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Implied Waiver After Seminole Tribe

Kit Kinports*

In 1996, the Supreme Court issued its controversial decision in *Seminole Tribe v. Florida*, holding that Congress may not use its Article I powers to abrogate the immunity from suit accorded to the states by the Eleventh Amendment. In so doing, the Court erected a roadblock in front of congressional efforts to enforce against the states legislation governing such diverse areas as the environment, intellectual property, bankruptcy,  

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2. 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 Subjects of any Foreign State." U.S. CONST. amend. XI.

3. See, e.g., *Seminole Tribe*, 116 S. Ct. at 1134 & n.1 (Stevens, J., dissenting) (noting that the Court's ruling "prevents Congress from providing a federal forum for a broad range of actions against States," including those alleging violations of environmental laws); Philip Weinberg, *Environmental Law, 1995-96 Survey of New York Law*, 47 SYRACUSE L. REV. 541, 549-50 (1997) (observing that *Seminole Tribe* will prevent those who are injured by state-operated hazardous waste sites from suing the states or their officials under federal environmental laws).


antitrust, labor relations, telecommunications, civil rights, veterans’ affairs, and Native American affairs.

47 SYRACUSE L. REV. 1, 32 (1996); Vázquez, supra note 4, at 1720-22.

In the wake of Seminole Tribe, one court has suggested that § 106 of the Bankruptcy Code, 11 U.S.C. § 106 (1994), constitutes a valid exercise of Congress’s power to abrogate the states’ Eleventh Amendment immunity under section 5 of the Fourteenth Amendment. See In re Burke, 203 B.R. 493, 497 (Bankr. S.D. Ga. 1996). But most courts have concluded that § 106 was passed pursuant to Article I and is therefore unconstitutional under the Court’s ruling in Seminole Tribe. See In re Fernandez, 123 F.3d 241, 243-45 (5th Cir. 1997); In re Koehler, 204 B.R. 210, 214-16 (Bankr. D. Minn. 1997); In re Lush Lawns, Inc., 203 B.R. 418, 421 (Bankr. N.D. Ohio 1996); In re Charter Oaks Assocs., 203 B.R. 17, 20-21 (Bankr. D. Conn. 1996).

6. See, e.g., Seminole Tribe, 116 S. Ct. at 1134 n.1 (Stevens, J., dissenting); Harris & Kenny, supra note 4, at 706-15; Vázquez, supra note 4, at 1720-22.

7. A number of courts have interpreted Seminole Tribe as invalidating the amendments to the Fair Labor Standards Act (FLSA) that were designed to abrogate the states’ Eleventh Amendment immunity. See, e.g., Close v. New York, 125 F.3d 31, 36-39 (2d Cir. 1997) (concluding that the FLSA exceeds Congress’s abrogation power as interpreted in Seminole Tribe); Mills v. Maine, 118 F.3d 37, 41-49 (1st Cir. 1997) (same); Aaron v. Kansas, 115 F.3d 813 (10th Cir. 1997) (same); Raper v. Iowa, 115 F.3d 623, 624 (8th Cir. 1997) (same); Wilson-Jones v. Caviness, 99 F.3d 203, 207-11 (6th Cir. 1997) (same); see also Wallin v. Minnesota Dept of Corrections, 974 F. Supp. 1284, 1241-42 (D. Minn. 1997) (holding that the Employee Retirement Income Security Act is not a valid exercise of Congress’s abrogation power); Knussman v. Maryland, 935 F. Supp. 659, 663 (D. Md. 1996) (leaving open the validity of abrogation in Family and Medical Leave Act). But cf. Timmer v. Michigan Dept of Commerce, 104 F.3d 833, 838-42 (6th Cir. 1997) (upholding the Equal Pay Act as a valid exercise of Congress’s abrogation power under section 5 of the Fourteenth Amendment).


10. See, e.g., Palmatier v. Michigan Dept of State Police, No. 5-95-CV-168, 1997 U.S. Dist. LEXIS 13444, at *6-9 (W.D. Mich. Aug. 15, 1997) (striking down abrogation in the Uniformed Services Employment and Reemployment Rights Act (USERRA)). But see Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609, 616 n.9 (1st Cir. 1996) (concluding that Congress has the power to abrogate the Eleventh Amendment when acting under its war powers, U.S. CONST. art. I, § 8, and therefore upholding Veterans’ Reemployment Rights
As a result of the Court's decision in *Seminole Tribe*, Congress apparently has the power to abrogate the states' Eleventh Amendment protection only when it acts under section 5 of the Fourteenth Amendment.\(^\text{12}\) It is the thesis of this Article, however, that the separate doctrine of implied or constructive waiver—whereby a state impliedly waives its Eleventh Amendment immunity—is still alive after *Seminole Tribe*. Under that doctrine, which has been lost in the shuffle of the Court's abrogation decisions, Congress can exercise its Article I powers to create a legislative regime that conditions a state's acceptance of federal money or participation in a federally regulated activity on its waiver of the Eleventh Amendment.

Part I of this Article briefly traces the history of the Supreme Court's Eleventh Amendment jurisprudence, focusing in particular on the opinions developing the doctrines of implied waiver and abrogation. Part II makes the case that the doctrine of implied waiver retains validity after *Seminole Tribe*, at least with respect to federal statutes passed pursuant to the Spending Clause\(^\text{13}\) that condition the receipt of federal funds on the states' waiver of the Eleventh Amendment and statutes passed under Congress's other Article I powers that regulate an activity voluntarily undertaken by the states. Finally, Part III considers other potential constitutional impediments to the resurrection of the implied waiver doctrine, examining both the scope of Congress's authority under the Spending Clause and, more generally, the Tenth Amendment's protection of state sovereignty.\(^\text{14}\) The Article concludes that although *Seminole Tribe* prevents Congress from unilaterally abrogating the states' Eleventh Amendment immunity when it acts under Article I, Act, the predecessor to USERRA).


12. U.S. CONST. amend. XIV, § 5 (giving Congress “power to enforce, by appropriate legislation, the provisions of” that amendment). For further discussion of Congress's power to abrogate the Eleventh Amendment when acting under section 5, see infra notes 39-50 and accompanying text.

13. U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”).

14. U.S. CONST. amend. X (providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”).
nothing bars Congress from using its Article I powers to solicit state waivers of the Eleventh Amendment.

I. THE SUPREME COURT'S ELEVENTH AMENDMENT JURISPRUDENCE

The Supreme Court decisions interpreting the Eleventh Amendment have been called "tortuous,"\(^\text{15}\) "confusing and intellectually indefensible,"\(^\text{16}\) and "replete with historical anomalies, internal inconsistencies, and senseless distinctions."\(^\text{17}\) On its face, the Amendment bars only federal court suits filed against a state by citizens of another state or of another country,\(^\text{18}\) but since its 1890 decision in *Hans v. Louisiana*,\(^\text{19}\) the Court has insisted that the Amendment also was intended to bar citizens from suing their own states in federal court.\(^\text{20}\) Nevertheless,


\(^{18}\) See supra note 2 (quoting the text of the Eleventh Amendment).

\(^{19}\) 134 U.S. 1 (1890).


The Court's faithfulness to *Hans* has also generated a great deal of criticism from academics, most of whom believe that the Eleventh Amendment was intended to limit only diversity jurisdiction, and not federal question jurisdiction. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1473-82 (1987); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pt. 1), 126 U. Pa. L. Rev. 515
the Court has concluded that there are two separate circumstances in which a plaintiff can bring a suit that would otherwise be barred by the Eleventh Amendment: when the state


21. The Eleventh Amendment bars suits brought against a state by any plaintiff other than the United States or one of the other states. See Principality of Monaco v. Mississippi, 292 U.S. 313, 328-29 (1934) (permitting suits brought by the federal government or another state on the grounds that they are "inherent in the constitutional plan"). In addition, the Eleventh Amendment bars suits filed against a state official in her official capacity so long as the plaintiff is seeking only prospective injunctive relief. See Edelman v. Jordan, 415 U.S. 651, 663 (1974).

The Amendment does not, however, bar a suit filed against a state official in her official capacity so long as the plaintiff is seeking only prospective injunctive relief. See id. at 654; Ex parte Young, 209 U.S. 123, 159-60 (1908). Some commentators have argued that the Ex parte Young exception "sapped state sovereign immunity of any real bite, leaving only a narrow domain within which to operate." Henry Paul Monaghan, The Sovereign Immunity "Exception", 110 HARV. L. REV. 102, 127 (1996); see also Seminole Tribe, 116 S. Ct. at 1131 n.16 (relying on the availability of injunctive relief under Ex parte Young in dismissing concerns about the drastic impact of Seminole Tribe as "misleadingly overbroad"). But an Ex parte Young suit provides no compensation to the plaintiff, and injunctive relief is not available as a matter of course in all cases. See generally 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, at 361-403 (3d ed. 1991) (describing various limits on injunctive relief). Moreover, the Court's recent opinion in Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028 (1997), may evidence a desire on the part of at least some members of the Court to cut back on the scope of the Ex parte Young doctrine. See id. at 2034 (noting that interpreting Ex parte Young to permit every prospective injunctive suit filed against a state
has waived its Eleventh Amendment immunity, or when Congress has abrogated that immunity. These two doctrines are examined in the following sections.

A. THE WAIVER CASES

The Supreme Court has long acknowledged that the Eleventh Amendment is subject to waiver.22 Just as states can waive their sovereign immunity and agree to be sued in their own state courts, and just as individuals can waive the rights guaranteed them by the Constitution, so a state can waive its Eleventh Amendment immunity from suit in federal court.23 The Court's Eleventh Amendment cases have recognized two forms of waiver: express waiver and implied waiver.

A state expressly waives its Eleventh Amendment protection by "specify[ing] [its] intention to subject itself to suit in federal court."24 The doctrine of express waiver involves inter-

official "would be to adhere to an empty formalism and to undermine the principle... that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction"; id. at 2035-40 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (suggesting that applicability of the Ex parte Young exception depends upon a case-by-case analysis that examines the availability of a state forum, the nature of the federal rights at issue, and the presence of "special factors counselling hesitation"); see also infra note 57 (describing restrictions on Ex parte Young doctrine articulated in Seminole Tribe).

Likewise, the Eleventh Amendment does not bar even a damages suit filed against a state official in her individual or personal capacity. But an individual-capacity damages suit does not afford a complete remedy in cases where the responsible officials are difficult to identify, outside of the court's jurisdiction, judgment-proof, immune, or likely to arouse sympathy from the jury. See, e.g., Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1996 SUP. CT. REV. 1, 48 (concluding that a "regime of personal official liability... seems neither very practical, politically feasible, nor likely to contribute to harmonious federalism"); Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 YALE L. J. 447, 456 (1978); Vázquez, supra note 4, at 1794-1804.

22. See, e.g., Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959) (noting that the Eleventh Amendment "is an immunity which a State may waive at its pleasure"); Clark v. Barnard, 108 U.S. 436, 447 (1883) ("The immunity from suit belonging to a State... is a personal privilege which it may waive at pleasure.").

23. See ORTH, supra note 17, at 123 (noting that the doctrine of waiver became possible "[o]nce the Supreme Court had linked the Eleventh Amendment with sovereign immunity in Hans v. Louisiana").

24. Atascadero, 473 U.S. at 241. Thus, a state does not expressly waive its Eleventh Amendment immunity by waiving sovereign immunity and consenting to be sued in its own state courts, see Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 149-50 (1981) (per curiam), or even by authorizing suit in "any court of competent jurisdic-
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interpretation of a state statute or constitutional provision as a matter of state law.25

By contrast, implied waiver—the type of waiver of concern here—involves an interpretation of a federal statute as a matter of federal law. The doctrine of implied waiver is most often associated with the Supreme Court’s 1964 ruling in Parden v. Terminal Railway.26 In that case, the Court held that the State of Alabama had impliedly consented to be sued by injured employees under the Federal Employers’ Liability Act (FELA)27 when it chose to operate an interstate railroad:

Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.28

Nine years later, in Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare (Missouri Employees),29 the Court distinguished Parden and held that employees of state health facilities in Missouri could not sue the state for failing to pay them overtime wages due under the Fair Labor Standards Act.30 In concluding that the state had not impliedly consented to be sued, the Court saw no reason to extend the ruling in Parden—which involved “a rather isolated state activity,” a “railroad business . . . operated ‘for profit’ . . . in [an] area where private persons and corporations normally ran the enterprise”—to the facts of Missouri Employ-


27. The FELA provides that “[e]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce.” 45 U.S.C. § 51 (1994).


ees, which involved state hospitals and facilities that were not "proprietary" and were not "operated for profit," and whose employees were indistinguishable from "elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy." The Court's opinion in Missouri Employees also contained the seeds of what would later become the "clear statement" rule: the Court thought it would be "surprising" for Congress to have "deprived Missouri of her constitutional immunity without... indicating in some way by clear language that the constitutional immunity was swept away."32

The following year, in Edelman v. Jordan,33 the Court again refused to find an implied waiver, rejecting the plaintiffs' argument that the State of Illinois had consented to be sued by accepting funds under a federal welfare statute. Noting that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights," the Court concluded that the "mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts."34 Similarly, the Court observed in its 1985 decision, Atascadero State Hospital v. Scanlon, that "the mere receipt of federal funds cannot establish that a State has consented to suit in federal court."35

Finally, in its 1987 ruling in Welch v. Texas Department of Highways & Public Transportation,36 the Court expressly adopted the "clear statement" rule for implied waivers. A state impliedly waives its Eleventh Amendment immunity, the Court said, only when a federal statute expresses in "unmistakably clear language" Congress's intent to permit suits against the

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32. Id. at 285.
34. Id. at 673.
36. 483 U.S. 468 (1987). In Welch, a state employee who was injured while working on a ferry dock brought suit under the Jones Act, which allows "[a]ny seaman who shall suffer personal injury in the course of his employment" to bring a damages action against his employer in federal court. 46 U.S.C. App. § 688(a) (1994).
state in federal court. In so holding, the Court indicated that Parden was overruled to the extent it was inconsistent with this clear statement rule.

B. THE ABROGATION CASES

The Supreme Court first recognized Congress’s power to abrogate the states’ Eleventh Amendment protection without their consent in its 1976 decision in Fitzpatrick v. Bitzer. In that case, a sex discrimination suit brought by state employees under Title VII of the Civil Rights Act of 1964, the Court unanimously held that “the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment” and that Congress therefore has the power to abrogate the Eleventh Amendment when acting pursuant to section 5. The Court reasoned that the Fourteenth Amendment, enacted as part of the wholesale restructuring following the Civil War, contemplated a “shift in the federal-state balance” and thus “sanctioned intrusions by Congress . . . into the judicial, executive, and legislative spheres of autonomy previously reserved to the States”—including the authorization of suits that would be “constitutionally impermissible in other contexts.”

Three years later, however, the Court began to exhibit some reluctance in inferring that Congress did in fact exercise the abrogation power recognized in Fitzpatrick. In its 1979

37. Welch, 483 U.S. at 478.
38. See id.
41. Fitzpatrick, 427 U.S. at 456. For the language of section 5, see supra note 12.
42. Fitzpatrick, 427 U.S. at 455, 456. The Court explained:
When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is “appropriate legislation” for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials . . . .

Id. at 456 (citations omitted). For a discussion of additional limits the Court has recently placed on Congress’s power to determine what is “appropriate legislation” to enforce the Fourteenth Amendment, see infra note 62 and accompanying text.
ruling in Quern v. Jordan, the Court held that Congress did not intend to abrogate the Eleventh Amendment when it enacted § 1983, the Reconstruction-era civil rights statute that created a cause of action in federal court against "[e]very person" who violates a right "secured by the Constitution and laws" while acting under color of state law. Although the Court thought there was "no question" that Congress believed § 1983 "ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States," it refused to "leap . . . to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States." After examining the language and legislative history of § 1983, the Court concluded that the statute does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.

In its 1985 decision in Atascadero State Hospital v. Scanlon, the Court completed its march toward the clear statement rule, refusing even to consider evidence from the legislative history of the Rehabilitation Act suggesting that Congress intended that statute to constitute an exercise of its section 5 abrogation power. Instead, the Court said, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." Four years later, the

44. 42 U.S.C. § 1983 (1994) (creating a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws").
45. Quern, 440 U.S. at 342.
46. Id. at 345. For commentary critical of Quern's reading of the legislative history of § 1983, see, for example, Bruce Mc Birney, Note, Quern v. Jordan: A Misdirected Bar to Section 1983 Suits Against States, 67 CAL. L. REV. 407 (1979).
48. Although the state argued before the Court that the statute was passed pursuant to the Spending Clause, and not section 5 of the Fourteenth Amendment, the Court noted that the defendants had conceded in the courts below that the statute was an exercise of Congress's section 5 power and therefore analyzed the statute on that basis. See id. at 244 n.4.
49. Id. at 242 (emphasis added). The majority explained that because
Court added in Dellmuth v. Muth, “Lest Atascadero be thought to contain any ambiguity,... [l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment.”

In the late 1980s, the Court turned its attention to the question of whether Congress’s power to abrogate the Eleventh Amendment is confined to statutes passed pursuant to section 5 of the Fourteenth Amendment. After expressly declining to resolve this issue on two separate occasions, five members of the Court agreed in Pennsylvania v. Union Gas Co. that Con-

“The States occupy a special and specific position in our constitutional system,” id. (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547 (1985)), it is “incumbent upon the federal courts to be certain of Congress’s intent before finding that federal law overrides the guarantees of the Eleventh Amendment,” especially in cases where the courts are expanding their jurisdiction and thereby enhancing their own power. Id. at 243.

The four dissenters criticized the majority for creating “special rules of statutory draftingmanship that Congress must obey before the Court will accord recognition to its act,” noting that “[t]hese special rules of statutory drafting are not justified (nor are they justifiable) as efforts to determine the genuine intent of Congress” and that “no reason has been advanced why ordinary canons of statutory construction would be inadequate to ascertain [that] intent.” Id. at 253-54 (Brennan, J., dissenting).

The year following the Court’s decision in Atascadero, Congress passed the Rehabilitation Act Amendments of 1986, expressly indicating its intent to subject the states to suit under the Rehabilitation Act as well as “any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.” 42 U.S.C. § 2000d-7(a)(1) (1994).

50. 491 U.S. 223, 230 (1989) (refusing to find that the Education of the Handicapped Act met the clear statement rule). For commentary critical of the clear statement rule, see, for example, William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 VAND. L. REV. 593, 621-23, 629-45 (1992) (criticizing clear statement rules in general, and also noting that the Court “played a kind of ‘bait and switch’ trick on Congress” by applying Atascadero’s clear statement rule even to older federal statutes); Vicki C. Jackson, One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term, 64 S. CAL. L. REV. 51, 77-91 (1990). But cf. George D. Brown, State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon, 74 GEO. L.J. 383, 388 (1985) (defending the clear statement rule because it “ensures that Congress knew what it was doing” in the abrogation context, and, in the case of implied waiver, “provides the additional assurance that the state knows what it is getting into”).


gress could abrogate the Eleventh Amendment when legislat-
ing under the Commerce Clause.\textsuperscript{53} Justice Brennan's plurality
opinion broadly argued that "[t]he language of the Eleventh
Amendment gives us no hint that it limits congressional
authority; it refers only to "the judicial power" and forbids
"constru[ing]" that power to extend to the enumerated suits—
language plainly intended to rein in the Judiciary, not Con-
gress."\textsuperscript{54} In addition, Brennan relied on the theory initially ex-
pounded in \textit{Parden} that "the States surrendered a portion of
their sovereignty when they granted Congress the power to
regulate commerce."\textsuperscript{55} Although Justice Brennan's plurality
opinion was joined by only three other Justices, Justice White
provided the critical fifth vote, agreeing with Justice Brennan's
conclusion that Article I gave Congress the authority to abro-
gate the Eleventh Amendment but indicating, without elabo-
ration, that he did "not agree with much of [Justice Brennan's]
reasoning."\textsuperscript{56}

Most recently, in \textit{Seminole Tribe}, the Court overturned the
seven-year-old ruling in \textit{Union Gas}, holding this time that Con-
gress does not have the power to abrogate the states' Eleventh

\textsuperscript{53} U.S. CONST. art. I, § 8, cl. 3.

\textsuperscript{54} \textit{Union Gas}, 491 U.S. at 18; \textit{see also} John E. Nowak, \textit{The Scope of Congression-
al Power to Create Causes of Action Against State Governments and
the History of the Eleventh and Fourteenth Amendments}, 76 COLUM.
L. REV. 1413, 1469 (1975) (arguing that the Eleventh Amendment was intended to
limit only the power of the federal courts, and thus that "Congress should be
free to determine the extent of federal court jurisdiction over state govern-
ments"); Laurence H. Tribe, \textit{Intergovernmental Immunities in Litigation,
Taxation, and Regulation: Separation of Powers Issues in Controversies About
Federalism}, 89 HARV. L. REV. 682 (1976) (same). \textit{But see} Martha A. Field, \textit{The
Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional
Imposition of Suit upon the States}, 126 U. PA. L. REV. 1203, 1252-61 (1978)
(criticizing the notion that the Eleventh Amendment creates a "dichotomy be-
tween congressional and judicial power").

\textsuperscript{55} \textit{Union Gas}, 491 U.S. at 14 (quoting \textit{Parden v. Terminal Ry.}, 377 U.S.
184, 191 (1964)). Justice Brennan explained:

\begin{quote}
Because the Commerce Clause withholds power from the States at
the same time as it confers it on Congress, and because the congres-
sional power thus conferred would be incomplete without the author-
ity to render States liable in damages, it must be that, to the extent
that the States gave Congress the authority to regulate commerce,
they also relinquished their immunity where Congress found it ne-
ceessary, in exercising this authority, to render them liable.
\end{quote}

\textit{Id.} at 19-20.

\textsuperscript{56} \textit{Id.} at 57 (White, J., concurring in the judgment in part and dissenting
in part). For a comprehensive discussion of \textit{Union Gas}, see \textit{Jackson, supra
note 50, at 56-80.}
Amendment immunity when acting under Article I.\(^57\) Noting that “we always have treated *stare decisis* as a ‘principle of policy,’ and not as an ‘inexorable command,’” the Seminole Tribe majority dismissed *Union Gas* as a “deeply fractured decision” and “a solitary departure from established law.”\(^58\) Specifically, the Court held that “the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III” that is “not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government.”\(^59\) The

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57. 116 S. Ct. 1114, 1124-32 (1996). Specifically, the Court struck down a provision in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7) (1994), that authorized Native American tribes to bring suit in federal court against states that failed to comply with their statutory duty to negotiate in good faith with tribes seeking to enter into compacts that would govern the operation of certain gaming activities, such as slot machines, lotteries, and casino games. *See id.* § 2710(d)(3)(A). The Court acknowledged that the statutory language indicated a clear congressional intent to abrogate the Eleventh Amendment, thereby satisfying the clear statement rule. *See* 116 S. Ct. at 1123-24. Nevertheless, the Court concluded that the provision had been passed pursuant to Congress’s authority under the Indian Commerce Clause to “regulate Commerce . . . with the Indian Tribes,” U.S. CONST. art. I, § 8, cl. 3, and that Congress lacked the power to abrogate the Eleventh Amendment when legislating under its Article I powers. *See* 116 S. Ct. at 1131-32. *But cf.* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 133 (5th ed. 1995) (“Even during periods when the [Supreme Court was] debating whether to significantly restrict the congressional power to regulate intrastate activities under the commerce power, there was no serious advocacy” of restricting congressional authority under the Indian Commerce Clause because the Court “never recognized any important or legitimate state interest in . . . dealings with American Indians.”).

The Court also dismissed the portion of the tribe’s suit naming the Governor as a defendant. Although the *Ex parte Young* exception to the Eleventh Amendment does not bar a suit against a state official seeking prospective injunctive relief, *see supra* note 21, the Court explained that “where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young.*” *Seminole Tribe*, 116 S. Ct. at 1132. Given the statute’s repeated references to “the State,” the Court concluded that Congress did not intend to create a cause of action against individual state officials. *See id.* at 1132-33. This portion of the *Seminole Tribe* decision has received mixed reviews. *Compare* David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547 (1997) (defending the Court’s position), and Monaghan, *supra* note 21, at 126-32 (same), with Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 510-41 (1997) (criticizing the Court), and Vézquez, *supra* note 4, at 1715-17 (same).


59. *Id.* at 1129, 1131 (quoting Pennhurst State Sch. & Hosp. v. Halder-
Court did not, however, question Fitzpatrick's holding that Congress may abrogate the states' immunity when acting under the Fourteenth Amendment. In fact, the Court distinguished the Fourteenth Amendment on three grounds: it was adopted "well after the adoption of the Eleventh Amendment," its prohibitions are "expressly directed at the States," and it "fundamentally altered the balance of state and federal power struck by the Constitution." 60

After Seminole Tribe, therefore, Congress's authority to abrogate the Eleventh Amendment is apparently restricted to statutes passed pursuant to its power to enforce the Fourteenth Amendment—61—a power that itself has been limited by the Court's recent ruling that statutes enacted under section 5 cannot be "substantive," but must instead "remedy or prevent unconstitutional actions." 62 Although the Seminole Tribe decision has generated a good deal of critical commentary, 63 its impact

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60. Id. at 1128, 1125.

61. In Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609, 616 n.9 (1st Cir. 1996), however, the court held that Congress has the power to abrogate the Eleventh Amendment when acting under its war powers, U.S. Const. art. I, § 8, concluding, without explanation, that Seminole Tribe "does not control the War Powers analysis." Id.

62. City of Boerne v. P.F. Flores, 117 S. Ct. 2157, 2164 (1997). In Boerne, the Court struck down the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (1994), which prohibited any governmental agency or official from "substantially burden[ing] a person's exercise of religion" unless it could demonstrate that the burden was "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest"—that is, unless the burden could withstand strict scrutiny. Id. § 2000bb-1(b). The Court concluded that RFRA exceeded Congress's power to enforce the Fourteenth Amendment because it was aimed at "alter[ing] the meaning of the Free Exercise Clause" as interpreted by the Court in Employment Division v. Smith, 494 U.S. 872, 882-89 (1990) (refusing to apply strict scrutiny to neutral, generally applicable laws that have the effect of burdening particular religious practices), and because, given its "[sweeping coverage," the statute was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Boerne, 117 S. Ct. at 2164, 2170.

63. See, e.g., Herbert Hovenamp, Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopes and Seminole Tribe Decisions, 96 Colum. L. Rev. 2213, 2237-47 (1996) (concluding that Seminole Tribe "offends both the plain meaning and the historical intent of the Constitution"); Jackson, supra note 57, at 500 (describing Seminole Tribe as "a clear mistake from which the Court should retreat as quickly as possible"); Meltzer, supra note 21, at 65, 21 (referring to the Court's decision as "regrettable" and "not well supported"); Monaghan, supra note 21, at 103 (claiming that Seminole Tribe makes a "symbolic statement" about state autonomy, but otherwise has little effect on the states' accountability for violating federal law); see also supra
on the implied waiver doctrine has been largely overlooked. The next part of this Article turns to that issue.

II. THE STATUS OF THE IMPLIED WAIVER DOCTRINE

The doctrines of implied waiver and abrogation, though related, involve two distinct concepts. Implied waiver presupposes a voluntary decision on the part of the states to forego their Eleventh Amendment protection, whereas abrogation is an exercise of congressional power to remove the states' immunity regardless of their wishes. Nevertheless, the two doctrines have been hopelessly confused and conflated for some time. The Supreme Court's decision in *Seminole Tribe* provides the opportunity—and the impetus—to resurrect the distinction between them.

A. THE CONFLATION OF IMPLIED WAIVER AND ABROGATION PRIOR TO *SEMINOLE TRIBE*

The implied waiver cases preceded the abrogation cases: *Parden* was decided in 1964, and it was not until twelve years later that the Supreme Court, in *Seminole Tribe*, resolved the issue of implied waiver. The implied waiver cases precede the abrogation cases: *Parden* was decided in 1964, and it was not until twelve years

notes 54 and 57 (citing additional sources critical of the approach taken in *Seminole Tribe*). For additional analysis of the meaning and impact of *Seminole Tribe*, see Vázquez, supra note 4.

Some of these commentators have suggested ways of limiting the impact of *Seminole Tribe* other than by reviving the implied waiver doctrine. First, Congress might make clear that a particular federal statute creates a property right whose deprivation denies due process, thus triggering Congress's Fourteenth Amendment power to abrogate the Eleventh Amendment. See Jackson, supra note 57, at 507-10; Meltzer, supra note 21, at 49 n.230; Vázquez, supra note 4, at 1744-66. Second, an individual might bring suit against a state in the name of the United States, which is not subject to the Eleventh Amendment bar. See Jackson, supra note 57, at 505-06; Meltzer, supra note 21, at 55-57; Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 Tex. L. Rev. 539 (1995). But see Blatchford v. Native Village, 501 U.S. 775, 785 (1991) (expressing "doubt... that [the federal government's] sovereign exemption can be delegated") (emphasis deleted). And third, an individual could file suit in state court, where the Eleventh Amendment does not apply, with the eventual possibility of appellate review in the Supreme Court. See Jackson, supra note 57, at 503-05; Meltzer, supra note 21, at 57-60; Monaghan, supra note 21, at 125-26; see also Jackson, supra note 20, at 13-39 (noting the tension in the Court's Eleventh Amendment jurisprudence created by this option). But cf. Vázquez, supra note 4, at 1717-22 (suggesting that *Seminole Tribe* may preclude Congress from authorizing suits against the states even in state court).


later, in 1976, that the Supreme Court first recognized the abrogation doctrine. But even that first abrogation case, *Fitzpatrick v. Bitzer*,""""66 did not clearly distinguish abrogation from implied waiver. At one point, the majority in *Fitzpatrick* remarked that """"the necessary predicate for [the implied waiver] doctrine is congressional intent to *abrogate* the immunity conferred by the Eleventh Amendment.""""67 Likewise, in *Quern v. Jordan*,68 the Court supported its conclusion that Congress had not intended to exercise its abrogation power when enacting § 1983 by citing *Missouri Employees*,69 an implied waiver case, for the proposition that """"[o]ur cases consistently have required a clearer showing of congressional purpose to *abrogate* Eleventh Amendment immunity.""""70

Later, in *Atascadero State Hospital v. Scanlon*,71 after announcing that Congress must make its intent clear on the face of the statute when exercising its abrogation power, the Court went on to address briefly the plaintiff's implied waiver argument. In finding insufficient evidence of implied waiver, the Court simply cited its previous discussion of the abrogation issue, rejecting the implied waiver argument on the grounds that Congress had failed to satisfy the clear statement requirement and therefore had not indicated an intent to abrogate the Eleventh Amendment:

> We have decided today that the Rehabilitation Act does not evince an unmistakable congressional purpose, pursuant to § 5 of the Fourteenth Amendment, to subject unconsenting States to the jurisdiction of the federal courts. The Act likewise falls short of manifesting a

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67. 427 U.S. at 451-52 (emphasis added). In addition, the Court observed that the """"threshold fact of congressional authorization""""—""""the prerequisite found present in *Parden* and wanting in [Missouri] *Employees*"""" (both implied waiver cases)—was clearly present in *Fitzpatrick*. *Id.* at 452 (quoting *Edelman v. Jordan*, 415 U.S. 651, 672 (1974)).


70. *Quern*, 440 U.S. at 343 (emphasis added). The Court's opinion in *Quern* then went on to distinguish the statute at issue in *Missouri Employees*, where the Court had found insufficient evidence of implied waiver, from that at issue in *Fitzpatrick*, which found sufficient evidence of abrogation. *See id.* at 343-44.

clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.\textsuperscript{72}

Two years later, the Court explicitly applied Atascadero's clear statement rule to the doctrine of implied waiver in Welch v. Texas Department of Highways and Public Transportation.\textsuperscript{73} In so doing, the Court relied indiscriminately on the implied waiver line of cases and the abrogation cases, most notably Atascadero.\textsuperscript{74} Moreover, in describing its earlier holding in Parden, the pivotal implied waiver case, the Welch Court used both "waiver" and "abrogation" language, explaining at one point that the Parden Court "concluded that the State of Alabama had waived its Eleventh Amendment immunity" and noting in the very next sentence that the Parden Court "reasoned that Congress evidenced an intention to abrogate Eleventh Amendment immunity."\textsuperscript{75}

After Welch, the standards for finding abrogation and implied waiver were identical, and any distinction between the two doctrines became moot.\textsuperscript{76} Although Congress had the authority to abrogate the Eleventh Amendment under either the Fourteenth Amendment (per Fitzpatrick) or the Commerce Clause (per Union Gas), a federal statute that did not comply with the clear statement rule would not be interpreted as an exercise of the abrogation power or as an invitation to the states to impliedly waive their Eleventh Amendment immunity. The doctrine of implied waiver was basically a dead letter, entirely encompassed within the doctrine of abrogation, and there was no need for a court to conduct an inquiry into the question of implied waiver once it had resolved the abrogation issue.

B. RESURRECTING THE DISTINCTION

With the issuance of the Seminole Tribe decision, however, the distinction between the two doctrines once again becomes important. Although Seminole Tribe makes clear that a statute passed pursuant to Congress's Article I powers cannot abrogate the states' Eleventh Amendment protection, it does not necessarily follow that such a statute—assuming it satisfies

\textsuperscript{72} 473 U.S. at 247 (emphasis added).
\textsuperscript{73} 483 U.S. 468 (1987). For a description of Welch, see supra notes 36-38 and accompanying text.
\textsuperscript{74} See Welch, 483 U.S. at 476-78.
\textsuperscript{75} Id. at 476 (emphasis added).
\textsuperscript{76} But cf. Brown, supra note 50, at 388 (noting that the clear statement rule performs a different function in the two contexts).
the clear statement rule—cannot serve as the basis for a finding that the state impliedly waived its Eleventh Amendment immunity. As one commentator has observed, "[i]t actually may be irrelevant whether Congress does or does not have the power to suspend state sovereign immunity unilaterally," given that "one of the few things that is really clear about the Eleventh Amendment is that it is subject to waiver by the state" and that "Congress seems to be free to offer incentives for waiver." 77

77. Daniel A. Farber, Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem, 83 Va. L. Rev. 397, 402-03 (1997) (acknowledging, however, that "we can't necessarily assume that the Eleventh Amendment is totally irrelevant in practice, at least not without a careful look at possible transaction costs"); see also Daniel A. Farber, The Coase Theorem and the Eleventh Amendment, 13 Const. Commentary 141, 141-42 (1996) (concluding that the Eleventh Amendment is subject to waiver, but that requiring consent from states may increase transaction costs); Meltzer, supra note 21, at 55 (recognizing the possibility that Congress could use its spending power to solicit waivers of the Eleventh Amendment, but concluding that implied waiver is not "a cure-all for the practical concerns voiced by the Seminole dissenters" because some federal statutes cannot readily be "associated with federal spending programs"); Vázquez, supra note 4, at 1707-08 & n.112 (discussing conditional spending statutes as a means of obtaining state waivers of immunity); Constitutional Law Scholars Attempt to Distill Recent Supreme Court Term, 65 U.S.L.W. 2274, 2288 (Oct. 29, 1996) (quoting Judge Frank Easterbrook as commenting that, even after Seminole Tribe, "the federal government 'has the whip hand in all this'"); cf. Jackson, supra note 57, at 504 n.39 (noting that implied waiver is "a possibility left open by Seminole Tribe," but concluding that it does not permit "the mandatory enforcement of regulatory legislation").

A number of federal courts have examined the status of the implied waiver doctrine in the wake of Seminole Tribe. Some of them continue to find instances of implied waiver. See Premo v. Martin, 119 F.3d 764, 770-71 (9th Cir. 1997) (concluding that the state waived the Eleventh Amendment by agreeing to participate in the Randolph-Sheppard program, a cooperative federal-state program providing employment opportunities for the blind, given that the governing federal statute explicitly required participating states to agree to submit grievances to judicially appealable arbitration); US West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1369-70 (W.D. Wa. 1997) (finding waiver where Congress conditioned state participation in the Telecommunication Act's interconnection agreement arbitration and approval process on the state's consent to federal court review of the state's actions, and the state chose to participate in that process).

Other courts seem to presume that the doctrine retains validity: they reject the plaintiffs' implied waiver arguments on the merits—typically on the grounds that the clear statement rule was not met—without discussing what impact Seminole Tribe has had on the implied waiver doctrine. See Mills v. Maine, 118 F.3d 37, 50 (1st Cir. 1997) (denying plaintiffs' request for discovery designed to uncover evidence supporting their waiver argument because they had not identified any "federal program or statute that supposedly required a waiver of state immunity as a condition for state participation or receipt of
Nevertheless, the Second Circuit recently suggested that the continuing viability of *Parden* is "precarious," and another court held outright that "*Parden* has been overruled by implication by *Seminole Tribe.*" Four related arguments have been made that arguably support this conclusion and militate against resurrection of the implied waiver doctrine: first, that *Seminole Tribe* makes clear that the Eleventh Amendment is jurisdictional and expressly "precludes Congress from using Article I to expand Article III"; second, that litigants cannot waive jurisdictional requirements; third, that *Seminole Tribe* federal money); *Booth v. Maryland*, 112 F.3d 139, 145 (4th Cir. 1997) (finding that neither the federal habeas statute nor the Antiterrorism and Effective Death Penalty Act of 1996 conditioned state participation on the state's willingness to consent to non-habeas civil suits); *Mulverhill v. New York*, Nos. 87-CV-855 & 91-CV-1282, 1997 U.S. Dist. LEXIS 10109, at *23 (N.D.N.Y. July 10, 1997) (finding that the state had not impliedly consented to be sued under the Fair Labor Standards Act (FLSA) because it was involved in hiring and paying employees before the FLSA was enacted, though recognizing that a state that "chooses to operate interstate common carrier railroads or ferries" may impliedly waive the Eleventh Amendment); *Hodgson v. Mississippi Dep't of Corrections*, 963 F. Supp. 776, 786-87 (E.D. Wis. 1997) (concluding that no federal statute provided that states that decide to join interstate compact by enacting the Uniform Act for Out-of-State Parolee Supervision thereby waive the Eleventh Amendment); *Taylor v. Virginia*, 951 F. Supp. 591, 603 (E.D. Va. 1996) (refusing to find implied waiver because the Fair Labor Standards Act and various federal highway statutes did not "reflect[] Congressional intent to condition receipt of [federal] funds on waiver of the States' Eleventh Amendment immunity"); *Hoeffner v. University of Minn.*, 948 F. Supp. 1380, 1394 (D. Minn. 1996) (concluding that the defendant's participation in a federally regulated experimental drug program did not constitute an implied waiver of the Eleventh Amendment because the governing federal statutes did not "evidence[] a congressional intent to subject a State to a waiver of its Eleventh Amendment immunity if that State should elect to enter the field of drug manufacture"). *See also infra* cases cited in notes 117 & 118.


78. *Close*, 125 F.3d at 40.


81. *See* *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1158 (1996) (Souter, J., dissenting); *Meltzer, supra* note 21, at 53 n.243 (articulating the argument); *see also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 25-26 (1989) (Stevens, J., concurring) (noting that, while a state may waive its sovereign immunity, a
endorses the position taken by Justice Scalia in his Union Gas dissent that "the difference between constructive waiver and abrogation is purely semantic," thus preventing Congress from "achiev[ing] indirectly, through 'waiver,' what it cannot do directly, through express abrogation," and, finally, that Seminole Tribe explicitly rejected the "theory of surrender" underlying Parden, that is, that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce."

With respect to the first argument—that Seminole Tribe takes the position that the Eleventh Amendment is jurisdictional—it is undeniably true that the Seminole Tribe majority rejected the idea that Congress can "under Article I expand the scope of the federal courts' jurisdiction under Article III." Specifically, the Supreme Court explained:

Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

But as the Court emphasizes repeatedly throughout its opinion, including in the passage quoted above, the Eleventh Amendment envisions that a state may waive the protection afforded by the Amendment and seeks to bar only suits against a state that has not consented to be sued in federal court. For example, the Seminole Tribe majority at one point calls the notion that the states can waive the Eleventh Amendment "unremarkable." At another point, the Court notes that the "presupposition" underlying the Eleventh Amendment is that

party may not waive defects in subject matter jurisdiction); Brown, supra note 50, at 368 (observing that the doctrine of waiver "conflicts with general principles of article III federal court jurisdiction").

82. Digiore, 962 F. Supp. at 1075 (noting in addition that Scalia's dissent in Union Gas was "cited liberally and with approval" in Seminole Tribe); see also Goebel, 1996 U.S. Dist. LEXIS 20929, at *30-31.

83. College Sav. Bank, 948 F. Supp. at 419 (noting in addition that Scalia "eventually triumphed in Seminole Tribe"); see also Close, 125 F.3d at 40-41; Digiore, 962 F. Supp. at 1075; AFSCME, 949 F. Supp. at 442.


85. 116 S. Ct. at 1128.
86. Id. at 1131-32 (emphasis added).
87. See id. at 1122-23, 1128-29, 1131 n.13.
88. Id. at 1128.
"each State is a sovereign entity in our federal system" and that ""[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."" Thus, there is no jurisdictional or constitutional barrier to suing a state that has consented to be sued. In fact, it would seem to undermine the notion of ""sovereignty"" on which the Eleventh Amendment is premised to disable a state from choosing to agree to be sued in federal court.

For the same reason, the second argument—that litigants cannot waive jurisdictional requirements—is inapt in this context. Although it is true that a federal court's jurisdiction generally cannot be expanded merely because the parties are willing to waive a jurisdictional limitation, the jurisdictional bar erected by the Eleventh Amendment simply does not arise in cases where the state agrees to be sued. When a state waives its Eleventh Amendment protection, it is not seeking to waive a jurisdictional requirement and expand the court's jurisdiction—something it cannot do—but is, by virtue of its waiver, rendering the jurisdictional requirement inapplicable. As the Supreme Court explained recently in Idaho v. Coeur d'Alene Tribe, the Eleventh Amendment ""enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction."

89. 134 U.S. 1, 13 (1890) (quoting The Federalist No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).


91. Cf. Pagan, supra note 15, at 488-89 (arguing that a state that consents to suit ""waives not the lack of subject-matter jurisdiction, which a litigant never can waive, but rather the privilege of enforcing a limitation on the exercise of jurisdiction otherwise possessed by the court"). But cf. Erwin Chemerinsky, Federal Jurisdiction 406 (2d ed. 1994) (characterizing this distinction as ""ephemeral"" and noting that it ""is not followed in other areas of subject matter jurisdiction").


93. Id. at 2033 (explaining in addition that the Eleventh Amendment is not ""cast in terms of reach or competence, so [that] the federal courts are altogether disqualified from hearing certain suits brought against a State"); see also Nowak & Rotunda, supra note 57, at 50 (noting that the possibility of waiver means that the Eleventh Amendment is ""not jurisdictional in the sense that the requirement of a diversity jurisdiction is jurisdictional"); Wright et al., supra note 90, § 3522, at 68 (noting that there is an ""exception"" to the general rule in cases where the state waives the Eleventh Amendment).
The third objection to reviving the implied waiver doctrine is that *Seminole Tribe* validated Justice Scalia’s dissenting opinion in *Union Gas*, which advocated abolishing the distinction between implied waiver and abrogation, thereby preventing Congress from using “the back door of waiver” to accomplish any result it cannot achieve under the abrogation doctrine. In his *Union Gas* dissent, Justice Scalia first articulated the view (ultimately adopted by a majority of the Court in *Seminole Tribe*) that Congress may not use its Article I powers to abrogate the Eleventh Amendment and then went on to reject the plaintiffs’ implied waiver argument. With respect to implied waiver, Scalia argued:

There are obvious and fatal difficulties in acknowledging [the doctrine of implied waiver] if no Commerce Clause power to abrogate state sovereign immunity exists.... All federal prescriptions are... in a sense conditional, and—to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability—can be redescribed as invitations to “waiver.”... At bottom... to acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State’s action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers—that is, to adopt the very principle I have just rejected.

By way of example, Scalia noted that there was no real difference between a federal statute making a state liable for the costs of cleaning up any hazardous waste sites it operated and one that imposed such liability only if the state “chose” to operate the sites.

The first observation to be made about the discussion of implied waiver in Justice Scalia’s *Union Gas* dissent is that the *Seminole Tribe* majority did not even cite or refer to it, much less endorse it. In fact, the only reference to the implied waiver doctrine in the majority opinion in *Seminole Tribe* suggests that the Court consciously limited its decision to the abrogation context. The *Seminole Tribe* majority criticized the *Union Gas* plurality for “misreading... precedent” by relying on *Parden* to support its holding that the Commerce Clause gave Congress the power to abrogate the Eleventh Amendment. The

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96. *See id.* at 44.
principle that states may waive the Eleventh Amendment (the issue in *Parden*) is "completely unrelated" to the abrogation doctrine (the issue in *Union Gas* and *Seminole Tribe*), the Court explained in *Seminole Tribe*.  

Turning to the merits of Justice Scalia’s argument, his point may well have some validity with respect to the specific illustration he cites. Scalia’s example is based on the facts of *Union Gas*, where the Commonwealth of Pennsylvania was alleged to have become the “owner or operator” of a hazardous waste site when it was excavating a creek in connection with flood-control efforts and struck a deposit of coal tar that had been left by Union Gas, causing the tar to seep into the creek. Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), any “owner or operator” of a hazardous waste site, including a state, could be held liable for the costs of cleaning up the site. On those facts, it does seem like a stretch to say that Pennsylvania made a voluntary decision to operate a hazardous waste site. Just as the state’s decision to hire employees in *Missouri Employees* was not in any real sense a voluntary choice that could be interpreted as impliedly consenting to suit under the Fair Labor Standards Act (FLSA), so implying a waiver of the Eleventh Amendment is "completely unrelated" to the abrogation doctrine.

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98. *Id.*
101. *See id.* § 9607.
103. In fact, four of the five lower court opinions that have questioned the validity of the implied waiver doctrine after *Seminole Tribe*, *see supra* note 77, involve suits brought by state employees seeking overtime pay due under the FLSA, 29 U.S.C. § 201 (1994). See *Close v. New York*, 125 F.3d 31, 40 (2d Cir. 1997) (reasoning that because "New York had employees before the enactment of the FLSA and before it was made applicable to the States, its continued status as an employer cannot realistically be construed as a waiver of immunity"); *Digiore v. Illinois*, 962 F. Supp. 1064, 1076, 1075 (N.D. Ill. 1997) (noting that "the State never ‘consented’ to the application of FLSA," and thus "the FLSA cannot provide the predicate for a constructive waiver of immunity by acceptance of federal funds"); also distinguishing the State’s operation of a railroad in *Parden* and noting that “[a] state can hardly manifest consent to suit by ‘choosing’ to perform an essential governmental function or by “hiring and paying its employees,” “activities that the state has but little choice to engage in”); *Goebel v. Colorado*, No. 93-K-1227, 1996 U.S. Dist. LEXIS 20929, at *29-31 (D. Colo. June 25, 1996) (questioning the continued viability of the implied waiver doctrine “in the context of the cases at bar,” where an essential state governmental function was at issue and “the choice of either waiving its
Amendment on the facts of Union Gas might indeed be tantamount to an abrogation of the Eleventh Amendment irrespective of the state’s wishes.

But not all federal legislation passed under Congress’s Article I powers can be characterized in this way. Most notably, when Congress passes a statute under the Spending Clause,\textsuperscript{104} it offers the states a substantial amount of federal money—money over which Congress has complete control and to which the states have no legitimate claim of entitlement. The states have the option of accepting or rejecting such an offer, but if they choose to accept, it is not unfair to require them to comply with the conditions Congress sets out in the statute.\textsuperscript{105} Soliciting a waiver of the Eleventh Amendment from a state that chooses to receive federal money is very different from unilaterally abrogating the state’s immunity without giving it any real say in the matter.

Although more problematic, some statutes passed under the Commerce Clause and Congress’s other Article I powers might also be described as regulating an activity that the state has voluntarily undertaken. In Parden, for example, the State of Alabama chose to operate a railroad, an activity typically engaged in by private corporations, knowing that interstate railroads were heavily regulated by federal statute.\textsuperscript{106} Assuming the statute was clear enough to put the state on notice that state-owned railroads, like privately owned ones, could be sued

\textsuperscript{104} For the language of the Spending Clause, see supra note 13.

\textsuperscript{105} For a discussion of the scope of Congress’s authority to impose conditions when legislating under the Spending Clause, see infra Part III.A.

\textsuperscript{106} See Parden v. Terminal Ry., 377 U.S. 184, 192 (1964); see also supra notes 26-28 and accompanying text (further describing Parden).
by injured employees, it was reasonable to interpret the state's voluntary decision to become involved in the railroad business as an implicit agreement to be subject to suit in federal court. It is true, as one commentator has argued, that "[a] state does not enter into the railroad business as a way of expressing consent to suit in federal court," but that observation does not seem entirely relevant in light of the law's longstanding notions of "consent." Traditionally, an actor's voluntary decision to act in a certain way—assuming she knows the consequences of that choice—will satisfy legal requirements of consent, without regard to whether her motive for so acting was to give consent.

For another example, consider *Mills Music, Inc. v. Arizona,* where the Ninth Circuit concluded that the State of Arizona had impliedly consented to be sued under the Copyright Act when it chose to use a copyrighted musical composition as the theme song for its state fair. Although it may be true that the State of Arizona "as a practical matter [had] no choice but to utilize copyrighted material in carrying out the basic functions of government," it did have a choice about whether it would sponsor a state fair—just as the State of Alabama had no choice but to hire employees who might get injured on the job, even though it did have a choice about whether to acquire a commercial operation and employ the personnel involved in running it. The critical fact in both *Parden* and *Mills Music* is that the state "voluntarily engaged


108. For example, a spectator does not attend a sporting event as a way of expressing consent to being hit by a flying ball, but nevertheless is deemed to have assumed the risk of such an injury. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 68, at 485-86 (5th ed. 1984). Likewise, a student does not try out for a sports team as a way of expressing consent to a drug test, but the Supreme Court has upheld the random drug testing of high school athletes, reasoning that "[b]y choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally" and "have reason to expect intrusions upon normal rights and privileges, including privacy." *Vernonia School Dist. 47J v. Acton,* 115 S. Ct. 2386, 2393 (1995).

109. 591 F.2d 1278 (9th Cir. 1979).

110. John C. Beiter, *Recent Development, Copyright Infringement and the Eleventh Amendment: A Doctrine of Unfair Use?*, 40 VAND. L. REV. 225, 262 (1987). Though critical of the ruling in *Mills Music,* Beiter acknowledges that "a state instrumentality that not only uses a copyrighted work without authority, but also attempts to register the work as its own, may have impliedly waived constitutional immunity." *Id.* at 263 n.292 (citation omitted).
in what is essentially a commercial activity”—the operation of a railroad in *Parden*, the planning of a state fair in *Mills Music*—“well after federal legislation regulated the activity,” and therefore could reasonably be deemed to have impliedly waived its Eleventh Amendment immunity.\(^{111}\)

Assuming different facts in *Union Gas*, even the Commonwealth of Pennsylvania might be said to have acted voluntarily so as to impliedly consent to be sued under CERCLA. Suppose, for example, that the coal tar deposited by Union Gas had started to find its way into the creek without any intervention on the part of the Commonwealth. Suppose further that the Commonwealth—acting like a private commercial developer—had voluntarily chosen to acquire the affected property for redevelopment purposes\(^ {112}\) and had refused to clean up

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111. *Mills Music*, 591 F.2d at 1286. The specific ruling in *Mills Music* became suspect once the Supreme Court required Congress to satisfy the clear statement rule when soliciting an implied waiver or abrogating the Eleventh Amendment, see *supra* notes 36-38 and 48-50 and accompanying text (describing the clear statement rule). The Ninth Circuit ultimately overruled *Mills Music* on the grounds that the Copyright Act did not satisfy the clear statement rule. See *BV Eng'g v. University of Cal.*, 858 F.2d 1394, 1398 n.1 (9th Cir. 1988), cert. denied, 489 U.S. 1090 (1989). But after the Supreme Court held in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that Article I gave Congress the power to abrogate the Eleventh Amendment, see *supra* notes 52-56 and accompanying text, Congress relied on that power in passing the Copyright Remedy Clarification Act of 1990, which clearly indicated its intent to abrogate the states' Eleventh Amendment immunity from copyright infringement suits. See 17 U.S.C. § 511(a) (1994) (providing that "[a]ny State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment . . . or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or non-governmental entity, for . . . any . . . violation under this title"). See generally 3 *MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT* § 12.01[E][2][b], at 12-47 to 12-48 (1997) (discussing abrogation in the Copyright Remedy Clarification Act). Now that *Union Gas* has been overruled by *Seminole Tribe*, Congress no longer has the power to abrogate the Eleventh Amendment when legislating under the Copyright and Patent Clause, U.S. CONST. art. I, § 8, cl. 8, but *Seminole Tribe* does not bar Congress from using that clause to solicit an implied waiver of the Eleventh Amendment in a case like *Mills Music*.

112. Cf. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (allowing the state to condemn certain private residential property and transfer ownership from the property to the lessees without “taking actual possession of the land” or “using the property” in any way); *Berman v. Parker*, 348 U.S. 26, 33-34 (1954) (permitting the District of Columbia to use its eminent domain power for purposes of redeveloping private property for sale or lease to other private parties, even though that meant “taking from one businessman for the benefit of another businessman”).
the tar, even though it knew that any owner or operator of a hazardous waste site was liable for cleanup costs under CERCLA. Under those circumstances, it would seem fair to say that the Commonwealth voluntarily chose to become the owner or operator of a hazardous waste site and thereby impliedly waived its Eleventh Amendment immunity.

Admittedly, line-drawing problems arise with statutes enacted pursuant to the Commerce Clause and other portions of Article I that are avoided when Congress acts under the Spending Clause. These challenging line-drawing issues might tempt a court to conclude that Congress may solicit an implied waiver of the Eleventh Amendment only when legislating under the Spending Clause.113 "But the luxury of precise definitions is one rarely enjoyed in interpreting and applying the general provisions of our Constitution."114 And certainly a state that chooses to take over the operation of a private factory should not be immune from suit if it decides—in violation of congressional legislation that clearly puts it on notice that entry into this market will create a risk of federal court litigation—to pollute the surrounding waters, maintain unsafe working conditions, fix prices, or misuse copyrighted or patented materials. In those circumstances, Justice Scalia’s views notwithstanding, it seems wrong to say that implying waiver is tantamount to abrogation.

113. The complexity of these line-drawing issues did lead the Court in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), to refuse to make any further effort to define what was a “traditional,” “integral,” or “necessary” governmental function, id. at 546, or to distinguish between governmental and proprietary activities for purposes of the Tenth Amendment. See id. at 537-47. But the Court did so in the context of getting the judiciary out of the business of using the Tenth Amendment to “protect the States from overreaching by Congress.” Id. at 551. “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power,” the Court concluded. Id. at 552. Thus, the Court expressed a preference to rely on the “political process”—that is, “the built-in restraints that our system provides through state participation in federal governmental action”—to “ensure[] that laws that unduly burden the States will not be promulgated.” Id. at 556. It is not clear, however, that the current Court still endorses the approach taken in Garcia. See infra note 150. In any event, as argued in the text, the Court cannot legitimately follow that approach here and simply wash its hands of the whole inquiry. For further discussion of the Tenth Amendment’s implications for the continued viability of the implied waiver doctrine, see infra Part III.B.

114. Garcia, 469 U.S. at 561 n.4 (Powell, J., dissenting).
The final objection to reviving the implied waiver doctrine—that the doctrine’s validity is suspect because Seminole Tribe rejected Parden’s “surrender theory”—is similarly overbroad. Seminole Tribe’s holding that Congress may not use its Article I powers to abrogate the Eleventh Amendment necessarily rejects the theory articulated in Parden, among other places,115 that the states forfeited their Eleventh Amendment protection by virtue of the fact that they “surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.”116 As a result, a state may not be deemed to have waived its immunity simply because it hired employees. Seminole Tribe does not foreclose the possibility, however, that a state may be deemed to have waived its immunity by voluntarily accepting federal funds117 or by voluntarily choosing to engage in an activity subject to federal regulation.118

117. See Clark v. California, 123 F.3d 1267 (9th Cir. 1997) (noting that a state may waive the Eleventh Amendment even in the absence of congressional abrogation, and that “[o]ne way for a state to waive its immunity is to accept federal funds where the funding statute ‘manifest[s] a clear intent to condition participation in the programs funded under the Act on a State’s consent to waive its constitutional immunity’”) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985)); Gehrt v. University of Ill., No. 96-1317, 1997 U.S. Dist. LEXIS 10178, at *7 (C.D. Ill. May 22, 1997) (observing that states “may consent to federal jurisdiction . . . by participating in a federally funded program that explicitly requires consent for participation”).
118. See Premo v. Martín, 119 F.3d 764, 770 (9th Cir. 1997) (noting that a state “will be deemed to have waived its sovereign immunity when . . . Congress clearly intended to condition the state’s participation in a program or activity on the state’s waiver of immunity”); Nihiser v. Ohio Envtl. Protection Agency, No. C2-94-1258, 1997 U.S. Dist. LEXIS 15405, at *3 (S.D. Ohio Aug. 6, 1997) (observing that a state “can waive its sovereign immunity when it voluntarily participates in a program where Congress has conditioned participation in the program on the state’s consent to suit in federal court”); Hodgson v. Mississippi Dep’t of Corrections, 963 F. Supp. 776, 787 (E.D. Wis. 1997) (pointing out that a state can “waive its immunity implicitly by voluntarily participating in a federal program when Congress has expressly conditioned state participation in that program on the state’s consent to suit in federal court”).

Even three of the five lower court opinions that have questioned the continued viability of the implied waiver doctrine, see supra note 77, seemingly acknowledge this possibility. See Close v. New York, 125 F.3d 31, 40 (2d Cir. 1997) (noting that “the FLSA deals with employee rights, not economic endeavors”); Digiore v. Illinois, 962 F. Supp. 1064, 1075 (N.D. Ill. 1997) (pointing out that the case did not involve “a voluntary spending program whose benefits the states may decide to accept or reject”); Goebel v. Colorado, No. 93-K-
Thus, the Court's decision in *Seminole Tribe* breathes new life into the implied waiver doctrine, furnishing a reason to distinguish once again between cases of implied waiver and cases of abrogation. Furthermore, there is no basis for reading *Seminole Tribe* to undermine the implied waiver doctrine, at least with respect to statutes passed pursuant to the Spending Clause that condition the receipt of federal funds on a state's waiver of the Eleventh Amendment, and with respect to statutes passed under Congress's other Article I powers that regulate activities voluntarily undertaken by the states. The next part of this Article considers whether any other hurdles stand in the way of reviving the implied waiver doctrine in the post-*Seminole Tribe* world.

**III. OTHER POSSIBLE HURDLES CONFRONTING THE IMPLIED WAIVER DOCTRINE**

As explained above, *Seminole Tribe* does not jeopardize congressional efforts to enact legislation that expressly conditions a state's voluntary decision to accept federal funds or participate in a federally regulated activity on its willingness to waive the Eleventh Amendment, as long as such legislation satisfies the clear statement rule. Nevertheless, such statutes must otherwise pass constitutional muster and fall within one of Congress's Article I powers. 119 One such power that is likely to be of critical

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1227, 1996 U.S. Dist. LEXIS 20929, at *29 (D. Colo. June 25, 1996) (observing that "[t]he sine qua non of waiver"—"the voluntary exercise of a real option"—was absent there).

Likewise, in *AFSCME v. Virginia*, 949 F. Supp. 438, 443 (W.D. Va. 1996), the court rejected on the merits the plaintiffs' argument that "discovery might possibly produce evidence that the Commonwealth waived its Eleventh Amendment immunity by participating in a federal program in which Congress explicitly conditioned participation on consent to suit in federal court." Rather than simply noting that such an argument was unavailing in the wake of *Seminole Tribe*, the court denied the plaintiffs' request for additional discovery on the ground that they had "made no colorable showing of waiver" and were merely "seek[ing] to undertake a fishing expedition," given that they had "not even been able to identify a specific program in which the Commonwealth participates that requires such a waiver." *Id.* at 443-44.

119. For example, under the Court's decision in *United States v. Lopez*, a statute passed pursuant to the Commerce Clause must be aimed at regulating one of three types of activities: "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce"; or "those activities that substantially affect interstate commerce." 514 U.S. 549, 558-59 (1995). Applying this test, the *Lopez* majority struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. §§ 921(a)(25), 922(q)(2)(A) (1994), which made it a federal crime to possess a gun within 1,000 feet of a school. The *Lopez* ruling marked the first time in almost 60 years that the Court had found that a stat-
importance in this context is the Spending Clause,120 and it is therefore important to consider the scope of Congress's authority to condition the receipt of federal monies on states' waiver of their Eleventh Amendment immunity. It is also necessary to analyze whether the Court's recent Tenth Amendment121 cases impose any additional limits on the implied waiver doctrine. These two issues are discussed in the following sections.

A. THE SPENDING CLAUSE CASES

The Supreme Court has long recognized, most recently in South Dakota v. Dole122 and New York v. United States,123 that Congress's Spending Clause powers are sweeping and are not necessarily circumscribed by the scope of its other enumerated powers. In Dole, for example, the Court observed that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."124 As a result, the Court indicated, "objectives not thought to be within Article I's

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120. For the language of the Spending Clause, see supra note 13.
121. For the language of the Tenth Amendment, see supra note 14.
124. Dole, 483 U.S. at 207 (citation omitted) (quoting United States v. Butler, 297 U.S. 1, 66, 65 (1936)).
'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.' Thus, Seminole Tribe's holding that Article I does not give Congress authority to abrogate the Eleventh Amendment does not foreclose Congress from conditioning a grant of federal funds on the states' willingness to consent to be sued in federal court.

Although Congress has broad discretion when legislating under the Spending Clause, Dole acknowledged—and New York v. United States confirmed—the existence of four "general restrictions" on Congress's authority in this area: (1) Congress must be acting "in pursuit of 'the general welfare';" (2) the statute must "unambiguously" specify the conditions with which the state must comply in order to receive the federal

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125. Id. For example, the statute before the Court in Dole required states that accepted certain federal highway funds to set their legal drinking age at 21. The Court held that the condition was a proper exercise of Congress's spending power even if the Twenty-First Amendment "would prohibit an attempt by Congress to legislate directly a national minimum drinking age." Id. at 206.

A number of commentators have criticized the Court's broad reading of Congress's spending power. See, e.g., Richard A. Epstein, Bargaining with the State 151-57 (1993) (arguing that the use of the spending power approved in Dole subverts the doctrine of unconstitutional conditions); Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911 (1995) (advocating that Spending Clause statutes be presumed invalid if they impose conditions Congress could not otherwise require); David E. Engdahl, The Spending Power, 44 Duke L.J. 1 (1994) (concluding that the Court's misunderstanding of Alexander Hamilton's views about the spending power has led to contradictions and anomalies in the Spending Clause cases); Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism's Trojan Horse, 1988 Sup. Ct. Rev. 85 (criticizing Dole as inconsistent with the notion that the federal government is one of delegated powers); Albert J. Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103 (1987) (questioning the permissibility of funding conditions that interfere with the states or require the relinquishment of individual rights); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989) (proposing stricter scrutiny of unconstitutional conditions); William Van Alstyne, "Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 Harv. J.L. & Pub. Pol'y 303 (1993) (arguing that state and local governments should refrain from accepting federal funds conditioned on the violation of state constitutional rights).

126. Congress might even condition the federal funds on the state legislature's passage of a statute consenting to suit in federal court, thus bringing into play the express waiver exception to the Eleventh Amendment. See supra notes 24-25 and accompanying text.

127. See 505 U.S. at 171-72.

128. Dole, 483 U.S. at 207.

129. Id.
funds in question, thereby “enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation”;

(3) any conditions must be “reasonably related to the purpose of the expenditure”;

(4) the conditions may not “violate any independent constitutional prohibition.”

As a final matter, the Court warned in Dole that under some circumstances, “the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'”

130. Id. (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

131. New York v. United States, 505 U.S. at 172. In Dole, the Court acknowledged that its prior cases had not provided any “significant elaboration” of this requirement. 483 U.S. at 207. The Dole Court itself declined to “define the outer bounds of the 'germaneness' or 'relatedness' limitation” and specifically refused to decide whether “a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached.” Id. at 208-09 n.3. The Court's failure to articulate a specific definition of the relatedness requirement has led to criticism. See, e.g., Baker, supra note 125, at 1933 (observing that the Court has provided “neither a workable definition ... nor any actual or hypothetical example” of the relatedness requirement); Engdahl, supra note 125, at 54-62 (referring to “the inaneness of 'germaneness'”); McCoy & Friedman, supra note 125, at 120-23 (describing the relatedness restriction as "contentless"); Sullivan, supra note 125, at 1456-76 (criticizing the germaneness requirement as both over- and underinclusive).

132. New York v. United States, 505 U.S. at 172. Assuming that this fourth condition is met, the doctrine of unconstitutional conditions should not pose a problem for Spending Clause statutes that condition the receipt of federal funds on the states' waiver of the Eleventh Amendment. In general, the unconstitutional conditions doctrine has not been applied in any consistent fashion. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 795-98 (1997) (describing the Supreme Court's inconsistent application of the unconstitutional conditions doctrine and concluding that “it is very difficult to reconcile the cases” in this area); Rosenthal, supra note 125, at 1121 (“Whether the conferring of a privilege may or may not be conditioned on conduct which could not otherwise be compelled admits of no categorical answer.”). A statute that falls within the bounds of the spending power as articulated in Dole and New York v. United States, the most relevant precedents, should therefore be valid. See id. (“Where the validity of coercive conditions on spending has been under consideration, the growing tendency of the Supreme Court has been to weigh them case by case rather than to try to resolve them by reference to some broad formulation relating to unconstitutional conditions.”).

133. 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). The Court’s failure to elaborate on the reach of the coercion exception has prompted criticism from some commentators. See, e.g., EPSTEIN, supra note 125, at 155-56 (noting that the “ostensible coercion theory” is usually “sterilly rebuffed” by the courts); Baker, supra note 125, at 1973 (observing that “any determination of the point at which 'compulsion' begins is inevitably arbitrary or subjective”); Engdahl, supra note 125, at 78-86 (advocating that the coercion exception be replaced by the contract law doc-
None of these limitations create a universal ban on statutes that condition the receipt of federal funds on the states' waiver of their Eleventh Amendment protection. First, although Congress must be acting to serve "the general welfare," nothing in the Court's Spending Clause or Eleventh Amendment jurisprudence supports the proposition that soliciting a waiver of the Eleventh Amendment is by definition antithetical to "the general welfare." In fact, the Court in *Dole* specifically instructed the courts to "defer substantially to the judgment of Congress" in determining whether this first criterion is met. Additionally, as noted above, the Court's Eleventh Amendment cases—including *Seminole Tribe*—have uniformly presumed that states are free to waive the protection afforded by that Amendment.

The second hurdle—that any condition must be unambiguously specified—adds nothing to the clear statement rule, which a statute must already satisfy to trigger the implied waiver doctrine. The third restriction—that the condition must be "reasonably related" to the purposes underlying the legislation—would appear to be easily satisfied by most Spending Clause statutes, and certainly by those specifying that any state wishing to receive the funds allocated by the statute must waive its immunity with respect to suits challenging the manner in which it is spending the funds or administering the program created by the statute.

134. 483 U.S. at 207.
135. See supra notes 22, 87-89 and accompanying text.
136. For a description of the clear statement rule, see supra notes 36-38, 47-50 and accompanying text.
137. Even Justice O’Connor, who dissented in *Dole* on the grounds that "establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose," would presumably agree. 483 U.S. at 213-14 (O’Connor, J., dissenting). In O’Connor’s view, the Spending Clause permits Congress to "condition grants in ways that can fairly be said to be related to the expenditure of federal funds," but does not allow Congress to "insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State’s social and economic life because of an attenuated or tangential relationship to highway use or safety." *Id.* at 217, 215 (O’Connor, J., dissenting). The key issue for her is "whether the spending requirement or prohibition is a condition on a grant or whether it is regulation." *Id.* at 216 (O’Connor, J., dissenting); cf. Meltzer, supra note 21, at 54 (questioning...
Although one might characterize the Eleventh Amendment as an "independent constitutional bar" prohibiting legislation that conditions the receipt of federal monies on the states' waiver of the protection afforded by that Amendment, *Dole's* description of this fourth limitation makes clear that the Court would not take this position. In *Dole*, the Court explained that the "independent constitutional bar" restriction is not "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly," but instead is designed simply to ensure that the power "not be used to induce the States to engage in activities that would themselves be unconstitutional." For example, the Court noted, Congress could not condition the receipt of federal funds on the states' willingness to inflict cruel and unusual punishment in violation of the Eighth Amendment. But given that the Eleventh Amendment itself envisions the possibility of waiver, asking the states to exercise their waiver rights does not require them to violate any "independent constitutional bar."

The final qualification on Congress's spending power—the possibility that a statute might be excessively "coercive"—refers to the amount of money at stake. It does not impose a substantive bar on any particular type of string Congress might choose to attach to a funding statute, and therefore would pose a problem only if a state that refused to waive the Eleventh Amendment risked losing a substantial amount of federal

whether a statute could "condition provision of tuition grants to graduate students in mathematics on the mathematics department's waiver of immunity from suit under the copyright, patent, and minimum wage laws"). Requiring the states to waive their Eleventh Amendment protection with respect to suits challenging the way in which they spend the federal funds allocated by the statute would presumably satisfy even this stricter definition of relatedness.

138. 483 U.S. at 210.
139. See id. at 210-11.
140. See supra note 22 and accompanying text.
141. Even Justice Brennan, who dissented in *Dole* on the grounds that the statute at issue there conditioned the receipt of federal funds "in a manner that abridges [the State's] right" under the Twenty-First Amendment, 483 U.S. at 212 (Brennan, J., dissenting), would probably agree. In Justice Brennan's opinion, the Twenty-First Amendment "itself [struck] the proper balance between federal and state authority." *Id.* Although Brennan would presumably describe the Eleventh Amendment in similar terms, that Amendment strikes a different balance by allowing for the possibility of waiver.

142. Thus, for example, the Court concluded that the statute at issue in *Dole* passed muster under this criterion because only "a relatively small percentage of certain federal highway funds" was at issue. 483 U.S. at 211.
funds. Moreover, as the Court recognized in Dole, every congressional spending statute "is in some measure a temptation," but "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." Therefore, the Court resolved to continue to be "guided by a robust common sense" that presumes the states are exercising their free will in accepting the conditions Congress imposes on the receipt of federal funds.

In general, therefore, these restrictions on the Spending Clause power do not foreclose Congress from conditioning grants of federal funds on the states' willingness to waive their Eleventh Amendment protection. The following subsection examines whether the Tenth Amendment nevertheless limits Congress's ability to pass such legislation.

B. THE TENTH AMENDMENT CASES

The Supreme Court's renewed interest in the principles of state sovereignty protected by the Tenth Amendment received a good deal of attention in the wake of the Court's recent decision in Printz v. United States. In that case, the Court struck down the provisions in the Brady Handgun Violence Prevention Act (the Brady Act) that required state and local law enforcement officials to conduct background checks on prospective purchasers of handguns. In so doing, the Court relied on the principle articulated in New York v. United States that the federal government "may not compel the States to enact or administer a federal regulatory program."

*New York v. United States*, only the second Supreme Court decision in fifty-five years to invalidate a federal statute on Tenth Amendment grounds, expressly recognized, however,
that the Tenth Amendment is "essentially a tautology": it merely confirms that the federal government is one of limited powers and that a federal statute is valid only if it falls within one of Congress's enumerated powers.\(^{151}\) By definition, therefore, a statute that is otherwise authorized by the Spending Clause or the Commerce Clause does not run afoul of the Tenth Amendment.\(^ {152}\) In fact, while the Court in New York v. United

same statute that is now the focus of a number of post-Seminole Tribe decisions, see supra notes 77 and 103—has also been at the center of the controversy in the Supreme Court's Tenth Amendment jurisprudence. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court held that applying the FLSA's minimum wage requirements to state and local employees violated the Tenth Amendment. Usery, the first decision to find a federal statute violative of the Tenth Amendment in almost 40 years, overruled the Court's earlier decision in Maryland v. Wirtz, 392 U.S. 183 (1968). Usery itself was overruled nine years later in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).


\(^{151}\) 505 U.S. at 156-57.

\(^{152}\) See id. at 155-56 (noting that the questions whether a statute comes within one of Congress's enumerated powers and whether it violates the Tenth Amendment are "mirror images of each other"). The Court's reference to the Tenth Amendment as a "tautology," which is preceded by the observation that "[t]he Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself," id. at 156-57, creates some ambiguity as to whether New York v. United States is articulating a Tenth Amendment principle applicable to all federal statutes, or is simply interpreting the reach of Congress's Commerce Clause power and thus governs only statutes passed under that clause. See Tushnet, supra note 150, at 1645-47.

Printz did not resolve this ambiguity. Although Justices O'Connor and Thomas stated quite explicitly their view that the Brady Act violated the Tenth Amendment, see 117 S. Ct. at 2385 (O'Connor, J., concurring); id. (Thomas, J., concurring), the majority opinion is not so clear. At one point, the majority acknowledged that there was "no constitutional text speaking to [the] precise question" before it, so that "the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and
States held that "Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,'" it also cautioned that "[t]his is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices." The Court reasoned that "encouraging a State to conform to federal policy choices" is unobjectionable because "the residents of the State retain the ultimate decision as to whether or not the State will comply."

One prominent method of influencing state policy choices expressly endorsed by the Court in New York v. United States is the congressional spending power. Imposing conditions on the receipt of federal funds does not violate the Tenth Amendment, the Court observed, because "[i]f a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." Thus, New York v. United

in the jurisprudence of this Court." Printz, 117 S. Ct. at 2370. Moreover, the majority questioned the presumption that "the Tenth Amendment is the exclusive textual source of protection for principles of federalism," noting that those principles are "reflected in numerous constitutional provisions, and not only those, like the Tenth Amendment, that speak to the point explicitly." Id. at 2379 n.13 (citation omitted). These passages prompted the four Printz dissenters to chide the majority for relying on "a 'principle of state sovereignty' mentioned nowhere in the constitutional text." Id. at 2388 n.2 (Stevens, J., dissenting).

In considering the viability of the implied waiver doctrine, this Article assumes the broadest reading of New York v. United States and Printz—that they articulate a constitutional principle, whether derived from the Tenth Amendment or the "reasonable implications" of some other constitutional provision, that governs all federal statutes. Printz, 117 S. Ct. at 2379 n.13.

153. 505 U.S. at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

154. Id. at 166. Likewise, the language in New York v. United States indicating that Congress may not force the states to "enact or administer a federal regulatory program," id. at 188—which is quoted in Printz, see supra text accompanying note 149—is immediately followed by the acknowledgment that "[t]he Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes." 505 U.S. at 188.

155. 505 U.S. at 168.

156. Id.; see also Dole, 483 U.S. at 210 (noting that the Tenth Amendment does not "limit the range of conditions legitimately placed on federal grants" because the states can "adopt the "simple expedient" of not yielding") (quoting Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143 (1947); Merritt, supra note 150, at 1577 (noting that the "autonomy model" of the
States upheld a Spending Clause provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985\(^\text{157}\) that provided monetary incentives to states that complied with the statute’s regulations for the disposal of radioactive waste. The Court reasoned that these incentives were “supported by affirmative constitutional grants of power to Congress” and therefore were “not inconsistent” with the Tenth Amendment.\(^\text{158}\) The Court also approved another section of the statute that gave the states “the choice of regulating [the disposal of radioactive waste] according to federal standards or having state law preempted by federal regulation” as a valid exercise of Congress’s power under the Commerce Clause and thus unassailable under the Tenth Amendment.\(^\text{159}\)

Although the Court’s recent decision in Printz gave these issues more cursory treatment, it essentially ratified the approach taken in New York v. United States.\(^\text{160}\) Moreover, the Printz Court observed at one point that the federal government may not “command the States’ executive power in the absence of a particularized constitutional authorization.”\(^\text{161}\) Likewise, it distinguished the Brady Act from several other statutes relied on by the Federal Government on the ground that the other statutes are “connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States.”\(^\text{162}\)

Tenth Amendment endorsed in New York v. United States “places no special constraints upon Congress’ Spending Clause power” and “allows Congress to tempt the states into following federal directives”).


\(^{158}\) New York v. United States, 505 U.S. at 173.

\(^{159}\) Id. at 173-74. But the Court struck down a provision in the statute that required the states to either accept ownership of radioactive waste or regulate its disposal according to federal guidelines. The Court explained that this provision, unlike the other two, constituted an impermissible “commandeering” of the state legislative process. See id. at 174-77.

\(^{160}\) See 117 S. Ct. at 2380-83. Printz did, however, extend the ruling in New York v. United States by prohibiting Congress from “commandeering” state executive as well as legislative officials, an extension that has been subject to criticism. See id. at 2397-98 (Stevens, J., dissenting); Saikrishna Bangalore Prakash, Field Office Federalism, 79 VA. L. REV. 1957 (1993) (arguing that the framers envisioned the “commandeering” of state executive, but not state legislative, officials).

\(^{161}\) 117 S. Ct. at 2372 (emphasis added).

\(^{162}\) Id. at 2376. Although the Court refused to “address these or other currently operative enactments that are not before us,” id., its opinion does not suggest any inclination to rethink the scope of Congress’s spending power. See id. at 2385 (O’Connor, J., concurring) (noting that Congress is “free to
Thus, the *Printz* Court would apparently have had no objection had Congress offered to finance the hiring of additional state police officers, but only on the condition that those officers conduct background checks on handgun purchasers. Similarly, *Printz*, like *New York v. United States*, does not prevent Congress from passing a statute that seeks an implied waiver of the states’ Eleventh Amendment immunity, so long as the statute is otherwise a permissible exercise of the congressional spending or commerce power.\(^{163}\)

**CONCLUSION**

The Supreme Court’s ruling in *Seminole Tribe* that Congress’s Article I powers do not include the authority to abrogate the states’ Eleventh Amendment immunity is one of a series of recent Supreme Court decisions that have protected state sovereignty at the expense of congressional prerogatives.\(^{164}\) Even though the Court has thus been very solicitous of states’ rights in recent years, *Seminole Tribe* need not—and should not—be read to limit Congress’s ability to use its Article I powers to encourage the states to impliedly waive their Eleventh Amendment protection. The doctrine of implied waiver continues to be viable in the wake of *Seminole Tribe* because the states clearly can—and should be able to—waive the Eleventh Amendment, and because Congress unquestionably can—and should be able to—condition the states’ receipt of federal money or participation in a federal program on compliance

amend the [Brady Act] to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs”; *id.* at 2396 (Stevens, J., dissenting) (observing that “nothing in the majority’s holding calls into question” the precedents permitting Congress to attach conditions to the receipt of federal funds).


with certain conditions, including waiver of the Eleventh Amendment. So long as an Article I statute clears the "clear statement" hurdle, explicitly giving a state notice that it is consenting to be sued in federal court if it voluntarily chooses to accept federal funds or participate in a federally regulated activity, the Supreme Court's ruling in *Seminole Tribe* does not stand in the way of congressional efforts to solicit implied waivers of the Eleventh Amendment.