

I. Introduction

The Eleventh Amendment¹ repudiated the Supreme Court’s decision in *Chisholm v. Georgia*,² which held that a South Carolina citizen could sue Georgia in federal court to collect a debt.³ The Court’s decision created a “shock of surprise throughout the country” that led to the Amendment’s proposal at the next congressional session.⁴ The Eleventh Amendment “reflects ‘the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III’”⁵ The Amendment limits federal courts’ subject matter jurisdiction by denying jurisdiction over suits by a citizen against a state.

Although the plain text of the amendment appears to reach only suits brought against a state by a non-citizen, its jurisdictional bar actually extends much further. *Hans v. Louisiana*⁶ involved a suit by Hans, a Louisiana resident, to collect on bonds issued by the defunct Reconstruction-era Louisiana government.⁷ Hans pressed his breach of contract suit under the Contract Clause,⁸ and the State claimed sovereign immunity under the Eleventh Amendment as a defense.⁹ The Court declared that previous decisions had established that the Eleventh Amendment’s immunity extended to suits brought under the Court’s federal question

¹ US CONST. amend. XI. The Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

² 2 U.S. 419 (1793).

³ *See id.*; *see also*, *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 199 S. Ct. 2219, 2222-23 (1999).

⁴ *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

⁵ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 64 (1996) (quoting *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-98 (1984)).

⁶ 134 U.S. 1 (1890).

⁷ *See id.* at 2-3.

⁸ US CONST, art I, §10.

⁹ *See Hans*, 134 U.S. at 3.

jurisdiction.¹⁰ Considering Hans' claim that the Amendment did not bar his suit because he was a citizen of Louisiana, the Court found that it would be "startling and unexpected" if the Amendment allowed states to be sued in federal courts by their own citizens, while it barred similar suits by non-residents.¹¹ The Court endorsed a broad view of state's sovereign immunity, holding that the constitution did not authorize suits against unconsenting states.¹²

Despite the Eleventh Amendment's broad grant of sovereign immunity, federal courts may still hear federal question cases against unconsenting states if Congress validly abrogated sovereign immunity from suit under the federal statute giving rise to the plaintiff's action.¹³ To abrogate sovereign immunity, Congress must unequivocally state its intent to abrogate, and it must act pursuant to a valid exercise of power.¹⁴ Federal courts may also hear cases against states if the states waive their sovereign immunity expressly or by their conduct in litigation.¹⁵

II. Gaining Jurisdiction through Abrogation of State Sovereign Immunity.

Though Congress need not explicitly mention the Eleventh Amendment when stating its intent to abrogate, it must make "its intention unmistakably clear in the language of the statute."¹⁶ The Court requires such a statement because abrogation works a fundamental

¹⁰ See *id.* at 10. In fact, the cases cited by the Court did not clearly establish the Amendment's applicability to federal question cases. See Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 8-9 (1996). Numerous commentators have rejected an interpretation of the Amendment that limits the federal courts' federal question jurisdiction. See *id.* at 10-11. Adherents of the diversity theory, for example, argue that the Amendment was drafted to protect unconsenting States from suit under federal court's diversity jurisdiction, but it was not intended to restrict the right to sue a state under federal law. See generally William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

¹¹ See *Hans*, 134 U.S. at 10-11.

¹² See *id.* at 15-16 (Finding that "[t]he truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States" and that "[t]he suability of a state, without its consent, was a thing unknown to the law.").

¹³ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress may abrogate state sovereign immunity when legislating pursuant to §5 of the Fourteenth Amendment).

¹⁴ See *Seminole Tribe*, 527 U.S. at 1123.

¹⁵ See *College Savings Bank*, 119 S. Ct. at 2223; see generally Note, *Reconceptualizing the Role of Constructive Waiver After Seminole*, 112 Harv. L. Rev. 1759, 1767-775 (1999) (reviewing methods by which states may waive sovereign immunity from suit in federal courts).

¹⁶ *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

disruption of the balance of power between states and the federal government, and such a disruption should not be undertaken unless Congress specifically decides it is necessary to its legislative scheme.¹⁷ In addition, finding abrogation of sovereign immunity results in an expansion of the Court’s Article III jurisdiction.¹⁸ Respect for undue expansion of its own power dictates that the Court must “rely only on the clearest indications in holding that Congress has enhanced [its] power.”¹⁹

In *Seminole Tribe*, the Court reaffirmed that Congress may abrogate sovereign immunity when legislating pursuant to §5 of the Fourteenth Amendment,²⁰ but held that Congress had no abrogation authority when exercising its Article I powers.²¹ *Seminole Tribe* explicitly overruled the Court’s holding in *Pennsylvania v. Union Gas Co.*,²² in which a plurality held that the Commerce Clause²³ granted Congress the power to abrogate state sovereign immunity.²⁴ The *Union Gas* plurality based its holding on the idea that in ratifying the Constitution the States necessarily ceded that portion of their sovereignty necessary to the regulation of interstate commerce.²⁵ *Seminole Tribe* repudiated that theory, finding that while States may have ceded such sovereignty originally, the Eleventh Amendment restored their sovereign immunity.²⁶ Only Amendments ratified after the Eleventh Amendment could be seen as contemplating abrogation of the sovereign immunity embodied in the Eleventh Amendment.²⁷

¹⁷ *See id.* at 242-43.

¹⁸ *See id.* at 243.

¹⁹ *Id.*

²⁰ *See Seminole Tribe*, 517 U.S. at 71 n.15 (noting that “under the Fourteenth Amendment ... Congress’ authority to abrogate is undisputed.”).

²¹ *See id.* at 66.

²² 491 U.S. 1 (1989) (overruled by *Seminole Tribe*, 517 U.S. at 66).

²³ U.S. CONST. art I, § 8, cl. 3.

²⁴ *See Union Gas*, 491 U.S. at 23.

²⁵ *See id.* at 16-17.

²⁶ *See Seminole Tribe*, 517 U.S. at 65-66.

²⁷ *See id.*

In dissent in *Seminole Tribe*, Justice Stevens argued that the Court’s decision would withhold a federal forum for a broad range of cases “from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.”²⁸ Subsequent case law has proven Justice Stevens prophetic.²⁹

After *Seminole Tribe*, congressional attempts to abrogate Eleventh Amendment immunity can be upheld under the doctrine of *Fitzpatrick v. Bitzer*³⁰ as exercises of Congress’ Fourteenth Amendment power.³¹ Section 5 of the Fourteenth Amendment gives Congress the power to “enforce, by appropriate legislation, the provisions of this article.”³² The Court’s Fourteenth Amendment jurisprudence defines “appropriate legislation” as remedial legislation that “deters or remedies constitutional violations....”³³ Section 5 gives Congress the power to remedy violations, but Congress may not legislate what constitutes a violation.³⁴ To ensure Congress does not overstep its powers, “it must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.”³⁵ The legislation must be tailored so that there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”³⁶

III. Obtaining Jurisdiction Through Waiver of Sovereign Immunity.

²⁸ *Id.* at 77 (Stevens, J., dissenting).

²⁹ See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999) (patent); *College Savings Bank*, 199 S. Ct. at 2224 (false advertising prong of the Lanham Act); *Sacred Heart Hosp. v. Pennsylvania*, 133 F.3d 237, 243-44 (3d Cir. 1998) (bankruptcy); *Chavez v. Arte Publico Press*, 157 F.3d 282 (5th Cir. 1998), reh’g granted, 178 F.3d 281 (5th Cir. 1998) (copyright).

³⁰ 427 U.S. 445 (1976).

³¹ See Meltzer, *supra* note 10, at 21.

³² U.S. CONST. amend. XIV, §5.

³³ *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

³⁴ See *id.* at 519.

³⁵ *Florida Prepaid*, 119 S. Ct at 2207.

In addition to abrogation under the Fourteenth Amendment, federal courts can assert jurisdiction over a state if the state voluntarily waives its Eleventh Amendment immunity.³⁷ A state may waive its sovereign immunity by enacting a statute or a constitutional provision that states explicitly its unequivocal intent to abrogate its Eleventh Amendment immunity from suit in federal court.³⁸ Additionally, States can waive sovereign immunity by participation in a federal program expressly conditioned upon waiver.³⁹ In addition to express waiver, a state may waive its immunity by affirmatively invoking the federal court's jurisdiction.⁴⁰

Prior to *College Savings Bank*, federal courts could imply constructive waiver of sovereign immunity by finding that a state engaged in an activity which subjected it to suit under federal law.⁴¹ In *Parden v. Terminal Railway*,⁴² the Court held that Alabama constructively waived its immunity by operating a railroad that it knew would be subject to federal regulation under the Federal Employer's Liability Act⁴³ (FELA).⁴⁴ Examining FELA, the Court found that it would be anomalous for Congress to allow state-run railroads to run free of the "allembicing" FELA legislation, because to do so would leave a single class of railway workers—those employed on state-run railroads--unprotected by FELA.⁴⁵ The Court refused to find that "Congress intended so pointless and frustrating a result."⁴⁶ The *Parden* court rejected Alabama's claim that Congress could not subject states to suit under FELA in light of the Eleventh

³⁶ *City of Boerne*, 521 U.S. at 520.

³⁷ *See Atascadero*, 473 U.S. at 238.

³⁸ *See id.* at 238 n. 1.

³⁹ *See id.* An unequivocal statement of intent to abrogate is required for waiver in this situation as well.

⁴⁰ *See Clark v. Barnard*, 108 U.S. 436, 47-48 (1883) (immunity waived by filing claim in federal court); *Reconceptualizing The Role of Constructive Waiver*, *supra* note 15 at 1770-72.

⁴¹ *College Savings Bank* expressly overruled *Parden*, holding that a State could not impliedly waive its sovereign immunity. *See College Savings Bank*, 119 S. Ct. at 2228.

⁴² 377 U.S. 184 (1964) (overruled by *College Savings Bank*, 119 S. Ct. at 2228).

⁴³ 45 U.S.C. §§ 51 (1994).

⁴⁴ *See Parden*, 377 U.S. at 196.

⁴⁵ *Id.* at 189-90.

⁴⁶ *Id.* at 190.

Amendment, finding that “the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.”⁴⁷

The Court’s holding in *Parden* rested not on a finding of abrogation, but rather on a finding of waiver. The Court held Congress had conditioned participation in interstate railroad activity on amenability to FELA suits.⁴⁸ By running a railroad regulated by FELA, Alabama must, therefore, have intended to waive its immunity to suit.⁴⁹ Later cases clarified that Congress could only effect a *Parden* waiver by expressly stating its intent to condition participation in a regulated activity on waiver of Eleventh Amendment immunity.⁵⁰

Some viewed the Court’s decision in *Seminole Tribe* as overruling the *Parden* doctrine by implication.⁵¹ Under *Seminole Tribe*, Congress may not abrogate sovereign immunity when acting under its Article I powers.⁵² Thus, an attempt to enact a waiver pursuant to Article I powers must be void under *Seminole Tribe*.⁵³ However, until the Court’s decision in *College Savings Bank*, the *Parden* doctrine remained the law.⁵⁴

⁴⁷ *Id.* at 191.

⁴⁸ *See id.* at 192.

⁴⁹ *See id.*

⁵⁰ *See* *Employees v. Department of Public Health and Welfare*, 411 U.S. 279 (1973); *see also* *Welch v. Texas Dep’t of Highways and Pub. Transp.*, 483 U.S. 468, 478 (1987) (overruling *Parden* to the extent that it “is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity be expressed in unmistakably clear language....”

⁵¹ *See, e.g.,* *College Savings Bank v. Florida Prepaid Postsecondary Educ. Bd.*, 948 F. Supp. 400, 418-20 (D. N.J. 1996).

⁵² *See* *Seminole Tribe*, 517 U.S. at 66.

⁵³ *See* *College Savings Bank*, 948 F. Supp. at 419.

⁵⁴ *See* *College Savings Bank*, 119 S. Ct. at 2228 (overruling *Parden*); *see also* *Reconceptualizing the Role of Constructive Waiver*, *supra* note 15, at 1769 (arguing that the *Parden* doctrine remained viable following *Seminole Tribe*).