THE ELEVENTH AMENDMENT REVISITED:
IMPLICATIONS OF RECENT SUPREME COURT INTERPRETATIONS ON THE IMMUNITY OF PUBLIC COLLEGES AND UNIVERSITIES

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The Eleventh Amendment Revisited: Implications of Recent Supreme Court Interpretations on the Immunity of Public Colleges and Universities

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Section One: Context of Eleventh Amendment Immunity

Ratified in 1795, the eleventh amendment 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." [U.S. Const. Amend. 11] The United States Supreme Court has held that the scope of the amendment extends well beyond its language. [See, e.g., Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934) recognizing "postulates" derived from the words of the amendment and Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) interpreting the amendment "not so much for what it says, but for the presupposition. . .which it confirms."] While states do not enjoy immunity in suits brought by the United States [See, e.g. United States v. Texas, 143 U.S. 621, 641-46 (1892)] or by sister states [See. e.g. Texas v. New Mexico, 482 U.S. 124, 107 S.Ct. 2279 (1987)], the Rehnquist Court has reaffirmed the proposition that "an unconsenting state" enjoys immunity from suits brought in federal courts "by her own citizens" and "by citizens of another state." [Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 110 S.Ct. 1868, 1872 (1990)] Eleventh amendment immunity has also been extended to state law claims brought into federal court under supplemental jurisdiction. [Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 121, 104 S.Ct. 900, 919 (1984)]

In Hans v. Louisiana [134 U.S. 1 (1890)], the United States Supreme Court held that an unconsenting state could not be sued by one of its citizens. The Hans decision emphasized a balance between federal supremacy and state autonomy by establishing three exceptions to eleventh amendment immunity. Under one exception, Congress may abrogate the States' eleventh amendment immunity provided it does so "unequivocally" [Green v. Mansour, 474

U.S. 64, 68, 106 S.Ct. 423, 426. (1985). See, e.g., Dellmuth v. Muth, 109 S.Ct. 2397 (1989) in which five justices held that the Education of All Handicapped Children Act did not abrogate the states' eleventh amendment immunity; Atascadero State Hospital v. Scanlon, 473 U.S. 234, 246, 105 S.Ct. 3142, 3149 (1985) in which the Court held that a general authorization for a suit in federal court is not sufficient to abrogate immunity; and Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) in which the Court recognized that Congress has power under the fourteenth amendment to abrogate eleventh amendment immunity from suit for monetary damages.]

Alternatively, a state may expressly waive its immunity in equally explicit terms. [See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239-40 (1985) and Parden v. Terminal R. Co., 377 U.S. 184 (1964), overruled in part, Welch v. State Dept. of Highways, 107 S.Ct. 2941 (1987)] In Edelman v. Jordan, [415 U.S. 651(1974)] the Court emphasized that a state's participation in a federal program in which the federal government provides financial assistance would not constitute consent on the part of the State to be sued in federal court. [Id. at 673] [See also Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900 (1984) in which the majority ruled that the declaration of waiver or abrogation must reflect an unequivocal intention to deprive the state of the protection of the eleventh amendment.] [Note that a clear state waiver of immunity is often compelled in the context of the acceptance of federal funding, since a condition of the allocation is that the state must surrender to federal court jurisdiction for actions arising from the statute.]

Under the third exception, a citizen may seek to vindicate a constitutional or federal law claim by suing state officials. This exception was articulated in Ex Parte Young, [209 U.S. 123, 28 S.Ct. 441 (1908)] in which the Court in effect held that private citizens may indirectly sue a state by suing the state's official. [Id. at 160] The Court reasoned that when a state official acts contrary to the federal constitution or laws, he or she is stripped of his official character and is no longer entitled to eleventh amendment immunity. [Id. at 159-160] The doctrine permits adjudication of a direct challenge to state action on the fiction that the state itself is not the defendant. One limitation to this exception is that while the private citizen may bring an action in federal court against the state official for violation of federal laws, any recovery is limited to prospective injunctive relief not a retrospective damage award.

[See Edelman v. Jordan, 415 U.S. 651, 663 (1974) distinguishing suits seeking to impose liability which must be paid from public funds in the state treasury.]

The doctrine of immunity articulated in Hans is in tension with two other fundamental constitutional principles. First, that the law will provide a remedy for rights violated by government, a precept that emphasizes governmental accountability. Second, that the judicial power of the United States over claims arising under federal law is as broad within its sphere, as is the legislative power of the United States, creating equivalent status for Articles III (judicial) and I (legislative) of the Constitution. Accommodating these competing principles has led to variation in the application of eleventh amendment immunity. [See, generally, Jackson, "The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity," Yale Law Journal, 98, 1 -126 (Nov. 1988)]

Section Two: Arm of the State Doctrine

A federal court may determine that the entity involved in litigation is not protected by eleventh amendment immunity because it falls outside the status of an "arm of the state" for purposes of immunity. In this analysis, courts classify state bodies according to a dichotomy, labeling the entities as either an "arm of the state" or as a "political subdivision." Political subdivisions do not enjoy governmental immunity because of their autonomy from the state. The Supreme Court has consistently held that the shield of sovereign immunity protects state agencies [See, e.g. Will v. Michigan Dept. of State Police, 109 S.Ct. 2304, 2309 (1989) and Alabama v. Pugh, 438 U.S. 781, 782 (1978)], but not counties and municipalities. [See, e.g., Owen v. City of Independence, 445 U.S. 622, 650 (1980); Moor v. County of Alameda, 411 U.S. 693, 717-21 (1973); and Lincoln County v. Luning, 133 U.S. 529, 530 (1890)]

In Lincoln County v. Luning [133 U.S. 529 (1890)] the Court rejected the immunity defense and exercised jurisdiction in a suit against a Nevada county to recover overdue coupons and bonds issued by the county. To distinguish the county from the state, the Court recited several characteristics and powers enjoyed by the county that defined its distinct status as a "corporation." [Id. at 530-31] In determining that the state was not the real party in interest for purposes of a damage award, the Court noted that, although the county received funding from the state legislature, Nevada counties were empowered to generate their own

revenue and the outstanding debt issued by the county would not be assumed by the state in the event the county defaulted.[Id.]

Applying the "real substantial party in interest" test, in a suit against Indiana's Department of the Treasury, the Court in Ford Motor Company v. Department of the Treasury [323 U.S. 459 (1945)] held that a suit against the department was actually against the State of Indiana and therefore barred by the eleventh amendment because state funds would be necessary to satisfy an adverse judgment against the department. [Id. at 464] The majority reasoned that federal courts are expected to look to the "essential nature and effect of the proceeding" to determine if the action is "in essence one for the recovery of money from the state. . ."[Id.]

In Mount Healthy City School District Bd. of Educ. v. Doyle, [429 U.S. 274 (1977)] the Court determined that a local school district was not entitled to eleventh amendment immunity, holding that although the state exercised some policy control over the district and provided a significant state financial subsidy, the district was a political subdivision rather than an arm of the state. The Court specified four factors in determining whether eleventh amendment immunity would apply: (1) the designation in state law of local school districts as political subdivisions; (2) the degree of supervision over districts by the state Board of Education; (3) the level of funding that districts received from the state; and (4) the districts' authority, or lack thereof, to generate revenue through the issuance of bonds or levy of taxes. [Id. 280] In its analysis, the Court emphasized the discretionary authority of the school district in making resource allocations, its power to sue and be sued, and its authority to issue bonds and levy taxes. [Id.] Justice Rehnquist's opinion for a unanimous Court concluded that "on balance," a school board "is more like a county or a city," and placed principal emphasis on the state law characterization of the school district rather than on the fact that a substantial portion of district annual operating funds came from the state. [Id. at 281]

The expansion of state services; the emphasis on privatization, revenue-sharing, and decentralization by the states; and emergence of specialized authorities and agencies created by the states have led to increasingly fact intensive tests defining entities for eleventh amendment immunity purposes. Hybrid state entities cannot always be placed squarely in the arm of the state or political subdivision categories. In resolving this dichotomy, federal courts

resort to a technical, fact-intensive inquiry employing a range of factors in a balancing test to determine whether eleventh amendment immunity applies. In reaching a decision, courts classify the entity on the basis of its origin and mission, its independence from state control and oversight, its status within state statute law and constitutional provision, its sources of funding, and whether an adverse judgment against the entity would be satisfied by the state.

For example, in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, [440 U.S. 391 (1979)] the Court denied eleventh amendment immunity to a bistate agency created by a compact between California and Nevada. The Court attempted to assess the nature of the entity by examining its status under state law, its origins and purpose, its source of funding, and its authority to govern in relation to the degree of state oversight and supervision. Given the unusual hybrid characteristics of the agency, the inquiry was even more fact intensive that in Mount Healthy, admitting to an expansion of the range of factors that might influence the extension of immunity. Similarly, in Hess v. Port Authority Trans-Hudson Corporation [513 U.S.---, 115 S.Ct. 394 (1994)] the Court evaluated another bistate entity's claim for eleventh amendment immunity. While the Court considered the high degree of state control over the entity in relationship to the substantial financial independence it enjoyed, it found these indicators inconclusive, and examined whether extending immunity to the bistate entity would compromise the dignity or financial solvency of either state. In denying immunity, the majority ruled that the states' dignity would not be affronted since the entity had been a joint creation with the federal government. Furthermore, a judgment against the entity would not compromise state solvency since the bistate authority was empowered to generate its own revenues and pay its own debts. [Id. at 406]

One commentary emphasizes that the limited decisions of the United States Supreme Court with regard to "arm of the state" determinations has resulted in a confusing array of tests in lower federal courts. In this analysis, factors fall into five broad categories: (1) whether the entity performs governmental or proprietary functions and, alternatively, whether it performs state or local functions; (2) the degree of state political and administrative control and influence over the entity; (3) the nature of the powers that the entity enjoys, especially the extent of its fiscal autonomy from the state; (4) the state-law definition of the entity, including state courts' characterization of the entity; and (5) whether the state treasury would be used

to satisfy a judgment against the entity. [Rogers, "Clothing State Government Entities With Sovereign Immunity: Disarray In The Eleventh Amendment Arm of the State Doctrine," Columbia Law Rev., 92, 1243-1309, at 1269 (June, 1992).]

Section Three: Public Universities and the Eleventh Amendment

Applying "arm of the state" analysis, a state university may be entitled to eleventh amendment protection from federal court damage suits if the state is the "real party in interest." [See Case Comment, "Shannon v. Bepko: Public Colleges and Universities as State Agencies: Standards for Eleventh Amendment Protection," Journal of College and University Law, 16, 1, 151-163 (1989)] Since state universities and colleges will often vary in the nature of their origins, finance and governance structure, the application of eleventh amendment immunity has remained a case-by-case determination.

In 1911, the United States Supreme Court denied eleventh amendment status to Clemson Agriculture College (later Clemson University) after determining that the college was not an arm of the state. [Hopkins v. Clemson Agricultural College of South Carolina, 221 U.S. 636, 648-49 (1911)] The Court noted that the college had sources of income other than state appropriations and exercised plenary power to make contracts, sue and be sued, buy and hold property, and accept gifts in its own name. Particular emphasis was placed on the state's grant of "municipal powers," while denying the college the right to "incur. . .obligation[s] on the part of the State."[Id. at 639-40]

While a survey of cases suggests that federal courts have willingly extended eleventh amendment immunity to public universities, [Julian, "The Promise and Perils of Eleventh Amendment Immunity in Suits Against Public Colleges and Universities," South Texas Law Rev., 36, 85-108, 96 (1995)], federal courts have typically viewed community colleges as political subdivisions not covered by eleventh amendment protection. [See Goss v. San Jacinto Junior College, 588 F.2d 96, 98-99 (5th Cir. 1979); Hander v. San Jacinto Junior College, 519 F.2d 273, 277-80 (5th Cir. 1979); Hostrop v. Board of Junior College Dist., 523 F.2d 569, 577 (7th Cir. 1975); and Parsons v. Burns, 846 F.Supp 1372 (W.D.Ark. 1993) recognizing the community colleges as political subdivisions and not entitled to eleventh amendment immunity. But see Cerrato v. San Francisco Community College Dist., 26 F.3d 968 (9th Cir. 1994) and Mitchell v. Los Angles Community College Dist., 861 F.2d 198, 201

(9th Cir. 1988) recognizing that California community college districts were entitled to eleventh amendment immunity despite their seemingly local purpose in educating area residents.]

Although a university's independence from state authorities may jeopardize eleventh amendment immunity, [See, Knivila, "Public Universities and the Eleventh Amendment," Georgetown L.J. , 78, 1723-1745 (1990) suggesting that judicial reliance on the status of the institution under state law or on multi-factor tests that include independence from state authority may work against those state institutions who maintain reasonable independence from state control.] two circuits have acknowledged immunity for institutions granted constitutionally autonomous status in the state constitution. The Eighth Circuit has concluded that the eleventh amendment protects the University of Minnesota because the university is identified as an "instrumentality of the state" in the state constitution. [Walstad v. University of Minnesota Hospital, 442 F.2d 634, 641 (8th Cir. 1971).] The Tenth Circuit employed a similar analysis in recognizing that the University of Wyoming enjoyed immunity from actions for damages in federal court based upon a similar reading of state constitution and statute law. [Prebble v. Broderick, 535 F.2d 605, 610 (10th Cir. 1976)]

When applied to state colleges and universities, "arm of the state" analysis has applied several different factor tests. The University of Kansas was granted eleventh amendment immunity by the Tenth Circuit after the federal appeals court acknowledge that the Kansas Supreme Court had determined the public university was under exclusive state control. [Brennan v. University of Kansas, 451 F.2d 1287 (10th Cir. 1971). See, also Dube v. State Univ. of N.Y., 900 F.2d 587 (2nd Cir. 1990) and Jain v. University of Tennessee, 670 F.Supp. 1388, 1390-91 (W.D.Tenn. 1987), cert. denied, 109 S.Ct. 78 (1988)] In Sherman v. Curators of the University of Missouri, [16 F.3d 860, 863 (8th Cir. 1994)] the Eighth Circuit articulated a two-part inquiry in which the court must first analyze to what extent the state university exercises a significant degree of autonomy from the state, and then determine whether the funds to pay an award would be derived from the state treasury.

In Skehan v. State System of Higher Education, [815 F.2d 244 (3rd Cir. 1987)] the Third Circuit applied a multi-factor test to a corporate system comprising Pennsylvania's universities and colleges. In this instance, the federal appeals court concluded that the higher

education system was "a state agency and therefore entitled to the protection of the eleventh amendment in federal courts. [at 249] The court emphasized that the state system performed essential "governmental functions and governmental objectives." [at 248] in finding that it was distinguishable from the state-related or state aided institutions who exercised some independent, proprietary functions. [See Samuel v. University of Pittsburgh, 375 F.Supp. 1119, 1128 (W.D.Pa. 1974) aff'd in part, rev'd in part on other grounds, 538 F.2d 991 (3rd Cir. 1976) in which Penn State University, Temple University and the University of Pittsburgh were not protected by the eleventh amendment immunity because they "function autonomously from the state and have been found to be persons under Section 1983.]

The Skehan decision may usefully be compared with another Third Circuit decision in which Rutgers University was denied immunity as an arm of the state. [Kovats v. Rutgers, 822 F.2d 1303 (3rd Cir. 1987)] In this case, the court emphasized a wide-ranging analysis of state statutes, many of which exempted the university from taxation, local zoning ordinances and tort suits, and some of which exempted the institution from state contract laws, civil service laws, competitive bidding statutes, and administrative procedure requirements. In addition to focusing on the interpretation of state statutes in determining that the university was "largely autonomous and subject only to minimal state supervision and control [Id. at 1311] the federal appeals court noted that Rutgers was not required to manage its funds as public monies and the State of New Jersey had 'twice explicitly insulated itself from any liability on obligations" incurred by the university. [Id. at 1309]

In Hall v. Medical College of Ohio, [742 F.2d 299 (6th Cir. 1984), cert. denied, 469 U.S. 1113, 105 S.Ct. 796 (1985)] the Sixth Circuit used a multi-factor test to determine that the eleventh amendment protects the Medical College of Ohio. While considering the source of funds for institutional operations, the court discounted private sources and focused on the annual state appropriations coupled with judicial notice that the legislature permitted the institution to retain such funds rather than requiring that the funds be paid into the state treasury and then allocated to the institution.

In Lewis v. Midwestern State University, [837 F.2d 197 (5th Cir. 1988), cert. denied, 488 U.S. 849, 109 S.Ct. 129 (1988)] the Fifth Circuit focused on (1) the status of the university under state law, (2) the degree of state control over the university, and (3) whether

a judgment against the university would interfere with the fiscal autonomy of the state. [Id. at 198] In recognizing eleventh amendment immunity, the court emphasized that the question is not the ability of a plaintiff to identify segregated funds from private sources, but whether the use of these private funds to pay a damage award would interfere with the fiscal autonomy and political sovereignty of the state. [Id. at 198-9] [For an application of the factors used in Lewis, see Idoux v. Lamar University System, 817 F.Supp. 637 (S.D.Tex. 1993).]

In Kashani v. Purdue University, [813 F.2d 843 (7th Cir. 1987), cert. denied 484 U.S. 846 (1987)] the Seventh Circuit emphasized financial autonomy and general legal status as the two principal factors to be evaluated in determining the entitlement to eleventh amendment immunity, and held that the university was immune from suit in federal court because the institution was not financially autonomous from the state since the state directly financed and controlled thirty-six percent of institutional operating funds. [Id. at 845-46] Although there were indicators of the institution's independence from state control, the court noted that the state's power to alter the powers of trustees and the Governor's power to appoint a majority of trustees, together with the institutional mission emphasis on educating citizens of the state influenced the court to invoke immunity. [Id. at 847] Other federal courts have followed a similar analysis, granting immunity after finding that (1) trustees are appointed by an officer of the state, (2) the institution is charged by statute or charter to perform the essential governmental function of educating the citizens of the state, and (3) that a damage award would ultimately be paid from the state treasury or otherwise influence state funds. [See, e.g., Jackson v. Hayadawa, 682 F.2d.1344 (9th Cir. 1982) and Vaughn v. Regents of the University of California, 504 F.Supp. 1349, 1353 (E.D.Cal. 1981)]

While many of the decisions cited above rested on judicial consideration of only one or a select few factors, one author has identified ten factors that may influence the determination of "arm of the state" status for public universities. The factors, no one of which is necessarily dispositive, are drawn substantially from the rationale in Krisel v. Duran, [258 F.Supp. 845, 849 (S.D.N.Y. 1966), aff'd, 386 F.2d 179 (2nd Cir. 1967), cert. denied, 390 U.S. 1042 (1968)] include the following:

1. What is the local statutory and common law defining the status and nature of the institution?

2. Will a judgment against the institution actually have to be paid from a state treasury?

3. Does the institution have access to non-state funds which could be used to pay a judgment?

4. Is the function in question a "governmental" or a "proprietary" function?

5. Is the institution separately incorporated?

6. What degree of autonomy does the institution have over its operations?

7. Has the institution been given the power to sue and be sued?

8. Has the institution been given the power to enter into contracts in its own name?

9. Is the institution immune from state taxation?

10. Has the state immunized itself from responsibility for the institution's operations? [Julian, supra, citing Krisel, 258 F.Supp. at 849]

Part Four: Seminole Tribe of Florida v. Florida

Interpretation and application of eleventh amendment immunity remains subject to competing viewpoints, and, as recently as 1987, the United States Supreme Court was evenly divided on whether the decision in Hans should be sustained or overruled. [See Welch v. State Department of Highways, 107 S.Ct. 2941 (1987) in which the Court split four-four on whether the Hans view was correct or should be overruled.] In a recent five to four decision, Seminole Tribe of Florida v. Florida, [116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)] a majority of the United States Supreme Court held that, under the eleventh amendment, Congress lacked power to subject states to suit in federal court under the Indian Gaming Regulatory Act (Gaming Act). The Gaming Act was adopted by Congress in 1988, pursuant to the Indian Commerce Clause, and provides that a tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the state in which the gaming activities are located. In addition to prescribing that the state "negotiate in good faith" to reach a compact, the Gaming Act provides that if the state fails to negotiate in good faith, the tribe may sue the State in federal court to compel negotiation. When the Seminole tribe of Florida became convinced that the state of Florida was no longer negotiating in good faith concerning a compact involving casino gambling, the tribe sued the Florida and its governor. The State moved to dismiss the suit in federal district court on the grounds that the suit violated Florida's sovereign immunity from suit in federal court. The district court

denied the motion, [801 F.Supp. 655 (S.D.Fla. 1992)], but the Eleventh Circuit Court of Appeals reversed, finding that the Indian Commerce Clause did not grant Congress the power to abrogate the states' eleventh amendment immunity and that the tribe could not enforce good faith negotiations by suing the State's governor. [11 F.3d 1016 (1994)]

In a decision by Chief Justice Rehnquist, the court majority reasoned that the eleventh amendment is based upon two principles: first, "that each State is a sovereign entity in our federal system; and second, that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" [Id. at 1122, citing Hans v. Louisiana, 134 U.S. at 15] The Chief Justice emphasized that Congress may abrogate immunity if it has "unequivocally expressed its intent to abrogated the States' sovereign immunity and has acted "pursuant to a valid exercise of power." [Id. at 1123, citing Green v. Mansour, 474 U.S. at 68] In this case, the court found numerous references to the "State" in the enactment, concluding that "Congress clearly intended to abrogate the States' sovereign immunity. . ." [Id. at 1124] However, the majority questioned whether Congress had the power to abrogate the States' immunity from suit, and focused analysis on whether the passage of the act was pursuant to a constitutional provision granting Congress such power. Determining that the Indiana Commerce Clause and the Interstate Commerce Clause were indistinguishable for purposes of its rationale, the Court majority considered two provisions of the Constitution in regard to an express authorization of Congressional power: the Fourteenth Amendment and the Interstate Commerce Clause. [Id. at 1125] Expressly overruling a plurality decision, Pennsylvania v. Union Gas Co., [491 U.S. 1 (1998)] which held that Congress could abrogate state sovereign immunity with statutes enacted pursuant to the Interstate Commerce Clause, the majority reasoned that the eleventh amendment was enacted subsequent to, and amended, the Constitution and the Interstate Commerce Clause.[Id. at 1128] Accordly, Congress did not have the power to abrogate state sovereign immunity pursuant to the Interstate Commerce Clause. The majority opinion held that the eleventh amendment restricts the judicial power under Article III and Article I cannot be used to circumvent the constitutional limitations placed upon federal court jurisdiction. [Id. at 1131-32] Furthermore, the doctrine of Ex parte Young could not be used to enforce the Gaming Act against a state official. Under that doctrine, a suit against a state official may go forward notwithstanding the eleventh

amendment, where the suit seeks injunctive relief in order to end a continuing federal law violation. Because the Gaming law prescribed only modest sanctions against State officials culminating in the intervention of the Secretary of the Interior to prescribe gaming regulations, the statute was incompatible with enforcement of the range of remedial powers available to federal courts under Ex parte Young. [Id. at 1132-33]

Justice Stevens, in dissent, emphasized that the majority opinion "prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy." [Id. at 1134. (Stevens, J. dissenting).] The majority, however, reasoned that relief may still be available in federal court as (a) under certain circumstances an individual may obtain injunctive relief against state officers for an ongoing violation of federal law, (b) states may consent to suit, or (c) the federal government can bring suit in federal court against a state.[Id. at 1131-32, n. 16] In an aside, the majority noted that even absent the availability of federal judicial relief "it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity." [Id.]

While a state may consent to be sued in a federal court, the question arises as to whether Chief Justice Rehnquist is correct that relief might still be available where the state refuses to consent to jurisdiction. Pursuant to the line of cases deriving from Ex parte Young [209 U.S. 123 (1908)], under limited circumstances an individual may obtain a federal court injunction against a state officer to force the officer to comply with federal law, notwithstanding the eleventh amendment. The majority reasoned in Seminole Tribe that Ex parte Young relief was not available because Congress had already created a limited remedial scheme for the enforcement of the particular federal right created by the Gaming Act. The Eleventh Circuit had reasoned that the relief sought was in reality against the state, not the Governor of Florida, as the Indian Gaming Act consistently refers to the duty of the State to negotiate a compact in good faith, not the duty of state officials. The Eleventh Circuit held that negotiation of a gaming compact constituted a discretionary act that could not be addressed under Ex parte Young. [11 F.3d at 1028-1029] Ex parte Young relief would not appear to be available where (1) Congress enacted a limited remedial scheme, (2) the relief

sought would compel an executive official to undertake a discretionary, rather than a ministerial task, or (3) the suit is in reality against the state, not the officer.

Seminole Tribe another case in an on ongoing effort by the current majority to further restrict the Congress' power to subject states to federal court suits seeking to enforce federal rights. In a decision last year, the Court held that Congress had exceeded its commerce clause power in enacting a statute that prohibited the possession of guns within 1,000 feet of a school. [U.S. v. Lopez, 115 S.Ct. 1624 (1995)] In that decision, Chief Justice Rehnquist emphasized that the power of Congress to regulate is limited to activities that substantially affect interstate commerce, finding that matters such as public education, crime and domestic relations generally were within the ambit of the sovereign states.] In an earlier decision, a narrow majority blocked legislation to force states to accept nuclear waste dumps within their borders. Justice O'Conner wrote for the Court that "States are not mere political subdivisions of the United States," and they cannot be "commandeered" to carry out federal purposes. [New York v. United States, 505 U.S. 144, 151 (1992)]

While the majority in Seminole Tribe limited Congressional power to abrogate state sovereign immunity under the provisions of the Interstate Commerce Clause, the opinion implicitly recognized that Congress still has power to abrogate state sovereign immunity by statutes enacted pursuant to the fourteenth amendment, or other amendments adopted subsequent to the eleventh amendment. Although this power was not focus of the Supreme Court majority, in the Eleventh Circuit lawyers for the Tribe had argued that the state, in violating the Gaming Act, was also violating the fourteenth amendment. This argument was not supported by evidence of Congressional intent, and was not given extensive consideration by the appeals court, but the legal argument may be considered by future federal court litigants seeking relief from states.

In Genentech, Inc. v. Regents of the University of California [939 F.Supp. 639 (S.D.Ind. 1996)], one of the first cases to cite Seminole Tribe, a federal district court reasoned that "Congress drew in part from its Fourteenth Amendment power when it amended the statutes in issue (patent laws)." [Id. at 643] In dicta, the court suggested that a person suing to protect an alleged infringement of copyright by a state university might claim that the fourteenth amendment itself provided the basis for a claim against the state. The court

reasoned that "a patent is a protectable property right and to permit the State to infringe that property right without redress for the patent owner would deprive that owner of property without due process of law." [Id.] However, the case involved a declaratory judgment action against the university seeking to declare the university's patent involving recombinant DNA technology invalid, unenforceable, and noninfringed. The plaintiff, having brought the action in an Indiana federal court, was facing an infringement claim brought by the university in a California federal court. In recognizing the university's eleventh amendment immunity, the Indiana federal district court emphasized that federal statutes purporting to abrogate immunity did not apply to a declaratory judgment action against the state, effectively removing the case to the California forum.

Seminole Tribe also leaves some doubt about whether individual state officials may be sued in federal courts to force them to comply with laws passed by Congress. Whether this tactic will remain viable will be one of the measures of the true impact of the decision. The question may be clarified in Idaho v. Coeur D'Alene Tribe, No. 94-474, which will be argued during the 1996-97 term.

The Court's decision that the eleventh amendment preserves the states' sovereign immunity from suit in federal court may have significant and far-reaching implications in insulating public universities from suits based on federal laws. The majority decision may be read to restrict the reach of federal statutes passed under the Congress' commerce clause authority. Federal statutes that provide for exclusive federal jurisdiction, including bankruptcy, copyright, antitrust, and Superfund/CERCLA would appear to be directly affected by the ruling. It is less likely that provisions of federal law authorized under the fourteenth amendment will be affected, since this amendment to the Constitution was passed after the eleventh amendment.