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State Sovereign Immunity: Myth or Reality After Seminole Tribe of Florida v. Florida?

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STATE SOVEREIGN IMMUNITY: MYTH OR REALITY AFTER *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*?

The Eleventh Amendment to the United States Constitution provides, "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."[1] The Amendment embodies the doctrine of state sovereign immunity which recognizes a state as a traditional sovereign

1. U.S. CONST. amend. XI. The Eleventh Amendment generally bars suits against state governments brought in federal court. *See* San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283, 288 (S.D. Cal. 1978), *aff'd*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied sub nom.* Department of Transp. v. San Diego Unified Port Dist., 455 U.S. 1000 (1982). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.11, at 44-54 (5th ed. 1995) (discussing the historical background of the Eleventh Amendment); George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of* Atascadero State Hospital v. Scanlon, 74 GEO. L.J. 363 (1985) (arguing that viewing the Eleventh Amendment as embodying state sovereignty principles best justifies the Amendment's elaborate jurisprudence); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988) (analyzing the history of the Eleventh Amendment in the context of appellate review); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989) (criticizing the diversity and congressional abrogation approaches to state sovereign immunity and the Eleventh Amendment); Doyle Mathis, Chisholm v. Georgia: *Background and Settlement*, 54 J. AM. HIST. 19 (1967) (discussing the history of *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793), in which the Supreme Court rejected the doctrine of state sovereign immunity); Gene R. Shreve, *Letting Go of the Eleventh Amendment*, 64 IND. L.J. 601 (1989) (discussing the state immunity controversy in the context of the Eleventh Amendment and arguing that the Amendment is a historical artifact).

The concept of state sovereign immunity in the United States stems from the American political experience and in reaction to British philosophical concepts. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430-42 (1987) (discussing the historical developments of early Federalist concepts of sovereignty); *see also* THE FEDERALIST NO. 15 (Alexander Hamilton), NO. 44 (James Madison). Sovereignty, as the British believed, was an "indivisible, final, and unlimited power." Amar, *supra*, at 1430. For centuries, political philosophers recognized the doctrine of sovereign immunity as a necessary component of stability in any political system. *See* RICHARD ASHCRAFT, LOCKE'S TWO TREATISES OF GOVERNMENT (Urwin Hyman Ltd. 1987) (1689) (recognizing that sovereign immunity existed in the people and the parliament); THOMAS HOBBES, LEVIATHAN (Michael Oakeshott ed., Collier MacMillan Pub. 1962) (1651) (arguing that the notion of sovereignty in government existed as a result of the social contract).

The roots of sovereignty in the British system vested in the crown and stemmed from the belief that the King was the sovereign agent of God. *See* Amar, *supra*, at 1430-31. Later,

entity that is immune from suit.[2] Representing state sovereign immunity,[3] the Amendment expressly limits Article III of the Constitution, the

sovereignty evolved into a political belief, but not necessarily a religious belief, that the King and the Parliament represented the sovereignty of their people. *See id.* at 1431.

In America, however, colonial leaders believed that legislative enactments were necessarily limited by the higher principles of written compacts such as the Magna Carta and the British Constitution. *See id.* at 1432; *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175-98 (1967) (discussing the roots of American constitutionalism and the effect on the concept of sovereignty). From these principles evolved the American understanding of sovereignty and sovereign immunity. *See* Amar, *supra*, at 1435.

2. *See* Hans v. Louisiana, 134 U.S. 1, 12 (1890) (holding that the language of the Eleventh Amendment and the structure of the Constitution presupposed the doctrine of state sovereign immunity); *infra* notes 67-80 and accompanying text (discussing the holding in *Hans*); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) (finding that *Hans* recognized the existence of state sovereign immunity in the Eleventh Amendment); Monaco v. Mississippi, 292 U.S. 313, 321 (1934) (reaffirming that the Eleventh Amendment embodied the doctrine of state sovereign immunity); United States v. Texas, 143 U.S. 621, 645 (1892) (discussing the holding in *Hans* and the doctrine of state sovereign immunity).

The historical purpose of the Eleventh Amendment was to protect state sovereign immunity by insuring that private individuals would not sue states. *See Monaco*, 292 U.S. at 330 (holding that inherent in the constitutional plan is the notion that a state is immune from suit without its consent); NOWAK & ROTUNDA, *supra* note 1, § 2.11, at 44-46; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91-99 (1923) (describing the circumstances surrounding the enactment of the Eleventh Amendment). The scope of the Eleventh Amendment evolved through expansions and limitations on the literal reading of the text of the Amendment. *See* NOWAK & ROTUNDA, *supra* note 1, § 2.11, at 44-46. The Eleventh Amendment bars suits against states in federal court. *See* U.S. CONST. amend. XI. The Amendment, however, did not bar suits in federal court brought by the United States or by another state against a state. *See* NOWAK & ROTUNDA, *supra* note 1, § 2.11, at 46; *see also Monaco*, 292 U.S. at 328-29. The Amendment does not reserve total immunity of the states to federal laws; however, by recognizing state immunity to suit in federal courts, it necessitates that the suits be brought in state court. *See* NOWAK & ROTUNDA, *supra* note 1, § 2.11, at 44-46.

Modern Eleventh Amendment jurisprudence limits federal courts from exercising jurisdiction over particular suits against states. *See id.* The Court has recognized three circumstances under which the Eleventh Amendment bars suits against a state. *See id.* First, the Eleventh Amendment bars suits brought against a state in federal courts. *See id.* The Eleventh Amendment does not bar, however, suits brought in state courts. *See id.* at 46-50. Second, the Amendment bars suits against any entity that constitutes a "state," meaning the government or agencies of the state, but not its political subdivisions. *See id.* at 47-48; *see also infra* notes 12-14 (discussing the limited exceptions to the general rule that the Eleventh Amendment bars all suits against states for monetary damages).

3. *See Hans*, 134 U.S. at 12 (holding that the Eleventh Amendment embodied state sovereign immunity). In subsequent Supreme Court cases, the Court reaffirmed that the doctrine of state sovereign immunity existed in the language of the Eleventh Amendment. *See* Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993); Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304 (1990); Dellmuth v. Muth, 491 U.S. 223, 229 n.2 (1989); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472-74 (1987); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237-38 (1985); *Pennhurst*, 465 U.S. at 97-

constitutional provision governing the judiciary, by limiting the federal courts' jurisdiction to hear suits brought against states.[4] The Amendment

100; Cory v. White, 457 U.S. 85, 90-91 (1982); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Employees v. Department of Public Health & Welfare, 411 U.S. 279, 280 (1973); United States v. Mississippi, 380 U.S. 128, 140 (1965); Parden v. Terminal Ry., 377 U.S. 184, 186 (1964); Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304 n.13 (1952); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944); Missouri v. Fiske, 290 U.S. 18, 25 (1933); *Ex parte* New York, 256 U.S. 490, 497 (1921); Duhne v. New Jersey, 251 U.S. 311, 313 (1920); Palmer v. Ohio, 248 U.S. 32, 34 (1918); Smith v. Reeves, 178 U.S. 436, 446 (1900); North Carolina v. Temple, 134 U.S. 22, 30 (1890); *see also* NOWAK & ROTUNDA, supra note 1, at 45 (explaining that the Eleventh Amendment was enacted to overrule the *Chisholm* decision, in which the Supreme Court allowed a non-citizen to sue a state for the payment of past debts and damages); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1422-41 (1975) (describing the historical background of the Eleventh Amendment). *But cf.* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 20-22 (1972) (arguing that "whether [state sovereign immunity] was waived cannot . . . be resolved in favor of implied waiver" on the basis of anomalous English common law cases, and that Constitutional Convention documents indicate that states were to lose sovereign immunity upon ratification of the Constitution).

4. *See Monaco*, 292 U.S. at 330 (holding that the states "retain the same immunity that they enjoy with respect to suits by individuals" against suits by foreign states); *supra* note 3 (citing cases for the proposition that the Eleventh Amendment represents the doctrine of state sovereign immunity). In *Monaco*, the Court held that despite the grant of federal jurisdiction over suits "between a State . . . and Foreign States", *see* U.S. CONST. art. III, § 2, cl. 1, the Eleventh Amendment barred suits against states by foreign states unless the state consented. *See Monaco*, 292 U.S. at 330. The *Monaco* Court based its holding on Alexander Hamilton's perception of state sovereign immunity as found in *The Federalist No. 81*. *See id.*; THE FEDERALIST NO. 81 (Alexander Hamilton). Hamilton understood that states had not surrendered their sovereignty by ratifying the Constitution and that they remained immune to suit. *See Monaco*, 292 U.S. at 330; THE FEDERALIST NO. 81 (Alexander Hamilton); *see also* Quern v. Jordan, 440 U.S. 332, 340 (1979) (citing Alabama v. Pugh, 438 U.S. 781, 782 (1978), and holding that a state was not subject to suit in federal court); *Edelman*, 415 U.S. at 662-63 (finding that even though the Eleventh Amendment by its terms did not bar suits against a state by its own citizens, the spirit of the Eleventh Amendment barred all suits against states); *Parden*, 377 U.S. at 186 (recognizing that unconsenting states were immune to federal court suits brought by citizens of any state); *Duhne*, 251 U.S. at 313 (holding that the judicial power under the Constitution did "not embrace the authority to entertain a suit brought by a citizen against his own state without its consent"); *Smith*, 178 U.S. at 446-48 (holding that a state could not be sued in federal court except in limited cases, as conferred on the federal courts in the original jurisdiction clause of the Constitution); Fitts v. McGhee, 172 U.S. 516, 524-25 (1899) (finding that the Constitution did extend to the judicial power the authority to hear suits against states brought by citizens of states). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-25, at 173-78 (2d ed. 1988) (discussing the parameters of the Eleventh Amendment state sovereign immunity doctrine); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978) [hereinafter Field, *Part One*] (discussing the historical context of the Eleventh Amendment); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203

also implicitly limits Congress from adding to federal courts' jurisdiction by creating a private right to sue state governments.[5] The limit on the

(1978) [hereinafter Field, *Congressional Imposition of Suit*] (discussing the congressional power to impose suits upon states in federal courts, despite the doctrine of state sovereign immunity); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) (analyzing the extra-textual interpretation of the Eleventh Amendment in a historical context); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983) (discussing the historical setting of the Eleventh Amendment and arguing that the Amendment was not to remove federal courts' jurisdiction in federal question cases); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61 (1984) (arguing for a clearer understanding of the Eleventh Amendment's scope and purpose and for a return to *Hans*).

5. *See* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1131-32 (1996)(finding that the Eleventh Amendment expressly limited the judicial power under Article III, and that Congress could not use its Article I powers to circumvent the constitutional limitations of the Eleventh Amendment by bestowing jurisdiction on federal courts to hear cases against a state); Pennsylvania v. Union Gas Co., 491 U.S. 1, 39 (1989) (Scalia, J. dissenting) (finding that states could not be sued without their consent notwithstanding Congress's attempt to abrogate the Eleventh Amendment pursuant to the Interstate Commerce Clause); *see also Welch*, 483 U.S. at 486 (regarding the principle of state sovereign immunity as a stable constitutional doctrine); *Ex parte* New York, 256 U.S. at 497 (finding that the Eleventh Amendment prohibited federal court jurisdiction in suits against a states)

By interpreting Article III and the Eleventh Amendment together, the Court defined the scope of federal court jurisdiction with regard to suits against a state. *See* Nowak, *supra* note 3, at 1422-69. The Court also interpreted the Eleventh Amendment as an implied limit on Congress's power to create causes of actions against state governments. *See id.* at 1445-46. The limit did not restrict congressional power to the same extent that it restricted judicial authority. *See id.* at 1460-64. The Court has taken two approaches in interpreting the Eleventh Amendment's effect on congressional power: either to slightly limit congressional power, *see Fitzpatrick*, 427 U.S. at 453 (holding that Congress could confer jurisdiction upon the federal courts to hear suits against states when legislating pursuant to the Enforcement Clause of the Fourteenth Amendment); or to severely limit congressional authority, *see Seminole*, 116 S. Ct. at 1131-32 (holding that the Eleventh Amendment restricts Congress from authorizing suits by private individuals against states).

Initially, the Court interpreted the Eleventh Amendment to bar *all* suits brought against states. *See Hans*, 134 U.S. at 10-12. In 1964, however, the Court loosened its construction of the Eleventh Amendment by allowing Congress to authorize private individuals to sue states pursuant to a state waiver of sovereign immunity. *See Parden*, 377 U.S. at 196-98 (holding that a state was subject to a federal damage action under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60). After *Parden*, the Court construed the Eleventh Amendment to allow Congress to create causes of action against a state when Congress showed express intent to waive state sovereign immunity. *See* Nowak, *supra* note 3, at 1446-50. Recently, the Supreme Court interpreted *Hans* to restrict congressional authority to create causes of action against state governments. *See Seminole*, 116 S. Ct. at 1131-32 (reaffirming the restrictive principle of state sovereign immunity, and holding that Article I could not be used to circumvent the Eleventh Amendment); *infra* notes 148-88 and accompanying text (discussing the holding in *Seminole*). *See generally* Alan D. Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1, 1-14 (1967) (discussing the history of state sovereign immunity jurisprudence); Doyle Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207,

judiciary, and intermittently on Congress, is subject to exceptions, such as state consent to suit.[6] Because the Eleventh Amendment affects both state and federal powers, it also has become a method by which the Court sustains the principle of federalism.[7]

215-245 (1968) (discussing the evolution of judicial interpretation of the Eleventh Amendment since ratification); Wayne McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C. L. REV. 485, 500-16 (1973) (analyzing the problem of judicial interpretation of the Eleventh Amendment); Rick Claybrook, Comment, *Implied Waiver of a State's Eleventh Amendment Immunity*, 1974 DUKE L.J. 925, 928-58 (discussing the evolution of state sovereign immunity jurisprudence after *Parden*); Kennedy P. Richardson, Comment, *Monetary Remedies Against the State in Federal Question Cases*, 68 Nw. U. L. REV. 544, 545-52 (1973)(discussing the effect of *Parden* on the state sovereign immunity doctrine).

6. *See Pennhurst*, 465 U.S. at 99 n.9 (finding that a waiver of sovereign immunity in state court did not also constitute a waiver of sovereign immunity in federal court); *see also Ford Motor Co.*, 323 U.S. at 467-68 (finding that a state legislature could waive state immunity to suit only by clear language in general law); Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909) (finding that a state may waive its sovereign immunity only by either clear and express language in a state statute or by overwhelming implication of waiver in the text of a state statute); TRIBE, *supra* note 4, § 3-25, at 175 (discussing that the Eleventh Amendment does not bar a suit against a state where the state has given its consent). The Court has consistently held that sovereign immunity belongs to the states and that, therefore, immunity could be waived pursuant to a state's choice. *See* Clark v. Bernard, 108 U.S. 436, 447 (1883). A state could waive its immunity expressly by explicit authorization in the state's constitution or in a state statute. *See* Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986); *cf. Murray*, 213 U.S. at 171 (finding a state could waive its sovereign immunity by overwhelming implication of waiver in the text of a state statute).

7. *See Monaco*, 292 U.S. at 322-23. The Court historically has construed the Eleventh Amendment issue as a question of federalism. *See Atascadero*, 473 U.S. at 242; *Pennhurst*, 465 U.S. at 99; TRIBE, *supra* note 4, § 3-25, at 177-78. The debate over state sovereignty originated in a judicial construction of Article III of the Constitution that grants the judiciary the power to hear cases against states. *See Monaco*, 292 U.S. at 322. The mere recognition of federal jurisdiction over sovereign states spawned a federalism debate over whether the judiciary could overpower state autonomy. *See id.* at 322-23. Ultimately, the debate resulted in the ratification of the Eleventh Amendment, which limits Article III by revoking the judiciary's jurisdiction in cases arising against states. *See id.*

In *Monaco*, the Court captured the essence of the federalism theory of the Eleventh Amendment by analogizing the structure of the Constitution to "postulates" of power:

> Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is . . . the postulate that States of the Union still possessing attributes of sovereignty, shall be immune from suits, without their consent . . . .

Id. at 322 (footnotes omitted).

The Supreme Court has consistently construed the Eleventh Amendment as a check on the balance of power between state and federal governments. *See id.* at 322-23. In essence, the federalism issue controlled the evolution of Eleventh Amendment jurisprudence. *See Seminole*, 116 S. Ct. at 1127 (reasoning that sovereign immunity jurisprudence had deviated sharply from the traditional federalism jurisprudence); *see also* Nowak, *supra* note 3, at 1441-45 (arguing that the "pragmatic problems of federalism posed by the Eleventh Amendment should be resolved by Congress, not by the Judiciary").

Although the text of Article III makes no reference to this restriction on the judiciary to hear cases against states,[8] the Framers of the Constitution contemplated the doctrine of state sovereign immunity.[9] Initially, the Court failed to recognize that the Constitution preserved state sovereign immunity, however, and in astonishment of the Court's opinion, the states proposed and ratified the Eleventh Amendment expressly overrul-

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8. U.S. CONST. art. III, § 2, cl. 1. The clause provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; . . . 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.

Id.

9. *See Hans*, 134 U.S. at 14 (quoting James Madison's and John Marshall's debate that recognized the existence of state sovereign immunity in the Constitution). The Framers of the Constitution, Alexander Hamilton, James Madison, and John Marshall recognized state sovereign immunity. *See id.* In *The Federalist*, Alexander Hamilton stated: "It is inherent in the nature of sovereignty, not to be amenable to suit of an individual *without its consent*." *See* THE FEDERALIST NO. 81, at 548 (Alexander Hamilton) (Jacob E. Cooke ed. 1961).

At the Virginia Convention, James Madison and John Marshall argued that state sovereign immunity should be specifically recognized in the construction of the Constitution. *See* Arguments of Delegates to the Convention of Virginia, *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533, 555-56 (Jonathan Elliot ed., J.B. Lippincott & Co., 2d ed. 1901) (1787) [hereinafter ADOPTION OF THE FEDERAL CONSTITUTION]. James Madison stated, "It is not within the power of individuals to call any state into court." *Id.* at 533. Similarly, John Marshall recognized that "an individual cannot proceed to obtain judgment against a state, though he may be sued by a state." *Id.* at 555-56.

Many Justices and legal scholars, however, have argued that the Court misconstrued the writings of the Founders and the historical precedential value of the sovereign immunity doctrine. *See Seminole*, 116 S. Ct. at 1146 (Souter, J., dissenting) (explaining that federal question jurisdiction was misunderstood by the *Hans* Court); *infra* note 60 (citing sources that discuss a literal interpretation of the Eleventh Amendment as compared to an extra-textual interpretation of the Eleventh Amendment). The *Hans* Court argued that the Founders never intended to preserve state sovereign immunity in the nature and the structure of the Constitution. *See Seminole*, 116 S. Ct. at 1146 (reasoning that the Framers were hostile to the wholesale inclusion of common law doctrine into the American legal system, such as the doctrine of sovereign immunity). The Framers claimed that sovereign immunity should be restricted to suits in diversity by a literal reading, not an extra-textual interpretation of the Eleventh Amendment. *See id.* at 1147, 1172-77; *see also* JACOBS, *supra* note 3, at 21-22 (arguing that the history of Article III "suggests contradictory answers" to whether the states were immune from suit before the passage of the Eleventh Amendment); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 572-76 (Fred B. Rothman & Co. 1991) (1833) (noting the historical background of the original jurisdiction of the federal courts set forth in Article III of the Constitution); Nowak, *supra* note 3, at 1422-30 (discussing the legislative and historical background of the ratification of the Eleventh Amendment).

ing the Court's interpretation of sovereign immunity.[10] The Supreme Court construed the Amendment to embody a constitutional right to sovereign immunity that arose from the structure of the Constitution itself and the spirit of the Eleventh Amendment.[11] Later, the Court

10. *See Hans*, 134 U.S. at 11. The Eleventh Amendment was passed in reaction to the Supreme Court's decision in *Chisholm v. Georgia*. *See id.*; *see also* Fletcher, *supra* note 4, at 1059-64 (discussing the effect of the holding in *Chisholm* upon the states and the ratification of the Eleventh Amendment). In *Chisholm*, the Court declined to recognize state sovereign immunity. *See* 2 U.S. (2 Dall.) 419, 428 (1793) (holding that Article III of the Constitution extended jurisdiction to the federal courts to hear cases against states); Mathis, *supra* note 1, at 19-20 (discussing the genesis of *Chisholm*). After *Chisholm*, states feared being plagued with suits. *See* Fletcher, *supra* note 4, at 1063. Within days of the decision, the Eleventh Amendment was proposed and it was ratified by twelve states in February 1795. *See id.* at 1059. *See generally* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE OF CONSTITUTIONAL LAW § 2.12, at 142 n.3 (2d ed. 1992) (listing historical cites that argue that the Amendment did not grant a constitutional right of sovereign immunity to states, but merely recognized the continuation of the analogous common law doctrine).

There were several theories why the Eleventh Amendment passed so swiftly after *Chisholm*. *See* Nowak, *supra* note 3, at 1437-39. One theory for the support of the Amendment was that the drafters of the Amendment wanted "to reaffirm the interpretation of Article III that citizens could not sue states in federal court." *Id.* at 1437. Another theory for support of the Eleventh Amendment found that the tendency of the American constitutional practice was to give more power to the states in the federal balance. *See id.* at 1438. A final theory for the support for the Amendment was that the states feared suits by British creditors for repayment of Revolutionary War debts. *See id.* at 1437-38. This theory argued that the states may have supported the Eleventh Amendment for political reasons to avoid increased tensions and a possible war with England. *See id.* at 1438-39. *See generally* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524 (2d ed. 1984) (discussing the history behind Eleventh Amendment jurisprudence); Note, *A Practical View of the Eleventh Amendment—Lower Court Interpretations and the Supreme Court's Reactions*, 61 GEO. L.J. 1473, 1475-82 (1973) (discussing the development of the state sovereign immunity doctrine via the Eleventh Amendment).

11. *See Hans*, 134 U.S. at 11. In *Hans* the Court recognized that sovereign immunity existed in the structure of the Constitution despite the limitation presented in the letter of the Eleventh Amendment. *See id.*; *see also infra* notes 57-74 and accompanying text (discussing the holding in *Hans*). The Court construed the Eleventh Amendment and the structure of the Constitution to limit Article III and to bar all suits against states, unless the state waived its constitutional immunity. *See Hans*, 134 U.S. at 11. In finding that the Eleventh Amendment guaranteed state sovereign immunity, the Court relied on Alexander Hamilton's statements made in THE FEDERALIST NO. 81:

> It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.
>
> It is inherent in the nature of sovereignty not to be amenable to suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal.

THE FEDERALIST NO. 81, at 548-49 (Alexander Hamilton) (Jacob E. Cooke ed. 1961).

recognized three limited exceptions to the Eleventh Amendment: consent,[12] the *Ex parte Young* doctrine,[13] and, the focus of this Note,

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Based on Alexander Hamilton's interpretation of sovereign immunity and that of other historical precedents, the *Hans* Court explained that an "extrajudicial" interpretation of the Eleventh Amendment, as an embodiment of state sovereign immunity, operates as a limit on Article III of the Constitution. *Hans*, 134 U.S. at 20. The Court thus found that individuals could not sue their own state or any state of the United States unless the state waived its constitutional immunity. *See id.* at 19-20. In essence, the Eleventh Amendment barred all federal jurisdiction—in law, equity, and admiralty—in cases brought against states pursuant to state law, federal law, or the Constitution. *See* Amar, *supra* note 1, at 1473 (explaining that individuals could not sue a state in federal court unless the state's sovereign immunity was waived or abrogated).

12. *See* Seminole Tribe of Florida v. Florida, 11 F.3d 1016, 1021 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996). There are two forms of waiver or consent: express or constructive. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467-68 (1945); Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909). A state may expressly waive its sovereign immunity to a class of suits or for the purpose of a particular suit. *See* NOWAK & ROTUNDA, *supra* note 1, § 2.11, at 50-51. In addition, a state can expressly waive its Eleventh Amendment immunity by statute by clearly permitting suits against the state in federal court. *See* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304-08 (1990). The state can also constructively waive its immunity, however, many courts are very reluctant to imply such waivers. *See* NOWAK & ROTUNDA, *supra* note 1, § 2.11, at 50-51. The courts' reluctance stems from the recognition that Eleventh Amendment sovereign immunity is a constitutional right. *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974). Under very limited circumstances, the Court has implied a waiver when the state participates in an interstate compact. *See* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 280-82 (1959). *See generally* TRIBE, *supra* note 4, § 3-26 (describing the concept of constructive waiver).

13. *See Ex parte* Young, 209 U.S. 123, 159-160 (1908) (creating an exception to the general doctrine of state sovereign immunity by asserting that a suit against a state official, regarding the constitutionality of his action in enforcing state law, is not considered a suit against a state); *see also* Papasan v. Allain, 478 U.S. 265, 281 (1986) (holding that an equal protection claim against a state official is not barred); Green v. Mansour, 474 U.S. 64, 69 (1985) (recognizing that a suit challenging the constitutionality of a state official's actions is not a suit against a state); *Pennhurst*, 465 U.S. at 102 (recognizing that pursuant to the *Ex parte Young* doctrine the Eleventh Amendment did not bar suits against a state official); *Edelman*, 415 U.S. at 663, 666 (reaffirming the *Ex parte Young* doctrine). Under the *Ex parte Young* doctrine, the Eleventh Amendment does not bar suits in federal court for injunctive relief against state officials. *See Green*, 474 U.S. at 69; *Pennhurst*, 46 U.S. at 102. The *Ex parte Young* doctrine creates the legal fiction that an injunctive action brought against a state official, who acted outside of the scope of his duty, is not a suit against the state, but a suit against the official, and thus not barred by the Eleventh Amendment. *See Ex parte Young*, 209 U.S. at 159-160; *Pennhurst*, 465 U.S. at 102. The rationale behind the doctrine is that when the state official acted outside of the scope of his duty, he is no longer an agent of the state and could therefore be sued in his individual capacity. *See Ex parte Young*, 209 U.S. at 159-60; *Papasan*, 478 U.S. at 281; *Green*, 474 U.S. at 69; *Pennhurst*, 465 US. at 102; *Edelman*, 415 U.S. at 651; TRIBE, *supra* note 3, § 3-38, at 144-47.

This exception is a common method by which plaintiffs seek to avoid a state's sovereign immunity defense. *See* Nell Jessup Newton, *In the Supreme Court: State of Idaho Seeks a Real Property Exception to the* Ex parte Young *Doctrine*, West Legal News, Oct. 16, 1996, *available in* Westlaw, 1996 WL 590118. For instance, in *Seminole*, the Court considered the *Ex parte Young* doctrine but failed to allow Indian tribes to use the doctrine to sue state

abrogation.[14]

Congressional abrogation of the Eleventh Amendment occurs when Congress enacts legislation that confers jurisdiction on federal courts to hear cases against states, overriding state sovereign immunity.[15] Initially, the Supreme Court recognized that Congress could abrogate state sovereign immunity only when legislating pursuant to section five of the Four-

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officials to enforce gambling agreements on Indian lands. *See Seminole*, 116 S. Ct. at 1132-33; *see also* Newton, *supra*, at *1.

The Supreme Court will revisit the issue in the 1996-97 term when it addresses whether an exception to the *Ex parte Young* doctrine exists to bar prospective relief actions against states where the action concerns real property. *See* Brief for Petitioner at i, Idaho v. Coeur D'Alene Tribe, 116 S.Ct. 1415 (1996) (No. 94-1474); *see also* Coeur D'Alene Tribe v. Idaho, 42 F.3d 1244, 1249 (9th Cir. 1994) (holding that the Eleventh Amendment barred quiet title actions against states and state agencies for injunctive and declaratory relief), *cert. granted*, 116 S. Ct. 1415 (1996); Matthew Berry, Case Note, *A Treasure Not Worth Salvaging*, 106 YALE L.J. 241 (1996) (discussing the lower court decision in *Coeur D'Alene Tribe*).

14. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 453 (1976). The Supreme Court recognized that Congress may abrogate a state's sovereign immunity to suit under the Enforcement Clause. *See id.* The theory behind the abrogation doctrine is that when Congress "act[s] in accordance with its article I powers as augmented by the necessary and proper clause, or act[s] pursuant to the enforcement clauses of various constitutional amendments," it can abrogate state sovereign immunity. TRIBE, *supra* note 4, § 3-26, at 185-86; *see also Seminole*, 116 S. Ct. at 1125 (holding that the Fourteenth Amendment expanded congressional power at the expense of state authority, thus expressly allowing Congress to abrogate state authority when acting pursuant to the Enforcement Clause); *Fitzpatrick*, 427 U.S. at 451-52 (holding that Congress's plenary authority, when acting pursuant to the Enforcement Clause, includes the authority to abrogate the Eleventh Amendment).

Under the *plan of convention theory*, the Court recognized that when the states signed and ratified the Constitution, they ceded some of their immunity to Congress over the areas in which Congress has plenary authority. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20 (1989) (developing the rationale known as the plan of convention theory). Thus, according to this theory, Congress can abrogate state sovereign immunity when legislating pursuant to ceded powers. *See id.* at 21. Applying this theory, the Court has held that pursuant to the Interstate Commerce Clause, Congress has the power to create a cause of action for money damages in fashioning solutions to environmental problems. *See id. See generally* Field, *Congressional Imposition of Suit*, *supra* note 4 (discussing the doctrine of congressional abrogation); Samuel H. Liberman, *State Sovereign Immunity in Suits to Enforce Federal Rights*, 1977 WASH. U. L.Q. 195, 244-49 (analyzing the Fourteenth Amendment in the context of congressional abrogation of the Eleventh Amendment); Nowak, *supra* note 3, at 1422-69 (discussing the history of the Supreme Court's interpretation of the relation between Congress and the Eleventh Amendment); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693-99 (1976) (discussing the theory of Eleventh Amendment abrogation).

15. *See Seminole*, 116 S. Ct. at 1123; *Union Gas*, 491 U.S. at 19-20; *Fitzpatrick*, 427 U.S. at 456; George D. Brown, *Beyond* Pennhurst*—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985) (discussing the ability of Congress to displace the Eleventh Amendment bar).

teenth Amendment.[16] Section five of the Fourteenth Amendment, also known as the Enforcement Clause, empowers Congress to enforce the Fourteenth Amendment against the states.[17] Despite the recognition of abrogation as a limitation on the Eleventh Amendment, the Supreme Court still struggled to balance federal interests with states' rights, in light of state sovereign immunity.[18]

As a result of this struggle over federalism, the Court developed a two-pronged test to guard against unwarranted abrogation of state sovereign immunity.[19] The test prescribed a means for the Court to limit Congress

16. *See* Dellmuth v. Muth, 491 U.S. 223, 227 (1989) (finding that Congress may abrogate states' sovereign immunity pursuant to the Enforcement Clause of the Fourteenth Amendment); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) (finding that the Enforcement Clause is a "well-established" exception to Eleventh Amendment immunity); *Pennhurst*, 465 U.S. at 99 (recognizing that Congress may abrogate the Eleventh Amendment when enacting legislation pursuant to the Enforcement Clause); *Fitzpatrick*, 427 U.S. at 454 (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1880)), for the proposition that the Enforcement Clause of the Fourteenth Amendment operates as a restriction on state power). Section five of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provision of this article." U.S. CONST. amend. XIV, § 5. The *Fitzpatrick* Court found that Congress could abrogate the Eleventh Amendment pursuant to legislation enacted under the Enforcement Clause. *See Fitzpatrick*, 427 U.S. at 455. The Court reasoned that because the Fourteenth Amendment was directed at limiting states' actions, the Amendment restricted state power and expanded Congress's Power. *See id.* at 455-56. Pursuant to the Enforcement Clause, Congress has the power to abrogate state sovereign immunity when enforcing the provisions of the Fourteenth Amendment through executive, legislative, or judicial means. *See id.* at 454 (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1880)).

17. U.S. CONST. amend. XIV, § 5; *see* Tribe, *supra* note 4, § 5-12, at 330-31 (providing an overview of Congress's power to enforce the Fourteenth Amendment). Using the Fourteenth Amendment, the Supreme Court validated Congress's power to promulgate reconstructive civil rights legislation applicable to the states. *See id.* § 5-12, at 331 n.8 (listing the cases upholding Congress's power to enforce, *inter alia*, the Fourteenth Amendment). The issue regarding the extent of Congress's power arose in subsequent Supreme Court decisions. *See* Katzenbach v. Morgan, 384 U.S. 641, 649 (1966); United States v. Guest, 383 U.S. 745, 755-56 (1966). In *Katzenbach*, the Court found that the Enforcement Clause authorized Congress to enforce the provisions of the Fourteenth Amendment on the states through laws that are reasonably related to the provisions of the Amendment. *See* 384 U.S. at 649.

18. *See Atascadero*, 473 U.S. at 242-43 (hesitating, but eventually deciding to abrogate state sovereign immunity because of the important role it played in the federal system); *Pennhurst*, 465 U.S. at 99 (stating that its reluctance to abrogate sovereign immunity stems from the states' role in the federalist system). The Court recognizes that states have a special position in our constitutional system. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547 (1985). Furthermore, the Court's reluctance to permit congressional abrogation of the Eleventh Amendment is also grounded in the need to maintain a "balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties." *Id.* at 572 (Powell, J., dissenting).

19. *See Seminole*, 116 S. Ct. at 1123. After *Fitzpatrick*, subsequent decisions led to the development of a stringent test designed to guard against any unjustified abrogation of state sovereign immunity. *See Atascadero*, 473 U.S. at 242-43; *see also supra* note 18 (dis-

from unjustly abrogating the Eleventh Amendment in instances when Congress did not have the constitutional authority to abrogate.[20] However, the Court itself did not abstain from recognizing Congress's authority to abrogate the Eleventh Amendment pursuant to another constitutional power other than the Fourteenth Amendment.[21] The Court later recognized Congress's abrogation powers to include Congress's plenary power over interstate commerce, in addition to the Enforcement Clause.[22] This acceptance of greater congressional power to abrogate, however, hampered the Court's struggle to balance states' rights with federal interests and heightened the search for an abrogation doctrine that would allow a delicate balance.[23]

In *Seminole Tribe of Florida v. Florida*,[24] the Court embraced the traditional state sovereign immunity doctrine recognized over two centuries earlier, redefining Eleventh Amendment jurisprudence.[25] The Seminole Indian Tribe alleged that Florida officials failed to comply with the Indian Gaming Regulation Act (IGRA),[26] a federal statute allowing Indian tribes to conduct prescribed gaming activities[27] pursuant to a valid agree-

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cussing *Atascadero* and the *Atascadero* Court's reluctance to abrogate states' sovereign immunity). The two-prong abrogation analysis requires a showing that, first, Congress "'unequivocally'" intended to abrogate state sovereign immunity, and second, that Congress legislated "'pursuant to a valid exercise of power.'" *Seminole*, 116 S. Ct. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

20. *See Atascadero*, 473 U.S. at 242. The two-pronged test was designed to prevent Congress from legislating outside of its constitutional powers, thereby upsetting the balance between state sovereign and federal power embodied in the Eleventh Amendment. *See id.* Despite the Court's recognition of the two-pronged test, the Court still recognized Congress's authority to abrogate the Eleventh Amendment pursuant to the Commerce Clause, a valid exercise of power which "with[held] power from the states at the same time as it confer[red] it on Congress." *Union Gas*, 491 U.S. at 19.

21. *See Union Gas*, 491 U.S. at 19 (finding that Congress had the authority to abrogate the Eleventh Amendment when legislating pursuant to the Interstate Commerce Clause).

22. *See id.* at 19-23.

23. *See id.* at 35-42 (Scalia, J. dissenting); *see also Seminole*, 116 S. Ct. at 1122.

24. 116 S. Ct. 1114 (1996).

25. *See Seminole*, 116 S. Ct. at 1122. The Court granted certiorari to consider two issues: 1) whether the Eleventh Amendment prevented Congress from creating a right of action against states to enforce the Indian Gaming Regulatory Act (IGRA), enacted pursuant to the Indian Commerce Clause; and 2) whether the doctrine of *Ex parte Young* authorized suits against a state's governor to enforce a good faith bargaining clause of the IGRA. *See id.*

26. *See* 25 U.S.C. §§ 2701-2721 (1994). Congress enacted the IGRA under the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, to promote economic development and self sufficiency among tribal nations. *See* § 2701(1); Pub. L. No. 100-497, § 2, 102 Stat. 2467 (as codified in 25 U.S.C. § 2701 (1994)). The IGRA grants Indian tribes the right to regulate gaming activities on their land so long as the gaming was not prohibited by federal law or state law. *See* § 2701(5).

27. *See* § 2701(5). The IGRA specifies three classes of gaming. *See* § 2703. Class I includes gaming solely for prizes of minimal value or traditional Indian games, § 2703(6);

ment[28] between the state and an Indian tribe.[29] The IGRA, enacted pursuant to the Indian Commerce Clause,[30] required that states negotiate an agreement with Indian tribes in good faith.[31] The IGRA also created a statutory right for tribes to sue a state in federal court if the state failed to negotiate in good faith.[32]

After the State of Florida refused to negotiate a compact over gaming

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class II includes games such as bingo, pull tabs, lotto, punch boards, tip jars, and other card game activities not prohibited by state laws, § 2703(7)(A); and Class III includes all gaming that were not in Class I or Class II, § 2703(8).

28. *See* § 2710(d)(1)(C). The IGRA prescribes that a "Tribal-State compact" would set forth the Indian tribe's authority to allow gaming activities on Indian lands that otherwise violated state law. *See* § 2710(d)(3)(A). Furthermore, the IGRA stated that the compact should be negotiated between states and an Indian tribe in good faith. *See id.* Once the tribal-state compact is agreed upon, the Indian tribe can lawfully operate gaming activities on its tribal lands. *See* § 2710(d)(1)(C).

29. *See id.* § 2710(d)(1)(C). The IGRA allows Indian tribes to conduct Class III gaming activities through the enactment of a "Tribal-State compact." *See id.* The IGRA states that "Class III gaming activities shall be lawful on Indian lands only if such activities are . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the state." § 2710(d)(1). The tribe can initiate negotiations of the tribal-state compact. *See* § 2710(d)(3)(A). If the state did not act in good faith in negotiating the compact, the IGRA gives the Indian tribe a right to sue the state in federal court. *See* § 2710(d)(7)(A).

30. *See Seminole*, 116 S. Ct. at 1119.

31. *See* § 2710(d)(3)(A).

32. *See* § 2710(d)(7)(A)(i). The statute states that

> "[t]he United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a state to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct negotiations in good faith."

Id. Under the IGRA, Congress expressly abrogated states' sovereign immunity to suit by creating a right for Indian tribes to sue states in federal court. *See Seminole*, 116 S. Ct. at 1121.

Federal district courts were split on the issue of whether Congress could abrogate the Eleventh Amendment pursuant to the Indian Commerce Clause. *Compare* Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 661 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994), *aff'd* 116 S. Ct. 1114 (1996), *with* Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 558 (S.D. Ala. 1991)(finding no abrogation), *aff'd sub nom.* Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996). In *Seminole*, the district court held that Congress abrogated state sovereign immunity pursuant to the Indian Commerce Clause. *See Seminole*, 801 F. Supp. at 660. In *Poarch*, the district court found that even though Congress intended to abrogate state sovereign immunity pursuant to the IGRA, the Indian Commerce Clause did not authorize Congress to abrogate state sovereign immunity. *See Poarch*, 776 F. Supp. at 558. On appeal, the United States Court of Appeals for the Eleventh Circuit consolidated *Seminole* and *Poarch* to address whether Congress successfully abrogated state sovereign immunity when enacting the IGRA. *See Seminole*, 11 F.3d at 1018. The court of appeals held that abrogation of the Eleventh Amendment pursuant to the Indian Commerce Clause was unconstitutional. *See id.* at 1028. The Supreme Court granted certiorari to resolve whether Congress may abrogate the Eleventh Amendment pursuant to the Indian Commerce Clause. See *Seminole*, 115 S. Ct. at 932.

activities that were illegal under Florida law,[33] the Seminole Indians sued the State of Florida in the United States District Court for the Southern District of Florida, alleging that all types of gaming activities prescribed in the IGRA were negotiable in the tribal-state compact.[34] The State of Florida moved to dismiss the complaint, raising its sovereign immunity defense,[35] but the district court denied the motion, holding that the IGRA constitutionally abrogated the Eleventh Amendment.[36] The United States Court of Appeals for the Eleventh Circuit reversed the district court's judgment and remanded the case, holding that the IGRA did not abrogate the Eleventh Amendment because the Indian Commerce Clause did not empower Congress to abrogate state sovereign immunity.[37] The Supreme Court granted certiorari[38] to resolve the issue of whether the Indian Commerce Clause granted Congress the power to abrogate the Eleventh Amendment.[39] The Court held that the Eleventh Amendment prevented Congress from abrogating state sovereign immunity pursuant to the Indian Commerce Clause.[40] The Court reasoned that the traditional doctrine of state sovereign immunity, as established in

33. *See Seminole*, 116 S. Ct. at 1121. The Seminole Indian Tribe asked the State of Florida to negotiate a tribal-state compact to allow the Seminole tribe to run gaming activity on its land. *See* Brief for Petitioner at 6, Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996) (No. 94-12). On March 4, 1991, the Seminole Tribe submitted a contract proposal to Florida for the operation of computer versions of "poker, bingo, pull-tabs, lotto, punchboards, tip jars, instant bingo, and other games similar to bingo." *Id.* at 7. The state agreed to discuss poker but rejected all of the tribe's other requests because they were illegal in Florida. *See id.*; *see also* FLA. STAT. ANN. §§ 849.15-849.16 (West 1994). On September 19, 1991, the Seminole Tribe filed suit against Florida in the United States District Court for the Southern District of Florida claiming that the state violated the IGRA. *See Seminole*, 11 F.3d at 1020.

34. *See Seminole*, 116 S. Ct. at 1121. In its complaint, the Seminole Tribe contended that all types of Class III gaming activities should be negotiable under the IGRA because the state permitted some Class III gaming activities within the state. *See id.* The Seminole Tribe contended that the state violated the good faith provision of the IGRA by refusing to enter into any negotiations over Class III gaming activity. *See id.*

35. *See Seminole*, 11 F.3d at 1020.

36. *See Seminole*, 801 F. Supp. at 657-58. The district court applied the two-prong abrogation analysis and found that the IGRA abrogated state sovereign immunity on its face. *See id.* at 658. It also held that Congress had the power, under the Indian Commerce Clause, to abrogate state sovereign immunity. *See id.* The court found the Indian Commerce Clause was analogous to the Interstate Commerce Clause and that, therefore, Congress possessed complete and plenary power under the Indian Commerce Clause to abrogate sovereign immunity. *See id.* at 661. Upon the denial of the motion to dismiss, the state completed an interlocutory appeal to the Federal Circuit Court of Appeals for the Eleventh Circuit. *See Seminole*, 11 F.3d at 1021.

37. *See Seminole*, 11 F.3d at 1025-28.

38. *See* Seminole Tribe of Florida v. Florida, 115 S. Ct. 932 (1995).

39. *See Seminole*, 116 S. Ct. at 1122.

40. *See id.* at 1119. Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas constituted the members of the majority. *See id.*

Hans v. Louisiana,[41] prohibited Congress from creating a federal forum for individuals to sue states, unless Congress legislates pursuant to the Enforcement Clause of the Fourteenth Amendment.[42]

In separate dissenting opinions, Justice Souter and Justice Stevens reasoned that the Eleventh Amendment did not limit Article I and that the majority incorrectly relied on the extra-constitutional principle of sovereign immunity to limit Congress's authority to abrogate.[43] In addition, Justice Stevens argued that neither the Eleventh Amendment nor any common law constitutional principle limited Congress from statutorily creating a right of action against a state in federal courts.[44] Further, Justice Souter argued that the Eleventh Amendment did not limit the federal courts from hearing suits against a state arising out of a federal question.[45]

This Note examines the interpretive evolution of the Eleventh Amendment in light of the doctrine of state sovereign immunity. This Note first discusses the Supreme Court's initial recognition of the doctrine of state sovereign immunity after the ratification of the Eleventh Amendment. Then, this Note traces the Court's expanding and changing interpretation of the Eleventh Amendment, including congressional abrogation of state sovereign immunity. This Note then discusses the Court's return to the traditional interpretation of the Eleventh Amendment, which restricted congressional abrogation and upheld the doctrine of state sovereign immunity. Finally, this Note analyzes the majority and dissenting opinions in *Seminole Tribe of Florida v. Florida*, and argues that the decision will create both federalism and separation of powers problems, as well as confusion in the lower courts.

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41. 134 U.S. 1 (1890).

42. *See Seminole*, 116 S. Ct. at 1131; *Hans*, 134 U.S. at 12-14.

43. *See Seminole*, 116 S. Ct. at 1133-45 (Stevens, J., dissenting), 1145-85 (Souter J., dissenting). Justice Souter's dissenting opinion was joined by Justices Ginsburg and Breyer. *See id.* at 1145.

44. *See id.* at 1133-34 (Stevens, J., dissenting). Justice Stevens argued that the majority had unconstitutionally construed the Eleventh Amendment as a limit on Congress for the first time in history. *See id.* He contended that the Eleventh Amendment applied only to the judiciary and not to Congress. *See id.* at 1134-35; *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 15-20 (1984) (finding that Congress could abrogate the Eleventh Amendment pursuant to the Interstate Commerce Clause).

45. *See Seminole*, 116 S. Ct. at 1167 (Souter, J., dissenting); *see also* Fletcher, *supra* note 4, at 1045-78 (discussing federal question jurisdiction with regard to traditional Eleventh Amendment jurisprudence); Gibbons, *supra* note 4, at 1941-2002 (discussing the different interpretative theories regarding the judicial construction of the Eleventh Amendment); Jackson, *supra* note 1, at 44-51 (discussing the diversity theory interpretation of the Eleventh Amendment).

I. EVOLUTION OF STATE SOVEREIGN IMMUNITY

A. *The Historical Background of State Sovereign Immunity*

For a period spanning almost two centuries,[46] the development of state sovereign immunity jurisprudence evolved from the Supreme Court's non-recognition[47] of the doctrine to full acceptance.[48] Initially, the Supreme Court declined to recognize state sovereign immunity by literally construing Article III, Section 2 of the United States Constitution to grant the judiciary the power to hear cases arising against states.[49] Subsequently, the states ratified the Eleventh Amendment, amending Article III and denying the federal judiciary the jurisdiction to hear cases brought against a state.[50]

In the seminal pre-Eleventh Amendment decision *Chisholm v. Georgia*[51] the Supreme Court refused to recognize the doctrine of state sovereign immunity, reasoning that Article III empowered federal courts to hear cases against a state.[52] In *Chisholm*, a citizen of South Carolina

46. *See Seminole*, 116 S. Ct. at 1130; Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 465 (1793). Over two hundred years passed between the Supreme Court's decision in *Chisholm*, which rejected the doctrine of state sovereign immunity, and the Court's decision in *Seminole*, which reaffirmed the fundamental principle of state sovereign immunity. *Compare Chisholm*, 2 U.S. (2 Dall.) at 465, *with Seminole*, 116 S. Ct. at 1130. Justice Iredell's dissent in *Chisholm* greatly influenced the present development of the current doctrine of state sovereign immunity jurisprudence. *See* JACOBS, supra note 3, at 64-65 (discussing the events following the *Chisholm* decision); Maeva Marcus & Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1970's*, 1993 J. SUP. CT. HIST. 73, 86 (noting the impact of the Eleventh Amendment on constitutional jurisprudence); Mathis, *supra* note 1, at 20-23 (explaining the events leading up to the *Chisholm* decision); John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia *(1793)*, 73 N.C. L. REV. 255, 256-60 (1994) (recognizing Justice Iredell's influence on the interpretation of the Eleventh Amendment).

47. *See Chisholm*, 2 U.S. (2 Dall.) at 451 (rejecting the doctrine of state sovereign immunity by construing Article III of the U.S. Constitution as a grant of power to the judicial branch to hear cases against a state).

48. *See* Hans v. Louisiana, 134 U.S. 1, 13-16 (1890) (finding that the doctrine of state sovereign immunity is embodied in the Eleventh Amendment and in the structure of the Constitution); *see also Seminole*, 116 S. Ct. at 1131 (reaffirming that the fundamental principle of state sovereign immunity is a limit on Article III).

49. *See Chisholm*, 2 U.S. (2 Dall.) at 450-51.

50. *See* NOWAK & ROTUNDA, supra note 1, § 2.11, at 45; *see also* Fletcher, *supra* note 4, at 1045-63 (analyzing the effect of *Chisholm* on early state sovereign immunity jurisprudence); Nowak, *supra* note 3, at 1433-41 (discussing the history of the ratification of the Eleventh Amendment); *supra* notes 2, 10 and accompanying text (discussing the scope of the Eleventh Amendment and the decision in *Chisholm*).

51. 2 U.S. (2 Dall.) 419 (1793). In delivering its opinion, the Supreme Court, sitting in Philadelphia, Pennsylvania, followed the practice of English judges by orally delivering their opinions seriatim with the most senior justice speaking last. *See* Orth, *supra* note 44, at 256.

52. *See Chisholm*, 2 U.S. (2 Dall.) at 423.

sued the State of Georgia for monetary damages arising from Revolutionary War debts.[53] The State of Georgia raised the defense of sovereign immunity.[54] Chisholm argued that the language of Article III granted the judiciary the power to hear cases arising between a state and a citizen of another state.[55]

The *Chisholm* Court interpreted Article III literally, barring any sovereign immunity defense.[56] The Court reasoned that the language in the Constitution was explicit and, therefore, granted the judiciary the authority under Article III to hear such controversies.[57] In reaction to *Chisholm*, the states ratified the Eleventh Amendment, amending Article III and recognizing a state's immunity to suit.[58]

B. A Broad Interpretation of the Eleventh Amendment and the Recognition of State Sovereign Immunity: Hans v. Louisiana

After rejecting the state sovereign immunity doctrine, the Supreme Court reconsidered the doctrine and recognized that the Eleventh Amendment uniformly protected states against suits brought by private individuals in federal court.[59] To avoid strict textual interpretation of the

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53. *See id.* at 419.

54. *See id.* at 429-30. The State of Georgia argued that Article III permitted the judicial branch to hear cases and controversies between a state and a citizen of another state only when the state had waived its sovereign immunity. *See id.* at 430.

55. *See id.* at 419-20.

56. *See id.* at 450. In holding that the Constitution empowered the judiciary to hear cases arising against a state, the Court interpreted two separate clauses of Article III, section 2. *See id.* at 466. It discussed the following clauses in its opinion: "The judicial Power shall extend to . . . controversies . . . between a State and Citizens of another State . . . [and] [i]n all cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2. The Court construed these clauses to find that the Constitution granted the judicial branch jurisdiction to hear suits brought by a citizen of one state against another state. *See Chisholm*, 2 U.S. (2 Dall.) at 466.

57. *See Chisholm*, 2 U.S. (2 Dall.) at 466. The majority found that, although the Constitution recognized states as sovereigns, the letter of the Constitution and the character of the federal government diminished and limited state sovereignty. *See id.* at 456. Furthermore, the majority argued that the Constitution clearly and directly indicated that federal courts had jurisdiction to hear cases and controversies arising against states and, therefore, that the doctrine of sovereign immunity did not limit Article III. *See id.*

58. *See* U.S. CONST. amend. XI. Less than two years after the Supreme Court rendered the decision in *Chisholm*, the states proposed and ratified the Eleventh Amendment. *See* NOWAK & ROTUNDA, supra note 1, § 2.11, at 45; Nowak, *supra* note 3, at 1433-41. The reaction to *Chisholm* was swift because states feared suits by Revolutionary War creditors. *See* NOWAK & ROTUNDA, *supra* note 1, § 2.11, at 45; 1 WARREN, *supra* note 2, at 96 (discussing the effect of the decision in *Chisholm* on the states); Marcus & Wexler, *supra* note 44, at 86 (discussing the reasons for the ratification of the Eleventh Amendment and the reaction to the *Chisholm* decision); Nowak, *supra* note 3, at 1437-41; *supra* note 10 and accompanying text (discussing theories for the ratification of the Eleventh Amendment).

59. *See, e.g.*, Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (confirm-

Constitution, the Supreme Court broadly construed the Eleventh Amendment beyond its textual meaning.[60] The Supreme Court first recognized state sovereign immunity in the Eleventh Amendment[61] by extra-textually interpreting the letter of the Amendment to presuppose the full protection of state sovereign immunity.[62]

In *Hans v. Louisiana*,[63] the Court held that the spirit, not the letter, of the Amendment preserved state sovereign immunity in all suits brought by citizens against states.[64] In *Hans*, the petitioner, a Louisiana citizen,

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ing that *Hans* established that the Eleventh Amendment stands for state sovereign immunity); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 (1987) (finding that *Hans* established state sovereign immunity jurisprudence in the federal system); Employees v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 290-94 (1973) (recognizing that *Hans* established the doctrine of state sovereign immunity protected by the Eleventh Amendment).

60. *See* Smith v. Reeves, 178 U.S. 436, 448 (1900); *Hans*, 135 U.S. at 13-15; John V. Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C. L. REV. 747, 748-50 (1981) (explaining how passage of the Eleventh Amendment allowed Southern states to repudiate their debts); John V. Orth, *The Fair Fame and Name of Louisiana: The Eleventh Amendment and The End of Reconstruction*, TULANE LAW. Fall 1980, at 2, 11-13 (discussing the history of the Eleventh Amendment during the post-Reconstruction era); *cf.* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 238-54 (1985) (addressing the practicality of a literal interpretation of the Eleventh Amendment); William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 131, 131-32 (1990) (discussing the theory that the Eleventh Amendment "was intended to repeal that part of the state-citizen diversity clause of Article III that had conferred party-based jurisdiction over unconsented suits brought against states by out-of-state citizens or aliens," also known as the "diversity theory"); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1261-64 (1989) (defending the diversity theory interpretation of the Eleventh Amendment); Gibbons, *supra* note 4, at 1893-94 (addressing whether the Eleventh Amendment barred cases arising out of a federal question); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 44-51 (1988) (analyzing an interpretation of the Eleventh Amendment based on the diversity theory).

61. *See Hans*, 134 U.S. at 13. Immediately after the states ratified the Eleventh Amendment, the *Hans* Court broadly interpreted the Amendment to presuppose state sovereign immunity in the structure of the Constitution and in the constitutionally mandated balance of federalism. *See id.* The decision in *Hans* was in direct reaction to the extremely textual interpretation of Article III in *Chisholm*. *See id.* at 11 (describing the *Chisholm* decision as "startling" and "unexpected"); *see also* Richard Monette, *When Tribes Sue States: How "Federal Indian Law" Offers an Opportunity to Clarify Sovereign Immunity Jurisprudence*, 14 QUINNIPIAC L. REV. 401, 413-16 (1994) (surveying the doctrine of state sovereign immunity in the context of the federal system).

62. *See Hans*, 134 U.S. at 12-13. In interpreting the Eleventh Amendment as embodying the fundamental principle of state sovereign immunity, the *Hans* Court relied on the historical doctrine of sovereign immunity and the opinions of the Founders. *See id.* at 12-16. *See generally* THE FEDERALIST No. 83 (Alexander Hamilton) (arguing that sovereign immunity to suit is an essential element of state sovereignty).

63. 134 U.S. 1 (1890).

64. *See id.* at 13-14. The petitioner also filed suit against the State of Georgia for

brought a suit against his state to collect unpaid Civil War contracts, arguing that an amendment to the State of Louisiana's Constitution forgiving the repayment of such contract violated Article I, Section 10 of the United States Constitution.[65] The State of Louisiana raised a sovereign immunity defense.[66] The petitioner asserted that the Eleventh Amendment did not bar his suit because the Amendment only prohibited suits brought by citizens of another state.[67]

The *Hans* Court examined whether a state was subject to suit in federal court by one of its own citizens when the suit arose under the laws of the United States.[68] The Court first addressed whether a citizen of a state could sue his own state based solely on federal question jurisdiction.[69] The Court found that the case arose under a federal question because the amendment to the State of Louisiana's Constitution interfered with Article I, Section 10 of the U.S. Constitution by prohibiting states from impairing the validity of contracts.[70] The Court found, however, that the Eleventh Amendment prohibited granting federal jurisdiction merely on the grounds that the suit involved a federal question.[71]

The Court then addressed whether the Eleventh Amendment acted as a bar to suits brought against a state by one of its own citizens.[72] Despite the omission of this language from the Eleventh Amendment, the Court held that the Amendment acted as a jurisdictional bar, by implication, to

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breach of contract. *See* Hans v. Louisiana, 24 F. 55, 55-56 (C.C.E.D. La. 1879), *aff'd*, 134 U.S. 1 (1890). The court of appeals dismissed the case, finding that the Eleventh Amendment barred federal court jurisdiction. *See Hans*, 134 U.S. at 3-4. The Petitioner appealed the circuit court's order and the Supreme Court granted certiorari. *See id.* at 4. The Supreme Court recognized that the doctrine of state sovereign immunity barred suits in federal question as well as in diversity despite the literal reading of the Eleventh Amendment. *See id.* at 13-16. The Court reasoned that the doctrine of state sovereign immunity was inherent in the structure of the Constitution and, therefore, the Court could apply the doctrine by implication. *See id.*

65. *See Hans*, 134 U.S. at 3.

66. *See id.* The State of Louisiana argued that the Court did not have jurisdiction to hear the suit without the state's consent because the Eleventh Amendment granted the state sovereign immunity. *See id.*

67. *See id.* at 1-3.

68. *See id.* at 9.

69. *See id.*

70. *See* U.S. CONST. art. I, § 10; *Hans*, 134 U.S. at 4.

71. *See Hans*, 134 U.S. at 9-10. The Court criticized the petitioner's argument that the federal court had jurisdiction to hear the case because it arose under the Constitution or the laws of the United States. *See id.* at 10. The Court found that the Eleventh Amendment was enacted to protect a state's sovereign immunity regardless of whether cases against it arose under diversity jurisdiction or federal question jurisdiction. *See id.* The Court held that the Eleventh Amendment stood not for the literal reading of the language in the Amendment, but for the sovereign immunity of states. *See id.*

72. *See id.* at 10.

such suits.[73] The Court also found that the recent ratification of the Eleventh Amendment, in reaction to the *Chisholm* decision, proved that the states intended to bar all suits against states.[74] The Court also reasoned that the Framers intended to preserve the doctrine of state sovereign immunity in the Constitution and never intended for the letter of the Constitution to be read to subject states to suit in federal court.[75] *Hans* established that the doctrine of state sovereign immunity was embodied in the spirit of the Eleventh Amendment and reflected in the structure of the Constitution and the federal system.[76]

C. *Congressional Abrogation of the Eleventh Amendment*

Although *Hans*'s extra-textual analysis of the Eleventh Amendment

73. *See id.* at 13. The *Hans* Court found that states understood that, at the time of the ratification of the Eleventh Amendment, state sovereign immunity was guaranteed by the Constitution. *See id.* at 16-17. The Court interpreted the doctrine of sovereign immunity in light of the intent of the drafters and ratifiers of the Eleventh Amendment. *See id.* at 13-14; *see also* Merrit R. Blakeslee, Case Comment, *The Eleventh Amendment and States' Sovereign Immunity From Suit by a Private Citizen:* Hans v. Louisiana *and Its Progeny After* Pennsylvania v. Union Gas Company, 24 GA. L. REV. 113, 115-117 (1989) (discussing the *Hans* Court's expansion of the doctrine of sovereign immunity).

74. *See Hans*, 134 U.S. at 11-12. In rejecting a literal interpretation of the Eleventh Amendment, the Court reasoned that it would be absurd to interpret the Amendment to bar suits based on diversity of jurisdiction but to allow suits based on federal question jurisdiction. *See id.* Furthermore, the Court reasoned that the states intended for the Eleventh Amendment to bar both suits in diversity and federal question because they swiftly enacted the Amendment in reaction to the unpopular *Chisholm* decision. *See id.*; *cf.* Marshall, *supra* note 1, at 1365 (providing alternative explanations for the passage of the Eleventh Amendment); Shapiro, *supra* note 4, at 62 (criticizing the doctrine of sovereign immunity and arguing that other doctrines, such as comity, would better serve federalism concerns).

75. *See Hans*, 134 U.S. at 12-16. In concluding that state sovereign immunity was presupposed in the Constitution, the Court discussed the Founders' prior writings and sifted through the historical meaning of sovereign immunity. *See id. See generally* THE FEDERALIST NO. 81 (Alexander Hamilton) (discussing the construction of Article III of the Constitution setting forth the jurisdiction of the federal courts). At the Virginia Convention, both James Madison and John Marshall argued that the literal construction of Article III should not enable citizens to recover claims against states. *See Hans*, 134 U.S. at 13-14. They claimed that it was in the nature of sovereignty to be immune from suit in federal court. *See* ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 9, at 533, 555. Thus, it was reasonable to conclude that the Framers intended that sovereign immunity be preserved. *See Hans* 134 U.S. at 13-14.

76. *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 (1987) (recognizing that since *Hans*, the Court has held that the Eleventh Amendment barred citizens from bringing suits against their own state in federal court); Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 290-94 (1973) (Marshall, J., concurring) (explaining that, although the Eleventh Amendment does not refer to a citizen's attempt to sue his own state in federal court, a federal court lacks jurisdiction to hear such a suit due to the Court's interpretation of the "spirit" of the Amendment).

endured,[77] subsequent Supreme Court decisions reinterpreting the Amendment narrowed its scope by allowing congressional abrogation of state sovereign immunity and judicial review of suits against a state.[78] The Supreme Court recognized that certain constitutional provisions empowered Congress to override the jurisdictional bar of the Eleventh Amendment.[79] The abrogation debate, however, spawned a struggle in the Court over the balance between states' rights and Congress's authority to enlarge its power at the states' expense.[80]

1. *Abrogation of State Sovereign Immunity Pursuant to the Fourteenth Amendment:* Fitzpatrick v. Bitzer

The Supreme Court subsequently recognized that the Eleventh Amendment was not an absolute bar to suits brought against states, and found that Congress could abrogate[81] the Eleventh Amendment to en-

77. *See* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1122 & n.7 (1996) (citing cases following *Hans*); *supra* note 3 and accompanying text (citing cases holding that the Eleventh Amendment embodied the fundamental principle of state sovereign immunity).

78. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 22 (1989) (finding that Congress could abrogate the Eleventh Amendment by enacting environmental legislation such as Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) that created a private cause of action against states to recover clean-up costs); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237-238 (1985) (finding that Congress may abrogate the Eleventh Amendment when enforcing the principles of the Fourteenth Amendment); Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976) (finding that state sovereign immunity could be abrogated by Congress when legislating pursuant to the Enforcement Clause).

79. *See* Dellmuth v. Muth, 491 U.S. 223, 227-29 (1989) (reaffirming the holding in *Fitzpatrick*); *Atascadero*, 473 U.S. at 238 (reaffirming that the Eleventh Amendment is subject to the exception of congressional abrogation); Pennhurst State Sch. & Hosp. v. Scanlon, 465 U.S. 89, 99 (1984)(recognizing that Congress may abrogate the Eleventh Amendment when enacting legislation enacted pursuant to the Enforcement Clause); *Fitzpatrick*, 427 U.S. at 453 (recognizing the Enforcement Clause of the Fourteenth Amendment as an exception to the Eleventh Amendment bar); *cf.* Quern v. Jordan, 440 U.S. 332, 343 (1979) (recognizing congressional abrogation pursuant to the Enforcement Clause and also requiring a "clear [ ] showing of congressional purpose" to abrogate the Eleventh Amendment).

80. *See Atascadero*, 473 U.S. at 242-43. The *Atascadero* Court discussed, at great length, the importance of the balance between state and federal governments. *See id.* The Court found that congressional abrogation upset the federal-state balance and, therefore, threatened the existence of sovereign immunity. *See id.* The Court concluded that because the Eleventh Amendment was so important to the federal system, the creation of a strict test was required to ensure that Congress would not eviscerate the Eleventh Amendment. *See id.*; *see also Seminole*, 116 S. Ct. at 1122 (finding that congressional intent to abrogate must be clearly expressed because abrogation jeopardized the Eleventh Amendment and the federal principles that it reflected); *Atascadero*, 473 U.S. at 242-43 (explaining that congressional intent to limit the power of states must be clearly expressed to preserve the state sovereign immunity doctrine).

81. *See Fitzpatrick*, 427 U.S. at 453. Congressional abrogation is simply one of the three judicially recognized methods to escape the jurisdictional bar of the Eleventh

force the principles of the Fourteenth Amendment.[82] The Court found that certain congressional plenary powers implicitly bestowed authority upon Congress to avoid the jurisdictional bar of the Eleventh Amendment.[83] The Supreme Court construed the Constitution to allow Congress to override the Eleventh Amendment, thus limiting the doctrine of state sovereign immunity for the first time in the history of the Supreme Court.[84]

In *Fitzpatrick v. Bitzer*,[85] the Court held that the Enforcement Clause empowered Congress to abrogate state sovereign immunity, thus, recognizing a limited exception to the Eleventh Amendment.[86] In *Fitzpatrick*, male state employees sued the State of Connecticut for sex discrimination under Title VII of the Federal Civil Rights Act.[87] The State of Connecticut argued that the Eleventh Amendment barred suits brought against a state by its citizens.[88] The petitioners argued that Congress could abro-

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Amendment. *See Union Gas*, 491 U.S. at 7 (describing the abrogation exception to the Eleventh Amendment). The two other exceptions to the state sovereign immunity defense are consent and the *Ex parte Young* doctrine. *See Atascadero*, 473 U.S. at 238; *Ex parte* Young, 209 U.S. 123, 159-60 (1908); *see also supra* notes 12-13 (discussing the *Ex parte Young* and consent exceptions to the Eleventh Amendment). A state could not raise an immunity defense if it had expressly or impliedly consented to a suit. *See Atascadero*, 473 U.S. at 238. Under the *Ex parte Young* doctrine, the Eleventh Amendment did not bar an individual from suing state officers in federal court for federal law violations. *See Ex parte* Young, 209 U.S. at 159-60; Green v. Mansour, 474 U.S. 64, 69 (1985). *See generally* Jeffrey B. Mallory, Note, *Congress' Authority to Abrogate States' Eleventh Amendment Immunity From Suit: Will* Seminole Tribe v. Florida *be Seminal?*, 7 ST. THOMAS L. REV. 791, 799-804 (1995) (discussing the concept of states' waiver of sovereign immunity).

82. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."); *Fitzpatrick*, 427 U.S. at 453 (stating that the Fourteenth Amendment "clearly contemplates limitations on [the states'] authority").

83. *See Fitzpatrick*, 427 U.S. at 453 (noting that the Enforcement Clause "clearly contemplates" abrogation); *Seminole*, 116 S. Ct. at 1125 (reaffirming that abrogation pursuant to the Enforcement Clause is constitutional); TRIBE, *supra* note 4, § 3-26, at 178-89 (discussing the interpretive evolution of the Court's construction of congressional abrogation).

84. *See Union Gas*, 491 U.S. at 17 (finding that the language of the Eleventh Amendment did not give any hint of limiting congressional authority but that the Fourteenth Amendment altered the "constitutional balance"); *Fitzpatrick*, 427 U.S. at 455 (finding that Congress abrogated the Eleventh Amendment for the first time by passing the Fourteenth Amendment). *See generally* Siegel, *supra* note 50, at 546-47 (explaining that Congress "usually" lacked the power to abrogate the Eleventh Amendment but that the Enforcement Clause created the first exception to this rule).

85. 427 U.S. 445 (1976).

86. *See id.* at 454.

87. *See* Federal Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1994) (prohibiting employers from discriminating against employees on the basis of sex); *Fitzpatrick*, 427 U.S. at 447-49. The state employees alleged that the State of Connecticut's employee retirement plan discriminated on the basis of sex. *See Fitzpatrick*, 427 U.S. at 447-49.

88. *See Fitzpatrick*, 427 U.S. at 448-49.

gate state sovereign immunity because Congress possessed the constitutional power to override the Eleventh Amendment pursuant to the Enforcement Clause.[89]

After reviewing the language of the Enforcement Clause,[90] a plurality of the Court found that the Enforcement Clause authorized Congress to override states' authority, including their sovereign immunity.[91] Because the Court traditionally construed the Fourteenth Amendment as a direct limitation on the states' powers and an enlargement of Congress's powers, it determined that Congress was empowered to restrict states rights.[92] Thus, the Court concluded that the special character of the Enforcement Clause granted Congress the authority to abrogate the Eleventh Amendment.[93]

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89. *See id.* at 451. Previously, the district court had ruled in favor of the petitioners, finding that the retirement plan discriminated on the basis of sex. *See* Fitzpatrick v. Bitzer, 390 F. Supp. 278, 280 (D. Conn. 1974), *aff'd in part and rev'd in part*, 519 F.2d 559 (2nd Cir. 1975), *aff'd in part and rev'd in part*, 427 U.S. 445 (1976). The district court, however, granted the petitioners an award of injunctive relief against the state instead of monetary damages, reasoning that the Eleventh Amendment barred the recovery of monetary damages in a suit against a state. *See id.* The United States Court of Appeals for the Second Circuit reversed in part and affirmed in part, finding that although the Eleventh Amendment did not bar attorney's fee damages, the Amendment did bar damages for the loss of retirement benefits. *See* Fitzpatrick v. Bitzer, 519 F.2d 559, 561 (2d. Cir. 1975), *aff'd in part and rev'd in part*, 427 U.S. 445 (1976). The petitioners appealed to the Supreme Court to resolve the issue of whether Congress could abrogate the Eleventh Amendment and allow monetary damage actions when legislating pursuant to the Fourteenth Amendment. *See Fitzpatrick* 427 U.S. at 445 (citing the language of the Enforcement Clause).

90. *See Fitzpatrick*, 427 U.S. at 453. Section 5 of the Fourteenth Amendment authorizes Congress to enforce the Due Process and Equal Protection Clauses of the Fourteenth Amendment to restrict unconstitutional state action. *See* U.S. CONST. amend. XIV, cl. 5; *see also* Katzenbach v. Morgan, 384 U.S. 641, 649 (1966) (providing an example of congressional preemption of state law pursuant to the Enforcement Clause). The Court traditionally construed the Fourteenth Amendment as a direct limit on state action. *See id. See generally* TRIBE, *supra* note 4, § 5-15, at 273 (discussing Congress's plenary power granted by section 5 of the Fourteenth Amendment).

91. *See Fitzpatrick*, 427 U.S. at 455-56.

92. *See id.* at 453. In determining the extent of Congress's power pursuant to the Enforcement Clause, the *Fitzpatrick* Court also looked to *Ex parte Virginia*, 100 U.S. 339 (1880), in which the Court validated congressional power to enact legislation under the Thirteenth and Fourteenth Amendments:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action . . . whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. . . . [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. . . . Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

Id. at 346.

93. *See Fitzpatrick*, 427 U.S. at 448. Because congressional power is plenary when

2. *Developing the Doctrine of Congressional Abrogation into a Two Pronged Test:* Atascadero State Hospital v. Scanlon

After the initial recognition of the abrogation doctrine,[94] the Court struggled with the possibility that abrogation could eviscerate meaningful sovereign immunity protection.[95] In reaction to this threat, the Supreme Court developed a test providing for stringent judicial review of congressional abrogation.[96] In constructing the test, the Court required that Congress plainly show its intention to abrogate the Eleventh Amendment.[97]

Atascadero State Hospital v. Scanlon[98] marked a return to the traditional Eleventh Amendment jurisprudence established in *Hans,* while still supporting the abrogation exception established in *Fitzpatrick*.[99] In

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acting pursuant to the Enforcement Clause, the Court found that the Eleventh Amendment did not limit legislative action that granted jurisdiction to federal courts for suits against states. *See id.* The Court recognized that when acting pursuant to the Enforcement Clause, Congress could employ any method of enforcement, including a statutorily created right to sue a state without invading a state's sovereignty. *See id.*

In addition, *Fitzpatrick* signaled the Court's willingness to recognize congressional abrogation pursuant to other constitutionally granted powers. *See id.* at 457. In separate concurring opinions, Justice Brennan and Justice Stevens recognized congressional authority to abrogate the Eleventh Amendment when legislating pursuant to the Interstate Commerce Clause in Section 8, Article I of the Constitution. *See id.* at 457-58 (Brennan, J., concurring); *id.* at 458-60 (Stevens, J., concurring). The expansion of such powers threatened the existence of the doctrine of state sovereign immunity. *See Atascadero*, 473 U.S. at 242 (finding that congressional abrogation threatened state sovereign immunity and the federal system).

94. *See supra* notes 77-93 and accompanying text (describing the Supreme Court's recognition of the abrogation doctrine).

95. *See Atascadero*, 473 U.S. at 242-43.

96. *See id.* at 242. In a series of cases involving both abrogation and waiver of state sovereign immunity, the Supreme Court developed a test to restrict unwarranted congressional abrogation or waiver of a state's sovereign immunity. *See id.* The Court created obstacles to Congress's efforts to interfere with states' sovereignty. *See id.* The test focused on determining Congress's intent to abrogate in the letter of the statute itself. *See id.* In a case involving state waiver of sovereign immunity, *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973), the Court first required that a congressional statute show a clear intention to waive state sovereign immunity. *See id.* at 285 (finding that Congress had no clear intent to waive sovereign immunity under an amendment to the Fair Labor Standard Act because the language of the statute did not clearly express this intent). In another case involving waiver of sovereign immunity, *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court required express language or an overwhelming intention to waive sovereign immunity in the statute. *See id.* at 673. In an abrogation case, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Court adopted the state waiver tests by requiring an unequivocal expression of intent to abrogate in the text of the statute. *See id.* at 99. Finally, in *Atascadero*, the Court solidified the test by requiring express language in the statute itself expressing intent to abrogate. *See Atascadero*, 473 U.S. at 242.

97. *See Atascadero*, 473 U.S. at 242.

98. 473 U.S. 234 (1985).

99. *See id.* at 238 (citing *Hans* and *Fitzpatrick*); *cf. id.* at 254-55 (Brennan, J., dissent-

Atascadero, the Supreme Court restricted the abrogation doctrine to ensure that state sovereign immunity was not unjustly abrogated[100] by establishing a test to determine the genuine intent of Congress.[101] The case arose when the petitioner sued a state hospital pursuant to the Rehabilitation Act of 1973 (Act),[102] claiming that the state violated the Act when it denied him employment.[103] The State of California raised an Eleventh Amendment sovereign immunity defense.[104] The petitioner responded by arguing that the Act afforded individuals a statutorily created right to sue a state in federal court.[105]

The Court addressed whether the Eleventh Amendment prohibited in-

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ing) (arguing that the Court's decision to create the clear statement rule obstructed Congress's Article I powers).

100. *See Atascadero*, 473 U.S. at 239-40; *see also* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1122 (1996) (finding that congressional legislation had to show a clear legislative statement of intent to abrogate); Pennsylvania v. Union Gas Co., 491 U.S. 1, 28 (1989) (finding that Congress had to indicate on the face of the statute that it intended to abrogate).

The clear statement test was commonly required in all areas that are associated with the surrendering of constitutional rights. *See Atascadero*, 473 U.S. at 242. The "clear statement" requirement, established in *Atascadero*, was analogous to the test that courts applied when a state waived its sovereign immunity pursuant to a state statute or a constitutional provision. *See Edelman*, 415 U.S. at 673. The stringent state waiver test mandated that the waiver show clear intent expressly stated in the statutory language. *See Atascadero*, 473 U.S. at 241. The abrogation test and the state waiver test were very similar because they both dealt with the waiver of the state's constitutional right to be immune from suit. *See id.* at 238 n.1.

101. *See Atascadero* 473 U.S. at 242. In three cases decided prior to *Atascadero*, the Supreme Court sketched out the congressional intent requirement. *See supra* note 95 (citing cases developing the clear statement test). The *Atascadero* Court created a clearer and more stringent test requiring congressional intent on the face of the statute. *See Atascadero*, 473 U.S. at 242 (requiring "unmistakably clear" intent); *accord Pennhurst*, 465 U.S. at 99 (requiring an "unequivocal expression of congressional intent"); *Edelman*, 415 U.S. at 673 (requiring either "express language" or an "overwhelming" implication to abrogate in the statute); *Employees*, 411 U.S. at 285 (requiring that the statute show a clear intention to abrogate state sovereign immunity).

102. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (1994)). The Rehabilitation Act provided that no handicapped person should be subject to discrimination under any program receiving federal assistance. *See id.* A subsequent amendment to the Act set forth a statutorily created right to sue the state for monetary damages under the Civil Rights Act of 1964. *See* Rehabilitation Comprehension Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, tit. IV, 92 stat. 2955, 2982-83 (codified as amended at 29 U.S.C. § 794a (1994)).

103. *See Atascadero*, 473 U.S. at 236.

104. *See id.*

105. *See id.* at 242. The district court granted the state's motion to dismiss based on the Eleventh Amendment bar. *See* Scanlon v. Atascadero State Hosp., 677 F.2d 1271, 1272 (9th Cir. 1982), *vacated and remanded*, 465 U.S. 1095 (1984). On remand, the court of appeals reversed the district court, finding that the Eleventh Amendment did not bar federal court jurisdiction because the state had consented to suit under the Act when it re-

dividuals who were seeking monetary relief from suing states in federal courts pursuant to the Act.[106] The majority held that the abrogation doctrine, as recognized in *Fitzpatrick*, threatened not only the unwarranted abrogation of the Eleventh Amendment,[107] but also federalism's delicate balance.[108] The Court then prescribed a test that permitted congressional abrogation only if the statute showed clear and "unmistakable language" demonstrating Congress's intent to abrogate state sovereignty.[109] The majority found that a stringent test would prevent legislation from overriding state sovereign immunity protected by the Eleventh Amendment.[110]

3. *Expansion of the Congressional Abrogation Power Pursuant to Article I:* Pennsylvania v. Union Gas Co.

In subsequent Supreme Court decisions, the abrogation analysis developed into a two-prong test to determine if a statute abrogated state sovereign immunity.[111] Building upon the abrogation doctrine, the test

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ceived federal funds. *See* Scanlon v. Atascadero State Hosp., 735 F.2d 359, 362 (9th Cir. 1984), *rev'd*, 473 U.S. 234 (1985).

106. *See Atascadero*, 473 U.S. at 240.

107. *See id.* at 242-43 (finding that abrogation threatened the doctrine of state sovereign immunity).

108. *See id.* at 243 (finding that abrogation could upset the balance of the federal system); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (finding that the vital role of the doctrine of state sovereign immunity in our federal system explains why the Supreme Court requires stringent tests to determine congressional intent).

109. *Atascadero*, 473 U.S. at 243.

110. *See id.*; *see also* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1122 (1996) (reasoning that the clear statement test was constructed to preserve the Eleventh Amendment and its federal principles). Despite the stringent abrogation test, the *Atascadero* decision foreshadowed a threat to the doctrine of state sovereign immunity. *See Atascadero*, 473 U.S. at 252 (Brennan, J., dissenting).

In his dissent, Justice Brennan criticized the doctrine of state sovereign immunity and the clear statement of intent rule set forth by the majority. *See id.* First, he contended that the current interpretation of the Eleventh Amendment was based on a mistaken historical premise that the Eleventh Amendment barred suits in diversity and federal question cases. *See id.* at 248. *See generally* David E. Egndahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972) (discussing the current practicality of sovereign immunity); Gibbons, *supra* note 4, at 1941-2002 (analyzing the diversity theory interpretation of the Eleventh Amendment). Justice Brennan argued that the Eleventh Amendment barred suits only in diversity jurisdiction, but not federal question jurisdiction. *See Atascadero*, 473 U.S. at 252-53. He claimed, therefore, that Congress was not subject to a stringent clear statement rule when creating a statutory right to sue states, but instead was subject to the rational basis standard of review. *See id.* at 255-56. Justice Brennan also asserted that Congress could abrogate the Eleventh Amendment pursuant to another valid exercise of power other than the Fourteenth Amendment. *See id.* at 252-53. He found that the clear statement test would not foreclose abrogation pursuant to other congressional powers. *See id.* at 253.

111. *See Seminole*, 116 S. Ct. at 1123 (expressing the test as two inquiries: "first,

required first that Congress legislate pursuant to a valid exercise of power,[112] and second that Congress express its intent to abrogate in the statute itself.[113] Despite the development of this stringent test, the possibility that the Court could validate congressional actions, which could expand Congress's authority to abrogate, still threatened the Eleventh Amendment.[114]

Pennsylvania v. Union Gas Co.[115] marked a decisive break[116] from the traditional judicial construction of the Eleventh Amendment by recognizing abrogation pursuant to Congress's plenary power over interstate commerce.[117] After being sued by the United States for environmental clean-up costs under the Comprehensive Environmental Response, Compensa-

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whether Congress has 'unequivocally expresse[d] its intent' . . . and second, whether Congress has acted pursuant to a valid exercise of power" (citation omitted) (alteration in original)); Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991) (highlighting the clear statement prong of the abrogation test).

112. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 454 (1976). The two pronged test was formed as a result of the combination of the holdings in *Fitzpatrick* and *Atascadero*. *See Seminole*, 116 S. Ct. at 1122; Green v. Mansour, 474 U.S. 64, 68 (1985).

113. *See Atascadero*, 473 U.S. at 243; *see also supra* notes 95-110 and accompanying text (discussing the development of the abrogation test established in *Atascadero*).

114. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989); *cf. Seminole*, 116 S. Ct. at 1130.

115. 491 U.S. 1 (1989).

116. *See id.* at 36 (Scalia, J., concurring in part, dissenting in part) (arguing the majority's decision departs from precedent). In *Union Gas*, the Court expanded Congress's power to abrogate state sovereign immunity, *see id.* at 20 (Brennan, J.), as foreshadowed in the dissenting opinions of *Fitzpatrick* and *Atascadero*. *See Atascadero*, 473 U.S. at 253 (Brennan, J., dissenting); *Fitzpatrick*, 427 U.S. at 454-55.

117. *See Union Gas*, 491 U.S. at 20 ("It would be difficult to overstate the breadth and depth of the commerce power."); *see also* U.S. CONST. art. I, § 8. The reasoning in *Union Gas*, extending congressional abrogation to the Interstate Commerce Clause, was commonly referred to as the "plan of convention" theory. *See* Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (noting that a state may consent to suit in federal court "either expressly or in the 'plan of convention'"). The plan of convention theory dictated that upon ratification of the Constitution, each state ceded powers to the federal government. *See Union Gas*, 491 U.S. at 20. According to the theory, the states thus ceded their sovereign immunity under the Constitution to the federal government in areas over which the federal government had total control. *See id.*; *see also* Victoria L. Calkins, Note, *State Sovereign Immunity After* Pennsylvania v. Union Gas Co.*: The Demise of the Eleventh Amendment*, 32 WM. & MARY L. REV. 439, 456-459 (1991) (discussing the "evisceration" of Eleventh Amendment state sovereign immunity by the decision in *Union Gas*); James Sherman, Comment, *Altered States: The Article I Commerce Power and the Eleventh Amendment in* Pennsylvania v. Union Gas, 56 BROOK. L. REV. 1413, 1413-15 (1991) (discussing how *Union Gas* impliedly overruled the traditional construction of the Eleventh Amendment); Susan Hill, Note, *Are States Free to Pirate Copyrighted Materials and Infringe on Patents?*—Pennsylvania v. Union Gas *May Mean That They Are Not*, 92 W. VA. L. REV. 487, 502-08 (1992) (discussing *Union Gas* and the rationale of the plan of convention theory).

tion, and Liability Act of 1980 (CERCLA),[118] the respondent filed a third party action against the State of Pennsylvania in federal court.[119] The respondent argued that because the State of Pennsylvania placed an easement on the respondent's land ten years prior to the suit, the state was partly liable for the clean-up costs.[120] The State of Pennsylvania argued that the Eleventh Amendment barred the suit because Congress unconstitutionally abrogated state sovereign immunity in CERCLA by legislating pursuant to the Interstate Commerce Clause.[121]

The majority applied the *Atascadero* two-pronged test to determine whether Congress had intended to abrogate state sovereign immunity when it enacted CERCLA.[122] The Supreme Court first addressed whether CERCLA clearly showed legislative intent to abrogate a state's sovereign immunity.[123] The Court found that CERCLA permitted a suit against a state in federal court, reasoning that Congress included statutory language adequate to clearly express its intent to abrogate state sovereignty.[124] The Court then addressed whether Congress had the power to abrogate state sovereign immunity under the Interstate Commerce Clause.[125] The plurality of the Court found that Congress had plenary power under the Interstate Commerce Clause,[126] similar to its Fourteenth Amendment power, and therefore, Congress could override a state's im-

118. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (1994). The United States sued the petitioner, the operator of a coal gasification plant, after a large coal tar deposit seeped into a creek near the petitioner's dismantled plant. *See Union Gas*, 491 U.S. at 5-6.

119. *See Union Gas*, 491 U.S. at 6.

120. *See id.*

121. *See id.* The district court dismissed the respondent's complaint on the grounds that the Eleventh Amendment barred the federal court from hearing the case. *See id.* The court of appeals affirmed the lower court's decision and found that there was no clear expression of intent in CERCLA to abrogate the state's sovereign immunity. *See id.* Upon certiorari, the Supreme Court vacated the opinion and remanded the case to determine whether a recent amendment to CERCLA expressed such required intent. *See id.* On remand, the court of appeals held that CERCLA was constitutional because the amendments clearly showed intent to abrogate the Eleventh Amendment. *See id.* Thus, Congress was legislating pursuant to a valid grant of power. *See id.*

122. *See id.* at 13, 19.

123. *See id.* at 7-13.

124. *See id.* at 13.

125. *See id.* at 13-23.

126. *See id.* at 16 (reasoning that the Commerce Clause, like the Fourteenth Amendment, "with one hand gives power to Congress while, with the other, it takes power away from the States"); *cf. id.* at 36, 42 (Scalia, J., concurring in part, dissenting in part) (reasoning that the majority's decision would upset the balance between federal authority and states' rights); *Seminole*, 116 S. Ct. at 1126 (stating that the plurality opinion in *Union Gas* should be read narrowly, due to the implications of a broad reading for the doctrine of state sovereign immunity).

munity to suit.[127]

To support its conclusion, the plurality adopted the *plan of convention theory*.[128] According to the theory, abrogation was constitutional because the states surrendered part of their sovereign immunity in areas such as interstate commerce when they ceded power to the federal government under the Constitution.[129] By holding that the states impliedly consented to abrogation, the Court did not overrule the decision in *Hans* but rather avoided the constitutional question of whether the Eleventh Amendment prohibited the judiciary from hearing controversies arising against a state.[130]

D. The Eleventh Amendment and Indian Tribes' Suits Against States in Federal Court: Blatchford v. Native Village of Noatak

The federal judiciary found the Eleventh Amendment was an absolute bar to suits brought by Indian tribes against states over state regulation of Indian gaming.[131] The Court found that pursuant to the Eleventh

127. *See Union Gas*, 491 U.S. at 16. Prior to *Union Gas*, the Court had recognized that Congress could abrogate states' immunity pursuant to the Interstate Commerce Clause only when a state expressly had waived its immunity. *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 475-76 (1987); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 252 (1985). *Union Gas*, however, construed the Interstate Commerce Clause as a valid power under which Congress could abrogate state sovereign immunity without the state's consent. *See Union Gas*, 491 U.S. at 19.

128. *See Union Gas*, 491 U.S. at 19-20.

129. *See id.* (finding that a state was not subject to suit in federal court unless it expressly waived its Eleventh Amendment privilege or else impliedly consented under the plan of convention theory by ratifying the Constitution); *see also* Blakeslee, *supra* note 73, at 129-35 (discussing the impact of the decision in *Union Gas* on Eleventh Amendment jurisprudence).

130. *See Union Gas*, 491 U.S. at 23. In *Hans v. Louisiana*, the Court's analysis of the Eleventh Amendment focused on the ways in which the Amendment limited Article III. *See* Hans v. Louisiana, 134 U.S. 1, 1-3 (1890); Calkins, *supra* note 117, at 439-42 (discussing the effect of *Union Gas* on traditional state sovereign immunity jurisprudence as established in *Hans*). On the other hand, in both *Fitzpatrick* and *Union Gas*, the Court did not discuss the Eleventh Amendment as a limit on Article III but instead broke from traditional state sovereign immunity analysis and focused on Congress's plenary powers as a limit on state power. *See Union Gas*, 491 U.S. at 31-42 (Scalia, J., concurring in part, dissenting in part). In his dissent, Justice Scalia argued that the plurality's opinion in *Union Gas* was flawed because its reasoning was inconsistent with traditional state sovereign immunity jurisprudence as established in *Hans*. *See id.* at 31. In *Seminole*, the Supreme Court treated Eleventh Amendment limitations on Article I as the Court did in *Hans*. *See Seminole*, 116 S. Ct. at 1122 (recognizing an expansive Eleventh Amendment).

131. *See* Idaho v. Coeur d'Alene Tribe, 798 F. Supp. 1443 (D. Id. 1992), *aff'd in part, rev'd in part*, 42 F.3d 1244 (9th Cir. 1994), *cert. granted* 116 S. Ct. 1415 (1996); *see also* Kevin J. Worthen & Wayne R. Farnsworth, *Who Will Control the Future of Indian Gaming? "A Few Pages of History Are Worth a Volume of Logic,"* 1996 BYU L. REV. 407, 439-47 (discussing the effect of the Eleventh Amendment on Indian tribal sovereignty); Brian M. Greene, Comment, *The Reservation Gambling Fury: Modern Indian Uprising or Unfair*

Amendment, states were not only immune to suits brought by private citizens, but also to suits brought by Indian tribes or other sovereign entities.[132] Furthermore, the Court held that states did not constructively waive their immunity to suit with respect to Indian tribes under the plan

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Restraint on Tribal Sovereignty?, 10 BYU J. PUB. L. 93, 94-95 (1996) (discussing the relevance of the Eleventh Amendment to Indian gaming); Newton, *supra* note 13, at *1-*5 (discussing the Eleventh Amendment issues presented by *Coeur d'Alene*).

With regard to Indian affairs, the Supreme Court previously held that state governments may not regulate or prohibit gambling on Indian lands. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221 (1987) (denying state intervention based on the threat of organized crime). The Supreme Court found that California could not criminally prosecute Indian tribes who were running commercial gambling facilities on Indian lands. *See id.* at 216-17. In *Cabazon*, California threatened to apply criminal sanctions against the Indians when the Indians opened gambling facilities on their lands. *See id.* at 207. The tribes sought a declaratory judgment stating that California had no power to apply statutory criminal penalties on Indian reservations. *See id.* at 206. California argued that it was justified in not allowing Indians to gamble on Indian lands because California's laws against gambling were criminal laws and that Congress had expressly granted California broad criminal jurisdiction over Indian lands within the state. *See id.* at 207-08.

The majority found that California had permitted and promoted a substantial amount of gambling in other settings. *See id.* at 208-10. The majority found that California regulated gambling and did not prohibit it. *See id.* at 211-14. The majority, therefore, concluded that the state had no authority to assert its jurisdiction over gaming activities on tribal lands. *See id.* at 214. The holding in *Cabazon* comported with fifty years of federal case law that held that state laws were not effective on Indian reservations. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1973) (concluding that the policy for leaving Indians free from state regulation had been first articulated one hundred and forty one years before the Court's decision); Williams v. Lee, 358 U.S. 217, 220 (1959) (finding that states did not have jurisdiction over Indian reservations). *See generally* Julian Schriebman, Developments in Policy, *Federal Indian Law*, 14 YALE L. & POL'Y REV. 353, 354-58 (1996) (discussing the effect of *Seminole* on the regulation of Indian gaming and states' rights).

In reaction to the decision in *Cabazon*, Congress enacted the IGRA to protect gaming on Indian reservations. *See* Pub. L. No. 100-497, 106 Stat. 2472 (codified as amended at 25 U.S.C. § 2710 (1994)); *see also* 134 CONG. REC. 24,027 (1987). Congressional committees discussed the importance of *Cabazon* and included it in their rationale for the passage of the IGRA. *See* S. REP. NO. 100-446, at 2-6, 22-23 (1987) (noting that the *Cabazon* Court balanced federal, state, and tribal interests to determine the proper degree of state authority over gaming on Indian Lands and finding that Congress should employ a similar balancing test when legislating in this area); 134 CONG. REC. 24,027 (1987) (Statement of Senator Evans) (arguing that the IGRA should be considered within the context of over a century of developed case law, including the basic principles that the Supreme Court set forth in the *Cabazon* decision). *See generally* T. Barton French, Jr., Note, *The Indian Gaming Regulatory Act and the Eleventh Amendment: States Assert Sovereign Immunity Defense to Slow the Growth of Indian Gaming*, 71 WASH. U. L.Q. 735, 738-40 (1993) (discussing the history of the Indian gaming issue). Despite the *Cabazon* holding, the controversy over Indian gaming on tribal lands remained heated. *See* Worthen & Farnsworth, *supra*, at 407-08 (explaining that Indian tribes have profited financially from gaming activities on reservations); Greene, *supra*, at 93-98 (discussing the differing concerns of Indian tribes and states with respect to Indian gaming); Schriebman, *supra*, at 353 (noting that the expansion of gaming on tribal Indian lands has been opposed by the states).

132. *See* Blatchford v. Native Village of Noatak, 501 U.S. 775, 783-85 (1991).

of convention theory.[133] Unless Congress constitutionally abrogated the Eleventh Amendment, the Amendment barred all suits brought against a sovereign state, including those brought by Indian tribes.[134]

Although not directly dealing with the conflict over Indian gaming, *Blatchford v. Native Village of Noatak*[135] marked a decisive victory for state sovereign immunity under the Eleventh Amendment in the context of Indian tribes' suits against states.[136] The *Blatchford* Court held that the principle of sovereign immunity barred suits brought not only by individuals and foreign states, but also by Indian tribes.[137] In *Blatchford*, Alaska Native Villages sued an Alaskan state official, seeking damages for money owed under a state statute.[138] The State of Alaska raised the sovereign immunity defense.[139] Alaska Native Villages, however, contended that the Eleventh Amendment did not apply to suits arising between two sovereigns[140] and that the states waived their immunity with respect to Indian tribes when they signed the Constitution.[141]

The Supreme Court addressed whether federal courts had jurisdiction to hear a case brought by an Indian tribe against a state for monetary damages.[142] The Court found that the notion of sovereign immunity, em-

133. *See id.* at 785-86.

134. *See id.* at 787-88.

135. 501 U.S. 775 (1991).

136. *See id.* at 781 (recognizing that the states did not waive their immunity under the plan of convention theory with respect to suits by Indian tribes). *See generally* Monette, *supra* note 61, at 416-35 (surveying sovereign immunity in the federalist system in the context of Indian tribes); Christopher L. Lafuse, Note, *Beyond* Blatchford v. Native Village of Noatak*: Permitting the Indian Tribes to Sue the States Without Regard to the Eleventh Amendment Bar*, 26 VAL. U. L. REV. 639 (1992) (discussing the effect of the decision in *Blatchford* on state sovereign immunity jurisprudence).

137. *See Blatchford*, 501 U.S. at 779-80. The Court revisited the issue of the Eleventh Amendment as a fundamental principle of state sovereign immunity in the context of suits by Indian tribes against states. *See id.* at 779. In *Blatchford*, the Court returned to the principle embodied in *Hans* and *Monaco*, finding that the doctrine of state sovereign immunity not only barred suits brought by individuals, but also those brought by other sovereigns, such as Indian tribes. *See id.* at 780; *see also* Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934) (finding that the principle of sovereign immunity extended to foreign sovereign countries suing states or state officials).

138. *See Blatchford*, 501 U.S. at 777-78 (citing ALASKA STAT. § 29.89.050 (Michie 1984) (repealed 1985)).

139. *See id.* at 777-78.

140. *See id* at 779-81.

141. *See id.* at 780-82. The district court dismissed the suit on the grounds that it violated the Eleventh Amendment. *See id.* at 778. The court of appeals reversed the district court's opinion and found that the state could not raise its Eleventh Amendment immunity defense because it did not apply to suits by Indian tribes against states. *See id.*; *see also* Native Village of Noatak v. Hoffman, 872 F.2d 1384 (9th cir. 1989), *withdrawn*, 896 F.2d 1157 (1990), *rev'd sub nom. Blatchford*, 501 U.S. 775 (1991).

142. *See Blatchford*, 501 U.S. at 777.

bodied in the Eleventh Amendment, extended to sovereign and foreign states.[143] The Court reasoned that the sovereign immunity defense was inherent in the nature of sovereignty, and could not be waived, unless by the consent of a state.[144] The majority then addressed whether the states impliedly waived their sovereignty with regard to Indian tribes when they adopted the Constitution, similar to the *plan of convention theory*.[145] The majority rejected this argument and found that states did not make any concession of sovereign immunity with respect to Indian tribes when adopting the Constitution because Indian tribes were not a party to the Constitution.[146] The rejection of the plan of convention theory foreshadowed that congressional abrogation under the Indian Commerce Clause may not have been constitutional in Eleventh Amendment Indian gaming cases.[147]

II. *SEMINOLE INDIANS OF FLORIDA V. FLORIDA*: THE ELEVENTH AMENDMENT AS THE SOVEREIGN PROTECTOR OF STATES' RIGHTS

A. *Tribal-State Compact Negotiations: The Framework for* Seminole*'s Abrogation Suit*

In *Seminole Indians of Florida v. Florida*,[148] the Supreme Court reaffirmed that the Eleventh Amendment protected state sovereign immunity and restricted the doctrine of abrogation.[149] In 1991, the Seminole

143. *See id.* at 777-82.

144. *See id.* at 780 n.1. The Court relied heavily on *Monaco* in finding that state sovereign immunity barred suits against Indian tribes in federal court. *See id.* In *Monaco*, the sovereign nation of Monaco tried to sue the State of Mississippi in federal district court. *See* Monaco v. Mississippi, 292 U.S. 313, 317-18 (1934). The dispute concerned the State of Mississippi's attempt to avoid liability for bonds that the state had bought prior to statehood. *See id.* The Court explained that the state enjoyed sovereign immunity to suits brought by both foreign nations, as well as by citizens of another state. *See id.* The *Monaco* Court found that the federal court lacked jurisdiction to hear the suit because the Eleventh Amendment represented the fundamental principle of sovereign immunity that barred all suits against a state. *See id.* In discussing *Monaco*, the *Blatchford* Court concluded that the doctrine of sovereign immunity barred suits brought by individuals or sovereign nations, including Indian nations. *See Blatchford*, 501 U.S. at 780-81.

145. *See Blatchford*, 501 U.S. at 781.

146. *See id.* at 782.

147. *Cf. Seminole*, 116 S. Ct. at 1126-28. (finding that states did not waive their sovereign immunity to suit pursuant to the Indian Commerce Clause under the plan of convention theory)

148. 116 S. Ct. 1114 (1996).

149. *See id.* at 1127-29. *See generally A Return to Conservative Activism*, ST. LOUIS POST-DISPATCH, Mar. 29, 1996, at 16C (editorial) (noting that the *Seminole* decision expanded the doctrine of state sovereign immunity); Erwin Chemerinsky, *Restricting Federal Court Jurisdiction*, TRIAL, July 1996, at 18 (discussing the judicial review and the future

Indian tribe inquired about negotiations with the State of Florida regarding gaming on its tribal reservation land pursuant to the Indian Gaming Regulatory Act of 1988 (IGRA).[150] The IGRA[151] allowed for the negotiation of gaming contracts between Indian tribes and a state and authorized Indian tribes to sue the state in federal court if the state refused to negotiate.[152] The State of Florida refused to negotiate with the Seminole

implications of the *Seminole* decision); Lyle Denniston, *Court Cuts U.S. Power Over States*, BALTIMORE SUN, Mar. 28, 1996, at A1 (arguing that the *Seminole* decision has far reaching implications beyond Indian gambling rights); Frank J. Murray, *High Court Revives States' Rights Against Lawsuits*, WASH. TIMES, Mar. 28, 1996, at A1 (noting that the *Seminole* decision is a landmark victory for states' rights advocates); Jim Myers, *Tribal Gaming Now Federal Issue*, TULSA WORLD, Mar. 29, 1996, at A1 (discussing the implications of the *Seminole* decision on Indian tribes); David G. Savage, *High Court Curbs Federal Lawsuits Against the States*, L.A. TIMES, Mar. 28, 1996, at A1 [hereinafter Savage, *High Court Curbs*] (noting that the *Seminole* case is an influential federalism decision); Jay Weaver & Bob French, *Florida Raises the Ante Against Seminoles' Slots*, SUN-SENTINEL (FLORIDA), Mar. 29, 1996, at 1A (discussing the effect of the *Seminole* decision on Indian tribes' rights to conduct gaming on Indian lands).

150. *See* Seminole Tribe of Florida v. Florida, 11 F.3d 1016, 1020-21 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996). The Seminole Indians wrote to the Governor of the State of Florida requesting to negotiate a tribal-state compact, pursuant to the IGRA. *See* Brief for Petitioner at 6-7, Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996) (No. 94-12). Two months later, the Seminole tribe submitted a proposed compact, but the Governor's counsel rejected the tribe's initial proposal with regard to most gaming activity except for poker. *See id.* at 7.

151. 25 U.S.C. §§ 2701-21 (1994 & Supp. 1995); *see also* Greene, *supra* note 131, at 98-99 (summarizing the legislative history of the IGRA). The IGRA was enacted as a result of increased litigation over Indian gaming. *See* Peter T. Glimco, Note, *The IGRA and the Eleventh Amendment: Indian Tribes are Gambling When They Try to Sue a State*, 27 J. MARSHALL L. REV. 193, 206 (1993) (describing federal regulation of Indian gaming before the IGRA). The IGRA was designed to address concerns of both Indian tribes and states. *See* Greene, *supra* note 131, at 98-99. The IGRA provided a basis for Indian tribes to operate gaming facilities in order to promote tribal economic development, self-sufficiency, and strong tribal governments. *See id.* The IGRA also addressed states' concerns by assuring fair and honest gaming, setting federal standards for casino gambling, and preventing infiltration by organized crime. *See id.*

152. *See* Glimco, *supra* note 151, at 197. Congress has plenary power to regulate relations with Indian tribes under the Indian Commerce Clause in the Constitution. *See* U.S. CONST. art. I, § 8, cl. 3. The IGRA attempted to regulate disputes over Indian gaming by requiring the negotiation of a tribal-state compact between states and tribes to allow for gaming on Indian lands. *See* § 2710(d)(1). Under IGRA, if the state refused to negotiate, the Indian tribe could sue the state in federal court. *See* § 2710(d)(7)(A)(i). As a result, many Indian tribes brought suits against states to enforce their rights to have gaming facilities on tribal lands. *See Seminole*, 116 S. Ct. at 1123 n.8; Ponca Tribe of Ok. v. Oklahoma, 37 F.3d 1422, 1427-28 (10th Cir. 1994), *vacated*, 116 S. Ct. 1410 (1996); Spokane Tribe of Indians v. Washington, 28 F.3d 991, 994-95 (9th Cir. 1991), *vacated*, 116 S. Ct. 1410 (1996); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 280-81 (8th Cir. 1993); Maxam v. Lower Sioux Indian Community of Minn., 829 F. Supp. 277, 279 (D. Minn. 1993); Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423, 1427 (D. Kan. 1993), *aff'd sub nom.* Ponca Tribe v. Oklahoma, 37 F.3d 1422 (10th Cir. 1994), *vacated*, 116 S. Ct. 1410 (1996); Seminole Tribe of Florida v. Florida, 801 F. Supp 655, 658 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th

tribe over gaming activities prohibited by state laws.[153]

Claiming that the state failed to negotiate a compact in good faith, the Seminole Indian tribe filed suit against the State of Florida and its Governor in federal district court pursuant to 25 U.S.C. § 2710(d)(7)(A)(i) & (B)(i).[154] The State of Florida filed a motion to dismiss, arguing that the Eleventh Amendment barred the suit.[155] The district court denied the state's motion and held that the IGRA constitutionally abrogated the Eleventh Amendment.[156] In an interlocutory appeal, the United States Court of Appeals for the Eleventh Circuit, reversed and remanded the case, finding that the Indian Commerce Clause did not empower Congress to abrogate state sovereign immunity.[157] The Supreme Court granted certiorari to reexamine the circumstances under which Congress may abrogate state sovereign immunity.[158]

Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996); Saulte Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1486-89 (W.D. Mich. 1992); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 557-58 (1991).

153. *See Seminole*, 11 F.3d at 1020.

154. § 2710(d)(7)(A)(i) & (B)(i). The provision states that the United States district courts shall have jurisdiction over:

> any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith . . . .
>
> An Indian tribe may initiate a cause of action . . . only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations . . . .

Id.; *Seminole*, 116 S. Ct. at 1121; *see also* Glimco, *supra* note 151, at 196-97 (discussing the legislative history of the IGRA); Christopher J. Moore, Comment, *What is Good for the Goose is Good for the Gambler: How the Indian Gaming Regulatory Act Fails to Abrogate State Immunity and Protects Tribal Immunity*, 21 OHIO N.U. L. REV. 1203, 1204-09 (1995) (discussing the mechanics of the IGRA).

155. *See Seminole*, 116 S. Ct. at 1121.

156. *See id.* The district court applied the abrogation test to determine if Congress had constitutionally abrogated the Eleventh Amendment in the IGRA. *See* Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 657-58 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996). The district court first found a clear expression of intent to abrogate the Eleventh Amendment in the language of the statute because the statute made numerous references to a "state" as a defendant in a suit. *See id.* at 658. The court also found that Congress acted pursuant to a valid exercise of power when legislating pursuant to the Indian Commerce Clause. *See id.* at 658-61. In finding that congressional abrogation pursuant to the Indian Commerce Clause was constitutional, the court reasoned that the Indian Commerce Clause was similar to the Interstate Commerce Clause because they were both plenary powers of Congress. *See id.* The court concluded that the IGRA constitutionally abrogated the Eleventh Amendment, pursuant to the Indian Commerce Clause. *See id.* at 161.

157. *See Seminole*, 116 S. Ct. at 1121-22.

158. *See id.* at 1122.

B. The Majority Opinion: Reaffirmation of the Two Hundred Year Old Doctrine of State Sovereign Immunity

In *Seminole*, the Supreme Court held that the Eleventh Amendment protected state sovereign immunity, and that Congress could abrogate sovereign immunity pursuant only to the Enforcement Clause of the Fourteenth Amendment.[159] In affirming the Eleventh Circuit's holding, the Supreme Court found that neither the Interstate Commerce Clause nor the Indian Commerce Clause empowered Congress to abrogate state sovereign immunity.[160] The five member majority[161] rejected the theory that Congress could abrogate the Eleventh Amendment pursuant to its plenary powers by criticizing the plan of convention rationale set forth in *Union Gas*.[162]

1. Recognizing Traditional Eleventh Amendment Jurisprudence

The *Seminole* Court began its inquiry into congressional abrogation by discussing Eleventh Amendment jurisprudence.[163] The majority first recognized that the Eleventh Amendment represented an extra-constitutional principle of state sovereign immunity.[164] In explaining the

159. *See id.* at 1131. The majority overruled *Union Gas* and reconfirmed that the traditional principle of state sovereign immunity embodied in the Eleventh Amendment was not subject to eradication by Congress's exclusive control over Indian commerce. *See id.*

160. *See id.* at 1128; *see also* Pat Smith, *Point:* Seminole Tribe of Florida v. Florida*: A Victory for States Rights; Indian Gaming Act Caught in the Crossfire*, MONT. LAW., July-Aug. 1996, at 21-22 (discussing the effect of *Seminole* on sovereign tribal nations).

161. *See Seminole*, 116 S. Ct. at 1119. Chief Justice Rehnquist delivered the opinion of the Court, with Justices O'Connor, Scalia, Kennedy, and Thomas joining. *See id.* Justice Stevens filed a dissenting opinion. *See id.* at 1133. Justice Souter also dissented, joined by Justices Ginsburg and Breyer. *See id.* at 1145.

162. *See id.* at 1123-28; *see also* David G. Savage, *States on a Winning Streak*, A.B.A. J., June 1996, at 46, 46-47 [hereinafter Savage, *Winning Streak*] (discussing the Eleventh Amendment *Seminole* decision in the context of the balance between the sovereignty of the states and the authority of Congress).

163. *See Seminole*, 116 S. Ct. at 1122. The Court looked to federal case law and found that for over a century the Court had consistently held that the Eleventh Amendment protected sovereign immunity and had restricted accordingly the jurisdiction of the federal courts to hear cases and controversies between states. *See id.* at 1122 n.7 (citing additional cases that stood for the proposition that state sovereign immunity was assumed in Article III of the Constitution); Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (reaffirming that the Eleventh Amendment should have been interpreted expansively when state sovereign immunity was at stake); Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (explaining that the Amendment stood "not so much for what it said but for the presupposition of our constitutional system it confirm[ed]," and that the states retained their sovereign immunity when they "entered the federal system"); Hans v. Louisiana, 134 U.S. 1, 10 (1890) (stating that state sovereign immunity had been "clearly established").

164. *See Seminole*, 116 S. Ct. at 1122. The Court found that the Eleventh Amendment did not necessarily mean exactly what it said on its face, but rather, stood for the "presup-

rationale in *Hans*, the majority noted that state sovereign immunity was inherent in our federal system of government and that the Eleventh Amendment barred federal jurisdiction over suits against unconsenting states.[165] The majority then recognized that Congress could abrogate the Eleventh Amendment in limited situations if the statute expressed clear intent to abrogate immunity and Congress acted pursuant to a valid exercise of power.[166]

2. *Departing from the Doctrine of Sovereign Immunity*

After agreeing with the Eleventh Circuit that Congress showed clear intent to abrogate state sovereign immunity in the IGRA,[167] the majority discussed whether the Indian Commerce Clause empowered Congress to abrogate the Eleventh Amendment.[168] The majority found that the Court previously had authorized abrogation pursuant to the Enforcement

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position" that the federal system included the sovereign immunity of the states. *See id.* The majority recognized that the Eleventh Amendment represented the idea that a state was a sovereign entity whose immunity was preserved under the Constitution. *See id.* Furthermore, the majority recognized that a state's sovereignty was extremely important because it sustained the nature and the balance of the federal system. *See id.*

165. *See id.* The majority reconfirmed that the presupposition of sovereign immunity established in *Hans* had two parts. *See id.*; *Hans*, 134 U.S. at 10. The majority found, first, that states were sovereign entities in the federal system and, second, that inherent in the states' sovereignty was the principle that they were immune to suit. *See Seminole*, 116 S. Ct. at 1122; *Hans*, 134 U.S. at 10.

166. *See Seminole* 116 S. Ct. at 1123. The majority analyzed the test established in *Atascadero* to determine if Congress's abrogation of state sovereign immunity under the IGRA was warranted. *See id.*; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). The *Atascadero* test required that the IGRA show Congress's clear intent to abrogate and that Congress act pursuant to a valid exercise of power when enacting the IGRA. *See Seminole*, 116 S. Ct. at 1122; Green v. Mansour, 474 U.S. 64, 68 (1985); *Atascadero*, 473 U.S. at 242. The majority also noted that applying such a stringent test would protect the Eleventh Amendment against unwarranted abrogation. *See Seminole*, 116 S. Ct. at 1122; *Atascadero*, 473 U.S. at 238-39; Quern v. Jordan, 440 U.S. 332, 345 (1979).

167. *See Seminole*, 116 S. Ct. at 1123-24. The majority found that, on its face, the IGRA showed clear intent and unequivocal language to abrogate the Eleventh Amendment. *See id.* The majority also found that the IGRA met the unequivocal language test set forth in *Dellmuth v. Muth*, 491 U.S. 223 (1989). *See Seminole*, 116 S. Ct. at 1123. The *Seminole* Court held the IGRA met the *Atascadero* test because it showed Congress's clear intent to abrogate on the face of the statute and because it made numerous references to suits against a "state." *See id.* at 1124; *see also States' Sovereign Immunity Protected by the 11th Amendment*, MEALEY'S LITIG. REP.: SUPERFUND, Apr. 11, 1996, at 8 [hereinafter *States' Sovereign Immunity*].

168. *See Seminole*, 116 S. Ct. at 1124-25. Before applying the second prong of the abrogation test to the IGRA, the Court discussed the petitioners' argument that the Eleventh Amendment did not bar suits demanding injunctive relief rather than monetary relief. *See id.* The Court rejected this argument, reasoning that the jurisdictional bar of the Eleventh Amendment was not avoided simply because a suit demanded injunctive relief. *See id.* The Court found that the relief sought was irrelevant to whether the state can raise a sovereign immunity defense. *See id.*; *see also* Cory v. White, 457 U.S. 85, 90 (1982) (hold-

Clause of the Fourteenth Amendment and the Interstate Commerce Clause, but not the Indian Commerce Clause.[169] The majority acknowledged that the Enforcement Clause empowered Congress to abrogate state sovereignty because the Amendment expressly dictated that Congress shall enforce the provisions of the Fourteenth Amendment on the states.[170] The Court then acknowledged that abrogation under the Interstate Commerce Clause was authorized because states ceded sovereign immunity to Congress on issues concerning interstate commerce upon signing the Constitution.[171] Because Congress passed the IGRA pursuant to neither the Interstate Commerce Clause nor the Enforcement Clause, the majority inquired whether the Indian Commerce Clause was analogous to the Interstate Commerce Clause to determine whether abrogation under the IGRA was constitutional.[172]

The majority, therefore, examined the Court's rationale in *Union Gas* regarding the Interstate Commerce Clause's grant of power to Congress to abrogate the Eleventh Amendment.[173] The majority found that, pursuant to both the Interstate Commerce Clause and the Indian Commerce Clause, Congress could enact legislation limiting state authority.[174] The majority concluded that the Indian Commerce Clause was analogous to the Interstate Commerce Clause, reasoning that the former was a plenary power similar to the latter.[175] The majority, however, determined that congressional abrogation pursuant to the Indian Commerce Clause was only warranted so long as the holding in *Union Gas* was

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ing that the Eleventh Amendment bar applies regardless of whether monetary relief is sought).

169. *See Seminole*, 116 S. Ct. at 1125. In *Fitzpatrick*, the Court authorized abrogation pursuant to the Enforcement Clause. *See* Fitzpatrick v. Bitzer, 427 U.S. 455, 456 (1976). In *Union Gas*, the Court authorized abrogation pursuant to the Interstate Commerce Clause. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20 (1989).

170. *See Seminole*, 116 S. Ct. at 1125. In *Fitzpatrick*, the Court found that the Enforcement Clause enlarged Congress's powers and diminished states' powers. *See Fitzpatrick*, 427 U.S. at 455-56. The *Fitzpatrick* Court thus held that Congress's powers pursuant to the Enforcement Clause were plenary and, therefore, that Congress could abrogate the Eleventh Amendment when enforcing the Fourteenth Amendment. *See id.* at 456; Katzenbach v. Morgan, 384 U.S. 641, 648 (1966).

171. *See Seminole*, 116 S. Ct. at 1125-26.

172. *See id.* at 1126.

173. *See id.* at 1125-26.

174. *See id.* at 1126-27.

175. *See id.* The majority found that according to the rationale of the plurality in *Union Gas*, the states' cession of sovereignty under the Constitution granted Congress plenary power to regulate interstate commerce. *See id.* at 1126; Pennsylvania v. Union Gas Co., 491 U.S. 1, 17 (1989). According to *Union Gas*'s rationale, a state's cession of authority under the Constitution included surrendering immunity to suit. *See Seminole*, 116 S. Ct. at 1126-27; *Union Gas*, 491 U.S. at 42 (Scalia, J., concurring in part, dissenting in part).

constitutional.[176]

3. *Re-recognizing a Limit on Congress's Power to Abrogate*

Applying the principle of stare decisis, the majority found that the holding in *Union Gas* deviated from the established state sovereign immunity precedent before *Union Gas* was decided and, therefore, that congressional abrogation pursuant to the Interstate Commerce Clause, and further the Indian Commerce Clause, were unconstitutional.[177] The majority rejected the rationale set forth in *Union Gas*, reasoning that the *Union Gas* Court inexplicably deviated from the traditional Eleventh Amendment jurisprudence established in *Hans*.[178] First, the majority found that *Union Gas*'s plan of convention theory rationale[179] unconstitutionally empowered Congress under Article I to expand the scope of the jurisdiction of federal courts under Article III.[180] Under the plan of

176. *See Seminole*, 116 S. Ct. at 1126-28. The *Seminole* Court agreed with the petitioner that if the Court adopted the reasoning in *Union Gas* then abrogation pursuant to the Indian Commerce Clause was constitutional. *See id.* But instead of holding that the Indian Commerce Clause empowered Congress to abrogate, the Court reconsidered whether the decision in *Union Gas* was constitutional. *See id.*

177. *See id.* at 1128. The Court recognized that the principle of stare decisis mandated an "'evenhanded, predictable, and consistent development'" of the law in reliance on prior judicial decisions. *Id.* at 1127 (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991), and noting that reliance on prior decisions contributed to the integrity of the judicial system). Generally, the majority in *Seminole* inquired into whether the *Union Gas* decision deviated from the traditional development of state sovereign immunity jurisprudence since *Hans*. *See id.* For further explanation of the principles of stare decisis, see Jerold H. Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 216-19 (noting the principle of stare decisis "impose[d] a special burden upon the Court"); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752-53 (1988) (discussing the dangers of judicial reconsideration); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 600-01 (1987) (discussing the value of stability in decisionmaking); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1349-50 (1990) (discussing the interests served by stare decisis).

178. *See Seminole*, 116 S. Ct. at 1127-28 (concluding that *Union Gas* was a "solitary departure" from established law); Sarah Bond, *Counterpoint:* Seminole Tribe of Florida v. Florida*: A Victory for States Rights; Indian Gaming Act Caught in the Crossfire*, MONT. LAW., July-Aug. 1996, at 21, 22-23 (discussing the Court's rationale in overruling *Union Gas*); Smith *supra* note 163, at 23 (arguing that the Court overruled *Union Gas* in order to curb Congress from enacting legislation that would interfere with state sovereignty).

179. *See supra* notes 128-29 and accompanying text.

180. *See Seminole*, 116 S. Ct. at 1128. The majority explained that before *Union Gas*, the Court had never authorized Congress to expand the jurisdictional boundaries of the federal courts in Article III. *See id.* In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court interpreted the Constitution to bar Congress's authority to amend the Original Jurisdiction Clause of Article III. *See id.* at 176-77. The majority found that the *Union Gas* plurality had disregarded *Marbury* and mistakenly interpreted the doctrine of waiver of sovereign immunity to allow abrogation of the Eleventh Amendment. *See Seminole*, 116 S. Ct. at 1128; Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184, 191 (1964). The *Seminole* majority rejected the reasoning in *Union Gas* because it authorized Congress

convention theory, Congress could add to federal jurisdiction set out in Article III when enacting legislation pursuant to the Interstate Commerce Clause.[181] Since the Supreme Court's landmark decision in *Marbury v. Madison*,[182] the Court has prohibited Congress from adding to the original jurisdiction of federal courts.[183] Second, the majority found that the *Union Gas* Court misinterpreted *Fitzpatrick*, because the language of the Interstate Commerce Clause was not so narrowly tailored as to empower Congress to abrogate state sovereign immunity as the Enforcement Clause.[184] The majority overruled *Union Gas*, concluding that, while strong, the policy of stare decisis did not justify adherence to such reasoning.[185]

In conclusion, the majority held that neither the Interstate Commerce Clause nor the Indian Commerce Clause empowered Congress to abrogate the Eleventh Amendment and that, therefore, federal courts did not have jurisdiction to hear the case brought by the Seminole tribe.[186] The Court found that the Eleventh Amendment restricted Congress from using its Article I powers to circumvent the constitutional limitations restricting the judicial power under Article III.[187] Further, in reaffirming the principle established in *Hans*, the majority held that the Eleventh Amendment acted as a limit on both Article I and Article III.[188]

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to add to the original jurisdiction of federal courts set forth in Article III and because states had not constructively waived their right to be sued under the Constitution. *See Seminole*, 116 S. Ct. at 1128.

181. *See Seminole*, 116 S. Ct. at 1128; *see also* Savage, *Winning Streak*, *supra* note 162, at 46-47 (discussing the ramifications of overruling *Union Gas*)

182. 5 U.S. 137 (1 Cranch)(1803).

183. *See Seminole*, 116 S. Ct. at 1128.

184. *See id.*

185. *See id.* In overturing *Union Gas*, the majority reasoned that *Union Gas* represented an anomalous departure from established state sovereign immunity jurisprudence occurring within the five years since it was decided. *See id.*; Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddie, Inc., 506 U.S. 139, 144-48 (1993) (citing cases reaffirming the sovereign immunity principle that, absent a state's consent, it is immune from suits in federal court). Second, the majority found that the decision was questionable precedent because a majority of the Court had disagreed with the plurality's rationale. *See Seminole*, 116 S. Ct. at 1128. Finally, the majority found that *Union Gas* undermined the function of Article III by authorizing Congress to add to federal jurisdiction set out in Article III. *See id.*

186. *See Seminole*, 116 S. Ct. at 1131-32; *see also* Bond, *supra* note 178, at 11-23 (discussing the rationale behind the *Seminole* Court's conclusion); *State's Sovereign Immunity*, *supra* note 171, at 8 (predicting the broad ramifications of the *Seminole* decision).

187. *See Seminole*, 116 S. Ct. at 1131-32. In conclusion, the majority stated that even if Congress had complete law making authority under the Constitution over a particular area, the Eleventh Amendment barred congressional authorization of a right to sue a state by private individuals. *See id.* at 1131.

188. *See id.* at 1132. The majority stated that the Eleventh Amendment restricted the judicial power under Article III, and that Article I could not be used to evade the constitu-

C. The Dissents: Critiquing the Sovereign Immunity Doctrine

Both dissenting Justices challenged not only the majority's reasoning concluding that state sovereign immunity acted as a limit on Article I, but also its adherence to cases construing the "constitutional" principle of state sovereign immunity.[189] Justice Stevens argued that the majority mistakenly relied on an extra-constitutional principle of sovereign immunity, and reasoned that such a principle did not bar congressional abrogation pursuant to the Interstate Commerce Clause.[190] Justice Souter questioned the majority's reliance on the historical principle that the Eleventh Amendment barred all suits against a state and concluded that the Amendment only barred suits in diversity, as stated in the letter of the Amendment.[191]

1. Justice Stevens: The Non-Constitutional Doctrine of Sovereign Immunity and the Inability of Congress to Amend Federal Court Jurisdiction

In his dissent, Justice Stevens rejected the majority's rationale, reasoning that the majority improperly relied on an unprecedented non-constitutional principle of state sovereign immunity to limit Congress.[192] First, Justice Stevens asserted that the majority's rationale was incorrect because the Eleventh Amendment traditionally limited the judicial branch, and not Congress.[193] He argued that neither the language of the Eleventh Amendment nor the decision in *Hans* evidenced any constitutional principle limiting Congress from abrogating the Eleventh Amendment.[194]

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tional limitations the Eleventh Amendment placed upon the judiciary's jurisdiction. *See id.*

189. *See id.* at 1133 (Stevens, J., dissenting), 1145 (Souter, J., dissenting); *see also* Savage, *Winning Streak*, *supra* note 162, at 47 (noting that in light of the length and analysis of the dissenting opinions in *Seminole*, the struggle over sovereign immunity is likely to continue into the future).

190. *See Seminole*, 116 S Ct. at 1134 (Stevens, J, dissenting); *see also* Victoria Slind-Flor, *High Court Gambling Case May Give States Big Payoff*, NAT. L. J., July 8, 1996, at B1 (noting that according to Justice Stevens, the *Seminole* decision limits Congress's authority to provide a federal forum for other types of cases).

191. *See Seminole*, 116 S. Ct. at 1144 (Stevens, J., dissenting).

192. *See id.* at 1133-34. Justice Stevens argued that the majority's opinion was flawed because it found that the Eleventh Amendment limited Article I when precedent had always assumed that Congress had the power to overcome the Eleventh Amendment. *See id.* Justice Stevens asserted that *Chisholm*, *Hans*, *Fitzpatrick*, and *Union Gas* assumed that Congress had the power to create a private cause of action against a state in federal court. *See id.* at 1133-35. *See generally* Nowak, *supra* note 4, at 1414-69 (discussing the distinction between the congressional and the judicial power to create a federal cause of action against states).

193. *See Seminole*, 116 S. Ct. at 1137-38 (Stevens, J., dissenting).

194. *See id.* at 1137-39. Justice Stevens argued that the *Hans* Court relied on Justice

Furthermore, Justice Stevens argued that the majority mistakenly relied on the common law principle of state sovereign immunity to limit congressional authority.[195] He claimed that Congress was not necessarily limited by an extra-constitutional common law doctrine.[196] Thus, Justice Stevens contended that the majority's rationale was fundamentally flawed because it relied solely on an extra-constitutional interpretation of state sovereign immunity, when no constitutional principle of state sovereign immunity existed.[197]

Second, Justice Stevens argued that the majority's opinion was inconsistent because it recognized a "narrow and illogical" exception to the Eleventh Amendment, whereby Congress can only add to the jurisdiction of federal courts set forth in Article III if enacting legislation pursuant to the Enforcement Clause.[198] Justice Stevens agreed with the majority's finding that Congress may not expand the jurisdictional limits set forth in Article III.[199] According to Justice Stevens, the majority's opinion was flawed because it conceded that Congress may not add to the jurisdiction of federal courts but recognized that the Enforcement Clause granted Congress authority to amend the Original Jurisdiction Clause of Article III.[200] Justice Stevens recognized, however, that although Congress may not abrogate state sovereign immunity by adding to the federal courts' jurisdiction, Congress may overcome it by denying states the right to rely on the defense of state sovereign immunity.[201]

In his conclusion, Justice Stevens argued that the Court should discard the common law sovereign immunity doctrine[202] relied on by the majority

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Iredell's dissent in *Chisholm* and on statements made by Hamilton in *The Federalist*, both of which assumed that Congress had the power to overcome the doctrine of state sovereign immunity. *See id.* at 1135, 1141. He claimed that the *Hans* Court assumed that Congress could abrogate sovereign immunity by recognizing that Congress could overcome the jurisdictional bar of state sovereign immunity through legislation. *See id.* at 1138.

195. *See id.* at 1138-39.

196. *See id.* at 1139 (reasoning the common law principle of state sovereign immunity has the status of mere "presumption," which can be "displaced" by Congress).

197. *See id.* at 1134 (reasoning that Congress clearly had the power to ensure that a cause of action could be brought by a citizen of a state against a state).

198. *See id.* Justice Stevens argued that the decision in *Fitzpatrick* was flawed because it recognized that Congress could add to the jurisdiction of federal courts in Article III pursuant to the Enforcement Clause. *See id.* at 1142.

199. *See id.* at 1139, 1142

200. *See id.* at 1142.

201. *See id.*

202. *See id.* at 1142-43. Justice Stevens argued that, given the majority's unprecedented conclusion that the Eleventh Amendment acts as a limit on Congress, the common law doctrine on which the court based its opinion should be limited or rejected rather than expanded. *See id.* He contended that there was no sound reason for "enshrining the judge-made" common law doctrine that has no precedential or practical value in the fed-

to bar congressional authority to abrogate.[203] He argued that the doctrine was out-dated and served no modern purpose.[204] In the alternative, Justice Stevens found that the Court should have conceded to the doctrine of congressional abrogation because the legislature was better equipped to weigh federalism issues and to consider whether states should be immune from suit.[205]

2. *Justice Souter: The Legality of Federal Question Suits Against States in Federal Court and the Implications for the Modern Doctrine of Sovereign Immunity*

Justice Souter, joined by Justices Ginsberg and Breyer, explained that the majority's state sovereign immunity rationale was fundamentally unconstitutional as well as historically and illogically misinterpreted.[206] First, Justice Souter reasoned that the majority mistakenly found that the Eleventh Amendment barred both suits brought under a federal question and suits brought in diversity.[207] Justice Souter concluded that the Founders intended the Eleventh Amendment to bar suits in diversity but not federal question suits.[208] Basing his conclusion on pre-constitutional debates and the language of the Eleventh Amendment,[209] Justice Souter stated that the Founders never intended a sovereign state to be immune from suits arising under its own laws.[210]

Justice Souter found that the belief that the Eleventh Amendment barred suits in both federal question and diversity contexts originated in

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eral system. *Id.* at 1144. Justice Stevens proposed that the legislature would be better equipped than the Court to determine if abrogation threatens the federal balance. *See id.*

203. *See id.* at 1143-44.

204. *See id.* at 1142-44; Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc. 506 U.S. 139, 151 (1993) (Stevens, J., dissenting). In his dissenting opinion in *Puerto Rico*, Justice Stevens argued that the rationale for the Eleventh Amendment was "embarrassingly inefficient." *Id.* at 151. Justice Stevens argued that the sovereign immunity defense was outdated and sacrificed fairness in order to preserve state sovereign immunity. *See id.*

205. *See Seminole*, 116 S. Ct. at 1143; *cf.* Herman Schwartz, *Supreme Court Opens New Round in Federal-State Fight*, L.A. TIMES, Apr. 7, 1996, at M2 (discussing the federalism controversy highlighted in the *Seminole* decision).

206. *See Seminole*, 116 U.S. at 1145 (Souter, J., dissenting).

207. *See id.*

208. *See id.* at 1167. Because Hamilton addressed the sovereign immunity defense in diversity but not in federal question cases, Justice Souter criticized the majority's reliance on Hamilton's discussion of sovereign immunity in *The Federalist No. 83*. *See id.*; THE FEDERALIST NO. 81 (Alexander Hamilton).

209. *See Seminole*, 116 S. Ct. at 1152 n.12. Justice Souter reasoned that, as evidenced by the clear and unambiguous language of the Amendment, the drafters obviously did not intend to address state sovereign immunity with regard to federal question cases. *See id.*

210. *See id.* at 1170-71.

Hans.[211] According to Justice Souter, the *Hans* Court misread the Eleventh Amendment and common law precedent, mistakenly holding that the Amendment barred federal question cases as well as diversity cases.[212] He concluded that because the Eleventh Amendment did not apply to federal question cases, such as *Seminole*, the Supreme Court could not bar Congress from creating a private right of action to sue a state.[213]

After determining that the Eleventh Amendment did not apply in federal question cases, Justice Souter addressed whether the common law doctrine of state sovereign immunity limited the judicial or the legislative branches.[214] Justice Souter explained that allowing sovereign states to be immune from federal question cases was contrary to our understanding of a federal government, particularly because the role of the legislature embraced a concept of legislative supremacy.[215] He further asserted that neither history nor precedent justified a common law doctrine of sovereign immunity that barred the judiciary from hearing federal question cases.[216] Justice Souter, therefore, determined that the majority's opinion was flawed because neither the Constitution nor the common law barred congressional authority to abrogate the Eleventh Amendment in federal question cases.[217]

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211. *See id.* at 1156-57.

212. *See id.* at 1156. Justice Souter reasoned that the *Hans* decision was wrongly decided because the *Hans* Court was mistaken in holding that the Eleventh Amendment barred federal question cases brought by a state citizen. *See id.* He explained that the *Hans* Court actually relied on the historical common law principle of state sovereign immunity, which was not found in the text of the Constitution. *See id.* The *Hans* Court thus mistakenly relied on a common law doctrine and unjustifiedly integrated it into the text of the Eleventh Amendment. *See id.*

213. *See id.* at 1151. Justice Souter argued that there was no logical reason to explain why the Eleventh Amendment deprived federal courts of jurisdiction over all suits against states. *See id.* Because the plaintiffs in the *Seminole* case were citizens of the state that they sued, Justice Souter concluded that the Eleventh Amendment did not apply to them. *See id.* at 1152.

214. *See id.* at 1159.

215. *See id.* at 1170-71. Justice Souter argued that when the new American federal government was formed, the Framers intended that the federal government's law would ultimately govern, although two sovereigns would co-exist within the same government. *See id.* In light of this consideration, disallowing the federal courts to hear cases against states that addressed a federal law or question would contradict this system of government. *See id.*

216. *See id.* at 1172. Justice Souter reasoned that the Framers would condemn the majority's decision in *Seminole* because it prevented Congress from altering or changing common law rules, plainly within its power to do. *See id.* Essentially, Justice Souter contended that the majority's decision was unauthorized because the Court gave common law rules constitutional status, giving power to the states at the expense of Congress's power. *See id.*

217. *See id.*

In conclusion, Justice Souter asserted that the Court should neither overrule *Hans* or *Union Gas* in light of the doctrine of stare decisis, nor extend the meaning of the Eleventh Amendment to bar legislative action.[218] He stated that the *Seminole* majority was acting outside the scope of its judicial functions by legislating.[219] He reasoned that the majority was acting as a legislature by extra-constitutionally construing the Eleventh Amendment as a limit on congressional action, as the Court did in *Lochner v. New York*.[220] He concluded that because abrogation is a legislative function, the Court should not limit it.[221]

II. RECONSTRUING THE NEW DOCTRINE OF SOVEREIGN IMMUNITY

A. Inconsistency of State Sovereign Immunity after Seminole

On the surface, the majority's holding in *Seminole* appeared consistent with the Eleventh Amendment jurisprudence established in *Hans*, *Fitzpatrick*, and *Atascadero*; in reality, however, the holding eviscerated the traditional doctrine it so desperately tried to preserve.[222] While the majority reasonably construed the Eleventh Amendment[223] to continue the tradition followed by the Court in *Hans*[224] and appropriately overruled *Union Gas*, the holding in *Seminole* ultimately confused the doctrine of

218. *See id.* at 1184-85. Justice Souter would treat *Hans* as embracing the doctrine of state sovereign immunity, even in federal question cases. *See id.* at 1184. However, he would not extend *Hans*, as had the majority, to bar congressional action from abrogating state sovereign immunity. *See id.* at 1184-85.

219. *See id.*

220. 198 U.S. 45 (1905). Justice Souter asserted that the majority was acting similar to the *Lochner* Court, which reigned in an era where Congress enacted legislation to abrogate common law economic principles. *See Seminole*, 116 S. Ct. at 1176-77. Like the *Lochner* Court, the majority constitutionalized common law principles to bar congressional actions. *See id.* Justice Souter explained that like the type of judicial scrutiny found in *Lochner*, the majority's judicial practices are unconstitutional. *See id.* He contended that the Court should not tolerate this type of decision-making. *See id.* at 1177; *see also* Schwartz, *supra* note 205 (discussing the effect of the *Seminole* decision on the federal balance).

221. *See Seminole*, 116 S. Ct. at 1185. Justice Souter argued that the majority should defer to Congress on all abrogation issues, and should only apply the "clear statement" rule to determine whether Congress's abrogation of the Eleventh Amendment would be unjustified. *See id.*; *see also* Smith, *supra* note 160, at 22-23 (discussing the negative effect of the *Seminole* decision on tribal sovereignty)

222. *See Seminole*, 116 S. Ct. at 1133, (Stevens, J., dissenting); *id.* at 1145 (Souter, J., dissenting); *see also* Smith, *supra* note 160, at 22-23 (arguing the Supreme Court just happened to "use" the *Seminole* case to limit Congress from enacting legislation that interfered with sovereign immunity and did not consider the effect on Indian tribes).

223. *See Seminole*, 116 S. Ct. at 1122 (finding that the Eleventh Amendment stood for more than merely the letter of the Amendment; it also stood for the doctrine of sovereign immunity).

224. *See id.* at 1127.

state sovereign immunity rather than clarifying it.[225] As Justice Stevens and Justice Souter recognized, the ambiguity of the *Seminole* opinion lay in the majority's construction of the Eleventh Amendment as a limit on Congress's power.[226] Furthermore, as Justice Souter argued, the majority's opinion lacked foundation because it simultaneously prohibited and allowed congressional abrogation of the Eleventh Amendment.[227]

1. Unwarranted Construction of a Limit on Congress

First, the majority misconstrued the Eleventh Amendment as a limit on Congress's legislative powers.[228] Before *Seminole*, the Court had never construed the Eleventh Amendment to limit Congress's Article I powers.[229] Congress enacted and the states ratified the Eleventh Amendment to limit expressly the federal courts' original jurisdiction set forth in Article III.[230] Justice Stevens argued that the majority strayed from *Hans* by construing the Eleventh Amendment as a limit on *any* federal action, whether the action was congressional, judicial, or executive.[231] The ma-

225. *See id.* at 1127-28 (asserting that *Union Gas* "created confusion" in the lower federal courts and, therefore, should be overruled); *see also* Joan Biskupic, *High Court's Goal: Rein in Congress, Empower States*, SEATTLE TIMES, Mar. 29, 1996, at A8 (stating that it is unclear to what extent the *Seminole* decision will affect all types of suits against states such as enforcing environmental regulations); Peter S. Canellos, *High Court Deferring to States*, BOSTON GLOBE, Mar. 29, 1996, at 3 (discussing that the *Seminole* decision will greatly restrict lower courts from deciding numerous cases in which a state government is sued); Savage, *High Court Curbs*, *supra* note 149, at A1 (discussing the impact of the *Seminole* decision on the environment and copyright protection); David G. Savage, *High Court Decisions May Alter Rules for Making Laws*, L.A. TIMES, March 29, 1996, at A1, 17 [hereinafter Savage, *High Court Decisions*] (predicting the effect of the *Seminole* decision on environmental law, bankruptcy law, copyright law, and American Indian affairs).

226. *See Seminole*, 116 S. Ct. at 1133 (Stevens, J., dissenting); *cf. id.* at 1119 (finding that the Eleventh Amendment limits both Article I and Article III).

227. *See id.* at 1133-34 (Stevens, J., dissenting); *cf. id.* at 1123-25 (holding that the Enforcement Clause expressly dictates that Congress can intrude on the states' sovereignty when enacting legislation to enforce the provisions of the Fourteenth Amendment).

228. *See id.* at 1133 (Stevens, J., dissenting). Although both Justices Stevens and Souter found an extension of the *Hans* doctrine barring congressional abrogation to be unconstitutional, the Justices' reasoning in arriving at this conclusion differed. *See id.* at 1141 (Stevens, J., dissenting), 1177 (Souter, J., dissenting). Justice Souter argued that neither the Eleventh Amendment nor *Hans* necessarily acted as a limit upon Congress's authority. *See id.* at 1141. Justice Souter argued that neither history, precedent, nor reason showed that the doctrine of state sovereign immunity, whether embodied in the Eleventh Amendment or expressed as a common law doctrine, applied to federal question cases such as *Seminole*. *See id.* at 1176-77.

229. *See id.* at 1134-1142 (Stevens, J., dissenting); Pennsylvania v. Union Gas Co., 491 U.S. 1, 25-26 (1989) (holding that Congress may subject a state to suit to pay environmental clean up costs under CERCLA).

230. *See Seminole*, 116 S. Ct. at 1137; *Union Gas*, 491 U.S. at 24 (Stevens, J., concurring).

231. *See Seminole*, 116 S. Ct. at 1137 (Stevens, J., dissenting). The majority inappropri-

jority contradicted itself because it urged strict adherence to the principles established in *Hans*, a decision that provided no basis for the majority's conclusion that the Eleventh Amendment barred congressional abrogation.[232] The *Hans* decision merely addressed the effect of the Eleventh Amendment on suits brought against a state by a citizen of that state, and did not discuss the effect of Congress's right to abrogate the Eleventh Amendment pursuant to its plenary powers.[233]

Justices Stevens and Souter persuasively argued that the majority's conclusion, that Congress lacked authority to abrogate state sovereign immunity, was based on a non-constitutional common law doctrine.[234] In coming to this conclusion, both dissenters pointed to the unconstitutionality of the majority's holding.[235] They noted that neither the express language of the Eleventh Amendment, nor other Constitutional provisions, prohibited Congress from creating a federal cause of action against the states.[236] Thus, by construing the Eleventh Amendment as a limit on both Article I and III, the *Seminole* majority confused the doctrine it attempted to preserve.[237]

2. *Inconsistency of the Abrogation Doctrine After the* Seminole *Decision*

In addition to departing from established sovereign immunity jurisprudence by construing the Eleventh Amendment as a limit on Congress's power, the majority adopted an inconsistent rationale in *Seminole*, confusing further the doctrine of state sovereign immunity.[238] As Justice Souter convincingly reasoned, the majority's rationale was contradictory because it was based on conflicting premises: it held that the Eleventh Amendment barred congressional abrogation and it also found that the

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ately characterized the Eleventh Amendment as a limitation on both the judicial branch and Congress. *Cf. id.* at 1128 (finding that the rationale of established federalism jurisprudence extends to a limit on congressional abrogation except when legislating pursuant to the Enforcement Clause).

232. *See id.* at 1138.

233. *See* Hans v. Louisiana, 134 U.S. 1, 3 (1890).

234. *See Seminole*, 116 S. Ct. at 1141 (Stevens, J., dissenting) (reasoning that the majority misconstrued the common law doctrine of state sovereign immunity as a constitutional limit on Congress's authority to abrogate the Eleventh Amendment), 1166-67 (Souter, J., dissenting) (asserting that the majority based its holding on an extra-constitutional principle, namely, that sovereign immunity extended to suits in federal question jurisdiction).

235. *See id.* at 1144 (Stevens, J., dissenting), 1177 (Souter, J., dissenting)

236. *See id.* at 1144 (Stevens, J. dissenting), 1145 (Souter, J., dissenting)

237. *See id.* at 1144 (Stevens, J., dissenting).

238. *See id.* at 1141-42. (Stevens, J., dissenting) (arguing that the majority's reasoning was flawed because it barred abrogation in all instances but simultaneously condoned a narrow exception under the Enforcement Clause).

Enforcement Clause empowered Congress to abrogate the Eleventh Amendment.[239] The majority eviscerated its holding by recognizing this "narrow and illogical exception."[240] *Marbury v. Madison* conclusively established that Congress does not have the power to confer jurisdiction on the federal courts.[241] The majority's conclusion lacks foundation because *Marbury* did not recognize any exceptions to this rule.[242]

The majority correctly overruled *Union Gas* because the *Union Gas* Court permitted Congress to unconstitutionally abrogate the Eleventh Amendment by adding to the jurisdiction of federal courts.[243] After overruling *Union Gas*, however, the *Seminole* majority retreated from its conclusion that the Eleventh Amendment barred Congress's authority to abrogate sovereign immunity.[244] The majority should have chosen one of two options.[245] Under the first and more reasonable option, the majority could have construed the Eleventh Amendment as a complete bar against congressional abrogation by overruling *Union Gas*, *Atascadero*, and *Fitzpatrick*, each recognizing Congress's authority to abrogate.[246] Under the second option, the majority could have allowed Congress to abrogate in all instances.[247] The majority created inconsistency and incongruity in the doctrine of state sovereign immunity by construing the Eleventh Amendment as a bar to abrogation and by affirming the narrow excep-

239. *Cf. id.* at 1128 (finding that congressional abrogation pursuant to the Enforcement Clause was constitutional because the Fourteenth Amendment contained language that empowered Congress to limit states' rights). The majority also held that the Eleventh Amendment limited abrogation pursuant to some of Congress's Article I powers, reasoning that Congress may not add to the jurisdictional limits set forth in Article III. *See id.*

240. *Id.* at 1134, 1141 (Stevens, J., dissenting) Justice Stevens agreed with the majority that the Constitution did not authorize Congress to expand the borders of federal court jurisdiction set forth in Article III. *See id.* at 1141. Therefore, he concluded that the majority's reasoning was flawed because it allowed Congress to add to the jurisdiction of the federal courts under the Enforcement Clause. *See id.*

241. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803) (holding that Congress could not expand the original jurisdiction of the federal courts set forth in Article III); *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 39 (1989) (Scalia, J., dissenting) (arguing that the Constitution in its entirety did not grant authority to sue a state); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 97-98 (1984) (finding that sovereign immunity limited the original jurisdiction of the judiciary).

242. *See Marbury*, 5 U.S. (1 Cranch) at 176-77.

243. *See Seminole*, 116 S. Ct. at 1128. The majority reasoned that the decision in *Union Gas* departed from established precedent by allowing Congress to add to the jurisdictional bounds of Article III and by adhering to the irrational "plan of convention" theory. *See id.*; *see also supra* notes 240-43 and accompanying text (discussing the principles established in *Marbury* that Congress may never expand the jurisdiction of the federal courts).

244. *Cf. Seminole*, 116 S. Ct. at 1142. (Stevens, J., dissenting); *see also Union Gas*, 491 U.S. at 25 (Stevens, J., concurring).

245. *Cf. Seminole*, 116 S. Ct. at 1140-41 (Stevens, J., dissenting).

246. *Cf. id.*

247. *Cf. id.*

tion to abrogation under the Enforcement Clause.[248]

B. *Federalism and the New Eleventh Amendment: A Changed Doctrine of State Sovereign Immunity Jurisprudence*

The strict limit that the Court applied on Congress's ability to abrogate the Eleventh Amendment raises issues regarding federalism and separation of powers.[249] Although the *Seminole* majority substantially reduced the threat that congressional abrogation posed to the Eleventh Amendment, the majority's holding created other dilemmas of great consequence.[250] As Justice Stevens reasoned, the *Seminole* decision created federalism problems by not clearly defining the extent to which the Eleventh Amendment limited Congress.[251] Thus, the majority created ambiguity when Congress was authorized to create causes of actions against states.[252] Furthermore, *Seminole* created separation of powers problems by construing the Eleventh Amendment as a limit on Congress, thus legislating and acting outside its judicial powers.[253]

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248. *See id.* at 1144 (Stevens, J., dissenting); *cf. id.* at 1128-32.

249. *Cf. id.* at 1131 (criticizing the dissents' less expansive review of the doctrine of state sovereign immunity). Although the Court embraced the traditional principle of state sovereign immunity, it failed to describe how the limitation of the Eleventh Amendment on congressional action would affect sovereign immunity jurisprudence. *See id.*

250. *Cf. id.* at 1131 (finding that although the Eleventh Amendment on its face restricted the judicial power in Article III, Congress was not empowered to circumvent that limitation by abrogating state sovereign immunity); Savage, *Winning Streak*, *supra* note 162 at 46-47 (discussing the effect of *Seminole* on the federal balance); Herman Schwartz, *Supreme Court Opens New Round in Federal-State Fight*, L.A. TIMES, Apr. 7, 1996, at M2 (discussing the federalism problems that resulted from state sovereign immunity jurisprudence after *Seminole*)

251. *See Seminole*, 116 S. Ct. at 1134 (Stevens, J., dissenting).

252. *See id.* Justice Stevens recognized that the ramifications of overruling *Union Gas* were great. *See id.* However, the majority's conclusion did far more than merely preventing Congress from abrogating the Eleventh Amendment; its conclusion also prevented Congress from providing a federal forum for a myriad of rights of action against states under copyright and patent laws, bankruptcy laws, environmental laws, and interstate commerce laws. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-14 (1989) (holding that Congress could create rights of action against states to pay clean up costs pursuant to CERCLA); Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975) (holding that states could be sued for anti-trust actions); *In re* Merchants Grain Inc., 59 F.3d 630, 632 (7th Cir. 1995) (holding that the Eleventh Amendment did not prohibit the bankruptcy court from suing a state); Chavez v. Arte Publico Press, 59 F.3d 539, 546 (5th Cir. 1995) (holding that the Eleventh Amendment did not bar a suit against a state university for infringing on an author's copyright). *See generally* H. Stephen Harris, Jr. & Michael P. Kenny, *Eleventh Amendment Jurisprudence After* Atascadero*: The Coming Clash With Antitrust, Copyright, and Other Causes of Action Over Which the Federal Courts Have Exclusive Jurisdiction*, 37 EMORY L.J. 645 (1988) (discussing the impact of *Atascadero* on other federal causes of action).

253. *See Seminole*, 116 S. Ct. at 1176 (Souter, J., dissenting); *see also Governors Try to Curb Tribes*, OMAHA WORLD-HERALD, May 25, 1996, at 3 (commenting that a federal

1. Federalism Problems Influencing the Future of the Eleventh Amendment

The *Seminole* decision presented federalism issues because the majority failed to address the extent to which the Eleventh Amendment affected Congress's ability to create a federal forum for suits against states.[254] Justice Stevens, for example, convincingly reasoned that the majority's construction of the Eleventh Amendment affected the circumstances under which Congress traditionally created a right to sue a state in federal court such as in bankruptcy law, copyright law, patent law, and other federal actions.[255] The majority failed to address how *Seminole* affected Congress's power to provide a federal forum for a broad range of actions against states in additional subject matters, such as environmental law and the regulation of the national economy.[256] The majority's conclusion that the Eleventh Amendment barred suits against states in federal court leaves no remedy for people harmed by states that violate federal copyright, bankruptcy, and antitrust laws.[257] The *Seminole* decision created questions and issues affecting the status of federally created rights of action in federal and state courts[258] which the Court will likely have to clarify in future opinions.[259]

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court should not have authority to impose its will on a conflict between Indian tribes and states).

254. *See Seminole*, 116 S. Ct. at 1134 (Stevens, J., dissenting); *see also* Karen Cordry, *State Governments in the Bankruptcy Courts After* Seminole*: Are They the New 800 Pound Gorillas?*, 28 Bankr. Ct. Dec. (CRR) A2 (May 14, 1996) (discussing how the *Seminole* decision could redefine the role of state governments in bankruptcy courts and other similar federal laws allowing states to be sued in federal court).

255. *See Seminole*, 116 S. Ct. at 1134 (Stevens, J., dissenting).

256. *See id.*; *see also* Genentech, Inc. v. Regents of Univ. of Cal., 939 F. Supp. 639, 641-44 (S.D. Ind. 1996) (applying the reasoning of *Seminole* to a patent action against a state). *See generally* Mark Browning, Seminole Tribe of Florida v. Florida*: A Closer Look*, 15 AM. BANKR. INST. J. 10 (1996) (arguing that *Seminole* will limit Congress's ability to provide a federal forum for many litigants).

257. *See Seminole*, 116 S. Ct. at 1134; *see also* Slind-Flor, *supra* note 190, at B2 (discussing the negative effect the *Seminole* decision could have on anyone involved with patent and copyright law); *supra* note 256 (citing articles suggesting that the *Seminole* decision will seriously hamper Congress's ability to create a federal forum for litigants in bankruptcy, intellectual property, anti-trust, and other areas of law).

258. *See Seminole*, 116 S. Ct. at 1134. In future opinions, the Court should indicate that *Seminole* will not have any effect on other such areas of law such as bankruptcy, other than those reasonably related to traditional state sovereign immunity jurisprudence. *Cf.* Dan Schulman, Seminole Tribe*: Issues in Litigation*, 5 J. BANKR. L. & PRAC. 521 (1996) (discussing the effect of the *Seminole* decision on bankruptcy law).

259. See *Seminole*, 116 S. Ct. at 1134 (Stevens, J. dissenting); *see also Genentech*, 939 F. Supp. at 642-43 (involving a legal issue of clarification with regard to Eleventh Amendment abrogation and patent law).

2. *Separation of Powers Dilemma and its Effect on Sovereign Immunity Jurisprudence*

The majority's reasoning created a serious separation of powers problem, in addition to the federalism issues traditionally debated in Eleventh Amendment jurisprudence.[260] As recognized by Justice Souter, the majority exceeded the scope of the Court's constitutional powers by extending state sovereign immunity as a limit on Congress.[261] As Justices Souter and Stevens asserted, the majority's conclusion that the Eleventh Amendment barred Congress's authority to abrogate was founded on an extra-constitutional common law principle.[262] Similar to the *Lochner* Court, the majority "constitutionalized" a common law doctrine to bar congressional authority over states.[263] In overruling *Lochner*, however, the Supreme Court found unconstitutional the judicial practice of construing common law as a constitutional limit on Congress.[264]

Not until *Seminole* had the Court subjected legislative power to a higher level of judicial scrutiny merely because it violated common law principles instead of constitutional principles.[265] The *Seminole* Court was likely acting without constitutional authority.[266] Furthermore, the *Seminole* majority prohibited Congress from conducting activities that were

260. *See Seminole*, 116 S. Ct. at 1126-27. Justice Souter argued that the majority's decision was similar to *Lochner v. New York* because the majority construed a common law doctrine to constitutionally limit Congress. *See id.* at 1177 (Souter, J. dissenting); *see also* United States v. Lopez, 115 S. Ct. 1624, 1652-53 (1995) (Stevens, J., dissenting) (discussing *Lochner* and its restrictive view of Congress's interstate commerce power). In *Lochner*, judicial review problems occurred as a result of the Court constitutionalizing common law notions of liberty and laissez-faire economics. *See Lopez*, 115 S. Ct. at 1652-53. The *Lochner* Court interpreted the structural limit of the Interstate Commerce Clause by choosing the legislative means to further a common law economic end, instead of a constitutional end. *See id.* Similar to *Lochner*, the *Seminole* majority used common law doctrines to constitutionally limit Congress from infringing upon state authority. *See Seminole*, 116 S. Ct. at 1176-77 (Souter, J., dissenting); *see also* Adkins v. Children's Hosp., 261 U.S. 525, 557 (1923) (finding unconstitutional the abrogation of the common law freedom to contact); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987) (discussing the legacy of the *Lochner* decision on American jurisprudence); *supra* note 220 and accompanying text (discussing the *Lochner* decision).

261. *See Seminole*, 116 S. Ct. at 1176-77 (Souter, J., dissenting) (arguing that the majority went beyond *Lochner* because it not only constitutionalized the common law, but also supported this assertion by finding that the Enforcement Clause warranted abrogation).

262. *See id.* at 1142 (Stevens, J., dissenting); *id.* at 1165 (Souter, J., dissenting).

263. *Id.* at 1159 (Souter, J., dissenting); *see also supra* notes 220 & 260 and accompanying text (discussing the decision in *Lochner*).

264. *See Seminole*, 116 S. Ct. at 1176-77 (Souter, J., dissenting).

265. *See id.* at 1177; *cf.* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 381 (1937) (finding that the legislative power was subject to a rational basis standard of review so long as Congress's actions were within its constitutional authority.)

266. *See Seminole*, 116 S. Ct. at 1177 (Souter, J, dissenting).

constitutionally intended.[267] Although a restriction on congressional abrogation was necessary because of the threat to the federal system, the Court overstepped its jurisdiction by creating an extra-constitutional bar[268] on Congress.[269]

C. The New Eleventh Amendment and Its Impact on Lower Courts

Seminole's inconsistency, in addition to the presentation of federalism and separation of powers issues, will have significant consequences on lower courts.[270] Because the majority failed to define the extent to which *Seminole* will affect bankruptcy, antitrust, and copyright actions, lower courts will likely be confused over the interpretation of the Eleventh Amendment as a limit on Congress.[271] Because of a lack of precedent following *Seminole*, lower courts will likely differ greatly in interpreting the Eleventh Amendment's limit on Congress.[272] Some courts may interpret the Eleventh Amendment as an absolute bar to all congressionally created rights of action against states, except as permitted by the Enforcement Clause.[273] On the other hand, courts could interpret *Seminole* to warrant abrogation pursuant to other constitutional amendments in addition to the Enforcement Clause.[274]

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267. *See id.* (contending that it is within the scope of the legislature, not the judiciary, to legislate).

268. *See id.* at 1176-77 (arguing the majority overstepped the judiciary's constitutional authority by constitutionalizing a common law principle).

269. *See id.*

270. *See id.* at 1134; *see also* Kathryn S. Piscitelli, Seminole Tribe of Florida v. Florida: *Can State Employees Still Sue in Federal Court?*, 47 LAB. L. J. 211 (1996) (discussing how *Seminole* could affect federal court jurisdiction over cases arising under the employment laws); Savage, *Winning Streak*, *supra* note 162, at 47 (discussing the effect of *Seminole* on the federal balance and the lower courts).

271. *See Seminole*, 116 S. Ct. at 1143 (Stevens, J., dissenting); *cf.* Nina Bernstein, *An Accountability Issue: As States Gain Political Power, a Ruling Seems to Free Them from Legal Reins*, N.Y. TIMES, Apr. 1, 1996, at A1 (arguing that as a result of the decision in *Seminole*, states will be less accountable for government wrongdoing).

272. *See Seminole*, 116 S. Ct. 1134 (Stevens, J., dissenting).

273. *See id.*; *see also* Slind-Flor, *supra* note 190, at B1 (arguing that if construed broadly, *Seminole* could bar Congress from "requiring states to waive their immunity in [all] private actions to enforce federal rights"). *Compare* Chavez v. Arte Publico Press, 59 F.3d 539, 546-47 (5th Cir. 1995) (holding that Congress abrogated state sovereign immunity in the Copyright Act and Lanham Act pursuant to the copyright clause), *with* Genentech, Inc. v. Regents of Univ. of Cal., 939 F. Supp. 639, 642-43 (S.D. Ind. 1996) (finding that the Eleventh Amendment barred a declaratory judgment action against a state university regarding the scope of the university's patent).

274. *See Seminole*, 116 S. Ct. at 1134 (Stevens, J., dissenting). Lower courts could potentially construe any amendment granting Congress plenary power as a grant of authority to abrogate the Eleventh Amendment, such as the Thirteenth, Fifteenth, Nineteenth, Twenty Third, Twenty Fourth, and Twenty Sixth Amendments. *See generally* Curtis McKenzie, *Copyright/Trademark/States' Immunity*, 2 No. 9 INTELL. PROP. STRATEGIST 10

Furthermore, lower courts may have difficulty determining to what extent the test in *Atascadero* still applies to abrogation pursuant to the Enforcement Clause.[275] Prior to the decision in *Seminole*, the Court applied the clear statement test, which required a clear statement of legislative intent on the face of the statute.[276] In reaction to *Seminole*, lower courts may refrain from applying the clear statement test, reasoning that *Seminole* drastically affected the doctrine of abrogation to the extent that it rendered the clear statement test inapplicable.[277] Whether in the context of abrogation or the clear statement test, the *Seminole* decision fails to clarify state sovereign immunity jurisprudence for lower courts.[278]

IV. CONCLUSION

Seminole Tribe of Florida v. Florida represents a return to the traditional state sovereign immunity jurisprudence established over two centuries earlier, when the Court first recognized that the Eleventh Amendment protected states from suits in federal court. The Court's extension of the traditional sovereign immunity doctrine as a limit on the legislative branch departs from the underpinnings of traditional Eleventh Amendment jurisprudence, and confuses the development of warranted congressional abrogation. By construing the Eleventh Amendment as an unprecedented limit on the legislative branch, the Court has created a separation of powers problem, confused the federal balance between state and federal governments, and reintroduced ambiguity to the lower federal courts. By expanding the traditional doctrine of state sovereign immunity, the Court obscured a doctrine that it should have interpreted conservatively to eliminate any threat presented by unwarranted congressional abrogation of the Eleventh Amendment.

Laura M. Herpers

(1996) (discussing the effect of *Seminole* on copyright and trademark law); Amy C. Wright & Jeff A. McDaniel, *Recent Developments in Copyright Law*, 4 TEX. INTELL. PROP. L.J. 129 (1995) (analyzing the effect of state sovereign immunity jurisprudence on copyright law).

275. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985).

276. *See, e.g.*, *Seminole*, 116 S. Ct. at 1123 (recognizing the clear statement test as a two part inquiry); Blatchford v. Native Village of Noatac, 501 U.S. 775, 786 (1991) (requiring a clear statement of congressional intent to abrogate); *Atascadero*, 473 U.S. at 239-40 (establishing that the clear statement test was met by an expression of congressional intent on the face of the statute); Quern v. Jordan, 440 U.S. 332, 343-45 (1979) (requiring a statement of congressional intent to abrogate the Eleventh Amendment).

277. *Cf. Seminole*, 116 S. Ct. at 1140 (Stevens, J., dissenting) (arguing the clear statement cases would have been inapplicable if the Court interpreted *Hans* to bar Congress's authority to abrogate the Eleventh Amendment.)

278. *See id.* at 1133, 1142-45.