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Allowing States To Avoid Accountability: A Death Knell For Private Enforcement Of Federal Environmental Laws?

Seminole Tribe of Florida v. Florida[1]

by Melissa McAllister

I. INTRODUCTION

The Eleventh Amendment addresses a fundamental issue in the lives of all citizens, the power of a private citizen to sue a state to make it obey the federal Constitution. For if the citizens may not sue a state to compel compliance with federal laws, those fundamental liberties which we hold dear may be in jeopardy. This Note will discuss the recent landmark United States Supreme Court decision, *Seminole Tribe of Florida v. Florida* (*Seminole Tribe*), in which a 5-4 Court relied on the Eleventh Amendment to assert that Congress is barred from authorizing private parties to sue the states in federal court without the states' consent.[2] This departure from existing law, and its possibly far-reaching impact on *environmental* litigation, will be the focus of this Note. The Court "has recognized that the general problem of environmental harm is often not susceptible to a local solution."[3] If such is the case, what does the instant decision mean for the future of environmental law?

II. FACTS AND HOLDING

In September 1991, the Seminole Tribe of Florida (Seminole) filed this action against the State of Florida and its Governor (Florida), invoking jurisdiction under 25 U.S.C. § 2710(d)(7)(A), the Indian Gaming Regulatory Act (IGRA),[4] and 28 U.S.C. §§ 1331 and 1362.[5] Seminole contended that Florida had violated the good faith negotiation requirement contained in § 2710(d)(3) by refusing to enter into any negotiation for inclusion of particular gaming activities in a tribal-state compact.[6] Florida moved to dismiss the complaint, alleging that the suit was violative of the State's sovereign immunity from suit in federal court.[7] The district court denied the motion,[8] from which Florida took an interlocutory appeal.[9]

The Court of Appeals for the Eleventh Circuit reversed the district court's decision, holding that the Eleventh Amendment barred Seminole's suit against Florida.[10] The Eleventh Circuit agreed with the district court that in § 2710(d)(7) Congress had clearly intended to abrogate the States' sovereign immunity, and that the IGRA had been passed pursuant to Congress' power under the Indian Commerce Clause. However, the Eleventh Circuit

[1] 116 S.Ct. 1114 (1996).

[2] *Id.* at 1133. Note, with respect to civil rights suits that derive from Fourteenth Amendment claims, Congress is not barred from authorizing private parties to sue the states in federal court without the states' consent. *Id.* at 1125.

[3] Pennsylvania v. Union Gas Co., 491 U.S. 1, 3 (1989) (citing Illinois v. Milwaukee, 406 U.S. 91 (1972); Philadelphia v. New Jersey, 437 U.S. 617 (1978)).

[4] *Seminole,* 116 S.Ct. at 1121. "The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the Tribe and the State in which the gaming activities are located...The Act, passed under the Indian Commerce Clause..., imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact..., and authorizes a Tribe to bring suit in federal court against a State in order to compel performance of that duty..." *Id.* at 1119.

[5] *Id.* at 1121. 28 U.S.C. § § 1331 and 1362 grant to the district courts original jurisdiction with respect to those civil actions arising under the Constitution, laws, or treaties of the United States, that is federal questions, and original jurisdiction of all civil actions, brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, in any controversy arising under the Constitution, laws, or treaties of the United States, respectively.

[6] *Id.* The facts which led to Seminole's allegations are as follows:
In January 1991, Seminole requested of Florida's Governor "the commencement of negotiations, pursuant to IGRA, for a tribal-state compact governing the conduct of class III gaming activities on tribal lands. On March 4, 1991, the Tribe submitted a proposed compact providing for tribal operation of poker, and all video, electronic and computer-aided games which duplicate poker, bingo, pull-tabs, lotto, punchboards, tip jars, instant bingo and other games similar to bingo... On May 24, 1991, the Governor's General Counsel responded for the Governor, rejecting all of the Tribe's proposed games with the exception of poker... [Following requests for reconsideration and the submission of legal memorandum to Florida, providing support for the proposed compact provisions], [i]n August 1991, the Governor's General Counsel reasserted that the State would not negotiate regarding any form of gaming not expressly allowed by State statutes, nor would the State negotiate regarding any machine gaming or any form of casino gaming. The State expressed a willingness to negotiate only poker and other card games, raffles, parimutuel wagering on dog and horse racing, and jai alai. Tribal and State representatives met in September 1991, but the State refused to change its position regarding the scope of the negotiations."
Brief for Petitioner at 7, 1995 WL 143442.

[7] *Id.*

[8] *Id.* Motion denied at 801 F.Supp. 655, 655 (S.D.Fla. 1992).

[9] *Id.*

[10] 11 F.3d 1016, 1018 (11th Cir. 1994).

disagreed with the district court, holding that under the Indian Commerce Clause, Congress did not have the power to abrogate a State's Eleventh Amendment immunity from suit.[11] The Eleventh Circuit also held that the doctrine of *Ex parte Young*[12] does not permit an Indian tribe to compel good faith negotiation by bringing a suit against the Governor of a State.[13] Due to its lack of subject matter jurisdiction, the appellate court remanded to the district court with directions to dismiss Seminole's suit.[14]

Seminole sought review of the Eleventh Circuit's decision, and the United States Supreme Court granted certiorari.[15] The United States Supreme Court, in a five-to-four decision affirming the Eleventh Circuit's dismissal of petitioner's suit, held (i) Congress lacked authority under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity and (ii) the doctrine of *Ex parte Young* did not apply to suits against a state official for prospective injunctive relief to enforce the good faith bargaining requirement of the IGRA.[16]

III. LEGAL BACKGROUND

A. The Indian Commerce Clause[17] and the IGRA[18]

The Indian Commerce Clause of the United States Constitution recognizes that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[19] Congress, through its passage of the IGRA in 1988, pursuant to the Indian Commerce Clause, sought to provide a statutory basis for the operation and regulation of gaming by Indian tribes.[20] The IGRA provides for three classes of gaming on Indian lands, with a different regulatory scheme for each class. Class III gaming, relevant to the instant decision, is defined as "all forms of gaming that are not class I gaming or class II gaming,"[21] including slot machines, electronic games of chance, casino games, poker, lotto, and the like.[22] Among other requirements, the IGRA provides that Class III gaming shall be lawful only where it is "¼conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect."[23] "Paragraph (3)" to which § 2710(d)(1) refers is § 2710(d)(3), which describes the scope of a Tribal-State compact,[24] and recognized judicial enforceability with respect to the State's obligation to make good faith negotiations with the Indian tribe by § 2710(d)(7)(A)(i) and (B)(i).[25]

The IGRA also sets forth a remedial scheme in order to ensure the formation of a Tribal-State compact.[26] Section 2710(d)(7)(B)(ii) provides that in any action brought by a Tribe under

[11] *Id.* at 1019.

[12] The doctrine of *Ex parte Young*, 209 U.S. 123 (1908), in certain instances, provides for a lifting of the Eleventh Amendment bar, in order to allow a suit against a state officer.

[13] *Seminole*, 11 F.3d at 1029.

[14] *Id.*

[15] *Seminole*, 116 S.Ct. at 1122.

[16] *Id.* at 1133.

[17] U.S. CONST., art. I, § 8, cl. 3.

[18] The Indian Gaming Regulatory Act (IGRA) is codified at 25 U.S.C. § 2701-2721 (1988).

[19] U.S. CONST., art. I, § 8, cl. 3.

[20] *See* 25 U.S.C. § 2702.

[21] 25 U.S.C. § 2703(8).

[22] Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations" and such gaming is of the exclusive jurisdiction of the Indian tribes. 25 U.S.C. § 2703(6). Class II gaming includes bingo, games similar to bingo, nonbanking card games not illegal under the laws of the State, and card games operated in States prior to the passage of the IGRA. *See* 25 U.S.C. § 2703(7). Class II gaming activities are primarily left to tribal self-regulation. *See* 25 U.S.C. § 2710(c)(3)-(6).

[23] 25 U.S.C. § 2710(d)(1). To be lawful, Class III gaming must also be authorized by an ordinance or resolution and located in a state that permits such gaming.

[24] *See* 25 U.S.C. § 2710(d)(3)(A). Section 2710(d)(3) provides in relevant part:
(A) any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

[25] *See* 25 U.S.C. § 2710(d)(7)(A)(i) and (B)(i). Section 2710(d)(7)(A)(i) and (B)(i) provides:
(A) The United States district courts shall have jurisdiction over—
(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith...
(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

[26] *See* 25 U.S.C. § 2710(d)(7)(B)(ii)-(vii).

§ 2710(d)(7)(A)(i), the Tribe must demonstrate that a Tribal-State compact has not been entered into and that the State did not respond in good faith to the Indian tribe's request to negotiate, at which point the burden of proof shifts to the State to show that it has negotiated in good faith.[27] "If the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact, [the court is directed to]order the State and the Indian tribe to conclude such a compact within a 60-day period."[28] If after the 60-day period, no compact has been concluded, "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact."[29] The mediator is directed to choose between the two proposed compacts, select "the one which best comports with the terms of [the IGRA] and any other applicable Federal law and with the findings and order of the court,"[30] and submit it to the State and the Indian tribe.[31] If the State consents to the proposed compact within the 60-day period beginning on the date on which the mediator submits the proposed compact, said compact is "treated as a Tribal-State compact entered into under paragraph (3)."[32] If the State does not consent to the proposed compact during the 60-day period described, the mediator is directed to notify the Secretary of the Interior, who "shall prescribe...procedures...under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction."[33]

B. An Overview of Eleventh Amendment Law and State Sovereign Immunity: The States, The Courts, and the Constitution

"[T]he [E]leventh [A]mendment is one of the Constitution's most baffling provisions and, for its importance, one of the least analyzed."[34] The text of the Amendment 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.[35]

In numerous decisions, the Supreme Court has interpreted the amendment as prohibiting federal courts from taking jurisdiction over suits brought in federal court against a state by private citizens.[36] Indeed, the Court has long viewed the Eleventh Amendment as raising a jurisdictional bar limiting the power of federal courts to entertain suits by private citizens against unconsenting states.

Ratified in 1798, the Eleventh Amendment was proposed and passed in response to a particular case—*Chisholm v. Georgia*.[37] To put *Chisholm* and the Eleventh Amendment into perspective, one must recall the text of Article III of the United States Constitution, under which the judicial power of the United States extends "to Controversies...between a State and Citizens of another State...and between a State...and foreign States, Citizens or Subjects."[38] Article III confers jurisdiction over disputes involving diversity, as well as those involving federal questions.[39]

Chisholm involved state-citizen diversity jurisdiction, as a citizen of South Carolina brought suit against the state of Georgia under Article III's jurisdictional grant over "Controversies between a State and Citizens of another State..."[40] In *Chisholm*, the Court held that this state-citizen diversity clause of the Constitution vested jurisdiction in the Supreme Court over a State, as a defendant, at the suit of a private citizen of another State.[41] "The Court's decision in *Chisholm* provided a chorus

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[27] *See* 25 U.S.C. § 2710(d)(7)(B)(ii).

[28] 25 U.S.C. § 2710(d)(7)(B)(iii).

[29] 25 U.S.C. § 2710(d)(7)(B)(iv).

[30] *Id.*

[31] *See* 25 U.S.C. § 2710(d)(7)(B)(v).

[32] 25 U.S.C. § 2710(d)(7)(B)(vi).

[33] *See* 25 U.S.C. § 2710(d)(7)(B)(vii).

[34] William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Construction of An Affirmative Grant of Jurisdiction Rather Than A Prohibition Against Jurisdiction.*, 35 STAN. L. REV. 1033, 1033 (1983).

[35] U.S. CONST. amend. XI.

[36] Fletcher, *supra* note 34, at 1033 (citing e.g., "Florida Dep't of State v. Treasure Salvors, Inc., 458 US. 670, 682 (1982) (characterizing the issue before the Court as a "determination of whether the Eleventh Amendment in fact barred an exercise of jurisdiction by the federal court"); Cory v. White, 457 U.S. 85, 91 (1982) (holding that "the Eleventh Amendment bars the statutory interpleader sought"); Edelman v. Jordan, 415 U.S. 651, 663 (1974) (referring to the rule "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment").

[37] 2 U.S. 419 (1793).

[38] U.S. CONST. art. III, § 2, cl. 1.

[39] Fletcher, *supra* note 34, at 1034.

[40] U.S. CONST. art. III, § 2, cl. 1.

[41] *Chisholm*, 2 U.S. at 420.

of calls around the country for a constitutional amendment."[42] Thus, the Eleventh Amendment was created, with the unquestionable purpose of countering the majority opinion in *Chisholm* and overruling its holding. However,

> [t]he Supreme Court did not directly address the issues of whether the [E]leventh [A]mendment forbade private suits against states by all private citizens, out-of-state or in-state, and whether private suits could be brought under another head of jurisdiction, until after the first general original federal question jurisdictional statute was adopted in 1875.[43]

In 1890, nearly a century after the adoption of the Eleventh Amendment, the Court in *Hans v. Louisiana*[44] held that a Louisiana citizen could not sue the state of Louisiana in federal court for a violation of the federal contracts clause.[45] The Court reasoned that if the Eleventh Amendment barred suits by out-of-state citizens, it followed that the framers of the amendment intended to bar suits by in-state citizens, as well.[46] "Hans, or the general principle prohibiting federal court jurisdiction perceived to lie behind it,"[47] today generally stands for the proposition that the Eleventh Amendment forbids citizens from suing states in federal court.[48]

Hans's prohibition against suing states in federal court was considered too broad in a federal system that seeks to control state action through federal law in order to protect private individuals. Therefore the Court developed a set of fictions and exceptions to avoid *Hans's* full effect. The most significant of these Court-created fictions is the doctrine of *Ex parte Young*.[49] This doctrine, in certain instances, provides for a lifting of the Eleventh Amendment bar, in order to allow a suit against a state officer. In *Young*, the Court held that a federal court could enjoin the Attorney General of Minnesota from enforcing a state railroad rate regulation statute. Since the acts were illegal, they were merely the acts of individuals acting without authority from the state. If the state could never authorize an unconstitutional action, the official must be acting in his or her individual capacity.[50] In 1974, the Court clarified this doctrine when in *Edelman v. Jordan*[51] the Court held that the doctrine of *Ex parte Young* permitted suits for prospective relief but did not permit suits for retroactive relief, "which requires the payment of funds from the state treasury."[52]

Apart from the *Ex parte Young* fiction, other means exist by which a state may be sued in federal court. First, a state may consent to be sued. Such consent may be recognized in a variety of state actions.[53] Second, Congress may abrogate a state's immunity to suit when it acts pursuant to its powers as enumerated in the Constitution. In *Fitzpatrick v. Bitzer*[54] the Court held that § 5 of the Fourteenth Amendment[55] allowed Congress to abrogate the immunity from suit guaranteed by the Eleventh Amendment.[56] Recently, in

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[42] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473 (1987).

[43] Fletcher, *supra* note 34, at 1039 (citing Act of March 3, 1875, ch. 137, 18 Stat. 470.).

[44] 134 U.S. 1 (1890).

[45] Fletcher, *supra* note 34, at 1039 (citing U.S. CONST. art. 1, § 10, cl. 1).

[46] *Hans*, 134 U.S. at 15 (1890). The Court stated:
The letter [of the amendment] is appealed to now [to support an argument that the state is liable to suit]... it is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face. *Id.*

[47] Fletcher, *supra* note 34, at 1040.

[48] *Id.*

[49] 209 U.S. 123 (1908).

[50] *Id.*

[51] 415 U.S. 651 (1974).

[52] *Id.* at 677.

[53] Fletcher, *supra* note 34, at 1042-1043. "A state's voluntary appearance in court and defense on the merits constitutes consent... A state also may confer consent, although such statutes are narrowly construed: If the statute does not unambiguously grant consent to federal court suit, a state will be held to have consented to suit only in state court... Finally, it is possible that a state may consent by voluntarily engaging in activity regulated by the federal government..." *Id.*

[54] 427 U.S. 445 (1976).

[55] Section 5 grants Congress the power to enforce the Fourteenth Amendment "by appropriate legislation." U.S. CONST. amend. XIV, § 5.

[56] *Fitzpatrick*, 427 U.S. at 445.

Pennsylvania v. Union Gas Co.[57] the Court upheld congressional abrogation of the states' Eleventh Amendment immunity through the Interstate Commerce Clause.[58] Third, while the Eleventh Amendment protects states, it provides no such protection to their subdivisions. Thus, state subdivisions such as cities, counties, and local school boards are not immune from suit.[59]

The scope of the Eleventh Amendment, particularly congressional power to abrogate the States' sovereign immunity, was again at issue in the instant case. The Supreme Court addressed whether Congress has the power to abrogate state sovereign immunity under the Indian Commerce Clause and whether the doctrine of *Ex parte Young* permits suits against a state official to enforce the good faith bargaining requirement of the IGRA.[60]

IV. INSTANT DECISION

A. The Majority Opinion[61]

In the instant case, the Supreme Court was presented with two questions: (i) whether the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against states for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause and (ii) whether the doctrine of *Ex parte Young* permits suits against a state's governor for prospective injunctive relief to enforce the good faith bargaining requirement of the IGRA?[62] The majority, which consisted of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas, answered the first question in the affirmative and the second question in the negative, thereby affirming the Eleventh Circuit's dismissal of Seminole's suit.[63] The Court held: (i) although Congress, in enacting the IGRA, clearly intended to abrogate the States' sovereign immunity, the Indian Commerce Clause did not grant Congress that power, and therefore § 2710(d)(7) of the IGRA could not grant jurisdiction over a state that does not consent to be sued and (ii) the doctrine of *Ex parte Young* may not be used to enforce the good faith bargaining requirement of § 2710(d)(3) of the IGRA against a state official.

Seminole's first argument was that Congress abrogated the States' immunity from suit, through the IGRA. The Court first found that the text of § 2710(d)(7) made it "unmistakably clear" that Congress intended, through the IGRA, to abrogate the States' sovereign immunity from suit.[64] Then, in response to Seminole's suggestion in favor of finding the power to abrogate because the IGRA authorizes only prospective injunctive relief rather than monetary relief, the Court dismissed as irrelevant the type of relief sought.[65] The Court also dismissed as irrelevant Seminole's contention that the abrogation power was validly exercised because the IGRA grants the states authority over gaming on Indian lands, a power that they would not otherwise have.[66]

The Court then narrowed its focus to consider whether the IGRA was passed pursuant to a constitutional provision granting Congress the power to abrogate.[67] The Court noted that when previously faced with this issue, it found the authority to abrogate under only two provisions of the Constitution.[68] In *Fitzpatrick v. Bitzer*,[69] the Court held that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by the Eleventh Amendment.[70] The Court then discussed the only other case in which congressional abrogation of the States' Eleventh Amendment immunity was upheld,[71] *Pennsylvania v. Union Gas*

[57] 491 U.S. 1 (1989).

[58] *Id.*

[59] *See* Workman v. New York, 179 U.S. 552 (1900); Moor v. County of Alameda, 411 U.S. 693, 717-21 (1973); Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977).

[60] *Seminole*, 116 S.Ct. at 1121.

[61] Rehnquist, CJ., delivered the 5-4 opinion of the Court, in which O'Connor, Scalia, Kennedy, and Thomas, JJ., joined. *Id.* at 1119.

[62] *Id.* at 1121.

[63] *Id.*

[64] *Id.* at 1124. The Court, upon examination of the statute's text, concluded, "the numerous references to the 'State' in the text of § 2710(d)(7)(B) make it *indubitable* that Congress intended through the Act to abrogate the States' sovereign immunity from suit." *Id.* (emphasis added).

[65] *Id.* The Court recognized, "[i]t would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought." *Id.* (quoting Cory v. White, 457 U.S. 85, 90 (1982)).

[66] *Id.* at 1125. The Court cautioned, "[t]he Eleventh Amendment immunity may not be lifted by Congress unilaterally deciding that it will be replaced by grant of some other authority." *Id.* (citing, by analogy, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 246-247 (1985) ("[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court.")).

[67] *Id.*

[68] *Id.*

[69] 427 U.S. 445 (1976).

[70] *Seminole*, 116 S.Ct. at 1125.

[71] *Id.* at 1126.

Co.,[72] which involved abrogation through Congress's Interstate Commerce Clause powers.

The Court agreed with Florida, that rather than extend the rationale of the *Union Gas* plurality to the Indian Commerce Clause, "*Union Gas* should be reconsidered and overruled."[73] The Court reasoned that the Court in *Union Gas* had reached its result without a rationale agreed upon by a majority of the court.[74] The Court stated that, "[s]ince it was issued, *Union Gas* has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision."[75] The Court then asserted that *Union Gas* "also deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans*."[76] The Court further recognized that:

> Never before the decision in Union Gas had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III.[77]

In sum, upon reconsideration of the decision in *Union Gas*, the Court concluded "that none of the policies underlying stare decisis require our continuing adherence to its holding... We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled."[78]

Upon consideration of Seminole's alternative argument, that its suit against the Governor of Florida could go forward under the doctrine of *Ex parte Young*, the Court held the instant situation to be "sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine."[79] The Court reasoned that although "we often have found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law'."[80] it could not supplement the remedial scheme set forth in § 2710(d)(7) with a judicially-created exception.[81] The Court concluded that as Congress had chosen to impose a significantly more limited liability than that which would be imposed upon a state officer under *Ex parte Young*, this action was a strong indication that Congress did not wish to create such liability under § 2710(d)(3) and the Court was not free to rewrite the statutory scheme.[82]

Therefore, the Court concluded that the Eleventh Circuit's dismissal of Seminole's suit was proper. The Court held that (i) Congress lacked authority under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity and (ii) the doctrine of *Ex parte Young* did not apply to suits against a state official for prospective injunctive relief to enforce the good faith bargaining requirement of the IGRA.[83]

B. Stevens's Dissent[84]

Justice Stevens's forceful

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[72] *See supra* note 3.

[73] *Seminole*, 116 S.Ct. at 1127.

[74] *Id.* The Court stated,

We have already seen that Justice Brennan's opinion received the support of only three other Justices. Of the other five, Justice White, who provided the fifth vote for the result, wrote separately in order to indicate his disagreement with the majority's rationale, and four Justices joined together in a dissent that rejected the plurality's rationale. *Id.*

Note that the four dissenters in *Union Gas* were Scalia, Rehnquist, O'Connor, and Kennedy, four of the five-Justice majority in the instant case.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 1128.

[78] *Id.* The Court explained:

In overruling Union Gas today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. *Id.* at 1129-30.

The Court concluded by dismissing Souter's dissent as, "in favor of a theory cobbled together from law review articles and its own version of historical events," among other things. *Id.*

[79] *Id.* at 1132.

[80] *Id.*

[81] *Id.* The Court stated that, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Id.*

[82] *Id.* at 1133.

[83] *Id.*

[84] Stevens, J., filed a dissenting opinion, acknowledging the thoroughness of the analysis of Justice Souter's dissent, but asserting that the "shocking character" of the majority's decision was worthy of additional comment. *Id.* at 1134.

dissent first asserts, "[t]his case is about power—the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right."[85] Stevens referred to a long line of cases, *Chisholm*, *Fitzpatrick*, *Union Gas*, even *Hans*, "a case the Court purports to follow today," in which the Court recognized that Congress has such power. He noted, "[n]evertheless, in a sharp break with the past, today the Court holds that with the narrow and illogical exception of statutes enacted pursuant to the Enforcement Clause of the Fourteenth Amendment, Congress has no such power."[86] Stevens stressed that the effect of the majority's decision was not simply to negate the IGRA, but to severely limit Congress's ability to provide private individuals with a judicial forum in which to confront the states, with the following:

> The importance of the majority's decision to overrule the Court's holding in *Pennsylvania v. Union Gas Co.* cannot be overstated. The majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of action against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.[87]

Further, Stevens found the majority opinion to be "profoundly misguided", calling it an "affront to a coequal branch of our Government [which] merits additional comment."[88]

Stevens then argued that the text of the Eleventh Amendment does not apply to federal question cases, but rather limits its application to diversity cases. He emphasized, "...one cannot deduce from either the text of Article III or the plain terms of the Eleventh Amendment that the judicial power does not extend to a congressionally created cause of action against a State brought by one of that State's citizens."[89] In answer to the majority's assertion that precedent (*Hans*) compels that same conclusion, Stevens disagreed, arguing that *Hans* merely held that federal courts should decline, as a matter of federal common law, to entertain suits against unconsenting States unless otherwise directed by Congress.[90] Stevens pointedly asserted,

> The fundamental error that continues to lead the Court astray is its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity "has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment."[91] It rests rather on concerns of federalism and comity that merit respect but are nevertheless, in cases such as the one before us, subordinate to the plenary power of Congress.[92]

Finally, suggesting that the "misguided opinion" of the majority is one of an advisory character, Justice Stevens expressed confidence that "Justice Souter's far wiser and far more scholarly opinion will surely be the law one day."[93]

C. Souter's Dissent[94]

Souter penned a penetrating dissent to counter the majority's decision, which he called "fundamentally mistaken."[95] Souter began with the following assertion:

> In holding the State of Florida immune to suit under the Indian Gaming Regulatory Act, the Court today holds *for the first time since the founding of the Republic* that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right.[96]

Souter then embarked on a lengthy historical analysis, which cannot be adequately summarized within the constraints of this Note.[97]

First, Souter engaged in a

[85] *Id* at 1133.

[86] *Id.* at 1134.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 1137.

[90] *Id.*

[91] *Id.* at 1142 (citing Pennsylvania v. Union Gas Co., 491 U.S. at 25 (Stevens, J., concurring)).

[92] *Id.*

[93] *Id.* at 1145.

[94] Souter, J., filed a dissenting opinion, in which Ginsburg and Breyer, JJ., joined. *Id.* at 1119. Note, "In a rare occurrence, Justice David H. Souter read parts of his dissent from the bench. In written form, it ran to 92 pages." David G. Savage, *High Court Curbs Federal Lawsuits Against the States*, L.A. TIMES, March 28, 1996, at 1.

[95] *Id.* at 1145.

[96] *Id.* (emphasis added).

[97] Indeed, Souter's dissent has been described as, "...an extraordinary review of both constitutional history and Supreme Court precedents with respect to sovereign immunity, the Eleventh Amendment and the *Hans* decision, and it is worth reading simply as a model of the persuasive use of legislative (and other) history for constitutional interpretation and not so incidentally - as history of the United States." Stephen L. Kass and Jean M. McCarroll, *Private Enforcement After 'Seminole'*, N.Y.L.J., Apr. 26, 1996, at 3.

textual analysis[98] of the Eleventh Amendment, concluding, "[t]he history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses."[99] Such a reading of the Eleventh Amendment, Souter held, comports with the Court's practice, with the history of the drafting of the Amendment, and with the Amendment's language.[100] Thus, Souter reasons, "[b]ecause the plaintiffs in today's case are citizens of the State that they are suing, the Eleventh Amendment simply does not apply to them. We must therefore look elsewhere for the source of that immunity by which the Court says their suit is barred from a federal court."[101]

Souter then looked "elsewhere" for the source of that immunity recognized by the Court—*Hans v. Louisiana*, addressing "the mistakes inherent in Hans and...the error of today's holding."[102] Souter first noted that the *Union Gas* Court held that the immunity recognized in *Hans* was without constitutional status and was subject to congressional abrogation, yet the instant Court overruled *Union Gas* and held the reverse.[103] Souter asserted that the *Hans* holding that the principle of sovereign immunity derived from the common law protects a state from federal question jurisdiction when the state is sued by its own citizen was simply "wrongly decided, as virtually every recent commentator has concluded."[104] Souter further criticized the majority with the following: "It follows that the Court's further step today of constitutionalizing *Hans*'s rule against abrogation by Congress compounds and immensely magnifies the century-old mistake of *Hans* itself and takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law."[105] While Souter indicated he would not overrule *Hans*, as a matter of stare decisis, he maintained that "an understanding of its failings...will show how the Court today simply compounds already serious error in taking *Hans* the further step of investing its rule with constitutional inviolability against the considered judgment of Congress to abrogate it."[106]

Next, in a stern criticism of the majority's decision, worthy of quotation at length, Souter rebuked the Court for its aggressive intervention, stating the following:

> It is...remarkable that as we near the end of this century the Court should choose to open a new constitutional chapter in confining legislative judgments on these matters by resort to textually unwarranted common-law rules, for it was just this practice in the century's early decades that brought this Court to the nadir of competence that we identify with Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).
>
> It was the defining characteristic of the Lochner era, and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutionally suspect...*The majority today, indeed seems to be going Lochner one better*...[in effect] extending its reach so far as to declare that the plain text of the Constitution is subordinate to judicially discoverable principles untethered to any written provision.[107]

Souter then discussed at length the origin and purpose of the doctrine of *Ex parte Young*, asserting that the doctrine was applicable in the instant case and that "the case could, and should, readily be decided on this point alone."[108] Souter noted that adherence to this well-established doctrine would have enabled the Court to avoid altogether the debate over congressional power to abrogate state immunity under the Commerce Clause or the Indian Commerce Clause.[109]

Souter concluded that absent application of the doctrine of *Ex parte Young*, he would follow the *Union Gas*

[98] In a footnote, Souter responded to the majority as follows, "The majority chides me that the "lengthy analysis of the text of the Eleventh Amendment is directed at a straw man." But plain text is the Man of Steel in a confrontation with 'background principle[s]' and 'postulates which limit and control'. An argument rooted in the text of a constitutional provision may not be guaranteed of carrying the day, but insubstantiality is not its failing." *Seminole*, 116 S.Ct. at 1152.

[99] *Id.* at 1150. In a footnote to this statement, Souter contends, "The great weight of scholarly commentary agrees," citing numerous well-known commentaries. *Id.*

[100] *Id.* at 1151-52.

[101] *Id.* at 1152.

[102] *Id.* at 1173.

[103] *Id.* at 1153.

[104] *Id.* In a footnote, Souter referred to the "'remarkabl[e] consisten[cy]' of scholarship on this point."

[105] *Id.*

[106] *Id.* at 1159-60.

[107] *Id.* at 1176-77.

[108] *Id.* at 1178.

[109] *Id.*

decision, "in recognizing congressional power under Article I to abrogate *Hans* immunity."[110] In sum, "[b]ecause neither text, precedent, nor history supports the majority's abdication of our responsibility to exercise the jurisdiction entrusted to us in Article III," Souter stated he would reverse the judgment of the Eleventh Circuit.[111]

V. COMMENT

As Justice Stevens suggested, this case is about power—the power of judicial review. Here, arguably, the majority abused its judicial review power to usurp Congress's abrogation powers. The majority defended its decision on the basis of "our established federalism jurisprudence,"[112] while the dissent criticized the Court for its intervention, leading to an appearance of incompetence and, seemingly, a return to the *Lochner* era.[113] Quite simply, the majority got it wrong. To reach its holding, the majority disregarded precedent and engaged in a suspect interpretation of the history of sovereign immunity, as well as of the history and the text of the Eleventh Amendment. Further, the majority's effort to dismiss the precedent of *Union Gas* is unconvincing.

First, the majority recognized that Congress was unmistakably clear in its intent to abrogate the States' sovereign immunity through § 2710(d)(7) of the IGRA. Indeed, the majority referred to such legislative intent as "indubitable."[114] Then, the majority discussed prior cases in which it found authority for congressional abrogation under two provisions of the Constitution, the Fourteenth Amendment and the Interstate Commerce Clause.[115] Rather than recognize that "[t]here is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause,"[116] as Seminole argued, the majority made that argument obsolete by altogether abandoning its previous holding that the Interstate Commerce Clause granted Congress the power to abrogate state sovereign immunity.[117]

The majority defends its conclusion that *Union Gas* was wrongly decided and should be overruled by dismissing the holding of *Union Gas* as merely a plurality decision.[118] The majority also reasoned that never before the decision in *Union Gas* had the Court suggested that Congress could abrogate the states' sovereign immunity pursuant to any constitutional provision other than the Fourteenth Amendment and that "[i]n the five years since it was decided, *Union Gas* has proven to be a solitary departure from established law."[119] Yes, *Union Gas* represented an extension of congressional abrogation powers, but the Court's rationale for retreating from this extension is simply unconvincing. After all, isn't new, groundbreaking law always a solitary departure at first?

What led to this abrupt retreat by the Court, concerning congressional power to abrogate state's immunity? Arguably, politics. The makeup of the Court has changed. At the time *Union Gas* was decided, Justices Marshall, Blackmun, Stevens, Brennan, and White formed the plurality-plus-one.[120] In the instant case, Justices Rehnquist, O'Connor, Scalia, Kennedy, the four dissenters in *Union Gas*, and the newly added Justice Thomas formed the majority.[121]

Arguably, the Court's decision in the instant case runs contrary to "sound reason, history, precedent, and strikingly uniform scholarly commentary," as Souter's dissent asserts.[122] The Court has, in effect, given more freedom to the states to violate individual rights without accountability. Of course, this poses a problem for environmental disputes. It has been suggested that "environmental enforcement...is most directly threatened by *Seminole*, for no other body of regulatory law has relied so prominently, and successfully, on private parties to monitor and enforce state compliance with federal requirements."[123]

What are the results of the instant decision? Clearly, a federal court may not order a state to pay clean-up costs pursuant to CERCLA at the request of a private party, as that was the holding of *Union Gas*, which the instant decision overruled. Indeed, citizens are already feeling the effects of *Seminole Tribe*, as the decision is

[110] *Id.* at 1184.

[111] *Id.* at 1185.

[112] *Id.* at 1127.

[113] *Id.* at 1176-77 (Souter, J., dissenting).

[114] *Id.* at 1124.

[115] *Id.* at 1125.

[116] *Id.*

[117] *Id.* at 1127.

[118] *Id.* at 1128.

[119] *Id.*

[120] *Union Gas*, 491 U.S. at 1.

[121] *Seminole*, 116 S.Ct. at 1119.

[122] *See supra* notes 95-111 and accompanying text.

[123] Kass and McCarroll, *supra* note 97, at 3.

beginning to preclude CERCLA suits against states.[124] Other environmental laws, such as "the Clean Air Act; the Clean Water Act; the Toxic Substances Control Act (TSCA); ...and the Resource Conservation and Recovery Act (RCRA), that include private enforcement and citizen suit provisions allowing private action against states. . .failing to comply with federal regulations,"[125] are directly affected by the *Seminole Tribe* decision. Under *Seminole Tribe*, such citizen suits are now unconstitutional since Congress may not abrogate a state's constitutionally protected sovereign immunity.

Also significant in the instant decision is the majority's decision to limit the applicability of the *Ex parte Young* doctrine itself. Recall that the majority held that suits seeking injunctive relief from violations of federal rights may only use the *Ex parte Young* doctrine as an exception to the Eleventh Amendment bar if Congress has not already enacted a "detailed remedial scheme," specifically designed for the enforcement of those rights.[126] Having recently heard oral arguments in *Idaho v. Coeur d'Alene Tribe*,[127] "the justices have another chance to limit the *Young* doctrine by narrowing the definition of prospective relief available to a plaintiff against a state."[128]

Coeur d'Alene Tribe concerns ownership of a lake in Idaho. The dispute arose when the Coeur d'Alene Indian Tribe sued Idaho and various state agencies and officials to quiet title, asserting its ownership and jurisdiction over Lake Coeur d'Alene, and several rivers. The U.S. District Court for the District of Idaho dismissed the suit because of Eleventh Amendment considerations and because the court said the Tribe failed to state a claim to the property at issue.[129] The Ninth Circuit Court of Appeals held that the Eleventh Amendment barred the Coeur d'Alene Tribe's claim against the state, state agencies, and state officials to quiet title in the reservation, but did not bar claims for injunctive and declaratory relief against state officials for future violations of federal law.[130] The issue before the Court was whether the presumption of state title removes this case from the scope of the *Ex parte Young* doctrine, as Idaho argued.[131] Also, Idaho contended that the declaratory relief sought was retroactive in nature because it essentially attacks the sovereignty the state held over the land since it came into the union.[132] The Coeur d'Alene tribe insists that the relief sought is prospective in nature.[133] As one commentator recognized, "depending on what the Court does, it could put a lot of civil rights actions out of bounds' by permitting declaratory judgment actions to be characterized as claims for retroactive relief"[134] In any case, the Court could once again redefine the parameters of citizen suit enforcement of federal environmental laws, as it did in *Seminole Tribe*.

In the wake of *Seminole Tribe*, what options are still available to enforce environmental laws? Congress could condition federal grants on the requirement that states waive their immunity from private lawsuits in federal court. Also, federal agencies, such as the Environmental Protection Agency, may initiate suits against states for environmental wrongdoing, or impose administrative sanctions on states that fail to comply with environmental regulations.[135] The doctrine of *Ex parte Young* allows suits against the responsible agency official by name rather than suing the state itself.[136]

VI. CONCLUSION

It is difficult to predict the long-term effect of the *Seminole Tribe* decision with respect to environmental disputes. One commentator suggested, "The decision in Seminole Tribe is indeed about the power of the federal courts to enforce federal law against state government. It is also, however, about the power of individuals to vindicate their federally protected rights in federal court."[137] Clearly, the decision jeopardizes and frustrates the efforts of citizens to force states to comply with federal environmental laws. By embracing states' rights, to the detriment of individuals' rights, the

[124] *See* Prisco v. New York, 1996 U.S. Dist. LEXIS 14944, at *45 (S.D.N.Y. Oct. 8, 1996) (holding that as the Eleventh Amendment bars CERCLA suits against a state, according to *Seminole*, a plaintiff has no recourse against New York under the federal superfund law for the actions of state environmental officials who allegedly polluted her land for profit under the guise of a "sting" operation.).

[125] Jeffrey Reynolds, *Court Ruling Could Affect Environmental Laws*, 1996 WL 8981217.

[126] *Seminole*, 116 S.Ct. at 1133.

[127] 1996 WL 604993 (U.S. Oral Arg.).

[128] Richard C. Reuben, *Justices Take the 11th*, 83 A.B.A.J. 44 (1997).

[129] 798 F.Supp. 1443 (1992).

[130] 42 F.3d 1244 (1994).

[131] 1996 WL 604993 (U.S. Oral Arg.).

[132] *Id.*

[133] *Id.*

[134] Reuben, *supra* note 128, at 44.

[135] 42 U.S.C. § 9613.

[136] Of course, the reason why Congress included citizen-suit provisions in most federal environmental statutes was because governmental agencies are often reluctant to bring suits against one another, due to a sort of a "don't bite the hand that feeds you" mentality.

[137] Martin A. Schwartz, *The Eleventh Amendment Decision*, N.Y.L.J., May 21, 1996, at 3.

Seminole Tribe decision, seems to sound a death knell for private enforcement of federal environmental rights. Thus, environmentalists would likely identify with Justice Stevens and hope that "...the better reasoning in Justice Souter's far wiser and far more scholarly opinion will surely be the law one day."[138]

[138] *Seminole*, 116 S.Ct. at 1145.