

STATE SOVEREIGN IMMUNITY AND JUDICIAL REVIEW OF INTERCONNECTION AGREEMENTS UNDER THE TELECOMMUNICATIONS ACT OF 1996

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I. INTRODUCTION

The Telecommunications Act of 1996 ("1996 Act"),¹ the most significant revision of federal communications law since the adoption of the Communications Act of 1934 (as amended, the "Communications Act"),² addresses a broad range of communications issues, including the areas of common carrier, broadcast, and cable regulation.³

The stated goals of the 1996 Act are "to secure lower prices and higher quality services for American telecommunications consumers" and to "encourage the rapid deployment of new telecommunications technologies."⁴ Congress envisioned that these goals would be achieved through marketplace competition.⁵ Accordingly, the 1996 Act

created new opportunities for businesses to enter markets for providing telecommunications services.⁶

In formulating the 1996 Act's common carrier provisions,⁷ Congress recognized the significant competitive advantages of incumbent local exchange carriers ("ILECs") and sought to reduce these advantages by imposing substantive obligations on all ILECs.⁸ One of the most important of these obligations is the duty of mandatory interconnection which the 1996 Act established by adding section 251 to the Communications Act.⁹ Under this section, an ILEC must physically connect its telecommunications network with the network of any other telecommunications carrier who so requests.¹⁰ The obligation of mandatory

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¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

² Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-714).

³ The 1996 Act includes seven titles, three of which bear noting here. Title I addresses common carriers, Title II addresses broadcast services and Title III addresses cable services. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

⁵ See *id.* Many telecommunications services have historically been provided by entrenched monopolists. For example, in most parts of the country residential customers are able to obtain telephony services from only a single incumbent local exchange carrier such as Bell Atlantic. Basic microeconomic theory provides that monopolists will exercise their monopoly power by reducing output and increasing prices. By adopting the 1996 Act, Congress sought to re-

duce these effects by promoting competition. See HENK BRANDS & EVAN T. LEO, *THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS* 12-30, 369-79 (1999).

⁶ See, e.g., Telecommunications Act of 1996 § 101, Pub. L. No. 104-104, 110 Stat. 56, 61-80, 47 U.S.C. §§ 251-261.

⁷ See *id.*

⁸ See, e.g., 47 U.S.C. § 251 (1994 & Supp. III 1997).

⁹ See *id.*

¹⁰ See 47 U.S.C. §§ 251(a), 251(c)(2). See also BRANDS & LEO, *supra* note 5, at 387-88.

"In the FCC's terminology, *interconnection* does not refer to the same thing as *transport and termination* . . . [interconnection] refers to arrangements needed to create the physical interconnection of networks . . . *Transport and termination*, on the other hand, refers to the actual exchange of telephone traffic between interconnect[ed] networks."

Id. Interconnection facilitates the seamless transport of telecommunications traffic between networks. See *id.* Lacking interconnection, telecommunications carriers seeking to compete against ILECs would be at a severe competitive disadvantage because consumers would strongly prefer the vastly superior connectivity of the ILECs' existing networks. The value of a network increases as more locations are interconnected by the network; in the field of economics, this phenomenon is known as "network externalities." *Id.* at 19-20. An insurgent initially has very few interconnected locations and thus is at a severe competitive disadvantage as

interconnection promotes the goals of the 1996 Act, including the goal of competition, by establishing an enforceable mechanism to ensure that non-incumbent telecommunications carriers will not be excluded from local markets.¹¹

Although Congress mandated interconnection under the 1996 Act, it realized that ILECs would have little or no financial incentive to provide interconnection to requesting carriers on terms that are just and reasonable. Therefore, the 1996 Act also added section 252 to the Communications Act of 1934.¹² Section 252 specifies the procedure for developing interconnection agreements and delegates the duty to monitor the implementation of the agreements to state commissions.¹³ Where the parties to a proposed agreement are unable to agree on specific terms, the state commission's role is under section 252 is to resolve the dispute¹⁴ and approve or reject the final settlement of the parties.¹⁵

If a party is aggrieved by the state commission's decision, the aggrieved party is expressly authorized to bring suit in federal district court to determine whether the decision is consistent with sections 251 and 252.¹⁶ The state courts, however, are denied jurisdiction over interconnection disputes.¹⁷ The exclusive federal judicial review of state commission decisions under sections 251 and 252 immediately reveals potential conflict with the doctrine of state sovereign immunity,¹⁸ which generally bars a federal court from hearing

suits against state governments.¹⁹ Under this doctrine, a state commission defendant in a section 251/252 suit can seek dismissal of the federal suit.²⁰ With a dismissed suit in federal court and no recourse in the state courts because of the express denial of state court jurisdiction, the aggrieved parties conceivably could be left with no method for obtaining relief.

The doctrine of state sovereign immunity is closely intertwined with the Eleventh Amendment, which 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, or by Citizens or Subjects of any Foreign State."²¹ However, the doctrine of state sovereign immunity extends well beyond the plain text of the Eleventh Amendment to encompass, *inter alia*, suits against states initiated by its own citizens²² or suits brought in state court pursuant to federal causes of action.²³ There is general agreement that the limitations imposed by the doctrine of state sovereign immunity are equally applicable to agencies of state government.²⁴

It is important to note that at the time the 1996 Act was adopted it was believed that the Commerce Clause empowered Congress to "abrogate" state sovereign immunity by establishing a statutory cause of action against the states enforceable in federal court pursuant to its regulatory authority over interstate commerce.²⁵ However, in *Semi-*

compared to a carrier that has a vast network of interconnected locations. *See id.* at 20. Interconnection between ILECs and other telecommunications carriers is facilitated by private contracts known as interconnection agreements. *See id.*

¹¹ *See* BRANDS & LEO, *supra* note 5, at 379-90 (quoting at length *In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499 (1996)).

¹² *See* Telecommunications Act of 1996 § 101, 47 U.S.C. § 252 (1994 & Supp. III 1997).

¹³ *See id.*; *see also* 47 U.S.C. § 153(41) (defining "state commission").

¹⁴ *See* 47 U.S.C. § 252(b).

¹⁵ *See* 47 U.S.C. § 252(e).

¹⁶ *See* 47 U.S.C. § 252(e)(6).

¹⁷ *See* 47 U.S.C. § 252(e)(4).

¹⁸ As sovereigns, states are immune from certain types of suits. *See* U.S. CONST. amend. XI. ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). *See generally* Alden v. Maine, 527 U.S. 706 (1999).

¹⁹ *See, e.g.,* Hans v. Louisiana, 134 U.S. 1 (1890); *Semi-*

nole Tribe of Florida v. Florida, 517 U.S. 44, 57-73 (1996); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999).

²⁰ Dismissal is based on lack of subject matter jurisdiction. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 367-419 (1994) (providing an overview of the doctrine of state sovereign immunity). *See also* FED. R. CIV. P. 12(b)(1) (motion to dismiss for lack of subject matter jurisdiction).

²¹ U.S. CONST. amend. XI.

²² *See, e.g.,* Hans v. Louisiana, 134 U.S. 1; Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279 (1973); Edelman v. Jordan, 415 U.S. 651 (1974); *Seminole Tribe*, 517 U.S. 44.

²³ *See generally* Alden, 527 U.S. 706.

²⁴ *See, e.g.,* Edelman, 415 U.S. 651; *College Savings*, 527 U.S. 666. In each of these cases, the Court assumed without question that a state agency may invoke the state sovereign immunity defense.

²⁵ *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), *overruled by* *Seminole Tribe*, 517 U.S. 44. There is no question that Congress adopted section 252 pursuant to its Interstate Commerce Clause power. *See, e.g.,* AT&T Communications of the S. Cent. States, Inc. v. BellSouth Telecomm., Inc., 43 F. Supp. 2d 593, 599 (M.D. La. 1999) ("Clearly, the Commerce Clause is the source of congressional power which was relied

nole Tribe of Florida v. Florida,²⁶ a case decided soon after the adoption of the 1996 Act, the Supreme Court significantly curtailed the abrogation doctrine. The Court held that the Commerce Clause does not empower Congress to abrogate state sovereign immunity.²⁷

It is not surprising in light of *Seminole Tribe* that state commission defendants in section 251/252 suits have attempted to invoke state sovereign immunity.²⁸ Because *Seminole Tribe* forecloses the possibility of invoking the abrogation doctrine as a response to the state sovereign immunity defense in Section 252 litigation,²⁹ plaintiffs instead have attempted to invoke the doctrines of express

waiver³⁰ and *Ex parte Young*³¹ to circumvent state sovereign immunity.³²

Suits to enforce the requirements of sections 251 and 252 have focused almost exclusively on constructive waiver. Courts considering the viability of constructive waiver in the context of such suits have explicitly or implicitly concluded that it survives *Seminole Tribe* and that a state commission can constructively waive state sovereign immunity by participating in the section 251/252 regulatory scheme.³³ However, the legitimacy of this conclusion has been called into question by the Supreme Court's 1999 decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Ex-*

upon to enact the Telecommunications Act of 1996 . . . Because the Supreme Court [in *Seminole Tribe*] has clearly spelled out that the Commerce Clause grants no such [abrogation] power to the Congress, it is apparent that it has exceeded its constitutional authority."); *MCI Telecomm. Corp. v. BellSouth Telecomm.*, 9 F. Supp. 2d 766, 771 (E.D. Ky. 1998) (stating that the "[1996] Act was passed pursuant to Congress's power to legislate under the Commerce Clause, and based on *Seminole Tribe* . . . Congress cannot use the Commerce Clause to abrogate a state's power"). See also Cynthia L. Bauerly, *Balancing the Scales: The 1996 Telecommunications Act and Eleventh Amendment Immunity*, 50 Fed. Comm. L.J. 399, 407 (1998) (concluding that because the 1996 Act was passed pursuant to Congress's Interstate Commerce Clause power, section 252 could not possibly abrogate state sovereign immunity).

²⁶ 517 U.S. 44 (1996).

²⁷ See *id.* at 57-73 (questioning the legitimacy of a number of federal statutes that provide causes of action against the states); see also Kit Kinports, *Implied Waiver after Seminole Tribe*, 82 MINN. L. REV. 793, 793 (1998) ("legislation governing such diverse areas as the environment, intellectual property, bankruptcy, antitrust, labor relations, telecommunications, civil rights, veteran's affairs, and Native American affairs").

²⁸ See, e.g., *MCI Telecomm. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999), amended by 183 F.3d 558, and reh'g granted, 183 F.3d 567 (7th Cir. 1999); *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999), *aff'd*, 1998 WL 419493 (N.D. Ill. Jul. 23, 1998); *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 186 F.3d 726 (6th Cir. 1999), *opinion withdrawn by court on Jan. 10, 2000; amended opinion reported at* ___ F.3d ___, 2000 U.S. App. LEXIS 585 (Jan. 18, 2000).; *AT&T Communications v. BellSouth*, 43 F. Supp. 2d 593 (granting dismissal); *Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wisconsin*, 57 F. Supp. 2d 710 (granting dismissal) [hereinafter *Wisconsin Bell II*]; *Indiana Bell Tel. Co. v. McCarty*, 30 F. Supp. 2d 1100 (S.D. Ind. 1998) (denying dismissal); *Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F. Supp. 2d 628 (S.D. Ind. 1998) (denying dismissal); *MCI Telecomm. Corp. v. BellSouth Telecomm.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998) (denying dismissal); *Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc.*, 16 F. Supp. 2d 817 (W.D. Mich. 1998) (denying dismissal); *U.S. West Communications, Inc. v. Public Serv. Comm'n of Utah*, 991 F. Supp. 1299 (D. Utah 1998) (denying dismissal); *Illinois Bell Tel. v. WorldCom Tech., Inc.*, No. 98-C-

1925, 1998 WL 547278 (N.D. Ill. Aug. 27, 1998) (denying dismissal); *U.S. West Communications, Inc. v. TCG Oregon*, 35 F. Supp. 2d 1237 (D. Or. 1998) (denying dismissal); *U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998) (denying dismissal); *U.S. West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997) (denying dismissal); *U.S. West Communications, Inc. v. Reinbold*, No. Civ. A1-97-25, 1997 U.S. Dist. LEXIS 22606, 1997 WL 1179956 (D. N.D. Jul. 28, 1997) (denying dismissal).

²⁹ See, e.g., *AT&T Communications v. BellSouth*, 43 F. Supp. 2d at 599 ("Because the Supreme Court [in *Seminole Tribe*] has clearly spelled out that the Commerce Clause grants no such [abrogation] power to the Congress, it is apparent that it has exceeded its constitutional authority" by enacting section 252(e)(6)); *MCI v. BellSouth*, 9 F. Supp. 2d at 771 (stating that the "[1996] Act was passed pursuant to Congress's power to legislate under the Commerce Clause, and based on *Seminole Tribe* . . . Congress cannot use the Commerce Clause to abrogate a state's power"). See also Bauerly, *supra* note 25, at 407 (concluding that, because the 1996 Act was passed pursuant to Congress's Interstate Commerce Clause power, section 252 could not possibly abrogate state sovereign immunity).

³⁰ Under the doctrine of waiver, a state may not invoke the state sovereign immunity defense if it has waived its sovereign immunity. See CHEMERINSKY, *supra* note 20, at 407; Courts historically have recognized that waiver may be express or constructive. See, e.g., *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299 (1990) (finding express waiver); *Parden v. Terminal Ry. of Alabama State Docks Dep't*, 377 U.S. 184 (1964) (finding constructive waiver), *overruled by College Savings*, 527 U.S. 666.

³¹ 209 U.S. 123 (1908).

³² See, e.g., *Illinois Bell v. Worldcom*, 179 F.3d 566; *MCI Telecomm. Corp. v. Illinois Commerce Comm'n*, 183 F.3d 558; *Indiana Bell v. McCarty*, 30 F. Supp. 2d 1100; *Indiana Bell v. Smithville Tel. Co.*, 31 F. Supp. 2d 628; *MCI v. BellSouth*, 9 F. Supp. 2d 766; *Michigan Bell Tel. Co. v. MFS Intelenet*, 16 F. Supp. 2d 817; *U.S. West v. Public Serv. Comm'n of Utah*, 991 F. Supp. 1299; *Illinois Bell Tel. v. WorldCom Tech., Inc.*, No. 98-C-1925, 1998 WL 547278 (N.D. Ill. 1998); *U.S. West v. TCG Oregon*, 35 F. Supp. 2d 1237; *U.S. West v. MFS Intelenet*, 35 F. Supp. 2d 1221; *U.S. West v. TCG Seattle*, 971 F. Supp. 1365; *U.S. West v. Reinbold*, *supra* note 28.

³³ See *id.*

pense Board,³⁴ which expressly repudiates the constructive waiver doctrine.³⁵

This article argues that *Seminole Tribe* and *College Savings* render the doctrine of *Ex parte Young* the only viable mechanism available to plaintiffs to circumvent the state sovereign immunity defense in suits under sections 251 and 252.³⁶ After reaching this conclusion, a court should dismiss the state commission and grant only injunctive relief against the state commission's officers. Upon dismissal of the state commission, however, section 252 imposes upon the Federal Communications Commission ("FCC") an express statutory duty to preempt the state commission's participation under sections 251 and 252 and assume the responsibilities of the state commission.³⁷ Once the FCC preempts the state commission, section 252 provides that the "exclusive" remedies available are a proceeding by the FCC and judicial review of the FCC's actions.³⁸ Therefore, consistent with *Seminole Tribe*, injunctive relief previously available under *Ex parte Young* is no longer an option.³⁹ Indeed, injunctive relief against the state commission's officers should be unnecessary because the FCC has assumed the responsibilities of the state commission.

This article is structured as follows: Part II of this article briefly describes the regulatory framework of sections 251 and 252 with an overview of both the substantive and procedural requirements imposed by those sections. Part III of this article discusses the doctrine of abrogation and, in particular, the abrogation-related aspects of the Court's decision in *Seminole Tribe*. Part IV argues that state commissions do not waive their sovereign immunity. In particular, in light of *College Savings*, the constructive waiver doctrine cannot be invoked to circumvent the state sovereign immunity defense. Part V argues that *Ex parte Young* suits may be used to circumvent the state sover-

eign immunity defense to enforce the requirements of sections 251 and 252, but only during the interim period between dismissal of the state commission and the FCC's subsequent preemption order. The conclusion combines these and other observations to present a simple and straightforward perspective on how litigation to enforce the requirements of sections 251 and 252 should proceed.

II. THE SUBSTANTIVE AND PROCEDURAL FRAMEWORK IN SECTIONS 251 AND 252

The establishment and regulation of interconnection agreements has two facets: The substantive content of interconnection agreements is provided in section 251⁴⁰ and the procedural mechanisms for developing interconnection agreements is provided in section 252.⁴¹

A. Substantive Framework Imposed By Section 251

Section 251 establishes substantive interconnection obligations; some apply to all carriers, others vary according to the carriers' status as an incumbent or non-incumbent carrier.⁴² Section 251(a), applicable to all carriers, imposes interconnection obligations on all "telecommunications carriers" including "local exchange carriers" ("LECs") and "incumbent local exchange carriers" ("ILECs").⁴³ Section 251(b) imposes obligations on all LECs, including ILECs;⁴⁴ and section 251(c) imposes obligations particular only to ILECs.⁴⁵

All telecommunications carriers are required under section 251(a) to interconnect with the facilities and equipment of other telecommunications carriers and are prohibited from installing network features, functions or capabilities that do not comply with the guidelines and standards of

³⁴ 527 U.S. 666 (1999).

³⁵ See *id.* at 527 U.S. 666, 119 S.Ct. at 2221 (noting that "a State's express waiver of sovereign immunity be unequivocal")

³⁶ See *infra* Parts III, IV, V.

³⁷ See 47 U.S.C. § 252(e)(6).

³⁸ See 47 U.S.C. § 252(e)(5).

³⁹ See generally *Seminole Tribe*, 517 U.S. 44.

⁴⁰ See 47 U.S.C. § 251 (1994 & Supp. III 1997).

⁴¹ See 47 U.S.C. § 252 (1994 & Supp. III 1997).

⁴² The discussion herein is merely intended to provide a brief overview of the substantive framework imposed by section 251. For a more comprehensive understanding of this framework, the reader should review the FCC's implement-

ing regulations and associated FCC orders and judicial opinions. See 47 C.F.R. pt. 51 (1998). See also *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd. 15499 (1996), and modified by 11 FCC Rcd. 13042 (1996), partially vacated, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), and *rev'd in part*, *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). Additional background on sections 251 and 252 can be found in HUBER, KELLOGG & THORNE, *FEDERAL TELECOMMUNICATIONS LAW* 455-537 (2d ed. 1999).

⁴³ See 47 U.S.C. § 251(a). The term "incumbent local exchange carrier" is defined in 47 U.S.C. § 251(h).

⁴⁴ See 47 U.S.C. § 251(b).

⁴⁵ See 47 U.S.C. § 251(c).

the Communications Act.⁴⁶ All ILECs are required under section 251(b) to provide telecommunications resale capacity, number portability,⁴⁷ dialing parity,⁴⁸ access to rights-of-way and reciprocal compensation arrangements for the transport and termination of telecommunications traffic.⁴⁹ These obligations cover a variety of issues that arise during interconnection negotiations and illustrate the economic incentives for litigation. For example, arrangements established to compensate interconnecting carriers for the amount of telecommunications traffic they terminate often become unbalanced, shifting the economic burden onto the disadvantaged interconnecting carrier.⁵⁰ Consequently, setting rates is an essential but contentious part of establishing a viable interconnection agreement.

Section 251(c) imposes obligations exclusive to ILECs, including six basic duties designed to promote competition.⁵¹ First, all ILECs must negotiate in good faith while adhering to the procedural requirements in section 252.⁵² Second, all ILECs must provide interconnection for the transmission of telecommunications services at any technically feasible point within its network on a non-discriminatory basis.⁵³ Third, all ILECs must provide to any requesting telecommunications carrier access to unbundled network elements on a non-discriminatory basis and on favorable terms.⁵⁴ Fourth, all ILECs must offer resale capacity on favorable terms.⁵⁵ Fifth, all ILECs must provide reasonable notice of network changes that would affect transmission and related services.⁵⁶ Finally,

all ILECs must provide opportunities for physical or virtual collocation of interconnection equipment and access to unbundled network elements at the ILEC's premises.⁵⁷

The remaining subsections in section 251 grant the FCC authority to administer these requirements. This includes the authority to adopt implementing regulations.⁵⁸ Section 251(f) establishes some exemptions and suspensions for rural telecommunications carriers.⁵⁹

B. The Section 252 Procedural Framework

Section 252 provides the procedural framework for establishing section 251 interconnection agreements. The implications of a viable agreement are significant because section 252(i) requires ILECs, including ILECs, to make available to all carriers interconnection, service, and network elements under the same terms and conditions as offered to any carrier under any agreement to which it is a party.⁶⁰

Carriers may enter into interconnection agreements either through voluntary negotiations or by petitioning a state commission to mediate or arbitrate disputes.⁶¹ Section 252 does not specify the state commission's mediation duties. However, section 252(c) identifies three broad primary responsibilities: (1) to ensure that resolution of issues is consistent with section 251 and FCC rules; (2) to establish rates; and (3) to establish a time schedule for meeting applicable terms and conditions of the agreement.⁶²

⁴⁶ See 47 U.S.C. § 251(a).

⁴⁷ See BRANDS & LEO, *supra* note 5, at 377 (describing number portability as allowing a customer to "keep her phone number if she changes carriers."); see also 47 U.S.C. § 153(46) (defining the term "number portability").

⁴⁸ See BRANDS & LEO, *supra* note 5, at 377 (defining dialing parity as a policy that ensures "that a CLEC's customer does not have to dial more digits than an ILEC's customer."); see also 47 U.S.C. § 153(15) (defining the term "dialing parity").

⁴⁹ See 47 U.S.C. § 251(b).

⁵⁰ See BRANDS & LEO, *supra* note 5, at 387-88. (noting that compensation typically occurs when one carrier terminates the telecommunications traffic originated by another carrier). Disputes can arise regarding the structure of the compensation rate, which may depend upon the type and amount of telecommunications traffic involved. See *id.*; see also *Illinois Bell v. Worldcom*, 179 F.3d 566 (providing a specific example of a dispute involving reciprocal compensation).

⁵¹ See 47 U.S.C. § 251(c).

⁵² See 47 U.S.C. § 251(c)(1).

⁵³ See 47 U.S.C. § 251(c)(2).

⁵⁴ See 47 U.S.C. § 251(c)(3).

⁵⁵ See 47 U.S.C. § 251(c)(4).

⁵⁶ See 47 U.S.C. § 251(c)(5).

⁵⁷ See 47 U.S.C. § 251(c)(6).

⁵⁸ See, e.g., 47 U.S.C. § 251(d)-(e). The FCC's implementing regulations appear in 47 C.F.R. pt. 51 (1998).

⁵⁹ See 47 U.S.C. § 251(f).

⁶⁰ See 47 U.S.C. § 252(i). See also 47 C.F.R. § 51.809 (1998) (implementing § 252(i)). See also, e.g., *GTE North, Inc. v. McCarty*, 978 F. Supp. 827, 832 (N.D. Ind. 1997) (noting that the "practical effect of §252(i) is to prohibit incumbent carriers from exercising a preference for one carrier over another").

⁶¹ See 47 U.S.C. § 252(a)-(b). In California, the "majority of interconnection agreements . . . have been negotiated without [state commission] intervention." James M. Tobin and Mary E. Wand, *Competition in Local Telephone Services: California's Experience in Implementation of the Telecommunications Act of 1996*, 50 ADMIN. L. REV. 791, 804 (1998). It is likely that the experiences of other states have been similar.

⁶² See 47 U.S.C. § 252(c) (1994 & Supp. III 1997).

Regardless of how an agreement is reached, the parties are required to submit the agreement to the state commission for review.⁶³ This review is limited to whether the interconnection agreement fulfills the requirements of section 251 and 252.⁶⁴ A state commission has the power to reject an agreement adopted by voluntary negotiation only if the agreement discriminates against third party carriers or is not in the public interest.⁶⁵ Agreements adopted by arbitration can be rejected by the state commission only if the agreement violates section 251, including implementing regulations, or violates pricing standards set forth in section 252(d).⁶⁶ A state is not prevented by section 252(e)(3) from applying other state law in its review of agreements, "including requiring compliance with intrastate telecommunications service quality standards or requirements."⁶⁷

Section 252 explicitly authorizes state commissions to participate in the review process, however they are not required to do so. Section 252(e)(5) provides,

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.⁶⁸

⁶³ See 47 U.S.C. § 252(e)(1).

⁶⁴ See 47 U.S.C. § 252(e)(6).

⁶⁵ See 47 U.S.C. § 252(e)(2)(A).

⁶⁶ See 47 U.S.C. § 252(e)(2)(B).

⁶⁷ 47 U.S.C. § 252(e)(3).

⁶⁸ 47 U.S.C. § 252(e)(5); see also 47 C.F.R. § 51.801 (1998).

⁶⁹ See, e.g., *U.S. West Communications, Inc. v. Reinbold*, supra note 28, 1997 U.S. Dist. LEXIS 22606 at *14, 1997 WL 1179956 at *4. (" '[B]y overwhelming implication' . . . this language places no obligation upon the State agency to participate in the [review] process"). See also *MCI v. Illinois Commerce Comm'n*, 168 F.3d 315, 323 (7th Cir. 1999) (noting that "the [1996] Act provides state commissions with a realistic and genuine choice whether to involve themselves in the regulatory process when asked to arbitrate and approve interconnection agreements, or whether to let the FCC assume those functions."). The author agrees with the conclusion that state commission participation under section 252 is voluntary. A few courts, however, have held that the 1996 Act in certain situations may have a coercive effect upon state commissions thereby making their participation effectively involuntary. See, e.g., *Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wisconsin*, 27 F. Supp. 2d 1149, 1157-59 (W.D. Wis. 1998) [hereinafter *Wisconsin Bell I*]. The arguments presented in this article do not turn on whether state commission participation is voluntary.

Courts have further interpreted this language to mean there is no obligation on state commissions to participate in the review process.⁶⁹ In effect, a state may opt out of sections 251 and 252 by taking no action.

Section 252 ensures regulatory oversight either by the state commission or the FCC in all situations except where the parties have reached a voluntary agreement through mediated negotiations and the state commission does not participate in the review process.⁷⁰ It also provides a scheme for judicial review: "In any case in which a State commission makes a determination" an aggrieved party "may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 and [section 252]."⁷¹

The term "determination" in section 252(e)(6) is broad and encompasses state commission decisions approving or rejecting interconnection agreements.⁷² Courts have further interpreted this term to include state commission decisions enforcing and/or interpreting interconnection agreements.⁷³

Jurisdiction of the federal district courts is exclusive;⁷⁴ state courts are expressly prohibited from reviewing state commission determinations by section 252(e)(4).⁷⁵ The courts that have exercised authority under section 252(e)(6) have con-

⁷⁰ The FCC's implementing regulations provide that a state commission "fails to act" under section 252(e)(5) if the state commission "fails to respond, within a reasonable time, to a request for mediation . . . or for a request for arbitration . . . or fails to complete an arbitration within the time limits established in section 252(b)(4)(C)." 47 C.F.R. § 51.801 (1998). A state commission has not failed to act, however, if it refuses to review a voluntary agreement; instead, the voluntary or mediated agreement is considered approved. See 47 C.F.R. § 51.801 (1998). See also *Wisconsin Bell I*, 27 F. Supp. 2d at 1158-59.

⁷¹ 47 U.S.C. § 252(e)(6).

⁷² See 47 U.S.C. §§ 252(e)(1), 252(e)(6).

⁷³ See, e.g., *Bell South Telecommunications v. MCI Metro Access Transmission Services, Inc.*, No. 3:99CV97-MU, 1999 U.S. Dist. LEXIS 12783, at *7 (W.D. N.C. May 10, 1999) (noting that "every court that has addressed this issue has held that federal district courts have jurisdiction under § 252(e)(6) to review state utility commission decisions enforcing and interpreting interconnection agreements approved by the [state] commission pursuant to the [1996] Act").

⁷⁴ See 47 U.S.C. § 252(e)(4).

⁷⁵ See *id.* (stating, "No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section").

cluded that a state commission's determinations are not reviewable until an interconnection agreement has been approved or rejected by the state commission.⁷⁶

III. THE ABROGATION DOCTRINE

Congress has a limited power to abrogate state sovereign immunity by enacting legislation to establish private rights of action enforceable in the federal courts against the states.⁷⁷ Prior to the adoption of the 1996 Act, this power of abrogation was very broad.⁷⁸ The Supreme Court's decision in *Seminole Tribe*, however, substantially curtailed Congressional power to abrogate by holding that Congress cannot abrogate state sovereign immunity pursuant to the exercise of its Commerce Clause powers.⁷⁹ Among the far reaching consequences of the Court's decision, the validity of the judicial review scheme in section 252 has been called into question.⁸⁰

A. Pre-*Seminole Tribe* Framework of the Abrogation Doctrine

The doctrine of abrogation springs from the history of the doctrine of state sovereign immunity and the ratification of the Eleventh Amendment.⁸¹ In *Chisholm v. Georgia* in 1793,⁸² the Supreme Court held that the original jurisdiction

of the federal courts extends to suits brought by the citizens of one state against the government of another state.⁸³ The Court's decision reportedly was "such a shock of surprise that the Eleventh Amendment was at once proposed and adopted,"⁸⁴ expressly proscribing federal jurisdiction over suits against one state brought by citizens of another state.⁸⁵ Nearly 100 years later, in *Hans v. Louisiana*⁸⁶ the import of the Eleventh Amendment was expanded to encompass suits against a state brought by citizens of the same state.⁸⁷

Several theories interpreting the Eleventh Amendment have been advanced,⁸⁸ and as one commentator noted, "The theory chosen determines the scope of the Eleventh Amendment and the circumstances under which states may be sued in federal courts."⁸⁹ In particular, the theory chosen determines which constitutional powers Congress may exercise to abrogate state sovereign immunity.⁹⁰

There are two major theories for interpreting the Eleventh Amendment that are consistent with *Hans* and the plain text of the Eleventh Amendment: subject matter jurisdiction and common law immunity.⁹¹ Under the "subject matter jurisdiction" theory, the Eleventh Amendment imposes a constitutional limit on the subject matter jurisdiction of the federal courts.⁹² In particular, the Eleventh Amendment limits the constitution-

⁷⁶ For example, in *GTE Northwest, Inc. v. Nelson*, the court stated, "Considering the [1996] Act in its entirety, it is clear that Congress intended to defer court review until an agreement has become final." 969 F. Supp. 654, 656 (W.D. Wash. 1997). See also *GTE North, Inc. v. Glazer*, 989 F. Supp. 922, 925 (N.D. Ohio 1997) (concluding that prescribing statutory time-tables for the state commission to reach a final decision would be inconsistent with allowing an appeal of a state commission decision prior to its final determination) (citing *GTE South, Inc. v. Morrison*, 957 F. Supp. 800 (E.D. Va. 1997)); *GTE North, Inc. v. McCarty*, 978 F. Supp. at 836 (finding that "the language, structure, and purpose of the [1996] Act make it fairly discernible that Congress intended to preclude judicial review until a state commission either approves or rejects a final interconnection agreement.").

⁷⁷ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. at 11-13, *overruled by Seminole Tribe*, 517 U.S. at 66.

⁷⁸ See, e.g., CHEMERINSKY, *supra* note 20, at 411, 414-16 (stating that "Congress has broad authority to abrogate the Eleventh Amendment").

⁷⁹ 517 U.S. at 57-73.

⁸⁰ See *supra* note 28 (listing relevant cases).

⁸¹ See, e.g., CHEMERINSKY, *supra* note 20, at 378. The doctrine of state sovereign immunity precedes the ratification of the Eleventh Amendment as well as the ratification of the U.S. Constitution. This article, however, does not attempt to

trace the origins of the state sovereign immunity doctrine prior to ratification of the U.S. Constitution.

⁸² 2 U.S. (2 Dall.) 419 (1793).

⁸³ See *id.*

⁸⁴ *Seminole Tribe*, 517 U.S. at 69 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934)).

⁸⁵ See U.S. CONST. amend. XI. ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

⁸⁶ 134 U.S. 1 (1890).

⁸⁷ See *id.*

⁸⁸ See CHEMERINSKY, *supra* note 20, at 374-83 (discussing three theories for interpreting the Eleventh Amendment).

⁸⁹ *Id.* at 374. As evidence for this observation compare the theoretical arguments advanced by the majority and dissenting opinions in *College Savings*, 527 U.S. 666.

⁹⁰ See CHEMERINSKY, *supra* note 20, at 374.

⁹¹ There is a third "diversity" theory that often is mentioned by commentators. This theory provides that the Eleventh Amendment does little more than limit the diversity jurisdiction of the federal courts. However, because this theory is inconsistent with the Court's well established holding in *Hans*, it has played a less influential role in the Supreme Court's decisions. See CHEMERINSKY, *supra* note 20, at 380-81.

⁹² See CHEMERINSKY, *supra* note 20, at 375-77. See also

ally permissible scope of federal subject matter jurisdiction as originally delineated by Article III of the Constitution.⁹³ Because *Marbury v. Madison*⁹⁴ and its progeny provide that Congress cannot legislatively expand the constitutionally permissible scope of the federal judicial power, the “subject matter jurisdiction” theory is inconsistent with the view that Congress can abrogate state sovereign immunity pursuant to the exercise of its Article I powers.

Under the “common law immunity” theory, the Eleventh Amendment is thought to have restored state sovereign immunity as it existed under the common law prior to ratification of the Constitution.⁹⁵ The “common law immunity” theory is consistent with an expansive view of the doctrine of abrogation because the theory does not entail constitutional limits on the subject matter jurisdiction of the federal courts or the attendant limits on Congress’s power to confer subject matter jurisdiction. Congress can always override the common law. Although a seemingly academic exercise, these two competing theories for interpreting the Eleventh Amendment have played important roles in the Supreme Court’s precedent addressing the scope of the doctrine of state sovereign immunity.⁹⁶

*Fitzpatrick v. Bitzer*⁹⁷ is the leading case holding that Congress may abrogate state sovereign immunity. The Court asserted that Congress may abrogate state sovereign immunity pursuant to its powers derived under section 5 of the Fourteenth Amendment.⁹⁸ The Court’s analysis was based on the reasoning that the Fourteenth Amendment, adopted after the Eleventh Amendment, was designed to limit the power of the states.⁹⁹ The

Court reasoned that abrogation pursuant to section 5 of the Fourteenth Amendment was permissible because “[w]hen Congress acts pursuant to Section 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.”¹⁰⁰

Fitzpatrick is consistent with both the “common law immunity” and the “subject matter jurisdiction” theories for Eleventh Amendment interpretation. As noted above, the “common law immunity” theory is consistent with the abrogation doctrine regardless of which congressional power Congress invokes to abrogate state sovereign immunity: Congress can always override the common law. Furthermore, *Fitzpatrick* is consistent with the “subject matter jurisdiction” theory because, as noted above, the Fourteenth Amendment modified the relationship between the states and the Federal Government. In other words, section 5 of the Fourteenth Amendment modified the constitutionally permissible scope of federal subject matter jurisdiction, allowing Congress to establish causes of action in furtherance of the amendment’s purposes and enforceable in the federal courts against the states.

In *Pennsylvania v. Union Gas Co.*,¹⁰¹ the Supreme Court addressed the issue of whether Congress may abrogate state sovereign immunity pursuant to the Interstate Commerce Clause power. Although there was no majority opinion, five justices concluded that Congress can abrogate state sovereign immunity pursuant to the Interstate Commerce Clause power.¹⁰²

Welch v. Texas Dep’t of Highways and Pub. Transp., 483 U.S. 468, 472 (1987) (stating, “The Court has recognized that the significance of the [Eleventh] Amendment ‘lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III’ of the Constitution”) (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 98 (1984)).

⁹³ U.S. CONST. art. III, § 2 (“The Judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof and foreign States, Citizens or Subjects.”).

⁹⁴ 5 U.S. (1 Cranch) 137 (1803).

⁹⁵ See generally CHEMERINSKY, *supra* note 20, at 378–80 (providing a general overview of the “common law immunity” theory).

⁹⁶ See CHEMERINSKY, *supra* note 20, at 374–75; see also text accompanying, *supra* note 89 and text accompanying, *supra* note 101.

⁹⁷ 427 U.S. 445 (1976).

⁹⁸ See *id.* at 456.

⁹⁹ See *id.* at 452–56.

¹⁰⁰ *Id.* at 456.

¹⁰¹ 491 U.S. 1 (1989), *overruled by Seminole Tribe*, 517 U.S. 44. *But cf.* *Welch v. Texas Dep’t of Highways and Pub. Transp.*, 483 U.S. 468, 475 (1987) (assuming without deciding “that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment”) (Powell, J., plurality).

¹⁰² See CHEMERINSKY, *supra* note 20, at 416 (noting, “There . . . were five votes that Congress, acting pursuant to its commerce clause authority, can create such federal court jurisdiction: Justices Brennan, Marshall, Blackmun, Stevens, and White”).

The Court's holding in *Union Gas* is consistent with the "common law immunity" theory because that theory does not impose limitations on Congress's power to abrogate state sovereign immunity. However, *Union Gas* is inconsistent with the "subject matter jurisdiction" theory because the Interstate Commerce Clause could not possibly alter the constitutionally permissible scope of federal subject matter jurisdiction. The principles established in *Marbury v. Madison* clearly provide that Congress cannot extend the subject matter jurisdiction of the federal courts beyond the ceiling established by the Constitution.¹⁰³

As a consequence of the Court's decision in *Union Gas*, the "common law immunity" theory appeared to be the appropriate guide for interpreting the Eleventh Amendment. Accordingly, commentators suggested that Congress could abrogate state sovereign immunity by "legislating under any of its constitutional authority," including its Article I powers.¹⁰⁴ This extraordinarily broad view of the abrogation doctrine was short-lived.

B. Impact of *Seminole Tribe* on the Abrogation Doctrine

The breadth of the abrogation doctrine was significantly curtailed when the Supreme Court issued its decision in *Seminole Tribe of Florida v. Florida* on March 27, 1996.¹⁰⁵ The five-member majority expressly overruled *Union Gas* by holding that Congress cannot abrogate state sovereign immunity via the Commerce Clause.¹⁰⁶

In *Seminole Tribe*, the Court considered the viability of the state sovereign immunity defense in the context of a suit brought under the Indian Gaming Regulatory Act ("IGRA"), which was enacted pursuant to the Indian Commerce Clause.¹⁰⁷ The Court stated the IGRA "provides

that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located."¹⁰⁸ The IGRA imposes a duty on states to negotiate in good faith to establish compacts with Indian tribes and provides a right of relief in the federal district courts against states that fail to uphold that duty.¹⁰⁹

In 1991, the Seminole Tribe filed suit against the State of Florida and the governor for failure to negotiate in good faith.¹¹⁰ Florida filed a motion to dismiss, asserting state sovereign immunity.¹¹¹ The federal district court rejected the state sovereign immunity defense but was reversed by the U.S. Court of Appeals for the Eleventh Circuit.¹¹² The Supreme Court then granted *certiorari* to consider, *inter alia*, whether the IGRA was "passed pursuant to a constitutional provision granting Congress the power to abrogate" state sovereign immunity.¹¹³

The Court began by addressing *Union Gas*.¹¹⁴ It noted there is no distinction between the Interstate Commerce Clause and the Indian Commerce Clause,¹¹⁵ so its decision in *Union Gas*, if followed, would compel the conclusion that the IGRA abrogated state sovereign immunity.¹¹⁶ However, the Court then overruled its decision in *Union Gas*.¹¹⁷

In doing so, the Court embraced the "subject matter jurisdiction" theory for interpreting the Eleventh Amendment. The Court declared,

Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III.¹¹⁸

The Court felt "bound to conclude that *Union Gas* was wrongly decided and that it should be,

¹⁰³ See generally *Marbury v. Madison*, 5 U.S. 137.

¹⁰⁴ CHEMERINSKY, *supra* note 20, at 414 (noting, however, that the Court's decision in *Union Gas* was deeply fractured). See generally U.S. CONST. art. I.

¹⁰⁵ 517 U.S. 44 (1996).

¹⁰⁶ See generally *id.* at 57-73. The Court also addressed the doctrine of *Ex parte Young*. This aspect of the Court's holding is discussed in Part V.B. Chief Justice Rehnquist wrote the opinion of the Court. The other members of the majority included Justices O'Connor, Scalia, Kennedy, and Thomas.

¹⁰⁷ See *id.* at 47-50.

¹⁰⁸ *Id.* at 47.

¹⁰⁹ See *id.*

¹¹⁰ See *Seminole Tribe*, 517 U.S. at 51-52.

¹¹¹ See *id.* at 52.

¹¹² See *id.* at 52-53, 59; *rev'ing* 801 F. Supp. 655 (S.D. Fla. 1992); *aff'g* 11 F.3d 1016 (1994).

¹¹³ *Id.*, *cert. granted*, 53 U.S. 1125 (1995).

¹¹⁴ 517 U.S. at 59-66.

¹¹⁵ See U.S. CONST. art. I, § 8, cl. 3. (enumerating both powers).

¹¹⁶ See *Seminole Tribe*, 517 U.S. at 59-66.

¹¹⁷ See *id.* at 66.

¹¹⁸ *Id.* at 65 (citing *Marbury v. Madison*, 5 U.S. at 174). Any lingering doubts about whether the Court embraced the subject matter jurisdiction theory were cast aside in *College Savings*, 527 U.S. 666, 119 S. Ct. 2199.

and now is, overruled."¹¹⁹ Accordingly, the Court dismissed the action brought against the State of Florida.¹²⁰ This decision has far reaching implications because it calls into question the viability of many federal judicial review schemes,¹²¹ including that of section 252.

C. Section 252 Does Not Abrogate State Sovereign Immunity

The 1996 Act was enacted shortly before the decision in *Seminole Tribe*, while *Union Gas* was still controlling authority.¹²² At the time of enactment, the judicial review scheme in section 252 conceivably could have abrogated state sovereign immunity because the 1996 Act was enacted pursuant to the Interstate Commerce Clause.¹²³ The Court's decision in *Seminole Tribe*, however, forecloses that possibility.¹²⁴

IV. THE WAIVER DOCTRINE

The Supreme Court's precedent provides that a state may expressly waive its sovereign immunity.¹²⁵ The court has also recognized that a state may constructively waive its sovereign immunity

by voluntarily participating in certain activities.¹²⁶ In the wake of *Seminole Tribe*, plaintiffs turned to this doctrine of constructive waiver in an effort to circumvent the state sovereign immunity defense.¹²⁷ However, very recent precedent casts significant doubt on the continuing viability of the constructive waiver doctrine.¹²⁸

Three general outcomes resulted from litigation surrounding sections 251 and 252 and the doctrine of sovereign immunity: First, at least one court embraced the proposition that the constructive waiver doctrine simply was no longer viable in light of *Seminole Tribe*.¹²⁹ Second, the same court and others concluded that the basic elements for invoking the constructive waiver doctrine are not fulfilled when a state commission does nothing more than participate in the regulatory scheme under sections 251 and 252.¹³⁰ These courts held, *inter alia*, that state commission participation is involuntary and therefore an impermissible basis for waiver.¹³¹ Third, in spite of the Court's decision in *Seminole Tribe*, a majority of the federal courts considering the issue found the constructive waiver doctrine applicable, rejecting the notion that state commission participation is somehow involuntary.¹³²

¹¹⁹ 517 U.S. at 66.

¹²⁰ See *id.* at 73. As noted above, the tribe also filed suit against Florida's governor. This aspect of the Court's decision focused on the *Ex parte Young* doctrine and is discussed infra Parts III and IV.

¹²¹ *Seminole Tribe* is especially important because it laid the foundation for three major decisions rendered by the Court in June 1999. See *Alden v. Maine*, 527 U.S. 606, 119 S. Ct. 2240, 2266 (1999); *College Savings*, 527 U.S. 666, Florida Prepaid Postsecondary Education Bd. v. College Savings Bank, 526 U.S. 627 (1999).

¹²² See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). The Telecommunications Act of 1996 was signed into law on February 8, 1996, only approximately two months before the *Seminole Tribe* decision.

¹²³ See *supra* note 25.

¹²⁴ See *Seminole Tribe*, 517 U.S. at 57-73. Because section 252 was enacted pursuant to Congress's Interstate Commerce Clause power, the Court's decision in *Seminole Tribe* instructs that Congress could not possibly have abrogated state sovereign immunity by enacting section 252. See *supra* note 29.

¹²⁵ See *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299 (1990) (finding express waiver). See also CHEMERINSKY, *supra* note 20, at 406.

¹²⁶ See *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964), *overruled by College Savings*, 527 U.S. 666 (expressly repudiating the constructive waiver doctrine).

¹²⁷ See *Chavez v. Arte Publico Press*, 157 F.3d 282, 286-87 (5th Cir. 1998) (holding that in light of *Seminole Tribe* the constructive waiver doctrine is no longer viable) *reh'g en banc*

granted, 178 F.3d 281 (5th Cir. 1998); *Close v. New York*, 125 F.3d 31, 40-41 (2d Cir. 1997) (concluding that in light of *Seminole Tribe* the continuing viability of the constructive waiver doctrine is "precarious"); *MCI Telecomm. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, 321 (7th Cir. 1999) *amended by*, 183 F.3d 558 (7th Cir. 1999), and *reh'g granted*, 183 F.3d 567 (7th Cir. 1999) (holding that *Seminole Tribe* did not invalidate the constructive waiver doctrine); *Premo v. Martin*, 119 F.3d 764, 770 n.2 (9th Cir. 1997) (holding that *Seminole Tribe* did not invalidate the constructive waiver doctrine). *But see College Savings*, 527 U.S. 666, 119 S. Ct. 2219 (expressly repudiating the constructive waiver doctrine).

¹²⁸ See, e.g., *MCI v. Illinois Commerce Comm'n*, 168 F.3d at 321; *Chavez v. Arte Publico Press*, 157 F.3d at 286-87; *Close v. New York*, 125 F.3d at 40-41; *Premo v. Martin*, 119 F.3d at 770 n.2.

¹²⁹ See, e.g., *AT&T Communications v. BellSouth*, 43 F. Supp. 2d at 600-01 (holding that it was bound by the Fifth Circuit's decision in *Chavez v. Arte Publico Press* to reject the constructive waiver doctrine when it was raised in the context of litigation concerning the Copyright and Lanham Act). In *Chavez*, the Fifth Circuit held that "Congress cannot condition states' activities that are regulable by federal law upon their 'implied consent' to being sued in federal court." 157 F.3d at 287.

¹³⁰ See *AT&T Communications v. BellSouth*, 43 F. Supp. 2d at 602-03; *Wisconsin Bell I*, 27 F. Supp. 2d at 1157-59.

¹³¹ See *AT&T Communications v. BellSouth*, 43 F. Supp. 2d at 603; see also *Wisconsin Bell*, 27 F. Supp. 2d at 1158.

¹³² See, e.g., *Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F. Supp. 2d 628, 636-37 (S.D. Ind. 1998) (noting that a state constructively waives its sovereign immunity when a

The Supreme Court's June 1999 decision in *College Savings Bank v. Florida Prepaid*¹³³ dramatically changed the legal landscape. In that federal trademark case, the Court substantially narrowed—if not altogether abandoned—the doctrine of constructive waiver.¹³⁴ As a consequence, it now seems clear that the constructive waiver doctrine is not available to plaintiffs seeking to circumvent the state sovereign immunity defense in the context of litigation to enforce the requirements of sections 251 and 252.¹³⁵ As this article demonstrates, however, even if some remnant of the constructive waiver doctrine survives *College Savings*, the constructive waiver argument is untenable because Congress did not clearly condition state participation on waiver.¹³⁶

A. Express Waiver

A state can expressly waive its sovereign immunity by enacting a statute¹³⁷ that is sufficiently clear to unmistakably show the state's intention to waive sovereign immunity.¹³⁸ The "test for determining whether a state has waived its [sovereign] immunity from federal-court jurisdiction is a stringent one."¹³⁹ Waiver is found "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'"¹⁴⁰ For example, a provision in a state con-

stitution or state statute authorizing litigation in any court of competent jurisdiction is too ambiguous to establish consent to suit in the federal courts because such a provision does not expressly refer to the federal courts.¹⁴¹ A provision in a state constitution or state statute will constitute an express waiver of state sovereign immunity only if it specifies "the State's intent to subject itself to suit in *federal court*."¹⁴²

Cases addressing the viability of the state sovereign immunity defense in the context of state commission participation under sections 251 and 252 have not focused on express waiver by either explicitly stating or implicitly assuming that the state commission did not expressly waive its sovereign immunity.¹⁴³ Indeed, there would be very little if any basis for litigating the issue of state sovereign immunity if state commissions expressly waived their immunity. The battleground over waiver has instead focused on the doctrine of constructive waiver.

B. Constructive Waiver

1. Pre-College Savings Framework

The doctrine of constructive waiver, also sometimes described as implied waiver, provides that a state may waive its sovereign immunity by voluntarily participating in certain activities.¹⁴⁴ The lead-

state commission participates in the process of developing and approving interconnection agreements); *Michigan Bell Tel. Co. v. MFS Intelenet* (Mich., 16 F. Supp. 2d 817, 825–26 (W.D. Mich. 1998) (stating that because participation in the Communications Act is voluntary, this constitutes a constructive waiver of a state's 11th Amendment immunity); *MCI Telecomm. Corp. v. Bellsouth Telecomm., Inc.*, 9 F. Supp. 2d 766, 770 (E.D. Ky. 1998) (stating that because the PSC did not have to participate in the process of interconnection, sovereign immunity was waived); *U.S. West Communications, Inc. v. MFS Intelenet*, 35 F. Supp. 2d 1221, 1229–30 (D. Or. 1998) (if states choose to act under the Communications Act, their regulatory decisions will be subject to review by federal courts); *U.S. West Comm. Inc. v. TCG Seattle*, 971 F. Supp. 1365, 1370 (W.D. Wash. 1997) (noting that the state's 11th Amendment immunity was waived by participating in the interconnection agreement process). See also discussion cited *supra* note 76 (noting that the author believes a state commission's participation under section 252 is voluntary).

¹³³ 527 U.S. 666, 119 S. Ct. 2219 (1999).

¹³⁴ See *id.* at 2226–31.

¹³⁵ At the time this article went to press, only one court had fully and directly addressed the significance of the *College Savings* decision in the context of such litigation. That court held that in light of *College Savings* the state commission did

not and could not constructively waive its sovereign immunity. See *Wisconsin Bell II*, 57 F. Supp. 2d at 712, 715.

¹³⁶ See *supra* Part IV.B.3.

¹³⁷ See *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 306–09 (1990); CHEMERINSKY, *supra* note 20, at 406–10.

¹³⁸ See *Feeney*, 495 U.S. at 306–09.

¹³⁹ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

¹⁴⁰ *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citing *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). See also *Feeney*, 495 U.S. at 305–06.

¹⁴¹ See, e.g., *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577–80 (1946).

¹⁴² *Atascadero*, 473 U.S. at 234 (emphasis in original).

¹⁴³ See, e.g., *Indiana Bell Tel. Co. v. McCarty*, 30 F. Supp. 2d 1100, 1105 (S.D. Ind. 1998) (finding that "Indiana has not expressly waived its Eleventh Amendment immunity through a statute or its constitution."); *U.S. West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997) (stating that the "State of Washington has not expressly waived its immunity by state statute or otherwise"). It is conceivable, however, that some states have expressly waived state sovereign immunity, thereby precluding the invocation of that defense by state commissions.

¹⁴⁴ See e.g. CHEMERINSKY, *supra* note 20, at 406–10. See also *Kinports*, *supra* note 27, at 807.

ing constructive waiver case is *Parden v. Terminal Railway of Alabama State Docks Department*,¹⁴⁵ where employees of a railroad owned and operated by the state of Alabama sued under the Federal Employer's Liability Act ("FELA").¹⁴⁶ The Court concluded that the state could not invoke the sovereign immunity defense because it constructively waived its sovereign immunity by voluntarily choosing to own and operate the railroad approximately twenty years after enactment of the FELA.¹⁴⁷ The Court declared that "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation."¹⁴⁸ The Court emphasized that its holding was necessary

to ensure "the efficient working of our federalism" because "States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation."¹⁴⁹

In the ensuing decades, the Court substantially narrowed the holding in *Parden*.¹⁵⁰ Nonetheless, commentators and lower federal courts concluded (although not uniformly) that the doctrine of constructive waiver could be invoked if two essential requirements were fulfilled.¹⁵¹ First, Congress's intent to condition state participation in some activity upon waiver had to be expressed in unmistakably clear language.¹⁵² Second, the state's participation in the activity had to be vol-

¹⁴⁵ 377 U.S. 184 (1964).

¹⁴⁶ See *id.* at 184-85.

¹⁴⁷ See *id.* at 184-85; see also *id.* at 192 ("Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and to have consented to suit.").

¹⁴⁸ *Id.* at 196 ("Congress enacted the FELA in the exercise of its constitutional power to regulate interstate commerce.").

¹⁴⁹ *Id.* at 197.

¹⁵⁰ In *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973) [hereinafter *Missouri Employees*], the Court considered a suit brought under the Fair Labor Standards Act ("FLSA") by a group of hospital employees seeking overtime compensation from their employer, the State of Missouri. See *id.* at 281. The principle issue considered by the Court was whether *Parden* was distinguishable. See *id.* at 281-82. The Court distinguished *Parden* on the grounds that there was no clear statement of congressional intent to "make it possible for a citizen of that State or another State to sue the State in the federal courts." *Id.* at 285. Unlike Alabama's decision to operate a for-profit railroad, the Court reasoned, Missouri could not be expected to abandon its role as a non-profit healthcare provider. See *id.* at 283-87. Accordingly, the Court was unwilling to infer from the statute that Congress intended to subject states, based upon their activities as non-profit healthcare providers, to lawsuits in federal court. See *id.* at 285.

Subsequently, in *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), the Court further narrowed its holding in *Parden*. The issue in *Welch* was whether an injured seaman could file a lawsuit in federal district court under the Jones Act, which specifically provides a private right of action for injured seamen. See *id.* at 470-71. In considering "whether the Eleventh Amendment bars a state employee from suing the State in federal court under the Jones Act," *id.* at 470, a plurality of the Supreme Court quoted approvingly Justice White's dissent in *Parden*: "O[nly when Congress has . . . expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of [the state sovereign immunity] defense." *Id.* at 477 (quoting *Parden*, 377 U.S. at 198-99 (White, J., dissent-

ing)).

The plurality, however, declared that "to the extent that *Parden* . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." *Id.* at 478. The Court's use of the term "abrogation" is unfortunate because it causes confusion about whether *Parden* was a constructive waiver case or an abrogation case. *Parden* is distinguishable from the pure abrogation cases, see generally *supra* Part III, because the Court assumed that some form of state conduct was necessary to circumvent state sovereign immunity. See *Parden*, 377 U.S. at 192.

The Court did not address, however, the portion of the decision in *Parden* that held a state may constructively waive its sovereign immunity by voluntarily engaging in a regulable activity. Arguably, the Court's decision in *Welch* therefore left open the possibility that a state may constructively waive its sovereign immunity if Congress declares in unmistakably clear language that any state that voluntarily undertakes a particular activity waives its sovereign immunity. The Court's holding in *Welch* merely overruled *Parden* to the extent that *Parden* is inconsistent with the clear statement rule expressed in *Welch*. See *Welch*, 483 U.S. at 470.

¹⁵¹ See *id.*; see also CHEMERINSKY, *supra* note 20, at 410; see, e.g., *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999); *MCI Telecomm. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999); *Indiana Bell Tel. Co. v. McCarty*, 30 F. Supp. 2d 1100 (S.D. Ind. 1998); *Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F. Supp. 2d 628 (S.D. Ind. 1998); *MCI Telecomm. Corp. v. Bell-South Telecomm.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc.*, 16 F. Supp. 2d 817 (W.D. Mich. 1998); *U.S. West Communications, Inc. v. Public Serv. Comm'n of Utah*, 991 F. Supp. 1299 (D. Utah 1998); *Illinois Bell Tel. v. WorldCom Tech., Inc.*, 1998 WL 547278 (N.D. Ill. Aug. 27, 1998); *U.S. West Communications, Inc. v. TCG Oregon*, 35 F. Supp. 2d 1237 (D. Or. 1998); *U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *U.S. West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *U.S. West Communications, Inc. v. Reinbold*, *supra* note 28.

¹⁵² See *id.* This clear statement rule essentially is the same rule that is applicable to express waivers. See generally *supra* Part IV.A.

untary.¹⁵³ In other words, a state would not be deemed to have waived its immunity unless it had a realistic choice about whether to participate in the activity upon which waiver was conditioned.¹⁵⁴

Essentially applying this two-prong test, one federal appellate circuit and over a dozen federal district courts have considered the viability of the constructive waiver doctrine in the context of litigation under sections 251 and 252.¹⁵⁵ A majority of the courts concluded that state commissions constructively waive their sovereign immunity by participating under those sections.¹⁵⁶

The leading case finding constructive waiver based upon state commission participation is *MCI Telecommunications v. Illinois Commerce Commission*, decided in February 1999 by the U.S. Court of Appeals for the Seventh Circuit.¹⁵⁷ In that case, the court first concluded that Congress' intent to condition state participation in the regulatory scheme under sections 251 and 252 may be inferred from the express terms of section 252 which indicates Congress's intent to subject state commission determinations to review in the federal courts.¹⁵⁸ Next, the court concluded that states have a "realistic and genuine" choice about whether to assume the 252 regulatory function or whether to defer to the FCC.¹⁵⁹ Accordingly, the court held that "by electing to assume responsibility . . . the [state commission] waived the State's immunity from suit in federal court."¹⁶⁰ The decision in *MCI Telecommunications* was reaffirmed by the Seventh Circuit in *Illinois Bell Telephone v. WorldCom Technologies*.¹⁶¹

On the other hand, at least two federal district

courts have held that in the unique circumstances involved in suits brought to enforce the requirements of sections 251 and 252, the essential elements required for constructive waiver are absent. These cases include *AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc.*,¹⁶² decided by the U.S. District Court for the Middle District of Louisiana in March 1999, and *Wisconsin Bell v. Public Service Commission of Wisconsin*,¹⁶³ decided by the U.S. District Court for the Western District of Wisconsin in November 1998.¹⁶⁴ Although the validity of the decision in *Wisconsin Bell* was called into question by the Seventh Circuit's subsequent decision in *MCI Telecommunications*, the Supreme Court's June 1999 decision in *College Savings* changed matters significantly. Indeed, the decision in *College Savings* vindicated those courts that concluded that the doctrine of constructive waiver did not survive *Seminole Tribe*.¹⁶⁵

2. Impact of College Savings On The Constructive Waiver Doctrine

In *College Savings*, a plurality decision of the Supreme Court expressly repudiated the doctrine of constructive waiver.¹⁶⁶ In that case, College Savings Bank asserted that Florida Prepaid Postsecondary Education Expense Board ("Florida Prepaid"), an agency of the State of Florida, violated section 43(a) of the Lanham Act, which imposes civil liability on any person, including any state or state agency, who engages in false or misleading advertising.¹⁶⁷ Florida Prepaid invoked the state

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See generally *supra* note 151 (listing relevant case law).

¹⁵⁶ See generally *id.*

¹⁵⁷ 168 F.3d 315 (1999).

¹⁵⁸ See *id.* at 322.

¹⁵⁹ See *id.* at 323.

¹⁶⁰ *Id.*

¹⁶¹ 179 F.3d 566 (7th Cir. 1999).

¹⁶² 43 F. Supp. 2d 593 (1999).

¹⁶³ 27 F. Supp. 2d at 1157.

¹⁶⁴ See *id.*

¹⁶⁵ See *supra* note 127 (listing relevant cases).

¹⁶⁶ See *College Savings*, 527 U.S. 666, 119 S. Ct. at 2226-2231. Justice Scalia wrote the opinion of the Court. The other members of the majority included Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas.

¹⁶⁷ See *id.* at 2223. Section 43(a)(1) of the Lanham Act provides that "[a]ny person" who engages in false or misleading advertising "shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by

such act." Trademark Act of 1946 (Lanham Act) § 43(a)(1), 15 U.S.C. § 1125 (a)(1). Section 43(a)(2) provides that "the term 'any person' includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity." Trademark Act of 1946 (Lanham Act) § 43(a)(2), 15 U.S.C. § 1127. Section 40 of the Lanham Act provides that

[a]ny State, instrumentality of a State or any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this chapter.

Trademark Act of 1946 (Lanham Act) § 40 (a), 15 U.S.C. § 1122(a). Had the Court in *College Savings* not repudiated the constructive waiver doctrine, the foregoing provisions would have strongly weighed in favor of finding that that Florida Prepaid waived its sovereign immunity by participating in activities regulated by the Lanham Act.

sovereign immunity defense thereby requiring College Savings Bank to identify a mechanism for circumventing that defense.¹⁶⁸

The Court first addressed the applicability of the abrogation doctrine.¹⁶⁹ In light of the Court's prior decisions in *Fitzpatrick*, *Union Gas* and *Seminole Tribe*,¹⁷⁰ this abrogation inquiry was limited to considering whether the Lanham Act's proscription against false or misleading advertising was enacted pursuant to Congress's powers under section 5 of the Fourteenth Amendment.¹⁷¹ College Savings Bank argued that Congress established the cause of action under section 43(a) to remedy and deter state deprivations of property in violation of the due process clause of the Fourteenth Amendment.¹⁷² The Court rejected the contention that a cognizable property interest was at stake and therefore concluded that Congress did not abrogate state sovereign immunity.¹⁷³

Next, the Court considered the constructive waiver doctrine.¹⁷⁴ Rather than address whether the basic elements required for constructive waiver were fulfilled, the Court declared, "the constructive-waiver experiment of *Parden* was ill conceived, and [there is] no merit in attempting to salvage any remnant of it."¹⁷⁵ The Court then proceeded to expressly overrule *Parden*.¹⁷⁶

To justify overruling *Parden*, the Court stated that it could not reconcile *Parden* with its cases that require an unequivocal expression by a state that it waives sovereign immunity.¹⁷⁷ The Court noted that "[t]here is a fundamental difference between a State's expressing unequivocally that it

waives its immunity, and Congress expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity."¹⁷⁸ Providing notice to the state that it engages in certain activity it will be subject to suit is insufficient to prove "that the state made an 'altogether *voluntary*' decision to waive its immunity."¹⁷⁹

The Court then analogized state sovereign immunity to "other constitutionally protected privileges" and noted that constitutional rights are not typically the type of rights subject to constructive waiver.¹⁸⁰ Specifically, the Court reasoned that in the arena of federal sovereign immunity, a close analogy to state immunity, waivers clearly must be express and not implied.¹⁸¹ The Court concluded that the same rule should apply to state sovereign immunity.¹⁸²

It also is difficult to reconcile *Parden* with *Seminole Tribe*. First, the Court argued that *Parden* is premised upon the common law immunity theory of the Eleventh Amendment which was rejected by the Court in *Seminole Tribe*.¹⁸³ Second, the Court argued that the constructive waiver doctrine did not survive the decision in *Seminole Tribe* because of the functional similarities between the constructive waiver and abrogation doctrines.¹⁸⁴ The Court rejected the notion that these inconsistencies could somehow be reconciled by limiting the applicability of the constructive waiver doctrine to those situations where a state acts as a "market participant."¹⁸⁵ Thus the Court concluded that the constructive waiver doctrine

¹⁶⁸ See *id.* at 2224.

¹⁶⁹ See *id.* at 2224–27.

¹⁷⁰ See *supra* Part III.

¹⁷¹ See *College Savings*, 527 U.S. 666, 119 S. Ct. at 2224.

¹⁷² See *id.* at 2224.

¹⁷³ See *id.* In reaching this conclusion, the Court stated, "The hallmark of a protected property interest is the right to exclude others . . . The Lanham Act's false-advertising provisions, however, bear no relationship to any right to exclude." *Id.* at 2224–25. Had the Court concluded that there was a cognizable property interest at stake, it would have proceeded to consider "whether the prophylactic measure taken under purported authority of § 5 . . . was genuinely necessary to prevent violation of the Fourteenth Amendment." *Id.* at 2225.

¹⁷⁴ See *id.* at 2226–31.

¹⁷⁵ *Id.* at 2228.

¹⁷⁶ See *id.* at 2228 (finding, "Whatever may remain of our decision in *Parden* is expressly overruled").

¹⁷⁷ See *id.*

¹⁷⁸ *College Savings*, 527 U.S. 666, 119 S. Ct. at 2228.

¹⁷⁹ *Id.* (citing *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)) (emphasis added).

¹⁸⁰ See *id.* at 2229 (citing *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)).

¹⁸¹ See *id.* at 2229.

¹⁸² See *id.*

¹⁸³ See *College Savings*, 527 U.S. 666, 119 S. Ct. at 2229. See also *supra* Part III.B. If there were any doubts about whether the Court's decision in *Seminole Tribe* rejected the common law immunity theory and embraced the subject matter jurisdiction theory, those doubts were firmly laid to rest by the Court during last term. See *id.*; *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. at 2240 (1999). (discussing in detail the theoretical underpinnings of state sovereign immunity).

¹⁸⁴ See *College Savings*, 527 U.S. 666, 119 S. Ct. at 2230 ("There is little more than a verbal distinction between saying that Congress can make Florida liable to private parties for false or misleading advertising in interstate commerce . . . and saying the same thing but adding at the end 'if Florida chooses to engage in such advertising.'").

¹⁸⁵ *Id.* at 2230–2231. The "market participant" conception of the constructive waiver doctrine arises from the specific facts of *Parden* and the Court's subsequent decisions in *Missouri Employees* and *Welch*. See *supra* note 150.

should be abandoned.¹⁸⁶

Finally, the Court addressed the relevance of its decisions in *Petty v. Tennessee-Missouri Bridge Commission*¹⁸⁷ and *South Dakota v. Dole*.¹⁸⁸ In *Petty*, the Court held that “a bi-state commission which had been created pursuant to an interstate compact (and which [the Court] assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact.”¹⁸⁹ In *Dole*, the Court held that Congress may use its spending power to achieve goals that it could not directly impose upon states by indirectly conditioning the provision of federal funds upon some action to be taken by the state.¹⁹⁰

In addressing these holdings, the Court distinguished *Petty* and *Dole* on the grounds that, unlike the situation under the Lanham Act, Congress had conditioned the state’s receipt of a “gift.”¹⁹¹ With regard to *Petty*, the Court observed that “[s]tates cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity.”¹⁹² Similarly, in *Dole*, the Court observed, congressional disbursement of funds is a gift, and Congress is not obligated to act upon its Spending Clause power.¹⁹³ In the situation under the Lanham Act, however, “what Congress threatens if the

State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from an otherwise permissible activity.”¹⁹⁴ In other words, exclusion of the state from such permitted activities as advertising is a sanction. The Court concluded its analysis of the constructive waiver doctrine by stating that “where the constitutionally guaranteed protection of the States’ sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.”¹⁹⁵

The Court’s analysis of the constructive waiver doctrine leaves no doubt that the touchstone inquiry for determining whether a valid waiver exists is voluntariness. A waiver cannot be effectuated by compulsion, rather it must be the product of a real and genuine choice by the state. Additionally, the Court substantially, if not entirely, repudiated the principle that a state may constructively waive its sovereign immunity. The Court’s discussion of *Petty* and *Dole*, however, may leave open the possibility—albeit improbable given the Court’s recent jurisprudence in the area of state sovereign immunity—that where Congress has clearly conditioned the receipt of a “gift” upon waiver, state sovereign immunity is waived by the

¹⁸⁶ The author disagrees with the Supreme Court’s conclusion that the constructive waiver doctrine cannot be reconciled with its decision in *Seminole Tribe*. The Court in *Missouri Employees* recognized that *Parden* is not predicated on the “common law immunity” theory:

[I]f *Parden* was concerned merely with the surrender of common-law sovereign immunity when the State granted Congress the power to regulate commerce, it would seem unnecessary to reach the question of waiver or consent, for Congress could subject the States to suit by their own citizens whenever it was deemed necessary or appropriate to the regulation of commerce. No more would be required.

411 U.S. at 280 (emphasis added).

The Court in *Parden* did reach the issue of consent and therefore did not rely on the “common law immunity” theory in reaching its decision. Accordingly, the constructive waiver doctrine is consistent with the theoretical underpinnings of *Seminole Tribe*. Nor is there a problem with the continuing viability of the constructive waiver doctrine when the holding of *Seminole Tribe* is viewed at a functional level. The Court in *College Savings* failed to consider the functional dissimilarities between the constructive waiver and abrogation doctrines. Although both doctrines can effectuate the same result, the functional requirements for invoking each doctrine are very different. Unlike the abrogation doctrine, the constructive waiver doctrine only may be invoked if the state voluntarily participates in an activity upon which waiver clearly is conditioned.

Furthermore, there is no problem with the fact that both doctrines accomplish the same result. The Court in *Seminole Tribe* obviously did not intend to preclude the possibility that state sovereign immunity can be circumvented because such a broad proscription would undermine the doctrine of express waiver as much as it would undermine the doctrine of constructive waiver. Indeed, the background discussion in *Seminole Tribe* appears to reaffirm the basic principle that a state may waive its sovereign immunity. Although ill founded, the Court’s decision in *College Savings* simply cannot be ignored, but rather must be substantially addressed in connection with any constructive waiver analysis.

¹⁸⁷ 359 U.S. 275 (1959).

¹⁸⁸ 483 U.S. 203 (1987). See also *New York v. United States*, 505 U.S. 144, 166 (1992) (“Where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’s power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”).

¹⁸⁹ *College Savings*, 527 U.S. 666, 119 S. Ct. at 2231 (citing *Petty*, 359 U.S. 275).

¹⁹⁰ See *id.* (citing *Dole*, 483 U.S. 203 (1987)).

¹⁹¹ See *id.*

¹⁹² *Id.*

¹⁹³ See *College Savings*, 527 U.S. 666, 119 S. Ct. at 2231.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

state's acceptance. As noted in Justice Breyer's dissent, the justicability of the gift/sanction distinction is dubious.¹⁹⁶ Nonetheless, this is the distinction upon which the Court relied.¹⁹⁷

It is too early to determine how courts reviewing cases brought under section 252 will react to *College Savings*. The Seventh Circuit failed to mention *College Savings*, although that case was decided four weeks before *Illinois Bell's* amended decision.¹⁹⁸ However, around the same time, the Seventh Circuit granted a rehearing in *MCI Telecommunications*, acknowledging the significance of the *College Savings* decision.¹⁹⁹ The court in *Wisconsin Bell I* issued a follow-on decision in *Wisconsin Bell II* in which it concluded that *College Savings* foreclosed the possibility of invoking the constructive waiver doctrine to circumvent the state sovereign immunity defense.²⁰⁰ As this article went to press, these and other proceedings were still pending.

3. State Commissions Do Not Constructively Waive State Sovereign Immunity By Participating Under Sections 251 and 252

In the wake of *College Savings* there is little if any room for advancing the constructive waiver argument. The Court's decision in *College Savings* expressly repudiated the doctrine of constructive waiver. The Court's decision may leave open the possibility that where Congress has clearly conditioned the receipt of a "gift" upon waiver, state sovereign immunity is waived when the state accepts that gift.²⁰¹ Even assuming for the sake of argument, however, that this or some other remnant of the constructive waiver doctrine survives *College Savings*, the essential requirements for waiver are not fulfilled if a state commission does

nothing more than participate under sections 251 and 252.

The death knell for any waiver argument based merely upon state commission participation—pre- or post-*College Savings* and regardless of the distinction involving "gifts"—is the conclusion that Congress did not clearly condition state participation upon waiver.²⁰² Even assuming that state commission participation is voluntary and can reasonably be characterized as a "gift" of sorts, mere participation does not constitute waiver if Congress did not intend to make waiver a condition of state participation.²⁰³

Initially, it is important to note that the Communications Act does not expressly condition state participation under sections 251 and 252 upon waiver. The Communications Act makes no mention whatsoever of the Eleventh Amendment or the doctrine of state sovereign immunity. Instead, such a condition—assuming one even exists—must be inferred.

Numerous courts have drawn inferences from the overall "structure" of section 252 to conclude that Congress intended state commission participation to be conditioned upon waiver. This conclusion logically is predicated on the observation that Congress intended state commissions to be defendants in actions brought under section 252(e)(6). Although there is some debate over this issue, the author concedes for the sake of argument that state commissions can and should be named as defendants in actions under section 252(e)(6).²⁰⁴

More troubling, however, is the corollary assumption that the existence of a remedy against state commissions under section 252(e)(6) suggests that Congress intended to make waiver a necessary condition of state participation in the

¹⁹⁶ See *id.* at 2236 ("The distinction that the majority seeks to make—drawn in terms of gifts and entitlements—does not exist.").

¹⁹⁷ The Court's discussion offers several clues about how to distinguish between a gift and a sanction. First, in response to Justice Breyer's criticism, the Court acknowledged that "when the gift that is threatened to be withheld is substantial enough," the withholding of that gift amounts to the imposition of a sanction. See *id.* at 2231. Second, the Court's analysis appears to embrace the notion that where Congress conditions a state's participation in an "otherwise lawful activity" upon waiver, the withholding constitutes a sanction. See *id.*

¹⁹⁸ See *Illinois Bell v. Worldcom*, 179 F.3d 566, 570 (7th Cir. 1999).

¹⁹⁹ See *MCI v. Illinois Commerce Comm'n*, 183 F.3d 567

(7th Cir. 1999).

²⁰⁰ See *Wisconsin Bell II*, 57 F. Supp. 2d at 715. The court expressly rejected the argument that Petty or Dole provides the basis for a waiver theory stating that "the [1996 Act] is neither an interstate compact nor an act involving a gift of funds." *Id.*

²⁰¹ See *supra* Part V.B.2.

²⁰² See *supra* notes 147–154 and accompanying text. See also *supra* Part V.A (discussing requirements for express waiver).

²⁰³ See *Id.*

²⁰⁴ See, e.g., *MCI Telecomm. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999) (discussing whether a state commission can be named as a defendant).

regulatory processes established by sections 251/252. This assumption is not supported by the text of the Communications Act because the text does not mention or allude to the Eleventh Amendment or the doctrine of state sovereign immunity; nor is the assumption somehow necessary to remedy any flaw in section 252.

Section 252 provides a viable, congressionally mandated mechanism for dealing with the situation where a state commission invokes the state sovereign immunity defense in a proceeding under section 252(e)(6).²⁰⁵ Section 252(e)(5) provides,

If a State commission fails to act to carry out its responsibility under this section in *any proceeding or other matter under this section*, then the [FCC] *shall* issue an order preempting the State commission's jurisdiction of that proceeding or matter . . . and *shall* assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.²⁰⁶

Without a doubt, an action under section 252(e)(6) is a "proceeding or other matter under . . . section [252]."²⁰⁷ Once the state commission successfully invokes its sovereign immunity, it has failed to act in a proceeding under section 252, and the FCC is subject to an express and unequivocal statutory command to preempt the state commission "with respect to the proceeding . . . and act for the State commission." In other words, because state commissions are the intended defendants in actions under section 252(e)(6), when a state commission successfully invokes state sovereign immunity, the state commission has "failed to act to carry out its responsibility under this section [252],"²⁰⁸ and thus the FCC is required to assume the role of the state commission under sections 251/252.²⁰⁹ The express language of section 252, therefore, provides a mechanism

for dealing with state commissions that successfully invoke their sovereign immunity.²¹⁰

Given the regulatory scheme, on what grounds can a federal court conclude that sections 251/252 establish a waiver mechanism? There is no need infer such a mechanism because the FCC, by acting for the state commission, ensures that all the essential functions of regulatory oversight are fulfilled in the absence of state commission participation.²¹¹ Indeed, it seems absurd to suggest that section 252 somehow is in need of such an extraordinary judicial interpretation because where a state commission fails to participate from the very beginning, the FCC assumes the responsibilities of, for example, mediating and arbitrating interconnection disputes.²¹² Arguably, a federal court would suggest that the FCC is incapable of fulfilling the role envisioned by Congress if it were to conclude that section 252 needs to be interpreted as providing a waiver mechanism.

Indeed, the very best that can be said for such an interpretation is that it might make the regulatory scheme function somewhat more efficiently. However, even assuming that efficiency would be improved, that would not be an adequate basis for a federal court to conclude that sections 251/252 provide a waiver mechanism. It is not the job of a court to interpret a statute simply to make it "better" or otherwise more to its liking. The significant deference the Supreme Court affords states via the doctrine of state sovereign immunity—as evidenced by its decisions in *Seminole Tribe* and *College Savings*—is entirely at odds with the notion that a federal court should or could infer a waiver mechanism. Based on the *Dole* and *Petty* cases, Congress may have the power to make waiver a condition of the receipt of the "gift" of participa-

²⁰⁵ See 47 U.S.C. § 252(e)(6).

²⁰⁶ 47 U.S.C. § 252(e)(5) (emphasis added).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Note that a plaintiff would not take issue with the conclusion that the state commission is an intended defendant in an action under section 252(e)(6) because if the state commission is not an intended defendant it can entirely escape judicial review.

²¹⁰ See 47 U.S.C. § 252(e)(5). The FCC could conceivably take the position that 47 C.F.R. § 51.801(b) provides an exhaustive list of the situations in which it will determine that a state commission has "failed to act." However, this position is inconsistent with the plain text of section 252(e)(5) and therefore would not be entitled to any deference under the principles laid down by the Court in *Chevron U.S.A., Inc. v. Nat'l Resources Defense Council*, 467 U.S. 837 (1984). Further-

more, it seems unlikely that the FCC would take such an extreme position. In drafting rules implementing section 252, the FCC likely did not even entertain the possibility that state commissions would be able to successfully invoke the state sovereign immunity defense and thereby fail to act in a proceeding under section 252, *i.e.*, section 252(e)(6). See generally *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, *First Report and Order*, 11 FCC Rcd. 15499, *modified by* 11 FCC Rcd. 13042 (1996), *partially vacated by* *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), and *rev'd in part by* *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). Additionally, the FCC was quite clear that it was adopting "interim procedures" and intended to learn from experience. See *id.* at 16218, para. 1284.

²¹¹ See 47 C.F.R. §§ 51.805, 51.807 (1998).

²¹² See *id.*

tion—thereby effectuating waiver when a state commission chooses to participate—but there is insufficient basis for concluding that Congress exercised that power by adopting the 1996 Act.

Nor should it be forgotten that even under the pre-*College Savings* conception of the constructive waiver doctrine, constructive waiver is found only if Congress's intent to condition state participation in some activity upon waiver is expressed in *unmistakably clear language*.²¹³ Even assuming the foregoing analysis does nothing more than cast reasonable doubt on the argument that Congress intended to condition state participation upon waiver, the clear statement rule could not possibly be fulfilled.²¹⁴

Considering the foregoing analysis and the fact that *College Savings* expressly repudiated the constructive waiver doctrine, it seems clear that constructive waiver is not a viable mechanism for circumventing the state sovereign immunity defense in the context of litigation to enforce the requirements of sections 251 and 252.

V. EX PARTE YOUNG DOCTRINE

The *Ex parte Young* doctrine is a well-established method for circumventing the state sovereign immunity defense.²¹⁵ The doctrine provides that a federal court may exercise subject matter jurisdiction over a suit against a state officer if the suit seeks only prospective relief in order to “end a continuing violation of federal law.”²¹⁶ However, in those situations where Congress has established a detailed remedial scheme for the enforcement of a federal right, *Seminole Tribe* instructs that federal courts should hesitate before permitting a suit to proceed under *Ex parte Young*.²¹⁷

²¹³ See *supra* notes 147–154 and accompanying text. See also *supra* Part IV.A. (discussing requirements for express waiver).

²¹⁴ Moreover, even if it were fulfilled, the Court held in *College Savings* that such a clear statement would not be enough: “There is a fundamental difference between a State’s expressing unequivocally that it waives its immunity, and Congress expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity.” *College Savings*, 119 S. Ct. at 2228. Thus, a plaintiff would still be required to demonstrate that the state expressed unequivocally that it waived its sovereign immunity.

²¹⁵ See CHEMERINSKY, *supra* note 20, at 390–94.

²¹⁶ *Green v. Mansour*, 474 U.S. 64, 68 (1985).

²¹⁷ See *Seminole Tribe*, 517 U.S. at 74–76.

²¹⁸ See *supra* note 32 (listing relevant cases).

Plaintiffs seeking to enforce the requirements of sections 251 and 252 have attempted to invoke *Ex parte Young* to circumvent state sovereign immunity. Federal courts considering the applicability of *Ex parte Young* in this context mostly have concluded that *Ex parte Young* relief is available.²¹⁸ Furthermore, the courts in *Michigan Bell Telephone Company v. Climax Telephone Company*,²¹⁹ *MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc.*,²²⁰ *Indiana Bell Telephone Company v. McCarty*²²¹ and *MCI Telecommunications Corporation v. Illinois Bell Telephone Company*²²² specifically addressed the Court’s decision in *Seminole Tribe* and concluded that it does not limit the availability of *Ex parte Young* relief to enforce the requirements of sections 251 and 252. However, the courts in *AT&T Communications*,²²³ *Wisconsin Bell I*²²⁴ and *MCI Telecommunications Corporation v. Frisby*²²⁵ have concluded otherwise.²²⁶

A. Essential Requirements for Obtaining *Ex Parte Young* Relief

As mentioned, federal court jurisdiction over a suit against a state officer may be premised on the doctrine of *Ex parte Young* if the suit seeks only prospective relief in order to “prevent a continuing violation of federal law.”²²⁷ Thus, if a state officer’s conduct causes a state government to violate federal law, a plaintiff may file suit against the state officer and thereby attempt to enjoin the illegal behavior.²²⁸ The underlying theoretical basis for the *Ex parte Young* doctrine is that a state officer who acts in violation of federal law is not acting pursuant to legitimate state authority and therefore is not protected by state sovereign immunity.²²⁹

²¹⁹ 186 F.3d 726 (6th Cir.1999), *opinion withdrawn by court on Jan. 10, 2000*; amended opinion reported at ___ F.3d ___, 2000 U.S. App. LEXIS 585 (Jan. 18, 2000).

²²⁰ 9 F. Supp. 2d 766 (E.D. Ky. 1998).

²²¹ 30 F. Supp. 2d 1100 (S.D. Ind. 1998).

²²² 1998 WL 156678 (N.D. Ill. Mar. 31, 1998), *aff’d on issue of constructive waiver*, *MCI Telecomm. Corp. v. Illinois Commerce Comm’n*, 168 F.3d 315 (7th Cir. 1999).

²²³ 43 F. Supp. 2d 593 (M.D. La. 1999).

²²⁴ 27 F. Supp. 2d 1149 (W.D. Wis. 1998).

²²⁵ 998 F. Supp. 625 (D. Md. 1998).

²²⁶ See *AT&T Communications v. BellSouth*, 43 F. Supp. 2d at 602–03; *Wisconsin Bell I*, 27 F. Supp. 2d at 1161; *Frisby*, 998 F. Supp. at 630.

²²⁷ *Green*, 474 U.S. at 68.

²²⁸ See Chemerinsky, *supra* note 20, at 391–92.

²²⁹ See *id.* at 392–93.

B. Impact of *Seminole Tribe* on *Ex Parte Young* Doctrine

The Court's decision in *Seminole Tribe* limits the availability of *Ex parte Young* relief.²³⁰ Because Congress could not use its Indian Commerce Clause power to abrogate state sovereign immunity, the Court concluded that the Tribe's lawsuit against the state of Florida was barred.²³¹ The Court then considered whether the suit could proceed against Florida's governor under the *Ex parte Young* doctrine.²³²

The Court determined that "where Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."²³³ The next issue the Court considered was whether the IGRA established a "detailed" remedial scheme.²³⁴ In concluding that the IGRA did establish such a scheme, the Court provided several examples of the IGRA's "intricate procedures":

[Under the IGRA,] where the court finds that the State has failed to negotiate in good faith [with an Indian tribe], the only remedy prescribed is an order directing the State and the Indian tribe to conclude a compact within 60 days. And if the parties disregard the court's order and fail to conclude a compact within the 60-day period, the only sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the [IGRA]. Finally, if the State fails to accept the compact selected by the mediator, the only sanction against it is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations governing . . . gaming on the tribal lands at issue.²³⁵

The Court concluded, "the fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter."²³⁶ Accordingly, the Court held that the *Ex parte Young* doctrine was not applicable.²³⁷

The decision in *Seminole Tribe* instructs that a remedial scheme is detailed if the remedial scheme

specifies forms of relief that are more limited than those typically available under *Ex parte Young*. For example, the Court's analysis in *Seminole Tribe* relies at least in part on the observation that the only form of relief that a federal court is authorized by the IGRA to provide is an "order directing the State and the Indian tribe to conclude a compact within 60 days."²³⁸ Under the IGRA, the federal court does not even have the contempt power because "if the parties disregard the court's order and fail to conclude a compact within the 60-day period, the only sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the [IGRA]."²³⁹

There are at least two other ways in which a remedial scheme may be detailed and therefore suggest Congress's intent to foreclose *Ex parte Young* relief. First, *Seminole Tribe* may support the proposition that a remedial scheme is detailed if it identifies classes of defendants exclusive of state officers. Specifically, the Court in *Seminole Tribe* observed that the remedial scheme under the IGRA focuses on the state, not state officers.²⁴⁰ From this the Court may have inferred that Congress intended to limit the availability of relief to an action against the state.²⁴¹

Second, *Seminole Tribe* also may support the proposition that a remedial scheme is detailed if it imposes procedural predicates to obtaining federal court review that are inconsistent with those for obtaining *Ex parte Young* relief. At the beginning of its opinion, the Court noted that in an action brought under the IGRA, a tribe is required to wait a specified period of time after requesting the state to enter into negotiations before attempting to initiate suit in federal court.²⁴² No such predicate exists for obtaining *Ex parte Young* relief. Whether this observation really suggests another way in which a remedial scheme may be detailed is unclear, however, because the Court did not discuss this characteristic of the IGRA in its discussion of the *Ex parte Young* issue.

²³⁰ *Seminole Tribe*, 517 U.S. at 73–76.

²³¹ *See id.* at 72.

²³² *See id.* at 73–76.

²³³ *Id.* at 74.

²³⁴ *See id.*

²³⁵ *See id.* at 74–75.

²³⁶ *Seminole Tribe*, 517 U.S. at 75–76.

²³⁷ *See id.*

²³⁸ *Id.* at 74–75.

²³⁹ *Id.* at 74–75 ("By contrast with [the remedial scheme under the IGRA], an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions.")

²⁴⁰ *See id.* at 75, n.17.

²⁴¹ *See id.* at 75–76.

²⁴² *See Seminole Tribe*, 517 U.S. at 47–51.

Whether the *Seminole Tribe* exception applies to the doctrine of *Ex parte Young* is determined in a case-by-case analysis. Subsequent to its decision in *Seminole Tribe*, the Court stated, "Last Term . . . we did not allow a suit raising a federal question to proceed based on Congress's provision of an alternative review mechanism. Whether the presumption in favor of federal court jurisdiction in this type of case is controlling will depend upon the particular context."²⁴³ Echoing this view, one commentator stated that "the impact of *Seminole Tribe* upon *Ex parte Young* remedies turns on analysis of the terms, history, purpose, and context of the remedial provisions of the particular statute sought to be enforced."²⁴⁴

C. *Ex Parte Young* Relief is Available to Enforce the Requirements of Sections 251 and 252 So Long As the FCC Does Not Issue an Order Preempting State Commission Participation.

At least initially, a plaintiff can and should seek *Ex parte Young* relief to enforce the requirements of sections 251 and 252. In such a suit, the essential requirements for obtaining *Ex parte Young* relief are fulfilled. The *Seminole Tribe* exception, at least initially, does not foreclose the availability of *Ex parte Young* relief because sections 251 and 252 do not impose a sufficiently detailed remedial scheme to suggest Congress's intent to foreclose *Ex parte Young* relief. However, there is an important caveat: Matters change if and when the state commission is dismissed from the suit and the FCC fulfills its statutory duty to issue an order preempting further participation by the state commission. At that point, the "exclusive" remedies available to the plaintiff are a proceeding by the FCC and judicial review of the FCC's actions in that proceeding. Thus, upon issuance of the FCC's order, the Court's decision in *Seminole Tribe* instructs that *Ex parte Young* relief ceases to be available.

²⁴³ *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 277 (1997).

²⁴⁴ David P. Currie, *Ex parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 550 (1997).

²⁴⁵ See *AT&T Communications v. BellSouth*, 43 F. Supp. 2d at 602-03; *MCI Telecomm. v. Frisby*, 998 F. Supp. 625, 629-30 (D. Md. 1998); *Wisconsin Bell I*, 27 F. Supp. 2d at 1159-61. The court in *Wisconsin Bell II*, however, concluded

1. *The Essential Requirements for Obtaining Ex Parte Young Relief are Fulfilled in an Action to Enforce the Requirements of Sections 251 and 252*

The federal cases considering the applicability of *Ex parte Young* in suits to enforce the requirements of sections 251 and 252 have uniformly concluded that the essential requirements for obtaining *Ex parte Young* relief are fulfilled. The federal cases rejecting the applicability of *Ex parte Young* have done so exclusively under the exception announced by the Court in *Seminole Tribe*.²⁴⁵ Nonetheless, an analysis of the applicability of *Ex parte Young* relief should provide at least passing attention to the issue of whether the essential requirements for obtaining *Ex parte Young* relief are fulfilled.

As discussed above, the named defendants in an *Ex parte Young* suit are one or more state officers.²⁴⁶ Plaintiffs seeking to enforce the requirements of sections 251 and 252 fulfill this requirement by naming as defendants the officers of state commissions. For example, in *Frisby*, plaintiff MCI Telecommunications named as defendants the five commissioners of the Public Service Commission of Maryland.²⁴⁷

Plaintiffs then must allege that the state officer is engaged in a violation of federal law.²⁴⁸ Plaintiffs seeking to enforce the requirements of sections 251 and 252 fulfill this requirement by alleging that the state officers are violating or will violate section 251 and/or section 252. For example, in *Frisby*, plaintiff MCI Telecommunications alleged that the five commissioners of the Public Service Commission of Maryland adopted a rate order in violation of section 252.²⁴⁹ Specifically, MCI Telecommunications argued that the rate order violated section 252(c)(4)(B) which "imposes a duty on local carriers not to prohibit or place unreasonable discriminatory conditions or limitations on the resale of telecommunications services" and section 252(d)(3) which "requires state

that *Ex parte Young* relief was not available because the state commission had been dismissed from the suit and was a necessary party. See *infra* note 264.

²⁴⁶ See *supra* Part V.A.

²⁴⁷ See *Frisby*, 998 F. Supp. at 625.

²⁴⁸ See *supra* Part V.A.

²⁴⁹ See *Frisby*, 998 F. Supp. at 627.

commissions to determine wholesale rates on the basis of retail minus avoidable costs.”²⁵⁰

Finally, plaintiffs must allege that the violation of federal law is ongoing.²⁵¹ This requirement can be fulfilled by careful pleading. A plaintiff can simply assert that it seeks to compel future compliance with sections 251 and 252 rather than to obtain redress for a prior violation. In *Frisby*, plaintiff MCI Telecommunications simply indicated that it was seeking only “prospective, injunctive relief.”²⁵² The threat of future enforcement of an unlawful interconnection order also provides a foundation for requesting *Ex parte Young* relief.²⁵³

2. *The Exception In Seminole Tribe Does Not Preclude Ex Parte Young Relief So Long As The FCC Does Not Issue An Order Preempting State Commission Participation*

In addressing whether the exception in *Seminole Tribe* precludes *Ex parte Young* relief, the key question is whether the relief that can be afforded under sections 251 and 252 is more limited than the relief that can be afforded under *Ex parte Young*.²⁵⁴ As noted above, there are at least three possible ways in which a statutory remedial scheme may be detailed and therefore imply that Congress intended to foreclose *Ex parte Young* relief.²⁵⁵

First, sections 251 and 252 may be detailed in the sense that those sections limit the types of relief that are available.²⁵⁶ Quoting language in section 252(e)(6), the court in *AT&T Communications* argued that the 1996 Act “specifically limits the relief available in a federal district court to a determination by the federal court that ‘the agreement or statement meets the requirements of section 251 of this title and this section.’”²⁵⁷ The court in *Wisconsin Bell I* reached a similar conclusion stating that “Congress made a logical

choice when it decided to limit the remedy within the Telecommunications Act to having a [state] commission’s ruling tested in federal court” because “[s]uch limited review is adequate to cure errors in federal law without subjecting state commissioners to the full remedial powers of a federal district court.”²⁵⁸ Furthermore, the court argued that “[l]imited review keeps the number of litigants to a minimum, which conserves judicial resources.”²⁵⁹

This reasoning is flawed. Unlike the IGRA, which limited the reviewing court’s power to issuing an “order directing the State and the Indian tribe to conclude a compact within 60 days,”²⁶⁰ the 1996 Act does not specify any form of relief. Section 252(e)(6) provides federal court jurisdiction “to determine whether the agreement or statement meets the requirements of section 251 and [section 252]” merely to clarify that the court is not to review state commission determinations that are based on state law.²⁶¹ Thus, sections 251 and 252 are silent as to the available remedial powers of the federal courts. Accordingly, the regulatory scheme is not sufficiently detailed in this respect to suggest that Congress intended to foreclose the availability of *Ex parte Young* relief.

Second, sections 251 and 252 may be detailed in the sense that those sections limit the types of defendants who may be subject to suit.²⁶² The courts in both *Frisby* and *AT&T Communications* advanced this proposition.²⁶³ However, sections 251 and 252 do not explicitly identify the proper defendants to name in an action brought under section 252(e)(6). Because of the 1996 Act’s repeated references to state commissions, the state commission is a logical state-party defendant. However, it seems unreasonable to conclude from this and nothing more that Congress intended an action against the state commission to be the exclusive remedy available.²⁶⁴ Moreover, the conclu-

²⁵⁰ *Id.* at 627.

²⁵¹ *See supra* Part V.A.

²⁵² *Frisby*, 998 F. Supp. at 629.

²⁵³ *See Climax*, 186 F. 3d 726 (6th Cir. 1999), *opinion withdrawn by court on Jan. 10, 2000; amended opinion reported at* ___ F.3d ___, 2000 U.S. App. LEXIS 585, at *14 (Jan. 18, 2000).

²⁵⁴ *See supra* Part V.B.

²⁵⁵ *See id.*

²⁵⁶ *See id.*

²⁵⁷ *AT&T Communications v. BellSouth*, 43 F. Supp. 2d 593, 602 (M.D. La. 1999) (quoting 47 U.S.C. § 252(e)(6)).

²⁵⁸ *Wisconsin Bell I*, 27 F. Supp. 2d at 116.

²⁵⁹ *Id.*

²⁶⁰ *Seminole Tribe* 517 U.S. at 74 (quoting the IGRA).

²⁶¹ *See* H.R. REP. NO. 104-458, at 126 (1996) (stating that section 252(e) “preserves state authority to enforce state law requirements in agreements approved under this section.”).

²⁶² *See supra* Part V.B.

²⁶³ *See AT&T Communications v. BellSouth*, 43 F. Supp. at 602; *Frisby*, 998 F. Supp. at 630.

²⁶⁴ The court in *Wisconsin Bell II* reached a very different conclusion by framing the issue not in terms of the exception in *Seminole Tribe*, but rather in terms of federal subject matter jurisdiction. *See Wisconsin Bell II*, 57 F. Supp. 2d at 710. In *Wisconsin Bell II*, the court dismissed the state commission, concluding that in light of *MCI Telecommunications*, *Illinois Bell* and *College Savings*, the state sovereign immunity defense could not be circumvented. *See id.* at 712-13. The court went

sion that the legislative scheme is detailed in this regard ignores the well-accepted underlying fiction created by *Ex parte Young*. Although the named defendants in an action under *Ex parte Young* are state officers, the relief granted by a court runs against the state. As demonstrated by the existence of section 252(e)(6), Congress intended the federal courts to have the power to grant relief against the state and did not intend to foreclose *Ex parte Young* relief.

Third, sections 251 and 252 may appear detailed because those sections stipulate procedural predicates to obtaining federal court review that would not be applicable in an action brought under *Ex parte Young*.²⁶⁵ However, the 1996 Act imposes only one procedural predicate to judicial review: the existence of an agreement that has been approved or rejected by a state commission.²⁶⁶ The court in *Frisby* seems to suggest that a suit brought under *Ex parte Young* would circumvent this procedural predicate, because the *Ex parte Young* doctrine authorizes suits to review intermediate determinations made by the state commission.²⁶⁷ However, the doctrine of *Ex parte Young* does not circumvent the well established finality requirement or the principle of exhaustion of administrative remedies. Thus, the fact that section 252(e)(6) only may be invoked if an interconnection agreement has been approved or rejected by the state commission is fully consistent with the remedial relief available under *Ex parte Young*. Accordingly, the judicial review scheme is not detailed in the sense of prescribing proce-

dural predicates to the availability of judicial review.

Additionally, it should be noted that the decision in *Seminole Tribe* does not clearly indicate that the existence of specialized procedural predicates to litigation necessarily precludes *Ex parte Young* relief. As noted in Part V.B, the Court's discussion of *Ex parte Young* does not explicitly cite the procedural predicates found under the IGRA. Indeed, even if procedural predicates are a relevant factor, *Ex parte Young* suits arguably would be foreclosed in only those situations where those procedural predicates are not fulfilled. Indeed, the outcome in *Frisby* is consistent with this proposition because the plaintiffs in that case were seeking review of the state commission's determinations prior to the formation of an agreement approved or rejected by the state commission.

Thus, at least initially, the Court's decision in *Seminole Tribe* does not foreclose *Ex parte Young* relief. However, there is an important caveat. As discussed in Part IV.B.3, upon a final order dismissing the state commission, the FCC is subject to an express statutory duty to "issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure."²⁶⁸ The FCC then is required to "assume the responsibility of the State commission . . . with respect to the proceeding or matter and act for the State commission."²⁶⁹ Section 252(e)(6) provides that "the proceeding by the [FCC] and any judicial review of the [FCC's] actions shall be the *exclusive*

on to conclude *MCI Telecommunications and Illinois Bell* required the state commission to be a "party" or the court did not have jurisdiction. The rationale behind this aspect of the decision in *Wisconsin Bell II* is dubious to say the least.

The issue before the Seventh Circuit in *MCI Telecommunications and Illinois Bell* was not whether the state commission is a "necessary party," but rather whether Congress intended the state commission to be named as a defendant in an action under section 252(e)(6). Although the Seventh Circuit concluded in both cases that the state commission can and should be named as a defendant in such actions, this conclusion differs from holding that the state commission is a necessary party in an action to enforce the requirements of sections 251 and 252. The court's decision in *Wisconsin Bell II* also can be distinguished because it considered the unique situation where both the state commission and the state commission's officers had been dismissed. See *Wisconsin Bell I*, 27 F. Supp. 2d at 1149-50 (dismissing the state commission's officers under the exception in *Seminole Tribe*).

²⁶⁵ See *supra* Part V.B text accompanying notes 227-244. See also *MCI v. Frisby*, 998 F. Supp. at 629-30; *Wisconsin Bell II*, 57 F. Supp. 2d at 712-13.

²⁶⁶ See *supra* Part II.B.

²⁶⁷ Specifically, the court in *Frisby* stated the following: This Court finds that Congress intended § 251(c)(4)(B) and § 252(d)(3) (the sections MCI asserts are violated by the Rate Order) to be enforced against the state only in an action brought under § 252(e)(6), not through an action based on *Ex parte Young*. Sections 251 and 252 of the Act were written with a view toward ultimate agreements between local and non-local carriers. The Act is an extremely complex, omnibus piece of legislation enacted after vigorous debate. The sections involved here are closely intertwined, and it is inconceivable to this Court that Congress intended that the sections be ripped out of the context of the agreements that these sections contemplate, for purposes of judicial review. Furthermore, Congress provided an express remedy against a State commission in federal court to enforce compliance with §§ 251 and 252, and a prerequisite of that express remedy is an interconnection agreement.

MCI v. Frisby, 998 F. Supp. at 630.

²⁶⁸ 47 U.S.C. § 252(e)(6).

²⁶⁹ 47 U.S.C. § 252(e)(6).

remedies for a State commission's failure to act."²⁷⁰ Because Congress clearly intended for this to be the "exclusive" remedy available to plaintiffs once the FCC issues its order, the Court's decision in *Seminole Tribe* instructs that *Ex parte Young* relief against the officers of the state commission ceases to be available. Indeed, *Ex parte Young* relief may be unnecessary. Once the state commission is preempted, it has no legal authority in connection with the matter. Accordingly, it should be unnecessary to enjoin the state commission.

VI. CONCLUSION

The foregoing discussion on the applicability of the doctrines of abrogation, waiver and *Ex parte Young* reveals a simple and straightforward perspective on how litigation to enforce the requirements of sections 251 and 252 of the Communications Act should proceed.

In a typical action, the plaintiff names as defendants both the state commission and its officers.²⁷¹ Indeed, a plaintiff would be remiss not to name both classes of defendants in light of section 252(e)(6) and the availability of the state sovereign immunity defense.²⁷²

If the state commission chooses to invoke the state sovereign immunity defense, it should be dismissed from the suit. In light of *Seminole Tribe*, the abrogation doctrine is not a viable mechanism for circumventing the defense because Congress cannot abrogate state sovereign immunity by exercising its Interstate Commerce power and did not adopt section 252 pursuant to its powers under section 5 of the Fourteenth Amendment.²⁷³ Furthermore, the waiver doctrine is not a viable mechanism for circumventing the state sovereign immunity defense because state commissions do not expressly waive their immunity. Nor can the plaintiff argue in light of the Court's decision in *College Savings* that the state commission constructively waives its immunity by participating under sections 251 and 252. Even assuming for the sake

of argument that some remnant of the constructive waiver doctrine survives *College Savings*, the waiver argument is not valid because there is insufficient justification for a court to conclude that Congress intended to make waiver a condition of state commission participation under sections 251/252.

Although the state commission can obtain dismissal, injunctive relief under the doctrine of *Ex parte Young* is available against the state commission's officers. At this stage, the Court's decision in *Seminole Tribe* does not foreclose *Ex parte Young* relief because the 1996 Act does not evince Congress's intent to limit the availability of such relief.

Matters change, however, once the state commission has been dismissed. Upon a final order of dismissal, the state commission has "failed to act to carry out its responsibility" under section 252.²⁷⁴ Thus, dismissal triggers the FCC's express statutory duty to "issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure."²⁷⁵ Upon issuing the order, the FCC is required to "assume the responsibility of the State commission . . . with respect to the proceeding or matter and act for the State commission."²⁷⁶

Once a preemption order is issued, *Ex parte Young* relief is no longer available. Section 252(e)(6) states "the proceeding by the [FCC] and any judicial review of the [FCC's] actions shall be the *exclusive* remedies for a State commission's failure to act."²⁷⁷ The Court's decision in *Seminole Tribe* instructs that where Congress has established a detailed remedial scheme, such as by clearly stating that the plaintiff's *exclusive* remedies shall be a proceeding by the FCC and judicial review of the FCC's actions, *Ex parte Young* relief is foreclosed.

Although this much of the framework under sections 251 and 252 seems clear, an aggrieved party seeking preemption faces additional questions. What is the scope of the FCC's preemption

²⁷⁰ 47 U.S.C. § 252(e)(5) (emphasis added). See also *supra* Part V and text accompanying notes 213–244.

²⁷¹ See *Wisconsin Bell II*, 57 F. Supp. 2d at 715–16.

²⁷² On one hand, if the state commission invokes state sovereign immunity, the plaintiff will want to obtain relief against the state commission's officers under *Ex parte Young*. On the other hand, if the state commission chooses not to invoke state sovereign immunity, the plaintiff will want to proceed against the state commission under section

252(e)(6). Because the plaintiff has no way of knowing at the onset of litigation whether the state commission will invoke the defense, the plaintiff should name both classes of defendants.

²⁷³ See also *Seminole Tribe*, 517 U.S. 65–66.

²⁷⁴ See 47 U.S.C. § 252(e)(5).

²⁷⁵ 47 U.S.C. § 252(e)(6).

²⁷⁶ 47 U.S.C. § 252(e)(6).

²⁷⁷ 47 U.S.C. § 252(e)(5) (emphasis added).

order?²⁷⁸ What role does the FCC assume once it preempts the state commission?²⁷⁹ What happens if the FCC ignores its statutory duty and refuses to issue a preemption order?

To eliminate the uncertainty surrounding these questions, the FCC should amend its rules to explicitly provide that it shall preempt any state commission that successfully invokes the state sovereign immunity defense. Such a rule might deter state commissions from invoking the defense and

would at the very least simplify the process of preemption. However, at this time, unless the FCC chooses to "take notice upon its own motion that a state commission has failed to act," the aggrieved party is required to file with the FCC a petition seeking preemption.²⁸⁰ Such a petition invariably will raise regulatory and policy considerations closely intertwined with the analysis presented in this article.²⁸¹

²⁷⁸ See, e.g., 47 C.F.R. § 51.805 (1998) (discussing scope of preemption).

²⁷⁹ The FCC's rules provide that "[a]t a minimum, the [FCC] shall approve or reject any interconnection agreement adopted by negotiation, mediation or arbitration for which the [FCC], pursuant to section 252(e)(5) of the [Communications] Act, has assumed the state commission's responsibilities." 47 C.F.R. § 51.805(a) (1998). See also 47 C.F.R. § 51.807 (1998) (discussing arbitration and mediation of agreements by the FCC pursuant to section 252(e)(5)).

²⁸⁰ See 47 C.F.R. § 51.803 (1998) (outlining filing and processing procedures). Note that "[t]he party seeking preemption must prove that the state has failed to act to carry out its responsibilities under section 252 of the [Communications] Act." 47 C.F.R. § 51.803(b) (1998).

²⁸¹ At the time this article went to press, the FCC had yet to consider a preemption petition premised upon a state commission's invocation of its sovereign immunity, and thus such a petition would be a case of first impression.