

SEMINOLE TRIBE AND SUPERFUND: A FEDERALISM GAMBLE

BARRY L. LOFTUS*

*The King can do no wrong*¹
*Nemo est supra leges*²

INTRODUCTION

A casualty of the Supreme Court's recurrent battle over federalism—the constitutional relationship between the federal and state governments³—is the balance between state sovereignty and state accountability. Specifically, private citizens no longer may pursue many federal rights of action against unconsenting states in federal courts. As a stark example of this power shift, private parties seeking just compensation from states have lost significant rights under a cornerstone of the nation's environmental regulatory enforcement scheme, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).⁴

In *Seminole Tribe of Florida v. Florida*,⁵ the third of four major federalism case for the Rehnquist Court in which states' rights were enhanced at the expense of Congress,⁶ the Court held that Congress does not have authority under the

* J.D. Candidate, 1998, Indiana University School of Law—Indianapolis; B.A., 1985, Marquette University. The author thanks his wife, Kimberly G. Loftus, for her suggestions and support.

1. Ancient maxim. See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3-5 (1963) (The doctrine of sovereign immunity first emerged in the reign of Edward I (1272-1307) based on the maxim "The King can do no wrong." Jaffe suggests that the statement really means the King is not allowed to do wrong. The British monarchs, desiring to extend justice to subjects, got around this problem by making the King's officers amenable to suit.)

2. "No one is above the law." BLACK'S LAW DICTIONARY 1038 (6th ed. 1990).

3. *Id.* at 612. See Erwin Chemerinsky, *Restricting Federal Court Jurisdiction*, TRIAL, July 1996, at 18 (stating that "[t]he most important changes in constitutional law in the 1990s have been in the area of federalism.").

4. 42 U.S.C. §§ 9601-9675 (1994).

5. 116 S. Ct. 1114 (1996).

6. The other three cases are *New York v. United States*, 505 U.S. 144, 162 (1992) (Congress may, under its power to regulate private activity under the Commerce Clause, offer states the choice of regulating the activity according to federal standards or of having state law pre-empted by federal regulation.); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (provision of Gun-Free School Zones Act, 18 U.S.C. § 922(q) (1994), which made it illegal to possess firearms in a school zone, was an unconstitutional expression of Congress' power under the Commerce Clause because the regulated activity did not substantially affect interstate commerce); *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 to -4 (1994) exceeds Congress' power under the Enforcement Clause of the Fourteenth Amendment, contradicting principles necessary to maintain federal-state balance).

Commerce Clause⁷ to grant private parties federal causes of action against unconsenting states.⁸ While the specific statute invalidated in the case concerned Indian gaming regulations, the Court specifically overruled one of its CERCLA cases that recognized private contribution and cost-recovery actions against states.⁹

The decision thwarts the twin policy objectives of CERCLA of making polluters pay for their damage and encouraging efficient, voluntary cleanups.¹⁰ States have broad authority under CERCLA to assist in cleanups, but states are also liable for damage caused as a result of their ownership and operation of sites. CERCLA litigation often features scores of liable parties, including state governments, battling each other to recover cleanup costs. The *Seminole Tribe* ruling allows states to use the Eleventh Amendment¹¹ of the Constitution to bar private suits in federal courts arising from laws rooted in the Commerce Clause. And since Congress granted to federal courts exclusive jurisdiction over CERCLA cases, states raising such a bar effectively block private parties from recovering under CERCLA.¹² Thus, states benefit from CERCLA's enforcement power when it is directed at private parties, but states now are able to block contribution and cost-recovery actions initiated by private parties in cases in which the state has been found liable under CERCLA. Without the threat of a federal court action, states will be less likely to settle with private parties. More resources, will be spent litigating recovery actions and the cleanup of hazardous waste sites will be delayed.

This shift in power from the federal government to states is emblematic of the "new federalism" pursued in the other three recent federalism cases, *New York v. United States*, *United States v. Lopez*, and *City of Boerne v. Flores*.¹³ Whereas the Court in *Lopez* and *New York* defined the contours of the Commerce Clause, the majority in *Seminole Tribe* used the clause to restrict federal jurisdiction. Justice John Paul Stevens, writing the first of two lengthy dissents in *Seminole Tribe*,¹⁴ bluntly characterized the decision: "This case is about

7. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

8. *Seminole Tribe*, 116 S. Ct. at 1131-32 ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

9. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled by Seminole Tribe*, 116 S. Ct. 1114. See *infra* Part I.B.1 and accompanying text.

10. See *infra* notes 162-63 and accompanying text.

11. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

12. 42 U.S.C. § 9613(b) (1994).

13. As of the 1996-97 term, Chief Justice William Rehnquist and Justices Antonin Scalia, Sandra Day O'Connor, Andrew Kennedy, and Clarence Thomas comprise a majority bloc sympathetic to expanded states' rights on federalism issues. Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer form a dissenting bloc on those issues.

14. *Seminole Tribe*, 116 S. Ct. at 1133, (Stevens, J., dissenting); *id.* at 1145 (Souter, J.,

power—the power of the Congress of the United States to create a private federal cause of action against a State . . . for the violation of a federal right.”¹⁵ He was emphatic about the impact of the decision, noting “it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.”¹⁶

CERCLA is illustrative of the impact of *Seminole Tribe* because it represents a vast, national expression of Congressional power directed at states and private parties. Already, at least one court has applied *Seminole Tribe*’s restriction of jurisdiction in a CERCLA case in which a state was sued by a private party.¹⁷ And as Justice Stevens predicted, the decision has reached into other areas of federal law.¹⁸

This Note analyzes the federalism issues in *Seminole Tribe* as they relate to CERCLA litigation and explores the new landscape many claimants may encounter. Part I surveys the federalism debate that formed the backdrop to *Seminole Tribe*. Part II briefly outlines the holdings and rationales of *Seminole Tribe*’s majority and dissenting opinions. Part III analyzes the case’s impact on CERCLA. Finally, Part IV suggests remedies and accommodations for restoring some measure of the balance lost in *Seminole Tribe* between state sovereignty and state accountability.

I. THE FEDERALISM CONTEXT

A. State Sovereign Immunity

Two key aspects of federalism coalesced in *Seminole Tribe*: state sovereign immunity and Congress’ authority under the Commerce Clause. The Court’s interpretations of these areas determine the reach of federal regulations such as CERCLA. The degree of sovereign immunity that states enjoy has been debated since before the Convention of 1787.¹⁹ Likewise, the Court has rekindled the

dissenting).

15. *Id.* at 1133.

16. *Id.* at 1134.

17. Ninth Avenue Remedial Group v. Allis-Chalmers Corp., 962 F. Supp. 131 (N.D. Ind. 1997) (dismissing for lack of subject-matter jurisdiction pursuant to *Seminole Tribe* a CERCLA contribution action brought by private parties against an Indiana state agency).

18. See *infra* notes 108 and 109 and accompanying text.

19. See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1897 (1983) (refuting the view that states enjoyed British-style sovereign immunity and did not surrender it in 1787, the author states “the relevant documents of the colonial period establish the absence of any expectation that governments were to be immune from suit.”). For conflicting views on pre-Constitution views of state sovereign immunity, see THE FEDERALIST NO. 81, at 487-88 (Alexander Hamilton) (Rossiter 1961). Hamilton adds in *The Federalist* No. 32 that “as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they

debate on the limits of the Commerce Clause.²⁰

While the Tenth Amendment,²¹ which gives states residual powers, is the touchstone for most federalism issues, the controversy in *Seminole Tribe* centered on the Eleventh Amendment.²² Textually, the amendment, passed in 1798, appears to divest federal courts of jurisdiction in diversity actions brought against a state by citizens of another state. Early Court opinions adopted this view.²³ Over the years, the Court has developed two other possible interpretations, (1) that it bars federal question jurisdiction in noncitizen suits against states,²⁴ or (2) that it blocks all private suits brought in federal court

before had, and which were not, by that act, *exclusively* delegated to the United States.” THE FEDERALIST NO. 32, at 198 (Hamilton) (Rossiter 1961). Both sides of the contemporary federalism debate find currency with Hamilton’s statements. *See Seminole Tribe*, 116 S. Ct. at 1130 (sovereign immunity referred to in THE FEDERALIST No. 81 applied to all federal jurisdiction over an unconsenting state); *id.* at 1166 (Souter, J., dissenting) (such immunity identified by Hamilton applied only to Citizen-State Diversity Clauses that would appear in Article III of the Constitution).

20. For thorough discussions on the “new federalism” attributed to the Rehnquist Court’s trio of Commerce Clause cases highlighted in this Note (*see supra* notes 5 and 6), see Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125; and Barry C. Toone & Bradley J. Wiskirchen, Note, *Great Expectations: The Illusion of Federalism After United States v. Lopez*, 22 J. LEGIS. 241 (1996).

21. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). Much federalism jurisprudence focuses on the Tenth Amendment. For a modern example of the ongoing tension created by the amendment, see *U.S. Term Limits v. Thornton*, 115 S. Ct. 1842, 1855 (1995) (“[T]he Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States.”); *id.* at 1875 (Kennedy, J., concurring) (“[T]here exists a federal right of citizenship . . . with which the States may not interfere.”); but compare, *id.* at 1875 (Thomas, J., dissenting) (In characterizing the “reserved” powers of states, “[t]he ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”).

22. *See supra* note 11 and accompanying text.

23. *See Cohens v. Virginia*, 19 U.S. 264, 382 (1821) (Chief Justice Marshall writing for the Court concluded “a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case.”); *Osborn v. Bank of United States*, 22 U.S. 738, 847 (1824) (“The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States.” The opinion makes no reference to federal question jurisdiction.).

24. The Court has never held to this interpretation, but it has appeared as dicta in opinions. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 288 n.41 (1985) (Brennan, J., dissenting) (“When the Court is prepared to embark on a defensible interpretation of the Eleventh Amendment consistent with its history and purposes, the question whether the Amendment bars federal-question or admiralty suits by a noncitizen or alien against a State would be open.”).

against unconsenting states regardless of citizenship.²⁵

In *Seminole Tribe*, the Court narrowly affirmed its broadest reading of the Eleventh Amendment, a view articulated more than a century earlier in *Hans v. Louisiana*.²⁶ The *Hans* Court ruled that the grant of immunity extended to all federal suits brought against states by private parties.²⁷ The Court reasoned that, since a state could invoke sovereign immunity against a noncitizen suing under federal question jurisdiction, it enjoyed the same immunity in such suits involving its own citizens.²⁸ This view is the law today, but with the sizable exception that states may not use the Eleventh Amendment to bar private suits authorized by Congress under the Fourteenth Amendment.²⁹ Eighteen years after *Hans*, in *Ex parte Young*,³⁰ another case central to *Seminole Tribe*, the Court shifted the federalism equation in the federal government's favor by providing private parties with injunctive relief against state officers who violate federal law in cases in which citizens may not sue the state directly.³¹

B. Setting the Stage for *Seminole Tribe*

Against the backdrop of the seemingly unchecked expansion of Congressional power under the Commerce Clause that continued into the 1980s, the Court bitterly separated into two factions in the name of federalism. In four

25. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890). In *Hans*, Louisiana sought to repudiate Reconstruction bonds held by one of its citizens and issued by the state during federal occupation. See also *Seminole Tribe*, 116 S. Ct. at 1131 ("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.").

26. 134 U.S. 1. Justice Souter, dissenting in *Seminole Tribe*, argued that the *Hans* decision was a concession to the emerging Southern state governments following the end of Reconstruction. The Court in *Hans*, Souter argued, found a way to allow Louisiana to bar the suit rather than to uphold existing Eleventh Amendment doctrine and see its decision go unenforced after federal troops had left the South. 116 S. Ct. at 1155 (Souter, J., dissenting).

27. *Hans*, 134 U.S. at 10.

28. *Id.*

29. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (award of retirement benefits to retired state employees found to have been discriminated against on the basis of sex under the state's retirement plan, in violation of a provision of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) (1994), was not barred by the Eleventh Amendment; section 5 of the Fourteenth Amendment grants Congress authority to enforce "by appropriate legislation" limitations on state authority).

30. 209 U.S. 123 (1908).

31. *Id.* at 159-60 (The federal government can enjoin a state official when the officer's action "is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.").

major Commerce Clause cases,³² the factions remained largely intact and are so today. Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas, with slight variance,³³ formed one side, which was successful in limiting Congress' Commerce Clause power in a manner not seen in almost sixty years. Justice Stevens, the lone member of the other faction to appear in all four decisions, aligned with Justices Souter, Breyer, and Ginsburg to form the other faction. Retired Justices Brennan, Marshall, Blackmun, and White generally supported the latter group.

1. *Pennsylvania v. Union Gas Co.*—To reach its decision in *Seminole Tribe*, the Court expressly overruled *Union Gas*.³⁴ Many of the constitutional arguments raised in *Union Gas* were repeated in *Seminole Tribe*. *Union Gas* was a case of first impression for the Court. The issue was whether Congress had authority under the Commerce Clause to subject an unconsenting state to suit in federal court.

The United States brought a CERCLA action against the operator of a coal gasification plant to recover cleanup costs.³⁵ The operator initiated a third-party suit against Pennsylvania. The district court dismissed the operator's suit,³⁶ accepting the state's claim that the Eleventh Amendment barred the suit. The Third Circuit affirmed the district court's decision, holding it found no clear Congressional intent to make states liable for monetary damages in CERCLA claims.³⁷ While the Supreme Court considered the gas company's certiorari petition, Congress amended CERCLA, including a contribution action as part of the Superfund Amendment and Reauthorization Act of 1986.³⁸ The high court granted certiorari, vacated the Third Circuit opinion, and remanded it to the Court of Appeals for consideration of the amendments.³⁹ The Third Circuit then found the amendments showed clear intent to subject states to damages under CERCLA.⁴⁰ The case then went back to the Supreme Court.⁴¹

The Court embarked on a two-step analysis that it would later repeat in *Seminole Tribe*. First, it looked at whether Congress had made its intent to abrogate state sovereign immunity "unmistakably clear."⁴² Second, the Court decided whether abrogation under the Commerce Clause of state sovereign

32. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), overruled by *Seminole Tribe*, 116 S. Ct. 1114; *New York*, 505 U.S. 144; *Lopez*, 514 U.S. 549; *Seminole Tribe*, 116 S. Ct. 1114.

33. Souter joined the majority in *New York*, 505 U.S. 144.

34. *Seminole Tribe*, 116 S. Ct. at 1131.

35. 42 U.S.C. §§ 9604 & 9606 (1994).

36. *United States v. Union Gas Co.*, 575 F. Supp. 949 (1983).

37. *United States v. Union Gas Co.*, 792 F.2d 372 (1986).

38. Pub.L. 99-499, 100 Stat. 1613 (1986), now codified as 42 U.S.C. § 9613(f).

39. 479 U.S. 1025 (1987).

40. 832 F.2d 1343 (1986).

41. 485 U.S. 958 (1988).

42. See *Atascadero*, 473 U.S. at 242 ("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.").

immunity is constitutionally valid. A plurality consisting of Justices Brennan, Marshall, Blackmun, and Stevens held that the plain language of CERCLA indicated that states fell within the definitions of “person” and “owner or operator,”⁴³ all of whom were subject to liability for remedial costs. Also, the Court noted a provision exculpating state and local governments for actions taken in emergencies. The provision reads “[T]his paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct.”⁴⁴ The Court then concluded that Congress, in enacting CERCLA, used valid power under the Commerce Clause to subject Pennsylvania to suit, overriding the state’s claim of sovereign immunity under the Eleventh Amendment.⁴⁵ Justice Brennan, who wrote for the Court, reasoned that the states effectively waived their immunity when they “granted Congress the power to regulate commerce;”⁴⁶ that Congress’ plenary authority to regulate interstate commerce, analogous to its Fourteenth Amendment enforcement authority, allowed it to abrogate state sovereign immunity;⁴⁷ and that Congress’ vast power under the Commerce Clause displaced state authority and sometimes precludes state regulation, even in areas in which the federal government has chosen not to act.⁴⁸

Justice Brennan feared the impact of denying private claims against states.⁴⁹ Such a reading would frustrate Congress’ “legitimate objectives under the Commerce Clause.”⁵⁰ In applying this reasoning to CERCLA, Brennan wrote, “the case before us brilliantly illuminates these points. The general problem of environmental harm is often not susceptible of a local solution.”⁵¹ He compared *Union Gas* to *Philadelphia v. New Jersey*,⁵² a 1978 case in which the Court held that a New Jersey statute regulating out-of-state solid waste and exempting in-state waste violated the Commerce Clause.⁵³ Brennan argued the proposition that some environmental problems can only be solved by the federal government,

43. 42 U.S.C. § 9601(21) (1994) (persons definition includes “state”); *id.* § 9601(20)(A) (owner or operator); *id.* § 9607(a) (who is liable).

44. *Id.* § 9607(d)(2).

45. *Union Gas*, 491 U.S. at 23. Justice White concurred in the judgment on the constitutional question and dissented on the intent to abrogate issue. *Id.* at 45-56.

46. *Id.* at 14. See *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 192 (1964) (“By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.”), *overruled on other grounds*, *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987).

47. *Union Gas*, 491 U.S. at 15.

48. *Id.* at 20.

49. *Id.* (“[A] conclusion that Congress may not create a cause of action for money damages against the States would mean that no one could do so.”).

50. *Id.* This is precisely the dilemma faced by potential plaintiffs in third-party cases post-*Seminole Tribe*. See *infra* Part III.D.

51. *Id.* at 20

52. 437 U.S. 617 (1978).

53. *Union Gas*, 491 U.S. at 21 (citing *Philadelphia v. New Jersey*, 437 U.S. at 626-29).

adding “often those solutions, to be satisfactory, must include a cause of action for money damages.”⁵⁴ CERCLA was a comprehensive remedy to a national problem of hazardous waste that earlier efforts failed to solve, he argued.⁵⁵ Congress encouraged voluntary cleanup efforts and induced such action authorizing private parties to recover cleanup costs from other potentially responsible parties.⁵⁶ To exclude states from the scheme, he argued, would thwart the purpose of CERCLA:

If States, which comprise a significant class of owners and operators of hazardous-waste sites, need not pay for the costs of cleanup, the overall effect on voluntary cleanups will be substantial. This case thus shows why the space carved out for federal legislation under the commerce power must include the power to hold States financially accountable not only to the Federal Government, but to private citizens as well.⁵⁷

The counterweight to the Court’s decision was Justice Scalia’s dissent.⁵⁸ The opinion attracted four-fifths of the majority that would, with the addition of Justice Thomas, decide *Seminole Tribe* seven years later. Justice Scalia based his opinion on a broad reading of *Hans v. Louisiana*,⁵⁹ in which the Court held a state could invoke sovereign immunity in all federal suits brought by private parties.⁶⁰ The dissent set out a constitutional analysis that would be repeated in *Seminole Tribe*. Scalia called *Hans* a “landmark case” that repudiated the “comprehensive” reading of the Eleventh Amendment, a view that limits state sovereign immunity to citizen-state diversity actions.⁶¹ Scalia argued the Eleventh Amendment stands for more than the textual grant of sovereign immunity in some diversity cases—it shows that states enjoyed substantial sovereign immunity before the Convention of 1787 and that immunity was not entirely eliminated by Article III of the Constitution.⁶²

Scalia’s characterization of *Hans* in *Union Gas* presages the ruling in

54. *Id.*

55. *Id.*

56. *Id.* at 21-22.

57. *Id.* at 22.

58. *Id.* at 29-45 (Scalia, J., dissenting). The case featured three other opinions, *see id.* at 23-29 (Stevens, J., concurring) (Stevens argued that Congress had properly balanced environmental protections with subjecting states to damages actions, that the “judicial power” of the United States extends to such suits, and—that even if the Court had disagreed with the balance Congress struck—the Court may not disregard Congress’ “express decision to subject the States to liability under federal law.”); *id.* at 45-56 (White, J., concurring) (White concurred in the constitutional issue without comment but disagreed with the majority’s assertion that Congress had made its intent “unmistakably” clear.); *id.* at 57 (O’Connor, J., dissenting) (no substantive comments.).

59. 134 U.S. 1 (1890).

60. *Id.* at 10.

61. *Union Gas*, 491 U.S. at 31.

62. *Id.* at 31-32.

Seminole Tribe.⁶³ Conversely, Justice Stevens, in his *Union Gas* concurrence, rebukes *Hans* as having created a second Eleventh Amendment, a “judicially created doctrine of state sovereign immunity.”⁶⁴ Both he and Justice Souter, in their *Seminole Tribe* dissents,⁶⁵ attacked the continued reliance on *Hans*.

2. *New York v. United States*.—This case is the first of the four major “new federalism” decisions.⁶⁶ Commentators have argued that these cases, *New York*, *Lopez*, *Seminole Tribe*, and *City of Boerne*, all upholding state power at the expense of Congress, could become the legacy of the Rehnquist Court.⁶⁷ In *New York*, the Court, for just the second time since 1936, invalidated a federal law on Tenth Amendment grounds.⁶⁸ Writing for the majority, Justice O’Connor said the Court faced “one of our Nation’s newest problems of public policy and perhaps our oldest question of constitutional law.”⁶⁹ The new problem was regulation of low-level radioactive waste; the old constitutional issue was federalism. *New York* brought suit against the federal government, challenging provisions of the Low-Level Radioactive Waste Policy Act of 1985.⁷⁰ The act offered three sets of incentives to induce state compliance. The first rewarded states monetarily for accepting out-of-state radioactive waste.⁷¹ The second allowed states to increase the cost of waste disposal and cut off-site access for waste generated in states not participating in the federal program.⁷² The third imposed a Faustian choice on states: take title of waste generated in their borders

63. *Seminole Tribe*, 116 S. Ct. at 1127 (“The [*Union Gas*] plurality’s rationale also deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans*.”).

64. *Union Gas*, 491 U.S. at 23.

65. *Seminole Tribe*, 116 S. Ct. at 1137, 1144.

66. 505 U.S. 144. The other two are *Seminole Tribe*, 116 S. Ct. 1114, and *Lopez*, 514 U.S. 549.

67. See, e.g., Loren Singer, *Scholar Calls Supreme Court’s Clarity on Some Issues, Indecision on Others the “Most Remarkable Thing” About the 1995-96 Term*, Oct. 22, 1996, WEST LEGAL NEWS 11214 (covers remarks made Oct. 19, 1996, by Professor Charles H. Whitebread at the University of Minnesota Law School: although *Seminole Tribe* was the “least important” case in the “new federalism” trend, “[t]hat trend will be Chief Justice Rehnquist’s ‘major legacy’ if the decisions are followed in the future.”); Linda Greenhouse, Analysis, *Rehnquist Legacy: States Rights*, ORANGE COUNTY (Calif.) REGISTER, April 14, 1996, at A25. (“When the Rehnquist Court passes into history . . . a reshaping of the federal-state balance may prove his most enduring legacy.”); *Reining in Congress*, WASH. POST, June 28, 1997 (“In recent years, the Rehnquist Court has curtailed the power of Congress.”).

68. The other Tenth Amendment case was *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was expressly overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1985) (rejecting the notion in *Usery* that constitutionality of a federal regulation depends on whether courts find it outside of “integral” or “traditional” state authority).

69. *New York*, 505 U.S. at 149.

70. Pub.L. 99-240, 99 Stat. 1842 (1985), now appears as 42 U.S.C. §§ 2021b-2021j (1994).

71. 42 U.S.C. § 2021e(d)(2)(A).

72. *Id.* § 2021e(e)(2)(A-D).

or regulate according to Congress' scheme.⁷³

The Court found that the "monetary" incentives were a valid exercise of Congress' power under the Spending Clause⁷⁴ and the Commerce Clause;⁷⁵ that the "access" incentives were examples of "cooperative federalism"—a conditional exercise of Commerce Clause power; but that the "take title" provisions violated the Tenth Amendment.⁷⁶ States had no choice but to assent to the regulations, an affront to their sovereignty, O'Connor wrote.⁷⁷ The government argued unsuccessfully that the scheme was valid under the Commerce Clause because it merely sought to arbitrate interstate conflicts in the disposal of radioactive waste. Justice White, in a dissent, criticized the "formalistically rigid obeisance to 'federalism'" employed by the majority.⁷⁸ He called it "the ultimate irony" that the Tenth Amendment, an assertion of states' rights, was employed to invalidate a scheme aimed at state and local solutions to a national environmental problem.⁷⁹ Justice Stevens was more direct in his dissenting assault. Federalism aside, the national government clearly had the power, in his opinion, to order state compliance in a host of areas of national concern, including radioactive waste management:⁸⁰ "[t]he notion that Congress does not have the power to issue a simple command to state governments to implement legislation enacted by Congress is incorrect and unsound."⁸¹

The impact of *New York* on Congress' Commerce Clause power was subtle. However, the expansive reading of the Tenth Amendment, which seems to have slightly upset the regulatory scheme in *New York*, presaged a direct assault on Congress' power three years later.

3. *United States v. Lopez*.—In a landmark case, the Court, for the first time since 1936, held a federal law unconstitutional because it exceeded Congress' authority under the Commerce Clause.⁸² *Lopez* brought the "new federalism" debate to the forefront⁸³ and provided the backdrop for *Seminole Tribe*. After nearly sixty years of unchecked Congressional action under the Commerce Clause, the Court, led by Chief Justice Rehnquist, stoked the federalism debate

73. *Id.* § 2021e(d)(2)(C).

74. *New York*, 505 U.S. at 173 (interpreting U.S. CONST. art. I § 8, cl. 1, "Congress shall have 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; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

75. *Id.* at 174 (interpreting U.S. CONST. art. I, § 8, cl. 3.); *see supra* note 7 and accompanying text.

76. *Id.* at 177 (interpreting U.S. CONST. amend X); *see supra* note 21 and accompanying text.

77. *Id.*

78. *Id.* at 210.

79. *Id.*

80. *Id.* at 211.

81. *Id.*

82. 514 U.S. 549 (1995).

83. *See supra* note 20 and accompanying text.

and revisited two centuries of history.⁸⁴

In *Lopez*, a defendant was convicted of possessing a firearm in a school zone in violation of the Gun-Free School Zones Act of 1990.⁸⁵ The Fifth Circuit reversed the conviction, finding the statute beyond the power under the Commerce Clause.⁸⁶ The Supreme Court affirmed the decision, holding the statute was criminal in nature and “ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise.”⁸⁷ It also held that the statute contained no jurisdictional element, “which would ensure, through case-by-case inquiry” the nexus to commerce.⁸⁸

The opinion, like those in *New York* and *Seminole Tribe*, featured lengthy explorations of constitutional history and precedent. “We start with first principles,” Rehnquist wrote,⁸⁹ launching into two centuries of federalism analysis. The Court based its opinion on existing Commerce Clause doctrines but read into those doctrines a more active role for itself in deciding the validity of congressional action. Citing precedent for each, the Court gave three categories in which Congress may regulate commerce: (1) to protect the channels for interstate commerce,⁹⁰ (2) to protect the instrumentalities of commerce,⁹¹ and (3) to control activities that have a “substantial relation” to interstate commerce.⁹²

The Court analyzed the firearms statute under the third category and found it outside of the Commerce Clause’s grant of authority.⁹³ Implicit in the Court’s

84. Joining Rehnquist were Justices Scalia, Kennedy, O’Connor, and Thomas, the same majority in *Seminole Tribe*. Kennedy and Thomas wrote concurring opinions. Dissenting were Justice Breyer (joined by Stevens, Souter, and Ginsburg), and Justices Stevens and Souter in separate opinions. The dissenters were the same in *Seminole Tribe*.

85. 18 U.S.C. § 922(q) (1994), amended by Pub. L. 103-322 (1994).

86. 2 F.3d 1342, 1367, 1368 (5th Cir. 1993).

87. *Lopez*, 514 U.S. at 561.

88. *Id.*

89. *Id.* at 552.

90. See *United States v. Darby*, 312 U.S. 100, 113 (1941) (“While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce.”).

91. See *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342, 351 (1914) (Shreveport Rail Rate Cases) (Congress’ authority “extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.”).

92. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”).

93. *Lopez*, 514 U.S. at 561.

opinion is that the statute also ran afoul of the Constitution because it sought to regulate non-economic activity.⁹⁴ In the chief dissent, Justice Breyer argues that the legislation is sustained by the Commerce Clause because Congress had a “rational basis” for concluding that a connection existed between gun possession near schools and interstate commerce.⁹⁵

The opinion that focuses most acutely on the elusive federalism balance, however, was Justice Kennedy’s concurrence. While joining in the “necessary though limited holding”⁹⁶ of the majority, Kennedy commented that federalism issues are murkier than those arising under the other constitutional pillars: separation of powers, checks and balances, and judicial review.⁹⁷ In the Court’s attempt to strike the proper balance, Kennedy wrote, “[o]ur ability to preserve this principle under the Commerce Clause has presented a much greater challenge” compared to the Court’s role in other doctrines.⁹⁸ In the end, Kennedy agrees that the statute should fail for its lack of a commercial nexus, that it upsets the constitutional balance.⁹⁹ But he is pointedly cautious in observing that “[w]hile the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant.”¹⁰⁰ Commentators have noted that Kennedy and Justice O’Connor hold the balance of power on the Court.¹⁰¹ In future federalism cases, it is possible that the cautious view articulated in *Lopez* by Kennedy will align with the “liberal bloc,” the *Lopez* dissenters, when the balance tips too far away from the federal government.¹⁰²

If *New York v. United States* raised any question about the depth of the majority’s resolve in shifting the federalism balance toward the states, *Lopez* provided a clear answer. By reining in Congress on the Commerce Clause for the first time in almost six decades, the Court opened the door for an array of challenges to federal authority claimed in the name of interstate commerce.¹⁰³ Understandably, the ruling has caused confusion in the district courts. One district court in Alabama relied on *Lopez* to invalidate retroactive provisions of CERCLA because the regulated activity—hazardous waste deposited by prior

94. *Id.*

95. *Id.* at 631.

96. *Id.* at 568.

97. *Id.* at 575.

98. *Id.* at 579.

99. *Id.* at 583.

100. *Id.*

101. See Singer, *supra* note 67 and accompanying text.

102. *Id.*

103. For example, a federal district court, in *Brzonkala v. Virginia Polytechnic & State University*, 935 F. Supp. 779, 787 (W.D. Va. 1996), used the two-step analysis in *Lopez* to strike down The Violence Against Women Act, 42 U.S.C. § 13981 (1994), finding the legislation an invalid use of Commerce Clause powers because the activity was non-economic and the statute lacked a jurisdictional element that would ensure case-by-case inquiry of its application to properly regulated activity.

users—did not bear a substantial relation to commerce and because CERCLA lacked a jurisdictional element that would ensure case-by-case inquiry of its relevance to commerce.¹⁰⁴ However, an Illinois district court took the opposite approach, finding CERCLA was a valid exercise of Commerce Clause authority because Congress had a rational basis for determining that hazardous waste activity “substantially affects” interstate commerce.¹⁰⁵ Thus, *Lopez* put federal courts in the position of applying its Commerce Clause test to different factual situations on a case-by-case basis. By contrast, the Supreme Court’s next significant federalism case would provide clearer guidance to further its ends.

II. SEMINOLE TRIBE OF FLORIDA V. FLORIDA

Just as the scope of *Lopez* is not limited to school safety, *Seminole Tribe*’s significance goes far beyond the specific controversy that brought it before the Court: the regulation of Indian gaming rights.¹⁰⁶ In one sense, this third expression of the “new federalism” fits into a trend from general to specific established by the two earlier decisions, *Lopez* and *New York*. In *New York*, the Court outlined the context for restricting Commerce Clause power, and, in *Lopez*, the Court struck down a congressional provision in that context. In *Seminole Tribe*, the Court cuts off Commerce Clause power at the source with a broad reading of the Eleventh Amendment. In another sense, the case can be seen as an intersection of two federalism issues—the Commerce Clause and state sovereign immunity—that had simmered below the surface for years.

Specifically, the case changed the rules for the regulation of Indian gaming activities and overruled a key CERCLA case.¹⁰⁷ Lower court cases in both arenas were immediately affected.¹⁰⁸ Like *Lopez*, the decision set off a cavalcade of

104. *United States v. Olin*, 927 F. Supp. 1502, 1532-33 (S.D. Ala. 1996), *rev’d*, 107 F.3d 1506 (11th Cir. 1997). This case was roundly criticized in by Richard Lazarus in *Striking Down Retroactive Liability*, ENVIRONMENTAL FORUM, July 4, 1996, at 8.

105. *United States v. N.L. Industries*, 936 F. Supp. 545, 563 (S.D. Ill. 1996).

106. While *Seminole Tribe* did not dominate the front pages, most major U.S. daily newspapers seized upon the federalism implications in coverage and commentary. *See, e.g.*, Editorial, *Seminole and State Sovereignty*, WASH. POST, March 30, 1996, at A16 (“[I]t is a broad victory for those who believe the federal government has been encroaching on the prerogatives of the states in a manner never contemplated by the Founders.”); Editorial, *Another Judicial Victory for Authority of the States*, L.A. TIMES, March 29, 1996, at 8 (“Congress’ power to address problems of such obvious federal interest as violence at abortion clinics, narcotics, ‘deadbeat dads,’ hazardous waste dumps or pistols in the hands of ex-felons may be in question.”); Editorial, *Restoring Federalism*, DETROIT NEWS, March 29, 1996 at A8 (“Now that the Eleventh Amendment has been rediscovered, we hope the rediscovery of other sections of the Constitution . . . such as the 10th Amendment, won’t be far behind.”).

107. *Seminole Tribe*, 116 S. Ct. 1114, 1128 (overruling *Union Gas*, 491 U.S. 1).

108. Two district courts divested themselves of jurisdiction in a private CERCLA action against a state. *See Ninth Avenue*, 962 F. Supp. at 131; *Prisco v. New York*, 1996 WL 596546 (S.D.N.Y. Oct. 16, 1996). For cases in which district court rulings dismissing complaints based

decisions covering several other sectors of federal law in the months following its announcement. In most cases, the basic holding of *Seminole Tribe*—that Congress may not use Article I powers to abrogate state sovereign immunity from federal suits brought by private parties—was used to convince federal courts to divest themselves of jurisdiction.¹⁰⁹

on state sovereign immunity claims pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2710 (1994) were affirmed following *Seminole Tribe*, see *Spokane Tribe of Indians v. Washington*, 790 F. Supp. 1057 (E.D. Wash. 1991), *rev'd*, 28 F.3d 991 (9th Cir. 1994), *vacated and remanded*, 116 S. Ct. 1410 (1996), *aff'd*, 91 F.3d 1350, 1351 (9th Cir. 1996); *Ponca Tribe of Oklahoma v. Oklahoma*, 834 F. Supp. 1341 (W.D. Okla. 1992), *aff'd in part, rev'd in part*, 37 F.3d 1422 (10th Cir. 1994), *vacated and remanded*, 116 S. Ct. 1410 (1996), *aff'd*, 89 F.3d 690 (10th Cir. 1996).

109. As Justice Stevens predicted in *Seminole Tribe*, 116 S. Ct. at 1134, the ruling has had a dramatic effect on several areas of federal law. For the impact on copyright cases, see *Genentech, Inc. v. Regents of the University of California*, 939 F. Supp. 639, 642 (S.D. Ind. 1996) (district court in a declaratory judgment action found that actions brought pursuant to the Patents and Copyright Clause, U.S. CONST. art. I, § 8, cl. 8, against state defendants were subject to state sovereign immunity claims; finding no waiver of immunity, the court granted dismissal in favor of a state university); *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995) (author brought a copyright infringement case, alleging a state university violated provisions of the Lanham Act, 15 U.S.C. § 1122 (1994) and the Copyright Act, 17 U.S.C. § 511(a) (1994); Fifth Circuit denied Texas' claim of sovereign immunity holding that the Patents and Copyright Clause gave Congress the authority to abrogate state sovereign immunity. *Chavez*, 59 F.3d at 546, but after *Seminole Tribe*, the Supreme Court granted certiorari, 116 S. Ct. 1667 (1996), and vacated and remanded the decision.). For an excellent discussion of *Chavez* and the impact *Seminole Tribe* may have on state universities, see Douglas Lederman, *Supreme Court Gives Public Universities New Protection Against Lawsuits*, CHRONICLE OF HIGHER EDUCATION, November 8, 1996, at A33.

For *Seminole Tribe*'s impact on state-employee cases, see *Close v. New York*, No. 94-CV-0906, 1996 WL 481550 (N.D.N.Y. Aug. 19, 1996) (following *Seminole Tribe*'s ban on abrogation of state sovereign immunity under the Commerce Clause, a federal court divested itself of jurisdiction in a case brought by state employees against New York under provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1994).); *Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996) (case brought by Ohio state employees dismissed; relying on *Seminole Tribe*, court found the claim arose under the Commerce Clause, not the Equal Protection Clause, U.S. CONST. amend. XIV § 1, and therefore the court did not have jurisdiction).

For the impact of cases brought under the Bankruptcy Clause, U.S. CONST. art I, § 8, cl. 4 (Congress has the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."), see *York-Hanover Developments, Inc., v. Florida Dept. of Revenue*, 201 B.R. 137, 141 (Bankr. E.D.N.C. 1996) (Chapter 7 trustee sought the return of alleged fraudulent transfers from the Florida Department of Revenue. The court found that Congress could not, as an exercise of Bankruptcy Clause power, abrogate state sovereign immunity under 11 U.S.C. § 106(a) (1994).).

See also *Gorka v. Sullivan*, 82 F.3d 772, 775 (7th Cir. 1996) (Medicaid recipients brought state and federal claims against Indiana in state court. Indiana removed case to federal court and claimed sovereign immunity to some of the claims. The Seventh Circuit said that although *Seminole Tribe* broadened state sovereign immunity, states may not use it as a sword and a shield. States may

A. *The Case in General*

The dispute arose from the attempts by the Seminole Tribe of Indians to establish commercial gaming activities in Florida pursuant to the Indian Gaming Regulatory Act (IGRA),¹¹⁰ which requires tribes to enter into a valid compact with the state in which the activities will be located.¹¹¹ The states have a duty to negotiate in good faith toward the formation of such a pact.¹¹² The act authorizes tribes to sue states in federal court to compel states to perform their duty.¹¹³ Congress passed the act pursuant to the Indian Commerce Clause, which is found in the same sentence that authorizes Congressional regulation of commerce with foreign nations and “among the several states.”¹¹⁴

The Seminoles brought suit in federal district court, alleging the state failed to negotiate in good faith. The state moved to dismiss the complaint, arguing the suit violated the state’s sovereign immunity under the Eleventh Amendment. The district court denied the state’s motion.¹¹⁵ The Eleventh Circuit reversed the district court decision, recognizing the state’s Eleventh Amendment bar and remanded the case with orders to dismiss.¹¹⁶ The circuit court also ruled the tribe could not force the state to negotiate under the *Ex parte Young* doctrine.¹¹⁷ The Supreme Court, in a 5-4 decision, affirmed the Eleventh Circuit’s order to dismiss the case.¹¹⁸ In reaching its decision, the Court expressly overruled *Pennsylvania v. Union Gas*,¹¹⁹ in which the Court had held that Congress has Commerce Clause authority to subject unconsenting states to suits brought by private parties in federal court.¹²⁰

B. *The Majority’s Analysis*

In many ways, *Seminole Tribe* can be read as a continuation of the debate

not remove a case to a federal forum and then contend that no relief may be granted when it gets there.).

110. 25 U.S.C. § 2710 (1994).

111. *Id.* § 2710(d)(1)(C).

112. *Id.* § 2710(d)(3)(A).

113. *Id.* § 2710(d)(7).

114. U.S. CONST. art. I, § 8, cl. 3; *see supra* note 7 and accompanying text. The Court accepts the view in *Union Gas*, 491 U.S. 1, that no “principled distinction” exists between the effect of the Indian Commerce Clause and the Interstate Commerce Clause, but it notes that, if anything, the Indian Commerce Clause, which the Court construes in Florida’s favor, represents a greater grant of sovereignty to the federal government than the Interstate Commerce Clause. *Seminole Tribe*, 116 S. Ct. at 1126, 1127.

115. 801 F. Supp. 655 (S.D. Fla. 1992).

116. 11 F.3d 1016 (11th Cir. 1994).

117. *Id.* at 1028, 1029. *See also Ex parte Young*, 209 U.S. at 159-60.

118. *Seminole Tribe*, 116 S. Ct. at 1122.

119. *Id.* at 1128.

120. *Union Gas*, 491 U.S. at 23.

begun in *Union Gas*, only the sides have switched position and the players have changed. With Justice Thomas joining the Court and the retirement of Justice Brennan, who wrote the *Union Gas* opinion, the majority was free to dispense with *Union Gas* as an aberration. As Thomas and Justices Kennedy, O'Connor, and Scalia joined him, Chief Justice Rehnquist penned a spare opinion compared to the tomes featured in the other recent federalism cases. For the first holding, that the IGRA-grounded suit was an invalid exercise of Commerce Clause authority, Rehnquist pursued a two-step analysis: did Congress "unmistakably" intend to abrogate state sovereign immunity and was it acting under valid constitutional authority? Rehnquist answered the former question in the affirmative, as he found express terms in the IGRA that subjected the state to suit.¹²¹ Rehnquist then addressed the second inquiry—whether the abrogation was valid under the Commerce Clause.

As in *Union Gas*, the logic of the majority and dissenting opinions flowed from how each side characterized *Hans*,¹²² in which the Court held that states enjoy immunity from all federal suits brought by private parties.¹²³ The majority endorsed the rule in *Hans* "essentially eviscerated" in *Union Gas*.¹²⁴ But, in *Seminole Tribe*, the majority criticized *Union Gas* because it "deviated sharply from our established federalism jurisprudence;" as a plurality opinion, its rationale was not sustained by a majority of the Court;¹²⁵ and it was a "solitary departure from established law."¹²⁶ In defending *Hans*, the majority argued that the *Hans* Court had a greater vantage point from which to infer the nature of pre-Eleventh Amendment state sovereign immunity than the dissent, and therefore *Hans*' extension of the amendment to federal question jurisdiction was a more valid point of reference than *Chisholm v. Georgia*,¹²⁷ the case cited for the same purpose by the dissent.¹²⁸ Specifically, the majority accused the dissent of

121. *Seminole Tribe*, 116 S. Ct. at 1124. ("[W]e think that the numerous references to the 'State' in the text of [25 U.S.C. § 2710(d)(7)(B) (1994)] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit." For example, the court cited § 2710(d)(7)(B)(ii)(II), which "provides that if a suing tribe meets its burden of proof, then the burden of proof shall fall upon the State." 116 S. Ct. at 1124.).

122. 134 U.S. 1, 10 (1890), *see supra* note 25 and accompanying text.

123. *Id.*

124. *Seminole Tribe*, 116 S. Ct. at 1127. In *Union Gas*, the Court upheld a third-party claim against Pennsylvania in a CERCLA action. 491 U.S. at 24.

125. *Seminole Tribe*, 116 S. Ct. at 1127.

126. *Id.* at 1128. *See also* a case cited by the Court, *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies.").

127. 2 U.S. (2 Dall.) 419, 429, 448 (1793) (Georgia could not invoke sovereign immunity in an assumpsit case brought by a South Carolina citizen seeking repayment of Revolutionary War loans.).

128. *Seminole Tribe*, 116 S. Ct. at 1130.

putting forward a new theory of state sovereign immunity,¹²⁹ a charge the dissent returned almost verbatim.¹³⁰

For its second holding, the majority relied on the text of IGRA and recent precedent in holding that injunctive relief under the *Ex parte Young* doctrine was not available to the Seminoles.¹³¹ The doctrine allows relief against a state officer found to be in violation of federal law, but it is limited to situations in which Congress has not prescribed a detailed remedial scheme.¹³² Such an “intricate” procedure for remedy existed in IGRA, the Court found.¹³³ This holding left the Seminoles with a federal right and no judicial forum in which to prosecute it, a position in which many claimants now find themselves.¹³⁴ The only option would be for Congress to amend IGRA in a way that allows for general injunctive relief under *Ex parte Young*.¹³⁵

C. Justice Stevens’ Dissent

In the first of two lengthy dissents,¹³⁶ Justice Stevens attacked the “shocking character of the majority’s affront to a coequal branch of government.”¹³⁷ Stevens endeavored to show that *Chisholm* and *Hans*, the foundational cases for what he derisively calls the “two Eleventh Amendments,” were based on interpretations of acts of Congress, not on whether Congress lacked the power to authorize a suit against a state.

To Stevens, the correct reading of the Eleventh Amendment comes from its text and the circumstances surrounding its adoption. The amendment was a reaction to *Chisholm v. Georgia*,¹³⁸ in which the Court subjected Georgia to an assumpsit action by a South Carolina creditor brought in federal court.¹³⁹ In a famous dissent, Justice Iredell argued that the Judiciary Act of 1789¹⁴⁰ incorporated the common law doctrine of state sovereign immunity, and,

129. *Id.* at 1131 (“In putting forward a new theory of state sovereign immunity, the dissent develops its own vision of the political system created by the Framers . . .”).

130. *Id.* at 1145 (Souter, J., dissenting) (“[T]he Court today holds for the first time . . . that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right.”).

131. *Id.* at 1133.

132. *Id.* at 1132.

133. *Id.*

134. See *supra* notes 108-09 and accompanying text.

135. *Seminole Tribe*, 116 S. Ct. at 1133.

136. The dissents in *Seminole Tribe* run 52 pages to the majority’s 14 in the commercial reporters. Souter’s dissent was the lengthiest opinion of the 1995-96 term.

137. *Id.* at 1134.

138. 2 U.S. (2 Dall.) 363, 419 (1793) (Georgia could not invoke sovereign immunity in an assumpsit case brought by a South Carolina citizen.).

139. *Id.* at 428.

140. Ch. 20, 1 Stat. 73 (1789).

therefore, the federal court had no jurisdiction.¹⁴¹ Stevens emphasized that Iredell did not argue that the Article III of the Constitution prevented Congress from restricting state sovereign immunity, only that Congress had not done so in the Judiciary Act.¹⁴² The Eleventh Amendment, Stevens argued, was limited to citizen-state diversity cases such as *Chisholm* and did not codify Iredell's expansive view of state sovereign immunity.¹⁴³ Thus, Stevens argued, when the Eleventh Amendment was adopted five years after *Chisholm*, it was a partial bar to federal jurisdiction.¹⁴⁴

Similarly, Stevens argued that the Court in *Hans*, which he sarcastically credits with creating a second Eleventh Amendment, based its opinion on Congressional action, not a constitutional rule of law. The Congressional action in the *Hans* opinion on which Stevens focused was actually inaction: Congress failed to displace the common law presumption of state sovereign immunity. Thus, Stevens concluded that *Hans* established "a presumption against jurisdiction that Congress must overcome, not an inviolable jurisdictional restriction that inheres in the Constitution itself."¹⁴⁵ Stevens reaffirmed the *Union Gas* position that Congress, through the Commerce Clause, may overcome such a presumption¹⁴⁶ and argued the majority's extension of the Eleventh Amendment was incorrect. Stevens' reading is that state sovereign immunity, while affecting federalism, is "subordinate to the plenary power of Commerce."¹⁴⁷

D. Justice Souter's Dissent

The case's second dissent pursued an exhaustive analysis of state sovereign immunity. Justice Souter's survey of English and American history and precedent runs from the Thirteenth Century reign of Henry III to the present term. He analyzed whether: (1) states enjoyed sovereign immunity from suits brought in their own courts prior to the Constitution; (2) after ratification, that immunity extended to diversity and federal question cases; and (3) Congress could abrogate that immunity.¹⁴⁸

Souter found no definite answer to the first question,¹⁴⁹ but, by pointing to the ambiguity, he undercut the majority's reliance on *Hans*, which assumed

141. *Chisholm*, 2 U.S. at 434-36.

142. *Seminole Tribe*, 116 S. Ct. at 1135.

143. *Id.* at 1136.

144. *Id.* ("Whatever the precise dimensions of the Amendment, its express terms plainly do not apply to all suits brought against unconsenting States.").

145. *Id.* at 1138.

146. *Id.* at 1142 (Stevens argued the Court read the "ancient doctrine of sovereign immunity" into the Eleventh Amendment.).

147. *Id.*

148. *Id.* at 1145.

149. *Id.*

without qualification that states enjoyed sovereign immunity before 1787.¹⁵⁰ For the second, Souter, like Stevens, concluded the Eleventh Amendment, read in the context of the *Chisholm* controversy, granted immunity to states only in citizen-state diversity cases and did not affect federal question jurisdiction.¹⁵¹ Souter also criticized the *Hans* court for “erroneously” assuming “a State could plead sovereign immunity against a noncitizen suing under federal question jurisdiction, and for that reason held that a State must enjoy the same protection in a suit by one of its citizens.”¹⁵² Finally, Souter answered the third question by arguing that the Framers were suspicious of common law doctrines and made them subject to legislative amendment.¹⁵³

According to Souter, in applying this view to the present case, the explicit abrogation of state sovereign immunity to a suit arising from an Indian gaming statute rooted in Article I powers (the Indian Commerce Clause) was trumped by the vague and erroneous notion of sovereign immunity contained in the *Hans* doctrine. “[I]n holding that a non textual common-law rule limits a clear grant of congressional power under Article I, the Court follows a course that has brought it to grief before in our history, and promises to do so again.”¹⁵⁴ Souter also argued that the majority had no valid basis for holding that the Seminoles could not obtain prospective injunctive relief under *Ex parte Young*.¹⁵⁵

III. SEMINOLE TRIBE’S EFFECT ON CERCLA

Arguably, in no other statutory scheme outside of the Indian Gaming Regulatory Act will the fallout of *Seminole Tribe* be more acutely manifest than in CERCLA.¹⁵⁶ CERCLA extends to private parties two substantial mechanisms—private enforcement actions and cost recovery actions—that appear constitutionally inapplicable to unconsenting state defendants. These provisions are the bedrock of CERCLA and their future after *Seminole Tribe* is in doubt because: (1) *Seminole Tribe*’s overruling of *Union Gas* gives courts clear guidance on private CERCLA claims brought against states; (2) unlike other environmental regulations,¹⁵⁷ CERCLA is a comprehensive scheme that expressly subjects governmental entities and private parties to liability and is, therefore, not as susceptible to “cooperative federalism;” (3) CERCLA provides a remedial scheme for enforcement of citizen suits, which now are invalid against state agencies (but might be extended to state officials under *Ex parte Young* as interpreted in *Seminole Tribe*); (4) CERCLA specifically provides for cost recovery and contribution actions against states, but with the demise of *Union*

150. *Hans*, 134 U.S. at 1.

151. *Seminole Tribe*, 115 S. Ct. at 1145, 1146.

152. *Id.* at 1146.

153. *Id.*

154. *Id.*

155. *Id.*

156. 42 U.S.C. §§ 9601-9675 (1994).

157. See *infra* note 228 and accompanying text.

Gas, the Court's interpretation of the Eleventh Amendment simply invalidates such actions; and (5) the efficacy of CERCLA depends on voluntary settlements, and now that states are in a greater negotiating position with respect to private parties, states have a reduced incentive to settle claims.

A. CERCLA in General

Congress enacted CERCLA in 1980 in response to the public outcry from environmental disasters such as Love Canal in western New York.¹⁵⁸ At the time, existing environmental regulations such as the Resource Conservation and Recovery Act (RCRA)¹⁵⁹ and traditional common law doctrines provided only limited relief. CERCLA's purpose was to provide federal authority to clean up leaking, inactive, or abandoned waste sites and to provide emergency response to spills.¹⁶⁰ The Act makes all potentially responsible parties (PRPs) liable for the clean-up costs on a restitution theory that those responsible for causing hazards should pay.¹⁶¹ CERCLA's primary goal is to protect and preserve public health and the environment¹⁶² by reaching voluntary settlements.¹⁶³ State and local governments continue to play key roles as owners and operators of

158. *Hazardous and Toxic Waste Disposal Field Hearings: Joint Hearings before the Subcomms. on Environmental Pollution and Resource Protection of the Comm. on Environment and Public Works*, 96th Cong. 2 (1979) (statement by Sen. Moynihan):

It was here at the Love Canal that an incident caused by the dumping of hundreds of hazardous chemicals became the first pollution problem recognized to be a national calamity; an unfortunate harbinger of a problem that was at that point just beginning to be understood. It is here that hundreds of families have suffered immense dislocation from their daily lives, in having to move their homes, and in living with growing anxiety over the possible health effects that may be the result of this tragedy. It is here, finally, that we have involvement at all levels of government to address a problem that transgresses all artificial boundaries [sic] between local, state, and federal concern.

159. 42 U.S.C. §§ 6901-6992 (1994).

160. *Id.*

161. *See Lone Pine Steering Committee v. EPA*, 777 F.2d 882, 886 (3d Cir. 1985) ("Congress empowered the EPA to take clean up action when necessary," and then collect from responsible parties."). For an excellent overview of CERCLA, see *The Impact of Environmental Law on Real Estate and Other Commercial Transactions*, ALI-ABA Course of Study, Sept. 25, 1997. The author used its fine compilation of cases.

162. *See Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1386 (5th Cir. 1989).

163. *See United States v. Conservation Chemical Co.* 628 F. Supp. 391, 403 (W.D. Mo. 1985), *order modified on other grounds*, 681 F. Supp. 1394 (W.D. Mo. 1988) ("CERCLA contemplates that hazardous waste sites will be cleaned up in the most cost-effective manner; spending precious Superfund monies on a site when there are responsible parties ready and willing to spend private monies to accomplish the same result would hardly be an efficient use of government resources."). *See also* H. REP. NO. 96-1016, Part I, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 (purpose of the bill is to "induce such persons voluntarily to pursue appropriate environmental response actions").

contaminated waste sites, and, as such, they are integral parties in Congress' remedial efforts.¹⁶⁴

A prime component of CERCLA is the Superfund, a revolving fund created with revenue from a tax on sales of petroleum and other chemicals. Initially, Congress allocated \$1.5 billion to the Superfund. The amount was increased to \$8.5 billion by the Superfund Amendments and Reauthorization Act of 1986 (SARA).¹⁶⁵ SARA was changed significantly and most prominently by the addition of express contribution cause of action to recover clean-up costs.¹⁶⁶ Another reauthorization vote is likely in the 105th Congress.¹⁶⁷

B. Structure and Scope of CERCLA and its Relation to States

Federal district courts have "exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy."¹⁶⁸ Parties subject to CERCLA include "the owner and operator of a vessel or facility,"¹⁶⁹ or "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of."¹⁷⁰ "Owner or operator" is defined as "any person" who owned or operated a vessel or facility.¹⁷¹ "Person" means private individuals and entities, the federal government and states, including political subdivisions of states.¹⁷² States are excluded from liability if they are lawfully acting in response to an emergency¹⁷³ or if they involuntarily acquire hazardous waste sites.¹⁷⁴ However, such exclusions do not apply to states that cause the environmental damage.¹⁷⁵

The standard of liability for CERCLA is strict liability patterned after the Clean Water Act.¹⁷⁶ Moreover, courts have ruled that when two or more parties are liable they are joint and severally liable.¹⁷⁷ CERCLA provisions apply

164. See Brief for Respondent at 8, *Union Gas*, 491 U.S. 1 ("The EPA has estimated that over 16% of all contamination sites on the National Priorities List are currently owned or controlled by states and local governments." Estimates were as of July 1, 1988.).

165. Pub. L. 99-499, 100 Stat. 1613 (1986).

166. Pub. L. 99-499, Title I, § 113, 100 Stat. 1647 (1982) (codified as 2 U.S.C. § 9613 (1994)).

167. CERCLA provision were pending as the 105th Congress recessed for 1997.

168. 42 U.S.C. § 9613(b) (1994).

169. *Id.* § 9607(a)(1).

170. *Id.* § 9607(a)(2).

171. *Id.* § 9601(20)(A).

172. *Id.* § 9601(21).

173. *Id.* § 9607(d)(2).

174. *Id.* § 9601(20)(D).

175. *Id.*

176. *Id.* § 9601(32) (specifically cites provisions of the Clean Water Act, 33 U.S.C. §§ 1321-1387 (1994)).

177. See *United States v. R.W. Meyer, Inc.* 889 F.2d 1497, 1507 (6th Cir. 1989) ("CERCLA

retroactively even if the activity in question occurred prior to CERCLA's enactment in 1980.¹⁷⁸

C. Relevant CERCLA Causes of Action

1. *Remediation.*—The president and the Environmental Protection Agency (EPA) are given broad authority to initiate and administer large-scale cleanup efforts as part of the National Contingency Plan (NCP).¹⁷⁹ The federal government also may pursue short-term “removal” actions aimed at providing immediate relief at hazardous waste sites. Both remediation and removal actions are limited to sites chosen for the National Priority List, a part of the NCP.¹⁸⁰ The EPA may do the work itself and then recover costs from PRPs, or it may order the PRPs to clean up the site.¹⁸¹ The EPA may issue orders or seek court-ordered injunctive relief.¹⁸²

2. *Cost Recovery and Contribution.*—The federal and state governments may pursue cost recovery actions against PRPs.¹⁸³ Private parties may do the same, but they may not recover attorney fees.¹⁸⁴ A potentially responsible party can seek contribution from any other PRP liable under CERCLA.¹⁸⁵ This provision is a codification of the common law contribution doctrine that was enforced judicially before Congress amended § 9613 in 1986.¹⁸⁶ “Persons” who resolve their liability to federal or state governments in an administrative or judicially approved plan are not liable for contribution for matters contained in the settlement.¹⁸⁷

3. *Citizen Suits.*—Any “citizen” or state may sue the federal government or any other “person” alleged to be in violation of a CERCLA “standard, regulation, condition, requirement, or order.”¹⁸⁸ Injunctive relief and civil penalties are available; damages are not.¹⁸⁹ For a person to demonstrate standing to bring a citizen suit, the person must prove an injury in fact.¹⁹⁰

has been interpreted to impose joint and several liability when the environmental harm is indivisible.”).

178. See *United States v. Alcan Corp.*, CIV No. 95-7570, 1996 WL 489731 (3d Cir. Aug. 22, 1996); Cf. *Olin*, 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

179. 42 U.S.C. § 9605(a) (1994).

180. *Id.* § 9604(a).

181. *Id.*

182. *Id.*

183. *Id.* § 9607(a).

184. See *Key Tronic Corp. v. United States*, 511 U.S. 809, 821 (1994) (fees incurred during negotiations with EPA are not “necessary costs of response” and are not recoverable).

185. 42 U.S.C. § 9613(f)(1) (1994).

186. See *Union Gas*, 491 U.S. at 20, 21.

187. 42 U.S.C. § 9613(f)(2) (1994).

188. *Id.* § 9659(a)(1).

189. See *Regan v. Cherry Corp.* 706 F. Supp. 145, 148 (D.R.I. 1989).

190. See *Conservation Law Foundation of New England Inc. v. Reilly*, 950 F.2d 38, 41 (1st

D. Effect of Seminole Tribe on Cost Recovery, Contribution Actions

With the demise of *Union Gas*, states may invoke sovereign immunity in contribution actions, just as Pennsylvania attempted in *Union Gas*. This turns the comprehensive cost-recovery scheme envisioned by Congress—and its value to voluntary settlements—on its head in cases involving states. The ruling violates two major policy objectives of CERCLA: (1) efficient shifting of costs to the parties responsible for pollution and (2) pursuit of cost-efficient settlements, which ultimately will result in faster and more efficient clean-up efforts. By eroding the comprehensive nature of CERCLA, the Court has returned the nation to the pre-1980 morass in which environmental disasters lingered because of inadequate remedies under RCRA, other environmental regulations, and common law principles.¹⁹¹ In Superfund cases involving states, this change will prolong or eliminate settlements, increasing the cost to taxpayers. Most significantly, however, the change leaves private PRPs with a federal right of action and no court in which to pursue it.

1. Immediate Impact of Seminole Tribe.—Shortly after the ruling in *Seminole Tribe*, two federal district courts dismissed CERCLA claims against state defendants for lack of subject-matter jurisdiction. In *Ninth Avenue Remedial Group v. Allis Chalmers Corp.*,¹⁹² an association of corporations liable under CERCLA brought a contribution action against the Indiana Department of Transportation seeking contribution. The court, following *Seminole Tribe*'s rule, recognized the state's Eleventh Amendment immunity and dismissed the suit.¹⁹³ The court reasoned that “the fact that CERCLA includes the states as possible liable persons in CERCLA actions filed by private citizens is meaningless in light of” *Seminole Tribe*.¹⁹⁴ It concluded that “any language in CERCLA that makes a state liable to private parties is unenforceable.”¹⁹⁵ Plaintiffs in the case failed to persuade the court that the state had waived Eleventh Amendment immunity: (1) through judicial action by virtue of a decision by the Indiana Supreme Court, which held the state had waived immunity in general to tort actions filed in state courts;¹⁹⁶ (2) through statute by incorporating CERCLA definitions in state hazardous substance response provisions; or (3) through the state's conduct in filing CERCLA claims in unrelated lawsuits elsewhere in the state.¹⁹⁷

In the second case, *Prisco v. New York*,¹⁹⁸ a private owner sought a

Cir. 1991) (watchdog group did not have standing for national injunctive relief, but individual members had standing to seek action pertaining to CERCLA sites that actually harmed them).

191. See *supra* note 159 and accompanying text.

192. 962 F. Supp. 131 (N.D. Ind. 1997).

193. *Id.* at 136.

194. *Id.* at 134.

195. *Id.*

196. *Campbell v. State*, 284 N.E.2d 733, 737 (Ind. 1972).

197. *Id.* at 133-35.

198. 1996 WL 596546, at *14 (S.D.N.Y. Oct. 16, 1996).

declaratory judgment against New York, declaring the state liable under CERCLA for future cleanup costs that will be incurred in a remediation action. The owner alleged that hazardous substances were released on her property while under state control. The district court initially denied the state's motion for summary judgment, holding a material issue of fact remained regarding whether the state exerted control over the property.¹⁹⁹ But after the *Seminole Tribe* ruling, the court granted the state's motion to dismiss the CERCLA claim. From the *Ninth Avenue* and *Prisco* courts' lock-step adherence to *Seminole Tribe*, one can infer that all private CERCLA claims against unconsenting states, including those filed before *Seminole Tribe*, will meet a similar fate. Like results have occurred in other federal cases based on non-Fourteenth Amendment claims.²⁰⁰

2. *Forum Shifting*.—These rulings affirm that CERCLA plaintiffs who oppose states have no cause of action in federal court. CERCLA provides an exclusive federal remedial scheme.²⁰¹ Now that private parties cannot bring federal suits against unconsenting states, with the exception of Fourteenth Amendment claims, a logical option would be to pursue some sort of relief in state courts. However, for the following reasons, those options are limited and do not come close to the relief granted by CERCLA before *Seminole Tribe*.

If *Prisco* signals things to come, *Seminole Tribe* sets federal environmental policy back to its pre-CERCLA days. Without a comprehensive remedial scheme authorizing contribution actions against *all* responsible parties, CERCLA is limited severely. This is precisely the danger of which Justice Brennan warned in his majority opinion in *Union Gas*:²⁰² "If states, which comprise a significant class of owners and operators of hazardous-waste sites . . . need not pay for the costs of cleanup, the overall effect on voluntary cleanups will be substantial." With finite federal resources, voluntary settlement agreements are crucial. Contribution actions are a significant inducement for those settlements. These CERCLA provisions, as Brennan noted, set the act apart from prior non-comprehensive efforts such as RCRA, which "failed in large part because they focused on preventative measures to the exclusion of remedial ones."²⁰³

On a more practical level, private entities involved in CERCLA actions are harmed significantly by *Seminole Tribe*. For example, "A" is a private party owning a contaminated waste site. The United States (U.S.) initiates a remediation action against A under CERCLA. The U.S. cleans up the site and successfully pursues a cost recovery action against A. Faced with staggering liability, A seeks contribution, under CERCLA, from prior owners and operators of the site. These include U.S., private parties "B," "C," and "D," and A's home state (S). Under CERCLA, any current or prior owner or operator is jointly and severally liable. The U.S. waived sovereign immunity by CERCLA's terms. S has not waived its sovereign immunity and moves for dismissal of the

199. 902 F. Supp. 400, 406 (S.D.N.Y. 1995).

200. See *supra* notes 108-09 and accompanying text.

201. 42 U.S.C. § 9613(b) (1994).

202. 491 U.S. at 22.

203. *Id.* at 21.

contribution action against it. Under the ruling in *Seminole Tribe*, A might receive contribution from U.S., B, C, and D, but not from S. Even though CERCLA mandates the parties be strictly liable to each other, the whole system breaks down. This result is especially unfair if S caused significantly more environmental damage than the other responsible parties.²⁰⁴

E. Effect of Seminole Tribe on Private Enforcement Through Citizen Suits

Unlike the undressing cost-recovery actions took, CERCLA's citizen-suit provisions survived *Seminole Tribe* relatively unscathed. Although § 9659 expressly grants injunctive relief and civil penalties against any "person" in violation of CERCLA including states,²⁰⁵ such efforts against states are barred by the Eleventh Amendment as interpreted in *Seminole Tribe*.²⁰⁶

What rescues these provisions, however, is the Court's ambiguous reading of the *Ex parte Young* doctrine, which would allow similar actions to be brought against state officials acting in their official capacity. This doctrine holds that state officials are subject to action in federal court for violations of federal law.²⁰⁷ Although the Court held in *Seminole Tribe* that *Ex parte Young* relief was unavailable to the Seminoles because the federal right in question arose from legislation that included a detailed remedial scheme,²⁰⁸ the Court left open the possibility that *Ex parte Young* relief was available in regulations with limited injunctive remedies.²⁰⁹ The Court referenced an environmental regulation, the Clean Water Act, as a limited scheme.²¹⁰

Two federal court rulings following *Seminole Tribe* provide strong evidence of the availability of *Ex parte Young* relief under CERCLA. In *Natural Resources Defense Council v. California Department of Transportation*,²¹¹ an environmental watchdog group sought California's compliance with the Clean Water Act in connection with state management of stormwater runoff from roads and maintenance yards. The state director of transportation also was named in the suit. The district court dismissed the claims against the state but refused to do the same with the claims against the transportation director.²¹² The Ninth Circuit, relying on *Seminole Tribe*, held that the environmental watchdog group's claim against the director was valid under *Ex parte Young*.²¹³ The court reasoned that "Congress implicitly intended to authorize citizens to bring *Ex parte Young*

204. For example, if S buried the waste that actually caused the damage.

205. 42 U.S.C. § 9659(a)(1) (1994).

206. *Seminole Tribe*, 116 S. Ct. at 1132.

207. *Ex parte Young*, 209 U.S. at 159-60.

208. *Seminole Tribe*, 116 S. Ct. at 1133.

209. *Id.* at 1133 n.14 (citing provisions in the Clean Water Act 33 U.S.C. 1365(a) (1994) (relief is available against "any person")).

210. *Id.*

211. 96 F.3d 420 (9th Cir. 1996).

212. *Id.* at 423.

213. *Id.*

suits against state officials with the responsibility to comply with clean water standards and permits.”²¹⁴

Significantly, CERCLA’s citizen suit provisions²¹⁵ track those of the Clean Water Act.²¹⁶ It is reasonable to infer that environmental groups seeking CERCLA compliance from states will be able to pursue *Ex parte Young* actions by naming state officials as the Natural Resources Defense Council did in the Ninth Circuit. The district court in *Prisco* makes the same point in dicta.²¹⁷ The court allowed the property owner to maintain an *Ex parte Young* action against New York for claims seeking injunctive relief under RCRA,²¹⁸ which has a citizen suit provision similar to CERCLA’s.²¹⁹ The *Prisco* court, in a footnote, distinguished the private owner’s CERCLA claim with respect to *Ex parte Young* because the CERCLA claim sought damages.²²⁰

IV. REMEDIES AND ACCOMMODATIONS

The harm done by *Seminole Tribe* to CERCLA cannot be remedied easily. The goal of any strategy to mitigate the harshness of the decision should be to restore the balance between the national goals of environmental health and safety and the rights of states. State sovereignty should be respected, but only so far as it promotes state accountability. Some suggested remedies and accommodations follow:

A. Total Remedies: Constitutional Amendment or Reversal *Seminole Tribe*

1. *Constitutional Amendment*.—As farfetched as this solution appears, it is not without precedent. A recasting of the Eleventh Amendment could end any debate about the scope of state sovereign immunity to federal suits. Provisions could be added that expressly subject states to federal jurisdiction in federal question cases. Contrarily, an amendment could codify the *Hans* doctrine, which holds that states enjoy sovereign immunity from all federal suits brought by private parties.²²¹ The first suggested redrafting would effectively further the goals of federalism, making states accountable when national interests are at stake, as in CERCLA cases.

When faced with puzzling federalism questions, the nation’s leaders more

214. *Id.* at 424. The court is referring to 33 U.S.C. § 1365(a)(1) (1994) (citizen suits may be brought against “any person” who violates relevant provisions).

215. 42 U.S.C. § 9659(a)(1) (1994) (CERCLA’s citizen suit provision also authorizes “any person” to bring such a suit).

216. 33 U.S.C. § 1365 (1994).

217. *Prisco*, 1996 WL 596546, at *16.

218. *Id.*

219. 42 U.S.C. § 6972(a)(1)(B) (1994) (Citizen suits are permitted against any “governmental instrumentality or agency” as allowed under the Eleventh Amendment.).

220. *See Prisco*, 1996 WL 596546 at *15 n.24.

221. Although it can be readily assumed that such provisions would be drafted as to not counter the Fourteenth Amendment.

than once have amended the Constitution to correct the federalism balance.²²² One Supreme Court case, *Chisholm*, led directly to the adoption of the Eleventh Amendment. However, nothing close to the national debt crisis that colored *Chisholm* exists today. If the Court had struck down abrogation under the Fourteenth Amendment, and civil rights enforcement had been brought into question, the public reaction probably would have been greater. Absent such a development, the Eleventh Amendment appears safe as a second-shelf provision. But recent efforts to amend the Constitution in the name of flag preservation, abortion restrictions, and budget balancing demonstrate that a federalism-inspired change should not be ruled out.

2. *Reversing Seminole Tribe*.—Reversing the ruling would not be much easier. Each faction in the federalism split could lose a justice—Chief Justice Rehnquist in the majority and Justice Stevens in the dissent—to retirement in the next few years, so the effect of a lineup change could be nil. Assuming no changes, the swing votes on the court, Justices Kennedy and O'Connor, appear firmly in the *Seminole Tribe* majority's camp concerning the Eleventh Amendment. Unlike *Lopez*, which established a test of degrees that, in another setting, could send Justice Kennedy to the liberal bloc,²²³ *Seminole Tribe* did not leave much of a gray area. Justice Kennedy sustained the judgment in *Union Gas*,²²⁴ but not its reasoning, and he agreed with the basic holding of *Seminole Tribe*—that Congress cannot rely on Commerce Clause authority to abrogate state sovereign immunity to private federal suits. Therefore, a favorable lineup change and continued solidarity are the *Seminole Tribe* dissent's best chance for a quick turnaround.

B. Middle Ground Test Between *Seminole Tribe* and *Union Gas*

When the Supreme Court hears its next Article I abrogation case, it should consider a compromise position first put forth in an amicus curiae brief in *Union Gas*.²²⁵ Rather than decide abrogation as an all-or-nothing proposition, as the Court did in *Union Gas* and *Seminole Tribe*, the Court could adopt a three-prong test that would narrow abrogation to important national interests. Under the test,

222. Several constitutional amendments owe their existence to federalism controversies: Tenth (residual powers vested in states), Eleventh (states immune to private suits in federal court), Thirteenth (slavery abolished), Fourteenth (extensive personal rights including due process of law), Fifteen (voting rights protected), Sixteenth (Congress may lay income tax), Seventeenth (direct election of senators). U.S. CONST. amend. X, XI, XIII-XVII.

223. See Singer, *supra* note 67.

224. *Union Gas*, 491 U.S. at 23 (Congress may abrogate state sovereign immunity under the Commerce Clause. This was overruled by *Seminole Tribe*, 116 S. Ct. at 1128.)

225. *Union Gas*, 491 U.S. 1. Amicus Curiae Brief of Pacific Legal Foundation in Support of Respondent. See also, *Flournoy v. California*, 230 Cal. App. 2d 520, 537 (1964) (The court applied the three-part policy test to find a California tort claims statute, 1963 Cal. Stat. ch. 1681 § 45, applied retroactively in a suit brought by an injured motorist against the state for alleged negligent bridge construction.).

the Court would consider (1) the nature and strength of the policy interest served by the statute; (2) the extent to which the statute abrogates the Eleventh Amendment; and (3) the nature of the right that the statute alters.²²⁶ In applying these factors to a CERCLA case such as *Union Gas*, the Court would first find the nature and strength of the policy interest to be the protection of public health from known dangers. Second, CERCLA only abrogates immunity to contribution actions in which the state is a responsible party. CERCLA does not supplant all of a state's sovereign immunity. Finally, the nature of the right the statute alters is limited. Parties have the right to pursue contribution and cost recovery actions in federal court. This is not a significant blow to states. Private parties will succeed only to the extent they can prove states are liable.

C. Spending Clause Solutions

1. *CERCLA Amendments*.—A third option includes amending CERCLA to take advantage of the “cooperative federalism” dynamics the Court endorsed in *New York v. United States*.²²⁷ Unlike its role in other environmental regulations, the federal government retains almost all of the authority in CERCLA.²²⁸ Its ambitious twin goals of cleaning up national hazardous waste disasters and making polluters pay²²⁹ leave states in a secondary role.²³⁰ Now that *Seminole Tribe* has strengthened the states' hand, Congress could offer incentives to states conditioned on the states' waiver of sovereign immunity to private CERCLA suits. Such a strategy has the dual benefits of respecting states' autonomy and restoring the comprehensive remedial scheme that existed before *Seminole Tribe*.

Congress has the authority, grounded in the Spending Clause,²³¹ to insist that states comply with federal regulations as a condition of receiving federal

226. For this test to be constitutional, the Court first would have to overturn *Hans*, 134 U.S. 1, which barred all private federal suits against unconsenting states. The Court would then have to interpret the Eleventh Amendment as not barring federal-question jurisdiction in such suits.

227. 505 U.S. at 167 (Congress may, under its power to regulate private activity under the Commerce Clause, offer states the choice of regulating the activity according to federal standards or having state law pre-empted by federal regulation.).

228. Under other regulations such as the Resource Conservation Recovery Act, 42 U.S.C. §§ 9601-9675 (1994), and the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021j, (1994), states play a more active role in implementing federal policies than states do under CERCLA. See *New York*, 505 U.S. 144, 151 (Radioactive waste regulation depends on interstate compacts). For an excellent discussion of “cooperative federalism” in the environmental context, see two articles from a 1995 symposium at the University of Maryland. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995); Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516 (1995).

229. See *supra* Part III.A.

230. For example, states may initiate cleanups under CERCLA and then recover their costs from potentially responsible parties. 42 U.S.C. § 9607 (1994).

231. U.S. CONST. art I, § 8, cl. 1. See *supra* note 74 and accompanying text.

funding.²³² The federalism concern in such an undertaking is whether the condition on states is a constitutionally valid incentive or an unconstitutional coercion.²³³ Furthermore, the condition has to satisfy factors articulated by the Court in *South Dakota v. Dole* to be considered valid under the Spending Clause. Those factors include (1) the exercise of Spending Clause power must be in pursuit of “the general welfare;” (2) the condition must be unambiguous; (3) the conditions must relate to a national interest; and (4) it must not be proscribed by other constitutional prohibitions.²³⁴

Congress should have no trouble complying with these requirements in a CERCLA amendment. To protect the condition as an incentive, not coercion, Congress must comport with the Court’s findings in *New York v. United States*²³⁵ by offering states a meaningful choice. Congress should be able to do that, as discussed below. The *Dole* factors should not pose a problem. First, the general welfare connection is clear—national public health and safety. Second, express terms easily could make the conditions unambiguous. Third, by eradicating dangerous and costly waste sites, the national interest is promoted. Finally, no other constitutional provisions bar the conditioning of such funds as long as Commerce Clause and Spending Clause interpretations are met.

Specifically, Congress should amend § 9607(a)(4), which allows the federal and state governments²³⁶ and private individuals²³⁷ to recover response costs. The grant of the cause of action to states in subparagraph A should be redrafted to say “any State that has waived its sovereign immunity for claims filed under this chapter” may recover response costs. Then, subparagraph B should be amended to close the loophole of “any person,” in which a state could fall based on the chapter definition of “person.”²³⁸ This latter amendment could be accomplished by making subparagraph B subject to subparagraph A.

States that want to preserve sovereign immunity would do so at great cost. The cost-recovery actions are the most effective mechanism under CERCLA for states to shift costs to polluters. However, it would be fundamentally unfair to offer a state, a potential wrongdoer under CERCLA, the benefits of cost recovery in this comprehensive scheme without imposing an equitable cost. The price the state must pay is subjecting itself to suit brought by private parties. Under § 9607, a state may clean up a site, pursuant to the National Contingency Plan, and

232. See *South Dakota v. Dole*, 483 U.S. 203, 208-210 (1987) (Congress had authority under the Spending Clause to condition receipt of federal highway funding on state’s adoption of a minimum age for the purchase of alcoholic beverages).

233. *Id.* at 211.

234. *Id.* at 207-08.

235. 505 U.S. 144, 185 (1992).

236. 42 U.S.C. § 9607(a)(4)(A)(1994) (Persons liable under CERCLA are liable for “all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan.”).

237. *Id.* § 9607(a)(4)(B) (Similar to subparagraph A, parties are liable for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.”).

238. *Id.* § 9601(21) (Person includes a “State” or “political subdivision of a State.”).

then impose joint and several liability on responsible parties. While the federal government retains oversight, states may play a leading role in cleaning up Superfund sites in their backyards under the auspices of CERCLA. States should want to assume this role out of public policy concerns and self-interest. The public policies forwarded include the furtherance of public health and safety, the enforcement of liability of those who cause damage, and the return of land to productive use. Out of self-interest, states would seek quick, cost-efficient cleanups that maximize the use of state resources. States that do not make use of cost-recovery actions must wait until EPA dictates how the site will be handled, creating the possibility of expensive delays. Also, states that clean up sites and remove them from the Superfund list capture more federal resources than states that do not.²³⁹

Nonetheless, in keeping with “cooperative federalism” goals, states would have the option of not accepting the right to cost-recovery under § 9607. A state could preserve its sovereign immunity to private suits brought under CERCLA, as *Seminole Tribe* says it may, and recover its costs under state regulations or CERCLA contribution provisions. Both options compare unfavorably to § 9607. State remedies are more limited in scope and may not be pursued if they conflict with CERCLA.²⁴⁰ If a state files a contribution action under CERCLA²⁴¹ in federal court, it waives sovereign immunity to private counterclaimants.²⁴²

A key part of the cost-recovery-condition plan would be to retain a state’s right to contribution under § 9613, so that the constitutionally mandated choice exists.²⁴³ It would be unfair, and likely unconstitutional under the *New York v. United States* framework, to subject a state to severe liability under CERCLA without giving it a means to prove that other PRPs share liability. However, contribution is a more limited remedy because it contemplates liability as between joint tortfeasors. Nonliable parties can bring cost-recovery actions, and defendants can be held jointly and severally liable. Another practical consideration is that the statute of limitations is six years for cost-recovery actions and three years for contribution.²⁴⁴

In sum, amending CERCLA to offer states the continued availability of cost-recovery actions in return for their waiver of sovereign immunity to private suits may not give states much of a choice, but it is a choice nonetheless. It would

239. For example, under 42 U.S.C. § 9622 (1994), the federal government has wide discretion to provide “mixed funding” financing to facilitate cleanups. States taking advantage of this provision would not have to commit as much of their own resources.

240. See *supra* Part IV.C.1.

241. 42 U.S.C. § 9613 (1994).

242. See *United States v. Mottolo*, 605 F. Supp. 898, 910 (D.N.H. 1984) (A state waives its Eleventh Amendment and sovereign immunities to compulsory recoupment counterclaims by filing a complaint in federal court.).

243. A CERCLA provision, 42 U.S.C. § 9613(f)(1) (1994), preserves this right. (“Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [sections 9606 or 9607].”).

244. 42 U.S.C. § 9613 (1994).

restore the balance between state and federal governments needed to address a serious national problem and preserve private parties' rights.

2. *Non-CERCLA Inducements.*—Congress also could induce states' full participation in CERCLA by requiring a sovereign immunity waiver as a condition to receiving non-CERCLA environmental grant money.²⁴⁵ The key issue would be whether, under the *Dole* factors, the conditioned spending relates to a national interest.²⁴⁶ A strong argument could be made that these environmental grants are aimed at promoting and protecting public safety and health by effectively managing waste and toxic substances. CERCLA's goals include the cleanup of mismanaged waste and toxic substances. Thus, a strong relation exists. In addition, states could not claim coercion if they voluntarily decline the grant money. The public policy arguments are the same as those for CERCLA amendments discussed above. States that want to address environmental problems will gain assistance from the federal government and capture dwindling grant money from states who maintain sovereign immunity with respect to CERCLA. Non-participating states that are polluters should pay for their conduct and should be deprived of federal grants. Those grants would go to other states willing to be held fully accountable for their acts. Ultimately, states rejecting the condition will spend more of their own resources, delay the return of waste sites to productive use, and continue to impinge on private parties' rights.

D. State Court Actions

Now that private parties do not have an exclusive federal remedy against unconsenting states under CERCLA, many parties may have to turn to the state courts to seek contribution from state-government defendants. In a sense, this returns prospective plaintiffs to pre-CERCLA days when polluters were subject to common doctrines of nuisance and contribution. However, the comprehensive dynamics of CERCLA have spawned litigation in a dramatically different context. Thus, attorneys who represent private clients in CERCLA contribution actions will tread new ground pursuing related claims in state courts. Unique problems may arise related to partial state sovereign immunity, the lack of expertise of state judges, and state political pressures.

1. *State Tort Claims Acts.*—The initial consideration for an attorney in this setting is finding a court of competent jurisdiction by drawing on the text of CERCLA, the ruling in *Seminole Tribe*, and assessing the scope of state sovereign immunity in that particular state. In pre-*Seminole Tribe* CERCLA

245. Examples include grants that help states construct wastewater treatment plants, 40 C.F.R. Solid § 35.300 (1995); maintain public drinking water systems, 40 C.F.R. § 35.400 (1995); implement hazardous waste management programs, 40 C.F.R. § 35.500 (1995); and develop non-point groundwater pollution control plans, 40 C.F.R. § 35.750 (1995).

246. Assuming other factors would be met: the activity promotes the public welfare, the condition is clear, and no other constitutional provision bars the condition. See *Dole*, 483 U.S. at 207-08.

cases in which parties sought partial relief under state tort claims acts, courts ruled that CERCLA preempted such actions.²⁴⁷ However, the preemption of state tort claims acts only extends to cases in which the state statute conflicts with federal law.²⁴⁸ Now that the provisions of CERCLA relating to private enforcement of rights against states appear unconstitutional, courts should allow plaintiffs to recover in CERCLA-related actions under state tort claims acts. The theory of recovery would be that the state statutes no longer conflict with certain CERCLA provisions rendered unconstitutional by the Court's interpretation in *Seminole Tribe*. Non-conflicting state law claims are valid in CERCLA-related litigation.²⁴⁹

Once the decision is made to pursue a state court claim, the attorney should assess that particular state's sovereign immunity doctrines. All states have curtailed sovereign immunity by judicial action or by statute.²⁵⁰ The idiosyncrasies of each statute or state rule will affect litigation strategy. An early CERCLA case, *Artesian Water Co. v. New Castle County*,²⁵¹ illustrates how state tort claims acts might bar state suits. In *Artesian*, a private water company filed a contribution claim against a county. The county argued that the contribution claim failed because the county was protected by the Delaware Tort Claims Act,²⁵² which expressly protected governmental units from damage claims arising out of the release of pollutants into bodies of water.²⁵³ Ruling eleven years before *Seminole Tribe*, the court in *Artesian* dispatched the county's claim on grounds that CERCLA, pursuant to the Supremacy Clause,²⁵⁴ preempted the state

247. See *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348, 1354 (D. Del. 1985); *United States v. Seymour Recycling Corp.*, 686 F. Supp. 696, 700 (S.D. Ind. 1988).

248. *Artesian*, 605 F. Supp. at 1354.

249. 42 U.S.C. § 9614(a) (1994) ("Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such state."). See *Attorney General v. Thomas Solvent Co.*, 380 N.W.2d 53, 59-60 (Mich. Ct. App. 1985) ("It is clear that CERCLA was intended only to supplement hazardous waste programs and not to preempt state programs.").

250. For a comprehensive list of the status of sovereign immunity in all states and the District of Columbia, see RESTATEMENT (SECOND) OF TORTS § 895B app. at 256-270 (1977), app. at 252-56 (1979 & Supp. 1996); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131 at 1043-56 (5th ed. 1985 & Supp. 1988).

251. 605 F. Supp. 1348 (D. Del. 1985).

252. 10 DEL. CODE ANN. §§ 4001-4013 (Supp. 1996).

253. *Id.* § 4011(b)(5) ("The discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, except as provided in subdivision (3) of § 4012 of this title.").

254. U.S. CONST. art VI, cl. 2, which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary

tort claims act.²⁵⁵ The court reasoned that the tort claims act conflicted with Congress' intent to hold governments liable under CERCLA.²⁵⁶

Today, the validity of the *Artesian* ruling is suspect. The relevant Delaware statutes have not changed, but the *Seminole Tribe* ruling has trumped the CERCLA provisions that the *Artesian* court said preempted the Delaware tort claims act. Plaintiffs such as the water company in *Artesian* can no longer sue unconsenting government defendants in federal court. If the case were brought in Delaware courts, the pollution exemption in the state tort claims act would likely bar the suit. The result is that a party might have a valid contribution claim against a tortfeasor and no forum in which to seek justice. This could possibly give rise to a constitutional claim, with the plaintiff claiming the state deprived it of property rights without due process of law.²⁵⁷ Delaware's near total retention of sovereign immunity is probably the worst hurdle a plaintiff would face. At the very least, this illustrates the trouble plaintiffs could encounter when taking CERCLA-related claims to state courts.

California—on the opposite end of the spectrum—has a more expansive tort claims act.²⁵⁸ However, California does not grant the state immunity in important areas affecting CERCLA claims. In *United States v. Montrose Chemical Corp. of California*,²⁵⁹ a federal district court interpreting California's tort claim act held that the state was not immune to a counterclaim for damages brought by a defendant chemical company.²⁶⁰ The court found that the chemical company stated several statutory causes of action that fall outside the immunity granted by the tort claims act.²⁶¹ The court recognized the chemical company's right to recoupment in state court subject to proving the state's liability.²⁶² To apply such a ruling today, it is clear that California makes itself amenable to state suits brought by private parties in the context of CERCLA. However, claimants likely would have to prove higher liability standards, such as negligence or nuisance, than the strict liability provided by CERCLA.

Indiana could be considered a middle ground between Delaware's express assertion of immunity to some environmental suits and California's expansive tort claims doctrine. The right to sue the state of Indiana is guaranteed in the

notwithstanding.

255. *Artesian*, 605 F. Supp. at 1355.

256. *Id.* at 1354.

257. U.S. CONST. art. V and amend. XIV.

258. CAL. GOV'T CODE §§ 810-997.6 (West 1995 & Supp. 1996).

259. 788 F. Supp. 1485 (C.D. Calif. 1992).

260. *Id.* at 1494.

261. CAL. GOV'T CODE § 815 (West 1995) provides that "[e]xcept as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity." The *Montrose* court then found that the chemical company stated statutory causes of action under negligence, nuisance, dangerous condition of public property, and failure to discharge mandatory duty. *Montrose*, 788 F. Supp. at 1495.)

262. *Montrose*, 788 F. Supp. at 1494.

state constitution.²⁶³ State and federal courts have ruled that parties can sue the state in its courts subject to statutory limitations and common law.²⁶⁴ Any CERCLA-related claim would have to get past the several immunities Indiana retains by statute.²⁶⁵ In a negligence and nuisance suit filed against a town for its alleged faulty construction and maintenance of a sewage system,²⁶⁶ a state court found that property owners stated a cause of action and rejected the town's claim of immunity based on its discretionary powers.²⁶⁷ Indiana has not entertained a CERCLA-related case such as *Montrose*.²⁶⁸ But similar to California, Indiana imposes fault-based liability on governmental entities subjected to suit.²⁶⁹ Thus, plaintiffs lose the strict liability of CERCLA, but they can seek damages against the state.

2. *Practical, Economic, and Political Factors.*—A second consideration in pursuing state forums is the expertise of the judges. Federal district judges have tried CERCLA cases exclusively. They are familiar with the nuances and complexities of the cases. Assuming that many state trial judges have handled similarly complicated environmental litigation, it is also highly probable that the range of expertise in state courts is considerably wide. Attorneys would have to compensate by providing more detailed pleadings, take a more proactive role in pre-trial proceedings, and even educate judges on CERCLA.

Thirdly, haling states into their own courts also means that attorneys will have to consider the effects of state politics. Superfund sites are large, expensive, and very public problems. State trial judges will decide their state's liability, which will be paid for by state and local tax money. These judges, some of whom are elected or retained by state and local taxpayers, face political and economic realities that federal judges, with life appointments, do not face.

If states would waive their sovereign immunity out of public policy concerns,

263. IND. CONST. art. IV, § 24. ("Provision may be made, by general law, for bringing suit against the State; but no special law authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.")

264. See *Burr v. Duckworth*, 547 F. Supp. 192, 195 (N.D. Ind. 1982), *aff'd*, 746 F.2d 1482 (7th Cir. 1984) (Indiana no longer adheres to strict sovereign immunity and is not immune from damages resulting from the exercise of its proprietary or governmental functions); *Maroon v. Dept. of Mental Health*, 411 N.E.2d 404, 415 (Ind. Ct. App. 1980) (the state, as sovereign, may provide conditions and limits for bringing suits against itself); *Perkins v. State*, 251 N.E.2d 30, 32 (Ind. 1969) (question of state or sovereign immunity rests upon common law).

265. IND. CODE § 34-4-16.5-3 (1993 & Supp. 1996). For example, "A governmental entity . . . is not liable if a loss results from: . . . (6) the performance of a discretionary function . . ."

266. *Hodge v. Town of Kingman*, 519 N.E.2d 1266 (Ind. Ct. App. 1988).

267. *Id.* at 1270 (rejecting town's claims under IND CODE § 34-4-16.5-3(6) because actions of town officials were ministerial in nature, not discretionary).

268. See *United States v. Seymour Recycling Corp.*, 686 F. Supp. 696, 700 (S.D. Ind. 1988) (In a pre-*Seminole Tribe* ruling, a federal court ruled CERCLA preempted the Indiana Tort Claims Act, and the court therefore did not reach issues of state liability.).

269. See *Rodman v. City of Wabash*, 497 N.E.2d 234, 240 (Ind. Ct. App. 1986) (duty of reasonable care met by municipality to homeowners complaining of sewage backups).

the *Seminole Tribe* holding would be benign. However, many might act as Pennsylvania did in *Union Gas*,²⁷⁰ Indiana did in *Ninth Avenue*,²⁷¹ and New York did in *Prisco*²⁷² and seek dismissal of claims against them. A third possibility is that a state would yield to suit in its own courts under certain conditions. Attorneys faced with the third scenario should weigh carefully the legal, political, and economic ramifications, as discussed above, in planning a CERCLA-related claim in state courts.

CONCLUSION

The Supreme Court's decision in *Seminole Tribe of Florida v. Florida* upset the balance of federalism, thwarting Congress' efforts to provide an effective remedy to a national crisis. As a result, private parties have seen their rights eroded. The national goal of efficient, voluntary cleanup efforts was dealt a serious blow. No longer may private parties seek contribution claims against unconsenting state defendants. States that caused environmental damage will now be able to shift the cost of their misdeeds to private parties. While the best solution is a repudiation of *Seminole Tribe*, lawmakers, attorneys, and judges should make efforts at the federal and state levels—through amendments to CERCLA, conditioned federal spending, and state judicial actions—to restore the federalism balance.

270. See *Union Gas*, 491 U.S. 1.

271. See *Ninth Avenue*, 962 F. Supp. 131.

272. See *Prisco*, 1996 WL 596546.