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

Joseph Beckham*

In a series of recent decisions, the United States Supreme Court's current majority has demonstrated a resolve to curb Congress's power to subject states to federal court suits seeking to enforce federal rights. In a 1992 decision, the majority blocked legislation to force states to accept nuclear waste dumps within their borders.1 Justice Sandra Day O'Connor wrote for the Court that “[s]tates are not mere political subdivisions of the United States” and cannot be “commandeered” to carry out federal purposes.2 In 1995, the Court held that Congress had exceeded its commerce clause authority in enacting a statute that provided criminal sanctions for the possession of a gun within one thousand feet of a school.3 In that decision, Chief Justice William Rehnquist concluded that the power of Congress to regulate is limited to activities that substantially affect interstate commerce and that matters such as public education and crime control were uniquely within the authority of the sovereign states.4 And, in the 1996–1997 term, a narrow majority ruled the Brady Act requirement that state law enforcement agents conduct background checks on handgun buyers to be an unconstitutional attempt by the Congress to control state officials in the execution of their duties.5

In the most significant of this line of decisions for public colleges

---

* Professor of Higher Education and Director, Institute for Studies in Higher Education, Florida State University. J.D., 1969, University of Florida, Ph.D. (higher education), 1977, University of Florida, The Author acknowledges with appreciation the assistance of Shelia Trice Bell, J.D., Executive Director, National Association of College and University Attorneys, for contributions to the initial outline of this paper.

2. Id. at 188.
4. See id. at 1630–32.
and universities, *Seminole Tribe v. Florida*, the Court reviewed a request for injunctive relief under the provisions of the Indian Gaming Regulatory Act and broadened the scope of analysis in its rationale to interpret congressional authority under the Interstate Commerce Clause. Writing on behalf of a five-to-four majority, Chief Justice Rehnquist reasoned that the Eleventh Amendment was enacted subsequent to, and amended, the Interstate Commerce Clause and held that the United States Congress could not exercise authority under that clause to abrogate the states’ Eleventh Amendment immunity. The majority opinion declared that congressional reliance on the Interstate Commerce Clause as a basis for promulgating federal laws would not permit jurisdiction over a state that did not consent to suit in a federal forum and went on to hold that a state official could not be sued for prospective injunctive relief in his or her official capacity if the federal law on which a plaintiff relied provided more restrictive remedial options.

*Seminole Tribe* will have profound implications for the immunity of public colleges and universities who fall within the Eleventh Amendment protection afforded by “arm of the state” status. While the Court implicitly recognized that Congress still has power to abrogate state sovereign immunity by statutes enacted pursuant to the Fourteenth Amendment, since the Fourteenth Amendment was adopted subsequent to the Interstate Commerce Clause, the reach of federal legislation permitting suits against public colleges and universities will be restricted by this landmark decision expanding Eleventh Amendment immunity.

**CONTEXT OF ELEVENTH AMENDMENT IMMUNITY**

Ratified in 1798, the Eleventh 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...”

---

7. See id. at 1119.
8. See id.
9. See id. at 1131.
10. See id. at 1132–33.
Subjects of any Foreign State."\(^{12}\) The United States Supreme Court has interpreted the amendment to extend beyond its literal language.\(^{13}\) While states do not enjoy immunity in suits brought by the United States\(^{14}\) or by sister states,\(^{15}\) 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.”\(^{16}\) Eleventh Amendment immunity has also been extended to state law claims brought into federal court under supplemental jurisdiction.\(^{17}\)

In *Hans v. Louisiana*\(^{18}\) the United States Supreme Court held that an unconsenting state could not be sued by one of its citizens.\(^{19}\) One author has suggested that the doctrine of immunity articulated in *Hans* is in tension with fundamental notions of governmental accountability and the principle that the judicial power of the United States over claims arising under federal law is equivalent, within its sphere, to the legislative power of the United States.\(^{20}\) Accommodating these competing principles has led to variation in the application of Eleventh Amendment immunity, with exceptions designed to limit the application of the doctrine.\(^{21}\)

In balancing federal supremacy and state autonomy, three exceptions to Eleventh Amendment immunity have been judicially recognized. In the exception addressed by the majority in *Seminole Tribe*,\(^ {22}\) Congress may abrogate the state's Eleventh Amendment immunity provided it does so “unequivocally.”\(^ {23}\) Although the Court

---

12. U.S. Const. amend. XI.
17. *See* Pennhurst State Sch., 465 U.S. at 121.
18. 134 U.S. 1 (1890).
19. *See* id. at 5.
22. *See* 116 S. Ct. at 1119.
has emphasized that Congress must make its intention to abrogate state immunity “unmistakably clear” in statutory language, what constitutes an “unequivocal” expression of congressional intent requires judicial interpretation.

For example, in Franklin v. Gwinnett County Public Schools, the Court held that federal courts have the authority to enforce damage remedies against state agencies under Title IX of the Education Amendments of 1972. The Court construed congressional intent to abrogate immunity from the juxtaposition of the Court’s decision in Cannon v. University of Chicago, which held that Title IX created an individual cause of action with all appropriate remedies, and its subsequent passage of the Civil Rights Remedies Equalization Amendment of 1986, which failed to reverse the Court’s interpretation of the breadth of remedies available under Title IX.

As a second exception, a state may waive its immunity if done so explicitly. In Edelman v. Jordan, the Court stressed 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. In this opinion, the Court emphasized that waiver should be found from only “the most express language or by such overwhelming implications from

Eleventh Amendment immunity); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (holding that a general authorization for a suit in federal court is not sufficient to abrogate immunity); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (recognizing that Congress has power under the Fourteenth Amendment to abrogate Eleventh Amendment immunity from suit for monetary damages).

26. See id.
28. See id. at 717.
30. Franklin, 503 U.S. at 71–73.
33. See id. at 673. Note that a clear waiver of state immunity is often compelled in the current 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.
the text as [will] leave no room for any other reasonable construction.\textsuperscript{34} As the Court has pointed out, any state waiver or abrogation must reflect an express and unequivocal intention to deprive the state of the protection of Eleventh Amendment law.\textsuperscript{35}

Acting on the third exception, a citizen may seek to vindicate a constitutional or federal law claim by suing state officials. This exception was articulated in \textit{Ex Parte Young},\textsuperscript{36} in which the Court in effect held that private citizens may indirectly sue a state by suing the state’s official.\textsuperscript{37} 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,\textsuperscript{38} thus permitting adjudication of a direct challenge to state action on the fiction that the state itself is not the defendant. A limitation to this exception is that while the private citizen may sue a state official in federal court for violating federal laws, any recovery is limited to prospective injunctive relief. The exception has not been interpreted to permit a retrospective damage award.\textsuperscript{39}

\textbf{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.\textsuperscript{40} In this analysis, courts distinguish state entities as either an “arm of the state” or as a “political subdivision.” State entities classified as “political subdivisions” do not enjoy governmental immunity because of their autonomy from the state.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{34} \textit{Edelman}, 415 U.S. at 673 (quoting Murray v. Wilson Distilling Co., 231 U.S. 151, 171 (1909)).
\item \textsuperscript{35} \textit{See Pennhurst State Sch.}, 465 U.S. at 99; Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284, 292 (1906) (recognizing that a federal court may acquire jurisdiction when the state voluntarily submits to the court’s jurisdiction by proceeding as a plaintiff or claimant).
\item \textsuperscript{36} 209 U.S. 123 (1908).
\item \textsuperscript{37} \textit{See id.} at 160.
\item \textsuperscript{38} \textit{See id.} at 159–60.
\item \textsuperscript{39} \textit{See Edelman}, 415 U.S. at 664–67 (distinguishing suits seeking to impose liability that must be paid from public funds in the state treasury).
\item \textsuperscript{40} \textit{See Hess v. Port Auth. Trans-Hudson Corp.}, 513 U.S. 30, 45–51 (1994).
\item \textsuperscript{41} \textit{See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle}, 429 U.S. 274, 279–81
\end{itemize}
The Supreme Court has consistently held that the shield of immunity protects state agencies but does not extend to counties and municipalities. In *Lincoln County v. Luning*, 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.” 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. In *Ford Motor Co. v. Department of the Treasury* the Court applied a “real substantial party in interest” test in a suit against Indiana’s Department of the Treasury and 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 a judgment. The majority reasoned that federal courts are expected to examine 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.”

In *Mt. Healthy City School District Board of Education v. Doyle*, the Court determined that a local school district was not


44. *Lincoln County*, 133 U.S. at 529.
45. See id. at 532–33.
46. See id. at 530–31.
47. See id. at 532–33.
49. See id. at 463–65.
50. Id. at 464. See also Regents of the Univ. of Cal. v. Doe, 117 S. Ct. 900, 904 (1997), in which the United States Supreme Court held that it is the entity’s potential legal liability for judgments, not whether it will be reimbursed by a third party, that is relevant in determining Eleventh Amendment protection.
entitled to Eleventh Amendment immunity. 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 to be used in determining whether 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. In applying the four factors, the Court noted 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. Justice Rehnquist's opinion for a unanimous Court placed principal emphasis on the state law characterization of the school district rather than on the fact that a substantial portion of the district's annual operating funds came from the state and reasoned that a school board, like a county or a city, fit the characterization of a political subdivision.

The expansion of state services, the emphasis on privatization, revenue-sharing, and decentralization by the states, and the emergence of specialized authorities and agencies created by the states have led to increasingly complex, multi-factor tests defining entities for Eleventh Amendment purposes. 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. Courts classify the entity on the basis of its origin and mission, its independence from state control and oversight, its status within state statutory 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*

---

52. See id. at 279–81.
53. See id. at 280.
54. See id.
55. See id. at 280–81.
Planning Agency, the Court denied Eleventh Amendment immunity to a bistate agency created by a compact between California and Nevada. Given the unusual characteristics of the agency, the judicial inquiry included a range of factors that might influence the extension of immunity. 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. Similarly, in Hess v. Port Authority Trans-Hudson Corp. the Court evaluated another bistate entity's claim for 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 state's 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.

One commentary contends that the limited decisions of the United States Supreme Court with regard to “arm of the state” determinations have resulted in a confusing array of tests in lower federal courts. As a consequence, courts may consider a range of factors which 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

57. See id. at 400–02.
58. See id. at 401–02.
59. See id.
60. 513 U.S. 30 (1994).
61. See id. at 397.
62. See id. at 404–05.
63. See id. at 405–06.
64. See id. at 406.
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.66

**PUBLIC UNIVERSITIES AND THE ELEVENTH AMENDMENT**

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. Applying “arm of the state” analysis, a state university may be entitled to protection from federal court damage suits if the state is the “real party in interest.”67 However, while a survey of cases suggests that federal courts have willingly extended Eleventh Amendment immunity to state universities,68 federal courts have typically viewed public community colleges as political subdivisions not covered by Eleventh Amendment protection.69

In 1911, the United States Supreme Court denied Eleventh Amendment immunity to Clemson Agriculture College (later Clemson University) after determining that the college was not an arm of the state.70 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 ac-

---

66. *Id.* at 1269.
69. For examples in which community colleges were recognized as political subdivisions and not entitled to Eleventh Amendment immunity, see Goss v. San Jacinto Junior College, 588 F.2d 96, 98–99 (5th Cir. 1979); Hostrop v. Board of Junior College Dist. No. 15, 523 F.2d 569, 577 n.3 (7th Cir. 1975); Hander v. San Jacinto Junior College, 519 F.2d 273, 277–80 (5th Cir. 1975); Parsons v. Burns, 846 F. Supp. 1372, 1376–80 (W.D. Ark. 1993). However, for examples in which the California community college districts were entitled to the Eleventh Amendment immunity despite their seemingly local purpose in educating area residents, see Cerrato v. San Francisco Community College Dist., 26 F.3d 968, 972 (9th Cir. 1994); Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1988).
cept 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.”

Although a university’s independence from state authorities may jeopardize its claim to immunity, two circuits have acknowledged immunity for institutions granted constitutionally autonomous status in their respective state constitutions. The Eighth Circuit has concluded that the Eleventh Amendment protects the University of Minnesota because of the university’s characterization as an “instrumentality of the state” in the state constitution. The Tenth Circuit adopted a similar analysis in recognizing that the University of Wyoming enjoyed immunity from actions for damages in federal court based upon a reading of Wyoming’s Constitution and applicable state statutes.

When applied to state colleges and universities, “arm of the state” analysis has involved a variety of multi-factor tests. The University of Kansas was granted immunity by the Tenth Circuit after the federal appeals court acknowledged that the Kansas Supreme Court had determined the public university was under exclusive state control. In Sherman v. Curators of the University of Missouri, the Eighth Circuit granted immunity after pursuing a two-part inquiry in which the court first analyzed the extent to which the state university exercised autonomy from the state, and then determined whether the funds to pay an award would be derived

71. See id. at 648.
72. Id. at 639–40.
73. See Kelly Knivila, Comment, Public Universities and the Eleventh Amendment, 78 GEO. L.J. 1723, 1723 (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 have established reasonable independence from state control through the adoption of constitutionally autonomous status).
74. See id. at 1733–35.
75. See Walstad v. University of Minn. Hosps., 442 F.2d 634, 641 (8th Cir. 1971).
76. See Prebble v. Broderick, 535 F.2d 605, 610 & n.2 (10th Cir. 1976).
77. See Knivila, supra note 73, at 1733–42.
78. See Brennan v. University of Kan., 451 F.2d 1287, 1290–91 (10th Cir. 1971); see also Mascheroni v. Board of Regents of Univ. of Cal., 28 F.3d 1554 (10th Cir. 1994); Dube v. State Univ. of N.Y., 900 F.2d 587 (2d Cir. 1990); Jain v. University of Tenn., 670 F. Supp. 1388, 1390–91 (W.D. Tenn. 1987), aff’d, 843 F.2d 1391 (6th Cir. 1988).
79. 16 F.3d 860 (8th Cir. 1994).
from the state treasury.80

In *Skehan v. State System of Higher Education*,81 the Third Circuit applied a multi-factor test to a state system comprising Pennsylvania's university and colleges.82 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 the federal courts."83 The court noted that the state system performed essential "governmental functions and governmental objectives"84 in finding that it was distinguishable from the state-related or state-aided institutions that exercised some independent, proprietary functions.85

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.86 In this case, the court undertook 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.87 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 con-
trol,"88 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.89

Other federal circuit courts have adopted variations on a multi-factor test in applying arm of the state analysis to institutions of higher education. The Sixth Circuit applied a multi-factor test to determine that the Eleventh Amendment protected the Medical College of Ohio.90 Emphasizing the source of funds for institutional operations as a determinative factor, the court nevertheless discounted private sources and focused on annual state appropriations to the institutions as a primary element in constructing its rationale.91 In Lewis v. Midwestern State University,92 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 money judgment against the university would . . . interfere with the fiscal autonomy of the state."93 In recognizing Eleventh Amendment immunity, the court ruled 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.94

In Kashani v. Purdue University,95 the Seventh Circuit considered financial autonomy and general legal status as the two principal factors to be weighed in determining the entitlement to Eleventh Amendment immunity.96 Holding that Purdue University was immune from suit in federal court, the opinion emphasized that the institution was not financially autonomous from the state since the state contributed and controlled slightly over thirty-six percent of in-
institutional operating funds.\textsuperscript{97} Discounting several indicators of the institution's independence from state control, the court noted that the state's authority to alter the powers of the governing board and appoint trustees, together with the institutional mission emphasis on educating citizens of the state, influenced the court to invoke immunity.\textsuperscript{98} 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.\textsuperscript{99}

While many of the decisions discussed above rested on judicial consideration of a select number of factors, a range of factors may influence the determination of arm of the state status for public universities.\textsuperscript{100} A court may consider whether a judgment against the institution will actually have to be paid from a state treasury or whether the institution may have access to non-state funds or alternative income sources which could be used to pay the judgment. A court may also determine the degree of autonomy the institution actually exercises over its operations and the degree of control the state exercises over its governance. Finally, a court may assess the legal status of the institution under state statute and common law, giving consideration to whether the institution is separately incorporated, and whether the institution has the power to sue and be sued and to enter into contracts in its own name.

\textbf{SEMINOLE TRIBE v. FLORIDA}

\textsuperscript{97} See id. at 845–46; see also Cosgrove, supra note 67, at 151.
\textsuperscript{98} See Kasmani, 813 F.2d at 847–48. In Kasmani, the court applied \textit{Ex Parte Young}, 209 U.S. 123 (1908), and remanded the plaintiff's claims for injunctive relief and reinstatement. See Kasmani, 813 F.2d at 848.
\textsuperscript{99} See, e.g., Jackson v. Hayakawa, 682 F.2d 1344, 1349–51 (9th Cir. 1982) (citing a number of factors that were regarded as relevant to the determination of arm of the state status, the most crucial of which was whether a damage award would have an impact on the state).
\textsuperscript{100} See Julian, supra note 68, at 94–96 (citing Krisel v. Duran, 258 F. Supp. 845, 849 (S.D.N.Y. 1966), aff'd, 386 F.2d 179 (2d Cir. 1967)).
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. In *Seminole Tribe v. Florida*, a five-to-four 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 in 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 State of Florida and its governor. The State moved to dismiss the suit in federal district court on the grounds that the suit violated Florida’s Eleventh Amendment immunity from suit. The district court denied the motion, but the Eleventh Circuit Court of Appeals reversed, finding that the Indian Commerce Clause did not grant Congress the power to abrogate the State's Eleventh Amendment immunity and that the Tribe could not enforce good faith negotiations by suing the State's governor.

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 sys-

---

101. See *Welch v. State Dep't of Highways*, 483 U.S. 468 (1987) (splitting four-four on whether the *Hans* view was correct or should be overruled).
103. See id. at 1119.
104. See id.
105. See id. at 1121.
106. See id.
108. See id.
tem,” and second, that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”110 The Chief Justice declared that Congress may abrogate immunity if it has “unequivocally expresse[d] its intent to abrogate the [State's sovereign] immunity” and has acted “pursuant to a valid exercise of power.”111 In this case, the Court concluded that “Congress clearly intended to abrogate the State's sovereign immunity. . . .”112 However, the majority went on to question whether Congress had the power to abrogate the State's immunity from suit and focused analysis on whether the passage of the Gaming Act was pursuant to a constitutional provision granting Congress such power.113

Determining that the Indian Commerce Clause and the Interstate Commerce Clause were indistinguishable for purposes of its rationale, the Court's majority considered two provisions of the Constitution in regard to an express authorization of congressional power: the Fourteenth Amendment and the Interstate Commerce Clause.114 Expressly overruling a plurality decision, Pennsylvania v. Union Gas Co.,115 which held that Congress could abrogate state sovereign immunity with statutes enacted pursuant to the Interstate Commerce Clause (Commerce Clause), the majority reasoned that the Eleventh Amendment was enacted subsequent to, and amended, the Constitution and the Commerce Clause.116 Accordingly, Congress did not have the power to abrogate state sovereign immunity pursuant to the Commerce Clause. The majority opinion held that the Eleventh Amendment restricts the judicial power under Article III, and that Congress's power under Article I cannot be used to circumvent the Eleventh Amendment limitation placed on federal court jurisdiction.117 In addition, the Court held the doctrine of Ex Parte Young could not be used to enforce the Gaming Act

110. Seminole Tribe, 116 S. Ct. at 1122 (citing Hans v. Louisiana, 134 U.S. 1, 13 (1890)).
111. Id. at 1123 (quoting Green, 474 U.S. at 68).
112. Id. at 1124.
113. See id. at 1125.
114. See id.
117. See id. at 1131–32.
against the State's governor.118 Under that doctrine, a suit against a
state official may go forward notwithstanding the Eleventh Amend-
ment, when the suit seeks injunctive relief to end a continuing fed-
eral law violation. Because the Gaming Act prescribed limited san-
tions against state officials culminating in the intervention of the
Secretary of the Interior to prescribe gaming regulations, the major-
ity reasoned that the statute was incompatible with enforcement of
the range of remedial powers available to federal courts under Ex
Parte Young.119

Justice Stevens, in dissent, insisted 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 pat-
ent law, to those concerning bankruptcy, environmental law, and
the regulation of our vast national economy.”120 The majority coun-
tered 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.121 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 State's sovereign immunity.”122

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. 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. Pursuant to the line of
cases deriving from Ex Parte Young,123 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.124 The majority reasoned in Seminole

118. See id. at 1132.
119. See id. at 1132–33.
120. Id. at 1134 (Stevens, J., dissenting) (footnote omitted).
121. See id. at 1131–32 & n.16.
122. Seminole Tribe, 116 S. Ct. at 1131–32 n.16.
123. 209 U.S. 123 (1908).
124. See id. at 167–68.
1997]  

Eleventh Amendment  

Tribe that Ex Parte Young relief was not available because Congress had already expressly created a very limited remedial scheme for the enforcement of the particular federal right created by the Gaming Act.\textsuperscript{125} The Eleventh Circuit had reasoned that the relief sought was in reality against the State, not the Governor of Florida, as the Gaming Act consistently refers to the duty of the state to negotiate a compact in good faith, not the duty of state officials.\textsuperscript{126} The Eleventh Circuit held that negotiation of a gaming compact constituted a discretionary act that could not be addressed under Ex Parte Young.\textsuperscript{127} Harmonizing the reasoning in these two decisions, it is arguable that Ex Parte Young relief would not be available when (1) Congress enacted a limited remedial scheme, (2) the relief sought would compel a state official to undertake a discretionary, rather than a ministerial act, or (3) the suit is in reality against the state, not the officer.\textsuperscript{128}

Although the majority in Seminole Tribe limited congressional power to abrogate state sovereign immunity under the 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. While this power was not the focus of the Supreme Court majority, 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 given extensive consideration by the appeals court, but the legal issue involved in assessing congressional intent will be advanced by future federal court litigants seeking relief from states.

CONCLUSION

\textsuperscript{125} See Seminole Tribe, 116 S. Ct. at 1132–33.  
\textsuperscript{126} See Seminole Tribe, 11 F.3d at 1028–29.  
\textsuperscript{127} See id. at 1028.  
When determining if Eleventh Amendment immunity effectively immunizes a state college or university from suit brought by an individual in federal court, the court must first apply a complex, multi-factor test to determine if the institution is an arm of the state and, thus, entitled to immunity, and then assess whether the state has waived immunity or whether Congress has lawfully abrogated the state's collective Eleventh Amendment immunity. The decision in *Seminole Tribe* limits congressional authority to abrogate the immunity of public colleges and universities clothed with arm of the state status under the Eleventh Amendment. The limitation imposed by the United States Supreme Court emphasizes that Congress cannot abrogate Eleventh Amendment immunity when enacting legislation pursuant to the Commerce Clause, since the Eleventh Amendment was passed after the Commerce Clause and acts as a limitation on it. By implication, federal laws passed as a valid exercise of Congress's power to enforce provisions of the Fourteenth Amendment would permit abrogation of Eleventh Amendment immunity.

The Court's decision in *Seminole Tribe* will impose on lower federal courts the responsibility to determine whether Congress has unequivocally abrogated immunity and whether Congress's power to abrogate was exercised under the enforcement provisions of the Fourteenth Amendment. Since Congress may not always expressly label its exercise of discretionary authority to legislate by reference to a particular provision of the Constitution, federal courts must interpret the source of that power. While it is clear that Congress has broad discretion to enforce those provisions of the Fourteenth Amendment that ban racial discrimination and remedy discriminatory practices, lower federal courts must interpret the provisions of other federal statutes in a way that balances the "government of limited powers" principle of federalism against the discretionary authority of Congress to legislate under Article I of the Constitution.

129. See *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997), in which the court opined, "[W]e are unable to understand how a statute [Title IX] enacted to specifically combat . . . discrimination could fall outside the authority granted to Congress by § 5 [of the Fourteenth Amendment]," and *Mayer v. University of Minnesota*, 940 F. Supp. 1474, 1479–80 (D. Minn. 1996), in which the district court found that Congress enacted the Americans with Disabilities Act and the Rehabilitation Act under a valid exercise of powers under the Fourteenth Amendment.
and the enforcement provisions of the Fourteenth Amendment. There is ample precedent for the use of an intent test in determining the source of congressional enforcement powers. For example, in *Fullilove v. Klutznick*, 130 the United States Supreme Court upheld legislation under a variety of constitutional sources for congressional power, including the enforcement provisions of the Fourteenth Amendment, despite the fact that the Fourteenth Amendment was not mentioned in the relevant act. 131 Similarly, in *Katzenbach v. Morgan*, 132 the Court developed a test to determine whether a federal statute was designed to enforce the Equal Protection Clause, absent any mention of the source for congressional authority in the statute. 133

As a consequence of the decision in *Seminole Tribe*, lower federal courts will be compelled to eschew literal interpretation and examine the history and legislative intent of federal statutes to assess whether the provisions are intended to enforce the Fourteenth Amendment, the Commerce Clause, or both. When provisions of federal law are expressly promulgated under the Commerce Clause, such as the wage and hour provisions of the Fair Labor Standards Act, 134 federal courts may be reluctant to infer an intention on the part of Congress to enforce the more general goals of guaranteeing due process or equal protection under the Fourteenth Amendment. 135 In the case of other federal statutes, more liberal interpre-

---

130. 448 U.S. 448 (1980). See Wilson-Jones v. Caviness, 99 F.3d 203, 209 (6th Cir. 1996) (rejecting a “rational relationship” test as a basis for inferring congressional intent, and noting that the general goal of achieving equal protection would “become a license to Congress to pass any sort of legislation whatsoever”). But see Timmer v. Michigan Dep’t of Commerce, 104 F.3d 833, 841–42 (6th Cir. 1997) (noting that the Equal Pay Act (EPA) was an amendment to the Fair Labor Standards Act, but holding that Congress’s authority for enacting the EPA derived from the Fourteenth Amendment because of the statutory goal of prohibiting gender-based discrimination).

131. See *Fullilove*, 448 U.S. at 448.


133. See id. at 651.


tation may be permitted.

In Genentech, Inc. v. Regents of the University of California\(^\text{136}\) one of the first cases to cite Seminole Tribe, a federal district court stated that “Congress drew in part from its Fourteenth Amendment power when it amended the statutes in issue [patent laws].”\(^\text{137}\) 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.\(^\text{138}\) 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.”\(^\text{139}\) 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.\(^\text{140}\) The plaintiff, having brought the action in an Indiana federal court, was facing an infringement claim in a California federal court.\(^\text{141}\) In recognizing the university's Eleventh Amendment immunity, the Indiana federal district court decided 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.\(^\text{142}\)

The Supreme Court's decision that the Eleventh Amendment preserves the state's sovereign immunity from suit in federal court may have significant and far-reaching implications in insulating public universities from suits brought in federal courts seeking damages based on federal law. It is unlikely that provisions of federal law extending civil rights\(^\text{143}\) and prohibiting discrimination will be

\(^{136}\) U.S. 930 (1994) (holding that the ADEA, as amended in 1974, was enacted pursuant to the Congress's power under the enforcement provisions of the Fourteenth Amendment).


\(^{138}\) Id. at 643.

\(^{139}\) See id. at 643–44.

\(^{140}\) See Genentech, 939 F. Supp. at 640.

\(^{141}\) See id.

\(^{142}\) See id. at 643–44.

\(^{143}\) It is not clear whether Congress intended to abrogate a state's Eleventh
affected, since these provisions either expressly or by implication are authorized under the Fourteenth Amendment.144 Federal laws providing exclusive federal jurisdiction, such as bankruptcy, copyright, antitrust, and Superfund/CERCLA would appear to be directly affected by the ruling, although lower courts may interpret these laws as embracing enforcement powers under the Fourteenth Amendment.

While the majority decision may be read to restrict the reach of federal statutes passed under Congress’s Commerce Clause authority, what is troublesome about Seminole Tribe is the majority’s abandonment of a “plain language” emphasis in its interpretation of the Eleventh Amendment in favor of an interpretation based on intent. Ironically, the decision will compel federal courts to devise a test of congressional intent in examining federal statutes. Plaintiffs seeking to recover damages against public institutions of higher education will urge that congressional intent embraced the Fourteenth Amendment’s enforcement provisions designed to guarantee equal protection and due process of law. As lower federal courts seek to resolve difficult questions of congressional intent, conflicting interpretations will inevitably result.145