

1998

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Recommended Citation

7 J. Bankr. L. & Prac. 521 (1998)

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7 J. Bankr. L. & Prac. 521

Journal of Bankruptcy Law and Practice
September/October, 1998

STATE SOVEREIGN IMMUNITY AND THE BANKRUPTCY CODE [PART ONE]

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This article is the first of a two-part series in which Professor Gebbia-Pinetti considers how the complexities of state sovereign immunity apply to bankruptcy actions. The present article lays the foundation by analyzing the source, scope, and nature of states' immunity from suits filed in federal court to enforce state and federal law. This includes a discussion of traditional sovereign immunity, Eleventh Amendment immunity, abrogation of immunity, and the Supreme Court's decision in Seminole Tribe v. Florida. The second article will consider the extent to which the bankruptcy estate may enforce Bankruptcy Code actions against the states, notwithstanding state sovereign immunity. (Forthcoming, Journal of Bankruptcy Law and Practice, November/December 1998).

I. INTRODUCTION: THE IMMUNITY ENIGMA

The perplexing problem of sovereign immunity has come full circle to vex bankruptcy courts and commentators.² This is altogether fitting, for it was an unpaid debt (in 1793, by the state of Georgia)³ that precipitated the convoluted development of the modern doctrine under which states may be immune from suit under federal law.⁴

In a bankruptcy case, the representative of the bankruptcy estate⁵ (the “debtor-in-possession” or “trustee”)⁶ might sue a state to enforce a federal bankruptcy law cause of action that “arises under” the Bankruptcy Code, or *522 “arises in” a bankruptcy case.⁷ These include actions to recover money or property from the state,⁸ enjoin the state from taking actions deleterious to the debtor or the estate,⁹ and bind the state to the bankruptcy court's determination of the amount, nature, classification and treatment of the state's claims against the debtor.¹⁰ The bankruptcy court may also hear state law and non-bankruptcy federal law causes of action against the state, including traditional tort and contract claims, if those actions “relate to” the bankruptcy case.¹¹

Suit by a bankruptcy trustee against a state presents an ironic clash between the immunity principle and bankruptcy law. In theory, immunity arises from a desire to honor the sanctity of sovereignty.¹² In practice, however, immunity is designed to protect states' treasuries.¹³ Immunity is also a practical necessity because a judgment against a state cannot be enforced peaceably *523 if the state resists.¹⁴ Immunity protects a state from its debt collectors, yet allows the state to collect its own claims. Bankruptcy law protects a debtor from its debt collectors, yet requires that the debtor collect its own claims in order to maximize distribution to its creditors. The trustee's ability to enforce claims against the states fosters the dual objectives of bankruptcy law.¹⁵ The debtor-oriented goal is to accord the debtor a fresh start through a discharge of pre-petition debts. This goal may be undermined if the trustee *524 cannot bind the state to the discharge or prevent the state from collecting its claims after bankruptcy. The creditor-oriented goal is to maximize and equitably distribute the estate's assets. This goal may be undermined if the trustee cannot collect money or property from the state, compel the state to return preferential transfers, or bind the state to the court's determination of the amount, nature, priority and treatment of the state's claims. This Article revisits immunity doctrine in order to determine the extent to which the bankruptcy estate may enforce the provisions of the Bankruptcy Code against the states. The answer to this question is complicated because the source, scope and nature of states' immunity depend upon the court in which a suit is filed (federal or state), the law the suit seeks to enforce (federal or state), who files a suit (private party or government), and other considerations.¹⁶ Moreover, since the very inception of federal court jurisdiction, constitutional law scholars and Supreme Court justices have disagreed among themselves concerning the source, scope and nature of states' immunity in federal question cases.¹⁷ These disputes have caused the justices to split five-to-four in most of the leading Supreme Court cases dealing with constructive consent and abrogation of states' immunity.¹⁸ Consequently, it *525 is difficult to define basic immunity doctrine with sufficient confidence to predict the path the law will take.¹⁹

The immunity enigma inheres in federalism. In a single-level government system (such as an independent nation-state), there is only one “sovereign,” one sovereign's law, one sovereign's courts, and one sovereign's citizens. Federalism, however, creates multiple levels of government, each with its own laws, courts, and citizens. Concurrent jurisdiction permits state courts to exercise jurisdiction over many federal law causes of action²⁰ (in addition to state law causes of action). Similarly, federal

courts, including federal bankruptcy courts, exercise jurisdiction over certain state law causes of action²¹ (in addition to federal law causes of action²²). Before federalism, a sovereign state generally was immune from a suit filed in its own courts, by its own citizens, to enforce its own laws.²³ After federalism, it is necessary to determine whether the state also enjoys immunity from a suit filed in (i) federal court, by its own citizens or another state's citizens, to enforce the state's own law; (ii) federal court, by its own citizens, another state's citizens or the federal government, to enforce federal law; or (iii) state court, by its own citizens, another state's citizens or the federal government, to enforce federal law.

Part II of this Article examines the source and scope of states' immunity from suit in federal court.²⁴ The Eleventh Amendment, which limits federal courts' "judicial power" over certain citizen suits against states, accords states a form of immunity.²⁵ Supreme Court justices and constitutional law scholars have long disputed, however, whether it is the Eleventh Amendment or traditional sovereign immunity that protects states from federal ***526** question suits filed in federal court.²⁶ The distinction between these two sources of immunity is critical because they differ markedly in nature.

Part III examines the nature of states' immunity in federal court. The nature of states' immunity determines the circumstances in which immunity may be eliminated. There is no doubt that states may waive traditional state court immunity. Similarly, Supreme Court decisions have long suggested that states may waive their federal court immunity. In recent decades, the Court has also suggested that immunity is malleable enough to permit Congress either to condition a state's participation in federal programs on the state's constructive consent to federal court enforcement, or to abrogate states' immunity under specific federal laws.²⁷ In 1996, however, in the now-infamous *Seminole* case,²⁸ the Supreme Court held that Congress has no power to "abrogate" states' immunity except pursuant to the express authority of the Fourteenth Amendment.²⁹ *Seminole* reasoned that states' immunity from citizen suits filed in federal court to enforce federal law arises solely under the Eleventh Amendment, and that the Eleventh Amendment embodies a constitutional limit on federal courts' jurisdiction. This rationale compels a re-examination of constructive consent, abrogation, and the nature of states' federal court immunity.³⁰ Part III of this Article discusses abrogation, *Seminole*, and *Seminole's* impact on immunity and abrogation doctrine.³¹

Parts IV and V will appear in the November/December issue of the Journal of Bankruptcy Law and Practice.

***527** Part IV.A applies immunity and abrogation doctrine in the bankruptcy context. It considers whether states are entitled to Eleventh Amendment immunity in bankruptcy court (Part IV.A.1), whether a bankruptcy case is a "suit against the state" for Eleventh Amendment purposes (Part IV.A.2), and whether Congress may abrogate states' immunity under the Bankruptcy Code using its Fourteenth Amendment powers (Part IV.A.3).

If states are immune from suit in bankruptcy cases and Congress cannot abrogate states' immunity, how can the bankruptcy trustee enforce the Bankruptcy Code against recalcitrant states? Part IV.B analyzes five possible means of enforcing the Bankruptcy Code against the states after *Seminole*: (i) suit in federal bankruptcy court with the state's consent or waiver (Part IV.B.1), (ii) suit in state court with or without the state's consent (Part IV.B.2), (iii) Supreme Court review of a federal bankruptcy law question determined in state court (Part IV.B.3), (iv) suit against a state official to compel the state to comply with federal bankruptcy law (Part IV.B.4),³² and (v) federal government enforcement (Part IV.B.5).

Part V summarizes my conclusions with respect to states' immunity and makes recommendations with respect to enforcing the Bankruptcy Code against the states.

II. THE SOVEREIGN STATE AND THE FEDERAL COURTS: THE SOURCE, NATURE AND SCOPE OF STATES' IMMUNITY

The Constitution creates a federal forum with judicial power over certain state law actions in which the state is a party,³³ and federal law actions without regard to the nature of the parties.³⁴ Parts II.A and II.B consider whether states were immune from suits filed in this new, federal forum³⁵ to enforce state law and federal law, respectively, prior to the Eleventh Amendment. Part II.C examines the scope and nature of the Eleventh Amendment. Parts II.D and II.E examine the Eleventh Amendment's impact on states' immunity from suits filed in federal court under diversity jurisdiction and federal question jurisdiction, respectively.

***528** A. State Law in Federal Courts: Diversity Jurisdiction Before the Eleventh Amendment

Suppose that a citizen of *State B* sues *State A* under state law to collect a debt. If the citizen sues *State A* in *State A's* own courts, *State A* probably would be entitled to assert sovereign immunity as a defense, under *State A's* law.³⁶ If the citizen sues *State A* in another state, such as *State B*,³⁷ *State A* might be entitled to assert sovereign immunity as a defense, under *State B's* law.³⁸ Diversity jurisdiction allows the citizen of *State B* to sue *State A* in federal court. Can the state assert immunity as a defense in federal court? The answer depends on two questions that define the source and scope of states' immunity.

First, would the state have been immune under traditional common law sovereign immunity? Second, how did the Constitution affect traditional common law immunity with respect to diversity suits?

If, under the common law, the state had been immune only from suits filed in its own courts, then the state would seem to be subject to suit in federal court, unless the Constitution expanded immunity to cover suits in federal court. If, instead, the state had been immune from suits filed in any court, then the state would seem to be immune from suit filed in federal court, unless the Constitution eliminated states' immunity with respect to diversity suits filed in federal court.

Before the Eleventh Amendment, the only provision of the Constitution that referred to the states' status in federal court was the diversity jurisdiction grant of Article III itself. Article III vests the "judicial power" of the United States in the Supreme Court and such lower courts as Congress may establish³⁹ and extends the judicial power to "Controversies between a State and Citizens of another State" (among other bases of jurisdiction).⁴⁰ This aspect of diversity jurisdiction may have been designed to protect citizens of one state from being sued by another state in that state's own courts. Its effect, however, is to grant federal courts jurisdiction over state law causes of action that previously would have been heard in state court. Article III gives §529 no express guidance concerning how this broad jurisdictional grant might affect states' immunity. Does Article III retain, expand, or eliminate states' common law immunity in diversity cases?

The Supreme Court addressed this issue in the well-known, pre-Eleventh Amendment case of *Chisholm v. Georgia*.⁴¹ In *Chisholm*, a citizen of South Carolina⁴² sued the state of Georgia to collect a debt. Although the complaint was based upon a state law cause of action, diversity jurisdiction allowed the citizen to sue in federal court. To Georgia (and other interested states) the issue was simple: if Georgia was immune from suit without its consent under the common law, could the mere coincidence of diversity jurisdiction eviscerate that immunity and subject Georgia to suit in federal court without its consent?

The answer, according to the Supreme Court, was "yes." The Court held (in a four-to-one split)⁴³ that Georgia had no immunity against a diversity suit commenced in federal court. The majority reasoned that the plain meaning of Article III's citizen-state diversity clause allows federal courts to hear citizen suits against unconsenting states,⁴⁴ and that the federal judicial power obviates any immunity the states might have enjoyed outside of federal court.⁴⁵ According to *Chisholm*, the "deal" to which federalism bound the states required states to forego federal court immunity as part of the price of joining the union. Consequently, a citizen of *State B* frustrated by *State A*'s state court immunity could simply circumvent that immunity by suing *State A* in federal court. The majority justices viewed this result as critical to the stability of the new nation.

The separate opinions of the four majority justices reflect divergent views, however, concerning the nature of states' sovereignty. Two of the majority justices simply assumed that Article III eliminated whatever immunity states §530 may have enjoyed in state court.⁴⁶ The other two justices argued that, under the Constitution, sovereignty rests in the people, as a sovereign superior to the states. In the exercise of their sovereign power, the people could and did establish the Constitution, which subjects the states to suit in federal court without the states' consent.⁴⁷

The fifth justice, Justice Iredell, argued that the majority erred in its vision of both the nature of states' sovereignty and the manner in which federalism affected states' sovereign immunity.⁴⁸ He argued that states were, indeed, sovereign and that immunity from suit was so essential to states' sovereignty that it could not be eliminated in a manner that was, to his view, as indirect as Article III's grant of diversity jurisdiction to federal courts.⁴⁹ Under Justice Iredell's approach, the federal courts received their power not directly from Article III's jurisdictional grant but only from laws that Congress enacted to implement Article III.⁵⁰ The relevant federal law, the Judiciary Act of 1789, granted the federal courts authority to exercise their jurisdiction only in a manner "agreeable to the principles and usages of law."⁵¹ Justice Iredell concluded that such an indirect grant did not abrogate states' immunity because no existing principle of law allowed a citizen to sue a state without the state's consent.⁵²

Not surprisingly, the *Chisholm* decision generated howls of protest by the §531 states.⁵³ Not only was the decision an affront to states' view of the privileges of sovereignty, but the specter of citizen suits threatened to deplete state treasuries at a time when states were struggling desperately to rebuild after the revolutionary war.⁵⁴

B. Federal Law in Federal Courts: Federal Question Jurisdiction Before the Eleventh Amendment

Chisolm's reasoning would seem to extend to federal question suits filed in federal court as well as to diversity suits.

Article III grants federal courts jurisdiction over federal question actions, just as it grants federal courts jurisdiction over diversity actions.⁵⁵ If Article III's grant of diversity jurisdiction obviates any immunity the states might have enjoyed outside of federal court in suits to enforce state law, then Article III's grant of federal question jurisdiction would seem to obviate any immunity the states might have enjoyed outside of federal court in suits to enforce federal law.⁵⁶ Moreover, citizen suits to enforce federal

law pose the same threat to the state's treasury (to the extent they seek money damages), and the same challenge to the states' notions of sovereignty as do diversity suits. Consequently, under *Chisholm's* reasoning (if valid), there would appear to be no basis upon which states would be immune from suit in federal court to enforce federal law, at least prior to the enactment of the Eleventh Amendment. If, however, Justice Iredell's reasoning is valid, and is extended to federal question cases, than states probably would be immune in federal question suits, but Congress might have the power to abrogate states' immunity.⁵⁷

The Eleventh Amendment was ratified before the Court definitively [*532](#) determined whether states were immune from suit filed in federal court to enforce federal law.⁵⁸

C. The Nature and Scope of Eleventh Amendment Immunity

The day after the Supreme Court issued its decision in *Chisholm*, a resolution designed to amend the Constitution to overrule *Chisholm* was introduced in the House of Representatives.⁵⁹ The broadly worded resolution, if enacted, would have “enshrin[ed] state sovereign immunity in federal courts for all cases.”⁶⁰ The source of states' immunity in federal court would clearly have been the Constitution itself (*i.e.*, the proposed Amendment) and the scope would have broadly included any federal court suit.⁶¹ The following day, a more narrowly worded resolution, referring only to suits commenced against a state by citizens of other states or of foreign nations, was introduced in the Senate.⁶² Congress and the states ultimately ratified, as the Eleventh Amendment, the narrower Senate resolution (with the addition of three words, the significance of which is disputed).⁶³ The Amendment (with the added words emphasized) provides that: “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.*”⁶⁴

[*533](#) The Eleventh Amendment became effective on January 8, 1798.⁶⁵ Courts and scholars have struggled to define its nature and scope ever since.⁶⁶

As to its nature, the challenge lies in determining the extent to which Eleventh Amendment immunity is similar in character to traditional common law sovereign immunity. If Eleventh Amendment and traditional immunity are identical in nature, it would not matter whether a state's immunity arose under one or the other. If, however, Eleventh Amendment and traditional immunity are different in nature, then the source of states' immunity becomes crucial in determining ancillary issues such as whether immunity may be waived or abrogated. The nature of states' immunity is examined *infra* in the context of abrogation, waiver and consent, and federal question cases filed in state court.⁶⁷

As to scope, Eleventh Amendment immunity is narrower than traditional immunity because the Eleventh Amendment protects the state against some, but not all, suits commenced in federal court.⁶⁸ Two clauses of the Eleventh Amendment determine which federal court suits fall within its scope: the “citizen-state” clause and the “judicial power” clause. First, the Amendment applies only to suits against states by citizens of other states or of foreign states. Although the Court has interpreted “citizen” broadly to prohibit federal court suits against a state by private parties other than individual citizens, such as Indian tribes and federal corporations,⁶⁹ the Amendment does not prohibit the federal government or other states from suing a state in federal court.⁷⁰

The more perplexing question is whether the citizen-state clause only bars suits against states by citizens of other states (in accord with the Amendment's language), or whether it also bars suits against states by their own citizens (in accordance with some broader principle of immunity). This issue arises only if the Eleventh Amendment applies to federal question suits because diversity suits necessarily involve a state and a citizen of a different state. This reveals the second scope question, which is whether the “judicial [*534](#) power” clause prohibits citizen suits against states only under diversity jurisdiction (Part II.D) or also under federal question (and other federal court subject matter) jurisdiction (Part II.E)?

D. Diversity Jurisdiction After the Eleventh Amendment

The Eleventh Amendment clearly bars a *Chisholm*-type suit, *i.e.*, a diversity jurisdiction suit, filed in federal court, by citizens of one state against another state, to collect a debt under state law.⁷¹ The Amendment was enacted directly in response to *Chisholm* (a diversity suit),⁷² and the Amendment's “judicial power” clause and “citizen suit” clause both clearly apply to diversity suits.

First, federal courts' “judicial powers,” which are restrained by the Eleventh Amendment, clearly include citizen-state diversity jurisdiction under Article III.⁷³ Indeed, the language of the Amendment closely parallels the language of Article III's citizen-state diversity clause.⁷⁴ Under Article III, the “judicial power” of the United States extends to (among other things) “Controversies between a State and Citizens of another State.”⁷⁵ Under the Eleventh Amendment, the “judicial power” of the United States shall not be construed to extend to “any suit ... commenced or prosecuted against one of the United States by Citizens of another State.”⁷⁶

Second, the Amendment's language expressly applies to suits by citizens of one state against another state.⁷⁷ Consequently, Article III's grant to federal courts of diversity jurisdiction no longer extends to diversity suits against states.

*535 Courts and scholars agree that the Eleventh Amendment applies to diversity suits.⁷⁸ The more difficult questions arise when the history, language and policies of the Amendment are applied to federal question suits against states.

E. Federal Question Jurisdiction After the Eleventh Amendment

Since the enactment of the Eleventh Amendment, the Supreme Court has consistently held that states enjoy immunity from citizen suits filed in federal court to enforce federal law.⁷⁹ The Supreme Court justices have not, however, unanimously identified the Eleventh Amendment as the source of that immunity. While some justices root states' federal question immunity in the Eleventh Amendment,⁸⁰ others find it in some generalized constitutional or extra-constitutional common law immunity doctrine.⁸¹ Several opinions navigate among these conflicting views by employing carefully vague language concerning the source of states' immunity in federal question cases.⁸²

These divergent views are best understood against the backdrop of *Hans* *536 v. *Louisiana*.⁸³ *Hans* is an early, leading case in which the Supreme Court was asked to define the source and scope of states' immunity in federal question suits filed in federal court.⁸⁴

In *Hans*, a Louisiana citizen sued Louisiana in federal court alleging that Louisiana had repudiated its debts in violation of the Constitution's Contract Clause.⁸⁵ Louisiana had amended its constitution to require that certain taxes, which had been collected to pay interest on state-issued bonds purchased by the plaintiff and others, be used instead to pay state government expenses.⁸⁶ Louisiana claimed immunity.

Hans differed from *Chisholm* in two important ways. First, the Court viewed the case as raising a federal Contract Clause issue (rather than a simple state law debt collection issue).⁸⁷ Second, the plaintiffs in *Hans* had sued their own state. The plaintiffs cited both of these differences to counter Louisiana's immunity defense. First, they argued that states enjoyed no immunity from suits that seek to remedy violations of federal law (in contrast to diversity suits, which seek to remedy violations of state law). Second, because the Eleventh Amendment expressly refers only to suits against states by citizens of other states, the plaintiffs argued that the Amendment could not apply to a suit by the state's own citizens.⁸⁸

The Court in *Hans* held that states do enjoy immunity in federal question cases and that citizens cannot sue either their own state or another state in federal court to enforce federal law under federal question jurisdiction.⁸⁹ *Hans*'s reasoning, however, created confusion that remains to this day *537 concerning the source of states' immunity in federal question cases. Courts and scholars have constructed at least four different interpretations of *Hans*-type immunity, all of which are consistent with the result in *Hans*, and each of which arguably is supported by selected language in *Hans*.⁹⁰ The following discussion of these interpretations moves from roughly the broadest to the narrowest interpretation of the Amendment.

First, under an expansive reading of the Eleventh Amendment (the "expansive view"), Eleventh Amendment immunity applies to both diversity and federal question suits filed against a state in federal court by the state's own citizens or another state's citizens.⁹¹ This view cannot be reconciled with the language of the Amendment, because the Amendment *538 refers only to suits against a state by citizens of another state.⁹² The *Hans* Court was troubled, however, by the apparent anomaly of prohibiting suits by citizens of other states but permitting suits by citizens of the same state.⁹³ To avoid this result, the Court reasoned that the Eleventh Amendment would never have been adopted if it had expressly permitted a citizen to sue its own state in federal court to enforce federal law.⁹⁴ The expansive view interprets this comment to mean that the Eleventh Amendment's language is merely illustrative of a much broader principle of sovereign immunity that the Eleventh Amendment itself (rather than some other source of immunity) actually embodies.⁹⁵ Five of the current Supreme Court justices (Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas) have embraced this expansive view of the Eleventh Amendment.⁹⁶

Second, under a textual reading of the Eleventh Amendment (the "textual view"), Eleventh Amendment immunity applies only to diversity suits and to federal question suits filed against states by citizen of other states ("non- *539 citizens").⁹⁷ States enjoy immunity in federal question suits filed in federal court by the states' own citizens, but that immunity arises only under the common law.⁹⁸ Again, *Hans* may be read as supporting this approach.

The *Hans* Court began its analysis by implying that the Court had already determined that the Eleventh Amendment granted states immunity in federal question cases filed by non-citizens.⁹⁹ In the earlier cases to which the Court referred, non-citizens

had sued state officials alleging violations of the Contract Clause. In each case, the Court had held that the suit was barred because the suit was virtually against the state itself, rather than the state official.¹⁰⁰ Although none of these cases held that the Eleventh Amendment applies to federal question suits,¹⁰¹ *Hans* concluded that the Court necessarily had assumed that the underlying federal question actions against the states would have been barred by the Eleventh Amendment.¹⁰² To avoid an anomalous result under which suits by non-citizens would be barred but suits by citizens would be allowed, *Hans* suggested that the Eleventh Amendment is not the only basis for states' immunity:

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that Amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read: and *if there were no other reason or ground for abating his suit, it might be maintainable*; and then we should have this anomalous result ...¹⁰³

To avoid this result, *Hans* arguably concludes that Louisiana's immunity §540 in a same-citizen suit arises *not* from the Eleventh Amendment (the language of which does not encompass same-citizen suits) but rather from some form of common law immunity that applies to matters not covered by the Amendment.¹⁰⁴ In other words, *Hans* may have applied the Eleventh Amendment to suits by non-citizens and applied common law to suits by citizens. This interpretation has garnered a small following among scholars and has prevailed in several opinions by Justice Brennan.¹⁰⁵ Under this view, most of the leading federal question immunity cases would not raise Eleventh Amendment issues at all because they involve suits by citizens against their own states.¹⁰⁶

Third, under a narrow reading of the Eleventh Amendment, Eleventh Amendment immunity applies only to diversity jurisdiction suits and common law immunity applies to federal question suits (the “diversity” view). This view prevailed in the past with Justices Marshall, Blackmun (and Brennan, §541 in some opinions),¹⁰⁷ prevails today with Justices Souter, Ginsburg, Breyer, and Stevens,¹⁰⁸ and is widely espoused by constitutional law scholars.¹⁰⁹ The diversity view may be difficult to reconcile with *Hans*'s suggestion that earlier cases applied the Eleventh Amendment to non-citizen federal question cases, or with the commonly held view that *Hans* interpreted the Amendment itself as embodying some broader principle of immunity than that which is included in its express words.¹¹⁰ Nevertheless, *Hans* is less than clear concerning the source of states' federal question immunity. *Hans* arguably may have employed common law immunity to supplement rather than expand the scope of the Eleventh Amendment, such that the Amendment applies to diversity cases and the common law applies to both citizen and non-citizen federal question cases. More importantly, however, advocates argue that the diversity interpretation is true to the language, history and purposes of the Amendment (some add that *Hans* should be overruled to the extent that it holds otherwise).¹¹¹ Because of its popularity and its significant impact on the doctrinal coherence of concepts such as waiver and abrogation, it is useful to consider briefly the principal arguments supporting the diversity view.

Diversity proponents argue that the text of the Amendment applies awkwardly, at best, to federal question jurisdiction. The Eleventh Amendment's “judicial power” clause (which limits federal courts' judicial power with respect to “any suit”) arguably limits federal courts' “judicial power” §542 with respect to federal question suits as well as diversity suits.¹¹² The Amendment's “citizen-state” clause, however, does not neatly parallel the Constitution's grant of federal question jurisdiction in the way that it neatly parallels the grant of diversity jurisdiction.¹¹³ If the Amendment were applied as written to federal question suits, it would prohibit federal courts from exercising jurisdiction over suits against states by other citizens of other states, but permit federal courts to exercise jurisdiction over suits against states by citizens of the same state. Many scholars find nothing in the history or purposes of the Amendment to support this anomaly.¹¹⁴ Consequently, they conclude that this incongruity demonstrates that the Amendment simply does not apply to federal question actions at all.¹¹⁵ They explain the Amendment's language by noting that Article III creates jurisdiction based upon subject matter (*e.g.*, federal question) and the status of the parties (*e.g.*, diversity). A federal question case may, incidentally, be commenced by a citizen of one state against another state. Nevertheless, because the Eleventh Amendment refers only to the status of the parties, it limits only Article III's party-status jurisdiction against the states (*i.e.*, diversity), not its subject matter jurisdiction against the states (*i.e.*, federal question).¹¹⁶ If the Eleventh Amendment had been designed to extend to federal question jurisdiction, it could have been drafted more broadly to include same-state citizen suits.¹¹⁷ On the other hand, if the Amendment had been designed to apply only to diversity suits, more precise drafting might have obviated §543 questions concerning its extension to other bases of federal court jurisdiction.¹¹⁸

Diversity advocates turn next to the history of the Amendment. They argue that the drafters never intended and the ratifiers never imagined that the Eleventh Amendment would be applied to bar federal court jurisdiction over suits against states to enforce federal law.¹¹⁹ This view rests, in part, in the fact that the Amendment was enacted in response to a diversity suit (*Chisholm*), and

that the debates leading to the enactment of the Eleventh Amendment did not expressly focus on federal question jurisdiction.¹²⁰ Some add that the drafters did not mention federal question jurisdiction or draft the Amendment broadly to include federal question jurisdiction because no one thought that states were immune from federal question suits.¹²¹ Others suggest that the drafters did consider federal question suits and expressly §544 rejected the earlier proposal to ensure that the Amendment would not apply to federal question suits.¹²²

Finally, it could be argued that an Eleventh Amendment limited in scope to diversity suits would establish a coherent immunity policy by ensuring that federal laws may be enforced in federal courts.¹²³

Although the diversity view enjoys wide support, there is yet a fourth interpretation of *Hans*. Under this view, advanced by federalism scholar Professor Martha A. Field, the Eleventh Amendment simply preserves traditional common law immunity by overruling *Chisholm* (“common law view”).¹²⁴ *Chisholm* held that Article III eliminated common law immunity. In dissent, Justice Iredell argued that Article III had no effect on states’ pre-existing common law immunity. Professor Field argues that the drafters, in fact, were split on this issue. The Eleventh Amendment, however, overruled *Chisholm* and, thereby, adopted the view that Article III does not affect states’ immunity. Consequently, *Hans* rejected the *Chisholm* majority view and embraced Justice Iredell’s argument.¹²⁵ This may suggest that *Hans* saw the Eleventh Amendment as simply restoring common law immunity with respect to both diversity and federal question suits.¹²⁶

If the immunity states enjoy in federal court in both diversity and federal question cases arises solely from the common law, and the Eleventh Amendment §545 does not add any new type of immunity, is the Eleventh Amendment superfluous? Professor Field argues that it is not because the Eleventh Amendment was a necessary means of instructing courts not to interpret Article III as eliminating states’ immunity, after *Chisholm* mistakenly read Article III as eliminating states’ immunity.¹²⁷ In this sense, the Eleventh Amendment serves as something of an interpretive guide to the proper reading of Article III.¹²⁸ Initially, Professor Field’s view may seem difficult to reconcile with the Eleventh Amendment’s distinction between citizens and non-citizens.¹²⁹ Professor Field argues, however, that the Amendment distinguishes non-citizen suits and citizen suits because the Amendment was designed to reverse the implication that Article III allows suits against states by non-citizens under diversity jurisdiction. Because there was no implication that Article III allowed suits against states by their own citizens, there was no need to refer to such suits in the Amendment.¹³⁰

In summary, more than one hundred years after *Hans*, courts and scholars continue to debate the source of *Hans*-type immunity. *Hans*’s ambiguity arises, in part, because the *Hans* Court may have been driven more by a desire to achieve a satisfactory result than by a desire to develop a coherent theory. The *Hans* decision is peppered with *dicta* suggesting that the result was motivated by political pressure, public sentiment, a desire to protect the Court’s credibility, and a deep concern for the political repercussions the Court foresaw flowing from a denial of states’ immunity. The majority apparently believed that a decision denying states immunity would promptly be overruled by a constitutional amendment. The Court had been chastized by the constitutional amendment overruling *Chisholm*, and it feared that the Court’s authority could be undermined if it issued an opinion as unpopular §546 as *Chisholm*.¹³¹ Not surprisingly, courts, commentators and even the concurrence in *Hans* have shied away from *Hans*’s forthright admission that political motivation influenced the decision.¹³² These motivations may, however, have overshadowed concerns for developing a coherent theory of state immunity in federal court.

The absence of a coherent theory of states’ federal court immunity is not merely of academic interest. Rather, it seriously undermines efforts to determine how to enforce federal law against the states after *Hans*. If states are immune from suits filed by citizens in federal court to enforce federal law, it is necessary to identify alternative means of enforcing federal law against the states. *Hans* casts a long shadow on this enterprise because the viability of alternate methods of enforcing federal law against the states depends in large part on questions left open by *Hans* concerning the source, scope and nature of states’ immunity. The most significant question in this regard is whether states’ immunity from suits filed in federal court to enforce federal law arises under the Constitution itself (through the Eleventh Amendment) or under the common law. Both the “diversity” and the “common law” interpretations (the third and fourth views discussed above) argue that states’ immunity with respect to federal question cases arises under the common law. In contrast, under the “expansive” interpretation (the first view discussed above), the Eleventh Amendment applies to all federal question suits against states, and under the “textual” interpretation (the second view discussed above), the Eleventh Amendment applies to some federal question suits against states (those by non-citizens). The result in *Hans* would be the same under any of these views. The distinction between a common law and a constitutional foundation for immunity is fundamental, however, to determining important ancillary issues that were not even raised in *Hans*, such as whether Congress can abrogate states’ immunity.¹³³

Part III examines congressional abrogation of states’ federal court immunity.

III. CONGRESSIONAL ABROGATION OF STATES’ FEDERAL COURT IMMUNITY

If states are immune from citizen suits filed in federal court to enforce [*547](#) federal law, how can citizens compel states to comply with federal laws, such as the Bankruptcy Code? For two decades,¹³⁴ Congressional abrogation of states' immunity seemed to provide a broad and effective means of enforcing federal law against unconsenting states.¹³⁵

A. Abrogation: Revisiting the Source and Nature of States' Federal Court Immunity

This Part defines the interplay between states' immunity and Congress' legislative powers.

Many scholars agree that if states' federal court immunity in federal question cases is based upon the common law (as under the diversity or common law interpretations of the Eleventh Amendment), then Congress may abrogate states' immunity. If states' immunity is a constitutional right, however, then Congress may not abrogate states' immunity.¹³⁶ The underlying premise is simple: Congress has the power to alter common law through legislation enacted under Congress' enumerated powers,¹³⁷ but Congress has no power to amend the Constitution by legislative fiat.

Other scholars suggest that, even if the Constitution grants states immunity, [*548](#) Congress may abrogate immunity under the exercise of its enumerated powers. The premise is that even constitutional immunity may be subject to abrogation under an equal and countervailing constitutional power. This countervailing power is found in the broad legislative powers granted to Congress (under Article I and several of the constitutional Amendments) to enact federal laws.¹³⁸

Both approaches assume that states agreed to forego some measure of immunity when they ratified a Constitution that grants Congress the power to legislate in particular areas and to bind the states to that legislation.¹³⁹

Several Supreme Court cases decided beginning in the late 1960s suggested that Congress might have the power to abrogate states' immunity. These cases arose in the context of whether the state had constructively consented to suit by engaging in activity that it knew Congress had regulated.

In the first case, *Parden v. Terminal Railway*,¹⁴⁰ citizens of Alabama sued an Alabama state-owned railroad in federal court to enforce provisions of the Federal Employers' Liability Act ("FELA").¹⁴¹ FELA's regulatory scheme applies to "every common carrier by railroad while engaging in [interstate] commerce" and FELA allows citizens to commence enforcement actions in federal court.¹⁴²

Even though FELA does not expressly mention states, the five-justice majority concluded that Congress had intended to subject state-owned railroads to liability under FELA because FELA applies to all common carriers.¹⁴³ The majority then held that:

By adopting and ratifying the Commerce Clause, the States empowered [*549](#) Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.¹⁴⁴

The four dissenters agreed that Congress has the power to condition a state's participation in interstate transportation on the state's waiver of immunity from suits arising from that activity. Essentially, the state could choose either to forego the activity or to consent to federal court suit for claims that arise from the activity.¹⁴⁵ The dissenters argued, however, that Congress could impose such a condition only by a statement of "unmistakable clarity" in the statute. FELA's general reference to "every common carrier," without any specific reference to states, they argued, did not meet this clear statement requirement.¹⁴⁶

In the ensuing decades, the Court considered the degree of clarity necessary to require the states to waive immunity as a condition of participating in regulated activity. In *Employees v. Department of Public Health & Welfare*,¹⁴⁷ state employees sued a state agency under the Fair Labor Standards Act ("FLSA").¹⁴⁸ The FLSA allowed employees to sue in federal court and had recently been amended to add employees of certain state institutions to the definition of persons entitled to recover damages.¹⁴⁹ The six-justice majority distinguished *Parden* but did not reject its rationale. The Court reasoned that the amendment, which allowed employees of certain state institutions to sue their employers but did not modify the provision allowing suit in federal court, did not clearly evince a congressional intent to condition states' operation of those institutions on a waiver of immunity.¹⁵⁰

The two-justice concurrence argued that states' federal court immunity was a constitutional protection that could be overcome only by the states' consent. The concurrence reasoned that the state could not have consented to [*550](#) suit because it had been operating the institutions before the FLSA had been amended to apply to employees of those institutions.¹⁵¹

One year later, in *Edelman v. Jordan*,¹⁵² the Court considered a citizen suit filed under the predecessor to the Social Security Act. The Act did not contain a provision allowing citizens to recover benefits that states had wrongfully withheld in the past.¹⁵³ The Court concluded that neither *Parden* nor *Employees* applied because “in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent.”¹⁵⁴

The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.¹⁵⁵

Edelman added that “constructive consent,” under which a state consents to suit merely by participating in a federal program, is not a viable means of waiving immunity under a statute that does not apply to the states.¹⁵⁶ *Edelman* did not expressly reject *Parden*, but held that neither abrogation nor waiver could apply unless Congress had created a cause of action against the states.

In *Welch v. Texas Department of Highways & Public Transportation*,¹⁵⁷ decided twenty-three years after *Parden*, the Court significantly limited *Parden*'s reach. A plurality of the Court¹⁵⁸ held that a congressional intent to subject states to suit in federal court must be “expressed in unmistakable *551 statutory language.”¹⁵⁹ *Welch* overruled *Parden* “to the extent that *Parden* ... is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language.”¹⁶⁰

Welch did not, however, expressly question *Parden*'s holding that Congress has the power to condition states' participation in federal programs on a waiver of immunity.¹⁶¹ Moreover, *Employees*, *Edelman*, and *Welch* all suggested that Congress could impose such a condition even if states' federal court immunity was constitutionally required.¹⁶² None of these cases suggested, however, that Congress could absolutely abrogate states' immunity without the states' constructive consent.

In *Fitzpatrick v. Bitzer*,¹⁶³ in contrast, the Court held that Congress could abrogate states' immunity *without* the states' consent.¹⁶⁴ In *Fitzpatrick*, male governmental employees and retirees, all of whom were Connecticut *552 citizens, sued the State of Connecticut¹⁶⁵ in federal court, alleging employment discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”).¹⁶⁶ They alleged that Connecticut's statutory retirement plan discriminated against them based upon their gender in violation of the Fourteenth Amendment, as implemented by Title VII.¹⁶⁷ In 1972, Congress had amended Title VII to include state governments in the definition of employers subject to private citizen suits, and to include state governmental employees in the definition of persons permitted to sue their employers on their own behalfs.¹⁶⁸

Connecticut argued that it had not consented to the suit and that abrogation without consent violated the Eleventh Amendment.¹⁶⁹ The Court disagreed.

First, the Court held that Congress did have the power to abrogate states' immunity.¹⁷⁰ The Court supported this conclusion with a narrow rationale that relied heavily upon Congress' Fourteenth Amendment powers.¹⁷¹ The Fourteenth Amendment, the majority reasoned, had fundamentally altered the federal-state balance of power that had existed at the time of the Eleventh Amendment by expanding federal power at the expense of state power.¹⁷² The Court concluded that this shift of power had granted Congress authority to abrogate states' immunity.

First, the Fourteenth Amendment was ratified one hundred years after the Eleventh Amendment.¹⁷³ Second, the Fourteenth Amendment expressly imposes substantive duties upon the states:

*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State *553 deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*¹⁷⁴

Third, Section 5 of the Fourteenth Amendment expressly authorizes Congress to enforce the Amendment “by appropriate legislation.”¹⁷⁵ The Court concluded that:

[w]hen Congress acts pursuant to § 5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one

section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.¹⁷⁶

The Court's focus on the relationship between the Eleventh Amendment and the Fourteenth Amendment suggests that the Court accepted the Eleventh Amendment (rather than the common law or some general constitutional principle) as the source of states' immunity, even in same-state citizen federal question suits. The Court found in the Fourteenth Amendment an equivalent and countervailing constitutional principle that permitted Congress to abrogate states' immunity. Justice Brennan, however, in his concurring opinion, continued to argue that only common law immunity applied to same-state citizen federal question suits. He would have concluded that Congress had authority to abrogate states' common law immunity under the enumerated powers of both Article I and the Fourteenth Amendment.¹⁷⁷

Second, the *Fitzpatrick* Court held that Congress had, indeed, expressly abrogated states' immunity in the 1972 Amendments to Title VII.¹⁷⁸

Later cases articulated *Fitzpatrick's* holding as a two-prong test. To abrogate immunity Congress must, first, act "pursuant to a valid exercise of power"¹⁷⁹ and, second, "unequivocally express its intention to abrogate" *554 states' immunity and make its "intention unmistakably clear in the language of the statute" itself.¹⁸⁰

In the years following *Fitzpatrick*, several cases in which plaintiffs argued that Congress had abrogated states' immunity were dismissed for lack of an unmistakably clear, unequivocal statutory abrogation.¹⁸¹ A number of these cases arose under federal statutes enacted pursuant to clauses of the Constitution other than the Fourteenth Amendment. The Court was not, however, required to determine whether *Fitzpatrick's* reasoning was limited to Fourteenth Amendment statutes because none of the other statutes contained a clear and unequivocal abrogation of states' immunity.

Pennsylvania v. Union Gas Company,¹⁸² however, involved an Interstate Commerce Clause statute that contained a clear attempt to abrogate states' immunity. In *Union Gas*, the federal government had sued Union Gas in *555 federal court under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")¹⁸³ to recover clean-up costs relating to the nation's first superfund site.¹⁸⁴ Union Gas filed a third-party complaint against Pennsylvania as an "owner or operator" of the site.¹⁸⁵

The "abrogation" clause was contained in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),¹⁸⁶ which was enacted while the case was pending. SARA amended CERCLA to (i) add states to the definition of "owners or operators" who could be liable for clean-up costs, and (ii) provide that states could be sued under CERCLA "in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity," with limited exceptions.¹⁸⁷ Five justices agreed¹⁸⁸ that SARA's language clearly and unequivocally revealed a congressional intent to abrogate states' immunity from citizen suits filed in federal court to collect monetary damages from states.¹⁸⁹

The Court then considered the scope of Congress' power to abrogate states' federal court immunity. *Fitzpatrick* had established Congress' power to abrogate states' immunity under a statute enacted pursuant to the Fourteenth Amendment. *Union Gas* interpreted a statute enacted pursuant to the Interstate Commerce Clause. The *Fitzpatrick* majority's heavy reliance on the unique characteristics of the Fourteenth Amendment suggested that this distinction might be critical.¹⁹⁰ In *Union Gas*, however, Justice Brennan's four-justice plurality opinion obviated the distinction by extending *556 *Fitzpatrick's* Fourteenth Amendment analysis to the Interstate Commerce Clause.¹⁹¹

Justice Brennan reasoned that (i) the Commerce Clause, like the Fourteenth Amendment, expands federal power at the expense of state power, and (ii) the states relinquished whatever immunity they may previously have enjoyed when they granted Congress plenary authority to regulate interstate commerce.¹⁹²

Justice Brennan dismissed arguments that the Eleventh Amendment superseded the Commerce Clause and prohibited Congress from abrogating states' immunity. First, he reasoned that the Eleventh Amendment merely preserved and embodied a principle of sovereign immunity that predated the Constitution. The Constitution granted Congress the power to abrogate this immunity under the Commerce Clause.¹⁹³ In other words, even if states' federal court immunity in federal question cases has a constitutional basis under the Eleventh Amendment, Congress may abrogate states' immunity. This is because the Constitution itself contains both the grant of immunity and the countervailing principle that permits Congress to abrogate that immunity.¹⁹⁴ This reasoning revisits and expands the reasoning of the portion of *Parden* that *Welch* did not overrule.¹⁹⁵ *Parden* and its progeny reasoned that Congress, using its Article I powers, could condition states' participation in federally regulated activities

on the states' consent to private, federal court enforcement suits.¹⁹⁶ The *Union Gas* plurality, in contrast, held that Congress, using its Interstate Commerce Clause powers, could abrogate states' immunity without the states' consent.

Union Gas's reasoning on this issue logically extends to the Bankruptcy Clause, the Indian Commerce Clause, and a variety of other provisions of Article I, under which states cede power to the federal government. Indeed, *557 the language of *Ex parte Virginia*,¹⁹⁷ upon which both *Fitzpatrick* and *Union Gas* rely heavily, applies easily to all of Congress' enumerated powers:

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, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. *No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact 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.*¹⁹⁸

Because both *Ex parte Virginia* and *Fitzpatrick* involved Fourteenth Amendment statutes, each found Congress' abrogation power in the implementing section of the Fourteenth Amendment. The Constitution, however, contains a similar implementing provision that applies to the Interstate Commerce Clause, Indian Commerce Clause, and Bankruptcy Clause: "Congress shall have the Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States"¹⁹⁹

Second, although Justice Brennan's abrogation rationale alone would justify the result, he went further. In a significant departure from earlier cases, Justice Brennan reasoned that the Eleventh Amendment does not impose any limit whatsoever on Congress' power. Instead, he argued that the three words "be construed to" that were added before the Amendment was enacted were designed simply to ensure that the Courts would not read Article III of the Constitution *alone* as an abrogation of states' immunity.²⁰⁰ *558 The Amendment did not, however, prevent Congress from abrogating immunity under its enumerated powers.²⁰¹ Moreover, if the Eleventh Amendment does not limit federal courts' judicial powers, abrogation does not improperly expand federal courts' judicial powers under Article III.²⁰²

Justice Brennan's reasoning allowed the plurality easily to reconcile *Hans*.²⁰³ The citizen in *Hans* sought to enforce the Contract Clause directly, without the benefit of any federal law under which Congress had abrogated states' immunity.²⁰⁴ According to the *Union Gas* plurality, *Hans* was correctly decided because, although Congress had power to abrogate states' immunity under laws enacted to implement the Contract Clause, it had not done so.²⁰⁵ *Fitzpatrick* and *Union Gas*, in contrast, interpreted laws under which Congress had expressly abrogated states' immunity. Thus, *Union Gas* seemed to create doctrinal coherence by establishing a plausible interpretation of immunity doctrine without overruling any of the Court's prior decisions.²⁰⁶

Finally, the plurality's reasoning seemed to obviate the troubling "common *559 law versus constitutional principle" question that had split the justices in earlier cases. Under Justice Brennan's rationale, Congress can abrogate states' immunity *even if* that immunity arises from a constitutional grant. Immunity is subject to an equal constitutional power that allows Congress to abrogate immunity under its enumerated powers.²⁰⁷ The common law / constitutional principle distinction had not disappeared, however. It figured prominently in both Justice Stevens' concurrence and Justice Scalia's dissent, and it resurfaced seven years later in *Seminole Tribe v. Florida*,²⁰⁸ which overruled *Union Gas*.

Justice Stevens (who joined the plurality but also wrote a separate concurring opinion in *Union Gas*) embraced the diversity interpretation of the *560 Eleventh Amendment.²⁰⁹ He distinguished "two Eleventh Amendments."²¹⁰ The first, the Eleventh Amendment itself, imposes a constitutional limit on federal courts' judicial power. Because the Eleventh Amendment's jurisdictional bar applies only to diversity jurisdiction, however, it has no application in federal question cases.²¹¹ According to Justice Stevens, federal question cases involve a second form of immunity, which arises from the common law, not the Eleventh Amendment. Congress may abrogate common law sovereign immunity but may not abrogate Eleventh Amendment immunity.²¹² Prior Court decisions, beginning with *Hans*, that seem to apply the Eleventh Amendment rather than common law immunity in federal question cases have complicated immunity doctrine and compelled the Court to create confusing exceptions.²¹³ Justice Stevens attempted to resolve this doctrinal incoherence by reinterpreting earlier federal question cases as cases in which the Court "abstained" from hearing suits against states based upon a "prudential balancing of federal and state interests."²¹⁴ In other words, the federal courts were not barred from hearing such suits, but they abstained in the interests of federalism and comity.²¹⁵ If states' immunity in federal question cases arises only under the common law, rather than the Eleventh Amendment's jurisdictional bar, then consent, waiver and abrogation do not raise doctrinal problems.²¹⁶ Justice Stevens acknowledged, however, that this approach restated the rationales of the Court's earlier cases.²¹⁷

In sharp contrast, Justice Scalia argued that states' federal court immunity in federal question cases arises from a constitutional grant that Congress cannot abrogate.²¹⁸ Justice Scalia generalized the Court's prior immunity cases as presenting a distinction between a "comprehensive" and a "noncomprehensive" *561 view of the Eleventh Amendment.²¹⁹ Under the comprehensive view, the Eleventh Amendment's language embodies the full extent of states' immunity in federal court. If this view had been adopted, the dissent would have interpreted the Amendment to apply only to diversity cases. The dissent agreed that the distinction the Amendment draws between same-state citizen suits and other-state citizen suits would make no sense if it were applied to federal question cases.²²⁰ The dissent argued, however, that the *Hans* Court rejected this "comprehensive" view in favor of a "non-comprehensive" view of the Eleventh Amendment. Under the latter view, *Hans* and its progeny confirm that state sovereign immunity is a fundamental right, embodied in the Constitution, and illustrated by (although not fully expressed in) the Eleventh Amendment. The Eleventh Amendment merely presents an example of part of the doctrine's scope.²²¹ Without expressly embracing this interpretation, Justice Scalia argued that *Hans's* approach was too ingrained to be reversed.²²² Finally, Justice Scalia argued that the only dispute has been over the extent to which the states waived their immunity under the constitutional plan. He conceded that the states waived immunity in federal question suits filed by the United States,²²³ and by other states.²²⁴ According to Justice Scalia, this establishes a coherent policy because there is a greater need for a neutral forum to resolve these types of suits than there is to resolve suits by individuals against the states. He also justified *Fitzpatrick's* exception because the Fourteenth Amendment is *sui generis*, specifically targets the states, and provides only limited abrogation.²²⁵

In contrast, if abrogation were extended to Interstate Commerce Clause statutes, it would apply to all of Congress' Article I powers. The dissent viewed this result as unreasonable.²²⁶ "If *Hans* means only that federal-question suits for money damages against the States cannot be brought in *562 federal court unless Congress clearly says so, it means nothing at all."²²⁷ Justice Scalia acknowledged that Congress' power, under *Parden*, to require that states waive immunity as a condition of participating in activity regulated under the Commerce Clause was essentially the same as abrogation. He argued, however, that this aspect of *Parden* should be overruled.²²⁸ He did not, however, clearly distinguish his comfort at overruling *Parden* from his discomfort at overruling *Hans*.

As a matter of immunity theory, *Union Gas* is troubling because the separate opinions of Justices Brennan, Stevens and Scalia reveal three markedly different views of the source, scope and nature of states' immunity from suits filed in federal court. Moreover, as a practical matter, *Union Gas* rests upon a shaky plurality that could collapse with the addition of a single new justice. Four justices embraced the plurality's reasoning; four justices embraced the dissent's rationale.²²⁹

B. Abrogation Under The Bankruptcy Code

After *Union Gas*, two questions arose in bankruptcy cases.²³⁰ First, does the Bankruptcy Clause grant Congress the same power to abrogate states' immunity as the Fourteenth Amendment (*Fitzpatrick*) and the Interstate Commerce Clause (*Union Gas*)? Second, if so, has Congress unequivocally abrogated states' immunity from suit for federal question causes of action that arise under the Bankruptcy Code?

1. Abrogation under the 1978 Bankruptcy Code

Under the 1978 version of [section 106\(c\) of the Bankruptcy Code](#), Congress waived the federal government's immunity and abrogated the states' immunity with respect to a broad array of issues that arise in bankruptcy cases:

Except as provided in subsections (a) and (b) of this section²³¹ and notwithstanding any assertion of sovereign immunity—

*563 (1) a provision of this title [*i.e.*, title 11, the Bankruptcy Code] that contains "creditor," "entity," or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.²³²

The terms "creditor" "entity" and "governmental unit" appeared in sections of the Bankruptcy Code dealing with federal bankruptcy law causes of action that arise under the Bankruptcy Code and with administrative determinations that arise in a bankruptcy case.²³³ Although the legislative history suggests that Congress had no power to waive states' sovereign immunity "completely,"²³⁴ [section 106\(c\)](#) was clearly designed to bind states to bankruptcy court orders even if the states did not voluntarily participate in the bankruptcy case.²³⁵

The abrogation clause was tested in *Hoffman v. Connecticut Department of Income Maintenance*²³⁶ (in 1989, the same year as *Union Gas*). In *Hoffman*, the bankruptcy trustee had sued a state agency to recover preferential tax payments and to compel

the turnover of monies due under a Medicaid §564 contract. The Court, in yet another plurality decision, held that section 106(c) had not effectively abrogated states' immunity.²³⁷

Justice White, in an opinion joined by three of the four justices who had dissented in *Union Gas*,²³⁸ held that section 106(c) does not reflect a clear congressional intent to abrogate state's immunity with respect to the recovery of monetary damages.²³⁹ The fourth *Union Gas* dissenter, Justice Scalia, filed a concurring opinion (which one member of the plurality also joined).²⁴⁰ The plurality opinion did not consider whether Congress had authority under the Bankruptcy Clause to abrogate states' immunity. The concurrence, however, would have held that Congress has no power under the Bankruptcy Clause or the Interstate Commerce Clause to abrogate states' immunity, and would have overruled *Union Gas*.²⁴¹ Two additional *Hoffman* plurality justices had earlier joined Justice Scalia's *Union Gas* dissent, which would have held that Congress had no power under the Interstate Commerce Clause to abrogate immunity.²⁴²

The four *Hoffman* dissenters argued that section 106(c) unequivocally abrogated states' immunity.²⁴³ These four justices (all of whom had joined the plurality opinion in *Union Gas*) also would have held that Congress had power under the Bankruptcy Clause to abrogate states' immunity.²⁴⁴

Three years later, the Court considered whether section 106(c) evinced a waiver by the federal government of its immunity from suit. In *United States v. Nordic Village, Inc.*,²⁴⁵ the trustee had sued the Internal Revenue Service to recover federal tax payments made by a corporate officer who had §565 improperly used corporate chapter 11 funds to pay a personal tax liability.²⁴⁶ Because *Nordic Village* involved a suit against the United States, it raised only a federal government waiver issue. It did not implicate either the Eleventh Amendment or abrogation of states' immunity. The case is interesting, however, because it shows how the interpretation of section 106(c) shifted as new justices joined the Court. The *Hoffman* justices split five-to-four on whether section 106(c) clearly abrogated states' immunity. The *Nordic Village* justices split seven-to-two on essentially the same question in the context of federal government immunity.

The Court held that section 106(c) does not “unequivocally express” a waiver of the federal government's immunity from suit.²⁴⁷ The majority comprised the five-justice plurality from *Hoffman* (Chief Justice Rehnquist and Justices Scalia, White, O'Connor, and Kennedy), plus both of the new justices (Justices Souter and Thomas).²⁴⁸ Justice Stevens again dissented, joined by Justice Blackmun.²⁴⁹

Although the two *Hoffman* concurring justices would have held that Congress has no authority to abrogate states' immunity under the Bankruptcy Clause, Congress could not resolve this issue by legislation. Congress could, however, easily respond to the five justices who concluded in *Hoffman* that the Bankruptcy Code did not contain an unequivocal abrogation of states' immunity (and the seven justices who concluded in *Nordic Village* that the Bankruptcy Code did not contain an unequivocal waiver of the federal government's immunity).

2. Abrogation under the 1994 Bankruptcy Code Amendments

In 1994, Congress amended the abrogation section of the Bankruptcy §566 Code, in response to *Hoffman* and *Nordic Village*.²⁵⁰ Under the new provision:²⁵¹

Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit²⁵² to the extent set forth in this section²⁵³ with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.²⁵⁴

This provision abrogates state governmental immunity and waives federal governmental immunity with respect to a broad array of federal bankruptcy law actions that “arise under” the Bankruptcy Code or “arise in” a bankruptcy case, including: matters relating to the general administration of the bankruptcy estate and the bankruptcy case,²⁵⁵ and actions to (i) avoid §567 transfers of property to the state and recover property from the state,²⁵⁶ (ii) enjoin action by the state that might be detrimental to the bankruptcy case, the bankruptcy estate, or the debtor,²⁵⁷ (iii) bind the state with respect to the debtor's discharge and/or plan confirmation and with respect to the effects of discharge and confirmation,²⁵⁸ (iv) determine the amount, priority and distribution on the state's claims,²⁵⁹ including secured claims,²⁶⁰ (v) determine tax claims and implement special provisions concerning tax consequences,²⁶¹ (vi) assume, reject and assign leases and executory contracts,²⁶² and (vii) collect property

of the estate and determine exemptions.²⁶³ As to all of these actions, ***568** the 1994 Amendments abrogate states' immunity even if the government has not filed a claim.²⁶⁴

The amended provision seems to abrogate states' immunity unequivocally and in “unmistakably clear language,”²⁶⁵ in compliance with the first prong of *Fitzpatrick*.²⁶⁶ The legislative history expressly states that the amendment is intended to overrule *Hoffman* and *Nordic Village*.²⁶⁷

Under *Fitzpatrick*'s second prong, abrogation is constitutionally permissible only if it is enacted pursuant to a valid exercise of congressional power.²⁶⁸ One circuit court of appeals and several bankruptcy courts soon held that abrogation under the 1994 Amendments was valid and constitutional.²⁶⁹ Each of these courts expressly extended *Union Gas*'s reasoning from the Interstate Commerce Clause to the Bankruptcy Clause, as the four dissenters in *Hoffman* would have done.²⁷⁰

By 1996, however, the Court's composition had changed significantly. Justice White, who had provided the swing vote during the 1989 Court Term, had left the Court. He had held that neither CERCLA (*Union Gas* concurrence ***569**²⁷¹) nor the 1978 version of the Bankruptcy Code (*Hoffman* plurality²⁷²) provided a clear abrogation of states' immunity. He equivocated, however, on the authority question: in *Union Gas*, he agreed that Congress has abrogation authority under the Interstate Commerce Clause, but he declined to join the plurality's reasoning.²⁷³ In *Hoffman*, he declined to address the question.²⁷⁴ During that Term, the other eight justices split on the authority question. Four justices argued that Congress has no abrogation authority under the Interstate Commerce Clause (*Union Gas* dissent²⁷⁵); and two of these justices argued that Congress has no abrogation authority under the Bankruptcy Clause (*Hoffman* concurrence²⁷⁶). All four of these justices remained on the Court in 1996 and remain on the Court today.²⁷⁷ The other four justices argued that Congress has abrogation authority under both the Interstate Commerce Clause and the Bankruptcy Clause (*Union Gas* plurality and *Hoffman* dissent).²⁷⁸ Of these four justices, only Justice Stevens remained on the Court in 1996 and remains on the Court today.

Consequently, *Union Gas* was in danger of being overruled if any of the four new, uncommitted, justices²⁷⁹ joined the four *Union Gas* dissenters. That is exactly what happened in 1996, in *Seminole Tribe v. Florida*,²⁸⁰ when the Court once again considered the scope of congressional authority to abrogate states' immunity. In yet another five-to-four decision, *Seminole* expressly overruled *Union Gas*, only seven years after *Union Gas* had been decided. Even though three of the four new justices agreed with the *Union Gas* plurality's holding that Congress has broad authority to abrogate states' immunity,²⁸¹ the fourth new justice joined the *Union Gas* dissenters.²⁸²

The scorecard reflects that eight of the last thirteen justices interpret the ***570** Constitution as permitting Congress to abrogate states' immunity under Congress' enumerated powers, including the Interstate Commerce Clause.²⁸³ This interpretation is also consistent with the view accepted by most constitutional law scholars.²⁸⁴ In contrast, only five of the last thirteen justices have voted to limit abrogation to Congress' Fourteenth Amendment powers. This five-justice “minority” now holds the majority position on the Court.²⁸⁵

C. The *Seminole* Case: Jurisdictional Immunity

In *Seminole*, a Florida Indian tribe²⁸⁶ sued the state of Florida in federal court to enforce a federal statute that had been enacted pursuant to the Indian Commerce Clause.²⁸⁷ The statute, the Indian Gaming Regulatory Act (“IGRA”),²⁸⁸ requires that states negotiate with Indian tribes in certain circumstances to achieve compacts with respect to gaming on tribal lands.²⁸⁹ IGRA clearly authorizes Indian tribes to sue states for non-compliance.²⁹⁰ It also provides 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 ... or to conduct such negotiations in good faith”²⁹¹

All nine justices agreed that these provisions contain clear and unequivocal language evincing a congressional intent to abrogate states' immunity ***571** from suits filed in federal court to enforce IGRA.²⁹² The five-justice majority, however, held that Congress does not have authority under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity.²⁹³ The dissenters bitterly criticized each prong of the majority's reasoning.²⁹⁴ Once again, the disputes focussed on the source, scope and nature of states' federal court immunity. First, as to the source of immunity, *Seminole* held that the Eleventh Amendment itself, rather than some generalized constitutional or extra-constitutional common law principle, provides the basis of states' immunity from suit in federal court.²⁹⁵ Second, as to scope, the majority concluded that the Eleventh Amendment applies to both diversity and federal question actions filed in federal court, including actions filed by citizens (or by Indian tribes) against their own states.²⁹⁶ The Court acknowledged

that the words of the Eleventh Amendment did not apply, but stated that “[b]ehind the words of the constitutional provisions are postulates which limit and control.”²⁹⁷ Those postulates, according to the Court, included immunity in same-state citizen federal question cases. The Court added that it was bound to follow *Hans* which, it concluded, had relied upon the Eleventh Amendment (supplemented by such a postulate) as the basis of states’ federal question immunity.²⁹⁸ By this reasoning, the majority essentially adopted the “expansive” interpretation of *Hans*.²⁹⁹

Justice Souter, in dissent, argued that the Eleventh Amendment applies only to diversity jurisdiction cases filed against a state by a citizen of another state.³⁰⁰ States may be immune from federal question suits filed in federal court by the state’s own citizens or another state’s citizens; however, immunity in federal question cases arises solely from non-constitutional common law.³⁰¹ Justice Souter’s rationale clearly embraces the “diversity” interpretation and departs from the more flexible rationale employed by the *Union Gas* plurality (*i.e.*, even if federal question immunity is a constitutional doctrine, Congress can abrogate immunity).³⁰² Similarly, Justice Stevens, dissenting, argued that states’ immunity in federal question cases arises solely from federal common law.³⁰³

Third, because the *Seminole* majority applied the Eleventh Amendment (rather than common law immunity) to same-state citizen federal question suits, the majority was required to define the nature of Eleventh Amendment immunity. The Court concluded, with little analysis, that the Eleventh Amendment limits federal courts’ Article III “judicial power.”³⁰⁴ Consequently, federal courts have no jurisdiction to hear suits that are within the Amendment’s scope.

Finally, the Court reasoned that the Constitution can be modified only by constitutional amendment, not by legislative action. Consequently, Congress cannot “abrogate” the jurisdictional limit that the Eleventh Amendment imposes on federal courts’ power.³⁰⁵ IGRA’s abrogation provision, therefore, is unconstitutional.

The Court applied this holding directly to abrogation under statutes enacted pursuant to the Indian Commerce Clause.³⁰⁶ By overruling *Union Gas*, the Court extended this holding to abrogation under statutes enacted pursuant to the Interstate Commerce Clause.³⁰⁷ *Seminole*’s reasoning also extends indirectly to the Bankruptcy Clause.³⁰⁸

Although *Seminole*’s interpretation of Eleventh Amendment immunity as a jurisdictional bar arguably is consistent with the Amendment’s language,³⁰⁹ *Seminole*’s holding goes significantly beyond any precedent interpreting the Amendment.³¹⁰ The Court insisted that it was following *Hans*.³¹¹ *Hans*, however, clearly did not compel this result.³¹²

First, abrogation was not an issue in *Hans*. The Court in *Hans* considered only whether a state enjoyed some form of immunity in a same-state citizen, federal question suit filed in federal court. It never considered whether Congress could abrogate that immunity.³¹³ *Hans* did not even precisely define the source of states’ federal question immunity, let alone its nature.³¹⁴ Indeed, *Hans* could not have considered whether Congress had power to abrogate states’ immunity, because the issue in *Hans* arose directly under the Contract Clause rather than under a statute that purported to abrogate states’ immunity.³¹⁵ In contrast, *Seminole* and *Union Gas* involved statutes under which Congress manifested a clear attempt to abrogate states’ immunity. Second, earlier cases that interpret the Eleventh Amendment as having jurisdictional aspects do so only in the context of either the court’s ability to raise the immunity issue *sua sponte* or the state’s ability to raise the immunity defense for the first time on appeal.³¹⁶ No prior decision has interpreted the Amendment’s jurisdictional bar as expansively as *Seminole*.

Despite holding that Congress generally may not modify the Eleventh Amendment’s jurisdictional bar, the Court reaffirmed *Fitzpatrick* (which had permitted Congress to use its Fourteenth Amendment powers to abrogate states’ immunity).³¹⁷ The *Seminole* majority reasoned that the Fourteenth Amendment had essentially “amended” or “modified” the Eleventh Amendment’s jurisdictional bar.³¹⁸ Consequently, the majority suggested that only the Fourteenth Amendment granted Congress power to abrogate states’ Eleventh Amendment immunity.³¹⁹

The manner in which the majority distinguishes Congress’ Fourteenth Amendment powers from Congress’ other enumerated powers in the context of abrogation is troubling. First, the Court suggests that the Fourteenth Amendment uniquely expands (or grants Congress the power to expand) federal courts’ Article III powers despite the Eleventh Amendment’s limitation of those powers. This interpretation strains the language of the Fourteenth Amendment. The Fourteenth Amendment does not even mention Article III, federal courts’ “judicial powers,” sovereign immunity, the Eleventh Amendment, abrogation, or suits in federal court, let alone expressly grant Congress any particular powers with respect to abrogating immunity or subjecting states to suit in federal court. Although the Fourteenth Amendment contains a broad, general enabling clause, that clause mirrors Article I’s enabling clause.³²⁰ There is little to suggest that only the Fourteenth Amendment grants Congress abrogation powers but the enumerated powers do not. Although the text of the Fourteenth Amendment refers directly to the states, Congress also

has the power to bind the states to federal laws enacted under Congress' other enumerated powers (within the limitations of the Tenth Amendment).

Second, the Court's carefully constructed vision of a Fourteenth Amendment designed to modify the Eleventh Amendment's jurisdictional bar with respect to federal question suits is suspect because the Eleventh Amendment was not interpreted to extend to federal question cases until after the Fourteenth Amendment had been enacted.³²¹

Third, even if the Eleventh Amendment applies to federal question suits and imposes a jurisdictional bar, the Court fails to explain adequately why Justice Brennan's reconciliation of abrogation (in the *Union Gas* plurality) is flawed. If the explanation is simply that Congress cannot modify a jurisdictional bar, then the majority fails to explain adequately why Congress can abrogate that bar under the Fourteenth Amendment.

Fourth, denying Congress the ability to supervise states' regulation of § 576 Indian affairs seems inconsistent with Congress' exclusive regulatory power over Indian affairs.³²²

Part III.D considers *Seminole's* immediate impact on abrogation.

D. Abrogation after *Seminole*

After issuing its decision in *Seminole*, the Supreme Court remanded four pending cases in which various Indian tribes had sued states or state officials under IGRA.³²³ On remand, the appellate courts dismissed each of these cases for lack of jurisdiction, based upon *Seminole*.³²⁴ The Court also vacated and remanded cases in which citizens had sued states under the Copyright Act,³²⁵ the Fair Labor Standards Act,³²⁶ and the Bankruptcy Code.³²⁷ In other § 577 cases seeking remedies under a variety of federal statutes, the courts quickly held that Article I gave Congress no abrogation powers.³²⁸ The only significant § 579 exception occurred in a case in which one circuit court of appeals upheld congressional abrogation under the War Powers Clause.³²⁹ Two district courts have, however, rejected that court's reasoning.³³⁰

What are *Seminole's* implications in bankruptcy cases? Is the Bankruptcy Code's abrogation provision unconstitutional? Does the Eleventh Amendment apply in bankruptcy court? Are bankruptcy actions "suits" for Eleventh Amendment purposes? Can Congress use its Fourteenth Amendment powers to abrogate states' immunity in bankruptcy cases? Can the estate sue a state in bankruptcy court with the state's consent? Can the estate sue a state in state court without the state's consent to enforce federal bankruptcy law? Might Supreme Court review, suits against state officials, or § 580 suits by the federal government provide adequate means of enforcing the Bankruptcy Code against recalcitrant states? These questions are considered in the second article of this two-part series.

Footnotes

- 1 Assistant Professor, University of Hawai'i School of Law. This Article benefitted from the research assistance of Emily Whitmore Badger, Kaleen Hasegawa, Philip Miyoshi, Susan Ornelles and Ryan Sanada.
- 2 See *infra* notes 331-334, 338-340, 399-401, 492-98, 621; see generally *infra* Part IV.
- 3 See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), discussed *infra* at notes 41-52 and accompanying text.
- 4 This Article examines states' immunity from suit in federal court to enforce federal or state law and from suit in state court to enforce federal law. It considers immunity from suit in state court to enforce state law only by way of background.
- 5 The commencement of a case under the Bankruptcy Code creates an "estate" that comprises virtually all of the debtor's interests in property, wherever located and by whomever held. See 11 U.S.C. § 541 (1994).
- 6 The terms "debtor," "trustee," and "bankruptcy estate" are used interchangeably. In a chapter 7 liquidation case for either an individual or a business, a trustee is appointed or elected to collect, liquidate and distribute the assets of the estate. See *id.* §§ 701, 702, 704 (1994). A trustee is also appointed in debt restructuring cases under chapter 12 (family farmers) and chapter 13 (individual wage earners) to advise, assist and monitor the debtor's performance under the restructuring plan. See *id.* §§ 1202, 1302. In chapter 11 reorganization cases, the debtor (as "debtor-in-possession") normally retains control over the estate's property and is authorized to prosecute causes of action on behalf of the estate. See *id.* §§ 1106, 1107. In extraordinary circumstances, a trustee may be appointed in a chapter 11 case to replace the debtor-in-possession. See *id.* § 1104. This Article will not consider issues arising under chapter 9 (restructuring the debts of a municipality). See *id.* §§ 901-946.
- 7 See 28 U.S.C. § 1334(b) (1994) (granting district courts original but not exclusive jurisdiction over civil proceedings arising under title 11, or arising in or related to a case under title 11).
- 8 See, e.g., 11 U.S.C. §§ 542 (turnover of property to the estate), 543 (turnover of property by a custodian), 547 (avoidance of preferential transfers), 548 (avoidance of fraudulent transfers), 549 (avoidance of post-petition transfers) (1994), 550 (recovery of avoided transfers); see also *id.* §§ 544, 545 (avoidance of certain liens).

- 9 See, e.g., *id.* §§ 362 (automatic stay), 524 (discharge injunction), 525(c) (protection against discriminatory treatment).
- 10 See, e.g., *id.* §§ 502 (allowance of claims), 505 (determination of tax liability), 506 (determination of secured status), 507 (priorities), 510 (subordination), 727 (chapter 7 discharge), 1141 (effect of chapter 11 confirmation), 1227 (effect of chapter 12 confirmation), 1228 (chapter 12 discharge), 1327 (effect of chapter 13 confirmation), 1328 (chapter 13 discharge). See also discussion *infra* at notes 386-398 and accompanying text.
- 11 See 28 U.S.C. § 1334(b) (1994). If these actions are “non-core” proceedings, the bankruptcy judge may enter a final order only with the consent of the parties. See *id.* § 157(c). Some matters must be heard in the district court. See *id.* § 157(b)(5). See also *id.* § 1334(c) (abstention).
- 12 See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 116-17, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (reasoning that immunity is based on the problem of forcing one sovereign to appear in the courts of another).
- 13 Constitutional law scholars and historians have argued that the question of compelling states to pay their war debts drove the the debates concerning the scope of Article III, see, e.g., Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 527-36 (1977), the contract clause, see, e.g., Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2244 & nn. 143-45 (1996), and the Eleventh Amendment, see, e.g., *id.* at 2240; see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821) (purpose of immunity is not to protect the state's dignity but to protect the state's treasury).
- 14 See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353, 27 S. Ct. 526, 51 L. Ed. 834 (1907) (“A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”); *Hans v. Louisiana*, 134 U.S. 1, 12-13 (1890) (citing THE FEDERALIST No. 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Karen Cordry, *Sovereign Immunity — Time to Come in From the Cold!*, 13-Sep. AM. BANKR. INST. J. 19, 19 (Sept. 1994) (“While sovereign immunity is often said to be based on the divine right of kings, its driving forces really derive from more mundane factors. It recognizes two stark realities—that governments are always short of funds, and that courts have no armies to enforce their decrees if unexpected liabilities are imposed on unwilling sovereigns.”).
- 15 For a discussion of the objectives of bankruptcy law, see generally *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S. Ct. 654, 112 L. Ed. 2d 755, 21 Bankr. Ct. Dec. (CRR) 342, 24 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 73746A, 70 A.F.T.R.2d (P-H) P 92-5639 (1991) (stating that “a central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy ‘a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt,’” but such “fresh start” is limited to the “honest but unfortunate debtor,” (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A.L.R. 195 (1934))); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 587-88, 55 S. Ct. 854, 79 L. Ed. 1593, 2 Ohio Op. 537, 97 A.L.R. 1106 (1935) (“[T]he original purpose of our bankruptcy acts was the equal distribution of the debtor's property among his creditors The discharge of the debtor had come to be an object of no less concern than the distribution of his property.”); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A.L.R. 195 (1934) (noting that bankruptcy is designed to accord debtors a fresh start); *Williams v. U.S. Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55, 35 S. Ct. 289, 59 L. Ed. 713 (1915) (“[T]he purpose of the Bankruptcy Act [is] to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh.”); H.R. Rep. No. 95-595, at 125 (1978) (“The purpose of straight bankruptcy ... is to obtain a fresh start, free from creditor harassment and free from the worries and pressures of too much debt.”); see also *In re American Mariner Industries, Inc.*, 734 F.2d 426, 431, 12 Bankr. Ct. Dec. (CRR) 227, 10 Collier Bankr. Cas. 2d (MB) 910, Bankr. L. Rep. (CCH) P 69886 (9th Cir. 1984), (“[T]he purposes of business reorganization [are] to initially relieve the debtor of its prepetition debts, to free cash flow to meet current operating expenses, and ultimately to permit the debtor ‘to restructure a business’ finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.” (quoting H.R. Rep. No. 95-595, at 220 (1978))).
- 16 In federal court, the scope of immunity is affected by whether the plaintiff is a citizen, non-citizen, another state or the federal government. In state court, the scope of immunity may depend on whether the suit seeks to enforce federal or state law. The nature of immunity may be a waivable privilege, constitutional right or jurisdictional bar. These distinctions are discussed *infra*.
- 17 See, e.g., separate opinions in cases cited *infra* at note 18; see also discussion *infra* at notes 91-130, 136-139 and accompanying text (discussing competing views of the source, nature and scope of states' immunity from suit in federal court).
- 18 See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996) (five-to-four); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1, 29 Env't. Rep. Cas. (BNA) 1657, 19 Env'tl. L. Rep. 20974 (1989) (overruled by, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996)); *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989) (five-to-four); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985) (five-to-four); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (five-to-four); *Dellmuth v. Muth*, 491 U.S. 223, 109 S. Ct. 2397, 105 L. Ed. 2d 181, 53 Ed. Law Rep. 792 (1989) (five-to-four); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987) (five-to-four plurality); *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (five-to four); *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184,

84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964) (overruled by, *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987)) (five-to-four); *see also* *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991) (six-to-three).

- 19 *Cf.* Martha A. Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3, 4 (1997) (suggesting that the meaning of the Tenth Amendment and Eleventh Amendment has changed often and theories of interpreting them are not yet at rest; today's doctrines could not have been predicted in 1974, perhaps not even in 1994).
- 20 *See, e.g.*, 28 U.S.C. §§ 1331 (1994) (according federal courts original but not exclusive jurisdiction over federal question causes of action); 1334(b) (according federal courts original but not exclusive jurisdiction over civil proceedings that arise under title 11 (the Bankruptcy Code) or arise in or relate to a case under title 11). In contrast, some federal question matters are within the exclusive jurisdiction of the federal courts. *See, e.g., id.* §§ 1333 (admiralty); 1338 (copyright, patent, trademark).
- 21 U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. §§ 1332 (1994 & *supp.* II 1996) (diversity jurisdiction); 1334 (bankruptcy jurisdiction).
- 22 U.S. CONST. art. III, § 2 cl. 1.
- 23 *See generally* discussion *infra* at notes 632-633 and accompanying text. Traditional common law immunity may be embodied in or modified by state statutes or constitutions.
- 24 *Cf.* discussion *infra* at Part IV.B.2 (considering whether states that had been immune from suit in their own courts are now subject to suit in their own courts to enforce federal law).
- 25 U.S. CONST. amend. XI, set forth *infra* at text accompanying note 64.
- 26 *See* discussion *infra* at Part II.E.
- 27 Waiver, consent and constructive consent are discussed *infra* at Part IV.B.1. Abrogation is discussed *infra* at Part III. Abrogation occurs when Congress, in a particular federal statute, expressly provides that private citizens may enforce the statute against unconsenting states notwithstanding states' immunity. *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) P 10999 (1976); *see also* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985).
- 28 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996).
- 29 *Seminole*, 517 U.S. at 59; *see also* *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) P 10999 (1976), discussed *infra* at notes 163-178 and accompanying text.
- 30 *See* discussion *infra* at Parts III.C and III.D (*Seminole's* impact on abrogation), Part IV.B.1 (*Seminole's* impact on consent and waiver); *see also* Field, *supra* note 19, at 4 (calling *Seminole* "a dramatic change of course").
- 31 *Seminole* held that Congress has no power to abrogate states' immunity from suit under the Indian Gaming Regulatory Act, which is a federal law enacted pursuant to the Indian Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3. The Court's reasoning, however, clearly extends to the Interstate Commerce Clause (U.S. CONST. art. I, § 8, cl. 3) and the Bankruptcy Clause (U.S. CONST. art. I, § 8, cl. 4). *See* discussion *infra* at Parts III.D, IV.A.3.
- 32 *See Ex parte Young*, 209 U.S. 123 (1908), discussed *infra* at Part IV.B.4.
- 33 *See* U.S. CONST. art. III, § 2, cl. 1.
- 34 *See id.*; *see also* U.S. CONST. art. VI, cl. 2 (Supremacy Clause); U.S. CONST. amend. X ("the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").
- 35 Part IV.B.2, *infra*, discusses states' immunity in suits filed in state court to enforce federal law.
- 36 *See* discussion *infra* at note 632 and accompanying text.
- 37 The citizen would be required to establish both personal and subject matter jurisdiction over *State A* in *State B*.
- 38 *See infra* note 734; *see also* *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979).
- 39 U.S. CONST. art. III, § 1.

- 40 U.S. CONST. art. III, § 2, cl. 1. Diversity jurisdiction is based upon the status of the parties; the other grounds for federal jurisdiction are based upon the subject matter of the suit. Under current law, federal district courts have original jurisdiction over diversity cases in which the matter in controversy exceeds \$75,000. *See* 28 U.S.C. § 1332 (1994 & Supp. II 1996).
- 41 2 U.S. (2 Dall.) 419 (1793).
- 42 The suit was filed by the executor of an estate. Both the executor and the testator were citizens of South Carolina. *Id.* at 420.
- 43 The majority comprised Chief Justice Jay, *id.* at 469, and Justices Blair, *id.* at 450, Wilson, *id.* at 453, and Cushing, *id.* at 466, each of whom wrote a separate opinion. Justice Iredell wrote a passionate dissent, *id.* at 429, which is discussed *infra* at notes 48-52 and accompanying text.
- 44 *See id.* at 450-51 (Blair, J.); *id.* at 464-466 (Wilson, J.); *id.* at 466-468 (Cushing, J.); *id.* at 474-79 (Jay, C.J.).
- 45 *See id.* at 452 (Blair, J.) (“[I]f sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.”); *id.* at 468 (Cushing, J.) (“Whatever power is deposited with the Union by the people for their own necessary security, is so far a curtailment of the power and prerogatives of States.”); *id.* at 473- 477 (Jay, C.J.) (arguing that the states, as parties to the national compact of the Constitution, consented to be suable by citizens of other states).
- 46 *See id.* at 450 (opinion of Blair, J.); *id.* at 466 (opinion of Cushing, J.).
- 47 *See id.* at 453-458 (Wilson, J.) (arguing that, under the United States Constitution, the people are the only sovereign, and states are subordinate to the people; contrasting this to the King of England who, as sovereign, is subject to no higher power; concluding that the people's Constitution subjects the states to jurisdiction in the federal courts); *id.* at 463-464 (arguing that the Constitution is ordained and established by the people; the state is also the creation of the people; the Constitution can vest in the federal courts jurisdiction over the states); *id.* at 470-472 (Jay, C.J.) (arguing that sovereignty rests in the people, who are sovereigns without subjects unlike European princes who were sovereigns over their subjects; concluding that the people established the Constitution, to which the states are bound and to which the state constitutions must conform, and that the state constitutions are compacts among the citizens of a state).
The Constitution derives not from a confederation of sovereign states ceding powers to an umbrella government, but rather from the sovereign people bestowing limited powers on their federal government. U.S. CONST. pmbl. (“We the people”).
- 48 *See id.* at 429 (Iredell, J., dissenting).
- 49 *See id.* at 430 (Iredell, J., dissenting).
- 50 *See id.* at 432 (Iredell, J., dissenting).
- 51 *Id.* at 433-34 (Iredell, J., dissenting) (quoting The Judiciary Act of 1789, 1 Stat. 73 § 14 (1789)).
- 52 *Chisholm*, 2 U.S. (2 Dall.) at 436-37 (Iredell, J., dissenting) (“[W]e can exercise no authority in the present instance consistently with the clear intention of the act, but such as a proper State Court would have been at least competent to exercise at the time the act was passed.”).
- 53 *See, e.g., Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 484, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987) (“The reaction to *Chisholm* was swift and hostile.”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473 (1987) (“*Chisholm* provoked a chorus of calls around the country for a constitutional amendment”).
- 54 *See, e.g., Jackson, supra* note 13, at 527-36.
- 55 U.S. CONST. art. III, § 2, cl. 1.
- 56 Article III's diversity jurisdiction clause expressly refers to suits involving states (because it is based upon the parties' status), whereas Article III's federal question clause does not (because it is based upon the subject matter of the suit). Nothing in Article III or elsewhere in the Constitution (prior to the Eleventh Amendment) suggests that federal courts' federal question power is subject to an exception in favor of the states.
- 57 *See* discussion *infra* at notes 136-139 and accompanying text.
- 58 Note also that the lower federal courts were not granted general federal question jurisdiction until 1875, long after the Eleventh Amendment was ratified. *See* The Judiciary Act of 1875. Ch. 137, § 1, 18 Stat. 470; *see generally Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 290, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985) (Brennan, J., dissenting) (discussing earlier laws granting the federal courts limited jurisdiction over federal question cases).

- 59 See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 283-84, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985) (Brennan, J., dissenting). The resolution read: [N]o state shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.
Id. (quoting 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 101 (rev. ed. 1937)); see also *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 325, 54 S. Ct. 745, 78 L. Ed. 1282 (1934) (noting that the Eleventh Amendment was adopted in reaction to *Chisholm*); discussion *infra* at notes 117-118 and accompanying text.
- 60 See *Atascadero*, 473 U.S. at 286 (Brennan, J., dissenting) (arguing that the Eleventh Amendment did not grant states immunity in all federal court cases) (“Had Congress desired to enshrine state sovereign immunity in federal courts for all cases, for instance, it could easily have adopted the first resolution introduced on February 19, 1793, in the House.”).
- 61 See *supra* note 59, *infra* notes 117-118.
- 62 *Atascadero*, 473 U.S. at 284 (Brennan, J., dissenting).
- 63 See discussion *infra* at notes 200-202.
- 64 U.S. CONST. amend. XI.
- 65 See *Atascadero*, 473 U.S. at 286 (Brennan, J., dissenting).
- 66 See, e.g., sources cited *infra* at notes 87, 91, 97 and 109.
- 67 See discussion *infra* at Parts III.C (immunity), III.D (abrogation), IV.B.1 (waiver and consent), IV.B.2 (federal question cases filed in state court).
- 68 Cf. discussion *infra* at 632-633 concerning the scope of traditional immunity.
- 69 See *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438, 27 Env’t. L. Rep. 21227 (1997); *Smith v. Reeves*, 178 U.S. 436, 445-49 (1900).
- 70 See, e.g., *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 785, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991) (suit by United States); *U. S. v. Mississippi*, 380 U.S. 128, 140, 85 S. Ct. 808, 13 L. Ed. 2d 717 (1965) (same); *State of South Dakota v. State of North Carolina*, 192 U.S. 286, 24 S. Ct. 269, 48 L. Ed. 448 (1904) (suit by state); *U.S. v. State of Tex.*, 143 U.S. 621, 12 S. Ct. 488, 36 L. Ed. 285 (1892) (suit by United States).
- 71 See, e.g., *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). After the Eleventh Amendment was ratified, the Court dismissed the *Hollingsworth* case, which had been pending in federal court apparently based solely on diversity jurisdiction.
- 72 See *supra* notes 53, 59.
- 73 U.S. CONST. art. III, § 2, cl. 1.
- 74 See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985) (Brennan, J., dissenting) (“The congruence of language suggests that the Amendment was intended simply to adopt the narrow view of the state-citizen and state-alien diversity clauses; henceforth, a State could not be sued in federal court where the basis of jurisdiction was that the plaintiff was a citizen of another state or an alien.”); Amar, *supra* note 53, at 1475, 1481; Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 495 (1989) (noting that, under the diversity view of the Eleventh Amendment (see *infra* notes 107-127 and accompanying text), the citizen-state and foreign citizen-state language “reads virtually *in haec verba* with that of the state-diversity clauses of the jurisdictional menu precisely because these and only these categories were meant to be repealed”).
- 75 U.S. CONST. art. III, § 2, cl. 1.
- 76 U.S. CONST. Amend. XI.
- 77 Although the Amendment actually refers only to a suit by “citizens,” and an earlier version of the Amendment, which was not adopted, would have expressly applied to a suit by a “person” or “persons,” courts have not distinguished between “a citizen” and “citizens” under the Eleventh Amendment. See *supra* note 59.
- 78 See generally discussion *infra* at notes 91-123 and accompanying text.
- 79 See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env’t. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1, 29 Env’t. Rep. Cas. (BNA) 1657, 19 Env’t. L. Rep. 20974 (1989) (overruled by, *Seminole Tribe*

of *Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996)); *Green v. Mansour*, 474 U.S. 64, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985); *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890); *cf.* *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) P 10999 (1976).

- 80 *See, e.g., Seminole*, 517 U.S. 44 (majority opinion); *see also* *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) P 8566, 70 Lab. Cas. (CCH) P 32876 (1973) (Marshall, J., concurring).
- 81 *See, e.g., Seminole*, 517 U.S. at 100 (Souter, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985) (Brennan, J., dissenting); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987) (Brennan, J., dissenting, joined by Justices Marshall, Stevens, and Blackmun).
- 82 Justice Brennan's plurality opinion in *Union Gas*, 491 U.S. 1, is a good example of this tactic. *See* discussion *infra* at text accompanying notes 182-208, *see also* Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 19 (suggesting that Justice Brennan may have suppressed his views in *Union Gas* to avoid losing Justice White's vote).
- 83 *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890).
- 84 By the time *Hans* arose, Congress had enacted a statute that granted federal courts general federal question jurisdiction. *See supra* note 58.
- 85 U.S. CONST. art I, § 10, cl. 1 (“No State shall ... pass any ... Law impairing the Obligation of Contracts”).
- 86 *See Hans*, 134 U.S. at 1-3.
- 87 *Id.* at 9-10, 20. Several scholars have argued that the case did not really raise a federal question, but they generally agree that *Hans* must be viewed as a federal question case because the Court treated it that way. *See* Hovenkamp, *supra* note 13, at 2242 n.132 (suggesting that the cause of action was really under state law, but that the Court treated it as a federal law question); Meltzer, *supra* note 82, at 8 & n.38 (suggesting that *Hans* “might be viewed as falling within federal question jurisdiction”); *but cf.* 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, 1055 n.97 (1983) (arguing that *Hans* was not a federal question case); William Burnham, *Taming the Eleventh Amendment Without Overruling Hans v. Louisiana*, 40 CASE W. RES. L. REV. 931, 941-48 (1989-1990) (arguing that *Hans* merely applied common law immunity to bar a common law contract claim, and that *Hans*, therefore, does not give rise to any type of immunity that would apply to claims under the Constitution or federal law).
- 88 *Hans*, 134 U.S. at 10.
- 89 *Id.* at 12.
- 90 “*Hans*-type” immunity refers to the source and scope of states’ immunity from same-state citizen suits in federal court to enforce federal law. Professor Hovenkamp also identifies four interpretations of the Eleventh Amendment after *Hans*, as follows: (i) the Eleventh Amendment bars diversity actions by citizens of one state against another state; (ii) the Eleventh Amendment and its “penumbra” bar diversity and federal question actions by citizens of one state against another state, unless Congress abrogates; (iii) the Eleventh Amendment and its “penumbra” bar diversity and federal question actions by any citizens against any state, including their own state, unless Congress abrogates; (iv) the Eleventh Amendment and its “penumbra” bar diversity and federal question actions by any citizens against any state, including their own state, and Congress may not abrogate. Hovenkamp, *supra* note 13, at 2239. The “penumbrae” are necessary because the Amendment’s language does not include the broader meanings. *See id.* at 2242. Professor Hovenkamp argues that the historical meaning is the first meaning, and that the Amendment was designed to preserve traditional common law immunity as a limit on federal courts’ diversity jurisdiction. *See id.* at 2239-41. He suggests that *Hans* adopted the third meaning, but did not address the abrogation issues (which distinguish the second and third from the fourth meanings). *See id.* at 2242. These categories parallel the first three categories discussed in the text (in reverse order), except that Professor Hovenkamp adds the abrogation issue. To avoid mixing distinct issues, I defer discussion of abrogation until Part III, *infra*. Professor Hovenkamp’s categories also do not expressly include the fourth category discussed in the text, which sets forth Professor Field’s argument that both diversity and federal question immunity are common law doctrines that are merely preserved by the Amendment. This suggestion is significant because it questions whether immunity under the Eleventh Amendment and under the common law should be treated as being different in nature, for purposes of considering issues such as waiver and abrogation. *See* discussion *infra* at Part IV.B.1; *see also* Field, *supra* note 13, at 540 nn.88-89 (discussing varied interpretations of the Eleventh Amendment).
- 91 *See, e.g.,* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 3 (1988) (noting that the Eleventh Amendment “has been construed to embody or recognize a broad constitutional immunity for states from being sued in federal courts”); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 62-63 (1989) (describing this as the conventional interpretation, but noting that it is highly criticized by scholars); Meltzer, *supra* note 82, at 9-10 (concluding that, after *Hans*, the Eleventh Amendment was seen as restoring immunity far broader than its text); Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102, 105-06 (1996) (suggesting that

Hans applied the Eleventh Amendment to suits in federal court by citizens of other states to enforce federal causes of action, then extended it to suits by citizens of the same state as well); Field, *supra* note 13, at 522-23 (noting that one view of *Hans* is that “all state sovereign immunity derives from the eleventh amendment, despite the amendment's wording indicating its applicability only to suits ‘commenced or prosecuted against one of the United States by Citizens of another State.’”).

- 92 U.S. CONST. amend. XI.
- 93 *Hans*, 134 U.S. at 10-11; *cf.* note 97 *infra* (identifying scholars who suggest possible explanations for the distinction between citizen suits and non-citizen suits).
- 94 *Hans*, 134 U.S. at 14-15.
- 95 *See, e.g., Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 291-92, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) P 8566, 70 Lab. Cas. (CCH) P 32876 (1973) (Marshall, J., concurring):
[I]t has become established by repeated decisions of this Court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.
Id. (quoting *Ex parte New York*, No. 1, 256 U.S. 490, 497 (1921)); *see also Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 322, 54 S. Ct. 745, 78 L. Ed. 1282 (1934) (“Behind the words of the constitutional provisions are postulates which limit and control.”); *id.* at 322-23 (reasoning that these postulates include immunity for states sued in federal court except where that immunity was surrendered in the plan of the convention) (citing THE FEDERALIST No. 81 (Alexander Hamilton); *U.S. v. State of Tex.*, 143 U.S. 621, 644, 12 S. Ct. 488, 36 L. Ed. 285 (1892).
- 96 *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996) (majority opinion of Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy and Thomas) (discussed *infra* at Part III.C.); *see also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1, 29 Env't. Rep. Cas. (BNA) 1657, 19 Env't. L. Rep. 20974 (1989) (overruled by, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996)) (Scalia, J., dissenting).
- 97 For explanations of why the drafters might have wished to prohibit suits by citizens of other states but allow suits by citizens of the same state, *see generally* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Massey, *supra* note 91; MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, 192-93 (2d ed. 1990); *see also* Gene R. Shreve, *Letting Go of the Eleventh Amendment*, 64 IND. L.J. 601, 609 (1989); *cf.* Amar, *supra* note 74, at 494-98 (criticizing Professor Marshall's interpretation); discussion *infra* at 112-116 and accompanying text.
- 98 *See, e.g.,* Marshall, *supra* note 97, at 1347; Shreve, *supra* note 97, at 611-12.
- 99 *See Hans*, 134 U.S. at 10 (citing *In re Ayers*, 123 U.S. 443 (1887); *Hagood v. Southern*, 117 U.S. 52, 6 S. Ct. 608, 29 L. Ed. 805 (1886); *State of Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711, 2 S. Ct. 128, 27 L. Ed. 448 (1883)).
- 100 *See Ayers*, 123 U.S. at 515; *Hagood*, 117 U.S. at 71; *Jumel*, 107 U.S. at 728.
- 101 *Cf.* Meltzer, *supra* note 82, at 8-9 (arguing that the cases *Hans* cites “were at best implicit, however, and the Court did not give the point the attention it deserves”).
- 102 *Hans*, 134 U.S. at 10.
- 103 *Id.* (emphasis added); *cf. id.* at 18 (stating additional reasons for dismissing the suit).
- 104 *Id.* at 18.
- 105 *See* sources cited *supra* note 97; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247-302, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985) (Brennan, J., dissenting); *Edelman v. Jordan*, 415 U.S. 651, 687-88, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (Brennan, J., dissenting) (suggesting that suit by a citizen of another state is barred under constitutional immunity, but that suit by the state's own citizen is barred only under a non-constitutional immunity and is, therefore, subject to congressional abrogation); *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 313-15, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) P 8566, 70 Lab. Cas. (CCH) P 32876 (1973) (Brennan, J., dissenting); *but cf. Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1, 29 Env't. Rep. Cas. (BNA) 1657, 19 Env't. L. Rep. 20974 (1989) (overruled by, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996)) (Brennan, J.) (apparently not focussing on the distinction between citizen and non-citizen federal question suits); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 509, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987) (Brennan, J., dissenting) (arguing that the Eleventh Amendment only applies to diversity suits); *see also* Field, *supra* note 13, at 539-40 & n.88; Meltzer, *supra* note 82, at 16-17.

- 106 See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996); *Union Gas*, 491 U.S. 1; *Welch*, 483 U.S. 468; *Atascadero*, 473 U.S. 234; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) P 10999 (1976); *Edelman*, 415 U.S. 651; *Employees*, 411 U.S. 279; *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964) (overruled by *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987)); *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890); see also *Field*, *supra* note 19, at 5 (“Most of the important cases since 1890 involved suits against a state by its own citizens”). The distinction becomes particularly significant in determining whether Congress can abrogate states' immunity. See discussion *infra* at Part III.
- 107 See, e.g., *Welch*, 483 U.S. at 509 (Brennan, J., dissenting) (joined by Justices Marshall, Stevens, Blackmun) (arguing that the Eleventh Amendment only applies to diversity suits).
- 108 See *Seminole*, 517 U.S. at 100 (Souter, J., dissenting) (joined by Justices Ginsburg and Breyer); *id.* at 93-96 (Stevens, J., dissenting) (arguing that sovereign immunity has nothing to do with the Eleventh Amendment); *Union Gas*, 491 U.S. at 23-24 (Stevens, J., concurring) (arguing that *Hans* obfuscated the distinction between sovereign immunity and the Eleventh Amendment); *Atascadero*, 473 U.S. at 304, *Green v. Mansour*, 474 U.S. 64, 74-81, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985).
- 109 See, e.g., Amar, *supra* note 53 at 1466-1473; Amar, *supra* note 74, at 494-98 (discussing the diversity view in the context of Article III and the Eleventh Amendment); Alan D. Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1 (1967); RICHARD H. FALLON, DANIEL J. MELZTER & DAVID L. SHAPIRO, HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1052-1055 (4th ed. 1996); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1262-64, 1274 (1989); Fletcher, *supra* note 87, at 1035-36; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Jackson, *supra* note 91; Meltzer, *supra* note 82, at 10-13 (discussing the diversity view and arguing that it is the better interpretation); John V. Orth, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 39, 149 (1987).
- 110 See *supra* notes 93-96, 103; see also *Field*, *supra* note 87.
- 111 See, e.g., Amar, *supra* note 53, at 1476, Meltzer, *supra* note 82, at 12-13; Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260 (1990).
- 112 The federal courts' judicial power under Article III clearly extends to federal question suits. U.S. CONST. art. III, § 2, cl. 1. See Amar, *supra* note 53, at 1480-83.
- 113 See *supra* note 74 and accompanying text; Amar, *supra* note 74, at 489-90. In the context of diversity jurisdiction, the Amendment's reference only to suits against a state by citizens of another state is understandable — there is no need to limit federal courts' jurisdiction over a diversity suit against a state by the state's own citizens because diversity jurisdiction does not extend to such a suit. See U.S. CONST. Art. III, § 1, cl. 2.
- 114 See, e.g., Amar, *supra* note 53, at 1475, 1481-82; Fletcher, *supra* note 87, at 1035-36, 1055-62.
- 115 See generally sources cited *supra* note 109; see, e.g., Fletcher, *supra* note 87, at 1036; Fletcher, *supra* note 109, at 1291; see also *Union Gas*, 491 at 7 (Scalia, J., dissenting).
- 116 See sources cited *supra* note 109.
- 117 See discussion *supra* notes 59-64 and accompanying text. The earlier proposal, which would have applied to federal question suits, read:
That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner of foreigners, of any body politic or corporate, whether within or without the United States.
PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 861 (2d ed. 1994); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 286, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985) (Brennan, J., dissenting); Hovenkamp, *supra* note 13, at 2240-41 (arguing that the earlier proposal would have applied to federal question cases); Fletcher, *supra* note 109, at 1269 (arguing that the earlier proposal “would have flatly prohibited a state from being made a defendant in a suit brought by a private individual”).
- 118 For example, if the Amendment had been meant to apply only to diversity jurisdiction, it might have read:
The Judicial power of the United States with respect to Controversies between a State and Citizens of another State or between a State and foreign Citizens or Subjects 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.
The emphasized language shows the change from the Amendment as enacted. The drafters might simply have viewed such a construction as awkward or redundant.

- 119 See, e.g., Amar, *supra* note 53, at 1473, 1481; Hovenkamp, *supra* note 13, at 2238-41; Field, *supra* note 13 at 537-38; Fletcher, *supra* note 87, at 1063; Fletcher, *supra* note 109, at 1264-75.
- 120 See *infra* note 123, Amar, *supra* note 53 at 1482; Fletcher, *supra* note 110, at 1263-64, 1274-75. Justice Rehnquist has argued that the drafters did not discuss federal question jurisdiction because, at the time the Amendment was ratified, the lower federal courts did not exercise general jurisdiction over federal question actions. See *Seminole*, 517 U.S. at 69-70 (Rehnquist, J.) (referring to The Judiciary Act of 1875, which granted federal courts general federal question jurisdiction). Consequently, because the drafters never expected that federal courts would have jurisdiction over federal question actions, they did not foresee the need to extend the Amendment to such actions. Justice Souter has rejected this argument because, even though the lower federal courts did not exercise general federal question jurisdiction at the time of the Amendment, the drafters were aware that the lower federal courts might be granted general federal question powers in the future. See *Seminole*, 517 U.S. at 116 n.12 (Souter, J., dissenting) (noting that laws enacted between 1790 to 1801 demonstrate that “early Congresses exercised their authority pursuant to Article III to confer jurisdiction on the federal courts to resolve various matters of federal law” and arguing that even though some of these acts were repealed, they still demonstrate that early Congresses recognized “the potential scope of Article III”); see also Meltzer, *supra* note 82, at 20 (noting other weaknesses in Justice Rehnquist’s reasoning); Fletcher, *supra* note 109, at 1274-75.
- 121 See *Seminole*, 517 U.S. at 101 (Souter, J., dissenting) (arguing that there was no discussion of federal question and concluding from this silence that no one thought states were immune from federal question suits at the time).
- 122 See Amar, *supra* note 53, at 1481-84; Fletcher, *supra* note 109, at 1276-79, 1291-93; Hovenkamp, *supra* note 13, at 2240-41.
- 123 Cf. Meltzer, *supra* note 82, at 11 (arguing that the diversity view preserves the full reach of federal courts’ power to enforce federal law and, thereby, makes the federal judicial and legislative powers co-extensive).
- 124 See Field *supra* note 13; Field *supra* note 19, at 7-8 (arguing that the Eleventh Amendment merely restored Justice Iredell’s view, which is that common law sovereign immunity was undisturbed by the Constitution and that Congress can abrogate immunity).
- 125 See *Hans v. Louisiana*, 134 U.S. 1, 12-19, 10 S. Ct. 504, 33 L. Ed. 842 (1890); Field, *supra* note 13, at 527-546 (arguing that Article III does not eliminate pre-existing traditional common law immunity or impose immunity as a constitutional requirement; rather, it is neutral; it simply restores the prior understanding, reflected in Justice Iredell’s opinion in *Hans*, that common law immunity survived the enactment of Article III); see also Burnham, *supra* note 87, at 934-40.
- 126 See *Hans*, 134 U.S. at 12-19; see also Field, *supra* note 13, at 537 (arguing that *Hans* is consistent with the view that sovereign immunity survived Article III only as a common law doctrine). Professor Field has also argued that courts interpret *Hans* as expanding the Eleventh Amendment based on underlying postulates which limit and control: One oddity of this interpretational approach is that the Court is essentially saying the rule would be the same if the Eleventh Amendment were not there. The redundancy is not because the Amendment is unimportant, but because the principle it reflects lies at the root of the constitutional system. Field, *supra* note 19, at 5-6 (footnote omitted). Professor Field argues that reading this into the Amendment “quite evidently flies in the face of the language of the Eleventh Amendment itself.” *Id.* at 6. She nevertheless acknowledges that the courts have interpreted *Hans* as applying the Eleventh Amendment, rather than the common law, to suits by citizens against their own states. See *id.*
- 127 See Field *supra* note 13, at 541-43 (arguing that, if the Eleventh Amendment is designed to adopt Justice Iredell’s view, then it embodies common law immunity because Justice Iredell simply said that Article III did not eliminate common law immunity; suits against states are beyond the scope of federal courts’ Article III powers only in the sense that Article III does not require such suits to be heard in federal court, not in the sense that it does not permit them to be heard there with consent).
- 128 See Field, *supra* note 13, at 517-18. Professor Field also notes that the federal government enjoys immunity without an express grant in the Constitution. If the Eleventh Amendment were necessary to grant states immunity, then what would be the basis for federal government immunity? She concludes that both arise from the common law. *Id.* at 544.
- 129 See Meltzer, *supra* note 82, at 17 (arguing that Professor Field’s view that all federal court immunity arises under the common law goes too far; among other problems, it cannot explain the Eleventh Amendment’s distinction between citizen and non-citizen suits).
- 130 See Field, *supra* note 13, at 544.
- 131 See *Hans*, 134 U.S. at 10. The decision also reflects greater concern for defining the scope of states’ immunity (*i.e.*, whether or not it applies to same-state citizen suits), than for determining its source (*i.e.*, common law versus the Eleventh Amendment).
- 132 *Id.* at 21.
- 133 Other issues that turn on the distinction between common law and constitutional immunity include whether the state may waive “immunity” (discussed *infra* at Part IV.B.1), and whether federal courts may review a state court determination of federal law involving a state (discussed *infra* at Part IV.B.3).
- 134 These two decades began in 1976, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) P 10999 (1976), and ended in 1996, see *Seminole*

Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996).

- 135 In contrast, certain other enforcement alternatives apply only in limited circumstances. See discussion *infra* at Part IV.B.3-5.
- 136 See, e.g., Burnham, *supra* note 87, at 934-35 & n.11; Meltzer, *supra* note 82, at 19 (“[A]ny position that reads Article III and/or the Eleventh Amendment as recognizing state sovereign immunity but that affirms Congress’ power to overcome that immunity faces grave difficulties;” arguing that the diversity view of the Eleventh Amendment obviates these problems); see also Field *supra* note 13, at 538-39 (arguing that Justice Brennan interprets the Eleventh Amendment as creating sovereign immunity as a constitutional requirement but only with respect to matters within its literal scope, which does not include suits by states’ own citizens); *id.* at 515 (arguing that Justice Brennan would allow congressional abrogation and state waiver in suits by states’ own citizens because sovereign immunity is only a common law doctrine, not constitutionally required, in such cases). For a comprehensive analysis of the competing approaches to abrogation, see Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978) (concluding that the Constitution allows sovereign immunity, but does not impose it as a constitutional doctrine); *id.* at 1212 (“If sovereign immunity has constitutional status, how could Congress abrogate it?”); see also Field, *supra* note 19, at 6-7 (characterizing the question as “whether sovereign immunity for states in federal court ... is constitutionally required;” in other words, can Congress abrogate states’ immunity or is it a constitutional right); Hovenkamp, *supra* note 13, at 2239-42 (discussed *supra* at note 90).
- 137 See, e.g., Hovenkamp, *supra* note 13, at 2245 (arguing that the Constitution was enacted with the common law as a backdrop; Congress has power to abrogate common law doctrines; therefore, the majority in *Seminole* had to make immunity a constitutional principle in order to avoid abrogation); see also Field, *supra* note 13, at 536-38 (state sovereign immunity as a common law doctrine remains intact unless Congress abrogates).
- 138 See, e.g., U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XXI, § 2. See generally Monaghan, *supra* note 82, at 121 (arguing that even if a “postulate” exists under which states are immune from suit without their consent, it carries no significance when Congress has clearly abrogated that immunity); see also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1, 29 Env’t. Rep. Cas. (BNA) 1657, 19 Env’t. L. Rep. 20974 (1989) (overruled by, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env’t. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996)); *Fitzpatrick*, 427 U.S. 445 (abrogation under the Fourteenth Amendment); discussion *infra* at notes 192-207 and accompanying text.
- 139 Congress’ power to regulate the states is limited by the Tenth Amendment. See U.S. CONST. amend. X.
- 140 *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964) (overruled in part by, *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987)).
- 141 45 U.S.C.A. § 51 *et seq.* (1986).
- 142 *Id.* at §§ 51, 56; see *Parden*, 377 U.S. at 185-86.
- 143 See *Parden*, 377 U.S. at 187-90.
- 144 *Id.* at 192.
- 145 *Id.* at 198 (White, J. dissenting) (joined by Justices Douglas, Harlan, and Stewart).
- 146 *Id.* at 199 (White, J., dissenting).
- 147 *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) P 8566, 70 Lab. Cas. (CCH) P 32876 (1973).
- 148 29 U.S.C. § 201 *et seq.* (1994).
- 149 *Id.* §§ 206, 207, 216(b), 217; see *Employees*, 411 U.S. at 282-83.
- 150 411 U.S. at 285.
- 151 *Id.* at 287 (Marshall, J., concurring) (joined by Justice Stewart). Justice Brennan dissented, reasoning that the states had surrendered their immunity to the extent that the Constitution granted Congress power to enact federal law. *Id.* at 298.
- 152 *Edelman v. Jordan*, 415 U.S. 651, 672, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).
- 153 42 U.S.C. § 301 *et seq.* (1994); see *Edelman*, 415 U.S. at 672-74.
- 154 415 U.S. at 672-74.

- 155 *Edelman*, 415 U.S. at 672. In two dissents, Justices Douglas, Marshall and Blackmun would have held that Congress had intended to create a private cause of action against the states and that the state had consented to suit in any event. *See id.* at 678 (Douglas, J., dissenting); *id.* at 688 (Marshall, J., dissenting). Justice Brennan would have held that the states surrendered their immunity to the extent that the Constitution grants Congress power to enact federal laws. *Id.* at 687 (Brennan, J., dissenting).
- 156 *Id.* at 674.
- 157 *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987).
- 158 Justice Powell wrote the plurality opinion, which Chief Justice Rehnquist and Justices White and O'Connor joined. *Id.* Justice White also wrote a concurring opinion. *Id.* at 495 (White, J., concurring). Justice Scalia concurred in part and concurred in the judgment. *Id.* at 495 (Scalia, J., concurring). Justice Brennan wrote a dissent, which Justices Marshall, Blackmun and Stevens joined. *Id.* at 496 (Brennan, J., dissenting).
- 159 *Id.* at 475.
- 160 *Id.* at 478.
- 161 *See id.* at 475 (reserving “without deciding or intimating a view” whether Congress could subject states to suit in federal court without their consent other than under the Fourteenth Amendment, but not questioning Congress’ authority under powers other than the Fourteenth Amendment to require that states waive immunity); *see also* Field, *supra* note 136, at 1209 (noting that the only opinion in *Parden*, *Employees* and *Edelman* that denied Congress power to abrogate states’ immunity was Justice Marshall’s dissent in *Employees*).
- 162 The (subsequently overruled) majority in *Parden* noted that states’ immunity did not arise under the express language of the Eleventh Amendment, but did not clearly state whether immunity was constitutionally required. *Parden*, 377 U.S. at 186. The dissent (which would have allowed abrogation with a clear statement) viewed immunity as constitutionally required, but also seemed to suggest that it was not within the express scope of the Eleventh Amendment. *Id.* at 198-200 (White, J., dissenting). Similarly, the majority and concurrence in *Employees* and the majority in *Edelman* suggested that immunity was constitutionally required, although not under the express language of the Eleventh Amendment. *See Employees*, 411 U.S. at 280, 287; *id.* at 291-92 (Marshall, J. concurring); *Edelman*, 415 U.S. at 662-63, 678. It was not until *Welch* that the Court, by a plurality, expressly stated that the Eleventh Amendment itself (rather than the common law or some general constitutional principle) barred same-state citizen suits. *Welch*, 483 U.S. at 487. Justice Brennan (dissenting in *Employees* and *Edelman*), joined by three other justices (dissenting in *Welch*), argued that only common law immunity, rather than the Eleventh Amendment, applied because the cases involved citizen suits against their own states to enforce federal law. *See Employees*, 411 U.S. at 309-22 (Brennan, J., dissenting); *Edelman*, 415 U.S. at 687-88 (Brennan, J., dissenting); *Welch*, 483 U.S. at 497, 504-516 (Brennan, J., dissenting); *see also* Field, *supra* note 136, at 1210-1218 (contrasting views of Justice Marshall, Justice Brennan and the Court concerning congressional power to condition states’ participation in federal programs on a waiver of immunity).
- 163 *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) P 10999 (1976).
- 164 *Id.*
- 165 Bitzer was the Chairman of the Connecticut State Employees’ Retirement Commission. The other defendants included Connecticut’s Treasurer and Comptroller. *See Fitzpatrick*, 427 U.S. at 449 n.4.
- 166 Title VII prohibits employment discrimination based upon race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1994).
- 167 *See Fitzpatrick*, 427 U.S. at 448. The plaintiffs sought money damages, in the form of retroactive benefits and attorney’s fees. *Id.* at 449-50. Because the plaintiffs sought money damages, rather than simply injunctive relief, *Ex parte Young*, 209 U.S. 123 (1908) (discussed *infra* at Part IV.B.4) did not apply.
- 168 *See* 42 U.S.C. §§ 2002e-2(a, b, f), 2000e-5(a-g); *see Fitzpatrick*, 427 U.S. at 449 & n.2.
- 169 *See Fitzpatrick*, 427 U.S. at 456-57.
- 170 *Id.* at 456-57.
- 171 *Id.* at 452-56; *see also* Field, *supra* note 19, at 10-11 (characterizing *Fitzpatrick*’s “curious” emphasis on the Fourteenth Amendment as a departure from established abrogation law in cases such as *Parden* and *Employees*, under which the Court suggested that Congress could abrogate states’ immunity under any of Congress’ legislative powers).
- 172 *See Fitzpatrick*, 427 U.S. at 454-55.
- 173 *See id.* at 452-56; U.S. CONST. amend. XIV.

- 174 U.S. CONST. amend. XIV § 1 (emphasis added).
- 175 *Id.* § 5.
- 176 *Fitzpatrick*, 427 U.S. at 456.
- 177 *Id.* at 457-58 (Brennan, J., concurring). Justice Stevens, concurring separately, does not expressly disagree with Justice Brennan, but argues that “[e]ven if the Eleventh Amendment does cover a citizen’s suit against his own State, it does not bar an action against state officers enforcing an invalid statute.” *Id.* at 458-59 (Stevens, J., concurring) (footnote omitted).
- 178 *Id.* at 457.
- 179 See, e.g., *Green v. Mansour*, 474 U.S. 64, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985) (reasoning that the Eleventh Amendment prohibits a citizen suit against a state in federal court absent a state’s consent or clear Congressional abrogation pursuant to a valid exercise of power; dismissing suit in which AFDC recipients challenged state’s method of calculating benefits).
- 180 *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985); see also *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 786, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991); *Dellmuth v. Muth*, 491 U.S. 223, 230, 109 S. Ct. 2397, 105 L. Ed. 2d 181, 53 Ed. Law Rep. 792 (1989) (reasoning that abrogation must be in the text of the statute, legislative history is irrelevant to this inquiry); *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 109 S. Ct. 2818, 106 L. Ed. 2d 76, 26 Soc. Sec. Rep. Serv. 175, 19 Bankr. Ct. Dec. (CRR) 514, 20 Collier Bankr. Cas. 2d (MB) 1204, Bankr. L. Rep. (CCH) P 72856 (1989) (holding that the Bankruptcy Code did not contain clear language abrogating states’ immunity); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 475, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979) (reasoning that the statute must “explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States ...”); Field, *supra* note 136, at 1235-37; cf. Field, *supra* note 19, at 10-11 (noting that the clear statement requirement arose before *Fitzpatrick* in cases such as *Employees*; suggesting that *Fitzpatrick* might have eliminated this requirement in the context of Fourteenth Amendment statutes because *Fitzpatrick* did not mention the need for a clear statement; acknowledging however that later cases such as *Atascadero* required a clear statement in Fourteenth Amendment statutes as well).
- 181 See, e.g., *Atascadero*, 473 U.S. 234 (Rehabilitation Act did not abrogate immunity; state may but did not waive immunity); *Blatchford*, 501 U.S. 775 (“§ 1362 does not reflect an ‘unmistakably clear’ intent to abrogate immunity”); *Dellmuth*, 491 U.S. 223 (holding that the Education of the Handicapped Act did not abrogate states’ immunity because there was no unequivocal declaration that Congress intended to exercise such powers); *Hoffman*, 492 U.S. 96 (Bankruptcy Code did not abrogate states’ immunity); *Pennhurst*, 465 U.S. 89 (“[W]e have required an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States”); *Quern*, 440 U.S. 332 (holding that the Civil Rights Act of 1871 did not abrogate Eleventh Amendment immunity because the general language of the Act does not reflect an intent to do so); *Welch*, 483 U.S. 468 (holding that “congress has not expressed in unmistakable statutory language its intention to allow States to be sued under the Jones Act”).
- 182 *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1, 29 Env’t. Rep. Cas. (BNA) 1657, 19 Env’t. L. Rep. 20974 (1989) (overruled by, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env’t. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996)).
- 183 42 U.S.C. §§ 9601, et seq. (1994).
- 184 See *Union Gas*, 491 U.S. at 6; 42 U.S.C. §§ 9604, 9606.
- 185 See *Union Gas*, 491 U.S. at 7; 42 U.S.C. §§ 9607(a).
- 186 Pub. L. 99-499, 100 Stat. 1613 (1986).
- 187 See 42 U.S.C. § 9601(20)(D) (SARA § 101(20)(D)) (the exceptions relate to a state or local government unit that acquires ownership or control involuntarily, such as through the bankruptcy or tax delinquency of the owner).
- 188 Justice Brennan wrote for the plurality. *Union Gas*, 491 U.S. at 4. Justices Stevens, Blackmun, and Marshall joined this part of the opinion. *Id.* These same three justices also agreed with Justice Brennan’s conclusion that Congress had authority to abrogate states’ immunity under a Commerce Clause statute. *Id.* Justice Scalia added the fifth vote by joining the part of Justice Brennan’s opinion that found a clear intent to abrogate. *Id.* at 29 (Scalia, J., concurring in part and dissenting in part). Justice Scalia dissented from Justice Brennan’s conclusion that Congress had authority to abrogate immunity. *Id.* Justices White, Rehnquist, O’Connor, and Kennedy found no unmistakably clear abrogation. *Id.* at 45 (White, J., dissenting). Justice White, however, agreed with the four-justice plurality that Congress could abrogate immunity, although he disagreed with “much of his [Brennan’s] reasoning.” *Id.* at 57 (failing to explain the bases for his disagreement).
- 189 *Union Gas*, 491 U.S. at 7-13.

- 190 See discussion *supra* notes 171-176 and accompanying text.
- 191 See *Union Gas*, 491 U.S. at 16-17.
- 192 See *Union Gas*, 491 U.S. at 19-20. “States enjoy no immunity where there has been ‘a surrender of this immunity in the plan of convention.’” *Union Gas*, 491 U.S. at 19 (quoting *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 322-23, 54 S. Ct. 745, 78 L. Ed. 1282 (1934) (quoting THE FEDERALIST No. 81, at 657 (Alexander Hamilton))).
- 193 *Id.* at 17-18.
- 194 See *supra* note 138 and accompanying text; *infra* notes 200-207 and accompanying text.
- 195 See *supra* notes 140-146, 157-160 and accompanying text.
- 196 See *supra* notes 140-160 and accompanying text. According to *Union Gas*, *Parden* and its progeny hold that Congress has power under the Commerce Clause to override states' immunity, but Congress had not made its intent to override states' immunity clear in the statute at issue in *Employees*. See *Union Gas*, 491 U.S. at 14.
- 197 100 U.S. 339 (1879) (considering a federal criminal statute, under which a Virginia state judge had been arrested, that prohibited state courts from excluding jurors based on race).
- 198 *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454-55, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) P 10999 (1976) (quoting *Ex parte Virginia*, 100 U.S. at 346).
- 199 U.S. CONST. art. I, § 8 cl. 18. Indeed, an implementing clause is required in a constitutional amendment only because the amendment cannot take advantage of the implementing clauses contained in the Constitution itself.
- 200 See *Union Gas*, 491 U.S. at 18; *cf.* *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 300, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) P 8566, 70 Lab. Cas. (CCH) P 32876 (1973) (Brennan, J., dissenting) (“[B]ecause of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver.”); *Edelman v. Jordan*, 415 U.S. 651, 687, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (Brennan, J., dissenting). Professor Tribe has also advanced this interpretation of the Amendment's “be construed to” language. See Lawrence Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 652, 683-99 (1976); see also John C. 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 (1975); *cf.* Meltzer, *supra* note 82, at 18-19 (commenting that this argument is appealing but finds little support in the constitutional text, history or structure).
- 201 *Union Gas*, 491 U.S. at 18-19; see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 285, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985) (Brennan, J., dissenting).
- 202 See *Union Gas*, 491 U.S. at 22-23 (acknowledging that Congress has no power to expand federal courts' Article III powers, but reasoning that the Eleventh Amendment does not implicate courts' Article III powers).
- 203 See *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890), discussed *supra* notes 83-90 and accompanying text.
- 204 The only applicable law in *Hans* was the Judiciary Act of 1875, which gave effect to Article III but did not expressly abrogate immunity. See *Union Gas*, 491 U.S. at 18-19.
- 205 *Id.* This approach arguably reconciles *Chisholm* as well. See Field, *supra* note 19, at 5 (in *Chisholm*, all five justices assumed that Congress had power to subject states to suit in federal court; Justice Iredell dissented because he did not believe that Congress had actually done so).
- 206 See also Field, *supra* note 19, at 8, 9 (arguing that Justice Brennan developed a coherent theory to support the long-established practice of congressional abrogation of states' immunity in federal court, and that “Justice Brennan's theory ... made a lot more sense, both historically and logically” than the theory advanced by Justice Douglas in *Employees*, but acknowledging that Justice Brennan's theory never received more than four votes); *but cf.* Field, *supra* note 136, at 1256-58 (questioning why a self-executing constitutional provision cannot abrogate states' immunity if a statute can; arguing that this might be justified if the Fourteenth Amendment is meant to limit judicial power but not congressional power, but raising doubts concerning the viability of this interpretation).
- 207 In previous decisions, Justice Brennan consistently argued that immunity in federal question suits filed in a state's own citizens arises only under the common law. In *Fitzpatrick*, for example, Justice Brennan, noting that the citizens were suing their own state, suggested that:
[i]n that circumstance, Connecticut may not invoke the Eleventh Amendment, since that Amendment bars only federal-court suits against States by citizens of other States. Rather, the question is whether Connecticut may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to a claim for damages under Title VII.
Fitzpatrick, 427 U.S. at 457 (Brennan, J., concurring).

Justice Brennan argued that the answer was “no” because “[t]he States surrendered that immunity, in Hamilton's words, ‘in the plan of the Convention,’ that formed the Union, at least insofar as the States granted Congress specifically enumerated powers.” *Id.* at 457-58 (quoting THE FEDERALIST No. 81 (Alexander Hamilton) (H. Dawson ed., 1876)). See also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247-302, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 1 A.D. Cas. (BNA) 758, 38 Fair Empl. Prac. Cas. (BNA) 97, 37 Empl. Prac. Dec. (CCH) P 35329 (1985) (Brennan, J., dissenting); *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (Brennan, J., dissenting); *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 298-323, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 20 Wage & Hour Cas. (BNA) 1254, 5 Empl. Prac. Dec. (CCH) P 8566, 70 Lab. Cas. (CCH) P 32876 (1973) (Brennan, J., dissenting).

In *Union Gas*, Justice Brennan carefully avoids any express statement of the source of states' immunity in same-state citizen federal question suits. Justice Brennan's position in *Union Gas* may have been designed to avoid alienating Justice White, who provided the fifth vote and who earlier had rejected Justice Brennan's common law argument. It may also have been designed to avoid a head-to-head confrontation with the dissent, which argued that immunity was a constitutional doctrine. Justice White concurred in the plurality's result, but declined without explanation to accept its reasoning. *Union Gas*, 491 U.S. at 45 (White, J., concurring).

See also Field, *supra* note 19, at 7-10; Meltzer, *supra* note 82, at 14-15 (arguing that the *Union Gas* plurality's focus on abrogation does not rely on the diversity interpretation of the Eleventh Amendment, but instead reasons from an extension of the *Fitzpatrick* rationale and an argument that, under the Constitution, the states surrendered any immunity that would have prevented congressional regulation).

- 208 [517 U.S. 44 \(1996\)](#), discussed *infra* at Part III.C.
- 209 See [Union Gas](#), 491 U.S. at 23 (Stevens, J., concurring); see also [Fitzpatrick](#), 427 U.S. at 458 (Stevens, J., concurring); [Seminole](#), 517 U.S. at 76 (Stevens, J., dissenting).
- 210 See [Union Gas](#), 491 U.S. at 23 (Stevens, J., concurring).
- 211 *Id.* at 24-25.
- 212 *Id.*
- 213 *Id.*
- 214 *Id.* at 26-28 & n.3.
- 215 *Id.* at 25-27.
- 216 *Id.* at 26; see also *id.* at 27 n.3 (commenting that this approach resolves the anomaly of federal court review of state court federal question actions, which would not make sense if federal courts had no jurisdiction in federal question cases, as is suggested by those who interpret *Hans* as extending Eleventh Amendment immunity to federal question cases).
- 217 *Id.* at 27.
- 218 *Id.* at 29 (Scalia, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justices O'Connor and Kennedy joined the portion of Justice Scalia's opinion that addressed the abrogation issue.
- 219 *Id.* at 31. Justice Scalia focuses particularly on [Welch v. Texas Dept. of Highways and Public Transp.](#), 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389, 1987 A.M.C. 2113 (1987), in which the justices split four-to-four on whether to overrule *Hans*. In *Union Gas*, Justice Scalia summarizes the competing positions advanced by the plurality and dissent in *Welch*.
- 220 [Union Gas](#), 491 U.S. at 29-32 (Scalia, J., concurring in part, dissenting in part)
- 221 *Id.* at 38.
- 222 *Id.* at 39.
- 223 See *id.* at 33 (citing [U. S. v. Mississippi](#), 380 U.S. 128, 85 S. Ct. 808, 13 L. Ed. 2d 717 (1965); [U.S. v. State of Tex.](#), 143 U.S. 621, 12 S. Ct. 488, 36 L. Ed. 285 (1892)).
- 224 See *id.* (citing [State of South Dakota v. State of North Carolina](#), 192 U.S. 286, 24 S. Ct. 269, 48 L. Ed. 448 (1904)).
- 225 As noted *infra* at note 319, these arguments would seem to apply to the Thirteenth and Fifteenth Amendments as well. See U.S. CONST. amend. XIII, XV.
- 226 [Union Gas](#), 491 U.S. at 42.
- 227 *Id.* at 36.
- 228 *Id.* at 42; see also discussion *supra* at text accompanying notes 157-160 (noting that *Welch* overruled *Parden* in part).

- 229 See *Union Gas*, 491 U.S. at 5 (Brennan, J., for the plurality); *id.* at 29 (Scalia, J., concurring in part and dissenting in part); see also discussion *infra* at notes 271-285 and accompanying text.
- 230 This discussion assumes that states' immunity extends to federal bankruptcy courts in the same manner as other federal courts. For a discussion of this issue, see *infra* Part IV.A.1.
- 231 Former subsections 106(a) and 106(b) related to waiver and setoff. See 11 U.S.C. §§ 106(a), (b) (1978) (superseded). The current provisions that replaced former subsections 106(a) and 106(b) are discussed *infra* at Part IV.B.1.a. For a history of § 106, see S. Elizabeth Gibson, *Congressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity*, 69 AM. BANKR. L.J. 311, 315 n.31 (1995).
- 232 11 U.S.C. § 106(c) (1978) (superseded).
- 233 See, e.g., 11 U.S.C. §§ 362 (providing an automatic stay applicable to all entities); 547(b) (permitting the recovery of preferential transfers made to or for the benefit of a creditor); 1141 (stating that confirmation of a plan binds creditors).
- 234 “Congress does not ... have the power to waive sovereign immunity completely with respect to claims of [a] bankruptcy estate against a State, though it may exercise its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy.” H.R. Rep. No. 95-595, at 317; S. Rep. No. 95-989, at 29-30 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6274 at 668.
- 235 “Section 106(c) codifies *Gwilliam v. U. S.*, 519 F.2d 407, 75-2 U.S. Tax Cas. (CCH) P 9556, 36 A.F.T.R.2d (P-H) P 75-5168 (9th Cir. 1975), and *In re Dolard*, 519 F.2d 282, 75-2 U.S. Tax Cas. (CCH) P 9558, 36 A.F.T.R.2d (P-H) P 75-5172 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a claim. Except as provided in sections 106(a) and (b), subsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit ...”
124 Cong. Rec. H. 11,091 (Sept. 28, 1978); S. 17,407 (Oct. 6, 1978); see also Gibson, *supra* note 243, at 314-15 (suggesting that the floor managers saw former section 106(c) as allowing the bankruptcy court to determine the amount and dischargeability of tax claims even if the government had not filed a claim, and also to bind the government on other matters). Cf. 11 U.S.C. § 106(b),(c) (1994 (allowing the debtor to assert counterclaims and setoff if the state has filed a claim).
- 236 *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 109 S. Ct. 2818, 106 L. Ed. 2d 76, 26 Soc. Sec. Rep. Serv. 175, 19 Bankr. Ct. Dec. (CRR) 514, 20 Collier Bankr. Cas. 2d (MB) 1204, Bankr. L. Rep. (CCH) P 72856 (1989) (five-to-four plurality).
- 237 *Id.* at 104.
- 238 Justices Rehnquist, O'Connor, and Kennedy joined Justice White's plurality opinion. *Id.* at 96.
- 239 *Id.* at 101-02.
- 240 *Id.* at 105 (Scalia, J., concurring). Justice O'Connor, who had joined Justice White's plurality opinion, also joined Justice Scalia's concurrence. *Id.*
- 241 *Id.* at 104 (White, J., for the plurality); *id.* at 105 (Scalia, J., concurring).
- 242 These are Chief Justice Rehnquist and Justice Kennedy. See *Union Gas*, 491 U.S. at 29 (Scalia, J., dissenting) (joined by Chief Justice Rehnquist and Justices Kennedy and O'Connor).
- 243 Justice Stevens wrote the dissent, which Justices Marshall, Brennan and Blackmun joined. See *Hoffman*, 492 U.S. at 106 (Stevens, J., dissenting).
- 244 *Id.*
- 245 *U.S. v. Nordic Village Inc.*, 503 U.S. 30, 112 S. Ct. 1011, 117 L. Ed. 2d 181, 22 Bankr. Ct. Dec. (CRR) 1022, 26 Collier Bankr. Cas. 2d (MB) 9, Bankr. L. Rep. (CCH) P 74435B, 92-1 U.S. Tax Cas. (CCH) P 50109, 69 A.F.T.R.2d (P-H) P 92-687 (1992).
- 246 *Id.* at 31. Chapter 11 is the part of the Bankruptcy Code under which businesses reorganize their financial affairs. See 11 U.S.C. §§ 1101-1144 (1994).
- 247 *Id.* at 31. *Nordic Village* required that waiver by the federal government be unambiguous and clearly stated in the text of the statute. See *id.*
- 248 See *id.*

- 249 *See id.* at 39 (Stevens, J., dissenting). Justice Blackmun had also joined Justice Marshall's and Justice Stevens' dissents in *Hoffman*. *See Hoffman*, 492 U.S. at 106 (Marshall, J., dissenting); *id.* at 111 (Stevens, J., dissenting). The other two *Hoffman* dissenters (Justices Brennan and Marshall) had since left the Court.
- 250 “This section would effectively overrule two Supreme Court cases that have held that the States and Federal Government are not deemed to have waived their sovereign immunity by virtue of enacting section 106(c) of the Bankruptcy Code.” [Discussing *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 109 S. Ct. 2818, 106 L. Ed. 2d 76, 26 Soc. Sec. Rep. Serv. 175, 19 Bankr. Ct. Dec. (CRR) 514, 20 Collier Bankr. Cas. 2d (MB) 1204, Bankr. L. Rep. (CCH) P 72856 (1989) and *U.S. v. Nordic Village Inc.*, 503 U.S. 30, 112 S. Ct. 1011, 117 L. Ed. 2d 181, 22 Bankr. Ct. Dec. (CRR) 1022, 26 Collier Bankr. Cas. 2d (MB) 9, Bankr. L. Rep. (CCH) P 74435B, 92-1 U.S. Tax Cas. (CCH) P 50109, 69 A.F.T.R.2d (P-H) P 92-687 (1992).] 140 Cong. Rec. H. 10,794 (October 4, 1994). For a history of the 1994 Amendments to § 106, *see* Gibson, *supra* note 231, at 327-329.
- 251 11 U.S.C. § 106(a) (1994). Former § 106(c) was redrafted as new § 106(a).
- 252 Governmental unit, as defined in Bankruptcy Code § 101(27), “means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States, ... a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.” *Id.* § 101(27).
- 253 The limitations are not significant for purposes of this analysis. Abrogation is limited under § 106(a)(3) (providing that a person may not recover punitive damages against a governmental unit under § 106(a) abrogation, but may under § 106(c) waiver), § 106(a)(3) (providing that the limitations of the Equal Access to Justice Act apply with respect to the recovery of fees and costs assessed against a governmental unit), and § 106(a)(4) (requiring that the enforcement of judgments against a governmental unit must be consistent with applicable non-bankruptcy law). *See* 11 U.S.C. § 106(a)(3, 4) (1994); *see also* discussion *infra* at Part IV.B.1 (discussing waiver and consent); *see generally* Gibson, *supra* note 231, at 332-34 (discussing § 106).
- 254 11 U.S.C. § 106(a) (1994).
- 255 *See id.* §§ 1107, 1203, 1303 (powers and duties of the debtor and debtor-in-possession), 105 (bankruptcy courts' broad equity power), 106 (abrogation and sovereign immunity), 107 (public access to papers filed in bankruptcy court), 108 (extension of time for matters stayed by bankruptcy filing; extension of time for certain actions by the debtor), 303 (sanctions for filing an involuntary case that is later dismissed), 901 (applicability of other Bankruptcy Code sections to chapter 9 cases).
- 256 *See id.* §§ 544-551 (avoidance, including of certain liens), 724 (avoidance of certain liens); 749, 764 (avoidance powers relating to stockbrokers and commodity brokers); 926 (avoidance powers in municipal bankruptcy cases).
- 257 *See id.* §§ 362 (automatic stay); 1201, 1301 (stay relating to co-debtors in chapter 12 and chapter 13 cases); 922 (stay in chapter 9 cases).
- 258 *See id.* §§ 944, 1141, 1227, 1327 (binding effect of confirmation in chapter 9, 11, 12, and 13 cases); 1142, 1143 (implementation of a plan and distribution in chapter 11 cases); 726 (distribution in chapter 7 cases); 523, 524 (discharge, its effects, the discharge injunction, and exceptions to the injunction); 525 (discrimination against the discharged debtor).
- 259 *See id.* §§ 502 (allowance and determination of claims), 503, 1305 (determination of post-petition claims and administrative expenses), 553 (setoff), 510 (subordination), 726 (order of distribution).
- 260 *See id.* §§ 506 (determination of secured status), 552, 928 (post-petition effect of a security interest), 722, 524c (redemption and reaffirmation), 363 (use, sale and lease of property, including property subject to secured claims), 364 (debtor-in-possession financing, including imposing a priming lien), 1206 (sale of property free and clear of interests in chapter 12). Section 106(a) does not, however, apply to § 361 (adequate protection).
- 261 *See id.* §§ 346, 728, 1146, 1231 (special tax provisions), 505 (determination of tax liability).
- 262 *See id.* §§ 365 (assumption, rejection and assignment of executory contracts and leases), 366 (utilities), 744 (executory contract, sale of securities, stockbroker liquidation), 929 (municipal leases).
- 263 *See id.* §§ 542, 543 (collection of property of the estate in general and from custodians), 522 (exemptions). The abrogation provision does not, however, apply to actions under § 541. Section 541 defines the scope of the bankruptcy estate's property broadly to include the debtor's pre-petition causes of action. *See id.* § 541. The omission of § 541 probably is designed to retain the states' immunity with respect to general non-bankruptcy law causes of action, such as routine contract and tort actions that become property of the estate under § 541 and may be prosecuted by the trustee. *See generally* Gibson, *supra* note 243, at 330-331 (arguing that the exclusion of § 541 was designed to ensure that the trustee could not enforce against the states pre-petition causes of action that the estate inherits from the debtor under § 541(1), or that they arise only under § 541(7)).
- 264 11 U.S.C. § 106(a); *see supra* note 235. The consequences of the government filing a claim are discussed *infra* at Part IV.B.1 in the context of consent, waiver and setoff.

- 265 See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) P 10999 (1976); see also *supra* notes 179-180 and accompanying text; see generally Gibson, *supra* note 231, at 337-340 (suggesting that § 106 clearly expresses Congress' intent to abrogate immunity).
- 266 427 U.S. 445 (1976).
- 267 See *supra* note 250.
- 268 See *Fitzpatrick*, 427 U.S. at 452-53; see also discussion *supra* at text accompanying note 179.
- 269 See *Matter of Merchants Grain, Inc.*, 59 F.3d 630, 635-36, 27 Bankr. Ct. Dec. (CRR) 602, 33 Collier Bankr. Cas. 2d (MB) 1766, Bankr. L. Rep. (CCH) P 76559 (7th Cir. 1995), judgment vacated, 116 S. Ct. 1411, 134 L. Ed. 2d 537 (U.S. 1996) (involving a preference action against a state agricultural commodity fund and advisory commission); *In re York-Hannover Developments, Inc.*, 190 B.R. 62, 65 (E.D.N.C. 1995) (involving an adversary proceeding to recover payments made by the debtor to the Florida Department of Revenue); *In re J.F.D. Enterprises, Inc.*, 183 B.R. 342, 354, 27 Bankr. Ct. Dec. (CRR) 521 (Bankr. D. Mass. 1995) (involving an adversary proceeding to enjoin the Massachusetts Alcoholic Beverage Control Commission); see also *Matter of McVey Trucking, Inc.*, 812 F.2d 311, 15 Bankr. Ct. Dec. (CRR) 1105, 16 Collier Bankr. Cas. 2d (MB) 218, Bankr. L. Rep. (CCH) P 71613 (7th Cir. 1987) (decided before *Union Gas*; holding that Congress had power to abrogate states' immunity under the Bankruptcy Clause), *cert denied*, 484 U.S. 895 (1987).
In *Merchants Grain*, Ohio filed a petition for certiorari, which the Court accepted. All 49 other states filed an amicus brief urging the Court to overrule *Union Gas*. See Cordry, *supra* note 137, at 9. The Court's treatment of *Merchants Grain* is discussed *infra* at note 327.
- 270 See *Merchants Grain*, 59 F.3d at 634-36; *York-Hannover*, 190 B.R. at 64-65; *J.F.D. Enters.*, 183 B.R. at 354; see also Gibson, *supra* note 231, at 338-339, 344-45 (if *Union Gas* is upheld, it supports the constitutionality of the 1994 amendment to § 106).
- 271 See *Union Gas*, 491 U.S. at 45 (White, J., concurring in part, dissenting in part).
- 272 See *Hoffman*, 492 U.S. at 98.
- 273 See *Union Gas*, 491 U.S. at 51-57 (White, J., concurring).
- 274 See *Hoffman*, 492 U.S. at 104.
- 275 See *Union Gas*, 491 U.S. at 29 (Scalia, J., dissenting).
- 276 See *Hoffman*, 492 U.S. at 105 (Scalia, J., concurring).
- 277 These are Chief Justice Rehnquist and Justices Scalia, Kennedy and O'Connor. Thus, the remaining "votes" on abrogation under the Bankruptcy Code are two (Scalia and O'Connor; no authority to abrogate) to one (Stevens; Congress has authority to abrogate).
- 278 See *Union Gas*, 491 U.S. at 1 (Brennan, J., for the plurality); *Hoffman*, 492 U.S. at 106 (Stevens, J., concurring).
- 279 Justices Breyer, Ginsburg, Souter, and Thomas had joined the Court in the interim.
- 280 517 U.S. 44 (1996).
- 281 Justices Ginsburg, Breyer and Souter joined Justice Stevens in arguing the Congress has power to abrogate states' immunity. See *id.* at 100 (Souter, J., dissenting); *id.* 517 U.S. at 76 (Stevens, J., dissenting).
- 282 Justice Thomas joined the majority opinion. See *id.* at 44.
- 283 These are Justices Blackmun, Brennan, Breyer, Ginsburg, Marshall, Stevens, Souter, and even White (who agreed with the result, but not the reasoning in *Union Gas*).
- 284 "Justice Brennan's approach has carried the day with the academic community, although each academic has his or her own variation on it. But most scholars who have examined the issue in the last twenty years have, through one path or another, come to the conclusion that the Eleventh Amendment was not intended to prevent Congress from allowing individuals to sue states in federal court, if Congress chose to do so."
Field, *supra* note 19, at 10 (footnote omitted); see also Hovenkamp, *supra* note 13, at 2245 (arguing that sovereign immunity is a common law doctrine, that the abrogation power is clear from the constitutional grant to Congress, and that immunity is like other common law doctrines that Congress preempts all the time); see generally sources cited *supra* notes 107-124.
- 285 These are Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. See *Seminole*, 517 U.S. at 44.

- 286 For a history of the people who have come to be known as the Seminole, see PETER MATTHIESSEN, INDIAN COUNTRY 27-74 (1979).
- 287 U.S. CONST., art. 1, § 8, cl. 3.
- 288 25 U.S.C. § 2701 *et seq.* (1994).
- 289 *Id.* § 2710(d)(1).
- 290 *Id.* § 2710(d)(7)(A)(i); 2710(d)(7)(B)(ii-vii); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996).
- 291 25 U.S.C. § 2710(d)(7)(A)(i).
- 292 See *Seminole*, 517 U.S. at 44; *id.* at 76 (Stevens, J., dissenting); *id.* at 100 (Souter, J., dissenting).
- 293 *Id.* at 47. Chief Justice Rehnquist wrote the majority opinion, which Justices O'Connor, Scalia, Kennedy and Thomas joined.
- 294 Justice Souter wrote a lengthy dissent, which Justices Breyer, Ginsburg, and Stevens joined. See *id.* at 100 (Souter, J., dissenting). Justice Stevens also wrote a separate dissent. See *id.* at 76 (Stevens, J., dissenting).
- 295 *Id.* at 54.
- 296 See *Seminole*, 517 U.S. at 72.
- 297 *Id.* at 68 (quoting *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 322-23, 54 S. Ct. 745, 78 L. Ed. 1282 (1934) (quoting THE FEDERALIST No. 81 (Alexander Hamilton) (H. Dawson, ed., 1876))).
- 298 *Id.* at 66.
- 299 *Hans*, 134 U.S. 1; see discussion *supra* at notes 91-96 and accompanying text.
- 300 See *Seminole*, 517 U.S. at 100 (Souter, J., dissenting) (joined by Justices Stevens, Ginsburg and Breyer).
- 301 *Id.* at 109-110.
- 302 See *supra* notes 107-123, 182-207; see also Meltzer, *supra* note 82, at 24-25 (summarizing Justice Souter's analysis).
- 303 *Seminole*, 517 U.S. at 84 (Stevens, J., dissenting).
- 304 *Id.* at 72.
- 305 *Id.* at 66.
- 306 U.S. CONST. art. 1, § 8, cl. 3.
- 307 *Id.* The *Seminole* Court found no reasonable basis for distinguishing the Indian Commerce Clause from the Interstate Commerce Clause. *Seminole*, 517 U.S. at 55-72.
- 308 U.S. CONST. art. 1, § 8, cl. 4. There is no more reason to distinguish the Bankruptcy Clause from the Interstate Commerce Clause than there is to distinguish the Indian Commerce Clause from the Interstate Commerce Clause. See *infra* note 331 (citing cases holding that the Bankruptcy Code's abrogation provision is unconstitutional after *Seminole*); *infra* note 322 (noting argument by Professor Meltzer that there are stronger arguments for abrogation of states' immunity under the Indian Commerce Clause than under other Article I powers because the federal government exercises broad, plenary authority over Indian affairs).
- 309 See U.S. CONST. amend. XI ("Judicial power of the United States shall not be construed to extend to *any* suit") (emphasis added). Indeed, the dissenting justices in *Seminole* agreed that the Eleventh Amendment limits federal courts' jurisdiction with respect to suits within the scope of the Amendment, although they argued that federal questions suits do not fall within the scope of the Amendment. They argued that the implications of imposing a jurisdictional bar demonstrate that the Amendment does not apply to federal question cases. See *Seminole*, 517 U.S. at 114-15 (Souter, J., dissenting); *id.* at 78 (Stevens, J., dissenting). Cf. discussion *supra* at notes 200-202 and accompanying text (discussing Justice Brennan's argument that the phrase "be construed to" prohibits courts from reading abrogation into Article III itself in the absence of legislative action, but does not limit federal courts' jurisdiction or prevent Congress from abrogating immunity).
- 310 See discussion *supra* at notes 91-130 and accompanying text. See also *Balgowan v. State of N.J.*, 115 F.3d 214, 216, 3 Wage & Hour Cas. 2d (BNA) 1703, 37 Fed. R. Serv. 3d (LCP) 1265 (3d Cir. 1997) (*Seminole* "abruptly changed the law regarding Eleventh Amendment immunity"); *Hurd v. Pittsburg State University*, 109 F.3d 1540, 1543, 117 Ed. Law Rep. 95, 73 Fair Empl. Prac. Cas.

(BNA) 1448, 70 Empl. Prac. Dec. (CCH) P 44615 (10th Cir. 1997) (noting that *Seminole* significantly changed immunity law); Field, *supra* note 19, at 15 (“[T]he Eleventh Amendment holding in *Seminole* constituted a sharp break with the past.”); *id.* at 22 (“*Seminole* represents a dramatic change in Eleventh Amendment jurisprudence”); Field, *supra* note 13, at 537 (suggesting that *Seminole* views the Eleventh Amendment as “imposing a constitutional doctrine of immunity;” arguing that there is no historical support for this view); Hovenkamp, *supra* note 13, at 2238 (arguing that *Seminole* went beyond any fair reading required by precedent); *id.* at 2222-23 (arguing that the *Seminole* majority’s interpretation of the Eleventh Amendment is inconsistent with its plain language, probably with the drafters’ intent, and is “not fully justified by stare decisis”); *id.* at 2238 (arguing that *Seminole* “gives constitutional status to a nontextual common law doctrine of state sovereign immunity as a limitation on powers expressly given to the federal government”); *see also* *Seminole*, 517 U.S. at 115-16 & n.12 (Souter, J., dissenting) (arguing that the general theory of sovereignty underlying the Constitution does not allow state sovereignty to defeat a congressional exercise of power).

- 311 See *Seminole*, 517 U.S. at 63-73.
- 312 See Hovenkamp, *supra* note 13, at 2244-2245 (arguing that *Seminole* went far beyond *Hans* in denying Congress power to abrogate states’ immunity; noting that abrogation was not an issue in *Hans* because *Hans* presented an issue directly under the Contract Clause, not under a federal statute); Meltzer, *supra* note 82, at 27-28 (arguing that *Hans* embraced Justice Iredell’s approach in *Chisholm* and that even Justice Iredell seemed to accept that Congress could abrogate states’ immunity, he simply did not believe that the Judiciary Act of 1789 had clearly abrogated states’ immunity; also noting that Justice Iredell’s general statement that no power existed at common law to sue unconsenting states could be construed to mean that Congress cannot abrogate immunity, but arguing that this is not consistent with Justice Iredell’s analysis of the Judiciary Act; acknowledging that *Hans* might adopt the view that Congress may not abrogate immunity, but noting that *Hans* analyzed the Judiciary Act of 1875 in a way similar to Justice Iredell’s analysis of the Judiciary Act of 1789).
- 313 See *Hans*, 134 U.S. 1.
- 314 See discussion *supra* notes 130-133 and accompanying text.
- 315 Cf. Monaghan, *supra* note 91, at 106 (suggesting that the argument that sovereign immunity in federal question cases is constitutional common law that Congress can abrogate and that the Eleventh Amendment applies only to diversity cases is a strained interpretation of *Hans* because *Hans* gave no suggestion that Congress could abrogate immunity).
- 316 See *infra* note 603.
- 317 See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614, 1 Employee Benefits Cas. (BNA) 1040, 12 Fair Empl. Prac. Cas. (BNA) 1586, 12 Empl. Prac. Dec. (CCH) P 10999 (1976), discussed *supra* at notes 163-178 and accompanying text.
- 318 *Seminole*, 517 U.S. at 59 (reasoning that the Fourteenth Amendment fundamentally altered the state/federal relationship subsequent to the enactment of the Eleventh Amendment and that, when states ratified the Fourteenth Amendment, they ceded to Congress the power to grant private citizens the right to enforce against the states in federal court federal laws enacted to implement the protections of the Fourteenth Amendment).
- 319 *Fitzpatrick*’s Fourteenth Amendment rationale is “wholly inapplicable to the Interstate Commerce Clause.” *Seminole*, 517 U.S. at 66. The *Fitzpatrick* Court’s reasoning ought to apply to the other Civil War Amendments which, like the Fourteenth Amendment, alter the federal/state balance. See U.S. CONST. amend. XIII, XV; *see also* Field, *supra* note 136, at 1228 & n.120. The same argument might be made with respect to amendments that contain similar implementing clauses, such as the Nineteenth and Twenty-first Amendments. See *id.*; U.S. CONST. amend. XIX, XXI § 2.
- 320 See *supra* notes 197-199. Professor Field argues that the congressional abrogation power is limited only if Congress attempts to regulate an essential state government function. In that case, the Fourteenth Amendment allows Congress to abrogate states’ immunity without the states’ consent. In other cases, however, Congress should be able to condition states’ participation in federal programs on states’ waiver of immunity. She views this as the true import of the Civil War Amendments and of *Fitzpatrick*. See Field, *supra* note 136, at 1230-39.
- 321 The Eleventh Amendment became effective in 1798. The Fourteenth Amendment became effective in 1868. Even if *Hans* had expressly extended the Eleventh Amendment to federal question suits, *Hans* was not decided until 1890. See *Hans v. Louisiana*, 134 U.S. 1 (1890).
- 322 See Meltzer, *supra* note 82, at 21-22 (arguing that the majority’s rationale fails to “seek to make sense of the whole,” reconcile the fact that the Fourteenth Amendment was enacted before the Eleventh Amendment was extended to federal question suits, or reconcile Congress’ exclusive regulation of Indian affairs).
- 323 See *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991 (9th Cir. 1994), cert. granted, judgment vacated, 116 S. Ct. 1410, 134 L. Ed. 2d 537 (U.S. 1996); *Ponca Tribe of Oklahoma v. State of Okl.*, 37 F.3d 1422 (10th Cir. 1994), cert. dismissed, 516 U.S. 972, 116 S. Ct. 435, 133 L. Ed. 2d 350 (1995) and cert. granted, judgment vacated, 116 S. Ct. 1410, 134 L. Ed. 2d 537 (U.S. 1996) and (overruling recognized by, *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997)); *Blackfeet Tribe of Blackfeet Indian Reservation v. Jessup*, 39 F.3d 1186 (9th Cir. 1994), cert. granted, judgment vacated, 116 S. Ct. 1410, 134 L. Ed. 2d 537 (U.S. 1996) and judgment vacated, 85 F.3d 465 (9th Cir. 1996) *supra*; *Fort Belknap Indian Community of Fort Belknap Indian Reservation v.*

State of Mont., 39 F.3d 1186 (9th Cir. 1994), cert. granted, judgment vacated, 116 S. Ct. 1410, 134 L. Ed. 2d 537 (U.S. 1996) and judgment vacated, 84 F.3d 1222 (9th Cir. 1996) *supra*.

- 324 *See Spokane Tribe of Indians v. Washington State*, 91 F.3d 1350 (9th Cir. 1996) (affirming district court's dismissal of IGRA case against the state and its officials); *Ponca Tribe of Oklahoma v. State of Okl.*, 89 F.3d 690 (10th Cir. 1996) (affirming district court's dismissal of IGRA case against the state); *Blackfeet Tribe of Blackfeet Indian Reservation v. Jessup*, 85 F.3d 465 (9th Cir. 1996) (same); *Fort Belknap Indian Community of Fort Belknap Indian Reservation v. State of Mont.*, 84 F.3d 1222 (9th Cir. 1996) (same); *see also Santee Sioux Tribe of Nebraska v. State of Neb.*, 121 F.3d 427 (8th Cir. 1997) (affirming district court's *sua sponte* dismissal of IGRA suit against state; holding that state had not waived immunity).
- 325 *See Chavez v. Arte Publico Press*, 59 F.3d 539, 101 Ed. Law Rep. 620, 35 U.S.P.Q.2d (BNA) 1609 (5th Cir. 1995), cert. granted, judgment vacated, 517 U.S. 1184, 116 S. Ct. 1667, 134 L. Ed. 2d 772 (1996) and cert. denied, 517 U.S. 1187, 116 S. Ct. 1672, 134 L. Ed. 2d 776 (1996) (holding that federal Copyright Act abrogates states' federal court immunity) (reversing district court's denial of states' immunity defense; holding that abrogation was unconstitutional).
- 326 *See Mueller v. Reich*, 54 F.3d 438, 2 Wage & Hour Cas. 2d (BNA) 1217, 130 Lab. Cas. (CCH) P 33236 (7th Cir. 1995), cert. granted, judgment vacated, 117 S. Ct. 1077, 137 L. Ed. 2d 212, 3 Wage & Hour Cas. 2d (BNA) 1376 (U.S. 1997) (holding that abrogation was unconstitutional and that the state did not waive its immunity).
- 327 *See Matter of Merchants Grain, Inc.*, 59 F.3d 630, 27 Bankr. Ct. Dec. (CRR) 602, 33 Collier Bankr. Cas. 2d (MB) 1766, Bankr. L. Rep. (CCH) P 76559 (7th Cir. 1995), cert. granted, judgment vacated, 116 S. Ct. 1411, 134 L. Ed. 2d 537 (U.S. 1996). The debtor had sued to recover a preference from the state fund, which served as guarantor for a number of individual farmers. Because the state asserted immunity, the debtor also sued the farmers directly. After the Supreme Court remanded the action against the state, the Seventh Circuit stayed the action on remand pending an appeal of the related preference action against the farmers. *Id.*
- 328 *See, e.g., Abril v. Com. of Virginia*, 145 F.3d 182, 4 Wage & Hour Cas. 2d (BNA) 1110, 135 Lab. Cas. (CCH) P 33686 (4th Cir. 1998) (holding that Congress could not abrogate states' immunity using its Interstate Commerce Clause powers, and that Congress' attempt to abrogate states' immunity under the Fair Labor Standards Act was not a valid exercise of Congress' Fourteenth Amendment enforcement powers); *Wheeling & Lake Erie R. Co. v. Public Utility Com'n of Com. of Pa.*, 141 F.3d 88 (3d Cir. 1998) (holding that Congress has no power under the Interstate Commerce Clause to abrogate states' immunity under the Railroad Revitalization and Regulatory Reform Act, but does have such power under the Fourteenth Amendment); *Balgowan v. State of N.J.*, 115 F.3d 214, 216, 3 Wage & Hour Cas. 2d (BNA) 1703, 37 Fed. R. Serv. 3d (LCP) 1265 (3d Cir. 1997) (holding that federal courts have no jurisdiction over citizen suits against states under the Fair Labor Standards Act); *Close v. State of N.Y.*, 125 F.3d 31, 4 Wage & Hour Cas. 2d (BNA) 108, 134 Lab. Cas. (CCH) P 33580 (2d Cir. 1997) (holding that Congress has no power under the Interstate Commerce Clause to abrogate states' immunity under the Fair Labor Standards Act); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 45 U.S.P.Q.2d (BNA) 1001 (3d Cir. 1997) (holding that Congress has no power to abrogate states' immunity under the Lanham Trade-mark Act); *Goshtasby v. Board of Trustees of University of Illinois*, 123 F.3d 427, 74 Fair Empl. Prac. Cas. (BNA) 553, 71 Empl. Prac. Dec. (CCH) P 44870 (7th Cir. 1997) (holding that Congress has no power under the Interstate Commerce Clause to abrogate states' immunity under the Age Discrimination in Employment Act; staying district court action pending determination whether Congress has power to do so under the Fourteenth Amendment); *Mills v. State of Me.*, 118 F.3d 37, 3 Wage & Hour Cas. 2d (BNA) 1802, 134 Lab. Cas. (CCH) P 33585 (1st Cir. 1997) (holding that Congress has no power to abrogate states' immunity under the Fair Labor Standards Act); *Moad v. Arkansas State Police Dept.*, 111 F.3d 585, 3 Wage & Hour Cas. 2d (BNA) 1540, 133 Lab. Cas. (CCH) P 33521 (8th Cir. 1997) (holding that Congress has no power under the Interstate Commerce Clause to abrogate states' immunity under the Fair Labor Standards Act); *Wilson-Jones v. Caviness*, 99 F.3d 203, 3 Wage & Hour Cas. 2d (BNA) 929, 132 Lab. Cas. (CCH) P 33450, 1996 FED App. 343P (6th Cir. 1996), opinion amended on denial of reh'g, 107 F.3d 358, 3 Wage & Hour Cas. 2d (BNA) 1501 (6th Cir. 1997) (holding that Congress has no power under the Interstate Commerce Clause to abrogate states' immunity under the Fair Labor Standards Act); *Garrett v. Board of Trustees of University of Alabama in Birmingham*, 989 F. Supp. 1409, 7 A.D. Cas. (BNA) 1247 (N.D. Ala. 1998) (holding that Congress has no power under the Interstate Commerce Clause to abrogate state's Eleventh Amendment immunity, and that the accommodation provisions of the Americans with Disabilities Act and the Rehabilitation Act were not valid exercises of Congress' Fourteenth Amendment enforcement powers); *Rodriguez v. Texas Com'n of Arts*, 992 F. Supp. 876, 45 U.S.P.Q.2d (BNA) 1953 (N.D. Tex. 1998) (holding that Congress has no power to abrogate states' Eleventh Amendment immunity under the Copyright Act); *Bergemann v. State of R.I.*, 958 F. Supp. 61, 3 Wage & Hour Cas. 2d (BNA) 1495 (D.R.I. 1997) (holding that Congress has no authority under the Interstate Commerce Clause to abrogate states' Eleventh Amendment immunity under the Fair Labor Standards Act); *Digiore v. State of Ill.*, 962 F. Supp. 1064, 3 Wage & Hour Cas. 2d (BNA) 1542, 133 Lab. Cas. (CCH) P 33543 (N.D. Ill. 1997) (holding that Congress has no power under the Interstate Commerce Clause to abrogate states' immunity under the Fair Labor Standards Act); *Frazier v. Courter*, 958 F. Supp. 252, 3 Wage & Hour Cas. 2d (BNA) 1662, 134 Lab. Cas. (CCH) P 33592 (W.D. Va. 1997) (holding that the Fair Labor Standards Act was enacted under Congress' Interstate Commerce Clause power, and that Congress may not abrogate the states' Eleventh Amendment immunity by enacting legislation pursuant to the Interstate Commerce Clause, no matter how clear its intent to do so may be); *Hodgson v. Mississippi Dept. of Corrections*, 963 F. Supp. 776 (E.D. Wis. 1997) (holding that Congress did not abrogate Mississippi's immunity under a valid exercise of power because Congress enacted the Crime Control Consent Act and approved the Uniform Act for Out-of-State Parolee Supervision pursuant to the Interstate Commerce Clause, which does not permit Congress to abrogate states' immunity); *Humenansky v. Board of Regents of the University of Minnesota*, 958 F. Supp. 439, 117 Ed. Law Rep. 606, 73 Fair Empl. Prac. Cas. (BNA) 1004 (D. Minn. 1997), *aff'd*, 77 Fair Empl. Prac. Cas. (BNA) 679 (8th Cir. 1998) (holding that the Age Discrimination in Employment Act Amendments, which were enacted as part of the Federal Labor Standards Act were not enacted pursuant to the Fourteenth Amendment and do not abrogate states' immunity because the Fourteenth Amendment is the only constitutional provision that accords Congress authority to legislate over the states' immunity); *Larry v. Board of Trustees of University of Alabama*, 975 F. Supp. 1447, 121 Ed. Law Rep. 673 (N.D. Ala. 1997) (holding that Congress has

no power to abrogate states' Eleventh Amendment immunity with regard to the Equal Pay Act provision of the Fair Labor Standards Act because the provision was not premised upon the Fourteenth Amendment); *Palotai v. University of Maryland College Park*, 959 F. Supp. 714, 118 Ed. Law Rep. 89 (D. Md. 1997) (holding that Congress has no authority under the Interstate Commerce Clause to abrogate states' Eleventh Amendment immunity under the Fair Labor Standards Act); *Rowlands v. Pointe Mouillee Shooting Club*, 959 F. Supp. 422, 27 Env'tl. L. Rep. 21167 (E.D. Mich. 1997) (holding that Congress has no power to abrogate states' immunity under the Resource Conservation and Recovery Act (RCRA) because Congress enacted RCRA pursuant to the Interstate Commerce Clause and not the Fourteenth Amendment); *Vazquez Morales v. Estado Libre Asociado de Puerto Rico*, 967 F. Supp. 42 (D.P.R. 1997) (holding that Eleventh Amendment immunity barred Emergency Medical Treatment and Active Labor Act (EMTALA) claim against territory and territorial university because the Social Security Act — of which the Medicare scheme, including EMTALA, forms a part — is an exercise of Congress' power under Article I to tax and to regulate interstate commerce); *Whalen v. State of Ariz.*, 962 F. Supp. 1218 (D. Ariz. 1997) (holding that Congress has no power under the Interstate Commerce Clause to abrogate states' immunity under the Fair Labor Standards Act); *Arnold v. State of Ark.*, 957 F. Supp. 185 (E.D. Ark. 1996) (holding that the federal court has no jurisdiction over a suit against a state under the Fair Labor Standards Act because Congress has no authority under the Interstate Commerce Clause to abrogate states' immunity); *Blow v. State of Kan.*, 929 F. Supp. 1400, 3 Wage & Hour Cas. 2d (BNA) 627, 132 Lab. Cas. (CCH) P 33445 (D. Kan. 1996), aff'd, 116 F.3d 489, 3 Wage & Hour Cas. 2d (BNA) 1792, 133 Lab. Cas. (CCH) P 33549 (10th Cir. 1997) (holding that Congress has no power under the Interstate Commerce Clause to abrogate states' immunity under the Fair Labor Standards Act); *Chauvin v. State of La. and Dept. of Wildlife and Fisheries*, 937 F. Supp. 567, 3 Wage & Hour Cas. 2d (BNA) 927, 132 Lab. Cas. (CCH) P 33457 (E.D. La. 1996) (same); *MacPherson v. University of Montevallo*, 938 F. Supp. 785, 113 Ed. Law Rep. 301, 71 Fair Empl. Prac. Cas. (BNA) 1318, 69 Empl. Prac. Dec. (CCH) P 44327 (N.D. Ala. 1996), aff'd, 139 F.3d 1426, 8 A.D. Cas. (BNA) 1, 125 Ed. Law Rep. 341, 76 Fair Empl. Prac. Cas. (BNA) 1201 (11th Cir. 1998) (holding that Congress has no power under the Interstate Commerce Clause to abrogate states' Eleventh Amendment immunity under the Age Discrimination in Employment Act); *Prisco v. State of New York*, 1996 WL 596546 (S.D.N.Y. 1996) (holding that immunity cannot be abrogated absent congressional legislation pursuant to the Fourteenth Amendment or waiver by the state; dismissing claims under Comprehensive Environmental Response, Compensation, and Liability Act); *Rehberg v. Department of Public Safety*, 946 F. Supp. 741, 3 Wage & Hour Cas. 2d (BNA) 1149, 133 Lab. Cas. (CCH) P 33526 (S.D. Iowa 1996), aff'd, 117 F.3d 1423 (8th Cir. 1997) (holding that the Fair Labor Standards Act could not abrogate states' immunity from suit in federal court because it was not enacted pursuant to § 5 of the Fourteenth Amendment); *Taylor v. Com. of Va.*, 951 F. Supp. 591, 3 Wage & Hour Cas. 2d (BNA) 1199 (E.D. Va. 1996) (holding that Congress has no power under the Interstate Commerce Clause to abrogate Commonwealth's Eleventh Amendment immunity under the Fair Labor Standards Act); *Union Pacific R. Co. v. Burton*, 949 F. Supp. 1546, 143 A.L.R. Fed. 703 (D. Wyo. 1996) (holding that Congress has no power under the Interstate Commerce Clause to abrogate states' Eleventh Amendment immunity under the Railroad Revitalization and Regulatory Reform Act); *Walden v. Florida Dept. of Corrections*, 975 F. Supp. 1330, 135 Lab. Cas. (CCH) P 33644 (N.D. Fla. 1996) (holding that Congress has no power to abrogate states' Eleventh Amendment immunity under the Fair Labor Standards Act because the Act was enacted pursuant to the Interstate Commerce Clause, not the Fourteenth Amendment); cf. *Gorka by Gorka v. Sullivan*, 82 F.3d 772 (7th Cir. 1996) (denying state's motion for removal and directing remand to state court because removal is permitted only if the federal court would have had original jurisdiction and, under *Seminole*, the federal courts have no jurisdiction if the state is a defendant; discussed *infra* at notes 609-612); but cf. *Goshtasby v. Board of Trustees of University of Illinois*, 141 F.3d 761, 76 Fair Empl. Prac. Cas. (BNA) 1179 (7th Cir. 1998) (holding that Congress abrogated states' immunity under a valid exercise of its Fourteenth Amendment enforcement powers when it amended the Age Discrimination in Employment Act to apply to the states). See also *infra* note 350 (discussing Bankruptcy Code cases); Part IV.A.3 (discussing abrogation under the Fourteenth Amendment).

Courts dismissed other cases for lack of a clear abrogation provision. See, e.g., *Fiedler v. State of N.Y.*, 925 F. Supp. 136 (N.D.N.Y. 1996) (holding that the Tax Injunction Act, which permits a federal court remedy where a state court remedy is inadequate, does not abrogate state's immunity); *Darne v. State of Wis., Department of Revenue*, 137 F.3d 484, 21 Employee Benefits Cas. (BNA) 2569 (7th Cir. 1998) (holding that the pre-emption provision in the Employee Retirement Income Security Act does not implicitly abrogate states' immunity).

- 329 U.S. CONST. art. I, § 8; see *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 152 L.R.R.M. (BNA) 2919, 132 Lab. Cas. (CCH) P 11635 (1st Cir. 1996) (involving suit against a Puerto Rico state agency under the Veterans' Reemployment Rights Act).
- 330 See *Velasquez v. Frapwell*, 994 F. Supp. 993, 125 Ed. Law Rep. 650, 157 L.R.R.M. (BNA) 2690 (S.D. Ind. 1998) (holding that Congress could not, under its Article I War Powers, abrogate Eleventh Amendment immunity in Uniformed Services Employment and Reemployment Rights Act ["USERRA"] suits brought against state employers); *Palmatier v. Michigan Dept. of State Police*, 981 F. Supp. 529, 156 L.R.R.M. (BNA) 2765 (W.D. Mich. 1997) (holding that Congress did not effectively abrogate states' Eleventh Amendment immunity when it enacted USERRA pursuant to the War Powers Clause; argues that *Diaz-Gandia* should not be followed because its reasoning was based on *Union Gas*).

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