which Alexander Hamilton wrote, "sovereign immunity 'is the general sense and the general practice of mankind.'" *Id.*

Justice Souter, in his dissent, however, engaged in a lengthy analysis of the evolution of the doctrine of sovereign immunity, concluding that the framers of the Constitution did not intend to adopt the doctrine of sovereign immunity. *See id.* at 1161-72. He rebutted the majority's reliance on Federalist No. 81, arguing that Hamilton supported precluding the federal courts from exercising jurisdiction only over citizen-state diversity cases. *See id.* at 1166. For an examination of Federalist No. 81, see *supra* note 24.

111. *See id.* at 1130. The Court noted that Congress reacted to the *Chisholm* Court's failure to hold the State of Georgia immune from suit by enacting the Eleventh Amendment. *See id.* The Court reasoned that Congress' quick reaction

Eleventh Amendment and confirmed that it rendered states immune from suit.[112]

The Court also justified its decision to overrule *Union Gas* by criticizing the *Union Gas* Court's reliance on *Fitzpatrick*.[113] The Court distinguished *Fitzpatrick* from *Union Gas*, noting that *Fitzpatrick's* application of the Theory of Congressional Abrogation was proper because the statute at issue in *Fitzpatrick* had been enacted through the Fourteenth Amendment rather than the Commerce Clause.[114] The Court reasoned that Congress had the power to abrogate a state's immunity through legislation enacted under the Fourteenth Amendment because the Fourteenth Amendment was

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demonstrated its surprise that the *Chisholm* Court failed to recognize the doctrine of sovereign immunity. *See id.*

112. *See id.* at 1127 (relying on *Union Gas*, 491 U.S. at 36 (Scalia, J., dissenting)). Both dissenting opinions in *Seminole Tribe* disagreed with the Court's decision to overrule *Union Gas*. *See id.* at 1134, 1145. Justices Stevens's and Souter's opinions contended that the Court's mischaracterization of *Hans* produced a faulty outcome. *See id.* at 1137, 1156. Both of these dissents rejected the majority's reliance on *Hans*, pointing out that *Hans* did not preclude congressional abrogation of a state's immunity. *See id.* In his dissenting opinion, Justice Stevens argued that:

> *Hans* does not hold, however, that the Eleventh Amendment, or any other constitutional provision, precludes federal courts from entertaining actions brought by citizens against their own States in the face of contrary congressional direction . . . . *Hans* instead reflects, at the most, this Court's conclusion that, as a matter of federal common law, federal courts should decline to entertain suits against unconsenting States.

Id. at 1137.

Expanding on this contention, Justice Souter added:

> The majority does not dispute the point that *Hans v. Louisiana* had no occasion to decide whether Congress could abrogate a State's immunity from federal question suits. . . . *Hans* conceded that Hans might successfully have pursued his claim "if there were no other reason or ground [other than the Amendment itself] for abating his suit."

*Id.*at 1156.

113. *See Seminole Tribe*, 116 S. Ct. at 1128. The Court found that its decision in *Fitzpatrick* was based upon a "rationale wholly inapplicable" to the Interstate Commerce Clause. *Id.*

114. *See id.* at 1128. In his dissenting opinion, Justice Stevens argued that the majority misinterpreted the Court's holding in *Fitzpatrick*. *See id.* at 1142. Specifically, he contended that there was no reason to distinguish between statutes enacted through the Commerce Clause and the Fourteenth Amendment. *See id.* Justice Stevens concluded his criticism of the majority's reliance on *Fitzpatrick* by arguing that:

> The fundamental error that continues to lead the Court astray is its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity "has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment." It rests rather on concerns of federalism and comity that merit respect but are nevertheless, in cases such as the one before us, subordinate to the plenary power of Congress.

Id.

enacted after the Eleventh Amendment, and thereby altered the pre-existing balance between federal and state power.[115] On the other hand, the Court found that application of the Theory of Congressional Abrogation to legislation passed through the Commerce Clause was impermissible, since the Commerce Clause had been enacted prior to the ratification of the Eleventh Amendment.[116]

IV. A CRITICAL ANALYSIS

A. The Eleventh Amendment

1. Early Interpretations of the Eleventh Amendment

The drafters of Article III of the Constitution granted the federal courts jurisdiction over cases arising under the Constitution and the laws of the United States, and also over controversies between a state and citizens of another state.[117] In other words, the Constitution, as originally adopted, provided the federal courts with both federal question jurisdiction and diversity jurisdiction.[118]

Enacted shortly after the ratification of the Constitution, the Eleventh Amendment altered the existing governmental structure by revoking the judiciary's power over cases brought against states

115. *See id.* at 1128. The Court reasoned that prior to Congress' ratification of the Fourteenth Amendment, the states enjoyed immunity from suit. *See id.* Section five of the Fourteenth Amendment, however, provided Congress with the power to enforce the Fourteenth Amendment through legislation. *See id.* By doing so, the Fourteenth Amendment withdrew a portion of each state's immunity. *See id.*

116. *See id.* The Court noted that it had previously recognized Congress' power to abrogate a state's immunity in the Court's decisions in *Fitzpatrick v. Bitzer* and *Pennsylvania v. Union Gas Co. See id.* at 1125. While *Fitzpatrick* involved abrogation of a state's immunity through legislation passed under the Fourteenth Amendment, the Court in *Union Gas* found that Congress had the power to abrogate a state's immunity through legislation enacted pursuant to the Commerce Clause. *See id.* The *Seminole Tribe* Court pointed out that when Congress ratified the Eleventh Amendment, it altered the entire Constitutional structure. *See id.* at 1128. Accordingly, the Court determined that abrogation was impermissible through the Commerce Clause since the Commerce Clause pre-dated the Eleventh Amendment. *See id.* The Court concluded by noting that "*Fitzpatrick* cannot be read to justify 'limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution.'" *Id.* (citing *Union Gas*, 491 U.S. at 42 (Scalia, J., dissenting)).

117. *See* U.S. CONST. art. III, § 2. For a further discussion of Article III of the Constitution, see *supra* notes 25-26 and accompanying text.

118. *See* Fletcher, *supra* note 30, at 1034-35. Article III confers the federal courts with jurisdiction over some suits based on particular characteristics of the parties. *See id.* at 1034. The most typical of this type of jurisdiction is diversity jurisdiction. *See id.* In addition, Article III provides the federal courts with jurisdiction over cases that involve certain subject matters, regardless of the characteristics of the parties involved. *See id.* The most prominent example of this is federal question jurisdiction. *See id.* at 1034-35.

by citizens of another state.[119] The language of the Eleventh Amendment can be interpreted in two ways. Some scholars argue that the Eleventh Amendment should be read to repeal only the federal courts' diversity jurisdiction, such that the federal courts could preside over a suit brought against a state by a citizen of another state only if the suit involved a federal question.[120] Other interpreters contend that the language of the Eleventh Amendment precludes the federal courts from hearing any case brought against a state by a citizen of another state, notwithstanding the fact that the case involves a federal question.[121] Nevertheless, neither of these interpretations suggests that the plain language of the Eleventh Amendment precludes a citizen from bringing a suit against his own state, where federal question jurisdiction exists.[122]

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119. *See* U.S. CONST. amend. XI. For a complete discussion of the Eleventh Amendment, see *supra* notes 31-42 and accompanying text.

120. *See* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 40 (1988); Lawerence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1342-43 (1989). Under this interpretation, the Court lacks jurisdiction only when the Court's sole basis for jurisdiction rests in the diversity of the parties. *See* Jackson, *supra*, at 40. Here, the Eleventh Amendment does not preclude jurisdiction if another basis for jurisdiction exists. *See* Marshall, *supra*, at 1342-43 (1989). For example, if a citizen files a suit against a state of which he is not a citizen that raises a federal question, this interpretation of the Eleventh Amendment empowers the Court to preside over the case. *See id.* Congress' decision to alter the language of the original draft of the Constitution and the Eleventh Amendment's failure to mention suits brought by in-state citizens suggest that Congress did not intend to bar the Court's jurisdiction over federal question suits. *See* Fletcher, *supra* note 30, at 1060. For a discussion regarding the language used in the original draft of the Eleventh Amendment, see *supra* note 30.

In his dissenting opinion in *Seminole Tribe*, Justice Souter demonstrated his support for this interpretation by noting:

> The history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses. In precisely tracking the language in Article III providing for citizen-state diversity jurisdiction, the text of the Amendment does, after all, suggest to common sense that only the Diversity Clauses are being addressed.

Seminole Tribe, 116 S. Ct. at 1150.

121. *See id.* at 1060-61. Supporters of this view contend that the Eleventh Amendment repeals the federal courts' jurisdiction over any matter brought by a citizen of another state against a state. *See* Fletcher, *supra* note 30, at 1060-61.

122. *See id.* In his dissenting opinion, Justice Souter noted that most scholars support the view that the Eleventh Amendment does not preclude suits brought by citizens of another state against a state where federal question jurisdiction exists. *Seminole Tribe*, 116 S. Ct. at 1150 n.8. He contended that while a minority of commentators has adopted the view that the federal courts do not have jurisdiction in any instance where a suit is filed by a citizen of another state against a state, "I have discovered no commentator affirmatively advocating the position taken by the Court today." *Id.*

Although *Cohens v. Virginia* did not require that Justice Marshall interpret the meaning of the Eleventh Amendment, he indicated in dicta that the Eleventh Amendment did not bar the federal courts from exercising jurisdiction over a suit brought by a citizen against his own state.[123] The Court in *Hans v. Louisiana*, however, disregarded Justice Marshall's acumen.[124] In *Hans'* "somewhat cryptic" opinion, it is clear that the Court dismissed the case because the federal courts lacked jurisdiction.[125] However, commentators have debated the Court's reasoning in *Hans*, and two theories regarding the case's strict holding have emerged.

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123. *See Cohens*, 19 U.S. (6 Wheat.) at 382-383. Specifically, Justice Marshall wrote:

> The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution; the subordination of the State governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case.

Id. For a complete discussion of the Court's holding in *Cohens v. Virginia*, see *supra* notes 32-37 and accompanying text.

Many commentators cite this section of Justice Marshall's opinion to support their argument that the Eleventh Amendment does not preclude the federal courts from exercising jurisdiction over a suit brought by a citizen against his own state where federal question jurisdiction exists. *See, e.g.*, Fletcher, *supra* note 30, at 1084 & n.207; Gibbons, *supra* note 2, at 1952-53. *But see* Jackson, *supra* note 120, at 24 n.108 (arguing that supporters of this position have read this passage out of its context and thus their conclusion is based on misreading of opinion).

124. *See Hans*, 134 U.S. at 20 ("It must be conceded that the last observation of the [C]hief [J]ustice [Marshall in *Cohens v. Virginia*] does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense extrajudicial . . . ."). For a complete discussion of the Court's decision in *Hans v. Louisiana*, see *supra* notes 38-42 and accompanying text.

125. *See Seminole Tribe*, 116 S. Ct. at 1137 (Stevens, J., dissenting). In his dissenting opinion in *Seminole Tribe*, Justice Stevens criticized Justice Bradley's opinion in *Hans* as "somewhat cryptic," arguing that a careful reading of *Hans* demonstrated that it actually rejected the majority's holding in *Seminole Tribe*. *Id.*

First, supporters of the Theory of Congressional Abrogation suggest that the *Hans* Court did not hold that the Eleventh Amendment codified the doctrine of sovereign immunity, but rather adhered to stare decisis by recognizing the doctrine of sovereign immunity as common law.[126] Since the plaintiff's action in *Hans* was not brought pursuant to a federal statute in which Congress precluded the recognition of a state's immunity to suit, these theorists contend that the Court properly applied the common law doctrine of sovereign immunity.[127]

126. *See* Massey, *supra* note 43, at 62. *See also* Fletcher, *supra* note 30, at 1063 (contending that drafters of Eleventh Amendment did not intend to codify doctrine of sovereign immunity); Gibbons, *supra* note 2, at 1936 (concluding confidently that Eleventh Amendment was not intended to restore doctrine of sovereign immunity).

Professor Massey calls this interpretation of the Eleventh Amendment the "revisionist interpretation." Massey, *supra* note 43, at 62. He describes this position as follows:

> The revisionists assert variously that the amendment has no independent prohibitory force, that it simply fails to authorize certain party based assertions of federal jurisdiction and does not limit the federal courts' power to hear suits against states founded upon a federal question, and that, in any case, Congress may use its powers to strip the states of whatever sovereign immunity was conferred upon them by virtue of the Eleventh Amendment.

Id. at 62-63.

127. *See id.* In *Hans*, Justice Bradley wrote:

> It is true that the same qualification existed in the judiciary act of 1789, which was before the court in *Chisholm v. Georgia*, and the majority of the court did not think that it was sufficient to limit the jurisdiction of the circuit court. Justice Irdell thought differently. In view of the manner in which that decision was received by the country, the adoption of the eleventh amendment, the light of history, and the reason of the thing, we think we are at liberty to prefer Justice Irdell's views in this regard.

Hans, 134 U.S. at 18-19.

Many scholars have used this and similar language to argue that *Hans* simply adopted Justice Irdell's dissenting opinion in *Chisholm v Georgia*. *See, e.g.*, Fletcher, *supra* note 30, at 1063; Gibbons, *supra* note 2, at 1934-36. *See also Seminole Tribe*, 116 S. Ct. at 1137 (Stevens, J., dissenting).

In his dissenting opinion in *Chisholm*, Justice Irdell contended that the Constitution failed to answer the question as to whether the federal courts had the power to exercise jurisdiction over the suit. 2 U.S. (2 Dall.) at 433-36. He reviewed the language of the Judiciary Act of 1789 and found that the statute required application of the doctrine of sovereign immunity. *See id.* Thus, Justice Irdell reasoned that since the Constitution did not resolve the issue, the Court had to look for a statutory expression from Congress. For a further discussion of Justice Irdell's dissenting opinion in *Chisholm*, see *supra* note 29.

Supporters of the Theory of Congressional Abrogation have borrowed Justice Irdell's reasoning. *See* Massey, *supra* note 43, at 62-63 (referring to supporters of Theory of Congressional Abrogation as "revisionists"). These commentators contend that since the Eleventh Amendment failed to incorporate the doctrine of sovereign immunity, the Constitution still fails to answer the question as to whether the federal courts can exercise jurisdiction over a suit brought by a citizen against his state. *See id.* Thus, supporters of the Theory of Congressional Abrogation argue that Congress can provide the federal courts with jurisdiction over suits

Second, other interpreters suggest that the *Hans* Court found that the Eleventh Amendment actually codified the doctrine of sovereign immunity.[128] In *Seminole Tribe*, for example, the Court adopted this interpretation, and reasoned that the abrogation of a state's immunity in a statute, such as IGRA, cannot displace a Constitutional Amendment.[129]

Hence, the plain language of the Constitution and the Court's decisions in both *Cohens* and *Hans* provided the Court in *Seminole Tribe* with three important resources for making its decision. While the language of the Constitution and Justice Marshall's dicta in *Cohens* clearly indicted that the Eleventh Amendment did not preclude the federal courts from exercising jurisdiction over suits brought by citizens against their own state, the Court's reasoning in *Hans* was ambiguous.[130] It seems odd, therefore, that the Court in *Seminole Tribe* relied on the interpretation of *Hans* which was inconsistent with both the plain language of the Constitution and Justice Marshall's interpretation of the Eleventh Amendment.[131] While claiming to adhere to the established principles of jurisprudence,

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brought by citizens against their state by enacting legislation that abrogates the common law doctrine of sovereign immunity. *See id.*

128. *See Borchard*, *supra* note 1, at 38 (noting that "the Eleventh Amendment restored the ancient doctrine [of sovereign immunity]"). *See, e.g.*, ORTH, *supra* note 1, at 30-46; Massey, *supra* note 43, at 61-62. Professor Massey calls this the "conventional interpretation" of the *Hans* decision. *See* Massey, *supra* note 43, at 61-62. In *Hans*, the Court noted that:

> [*Chisholm v. Georgia*] created such 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, and was in due course adopted by the legislatures of the states. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court. It did not in terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits.

Hans, 134 U.S. at 11. Professor Massey pointed to this language as support for the conventional interpretation of *Hans*. *See* Massey, *supra* note 43, at 62 & n.8.

129. *See Seminole Tribe*, 116 S. Ct. at 1127-28 (arguing that decisions since *Hans* clearly reflect that Eleventh Amendment incorporates constitutional principle of state sovereign immunity). For a discussion of *Seminole Tribe's* interpretation of *Hans*, see *supra* notes 109-112 and accompanying text.

130. Due to the confusion created by the Court's reasoning in *Hans*, many scholars have argued that adherence to *Hans* should be abandoned. *See, e.g.*, *Welch*, 483 U.S. at 521 (dissent arguing that "it is time to begin a fresh examination of Eleventh Amendment jurisprudence without the weight of that mistaken precedent"); Michael P. Kenny, *Sovereign Immunity and the Rule of Law: Aspiring to a Highest-Ranked View of the Eleventh Amendment*, 1 GEO. MASON INDEP. L. REV. 1, 27 (1992) (arguing that *Hans* should be overruled since it closes courthouse doors to "[w]e the [p]eople").

131. In discussing the interpretation of *Hans* adopted by the Court in *Seminole Tribe*, Judge Gibbons argued:

the majority in *Seminole Tribe* disregarded both the plain language of the cornerstone of our nation's jurisprudence and one of our most esteemed and influential Supreme Court justices.

2. *The Constitutional Effect of the Eleventh Amendment*

The Court in *Seminole Tribe* also relied on its earlier decisions in *Fitzpatrick v. Bitzer* and *Pennsylvania v. Union Gas Co.* to assist in its determination of whether Congress had the power to abrogate a state's immunity.[132] Although these decisions demonstrated that Congress has the power to abrogate a state's immunity through legislation enacted under the Commerce Clause and the Fourteenth Amendment, the *Seminole Tribe* Court distinguished these two Constitutional provisions.[133] Specifically, the Court held that congressional abrogation was proper only through the Fourteenth Amendment since Congress ratified the Fourteenth Amendment after the Eleventh Amendment.[134] The Court reasoned that since the Fourteenth Amendment altered the pre-existing Constitution, states could be sued in federal court through legislation enacted pursuant to the Fourteenth Amendment.[135] Conversly, the Court also reasoned that Congress lacked the power to abrogate a state's immunity through legislation enacted under the Commerce Clause because the Commerce Clause existed prior to the ratification of the Eleventh Amendment.

Consistent with this reasoning, Congress' ratification of the Eleventh Amendment also must have affected the pre-existing Constitution. The Court in *Chisholm v. Georgia* held that the original Constitution did not incorporate the doctrine of sovereign immu-

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> If the older industrial states of the Northeast, faced with shrinking revenues, decided to balance their budgets not by curtailing support for services such as higher education and welfare, but by eliminating debt service, the shock to the nation's banking system, and thus to the nation's money supply, would be profound. Yet under current eleventh amendment doctrine, federal courts would not be able to hear suits by bondholders against the states. No amount of arid theorizing on the nature of state sovereignty or the amenability of enforcements against state treasuries could justify such a catastrophic result.

Gibbons, *supra* note 2, at 2004.

132. For a complete discussion of the Court's holding in *Fitzpatrick v. Bitzer*, see *supra* notes 69-71 and accompanying text. For an equally thorough discussion of the Court's decision in *Pennsylvania v. Union Gas Co.*, see *supra* notes 84-92 and accompanying text.

133. *See Seminole Tribe*, 116 S. Ct. at 1128.

134. *See id.*

135. For a discussion of *Seminole Tribe's* reasoning in differentiating its holding in *Fitzpatrick v. Bitzer* from its decision in *Pennsylvania v. Union Gas Co.*, see *supra* notes 113-116 and accompanying text.

nity.[136] Yet, the Court in *Seminole Tribe* assumed that the Eleventh Amendment codified sovereign immunity, even though the plain language of the Eleventh Amendment does not preclude suits by citizens against their own state, but rather, only suits against other states.[137] As Justice Scalia stated in his dissenting opinion in *Union Gas*, "[i]t would be a fragile Constitution indeed if subsequent amendments could, without express reference, be interpreted to wipe out the original understanding of congressional power."[138]

In opting to ignore the principle of stare decisis by overruling *Union Gas*, the Court in *Seminole Tribe* offered an unpersuasive distinction between legislation enacted through the Commerce Clause and statutes passed pursuant to the Fourteenth Amendment.[139] Although abandoning precedent may be proper when a decision has proven to be unworkable, the evidence fails to demonstrate that this burden was met.[140]

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136. Four of the five justices who wrote opinions in *Chisholm v. Georgia* explicitly recognized that the original Constitution did not preclude the federal courts from exercising jurisdiction over a suit brought by a citizen of one state against another state. *See Chisholm*, 2 U.S. (2 Dall.) at 451 (noting "our Constitution most certainly contemplates . . . maintaining a jurisdiction against a State" (opinion of Justice Blair)); *See id.* at 466 (finding "doctrine [of sovereign immunity] rests not upon the legitimate result of fair and conclusive deduction from the Constitution" (opinion of Justice Wilson)); *See id.* at 469 (concluding "the Constitution warrants a suit against a State, by an individual citizen of another State" (opinion of Justice Cushing)); *See id.* at 479 (holding "a State is suable by citizens of another State" (opinion of Chief Justice Jay)). For a discussion of the Court's holding in *Chisholm v. Georgia*, see *supra* notes 27-31 and accompanying text.

137. *See Seminole Tribe*, 116 S. Ct. at 1122. For a discussion of the Court's determination in *Seminole Tribe* that the Eleventh Amendment precludes a citizen from suing his state, see *supra* notes 102-116 and accompanying text.

138. *Union Gas*, 491 U.S. at 18. Writing the plurality opinion in *Union Gas*, Justice Brennan contended that:

> [Assuming that the Eleventh Amendment introduced the principle of sovereign immunity] the order of events would matter only if the Amendment changed things; that is, it would matter only if, before the Eleventh Amendment, the Commerce Clause *did* authorize Congress to abrogate sovereign immunity. But if Congress enjoyed such power prior to the enactment of this Amendment, we would require a showing far more powerful than . . . [the contention that] the Amendment was intended to obliterate [the jurisdiction of the federal courts vested in Article III].

Id.

139. *See Seminole Tribe*, 116 S. Ct. at 1128.

140. *See id.* at 1127. The Court in *Seminole Tribe* noted that the Court need not adhere to precedent when "'governing decisions are unworkable or are badly reasoned.'" *Id.* Finding that the decision in *Union Gas* met this requirement, the *Seminole Tribe* Court overruled it. *See id.* at 1128.

B. Theory of Implicit Waiver v. Theory of Congressional Abrogation

It is well established that the federal courts may exercise jurisdiction over a suit brought by citizens against their state when the state has expressly waived its sovereign immunity.[141] In *Parden*, the Court expanded this concept by introducing the Theory of Implicit Waiver.[142] Here, the Court found that since the state had operated a railway in interstate commerce, it had implicitly waived its immunity, and thereby provided the federal courts with jurisdiction.[143] The Court in *Welch* partially overruled *Parden* by requiring an unmistakably clear statement from Congress of its intent to hold a state liable in order to find that a state had implicitly waived its immunity.[144] Even after *Welch*, however, it is arguable that the Theory of Implicit Waiver had survived by requiring both an implicit waiver by the state and a statutory expression of Congressional intent.[145]

Conversely, the Court in *Union Gas* relied on the Theory of Congressional Abrogation.[146] Here, the Court held that the federal courts had jurisdiction over a suit brought by a citizen against its state where the legislature clearly expressed its intent to hold a state

141. *See* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Clark v. Barnard, 108 U.S. 436 (1883); Curran v. Arkansas, 56 U.S. (15 How.) 304 (1853). For a brief discussion of a state's ability to expressly waive its immunity from suit, see *supra* notes 43-47 and accompanying text.

142. *See Parden*, 377 U.S. at 184-92. For a discussion of the Court's holding in *Parden v. Terminal Railway*, see *supra* notes 52-55 and accompanying text.

143. *See id.* at 192. In making its decision, the Court noted that "immunity may of course be waived; the State's freedom from suit without its consent does not protect it from a suit to which it has consented." *Id.* at 186 (relying on Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Clark v. Barnard, 108 U.S. 436 (1883)). Accordingly, the Court found that "when it began operation of an interstate railroad . . . [the State] necessarily consented to such suit . . . ." *Id.* at 192.

144. *See Welch*, 483 U.S. at 478. For a discussion of the Court's holding in *Welch*, see *supra* notes 61-63 and accompanying text.

145. *See id.* In *Welch*, the Court overruled *Parden* "to the extent that [it] . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress . . . be expressed in unmistakably clear language . . . ." *Id.* Accordingly, some commentators suggest that the *Welch* Court merely added a requirement to the test for implicit waiver. *See Union Gas*, 491 U.S. at 42 (Scalia, J., dissenting); CHEMERINSKY, *supra* note 28, at 410.

In his dissenting opinion in *Union Gas*, Justice Scalia recognized that the Theory of Implicit Waiver was not eradicated by the Court's decision in *Welch*. *See Union Gas*, 491 U.S. at 42. After finding that Congress did not have the power to abrogate a state's immunity, he noted, "[i]t remains for me to consider whether the doctrine of waiver applies here." *Id.*

146. *See generally Union Gas*, 491 U.S. 1. For a discussion of the Court's holding in *Pennsylvania v. Union Gas Co.*, see *supra* notes 84-92 and accompanying text.

amenable to suit.[147] Thus, the Theory of Congressional Abrogation required only that Congress provide a clear statement of its intent to hold a state amenable to suit in federal court.

Some scholars suggest that the Theories of Implicit Waiver and Congressional Abrogation are distinguishable.[148] These commentators point out that although the Theories of Implicit Waiver and Congressional Abrogation both require a statutory expression from Congress, the Theory of Implicit Waiver has an additional requirement.[149] Specifically, unlike the Theory of Congressional Abrogation, the Theory of Implicit Waiver requires that the state implicitly waive its immunity by participating in an activity regulated by Congress.[150] By contrast, the Theory of Congressional Abrogation provides the federal courts with jurisdiction over a suit brought by a citizen against his state in any instance authorized by Congress.[151]

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147. *See id.* at 19.

148. *See, e.g., Union Gas*, 491 U.S. at 42-44 (Scalia, J., dissenting); CHEMERINSKY, *supra* note 28, at 406-19; Pagan, *supra* note 44, at 491-98.

149. *See* CHEMERINSKY, *supra* note 28, at 406-19; Pagan, *supra* note 44, at 491-98. Specifically, Professor Pagan noted:

> Two conditions must be met before a court may find that a state implicitly waived its eleventh amendment immunity. First, Congress must have manifested its intent to subject states to suit in federal court if they engage in a certain course of conduct or participate in a particular federal program. Second, states could have avoided the liability by staying out of the field which Congress had decided to regulate.

Pagan, *supra* note 44, at 491-92.

Chemerinsky admitted that it was unclear whether the Theory of Implicit Waiver had survived the Court's holding in *Welch*. CHEMERINSKY, *supra* note 28, at 410. Nevertheless, he noted that, "[i]f [the Theory of Implicit Waiver] ever will exist, it will be in situations where Congress indicates a clear intent to make states liable in federal court if they engage in a particular activity, and then a state voluntarily chooses to engage in that conduct." *Id.*

150. *See* CHEMERINSKY, *supra* note 28, at 410-19; Pagan, *supra* note 44, at 491-95. In discussing the second prong of the Theory of Implicit Waiver, which required that the state engage in an activity within interstate commerce, Professor Pagan contended:

> The implied waiver doctrine presupposes a degree of genuine choice. A state cannot "choose" to waive its sovereign immunity unless it has a realistic alternative. No state realistically could abandon its responsibilities in fields such as education, public health, and law enforcement. To say that a state voluntarily surrenders its immunity from suit in federal court because it elects to continue running schools, hospitals, and a police department despite Congress's enactment of a liability statute is to indulge in a legal fiction.

Id. at 495. For a complete discussion of the Theory of Implicit Waiver, see *supra* notes 49-63 and accompanying text.

151. *See* CHEMERINSKY, *supra* note 28, at 414 (noting the Theory of Congressional Abrogation requires only that "a law *in its text* . . . clearly and expressly authorize federal court jurisdiction over the state government"); Pagan, *supra* note 44, at 496 ("Abrogation analysis has only one prong . . . . The terms of the requirement are identical to those of the clear-statement test discussed . . . in connection

This distinction is insignificant, however, because the Theory of Congressional Abrogation is not applicable until the state has, in effect, implicitly waived its immunity. Any Congressional regulation is conditional in the sense that liability does not arise unless the object of the regulation engages in an activity or holds a certain status that produces liability.[152] In other words, a state cannot be held liable unless it first triggers a condition prescribed by Congress.[153] Hence, the Theory of Congressional Abrogation essentially requires that the state implicitly waive its immunity, since a State's potential liability does not arise unless the state triggers the statutory condition.[154]

For example, CERCLA provides for potential liability when a person takes ownership of property.[155] Pursuant to CERCLA, therefore, potential liability is conditioned on owning property.[156] Since CERCLA provides an unmistakably clear statement of Congress' intent to hold states liable, the federal courts could exercise jurisdiction over a suit brought by a citizen against a state under the Theory of Congressional Abrogation.[157] Such a suit, however, would not be brought unless the state allegedly triggers the condition of owning property, that is, unless the state implicitly waived its immunity from suit.[158] In reality, therefore, the Theory of Congres-

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with implied waivers."). For a complete discussion of the Theory of Congressional Abrogation, see *supra* notes 64-75 and accompanying text.

152. *See Union Gas*, 491 U.S. at 43 (Scalia, J., dissenting).

153. *See id.*

154. *See Union Gas*, 491 U.S. at 43 (Scalia, J., dissenting) (noting that "all federal prescriptions . . . can be redescribed as invitations to 'waiver'"). *Id.*

155. *See* CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1). For a discussion of this section of CERCLA, see *supra* note 79.

156. *See id.*

157. *See generally Union Gas*, 491 U.S. at 1. For a discussion of the Court's application of the Theory of Congressional Abrogation, see *supra* notes 90-92 and accompanying text.

158. *See Union Gas*, 491 U.S. at 42-44 (Scalia, J., dissenting). Although recognizing a distinction between the Theory of Congressional Abrogation and the Theory of Implicit Waiver, Justice Scalia contended that there was virtually no difference in the application of these two doctrines. *See id.* He recognized that the Theory of Congressional Abrogation did not expressly require an implicit waiver of immunity by the state. *See id.* at 43. Nonetheless, he pointed out that a state could not be held liable until the state had participated in a regulated activity. *See id.* at 43-44. Thus, he concluded that the Theory of Congressional Abrogation does, in fact, require an implicit waiver of immunity by the state since no liability would arise unless the state had actually engaged in the regulated activity. *See id.* at 44. Specifically, he argued:

> To acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immu-

sional Abrogation mirrors the Theory of Implicit Waiver since both require an implicit waiver by the state and a statutory expression of Congress' intent to waive the state's sovereign immunity.

In overruling the Court's decision in *Union Gas*, the *Seminole Tribe* Court held that Congress lacks the power to abrogate a state's immunity through legislation enacted under the Commerce Clause.[159] Since the Theory of Implicit Waiver and the Theory of Congressional Abrogation are effectually indistinguishable, it is clear that neither of these theories will provide the federal courts with jurisdiction over suits brought by citizens against their state under statutes enacted through the Commerce Clause. As a result, without an express waiver from the state, citizens will be unable to sue their state in federal court under CERCLA.

V. IMPACT

The Court's decision in *Seminole Tribe* prolongs the recognition of the archaic concept of sovereign immunity.[160] Although this doctrine may have had its place in a society governed by a monarch, this same principle prompted the writing of the Declaration of Independence.[161] By interpreting *Hans* as incorporating the doctrine of sovereign immunity into the Constitution, the Court in *Seminole Tribe* imposes hardships upon individuals accused of depositing haz-

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> nity in the exercise of its Article I powers — that is, to adopt the very principle [of congressional abrogation that] I have just rejected. There is little more than a verbal distinction between saying that Congress can make the Commonwealth of Pennsylvania liable to private parties for hazardous-waste clean-up costs on sites that the Commonwealth owns and operates, and saying the same thing but adding at the end "if the Commonwealth chooses to own and operate them."

Id. at 44.

159. *See Seminole Tribe*, 116 S.Ct. at 1131. For a complete discussion of the Court's holding in *Seminole Tribe*, see *supra* notes 93-99 and accompanying text.

160. *See* JACOBS, *supra* note 1, at 150 (noting that "the longevity of legal doctrine, especially in the area of public law, is not an altogether convincing reason for its existence"); Pugh, *supra* note 1, at 480 (noting that doctrine of sovereign immunity is grounded in English law, and even England has abandoned this tradition in an attempt to keep "with the needs of *modern* society").

161. *See* JACOBS, *supra* note 1, at 151-52 ("Sovereign immunity in English law was premised upon the nature of kingship . . . . This theory of kingship has no validity for constitutional republics."). Justice Stevens pointed out that the doctrine of sovereign immunity had its place in England where the common belief was that the monarch served by divine right. *Seminole Tribe*, 116 S. Ct. at 1143 (Stevens, J., dissenting). He argued that there is little justification, however, for the application of this principle in the United States. *See id.*

ardous wastes similar to those that were once levied by King George III on the early colonists.[162]

Nevertheless, the Court leaves the door to the federal courthouse open for plaintiffs seeking relief from their state through statutes passed under the Fourteenth Amendment.[163] In *Seminole Tribe*, the Court reaffirmed that Congress may use the Theory of Congressional Abrogation to provide the federal courts with jurisdiction over suits brought against states through statutes enacted under the Fourteenth Amendment.[164] Consequently, by distinguishing the Commerce Clause from the Fourteenth Amendment, the *Seminole Tribe* Court has not completely eradicated the use of the federal courts in suits brought by citizens against their state.

By overruling its holding in *Union Gas*, neither the Theory of Implicit Waiver nor the Theory of Congressional Abrogation will provide the federal courts with jurisdiction over suits brought by citizens against their state through legislation enacted under the Commerce Clause.[165] As such, the Court's decision in *Seminole Tribe* limits opportunities for citizens to obtain relief from their state in contribution suits under CERCLA. For example, under the Court's holding in *Seminole Tribe*, Union Gas Company would have been denied the opportunity to seek relief from the Commonwealth of Pennsylvania in federal court. This inequity becomes more obvious by considering that CERCLA could have rendered Union Gas Company entirely liable for the cost of the cleanup by virtue of its past ownership of the property, even though Pennsylvania may have been solely responsible for depositing all of the hazardous wastes at the site.[166] Under the Court's holding in *Seminole Tribe*, Union Gas Company would have been able to seek relief from Pennsylvania only in a state court, regardless of the fact that Union Gas' liability arose under a federal statute.

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162. *See id.* Justice Stevens contended that, "the recitation in the Declaration of Independence of the wrongs committed by George III made [the doctrine of sovereign immunity] unacceptable on this side of the Atlantic." *Id. See also* Gibbons, *supra* note 2, at 2004 (arguing that Court's reasoning in *Hans* "makes for very bad constitutional theory").

163. *See Seminole Tribe*, 116 S. Ct. at 1128. For a discussion of the *Seminole Tribe* Court's distinction between statutes enacted under the Commerce Clause from legislation passed pursuant to the Fourteenth Amendment, see *supra* notes 113-116 and accompanying text.

164. *See id.*

165. For a discussion of effect of the *Seminole Tribe* Court's decision on both the Theory of Implicit Waiver and the Theory of Congressional Abrogation, see *supra* notes 141-159 and accompanying text.

166. *See* CERCLA §§ 107(a)(4)(A)-(D), 42 U.S.C. §§ 9607(a)(4)(A)-(D). For a discussion of this section of CERCLA, see *supra* note 79.

In sum, the Court in *Seminole Tribe* has failed to adhere to the weight of authority. By relying primarily on its ambiguous reasoning in *Hans*, the Court has condoned the antiquated doctrine of sovereign immunity. Moreover, the Court offered an unconvincing distinction between statutes enacted through the Commerce Clause from statutes passed under the Fourteenth Amendment. Most notably, by overruling its decision in *Union Gas* and invalidating the application of the Theory of Congressional Abrogation to statutes enacted through the Commerce Clause, the Court has revoked citizens' established right to file CERCLA claims against their state in federal court.

Gregory J. Hauck